International Lawyer

Volume 17 | Number 2 Article 5

1983

Alienage Jurisdiction in the Federal Courts

Neil J. Rubenstein

NEIL J. RUBENSTEIN*

Alienage Jurisdiction in the Federal Courts

I. Introduction

The desirability of providing aliens access to the federal courts was recognized by the founders of the United States and they expressly granted aliens the right to have their cases heard in the federal courts when they drafted the Constitution.[1]

Although there are few records of the Constitutional Convention relating to the subject of the judiciary,[2] it is generally accepted that the decision to establish a federal forum for cases involving aliens arose from two related concerns. The first concern was that state and local judges were likely to be swayed by local prejudices against foreigners and that aliens would therefore have difficulty obtaining a fair trial in state or local courts.[3] The second, and perhaps more compelling, concern was that foreign nations might take offense if the affairs of their citizens in the United States were not treated at the national level.[4] Allowing aliens access to the federal courts in

---

*Mr. Rubenstein practices law in Los Angeles.

[1]"The judicial power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Const. art. III, § 2.

[2]FARRAND, THE FRAMING OF THE CONSTITUTION, 154 (1913). Farrand spent more than 10 years in collecting and editing the records of the Constitutional Convention.

[3]*See* FARRAND, *supra* at 46; Friendly, *The Historic Basic of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928). A particular problem in this regard was that, prior to the adoption of the Constitution, the national government was unable to compel the individual states to enforce the provisions of national treaties. *Id. See also* 3 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528, relating to the Convention of Virginia, in which James Madison is quoted as stating: "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us."

[4]As Alexander Hamilton stated:

> [T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other

which the judges were not accountable to the local citizenry appeared to be the best way of overcoming these problems.

Although the concept of allowing aliens access to the federal courts is relatively simple, numerous restrictions and uncertainties relating to this right have arisen over the years—frequently in a way that undermines the rationale under which alienage jurisdiction was established. The importance of understanding these restrictions and uncertainties is particularly pronounced because of the rule that parties may not confer subject matter jurisdiction on the court by collusion, waiver or estoppel and that the court's lack of subject matter jurisdiction may be raised by any party or by the court itself at any time.[5] Accordingly, a party who has brought an action in federal court under the mistaken belief that alienage jurisdiction exists may incur great expense in prosecuting his action before the court's lack of subject matter jurisdiction is raised and may even find that so much time has passed before he discovers the mistake that he is barred by the statute of limitations from refiling his action in state court.[6]

There are several different statutes pursuant to which aliens can gain access to the federal courts. This article considers one of the most commonly used of those statutes—the "alienage jurisdiction" statute which provides that the federal courts shall have jurisdiction over actions between citizens of a U.S. state and citizens or subjects of a foreign state and over actions between citizens of different U.S. states and in which citizens or

---

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.

THE FEDERALIST No. 80 (A. Hamilton). *See also* Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 500 (S.D.N.Y. 1955); Sadat v. Mertes, 615 F.2d 1176, 1182 (7th Cir. 1980).

[5]FED. R. CIV. P., 12(h)(3); Capron v. Van Noorden, 6 U.S. (2 Cranch) 125, 126 (1804); American Fire & Cas. Co., v. Finn, 341 U.S. 6, 17-18 (1951); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1977).

[6]*See, e.g.*, Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980) in which the defendant waited more than two years after the initiation of the federal court action before claiming that the court lacked subject matter jurisdiction. The court recognized that the statute of limitations had run on plaintiff's claim in the meantime (615 F.2d at 1188), but dismissed the action anyway.

The court in DiFrischia v. New York Central R.R., 279 F.2d 141 (3d Cir. 1960), refused to follow this rule. The defendant in *DiFrischia* originally alleged in its answer that the court lacked subject matter jurisdiction, but subsequently withdrew that defense and stipulated that the court had jurisdiction. Almost two years later, after the statute of limitations had run on the plaintiff's claim, the defendant raised the defense again by means of a motion to dismiss. The trial court granted the motion, but the court of appeals reversed. The court treated the defendant's motion as an attempt to amend its answer to reassert a defense previously abandoned. The court held that the trial court had abused its discretion in allowing the amendment, stating that "A defendant may not play fast and loose with the judicial machinery and deceive the courts."

Courts which have subsequently considered *DiFrischia*, however, have uniformly refused to follow it. *See, e.g.*, Sadat v. Mertes, 615 F.2d 1176, 1189 (7th Cir. 1980); Eisler v. Stritzler, 535 F.2d 148, 151-52 (1st Cir. 1976); Basso v. Utah Power and Light Co., 495 F.2d 906 (10th Cir. 1974). Accordingly, *DiFrischia* appears to be no more than an aberration to the general rule that the court's lack of subject matter jurisdiction may be raised at any time and that the court must dismiss the action whenever jurisdiction is found not to exist.

subjects of a foreign state are additional parties.[7] Prior to 1976, actions by and against foreign states were also governed by that statute. In that year, however, Congress enacted the Foreign Sovereign Immunities Act of 1976,[8] which established separate procedures for actions involving foreign states. Because of its close connection with the alienage jurisdiction statute and because many foreign entities are deemed to be both foreign corporations and foreign states, that statute will be considered here as well.

There are other methods by which aliens can gain access to the federal courts, which will not be considered here. One method is the use of statutes which provide jurisdiction for claims arising under the Constitution, laws or treaties of the United States.[9] Jurisdiction has also been conferred in actions by or against ambassadors, consuls or vice-consuls of foreign states and members of a mission or their families,[10] and in actions by an alien for a tort committed in violation of the law of nations or a treaty of the United States.[11] These statutes have been discussed elsewhere.[12]

In Part II, below, this article considers briefly the two methods by which an action may be brought into federal court pursuant to alienage jurisdiction. Part III considers the rules that have been developed in determining who is an alien for purposes of alienage jurisdiction. Part IV discusses the principle that alienage jurisdiction does not exist merely because an alien is a party and considers the additional requirements that must be satisfied before a federal court may properly assume jurisdiction pursuant to the statute. Part V considers the Foreign Sovereign Immunities Act of 1976 and the jurisdictional provisions in the act.

Although alienage jurisdiction in the federal courts has always existed, a surprisingly large number of uncertainties regarding the scope of this jurisdiction continue to exist. In the course of this article, these areas of uncertainty are discussed and possible resolutions are proposed.

---

[7] 28 U.S.C. §§ 1332(a)(2) and 1332(a)(3).

[8] Pub. L. No. 94-583 (1976).

[9] *See, e.g.*, 28 U.S.C. § 1331 which reads:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Other statutes of this type include 28 U.S.C. section 1333 (admiralty and maritime cases), 8 U.S.C. section 1329 (immigration cases), and 8 U.S.C. section 1421 (proceedings to naturalize aliens).

[10] Under 28 U.S.C. section 1251(b) the Supreme Court has original but not exclusive jurisdiction of all actions or proceedings to which ambassadors, other public ministers, consuls or vice-consuls of foreign states are parties. Title 28, section 1351, overlaps somewhat, by providing that the district courts shall have original jurisdiction, exclusive of the state courts, of all civil actions and proceedings against consuls or vice-consuls of foreign states or members of a mission or members of their families.

[11] 28 U.S.C. § 1350.

[12] *See, e.g.*, Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 UNIV. OF SAN FRAN. L. REV. 105 (1979); Note, *Enforcement of International Human Rights in the Federal Courts after Filartiga v. Pena-Irala*, 67 VIRG. L. REV. 1379 (1981); Black, *Admiralty Jurisdiction: Critique and Analysis*, 50 COLUM. L. REV. 259 (1950).

II. Methods of Bringing an Action into Federal Court under Alienage Jurisdiction

There are two procedures whereby an action may be brought into federal court pursuant to alienage jurisdiction. The first method is if the action is filed in federal court originally pursuant to 28 U.S.C. sections 1332(a)(2) or 1332(a)(3). The other method is if the action is originally filed in state court, but is removed to federal court pursuant to 28 U.S.C. section 1441.

The simplest way of bringing an action into federal court pursuant to the court's alienage jurisdiction is to file it in federal court originally pursuant to 28 U.S.C. sections 1332(a)(2) or 1332(a)(3). Those sections read as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
> . . .
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties.

An action which has originally been filed in state court may, however, be removed to federal court under certain circumstances. The basic requirement which must be satisfied in each such case is that the action be one which could have been filed in federal court originally. In addition, however, all defendants must join in the request for removal and none of the defendants may be a citizen of the state in which the action is brought.[13] An action against an alien and a citizen of the forum state, therefore, cannot be removed to federal court even if it might have been possible to file the case in federal court originally pursuant to the alienage jurisdiction statute.

Questions that have given rise to considerable litigation in both original jurisdiction and removal cases include determining who is an alien for purposes of alienage jurisdiction and determining what types of actions may be brought in federal court even when an alien, within the terms of the statute, is a party. These questions are considered in depth in parts III and IV, below.

III. Determining Who is an Alien for Purposes of Alienage Jurisdiction

A. *Introduction*

A person does not come within the scope of alienage jurisdiction merely because he is not a citizen of the United States. Under the Constitution and the diversity jurisdiction statute enacted by Congress, a person comes within the scope of alienage jurisdiction only if he is a "citizen or subject of a foreign state." This restriction has led to problems in a number of cases because of the fact that some persons are not considered citizens or subjects

---

[13] *See* 28 U.S.C. § 1441.

of any place and because of the fact that some foreign political entities are not considered "foreign states" for purposes of alienage jurisdiction.

Set forth below is a discussion of the meaning of "citizen or subject," as used in this context. The meaning of "foreign state" is also discussed, as is the effect of dual citizenship on alienage jurisdiction.

B. *The Basic Test—Being a Citizen or Subject of a Foreign State*

1. INTRODUCTION

Under the Constitution[14] and the diversity jurisdiction statute,[15] a person, to be included within the scope of alienage jurisdiction, must be a citizen or subject of a foreign state. The terms "citizen or subject" and "foreign state" are both terms of art which have been given special meanings by the courts in this situation.

2. MEANING OF "CITIZEN OR SUBJECT"

a. Individuals

In determining whether an individual is a citizen or subject of a foreign state for purposes of alienage jurisdiction, the court must look to the law of the foreign nation involved and whether that nation recognizes the person as one of its citizens or subjects.[16] Only if the person is recognized as a citizen or subject of a foreign state can alienage jurisdiction exist. The individual seeking to have the court exercise jurisdiction has the burden of proving that the alien is a citizen or subject of that nation.[17]

One problem that occasionally arises is that the individual is not recognized as a citizen or subject by any state. This usually occurs either when the person has voluntarily relinquished his citizenship of one country and has not obtained citizenship in another country,[18] when the country has revoked that person's citizenship and he has failed to acquire citizenship elsewhere,[19] or when the place of which he is a citizen is not recognized as a sovereign nation.[20] If no nation recognizes the individual as a citizen or

---

[14]Const. art. III, § 2.

[15]28 U.S.C. § 1332(a).

[16]United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898); Muraka v. Bachrack Bros. Inc., 215 F.2d 547, 553 (2d Cir. 1954); Blair Holdings Corporation v. Rubinstein, 133 F. Supp. 496, 499 (S.D.N.Y. 1955); Medvedieff v. Cities Service Oil Co., 35 F. Supp. 999 (S.D.N.Y. 1940).

[17]FED. R. CIV. P. 8(a); Factor v. Pennington Press, Inc., 238 F. Supp. 630 (N.D. Ill. 1964); Medvedieff v. Cities Service Oil Co., 35 F. Supp. 999 (S.D.N.Y. 1940). For a discussion of the result when a person is both a citizen of the United States under U.S. law and a citizen of another nation under the laws of that nation, see notes 38-42 and accompanying text, *infra*.

[18]*See, e.g.*, Blair Holdings Corporation v. Rubinstein, 133 F. Supp. 496 (S.D.N.Y. 1955). In that case, the defendant was held to be stateless because he had forfeited his Russian citizenship by leaving the country after the revolution and did not comply with the necessary requirements to retain it.

[19]*See, e.g.*, Shoemaker v. Malaxa, 241 F.2d 129 (2d Cir. 1957) (Defendant's citizenship in Roumania had been revoked prior to the date the action was filed); Medvedieff v. Cities Service Oil Co., 35 F. Supp. 999 (S.D.N.Y. 1940) (plaintiff's Italian citizenship had been revoked).

[20]*See* notes 34-37 and accompanying text, *infra*.

subject, then he cannot be a party in a diversity case. If he is included as a party in such an action, the case must be dismissed for lack of subject matter jurisdiction.[21]

If the person can establish that he is a citizen or subject of a foreign state and he is not also a United States citizen, it makes no difference where he is residing or domiciled.[22] The fact that the individual may be residing and domiciled in a state within the United States is of no importance, since a person cannot be considered a citizen of that state unless he is also a citizen of the United States.[23]

b. Corporations

In *Louisville Railroad Co. v. Letson*,[24] and in *Marshall v. Baltimore & Ohio Railroad Co.*[25] the Supreme Court held that a corporation incorporated in a state is to be deemed a citizen of that state for purposes of diversity jurisdiction and that its stockholders will conclusively be presumed to be citizens of that state. The Court later held that a foreign corporation would be considered a citizen of the foreign state in which it was

---

[21]*See* cases cited in nn.18 and 19, *supra*. The court does have authority, if the stateless person is not an indispensable party and there is subject matter jurisdiction in his absence, however, to dismiss the stateless person from the action and proceed with the remaining parties. FED. R. CIV. P. 21; Windert Watch Co., Inc. v. Remex Electronics, Ltd., 468 F. Supp. 1242, 1246 (S.D.N.Y. 1979); Grant County Deposit Bank v. McCampbell, 194 F.2d 469, 472 (6th Cir. 1952).

Occasionally, of course, a court will overlook the jurisdictional problem in a case in which a stateless alien is a party and render a decision despite its lack of jurisdiction. In Blanco v. Pan-American Life Insurance Company, 221 F. Supp. 219 (S.D. Fla. 1963), *mod. on other grounds*, 362 F.2d 167 (5th Cir. 1966), for example, the court failed to consider or follow the principles and cases discussed above in issuing a decision in a diversity action between Cubans who had fled Cuba after the government headed by Fidel Castro came to power and two American insurance companies which had issued policies to them when they were still living in Cuba. The court rejected the defendant's claim that certain decrees made by the Castro government absolved them from liability under the policies, basing its ruling in part on the fact that plaintiffs had renounced their Cuban citizenship when they left that country and were no longer citizens of that country or bound by its laws. They were, the court held, "political citizens of nowhere," (221 F. Supp. at 228), but were entitled to the protection of U.S. law because they were residing in Florida. *Id.* Under the cases cited above, this conclusion should have mandated dismissal of the action, but the court did not consider the jurisdictional implications of this finding.

[22]Breedlove v. Nicolet, 7 Pet. (32 U.S.) 413, 431-32 (1833); C.H. Nichols Lumber Co. v. Franson, 203 U.S. 278 (1906); Sadat v. Mertes, 615 F.2d 1176, 1183 (6th Cir. 1980).

[23]Colgate v. Harvey, 296 U.S. 404, 427 (1935); Factor v. Pennington Press, Inc., 230 F. Supp. 906, 909 (D.C. Ill. 1963).

Another problem that occasionally arises concerns a United States citizen domiciled abroad. Because he is not domiciled in a state within the United States, he is not considered a citizen of a "State" for purposes of diversity jurisdiction and, because he is a United States citizen, he is not considered a "citizen or subject of a foreign state," either. Accordingly, he cannot be a party in a diversity action. *See* Sadat v. Mertes, 615 F.2d 1176, 1180 (7th Cir. 1980); Meyers v. Smith, 460 F. Supp. 621 (D.D.C. 1978); Kaufman & Broad, Inc. v. Gootrad, 397 F. Supp. 1054 (S.D.N.Y. 1975); Van der Schelling v. United States News & World Report, Inc., 213 F. Supp. 756 (E.D. Pa. 1963) *aff'd.* 324 F.2d 956 (3d Cir.), *cert. denied*, 377 U.S. 906 (1964).

[24]2 How. (42 U.S.) 497 (1844).

[25]16 How. (57 U.S.) 314 (1853).

incorporated.[26]

In 1958, Congress amended the statute conferring diversity jurisdiction to provide that a corporation shall be deemed a citizen not only of any state in which it has been incorporated, but also "of the State where it has its principal place of business."[27] Although the applicability of this provision to U.S. corporations has never been doubted,[28] the courts are irreconcilably in conflict as to whether this amendment applies to corporations which are incorporated in foreign nations. The difficulty arises because Congress did not consider that issue[29] and the language of the statute is unclear.

Some of the courts which have considered the issue take the position that this amendment does not apply to foreign corporations and that foreign corporations therefore remain citizens only of the country in which they are incorporated. The rationale behind this conclusion, as described in *Eisenberg v. Commercial Union Assurance Co.*,[30] is that the "S" in "State" in 28 U.S.C. section 1332 is capitalized when it refers to a state within the United States and that it is lower case when it refers to a foreign state. Since a capital "S" is used in the portion of the statute stating that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State in which it has its principal place of business," these courts hold that the provision applies only to corporations which are incorporated and have their principal place of business in the United States.[31]

Other courts take the position that the statute applies to foreign corporations, as well as U.S. corporations. Under this result, an alien corporation is deemed to be a citizen not only of its country of incorporation, but also of the place—alien or domestic state—where it has its principal place of business. The courts which take this position do so on policy grounds. Their rationale is that the 1958 amendment was intended to limit the scope of federal jurisdiction by prohibiting corporations which do most of their business in the forum state from gaining access to the federal courts in that state under the diversity statute just because they incorporated themselves in

---

[26]National Steamship Co. v. Tugman, 106 U.S. 118, 121 (1882); Barrow Steamship Company v. Kane, 170 U.S. 100 (1898).

For a discussion of the result when a corporation is incorporated in more than one state or is found to be a citizen of more than one state, *see* notes 44-54 and accompanying text, *infra*.

[27]*See* 28 U.S.C. § 1332(c), which reads, in pertinent part, as follows: "For purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

[28]*See, e.g.*, Munoz v. Small Business Administration, 644 F.2d 1361, 1365 (9th Cir. 1981); R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 654 (2d Cir. 1979).

It has been held, however, that a corporation which is incorporated in the United States, but has its principal place of business in a foreign country, should be considered a citizen only of the state in which it is incorporated. Willems v. Barclays Bank D.C.O., 263 F. Supp. 774 (S.D.N.Y. 1966).

[29]*See* Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31, 32 (5th Cir. 1981).

[30]189 F. Supp. 500 (S.D.N.Y. 1960).

[31]Other cases in which this reasoning was adopted are Tsakonites v. Transpecific Carriers Corp., 246 F. Supp. 634 (S.D.N.Y. 1965), *aff'd* 368 F.2d 426 (2d Cir.), *cert. denied*, 386 U.S. 1007 (1967); Chemical Transp. Corp. v. Metropolitan Petroleum Corp., 246 F. Supp. 563 (D.C. N.Y. 1964); and Salomon v. Israel Discount Bank, 494 F. Supp. 914 (S.D.N.Y. 1980).

another state. Congress took the position in adopting the amendment that these corporations are actually local companies and do not need the protection of the federal courts. The courts which apply the amendment to foreign corporations say that the same reasoning should apply to foreign corporations; if a foreign corporation has its principal place of business in a state within the United States, it should be considered a citizen of that state despite the fact that it is incorporated in another country.[32]

It is not surprising that a dispute has arisen on this issue, since the statute enacted by Congress is ambiguous and it does not provide any "correct" resolution. Given the underlying purpose of alienage jurisdiction, however—to provide a federal forum for citizens of foreign states so as to avoid offending those states—it would appear desirable to include all corporations incorporated in a foreign nation within the scope of alienage jurisdiction, regardless of where they have their principal place of business. This solution is particularly desirable since neither Congress nor the courts have adopted a uniform standard to determine a corporation's principal place of business[33] and there is a substantial risk that a foreign state may believe that the standard chosen by an individual judge in a given case to determine the principal pace of business of one of its corporations was inappropriate.

3. MEANING OF "FOREIGN STATE"

Although neither the Constitution nor the diversity statute defines "foreign state," the courts have construed the term to mean a political entity that is recognized by the Executive Branch of the United States government as a sovereign and independent nation. If the entity is not so recognized, then its citizens or subjects are not included within the scope of the diversity statute.

The requirement that the entity be recognized as an independent sovereign nation can lead to some unexpected results. As recently as 1979, for

---

[32] *See, e.g.*, Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31 (5th Cir. 1981); Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001, 1005-07 (N.D. Ill. 1973); Arab International Bank & Trust Co. v. National Westminster Bank, Ltd., 463 F. Supp. 1145, 1147 (S.D.N.Y. 1979); Jerro v. Home Lines, Inc., 377 F. Supp. 670, 672 (S.D.N.Y. 1974); Bergen Shipping Co., Ltd. v. Japan Marine Services, Ltd., 386 F. Supp. 430 (S.D.N.Y. 1974); Corporacion Venezolana de Fomento v. Vintero Sales 477 F. Supp. 615 (S.D.N.Y. 1979).

One possible interpretation of the statute that has been suggested is that a foreign corporation should be deemed a citizen of the state within the United States in which it has its principal U.S. place of business, no matter how small its activities are compared to its worldwide activities. That approach has not found favor with the courts, however. *See* Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764 (D. Kan. 1981); R.W. Sawant & Co. v. Ben Kozloff, Inc., 507 F. Supp. 614 (N.D. Ill. 1981).

[33] *See* 1 MOORE'S FEDERAL PRACTICE ¶ 0.77[3.01] in which Professor Moore identifies 5 different criteria used by various courts in determining a corporation's principal place of business: (1) the place from which the corporation's activities are directed or controlled; (2) the location of the actual activities and operations of the corporation; (3) the center of day-to-day corporate activity and management; (4) the location of the operational offices; and (5) the state where corporate litigation is most likely to arise.

example, a federal court dismissed an action against two Hong Kong corporations on the ground that Hong Kong, as a colony of Great Britain, was not an independent or sovereign nation.[34] Similarly, in another case,[35] a court dismissed an action brought by two citizens of Palestine because Palestine was, at the time, a mandate territory administered by Great Britain.

Many courts which are faced with this problem, however, believe that it would be inequitable to dismiss an action in these circumstances and find some basis by which they can retain jurisdiction. Thus, for example, in *Muraka v. Bachrack Bros.*,[36] the court of appeals utilized the concept of "de facto" recognition to avoid dismissing an action. The plaintiffs in that case were citizens of India who filed a diversity action just one month prior to the time India was granted its independence by Great Britain. Although the United States had not yet officially recognized India as a sovereign nation, it had exchanged ambassadors with the interim government which had been set up to assist in the transition to independence. The court held that it would be inequitable to dismiss the action under these circumstances since the United States had, in fact, recognized the separate existence of India at the time the complaint was filed, even though formal recognition had not yet been accorded. This de facto recognition, the court held, was sufficient to make India a "foreign state" for purposes of alienage jurisdiction.[37]

---

[34]Windert Watch Co. v. Remex Electronics, Ltd., 468 F. Supp. 1242 (S.D.N.Y. 1979). In dismissing the action against the two Hong Kong corporations, the court rejected the plaintiff's claim that Hong Kong should be considered a part of Great Britain since "the Act of Parliament by which the United Kingdom was constituted . . . indicates that the United Kingdom consists only of England, Scotland, Wales, and Northern Ireland." 468 F. Supp. at 1245.

[35]Klausner v. Levy, 83 F. Supp. 599 (E.D. Va. 1949). The court held in that case that citizens of the then British mandate of Palestine were not citizens or subjects of a foreign state, because Palestine was not a foreign state within the meaning of the Constitution and the diversity statute. As the court stated:

> A state in their texts means one formally recognized by the executive branch of the government of the United States. [citation] The territory of the plaintiff's citizenship was not recognized as a state until May 14, 1948, when it was conceded a de facto status under the name of Israel, the de jure recognition being attained on January 31, 1949. As recognition of a sovereignty is a political and not a judicial matter, the courts are conclusively bound by the status accorded a territory by the executive department of our government. [citations]
>
> Obviously, then, when this action was filed the plaintiff was not a citizen or subject of a foreign state, and this Court was without jurisdiction, no ground of jurisdiction save diversity of citizenship being urged or shown.
>
> The complaint will be dismissed. . . .

83 F. Supp. at 600.

[36]215 F.2d 547 (2d Cir. 1954).

[37]As the court stated, "Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent national entity and was so recognized by the United States." Muraka v. Bachrack Bros., 215 F.2d 547, 552. *See also* Chang v. Northwestern Memorial Hospital, 506 F. Supp. 975 (N.D. Ill. 1980), in which one of the parties was a citizen of Taiwan. The court held that, despite the fact that President Carter had terminated U.S. diplomatic relations with Taiwan prior to the time the action was commenced, Taiwan should still be considered a "foreign state" for purposes of alienage jurisdiction because the United States still accorded it "de facto" recognition.

Although the concept of de facto recognition has increased the number of countries which will be considered "foreign states" for purposes of alienage jurisdiction, the above cases indicate that the status of the country of which the alien is a citizen remains an important concern.

C. *Dual Citizenship*

1. INTRODUCTION

Occasionally, a situation will arise in which a party is a citizen both of the United States and of a foreign nation. In that case, it must be determined which nationality is to be used in determining whether alienage jurisdiction exists.

2. INDIVIDUALS

The courts are divided in deciding how to treat individuals who are citizens both of the United States and of a foreign state. There appear to be only three cases which have considered this issue, and, in each case, the court came to a different conclusion.

Dual citizenship can arise because each country determines under its own laws whether a person is one of its own citizens and the United States

---

Another case in which a court found jurisdiction was that of Great China Trading Company, Ltd. v. Cimex U.S.A., Inc., (No. 80-4221 MML). In an unpublished opinion filed on March 17, 1982, the court refused to follow the case of Windert Watch Co., Inc. v. Remex Electronics, Ltd., 468 F. Supp. 1242 (S.D.N.Y. 1979) and held that a corporation incorporated in Hong Kong should be considered a citizen of Great Britain for purposes of diversity jurisdiction. The court gave three reasons for its decision. The first reason was that, under the British Nationality Act of 1948, an individual has the status of a British subject if he is a citizen of the United Kingdom or its colonies. The court reasoned that, although neither Great Britain nor Hong Kong recognize the fiction of citizenship for corporations, a Hong Kong corporation should be considered a British citizen for purposes of diversity jurisdiction because it owes its allegiance to the British Crown and it would be "neither sensible nor equitable" to hold that "the right of a Hong Kong business to bring suit in federal court would depend on whether that business was organized as a partnership or a corporation."

The second reason given by the court was that Hong Kong, as a colony of Great Britain, should be considered a "creature or member" of that country and, therefore, a citizen of Hong Kong should also be considered to be a citizen of Great Britain. The court based this reason on language in the case of Land Oberoesterreich v. Gude, 109 F.2d 635 (2d Cir. 1940), in which the court of appeals held that a governmental subdivision of a foreign state could maintain an action in federal court because it was a creature or member of that foreign state. The court in *Great China* recognized that Hong Kong was not a part of the United Kingdom proper, but held that it should be considered a "creature or member" of Great Britain because it was a colony of Great Britain. The court concluded that since the plaintiff was a citizen of Hong Kong and Hong Kong was a "creature or member" of Great Britain, the plaintiff should be considered a citizen of Great Britain.

The third reason given by the court was that "the policies underlying alienage jurisdiction" favor the assertion of jurisdiction. The court noted that the considerations which prompted the granting of alienage jurisdiction were (1) failure on the part of individual states to give protection to foreigners under treaties; and (2) apprehension of entanglements with other sovereigns that might ensue from a failure to treat the controversies of aliens on a national level. The court concluded that these policies were just as important when one of the parties is a Hong Kong corporation as when it is a British corporation or a Hong Kong partnership and that the court should therefore not differentiate between them for jurisdictional purposes.

accepts a foreign country's determination of that issue as conclusive.[38] Accordingly, a person can at the same time be a United States citizen under U.S. law and a citizen of a foreign county under the laws of that country.

In one district court case in which the court considered the effect of dual nationality on diversity jurisdiction—*Aguirre v. Nagel*[39]—the court held that the proper procedure was to determine whether diversity jurisdiction existed under either nationality and to accept jurisdiction if it did. The plaintiff in that case was a minor who was a citizen of the state of Michigan, having been born and raised there. She was also a citizen of Mexico under Mexican law, since both her parents were Mexican citizens. The defendant was a citizen of Michigan and sought dismissal on the ground that there was no diversity of citizenship. The court denied the motion, holding that it should consider only the plaintiff's Mexican citizenship rather than her Michigan citizenship. The court stated that, since the plaintiff was a citizen of Mexico and 28 U.S.C. section 1332(a)(2) conferred jurisdiction in cases between a citizen of a foreign state and a citizen of a state within the United States, the exercise of jurisdiction was proper; the fact that jurisdiction would not exist if the plaintiff's Michigan citizenship was used was not deemed controlling.

This conclusion was rejected by another district court in the case of *Raphael v. Hertzberg*.[40] The plaintiff in that case, although a naturalized citizen of the United States living in California, also claimed to be a citizen of the United Kingdom. The defendants were all citizens of California. The court dismissed the action on the ground that there was no diversity between the plaintiff and the defendants. The court expressly rejected the holding in *Aguirre*, saying that, because of the requirement of complete diversity, it should dismiss the case if any one of the plaintiff's nationalities *destroyed* diversity.

Another court which considered the issue took a third position. In that case—*Sadat v. Mertes*[41]—the court of appeals held that the proper course was to determine in each case which nationality was "dominant" and use that nationality in determining whether it had jurisdiction. The plaintiff in that case was a citizen of both the United States and of Egypt. Since he had renounced his Egyptian citizenship at the time he became a naturalized United States citizen and acted thereafter in a manner consistent with his intent to remain a United States citizen, however, the court held that he should be considered a United States citizen for purposes of jurisdiction.[42]

---

[38] *See* note 16 and accompanying text, *supra*.

[39] 270 F. Supp. 535 (E.D. Mich. 1967).

[40] 470 F. Supp. 984 (C.D. Cal. 1979), *appeal dismissed*, 636 F.2d 1227 (9th Cir. 1980).

[41] 615 F.2d 1176 (7th Cir. 1980).

[42] The court of appeals' decision in *Sadat* was particularly harsh because it caused the case to be dismissed for lack of jurisdiction. The plaintiff in *Sadat* had been born in Egypt but subsequently moved to the United States, became domiciled in Pennsylvania and became a naturalized U.S. citizen. While in the United States, he was involved in the automobile accident which was the subject of the lawsuit.

The decisions in all three of these cases appear to be undesirable. The decision in *Sadat* does not appear to be a desirable solution to the problem, because the nationality a court would consider "dominant" would be difficult to predict in advance. As a result, a plaintiff in such a situation would often be unable to determine in advance whether the case was one which could properly be brought in federal court. The *Aguirre* and *Raphael* decisions also appear wrong because they create a new category of U.S. citizen without any real justification. If the United States has accorded citizenship to a person, he should be treated as a U.S. citizen for all purposes; the fact that a foreign state also views him as one of its citizens should not strip him of his status as a U.S. citizen for purposes of being a party in a federal court proceeding.

Although this result may, in a rare case, offend a foreign state which believes that its citizens are not being afforded access to the federal courts, this would seem to be a risk worth taking in order to avoid the possible constitutional problems in denying a person the rights incident to his status as a U.S. citizen.[43]

The plaintiff thereafter moved to Lebanon where he worked as the area manager for a United States company. He lived in Lebanon and later, Egypt, for a period of 5 years. He then returned to the United States to live.

The lawsuit was filed in Wisconsin during the period of time after the plaintiff had become a naturalized U.S. citizen but was living in Egypt. The complaint alleged that the defendants were citizens of either Wisconsin or Connecticut.

In affirming the trial court's dismissal of the case, the court of appeals held that the plaintiff should be considered a United States citizen domiciled abroad, and thus a citizen of no state. (*See* note 23, *supra*). The court rejected the plaintiff's claim that he be considered a citizen of Pennsylvania, since it found that he had relinquished his domicile there when he moved to Lebanon. Although Egypt still considered the plaintiff to be a citizen of Egypt, the court also rejected the plaintiff's claim that he be considered a citizen of a foreign state—Egypt—since it considered his United States citizenship "dominant."

The harshness of the decision in *Sadat* arises from the fact that the court's lack of jurisdiction was not raised until 2 years after the complaint was filed and after the statute of limitations prevented the plaintiff from refiling his action in state court. Although the court acknowledged this problem in its opinion, it declined to modify its decision in light of it.

[43] *See, e.g.*, Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738 (1824), in which the Supreme Court stated that a naturalized citizen has the same capacity to sue in the courts of the United States as a native citizen:

> A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

9 Wheat. at 827-28. *See also* Knauer v. United States, 328 U.S. 654, 658 (1946); and Luria v. United States, 231 U.S. 9, 22 (1913).

3. CORPORATIONS

The courts are also in conflict on how to treat a foreign corporation which has dual citizenship—i.e., when the corporation is a citizen both of a foreign country and a state within the United States. This problem arises in two contexts: (a) when the corporation is incorporated both in a foreign country and in a state within the United States; and (b) when the corporation is incorporated in a foreign country but has its principal place of business in the United States.

a. Citizenship when the Corporation is Incorporated in Both a Foreign State and in the United States

It is not clear what result will occur when a corporation is incorporated in both a foreign state and in a state within the United States. There do not appear to be any cases which have considered this point and the cases which have considered the citizenship of a corporation which is incorporated in two or more states within the United States are in conflict.

The traditional way of determining the citizenship of a corporation which is incorporated in two separate states within the United States is the "forum doctrine." Under that doctrine, if a suit is brought by or against a corporation in one of the states in which it is incorporated, it will be treated as a citizen only of that state.[44] If the suit is brought by or against the corporation in a state other than one of its states of incorporation, the corporation is deemed to be a citizen of each of its states of incorporation.[45]

In 1958, however, Congress amended 28 U.S.C. section 1332 to provide that a corporation "shall be deemed a citizen of any State by which it has been incorporated." Although most courts which have considered this issue have held that the amendment abolished the forum doctrine and established a rule that a corporation will be considered a citizen of *each* state in which it has been incorporated (thus destroying diversity if any one of the states of incorporation is the same as the state of citizenship of an opposing party),[46] other courts have held that the forum rule continues unchanged.[47] The rationale given by the courts which have held that the amendment

---

[44]Jacobson v. New York, New Haven & Hartford Railroad Co., 347 U.S. 909 (1953); Patch v. Wabash R.R. Co., 207 U.S. 277 (1907); Memphis & Charleston R.R. Co. v. State of Alabama, 107 U.S. 581 (1882).

[45]*See, e.g.*, Brailey v. Baltimore & Ohio R.R. Co., 151 F. Supp. 431 (S.D.N.Y. 1957); Waller v. New York, New Haven & Hartford R.R. Co., 127 F. Supp. 863 (S.D.N.Y. 1955); Dodd v. Louisville Bridge Co., 130 F.2d 186 (C.C.D. Ky. 1904).

[46]*See, e.g.*, Yancoskie v. Delaware River Port Authority, 528 F.2d 722 (3d Cir. 1975); DiFrischia v. New York Central Railroad Co., 279 F.2d 141 (3rd Cir. 1960); Oslick v. Port Authority of New York & New Jersey, 83 F.R.D. 494 (S.D.N.Y. 1979); Rudisill v. Southern Railway Co., 424 F. Supp. 1102 (W.D.N.C., 1976), *aff'd* 548 F.2d 488 (4th Cir. 1977); French v. Clinchfield Coal Co., 407 F. Supp. 13 (D. Del. 1976). This rule applies, however, only with respect to those states in which the incorporation has been voluntary. Rudisill v. Southern Railway Co., 424 F. Supp. 1102 (W.D.N.C. 1976).

[47]Hudack v. Port Authority Trans-Hudson Corp., 238 F. Supp. 790 (S.D.N.Y. 1965); Kozikowski v. Delaware River Port Authority, 397 F. Supp. 1115 (D.N.J. 1975).

abolished the forum doctrine is that Congress intended in 1958 to reduce the diversity caseload of the federal courts and that, although the statute is ambiguous, reading it to abolish the forum doctrine would give effect to the intent of Congress.[48] The reason given by the courts which have held that the amendment did not affect the forum rule is that the statutory language is ambiguous and the rule should not be changed unless Congress' intent to do so is clear.[49]

Although the trend appears to be in favor of holding that a corporation is deemed a citizen of every state in which it is incorporated, the issue is still unsettled. It is also not clear what is the result if a corporation is incorporated in both a foreign nation and in a state within the United States.

b. Citizenship of a Corporation Incorporated in a Foreign Country with Its Principal Place of Business in the United States

As noted above, there is considerable uncertainty whether the provision in 28 U.S.C. section 1332(c) stating that a corporation shall be deemed a citizen "of the State where it has its principal place of business" applies to foreign corporations.[50] Accordingly, it is unclear whether a foreign corporation with its principal place of business in the United States shall even be considered to have U.S. citizenship.

A further area of uncertainty, however, exists even among those courts which hold that 28 U.S.C. section 1332(c) does apply to foreign corporations—namely, if the corporation is deemed to be also a U.S. citizen by virtue of having its principal place of business in the United States, is complete diversity necessary between the foreign corporation's two places of citizenship and the place of citizenship of its opposing party?

The rule followed by most courts is that jurisdiction is destroyed if either of the places of which the foreign corporation is a citizen is the same as the place of citizenship of its opponent.[51] This result is based on the reasoning that the purpose of the section was to reduce the jurisdiction of the federal courts and that it should be read to give effect to that policy.[52]

The court in *Bergen Shipping Co., Ltd. v. Japan Marine Services, Ltd.*,[53] however, gave a wholly different interpretation of the statute and held that, when a foreign corporation has its principal place of business in the United States, it should be considered only a U.S. corporation and its foreign citizenship should be disregarded. The reason given by the court for this construction is that the 1958 amendment stating that a corporation should be deemed a citizen of the state in which it has its principal place of business

---

[48] *See, e.g.*, French v. Clinchfield, 407 F. Supp. 13 (D. Del. 1976).

[49] *See, e.g.*, Hudack v. Port Authority Trans-Hudson Corp., 238 F. Supp. 790 (S.D.N.Y. 1965).

[50] *See* notes 27-32 and accompanying text, *supra*.

[51] *See, e.g.*, Hercules, Inc. v. Dynamic Export Corp., 71 F.R.D. 101 (S.D.N.Y. 1976); Corporacion Venezolana de Fomento v. Vintero Sales, 477 F. Supp. 615 (S.D.N.Y. 1979).

[52] Corporacion Venezolana de Fomento v. Vintero Sales, 477 F. Supp. 615 (S.D.N.Y. 1979).

[53] 386 F. Supp. 430 (S.D.N.Y. 1974).

was meant to treat corporations which are engaged in a local business as local corporations and not as foreign corporations. Accordingly, that court stated, alienage jurisdiction existed in an action between a Liberian corporation with its principal place of business in New York and a Japanese corporation. Although the court recognized that this construction would enlarge federal jurisdiction in some cases, it held that such an interpretation was necessary to effect the intent of Congress.

The *Bergen* decision appears to be clearly incorrect, since it amounts in essence to a determination that *only* the corporation's principal place of business is to be considered in determining citizenship and that the place of incorporation should be disregarded. This is directly contrary to the wording of 28 U.S.C. section 1332(c), which states that "a corporation should be deemed a citizen of any State by which it has been incorporated *and* of the State where it has its principal place of business." The *Bergen* case should not be disregarded, however, since at least two other courts have come to the same conclusion.[54]

c. Conclusion

Although there is no clearly correct solution to the problem of determining the citizenship of alien corporations, a reasonable way of solving it is to treat an alien corporation as a citizen of each state in which it is incorporated and to disregard its principal place of business. The act of incorporation in a state is an affirmative expression by the corporation of its willingness to be subject to the laws and regulations of that state. If a corporation has been incorporated in the United States, therefore, there is not a substantial risk that a foreign country in which it may also be incorporated would believe that recognition of the U.S. place of incorporation would be improper. The concept of "principal place of business," however, is less clear-cut and the standard used by the federal courts may be one that is not recognized by many foreign countries. Accordingly, an attempt by the United States to treat as a U.S. citizen a corporation which is incorporated only in a foreign country may cause that foreign country to feel that its nationals are not being treated fairly.

---

[54]Grimandi v. Beech Aircraft Corp., 512 F. Supp. 764, 776 (D. Kan. 1981); Arab Intern. Bank & Trust Co., Ltd. v. National Westminster Bank, Ltd., 463 F. Supp. 1145 (S.D.N.Y. 1979). *Arab Intern. Bank* was an action between a corporation incorporated in the West Indies with its principal place of business in the West Indies and a corporation incorporated in the United Kingdom. There was a dispute between the parties as to whether the principal place of business of the United Kingdom corporation was in the United Kingdom or in New York. The court took the position that this question was material in determining whether jurisdiction existed and gave plaintiff leave to amend its complaint to allege facts showing that the United Kingdom corporation had its principal place of business in New York. Under the generally accepted interpretation of the statute, the corporation's principal place of business would have been irrelevant in this case because the fact that both parties were incorporated in foreign countries would have defeated jurisdiction. That the court considered the corporation's principal place of business important indicates that it would have exercised jurisdiction if the corporation was found to have its principal place of business in New York.

D. *Conclusion*

As shown above, a person does not become subject to the alienage jurisdiction of the federal courts merely by virtue of not being a United States citizen. In order to be subject to jurisdiction on that basis, he must be a citizen or subject of a foreign state, as those terms have been construed by the courts.

IV. Jurisdictional Rules When a Citizen or Subject of a Foreign State is a Party

A. *Introduction*

As was discussed above, the major reason for allowing aliens access to the federal courts is to increase the likelihood that they will not be subject to the local prejudices perceived to be present in the state courts. In accordance with this policy, Congress provided in the Judiciary Act of 1789 that the federal courts would have jurisdiction in all actions in which a citizen or subject of a foreign state was a party, as long as there was $500 or more in controversy.[55]

Not long thereafter, however, in the case of *Mossman v. Higginson*,[56] the Supreme Court held this provision could not be read as conferring jurisdiction in actions between aliens, because article III, section 2 of the Constitution did not authorize Congress to confer jurisdiction on the federal courts in such actions. As the court stated in that case:

> [T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits "where an alien is a *party*;" but as the legislative power of conferring jurisdiction on the federal Courts is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, "where, indeed, an alien is one party, but a citizen is the other."[57] (Emphasis supplied)

The Court's decision, although a literally correct reading of the Constitution, may have been contrary to the intent of the drafters of the Constitution. This appears to be particularly clear because the provision invalidated by the Court was enacted by the First Congress, which was composed in

---

[55]Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78:

> Sec. 11. And be it further enacted, that the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State . . .

[56]4 Dall. (4 U.S.) 12 (1800).

[57]Mossman v. Higginson, 4 Dall. (4 U.S.) 12, 13 (1800). *See also* Jackson v. Twentyman, 2 Pet. (27 U.S.) 136 (1829); Hodgins v. Bowerbank, 5 Cranch (9 U.S.) 303 (1809) in which the Court repeated this holding. This principle does not apply, however, when there is a basis for jurisdiction apart from alienage jurisdiction. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Alien Tort Claims Act, 28 U.S.C. § 1350).

large part of the men who drafted the Constitution.[58]

Furthermore, all but one of the proposals submitted at the Constitutional Convention specifically provided for federal court jurisdiction in cases in which aliens were interested[59] and none of those made the distinction between cases between aliens and cases between an alien and a U.S. citizen which the court found in the final version. It is also noteworthy that, although the Supreme Court issued the *Mossman* decision in 1800, Congress did not amend the diversity statute to take into account the Court's ruling until 1875.[60]

Not only did the Supreme Court's holding in *Mossman* sharply limit the jurisdiction of the federal courts, it also created several complications in the law. These complications are considered below. In part B, below, is a discussion of the situations in which alienage jurisdiction does and does not exist when there is an alien on only one side of the case. Part C considers when there is and is not jurisdiction when there are aliens on both sides.

B. *Actions in Which Aliens are on One Side of the Case*

1. Situations in Which Jurisdiction Exists

The simplest situation involving the exercise of alienage jurisdiction is when a citizen or subject of a foreign state sues, or is sued by, a citizen of a state within the United States. There is clearly jurisdiction in this case.[61]

Furthermore, although the Constitution and the diversity statute literally refer only to suits between "citizens of *a* State" and citizens or subjects of foreign states,[62] the courts have held that jurisdiction exists even if the U.S. citizens on one side of the controversy are from different states.[63] The reason given by the courts is that, since each of the U.S. citizens could have sued or been sued by the alien in separate actions, it would be inequitable to hold that they could not sue or be sued in the same action.[64]

---

[58] *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57 (1923). On other occasions, the Supreme Court took the position that the provisions of the Judiciary Act of 1789 should be used in construing the meaning of the Constitution, basing its decision on the ground that many of the members of the First Congress had been "leading and influential members of the [constitutional] convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the states and with the objections against it . . ." Ames v. Kansas, 111 U.S. 449, 464 (1883). *See also* Wisconsin v. Pelican, 127 U.S. 265, 297 (1887).

[59] *See* 1 Moore's Federal Practice, ¶ 0.71[1].

[60] Act of March 3, 1875 § 1, 18 Stat. 470. The 1875 act gave the circuit courts jurisdiction of

> all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars . . . in which there shall be . . . a controversy between citizens of a State and foreign states, citizens, or subjects.

[61] *See* 28 U.S.C. § 1332(a)(2), which reads:

> (a) The district courts shall have original jurisdiction of all civil actions . . . between . . .
> (2) Citizens of a State and citizens or subjects of a foreign state.

[62] Const., art. III, § 2; 28 U.S.C. § 1332(a).

[63] DeKorwin v. First Nat. Bank of Chicago, 156 F.2d 858 (7th Cir. 1946); Niccum v. Northern Assur. Co., 17 F.2d 160 (D. Ind. 1927).

[64] Niccum v. Northern Assur. Co., 17 F.2d 160, 163-64 (D. Ind. 1927).

Prior to 1976, it was clear that there was no jurisdictional impediment if the aliens on the same side of the controversy were from different countries. Both the Constitution and the diversity jurisdiction statute referred only to actions between U.S. citizens and "foreign states or citizens or subjects thereof."[65] In the Foreign Sovereign Immunities Act of 1976, however, Congress established a procedure for actions by or against foreign states and removed foreign states from the general alienage statute.[66] In so doing, however, it changed the language of the statute so as to provide for jurisdiction only when "citizens or subjects of *a* foreign state" are parties. There is no reason to believe that Congress actually intended to change prior law, however, and the amendment probably does not defeat jurisdiction when aliens from different foreign countries are on the same side of the controversy. Nonetheless, the issue has not been resolved.

There is also jurisdiction when the action is between citizens of two different states within the United States and a foreign citizen is joined as a party on one side of the controversy.[67] The statute authorizing this appears to be merely an application of the constitutional provision authorizing the exercise of jurisdiction in actions "between citizens of different States."[68]

2. Situations in Which Jurisdiction Does Not Exist

There are two exceptions to the general principle that alienage jurisdiction exists when aliens are on only one side of the controversy. The first exception to this general principle is when there is a party in the action who is neither a citizen of a U.S. state or of a foreign state. In this situation, there is no jurisdiction regardless of whether there are aliens in the proceeding or how they are positioned. This result arises from the fact that the Constitution and the diversity statute refer only to actions between citizens or subjects of a state. As was discussed above,[69] this means that a diversity

---

[65]Const., art. III, § 2; Prior to 1976 the text of 28 U.S.C. § 1332(a) read as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

See 28 U.S.C.A. § 1332 (1966 ed.).

[66]The act is considered at notes 79-91 and accompanying text, *infra*.

[67]28 U.S.C. § 1332(a)(3) reads as follows:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties.

Whether jurisdiction exists when there are aliens, as well as U.S. citizens, on both sizes of the controversy is considered at notes 73-75 and accompanying text, *infra*.

[68]Const., art. III, § 2.

[69]*See* notes 14-37 and accompanying text, *supra*.

action may not proceed if one of the parties is neither a citizen or subject of a foreign state or of a state in the United States. The court may, however, dismiss the person from the action if he is not an indispensible party and proceed without him as long as subject matter jurisdiction exists in his absence.[70]

A second situation in which there is no jurisdiction despite the general principle described above is when, in addition to the alien, there are citizens of the same U.S. state on both sides of the controversy. This result arises from the rule created by the Supreme Court in *Strawbridge v. Curtiss*,[71] that there must be complete diversity of citizenship between the parties before there may be federal court jurisdiction—i.e., each plaintiff must be capable of suing each defendant. Since, in the above situation, the opposing U.S. citizens could not sue each other, there is no jurisdiction.[72]

Absent these situations, alienage jurisdiction does exist when an alien is present on only one side of the case, as long as the amount in controversy requirement is satisfied.

C. *Actions in Which Aliens Are on Both Sides*

As stated above, the Supreme Court has held that alienage jurisdiction does not exist in an action in which only aliens are parties. The Court's holding was based on the principle that the Constitution does not authorize the exercise of jurisdiction in such a case.[73]

Cases holding that diversity jurisdiction does not exist in an action between aliens when U.S. citizens are also parties do not appear to be based on this constitutional ground, however, but on the judicially created rule that complete diversity is generally required to confer jurisdiction. As stated above, this rule provides that each plaintiff must be capable of suing each defendant before diversity jurisdiction can be held to exist.

In accordance with this principle, the courts have uniformly held that an action between a citizen of a U.S. state and an alien, on the one hand, and another alien, on the other hand, is not within the jurisdiction of the federal courts. The rationale is that, although the plaintiff U.S. citizen could sue or be sued by the defendant alien, the plaintiff alien could not. Complete diversity, therefore, does not exist.[74]

---

[70]*See* note 21, *supra*.

[71]7 U.S. (3 Cranch) 267 (1806).

[72]*See* Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978).

[73]*See* notes 55-57 and accompanying text, *supra*.

[74]The district court stated the applicable rule in Tsitsinakis v. Simpson, Spence & Young, 90 F. Supp. 578 (S.D.N.Y. 1950), as follows:

> It is well settled that in order to sustain jurisdiction of an action based on diversity of citizenship in the federal court, each plaintiff must be capable of suing each defendant in that court. [citation] The courts of the United States have no jurisdiction of a case in which both parties are aliens, [citation]; if both a party plaintiff and party defendant are aliens the district court lacks jurisdiction, even though there are other parties in the action, as plaintiffs or defendants, who are citizens of the United States. [citation] Since in this action the plaintiff

Complete diversity is not a constitutional requirement, however, and Congress has the right to eliminate it as long as it maintains a requirement of minimal diversity.[75] In accordance with this authority, Congress appears to have eliminated the complete diversity requirement in actions between aliens when there are also citizens of different U.S. states on both sides of the controversy. Although there are no cases deciding whether jurisdiction exists in this situation—and there is language in other types of cases which would indicate a lack of jurisdiction[76]—it appears clear that jurisdiction does exist.

This result follows from the literal wording of 28 U.S.C. section 1332(a)(3), which confers jurisdiction in actions "between citizens of different states and in which citizens or subjects of a foreign state are additional parties."[77] This provision does not run afoul of the Constitution, since article III, section 2, authorizes Congress to confer jurisdiction in cases "between citizens of different States."

There is a minimal diversity requirement present in 28 U.S.C. section 1332(a)(3), since the statute requires that there be citizens of different states on opposite sides of the controversy. Accordingly, the decision by Congress to confer jurisdiction even if aliens are also parties in the action appears enforceable.

Although, under the Constitution, alienage jurisdiction cannot exist in an action in which only aliens are parties, it appears that Congress has the right if it maintains a requirement of minimal diversity to confer jurisdiction in an action between aliens when U.S. citizens are also parties.

---

and the two individual defendants (who, it seems, are indispensable to the action) are aliens, the Court has no jurisdiction to entertain the action.

90 F. Supp. at 579.

See also IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); and Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp., 506 F.2d 757 (5th Cir. 1975).

[75]State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967). In that case, the Supreme Court upheld the constitutionality of the federal interpleader statute (28 U.S.C. § 1335), which confers federal court jurisdiction in interpleader actions when there are "two or more adverse claimants, of diverse citizenship." The Court held that the fact that there might be other claimants who are co-citizens does not defeat jurisdiction because complete diversity is not constitutionally required and Congress legitimately eliminated this requirement for federal interpleader actions. The Court reaffirmed its conclusion that complete diversity is not constitutionally required in the case of Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373, n.13 (1978).

[76]*See* cases cited in n.74, *supra*.

[77](a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

. . .

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties . . .

28 U.S.C. § 1332(a)(3).

D. *Conclusion*

The holding by the Supreme Court in *Mossman v. Higginson*[78] invalidating the portion of the Judiciary Act that stated that the federal courts possessed jurisdiction in any action in which an alien was a party has given rise to a considerable amount of litigation. The holding has been uniformly followed, however, and it is well established that alienage jurisdiction exists only when the specific requirements discussed above are satisfied.

V. Foreign Sovereign Immunities Act of 1976

A. *Description of the Act*

Prior to 1976, actions by and against foreign states were governed by the same jurisdictional statute as actions by and against citizens or subjects of foreign states.[79] The determination of whether sovereign immunity applied in any given case was often determined by the courts based on recommendations by the United States Department of State.[80] In the Foreign Sovereign Immunities Act of 1976,[81] Congress removed the provision regarding foreign states from the alienage jurisdiction statute and enacted separate jurisdictional sections for actions involving foreign states. It also codified the standards to be used in determining when foreign states would be entitled to sovereign immunity.

Under the act, a foreign state includes not only the government of a foreign county, but also subdivisions of foreign states and agencies or instrumentalities of foreign states. An agency or instrumentality of a foreign state, as defined in the act, means any entity which is (1) a separate legal person and (2) which is an organ of a foreign state or political subdivision or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and (3) which is neither a citizen of a state of the United States nor created under the laws of any third country.[82] Thus, a corporation owned by a foreign government is included

---

[78]4 Dall. (4 U.S.) 12 (1800).

[79]Title 28, section 1332(a) read as follows immediately prior to the enactment of the Foreign Sovereign Immunities Act of 1976:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

[80]*See* 1976 U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, Vol. 5, pp. 6606-07; *Ex Parte Peru*, 318 U.S. 578 (1943); Mexico v. Hoffman, 324 U.S. 30 (1945).

[81]Pub. L. No. 94-583 (1976).

[82]*See* 28 U.S.C. § 1603 which reads in pertinent part, as follows:

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state means any entity—

within the act's definition of a foreign state.

Actions brought by a foreign state are covered by a different jurisdictional provision in the act than are actions against a foreign state. Actions brought by a foreign state are governed by the section which has been codified as 28 U.S.C. section 1332(a)(4). Under that provision, jurisdiction exists in any action between a foreign state, as plaintiff, and citizens of a state or of different states, as long as there is more than $10,000 in controversy.[83]

The provision which confers jurisdiction for actions against foreign states is 28 U.S.C. section 1330. That section provides that the district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as to any claim to which the foreign state is not entitled to immunity.[84] The act also contains a special removal statute, which provides that any civil action brought in a state court against a foreign state may be removed by the foreign state to federal court.[85]

B. *Uncertainties in the Act*

Although the Foreign Sovereign Immunities Act was designed to clear up certain uncertainties in the law, it has created some as well. One of these is whether its grant of jurisdiction in actions against foreign states is exclusive. One problem in particular concerns actions against corporations which are owned by foreign governments. Because of an overlap in definitions, such

---

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

[83] (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

. . .

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a)(4).

[84] (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.

28 U.S.C. § 1330(a).

The act provides that a foreign state is entitled to immunity except when it has waived its immunity, when the action is based on commercial activity by the foreign state carried out in the United States or which caused a direct effect in the United States or in certain other designated situations. 28 U.S.C. §§ 1604-1607. For a more detailed discussion of the provisions of the act, *see* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SOUTHWESTERN L.J. 1009 (1979).

[85] 28 U.S.C. § 1441(d).

an entity is considered both a citizen of a foreign state under 28 U.S.C. sections 1332(a)(2) and 1332(a)(3) and a foreign state, itself, under section 1330.

As a result, a question may arise as to which statute provides the basis for jurisdiction in an action against a corporation owned by a foreign government. The answer may be important because a plaintiff whose action is based on 28 U.S.C. section 1332 is entitled to a jury trial and prejudgment attachment in appropriate cases, whereas a plaintiff whose action is based on 28 U.S.C. section 1330 is entitled to neither.[86]

The courts which have considered this question have disagreed as to whether 28 U.S.C. section 1330 precludes the use of 28 U.S.C. section 1332 as a basis for jurisdiction over corporations owned by a foreign government. One group of cases takes the position that, by eliminating the term "foreign state" from section 1332 and placing it in section 1330, Congress clearly showed that it intended that entities which fell within its definition of "foreign state" should be treated only under section 1330.[87] Another group of cases takes the position that the plaintiff has the option of choosing the jurisdictional statute under which he wishes to proceed. These courts conclude that the plain language of section 1332(a), even after Congress' amendment, continues to include corporations which are owned by foreign governments. In the absence of a clearer indication that Congress intended to eliminate this basis of jurisdiction, these courts hold, this basis of jurisdiction is still available.[88]

Another area of uncertainty in the act is whether 28 U.S.C. section 1330 authorizes an action by an alien against a foreign state. Although the language of the statute clearly appears to authorize such an action, the United States Court of Appeals for the Second Circuit has held that such a grant of jurisdiction was not authorized by the Constitution and is therefore invalid.[89] The court based its decision on the long-established rule that the Constitution does not authorize Congress to confer federal court jurisdiction in actions between aliens unless the grant of jurisdiction relates to one of the specific types of disputes enumerated in article III, section 2 of the Constitution. the Foreign Sovereign Immunities Act, the court held, was merely a method of providing access to the courts in order to resolve ordinary legal disputes. Although the grant of jurisdiction in actions between U.S. citizens and foreign states was allowable under the Constitution, the

---

[86] 28 U.S.C. § 1330 confers jurisdiction only in a "nonjury civil action." Title 28, section 1609, states that property of a foreign state under the Foreign Sovereign Immunities Act is immune from prejudgment attachment. *See* discussion at Geveke & Co. Intern. v. Kompania Di Awa, etc., 482 F. Supp. 660 (S.D.N.Y. 1979).

[87] *See, e.g.*, Ruggiero v. Compania Peruana de Vapores, etc., 639 F.2d 872 (2d Cir. 1981); Jones v. Shipping Corp. of India, Ltd., 491 F. Supp. 1260 (E.D. Va. 1980).

[88] *See, e.g.*, Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979); Lonon v. Companhia de Navegacao, etc., 85 F.R.D. 71 (E.D. Pa. 1979).

[89] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981); *cert. granted*, 102 S. Ct. 997 (1982).

court held, there was no constitutional basis on which to base the grant of jurisdiction in actions between a foreign citizen and a foreign state. Under the principle established by the Supreme Court in *Mossman v. Higginson*,[90] therefore, jurisdiction did not exist. The court of appeals' decision is not the final word on this issue, however, since the Supreme Court has granted certiorari.[91]

C. *Conclusion*

The Foreign Sovereign Immunities Act has created new jurisdictional provisions for actions by and against foreign states. There are several uncertainties in the law, however, which can and should be resolved by corrective legislation.

VI. Conclusion

Alienage jurisdiction is a subject that is becoming increasingly important as a result of the increased foreign investment in the United States and increased trade between the United States and other countries, with the attendant increase in the number of legal disputes. Although some of the uncertainties in the law discussed above are inevitable, most of them can and should be eliminated by appropriate amendments to the alienage jurisdiction statute.

One major area which can and should be resolved by legislation is determining the place of citizenship which is to be ascribed to a corporation which is incorporated in a foreign country. As is explained above, the courts are divided on whether the corporation should be considered to be a citizen only of its place of incorporation, or whether it should be considered a citizen of its principal place of business as well. They are also divided as to what effect dual citizenship of a corporation should have.

There is no clearly correct resolution to this problem, other than that the present state of uncertainty should be eliminated. As described above, one method of resolving the issue would be to establish that an alien corporation is to be deemed a citizen only of each of the states in which it is incorporated and that diversity is destroyed if any one of these states of incorporation is the same as a state of citizenship of an adversary. Since the act of incorporation is voluntary and a corporation's state of incorporation can be established without dispute, a foreign state could not be heard to complain that an alien corporation which has also chosen to incorporate in the United States is being treated unfairly if it is treated as a U.S. citizen for purposes of jurisdiction.

Another area of uncertainty which can and should be resolved by legislation concerns the citizenship to be ascribed to an individual who is a citizen of both the United States and a foreign country. Because of the constitu-

---

[90] 4 Dall. (4 U.S.) 12 (1800). *See* notes 55-57 and accompanying text, *supra*.
[91] 102 S. Ct. 997 (1982).

tional problems, discussed above, that may result from treating one class of U.S. citizens differently than another class in this situation, it is desirable to consider only the individual's U.S. citizenship for purposes of jurisdiction.

As has long been recognized, the treatment of aliens in the federal courts is a matter that may have a significant effect on U.S. relations with foreign countries. The present uncertainties in the law cannot help but cause problems in that area and should be eliminated.