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The Foreign Defendant's Demand for Jury Trial under the Foreign Sovereign Immunities Act

J. Christopher Groobey†

Congress enacted the Foreign Sovereign Immunities Act1 ("FSIA" or "the Act") in 1976 to codify the restrictive theory of sovereign immunity and standardize the procedures governing suits brought by Americans against foreign states in United States courts. Courts have uniformly held that the FSIA prohibits an American plaintiff from demanding a jury trial, but the United States Supreme Court recently refused to say whether the FSIA bars satisfaction of a similar demand by a foreign state defendant.

In Granfinanciera, S.A. v Nordberg,2 a bankruptcy trustee sued to recover funds fraudulently transferred from a bankrupt corporation to Granfinanciera, an instrumentality of the Colombian government.3 Granfinanciera, the defendant, demanded a jury trial.4 The Bankruptcy Court denied Granfinanciera's request,5 and the District Court affirmed without addressing Granfinanciera's demand for a jury trial.6

The Eleventh Circuit also affirmed, agreeing with the Bankruptcy Court that Granfinanciera could not assert a Seventh Amendment right to a jury trial.7 The Supreme Court granted cer-

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1 Pub L No 94-583, 90 Stat 2891 (codified as amended at 28 USC §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988)).
3 The Colombian government nationalized Granfinanciera soon after the initial complaint was filed. Id at 2787. The FSIA applies not only to a foreign state, but also to "an agency or instrumentality of a foreign state' . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 USC § 1603.
4 In its answer to the initial complaint, Granfinanciera requested a "trial by jury on all issues so triable." Granfinanciera, 109 S Ct at 2787.
5 The Bankruptcy Court ruled that a suit to recover a fraudulent transfer was "a core action that originally, under the English common law . . . was a non-jury issue." Id. The court therefore held that the Seventh Amendment's right to a jury trial did not apply.
6 Id. The decisions of the Bankruptcy Court and the District Court are unreported.
7 In re Chase & Sanborn Corp., 835 F2d 1341 (11th Cir 1988).
tiorari to decide whether Granfinanciera’s request for a jury trial should have been granted.8

On brief in the Supreme Court, Granfinanciera again argued that its request for a jury trial had been improperly denied. Nordberg, the bankruptcy trustee, responded with an argument that had not been raised in the courts below: that the FSIA barred Granfinanciera from receiving a jury trial because it was an “instrumentality of a foreign sovereign.”9

The Supreme Court found that the Seventh Amendment applied to this case, and that Granfinanciera’s request for a jury trial had therefore been unconstitutionally denied.10 The Court refused, however, to address Nordberg’s FSIA argument, finding that it was a “difficult question whether a jury trial is available to a foreign state upon request under [the FSIA].”11 Since Nordberg “failed to raise [the argument] below and since the question it poses [had] not been adequately briefed and argued,”12 the Court left resolution of the FSIA question “for another day.”13

Granfinanciera appears to be the first FSIA case in which the foreign defendant, as opposed to the American plaintiff, demanded a jury trial. A number of lower courts have held that the FSIA bars American plaintiffs from demanding and receiving trial by jury. The question after Granfinanciera is whether the prohibition of jury trials applies equally to foreign sovereign defendants.

Part I of this Comment describes the substantive and procedural history of foreign sovereign immunity prior to the enactment of the FSIA. Part II examines the structure and legislative history of the FSIA itself. Part III reviews the court decisions holding that the FSIA prohibits an American plaintiff from demanding a jury trial. Finally, part IV presents the political and procedural arguments for and against allowing the foreign defendant to demand a jury trial. The Comment concludes that the FSIA must apply equally to American plaintiffs and foreign sovereign defendants.

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* In his brief, Nordberg argued that “[a]n entirely separate ground for upholding the judgment against petitioner Granfinanciera is that its status as the instrumentality of a foreign sovereign precluded any finding of a jury right under the Seventh Amendment.” Brief for Respondent at 46-47, Granfinanciera, S.A. v Nordberg, 109 S Ct 2782 (1989) (No 87-1716). Granfinanciera disputed this conclusion on technical grounds, arguing that the FSIA did not apply because Granfinanciera had been nationalized after the complaint was filed. See Reply Brief of Petitioners at 15-16, id.

10 Granfinanciera, 109 S Ct at 2802.

11 Id at 2789.

12 Id at 2788.

13 Id at 2789.
and must therefore bar a foreign defendant from demanding a trial by jury.

I. FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES

The doctrine of foreign sovereign immunity does not appear in the Constitution, nor, prior to the enactment of the FSIA, had it been codified in the statutes of the United States. When first adopted by the United States in 1812, sovereign immunity was a doctrine of public international law.

In The Schooner Exchange v M'Faddon, the Supreme Court held that the United States, as the territorial sovereign, was obligated to respect the "perfect equality and absolute independence" of a foreign sovereign and "waive the exercise of a part of [its] complete exclusive territorial jurisdiction." A French warship had sailed into Philadelphia for repairs after a severe storm. Two Americans filed an action to recover the ship, claiming that the French Emperor Napoleon had seized the schooner and its cargo from them and converted the ship into a French naval vessel. The United States government opposed the action and urged the Court to dismiss the suit on sovereign immunity grounds. Chief Justice Marshall, speaking for a unanimous Court, not only refused to assert jurisdiction over the ship, but also fashioned the common

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14 "Foreign sovereign immunity is a matter of grace and comity ... and not a restriction imposed by the Constitution." Verlinden B.V. v Central Bank of Nigeria, 461 US 480, 486 (1983).
15 "Foreign sovereign immunity is derived from domestic sovereign immunity, a concept best embodied in the maxim "the King can do no wrong." One nineteenth-century English decision elaborated:
the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. ... As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise.
16 11 US 116 (1812).
17 Id at 136.
18 According to the Chief Justice, the schooner, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.
Id at 147.
law rule of foreign sovereign immunity that was to prevail in U.S. courts for the next century and a half:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication.\textsuperscript{19}

The United States held fast to this "absolute" theory of sovereign immunity until 1952.\textsuperscript{20} Then, in the "Tate Letter,"\textsuperscript{21} the State Department announced that the United States would follow numerous other nations and adopt the "restrictive" theory\textsuperscript{22} of foreign sovereign immunity, under which state entities are not immune from suits arising from essentially private activities.\textsuperscript{23} Although the U.S. government was responding primarily to changes in international law,\textsuperscript{24} it was also concerned that the absolute theory of sovereign immunity gave foreign states operating in

\textsuperscript{19} Id at 136.

\textsuperscript{20} Strictly construed, the holding in The Schooner Exchange applied only to a state's military vessels. In 1926, the Court extended the reach of sovereign immunity to cover commercial entities owned by foreign governments: "The decision in The Exchange therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships."\textsuperscript{22} Berizzi Brothers Co. v S.S. Pesaro, 271 US 562, 574 (1926).

\textsuperscript{21} Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dept State Bull 984 (1952).

\textsuperscript{22} The restrictive theory of foreign sovereign immunity is enunciated in Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) ("Restatement"): Immunity of Foreign State From Jurisdiction to Adjudicate: The Basic Rule: Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.

\textsuperscript{23} "[I]t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." Tate Letter, 26 Dept State Bull at 985. For other countries that have judicially adopted the restrictive theory of sovereign immunity, see Alfred Dunhill of London, Inc. v Cuba, 425 US 682, 702 n 15 (1976).

\textsuperscript{24} See Restatement at 391 (note on immunity of foreign states from jurisdiction to adjudicate).
an individual or private capacity an unfair advantage over domestic private companies in commercial markets.\textsuperscript{25}

The United States adopted the restrictive theory of sovereign immunity in an effort to balance the interests of private litigants and foreign sovereigns.\textsuperscript{26} As foreign government instrumentalities entered the marketplace, domestic private parties sought the opportunity—granted under the restrictive theory—to adjudicate claims against foreign instrumentalities in a convenient forum according to objective legal standards.\textsuperscript{27} At the same time, the restrictive theory protected foreign states from vexatious political litigation intended more to harass than to resolve, as well as from litigation that otherwise challenged fundamental sovereign activities.\textsuperscript{28}

As the substantive scope of foreign sovereign immunity changed over time, so did the procedural mechanism by which it was granted. As it had in The Schooner Exchange, the State Department often “suggested” whether immunity was appropriate in a particular case; over time, the courts looked less to the law and practice of nations and more to the needs and policies of the executive branch.\textsuperscript{29} This trend of subordinating judicial to political concerns culminated in two cases, Ex Parte Peru\textsuperscript{30} and Mexico v Hoffman,\textsuperscript{31} in which the Supreme Court proclaimed the virtues of

\textsuperscript{25} United States courts were familiar with this concern. Twelve years after The Schooner Exchange, Chief Justice Marshall appeared to endorse for this very reason the restrictive theory of sovereign immunity in the domestic context:

\begin{quote}
It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.
\end{quote}

Bank of the United States v Planters' Bank of Georgia, 22 US (9 Wheat) 904, 907 (1824). One trial court accepted the “unfair advantage” argument against the absolute theory of sovereign immunity, but the argument was rejected by the Supreme Court on appeal. The Pesaro, 277 F 473, 481 (SDNY 1921), rev'd, Berizzi Brothers Co. v S.S. Pesaro, 271 US 562 (1926).


\textsuperscript{27} Dunhill, 425 US at 702.


\textsuperscript{30} 318 US 578 (1943).

\textsuperscript{31} 324 US 30 (1945).
wholesale deference to the executive in decisions of sovereign immunity.

In *Ex Parte Peru*, Chief Justice Stone termed it the "duty" of the courts to follow the dictates of the Executive branch:

[The foreign sovereign] may also present its claim to the Department of State, the political arm of the Government charged with the conduct of our foreign affairs. Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant the relief obtainable through diplomatic negotiations.\(^3\)

Two years later, in *Mexico v Hoffman*, the Court elaborated that it was "a guiding principle . . . that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs," and that it was "therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."\(^3\)

After the Tate Letter and the adoption of the restrictive theory of sovereign immunity, United States courts continued to follow the recommendations of the State Department, granting immunity to foreign states in suits concerning their public acts but not in suits concerning their private or commercial acts.\(^3\) The Tate Letter was more of a proclamation than a plan of action, however, and its lack of specific standards for differentiating between public and private acts\(^6\) resulted in the arbitrary administration of foreign sovereign immunity\(^6\) and, thus, in uncertainty.

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\(^3\) *Ex parte Peru*, 318 US at 588-89 (citations omitted). The Court further stated that the Executive branch's suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that continuing with the suit would "interfere[] with the proper conduct of our foreign relations." It was therefore "the court's duty . . . to proceed no further in the cause." Id at 589.

\(^3\) *Mexico v Hoffman*, 324 US at 35. For criticism of the Court's position, see Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am J Intl L 168 (1946).

\(^3\) "[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)." Tate Letter, 26 Dept State Bull at 984 (cited in note 21).

\(^6\) For one court's attempt to define private acts, see *Victory Transport Inc. v Comision General de Abastecimientos y Transportes*, 336 F2d 354 (2d Cir 1964).

\(^6\) After the Tate Letter, the State Department awarded immunity on the basis of submissions by the foreign sovereign; the domestic plaintiff was excluded from this proceeding. Restatement at 399 (cited in note 22). This procedure was sharply criticized, see Michael H.
for domestic private parties contemplating suits against a foreign sovereign.37

The Supreme Court was not completely enamored of the theory or the process.38 Neither were the litigants: Even if the American plaintiff survived the foreign sovereign immunity process and eventually won a judgment, the United States still adhered to the absolute theory of foreign sovereign immunity in the execution of judgments.39 A favorable judgment served only as the basis for enforcement outside the United States or for requesting diplomatic assistance from the State Department.40

These problems—no guidelines for implementing foreign sovereign immunity, no guarantee that American plaintiffs' legal claims against foreign defendants would be heard, and no judicial or congressional oversight of the immunity determinations of the

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37 For an example of the State Department using a grant of immunity to further diplomatic goals, see Rich v Naviera Vacuba S.A., 295 F2d 24 (4th Cir 1961) (per curiam). As recounted in Note, "Imperatives of Events and Contemporary Imponderables": The Effect of the Foreign Sovereign Immunities Act on Presidential Power, 62 BU L Rev 1275 (1982), the State Department suggested that sovereign immunity be granted to Cuba in an unrelated commercial case as a quid pro quo for the return of a hijacked airplane. See also Spacil v Crowe, 489 F2d 614 (5th Cir 1974); Chemical Natural Resources, Inc. v Republic of Venezuela, 420 Pa 134, 215 A2d 864 (1966).

38 In the dissenting opinion to Dunhill, four justices agreed that "[t]he restrictive theory of sovereign immunity has not been adopted by this Court, but even if we assume that it is the law in this country, it does not follow that there should be a commercial act exception to the act of state doctrine." 425 US at 725 (Marshall dissenting, joined by Brennan, Stewart and Blackmun). Although Dunhill focused on the act of state doctrine, the Court extensively reviewed the history of foreign sovereign immunity.

39 In a March 9, 1959, letter to the Department of Justice, the Department of State said it had always recognized the distinction between "immunity from jurisdiction" and "immunity from execution." The Department has maintained the view that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.

Quoted in Marjorie M. White, 6 Digest of International Law 709, 711 (1968). The letter was submitted in the case of Weilamann v Chase Manhattan Bank, 21 Misc 2d 1086, 192 NYS2d 469 (1959).

40 In general, however, foreign states complied with the judgments against them. See von Mehren, 17 Colum J Transnat'l L at 42-43 (cited in note 15).
State Department—led to calls for a statutory scheme of foreign sovereign immunity.41

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act of 1976 was the result of the cooperative efforts of the executive and legislative branches42 to resolve the substantive and procedural confusion surrounding foreign sovereign immunity.43 The FSIA was intended "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."44 The Act "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states" and "preempt[es] any other State or Federal law."445

41 The English Court of Appeals described the economic motivations for codifying the restrictive theory of foreign sovereign immunity in Trendtex Trading Corp. v Central Bank of Nigeria, 2 WLR 356, 385-86 (1977):

So long as sovereign institutions confined themselves to what may in general terms be described as the basic functions of government a total personal or individual immunity from suit was unobjectionable since the area in which it operated had its own inherent limits. The comity of nations was aided by such a doctrine confined as it was, broadly speaking, to acts which could be properly described as an exercise of sovereign power. The radical changes in political and economic and sociological concepts since the first world war have falsified the very foundations of the old doctrine of sovereign immunity. Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature. To apply a universal doctrine of sovereign immunity to such activities is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded. It is no longer necessary or desirable that what are truly matters of trading rather than of sovereignty should be hedged about with special exonerations and fenced off from the processes of the law by the attribution of a perverse and inappropriate notion of sovereign dignity.

42 The FSIA "is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community." House Report at 9, 1976 USCCAN at 6608 (cited in note 29).

43 28 USC § 1602 sets out the "[f]indings and declaration of purpose" of the FSIA: The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.


45 Id at 12, 1976 USCCAN at 6610.
Substantively, the FSIA did not change existing law; it merely codified the restrictive theory of sovereign immunity.\textsuperscript{48} Procedurally, however, the FSIA effected important changes, including transferring the power to grant foreign sovereign immunity from the executive branch to the judiciary.\textsuperscript{47} Thus, the FSIA implements, but does not alter, previously existing substantive law.

The structure of the Act is straightforward: it grants a blanket immunity to foreign sovereigns and their instrumentalities,\textsuperscript{48} and then delineates exceptions to that rule.\textsuperscript{49} If the foreign defendant is amenable to suit within one of these exceptions, the Act dictates the procedures to be followed at trial.\textsuperscript{50}

The FSIA accomplished its purposes by amending existing jurisdiction and removal statutes\textsuperscript{51} and creating new provisions.\textsuperscript{52} Of

\textsuperscript{48} The Act "codif[ies] the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." Id at 7, 1976 USCCAN at 6605.

\textsuperscript{47} Congress hoped this transfer would reduce "the foreign policy implications of immunity determinations and assure[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report at 7, 1976 USCCAN at 6606. See also 28 USC § 1602 (set out in note 43). The Executive branch did not relinquish all of its power to the judicial branch, however. See Note, Sovereign Immunity—Limits of Judicial Control, 18 Harv Intl L J 429, 454 (1977). See also 28 USC § 2403(a) (1988) (Attorney General must be notified of cases that question the constitutionality of an Act of Congress).

\textsuperscript{49} 28 USC § 1604 provides, in pertinent part, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

\textsuperscript{50} The FSIA denies sovereign immunity for these reasons:
1. The foreign state has waived its immunity, either expressly or by implication.
2. The foreign state has engaged in commercial activity having an adequate nexus with the United States.
3. The foreign state has taken property in violation of international law and the property is located in the United States.
4. The case involves rights to property in the United States that were acquired by succession or gift, or rights to immovable property situated in the United States.
5. The foreign state, or its officials or employees, committed a tortious act that causes personal injury, death, or property damage in the United States.
6. The foreign state has entered into a valid arbitration agreement with specified connections to the United States.


\textsuperscript{51} See 28 USC §§ 1330 (partially set out in note 53), 1441(d) (set out in note 54), 1608 (service on foreign states and instrumentalities; time for answer and reply; default judgment).

\textsuperscript{52} Amended were 28 USC § 1332(a) (granting district courts original jurisdiction over suits involving a foreign state), and 28 USC § 1441(d) (allowing removal of state civil actions against foreign state defendants to federal district court).

\textsuperscript{53} The FSIA added 28 USC § 1330 (granting district courts original jurisdiction over non-jury civil actions against foreign states), and 28 USC §§ 1602-1611 (defining the jurisdictional immunities of foreign states, and providing service procedures).
primary importance for the purposes of this Comment are 28 USC § 1330," granting district courts original jurisdiction over FSIA suits, and 28 USC § 1441," permitting removal of FSIA actions from state to federal court. These sections determine whether a jury may be impanelled in a suit brought under the FSIA. Section 1330(a) provides that the district courts have jurisdiction over "any nonjury civil action against a foreign state." Section 1441(d) provides that actions removed by a foreign state from state to federal court "shall be tried by the court without jury."

In fashioning these provisions, Congress recognized the similarity between domestic and foreign sovereign immunity and therefore sought to place foreign governments in the same position as the United States government when it is sued by American citizens. The similarities range from time limits for responsive pleading and provisions for default to, significantly, denial of jury trials.

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"8 28 USC § 1330(a) provides:

Actions Against Foreign States: (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

"4 28 USC § 1441(d) provides:

Actions removable generally: (d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury.

"5 See note 15.

"6 House Report at 25-26, 1976 USCCAN at 6624-25 (cited in note 29). The United States was already following the restrictive theory of sovereign immunity in its own activities abroad. Beginning in the early 1970s, the United States did not claim sovereign immunity in foreign courts if it would not have granted immunity to a foreign government under the same circumstances in American courts. Id at 9, 1976 USCCAN at 6607-08.

"7 Compare FRCP 12(a) ("The United States . . . shall serve an answer . . . within 60 days after service.") and FRCP 55(e) ("No judgment by default shall be entered against the United States.") to 28 USC § 1608(d) ("[A] foreign state . . . shall serve an answer . . . within sixty days after the service.") and 28 USC § 1608(e) ("No judgment by default shall be entered . . . against a foreign state.").

"8 "As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402." House Report at 13, 1976 USCCAN at 6611. Section 2402 provides, with limited exceptions, that the United States is subject to suit in tort or contract only in a non-jury civil action. Suits against the United States may be tried to a jury only if a statute so provides. See Galloway v United States, 319 US 372, 388-89 (1943).
In enacting the FSIA, the United States rejoined the mainstream of international law and clarified its procedures for the administration of foreign sovereign immunity, to the benefit of both the foreign defendant and the American plaintiff. The Act also protects Americans engaged in business abroad, as foreign government instrumentalities are now afforded the same treatment in the United States as the U.S. government seeks for its instrumentalities.

III. American Plaintiffs' Demands for Jury Trials in Actions Brought under the FSIA

The plain language of the FSIA appears to bar jury trials. Nevertheless, a few of the many American plaintiffs who have sued under the FSIA have challenged this prohibition. Their principal argument rests on the Seventh Amendment's general right to jury trial in civil suits. Despite some initial successes at the trial court level, every American plaintiff who has challenged the constitu-

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60 See 28 USC § 1330(a) (“district courts shall have original jurisdiction . . . of any nonjury civil action”) (emphasis added) and 28 USC § 1441(d) (“Upon removal the action shall be tried by the court without jury.”) (emphasis added).

61 By 1986, more than two thousand cases had been brought under the Act; more than four hundred of these decisions have been published. Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations vi (BNA, 1988).

62 The Seventh Amendment provides, in relevant part, “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” US Const, Amend VII.

tionality of the FSIA’s prohibition of jury trials has ultimately lost the issue.\textsuperscript{64}

As the Supreme Court has repeatedly held, the Seventh Amendment preserves the right to a jury trial only in those causes of action triable to a jury in 1791.\textsuperscript{65} At the time of the ratification of the Constitution, the absolute theory of foreign sovereign immunity was an accepted common law doctrine; private plaintiffs could not sue foreign sovereigns or their instrumentalities in 1791.\textsuperscript{66}

American plaintiffs have also tried to argue that the FSIA’s original jurisdiction provision\textsuperscript{67} is not the exclusive source of subject matter jurisdiction over suits against foreign states. These plaintiffs argue that the general diversity statute, particularly 28 USC § 1332(a)(2), even after the statute was amended by the FSIA, continues to grant federal courts jurisdiction over suits against foreign sovereigns.\textsuperscript{68}

The courts have rejected this challenge on two grounds. The Second Circuit found that the FSIA created a new category of cases, arguing that

in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a


\textsuperscript{66} “We think it is manifestly clear that in 1791 a suit against a foreign government could not be maintained in either the courts of America or England.” \textit{Williams}, 653 F2d at 882.

\textsuperscript{67} 28 USC § 1330(a) (set out in note 53).

\textsuperscript{68} 28 USC § 1332(a) provides, in relevant part,
The district courts shall have original jurisdiction of all civil actions . . . between—
\begin{itemize}
  \item[(1)] citizens of different states;
  \item[(2)] citizens of a State and citizens or subjects of a foreign state;
  \item[(3)] citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
  \item[(4)] a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
\end{itemize}

Prior to the enactment of the FSIA, section 1332(a) had also granted federal courts jurisdiction over suits against foreign sovereigns: “[t]he district courts shall have original jurisdiction of all civil actions . . . between . . . (2) citizens of a State, and foreign states or citizens or subjects thereof.” 28 USC § 1332(a) (1976) (emphasis added).
tripartite division—federal question cases, diversity cases and actions against foreign states. If a case falls within the third division, there is to be no jury trial even if it might also come within one of the other two.\(^6\)

Thus, the court concluded, “as a matter of statutory construction, no jury can be had in an action in a federal court against a foreign state as broadly defined in [the FSIA].”\(^7\)

The Fourth Circuit, reaching the same result, construed section 1330 not as a delineation of jurisdiction, but rather as an expression of congressional intent. Specifically, the court interpreted Congress’s grant of jurisdiction of “nonjury civil action[s]” in section 1330 “as a shorthand way of ensuring that actions against foreign states would be tried without a jury.”\(^8\) The court also found that section 1441, which clearly states that FSIA actions removed from state courts “shall be tried by the court without jury,”\(^9\) “harmonizes” with section 1330 and “more clearly expresses congressional intent.”\(^10\)

The statutory argument has thus met with the same fate as the constitutional challenge: No appellate court has seen fit to overturn the FSIA’s ban on jury trials.\(^11\) And the Supreme Court, although petitioned for certiorari in many of these cases, has chosen not to disturb this result.

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\(^6\) Ruggiero, 639 F2d at 876. The Ruggiero court relied on a comment in the FSIA’s legislative history that section 1332(a)(2) had been amended because “jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, [and therefore] a similar jurisdictional basis under section 1332 becomes superfluous.” Id at 877, citing House Report at 14, 1976 USCCAN at 6613 (cited in note 29).

\(^7\) Ruggiero, 639 F2d at 875.

\(^8\) Houston v Murmansk Shipping Co., 667 F2d 1151, 1154 (4th Cir 1982).

\(^9\) 28 USCA § 1441(d) (set out in note 54). Construing section 1441, one court said “one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court.” Williams v Shipping Corp. of India, 489 F Supp 526, 531 (ED Va 1980), aff’d, 653 F2d 875 (4th Cir 1981). For other cases removed to federal court pursuant to section 1441, see Arango, 761 F2d 1527; Herman v El Al Israel Airlines, 502 F Supp 277 (SDNY 1980).

\(^10\) Houston, 667 F2d at 1154.

IV. FOREIGN STATE DEFENDANTS AND JURY TRIALS UNDER THE FSIA

The Courts of Appeals agree that the FSIA precludes American plaintiffs from successfully demanding jury trials. No court has decided that the FSIA imposes an equal constraint on foreign sovereign defendants, however. This Comment argues that it does. The language and legislative history of the FSIA do not differentiate between plaintiffs and defendants with respect to jury trials. In addition, the public policies supporting the statute and the unique position of foreign sovereign defendants argue against the availability of jury trials in these cases.

A. The Language and Legislative History of the FSIA

The sections of the FSIA that require non-jury trials, whether brought originally in federal district court or removed from state court, do not discriminate between plaintiffs' and defendants' requests for jury trials; the language flatly denies both. To accord plaintiffs and defendants different treatment in this regard would contravene the plain language of the statute.

Even if the literal meaning of these sections of the FSIA were in doubt, the legislative history of the Act confirms the accuracy of this reading. The House Judiciary Committee offered an unequivocal statement of Congressional intent: "[a]s in suits against the U.S. Government, jury trials are excluded." But notwithstanding the unambiguous language and legislative history of the FSIA, courts that have denied domestic plaintiffs' requests for jury trials have found it necessary to go beyond the terms of the Act and address the policies in support of the

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78 28 USC § 1330(a) (set out in note 53).
79 28 USC § 1441(d) (set out in note 54).
87 One court wrote, "Congress could have stated [its intentions] with more elegance." Rex, 660 F2d at 64. Another found the FSIA "remarkably obtuse" and a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary." Gibbons v Udaras na Gaeltachta, 549 F Supp 1094, 1105-06 (SDNY 1982). For an argument that the FSIA was the product of "careless drafting," see Note, Ruggiero v. Companie Pervana de Vapores and Rex v. Cia. Pervana de Vapores: Jury Preclusion in Actions Against Foreign Sovereign-Owned Instrumentalities, 20 Colum J Transnatl L 199, 213 (1981).
79 House Report at 13, 1976 USCCAN at 6611-12 (cited in note 29) (emphasis added) (from the analysis pertaining to § 1330(a)). See also Moore, et al, 1 Moore's Federal Practice ¶ 0.66[4] (cited in note 65) ("The legislative history makes it clear that the words 'any nonjury action' [in section 1330] were used to exclude a jury trial rather than describe a category of civil actions not triable to a jury.").
prohibition. That the Supreme Court, in *Granfinanciera*, found the question of whether a foreign sovereign defendant could demand a jury trial "difficult" suggests that the plain language is not enough. Therefore, the policy issues must also be addressed.

**B. Public Policy Considerations and the FSIA**

The FSIA's prohibition of jury trials in many ways protects foreign defendants. Congress, in adopting the FSIA, may simply have failed to consider that a foreign defendant might want a jury trial. In litigation in which it desires a jury trial, however, a foreign defendant might argue that it should be able to waive a protection that was provided for its own benefit. Some policy considerations behind the FSIA support this argument. But the more dominant policy considerations—the same considerations that influenced Congress to bar American plaintiffs from demanding a jury trial—argue against allowing foreign defendants to do the same.

One argument for denying jury trials is to protect foreign defendants from an unfamiliar judicial procedure. This argument, however, is in most cases illusory. Foreign defendants almost certainly rely on local counsel when sued by American plaintiffs in U.S. courts; it seems highly unlikely that a foreign state or its counsel would demand a jury if it were not to its advantage.

Another of Congress's reasons for prohibiting jury trials was that juries, unlike judges, might be swayed by appeals from a domestic plaintiff to protect American interests over those of foreigners. To this argument, a foreign defendant might respond that if it is willing to accept the risk of such jury xenophobia, it should be allowed to do so.

Jurors, however, are likely to have opinions about foreign countries that vary as greatly as their opinions of American parties. A jury might, for example, be more sympathetic to an instrumentality of a developing nation in an action brought by a large American multinational corporation. Congress's real fear, therefore, may have been not that juries are xenophobic, but rather that they simply are unreliable factfinders in actions against foreign

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79 See text accompanying note 11.

80 In *Ruggiero*, Judge Friendly stated: "Whatever our enthusiasm over the jury may be, this is not necessarily shared by foreign governments—particularly those which may fear that at one time or another they may be politically unpopular with Americans." 639 F2d at 880 n 12.
That interpretation, too, augurs against jury trials, regardless of which party requests them.

Congress also feared that inconsistent verdicts would have an impermissible negative impact on foreign relations and trade, and believed that "[a]ctions tried by a court without [a] jury will tend to promote a uniformity in decision where foreign governments are involved." This goal assumes particular importance in light of the uncertainty that accompanied the previous State Department-administered foreign sovereign immunity procedure. Congress therefore mandated bench trials because "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." In this respect, the FSIA partially reflects the political concerns that drove the previous scheme.

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81 In some cases, of course, judges may be no less xenophobic than jurors. One trial judge circumvented the FSIA ban on jury trials by permitting a jury to try all issues except the question of immunity itself. At the conclusion of this bifurcated trial, the jury found in favor of the defendant, an instrumentality of the Soviet Union; the judge set aside the jury's verdict and awarded $443,000 to the American plaintiff. Houston v Murmansk Shipping Co., 87 FRD 71 (D Md 1980), vacated and remanded for trial before another judge, 667 F2d 1151 (4th Cir 1982).

82 House Report at 7, 1976 USCCAN at 6605-06.

83 Id at 13, 1976 USCCAN at 6611-12.

84 See text accompanying notes 35-37. It is plausible that one party might desire a more uncertain outcome, perhaps to influence settlement negotiations or, in an especially complex trial, to increase the chances that a jury might misunderstand the evidence. At least one court has decided that utilizing a jury in complex cases could amount to a violation of due process. See In re Japanese Electric Products Litigation, 631 F2d 1069 (3d Cir 1980), rev'd on other grounds as Zenith Radio Corp. v Matsushita Electric Industries Co., 475 US 574 (1986).

85 House Report at 13, 1976 USCCAN at 6611. Political considerations have always guided the jurisdictional allocations to the federal courts. Despite the Act's stated purpose of removing foreign sovereign immunity decisions from the executive branch to the judiciary so as to insulate the decisions from foreign policy implications, see id at 7, 1976 USCCAN at 6606, the judiciary continues to consider such factors. One author suggests that the stated goal of "uniformity" might actually be directed at avoiding political embarrassment caused by biased juries. Dellapenna, Suing Foreign Governments at 333-34 (cited in note 61).

The impact of court cases on foreign relations was of concern to the Founders as well. Article III reserves jurisdiction over alienage cases to the federal courts: "The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." US Const, Art III, § 2. The potential gravity of these cases was stressed in The Federalist Papers:

"The peace of the WHOLE ought not to be left at the disposal of a PART: . . . As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

Foreign states should not be allowed to jeopardize American foreign relations by demanding jury trials and thereby increasing the danger of inconsistent verdicts. Such verdicts may have consequences that go well beyond the relations between the United States and that country. While that country may be willing to bear such uncertainty in exchange for a jury trial, it should not be allowed to impose that uncertainty on the United States’ relations with other countries.

Congress also might have feared that juries would perceive foreign defendants as “deep pockets,” able to afford easily a large judgment against them. One court, after commenting that no significant differences exist between suits against foreign states and suits against the United States, noted “one reason why the United States has coupled its waiver of sovereign immunity in certain types of cases with a refusal to submit itself to jury trial was the fear that juries might draw too heavily on a deep pocket.”

While a foreign government might again wish to take this risk if it thought a jury trial desirable, the United States has an independent interest in preventing that possibility from occurring. One sizable jury verdict against a foreign sovereign could have a greatly disproportionate effect on foreign relations and foreign investment in the United States.

Finally, an overarching systemic concern for fairness mandates the prohibition of jury trials. Fairness requires that the operation and interpretation of the FSIA apply equally to both the American plaintiff and the foreign defendant. Courts unanimously hold that the FSIA bars American plaintiffs from demanding a jury trial. Allowing only foreign state defendants to demand a jury trial would tilt the scale in their favor, squarely contradicting the underlying rationale for the restrictive interpretation of foreign sovereign immunity.

The FSIA was enacted to permit American plaintiffs to sue foreign governments acting as private citizens in economic and commercial relations. The basic premise was simple: States could not trade like individuals and then invoke the traditional prerogatives of sovereignty to shield themselves from the resulting litigation. Standing alone, this is the strongest argument for why a foreign sovereign should have a jury trial. Foreign states might argue that if they are to be sued as private citizens, they should also en-

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88 See Ruggiero, 639 F2d at 880.
87 Id.
88 See text accompanying note 26.
joy the domestic private citizen's right to a jury trial. But the underlying principle of equal treatment must apply uniformly to both judicial interpretation and congressional intent. Where the courts and Congress have denied the exercise of this right to individual American plaintiffs, it must also be denied to the individual foreign defendant. Since the Seventh Amendment right to a jury trial does not extend to these cases, the foreign state, acting and being sued as an individual, should also not have that right.

**Conclusion**

So long as American courts continue to prohibit American plaintiffs from demanding a jury trial in cases brought under the FSIA, foreign state defendants must also be denied jury trials. The restrictive theory of sovereign immunity places foreign states and private citizens on equal footing; the FSIA, which was enacted to codify and implement the restrictive theory, should not be interpreted to disturb that balance. Further, analysis of the plain language of the FSIA, its legislative history, and the policies underlying the Act provides strong evidence that the FSIA bars defendant foreign states from demanding a jury trial. Therefore, neither the plaintiff nor the defendant in a suit brought under the FSIA should be allowed to demand a jury trial. Logic and equity compel the same result.