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Verlinden B.V. v. Central Bank of Nigeria: Expanding Jurisdiction Under the Foreign Sovereign Immunities Act

I. INTRODUCTION

In 1976 Congress enacted the Foreign Sovereign Immunities Act¹ to clarify the law surrounding actions in United States federal courts against foreign states.² Congress intended to establish “the sole and exclusive standards to be used in resolving questions of sovereign immunity.”³ The Act provides comprehensive guidelines on when and how a party can bring suit against a foreign state.⁴ By contrast, *Verlinden B.V. v. Central Bank of Nigeria*⁵ addresses who can bring suit under the Act. In *Verlinden*, the Supreme Court interpreted the Act to enable not only domestic plaintiffs,⁶ but also foreign plaintiffs, to sue foreign defendants in the federal courts under certain circumstances.⁷ Having determined that the Act allows foreign parties to sue foreign sovereigns in United States courts, the Court further held that constitutionally-based federal interests in foreign affairs and regulation of foreign commerce provide sufficient basis for federal jurisdiction in all such suits.⁸

By unanimously ruling that the resolution of suits brought by foreign plaintiffs under the FSIA does not exceed the scope of judicial power delineated in Article III of the Constitution,⁹ the Supreme Court made a strong move to facilitate Congress’ ability to influence and regu-

¹ Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982) [hereinafter cited as “FSIA”].

² The FSIA defines “foreign state” broadly to include “an agency or instrumentality of a foreign state.” 28 U.S.C. §1603(a) (1982). This can include individuals or corporations. 28 U.S.C. §1603(b) (1982).

³ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12 (1976) [hereinafter cited as H.R. REP. NO. 1487].

⁴ *Id.*

⁵ 103 S. Ct. 1962 (1983).

⁶ “Domestic plaintiffs” are defined as persons who have United States citizenship.

⁷ The provisions of §1605 of the FSIA, incorporated by reference in §1330, require that the claim must have a substantial nexus with the United States. This may include a commercial activity of a foreign state that merely “causes a direct effect in the U.S.” 28 U.S.C. §1605(a)(2) (1982).

⁸ *Verlinden*, 103 S. Ct. at 1964.

⁹ *Id.*

late foreign commerce. The Court's holding may also reflect a larger trend toward greater United States intervention in world affairs.

Inescapably, any law that the United States attempts to enforce against foreign parties will affect international relations with those parties' nations. The Supreme Court has recognized that even if the effect is quite subtle, "experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."¹⁰ Because the *Verlinden* decision allows United States federal courts to apply American law in cases where both parties are foreign, international relations concerns become doubly sensitive.¹¹ Future attempts to adjudicate and enforce suits which involve only foreign parties may be viewed as undue meddling in the activities of other nations. Furthermore, there is a risk that already backlogged federal courts will become crowded with litigation essentially unrelated to United States concerns.¹² Foreign plaintiffs may engage in forum shopping and choose United States jurisdiction although their disputes are much more closely tied to the interests of other nations' legal systems.¹³ Yet there was no disagreement among the Justices in *Verlinden* that such suits are constitutional, and they are perhaps justified by the goals of promoting United States policies worldwide and protecting American business enterprises with international ties.¹⁴

II. BACKGROUND AND PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

In the two centuries since the shaping of the Constitution, the doctrine of sovereign immunity has gradually evolved to allow certain kinds of suits against foreign sovereigns in United States courts.¹⁵ Before 1952, the United States adhered to an absolute doctrine of sovereign immunity.¹⁶ Because of foreign relations concerns and the principle of comity of nations, foreign sovereigns were absolutely immune from suit in the United States unless they explicitly consented to waive their immunity.

¹⁰ *Hines v. Davidowitz*, 312 U.S. 52, 64 (1940).

¹¹ See *infra* notes 103-109 and accompanying text.

¹² See *infra* notes 110-115 and accompanying text.

¹³ *Id.*

¹⁴ See *infra* notes 123-128 and accompanying text.

¹⁵ Sovereign immunity may be distinguished from diplomatic immunity, which involves suits brought against individual diplomats. See generally C. LEWIS, *STATE AND DIPLOMATIC IMMUNITY* 1 (1980).

¹⁶ The doctrine of sovereign immunity was first recognized by the Supreme court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

Executive determinations of whether foreign sovereigns were entitled to sovereign immunity were binding on all courts, federal and state.¹⁷

In 1952, the United States adopted a restrictive theory of sovereign immunity which permitted suits against foreign sovereigns when they arose out of actions taken by states in a commercial, not public, capacity.¹⁸ The determination of whether the state's act was commercial or public was to be made by the State Department, and was again binding on both federal and state courts.¹⁹ This system of *ad hoc* State Department determinations of immunity proved to be troublesome because it lacked consistency²⁰ and was susceptible to politicization.²¹

In 1976 Congress enacted the FSIA,²² and the authority for making determinations of immunity was shifted from the executive to the judicial branch of the federal government. A major purpose of the FSIA was to ensure the consistent treatment of foreign governmental defendants.²³ Congress recognized that "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."²⁴ Therefore, Congress made a deliberate attempt to channel all such cases into the federal courts, both through a broad grant of original jurisdiction and a comparable grant of removal jurisdiction.²⁵ A second major

¹⁷ See *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Compania Espanola de Navegacion Maritana, S.A. v. The Navemar*, 303 U.S. 68 (1938).

¹⁸ The State Department formally adopted the restrictive theory of sovereign immunity in the "Tate Letter," which established State Department policy on the making or withholding of immunity recommendations. Letter from Jack B. Tate, Acting Legal Advisor of the State Department, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976).

¹⁹ *Id.*

²⁰ The situation whereby courts deferred to executive determinations of immunity claims frequently led to results that were inconsistent with the State Department's own policy of restrictive sovereign immunity. For examples of cases involving such executive determinations, see *Pan American Tankers Corp. v. Republic of Vietnam*, 291 F. Supp. 49, 51 (S.D.N.Y. 1968) and cases cited therein. See also *Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223 (1st Cir. 1974); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1973), cert. denied, 404 U.S. 985 (1971).

²¹ Indeed, the legislative history of the FSIA specifically recognized the objective of depoliticizing immunity decisions:

Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds. . . .

1976 U.S. CODE CONG. & AD. NEWS 6604, 6606.

²² See *supra* note 1.

²³ H.R. REP. NO. 1487, *supra* note 3, at 12-13.

²⁴ *Id.* at 13.

²⁵ See 28 U.S.C. §§1330(a), 1441(d) (1982). Section 1441(d) provides that "[a]ny civil action brought in a State Court against a foreign state, as defined in section 1608(a) of this title, may be

purpose of the FSIA was to protect the overseas investments of American citizens.²⁶ Both of these primary intentions have been advanced by the decision in *Verlinden*.²⁷

III. PROCEDURAL HISTORY AND CASE ANALYSIS

A. Statement of the Facts

The petitioner *Verlinden B.V.* ("Verlinden") is a Dutch corporation with its principal business offices in Amsterdam, The Netherlands.²⁸ On April 21, 1975, *Verlinden* signed a contract with the Federal Republic of Nigeria, agreeing to ship to Nigeria 240,000 metric tons of cement over the course of several months.²⁹ According to the terms of the contract, the government of Nigeria was to establish within 21 days an irrevocable, confirmed letter of credit for the total purchase price of the cement, to be arranged through *Slavenburg's Bank* in Amsterdam.³⁰ In variance with the contract terms, the government of Nigeria established an unconfirmed letter of credit at the Central Bank of Nigeria ("Central Bank"), and made it payable through the *Morgan Guaranty Trust Company* ("Morgan Guaranty") in New York.³¹ This connection with *Morgan Guaranty* provided the nexus with the United States that allowed the suit to be brought under the FSIA. On August 21, 1975, *Verlinden* subcontracted with a third party, the Liechtenstein-based corporation *Interbuco*, to purchase the cement needed to fulfill the contract terms.³² *Verlinden* agreed to pay *Interbuco* five dollars per ton if *Verlinden* reneged on the purchase.³³

Nigeria's contract with *Verlinden* was only one of 109 such cement contracts entered into by Nigeria in 1975.³⁴ This massive purchase of

removed by the foreign state to the [federal] district court of the United States for the district and division embracing the place where such action is pending."

²⁶ H.R. REP. NO. 1487, *supra* note 3, at 6-7.

²⁷ See *infra* notes 107-111 and accompanying text.

²⁸ *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1286 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983).

²⁹ *Id.* at 1287.

³⁰ *Id.*

³¹ *Id.* at 1287, 1288.

³² *Id.* at 1288.

³³ *Id.*

³⁴ For a general background of these events, see *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1198 (1982). Nigeria is a rapidly developing African nation. *Id.* at 302. Nigeria contracted to import huge quantities of Portland cement, essential to the construction of the infra-structure of its major industry, high-grade oil exportation. *Id.* Nigeria grossly overpurchased, and her ports became clogged with cement-bearing ships waiting to unload. *Id.* The congestion was so bad that importation of other goods was forced to a standstill, yet more cement ships were on the way. *Id.* Nigeria, unable to accept more cement,

cement resulted in unmanageable congestion in Nigeria's ports which made timely delivery of the cement purchased from Verlinden difficult if not impossible.³⁵ Central Bank, therefore, attempted to alter its obligations to Verlinden under the cement contract while claiming sovereign immunity from suit.³⁶ Central Bank instructed Morgan Guaranty, who in turn notified Verlinden, that Morgan Guaranty was not to pay Verlinden under the letter of credit for any shipments of cement unless Verlinden obtained special permission from Nigeria to enter her ports two months in advance of sailing.³⁷ Verlinden brought suit against Central Bank in the United States District Court for the Southern District of New York, claiming anticipatory breach of the letter of credit.³⁸ Verlinden alleged \$4.66 million in damages, consisting mostly of lost profits and payments it was forced to make to Interbuco under the terms of the subcontract.³⁹

Verlinden claimed jurisdiction under § 1330(a) of the FSIA,⁴⁰ which creates original jurisdiction in federal district courts over "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity. . . ."⁴¹ Central Bank moved to dismiss for lack of subject matter and personal jurisdiction.⁴² The district court granted the motion for dismissal after determining that none of the exceptions to sovereign immunity under the FSIA applied in this case.⁴³

attempted unilaterally to modify or repudiate all her cement contracts and then shelter herself from liability to her suppliers by claiming sovereign immunity. *Id.*

³⁵ *Id.*

³⁶ *Verlinden*, 488 F. Supp. at 1287-88.

³⁷ *Id.* at 1288.

³⁸ *Id.*

³⁹ *Id.* at 1288.

⁴⁰ *Id.*

⁴¹ 28 U.S.C. §1330(2) (1982) provides, in relevant part:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury 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.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

⁴² *Verlinden*, 488 F. Supp. at 1288.

⁴³ The general exceptions to the jurisdictional immunity of a foreign state are delineated in 28 U.S.C. §1605(a) (1982), which provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

- (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
- (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connec-

B. District Court Upholds Jurisdiction Over Foreigner/Foreign State Suits

Notwithstanding its dismissal of the case, the district court held that, generally, a federal court may exercise subject matter jurisdiction over a suit brought by a foreign corporation against a foreign sovereign if one of the enumerated exceptions to sovereign immunity applies.⁴⁴ Judge Weinfeld reasoned that although the intent of the drafters of the FSIA is not discernable on this point, the language of the Act on its face does not necessarily preclude jurisdiction when both parties are aliens.⁴⁵ The Act “neither limits such actions to those brought only by citizens of the United States nor does it exclude those brought by foreign citizens. “. . . [T]he language of the statute itself is controlling. That language is broad and inclusive.”⁴⁶

Furthermore, § 1330(a)⁴⁷ must be read as part of the “ ‘comprehensive jurisdictional scheme’ enacted by Congress to foster ‘uniformity in decision’ in cases involving foreign states.”⁴⁸ An essential part of this scheme is the removal provision which allows any foreign state named as a defendant to remove from state to federal court.⁴⁹ Judge Weinfeld pointed out that in some instances aliens may sue other foreign instru-

tion with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

- (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
- (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or
- (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
 - (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
 - (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Section 1605(b) provides for those exceptions to sovereign immunity which apply in admiralty suits to enforce maritime liens. 28 U.S.C. §1605(b) (1982).

⁴⁴ *Verlinden*, 488 F. Supp. at 1292.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 28 U.S.C. §1330(a) (1982).

⁴⁸ *Verlinden*, 488 F. Supp. at 1292.

⁴⁹ 28 U.S.C. §1331(a) (1982). See *supra* note 25.

mentalities in state courts,⁵⁰ and the removal provision was designed to help channel such cases into federal courts.⁵¹ Therefore, "[i]t could hardly have been within the contemplation of Congress to permit removal in the instance of an action properly commenced in a state court by a foreign citizen against a foreign nation and to deny initial access to the federal courts to the same plaintiff."⁵²

Judge Weinfeld also addressed the larger issue of whether the FSIA, so construed, meets the jurisdictional requirements for federal courts under Article III of the Constitution. Verlinden had conceded that there was no diversity jurisdiction,⁵³ and Central Bank had argued that the case was not one "arising under"⁵⁴ the Constitution, laws or treaties of the United States. The district court held that even though Verlinden's claim was grounded in common law, the case "arises under" federal law because "[i]t compels the application of the uniform federal standard governing assertions of sovereign immunity."⁵⁵ The court's position is supported by other cases holding that "a case may 'arise under' federal law, even though the claim is created by state law, if the complaint discloses a need for the interpretation of an act of Congress."⁵⁶ Under this reasoning, because the FSIA "incorporates into the concept of jurisdiction substantive, federal criteria for determining the validity of assertions of sovereign immunity,"⁵⁷ any claim brought under the Act would necessarily "arise under" federal law.⁵⁸ As Judge Weinfeld stated, "[i]n short, the Immunities Act injects an essential federal element into *all* suits brought against foreign states."⁵⁹

⁵⁰ See, e.g., *J. Zeevi & Sons v. Grindlays Bank (Uganda)*, 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, cert. denied, 423 U.S. 866 (1975).

⁵¹ *Verlinden*, 488 F. Supp. at 1292.

⁵² *Id.*

⁵³ The foreign diversity clause provides that jurisdiction extends "to controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST., art. III, § 2, cl. 1. The requisite diversity would have been satisfied had any one of the parties been a citizen or state of the United States. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530 (1967) (article III requires only "minimal diversity").

⁵⁴ The so-called "arising under" clause provides in pertinent part: "The Judicial Power shall extend to all cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST., art. III, §2, cl. 1.

⁵⁵ *Verlinden*, 488 F. Supp. at 1292.

⁵⁶ *Id.* at 1293; *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968). See *De Sylva v. Ballentine*, 351 U.S. 570 (1968); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

⁵⁷ *Verlinden*, 488 F. Supp. at 1292.

⁵⁸ *Id.*

⁵⁹ *Id.* (emphasis supplied).

C. Appellate Court Rules That Foreigner/Foreign State Suits
Unconstitutionally Enlarge Federal Jurisdiction

On appeal, the Court of Appeals for the Second Circuit affirmed the dismissal of the case, but disagreed with the position that federal courts may exercise jurisdiction over suits between foreign parties.⁶⁰ Judge Kaufman agreed that § 1330, in vesting jurisdiction over “any . . . action against a foreign state,” must be construed to include actions brought by an alien plaintiff.⁶¹ He noted, however, that from the “murky and confused legislative history, only one conclusion emerges: Congress formed no clear intent as to the citizenship of plaintiffs under the Act.”⁶²

As to the issue of whether the “arising under” clause of Article III of the Constitution supports jurisdiction over actions by foreign plaintiffs against foreign sovereigns, Judge Kaufman said that here, too, “we discern the Framers’ intent only as seen through a glass, darkly, if at all.”⁶³ He pointed out, however, that clearly “the Framers emphatically did not intend to grant the legislature power to create jurisdiction over any cases Congress chose. Congressional prerogative in this area is circumscribed.”⁶⁴ Judge Kaufman reasoned that granting federal courts the power to hear suits between foreign entities would be an unconstitutional enlargement of the courts’ previous jurisdictional scope.⁶⁵ He relied on the words of Alexander Hamilton as the clearest statement of the Framers’ intent:

The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression by those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction, because the objects of their cognizance being enumerated, the specification would be negatory if it did not exclude all ideas of more extensive authority.⁶⁶

Judge Kaufman, therefore, “defer[red] to the Framers’ precient restraint, and [found] jurisdiction lacking in the constitutional sense.”⁶⁷

D. Supreme Court Holds That Jurisdiction Over Foreigner/Foreign
State Suits is Grounded in Article III

The Supreme Court granted certiorari to consider whether the

⁶⁰ *Verlinden B.V. v. Federal Republic of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *rev’d*, 103 S. Ct. 1962 (1983).

⁶¹ *Id.* at 324.

⁶² *Id.*

⁶³ *Id.* at 330.

⁶⁴ *Id.* at 328.

⁶⁵ *Id.* at 330.

⁶⁶ *Id.* at 328.

⁶⁷ *Id.* at 322.

FSIA, by authorizing a foreign plaintiff to sue a foreign state in a United States district court on a non-federal cause of action, violates Article III of the Constitution.⁶⁸ Chief Justice Burger delivered the unanimous opinion of the Court, concluding that such a grant of jurisdiction is constitutional.⁶⁹ Consequently, the case was remanded to the Court of Appeals to consider whether one of the specified exceptions to sovereign immunity was applicable, and if so, to remand the case to the district court for trial on the merits.⁷⁰ The Court dealt exclusively with the legal issue of the constitutionality of foreigner/foreign state suits, avoiding all discussion of the policy behind encouraging such suits or the implications for American interests.

The Court agreed with the lower courts' holdings that the language of the FSIA, which grants jurisdiction over "*any* non-jury civil action against a foreign state,"⁷¹ lacks specificity as to the citizenship of the plaintiff and, therefore, does not bar foreign plaintiffs access to federal courts.⁷²

The Court emphasized, however, that "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution."⁷³ Turning to the issue of whether Congress exceeded the scope of Article III of the Constitution by granting such jurisdiction, the Court noted that there are two possible sources of authorization within Article III—the diversity clause and the "arising under" clause.⁷⁴ The Court found that diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs, since the diversity clause provides for jurisdiction only over controversies between "a State, or the Citizens thereof, and foreign States,"⁷⁵ and a foreign plaintiff, of course, is not "a State, or [a] Citize[n] thereof. . . ."⁷⁶

The Court determined, however, that the "arising under" clause of Article III,⁷⁷ "provides an appropriate basis for the statutory grant of subject matter jurisdiction to actions by foreign plaintiffs under the Act."⁷⁸ The Court relied heavily on the seminal decision in *Osborn v.*

⁶⁸ *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962, 1965 (1983).

⁶⁹ *Id.* at 1973.

⁷⁰ *Id.* at 1974.

⁷¹ 28 U.S.C. §1330(a) (1984).

⁷² *Verlinden*, 103 S. Ct. at 1969.

⁷³ *Id.* at 1970.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Verlinden*, 103 S. Ct. at 1970.

⁷⁷ U.S. Const., art. III, §2, cl. 1.

⁷⁸ *Id.*

Bank of the United States,⁷⁹ which established the rule that:

[It is] a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or laws of the United States, and sustained by the opposite construction.⁸⁰

Under this rule, Congress may grant jurisdiction over any case that may call for the application of federal law.⁸¹

The Court has noted, however, that there are limits to jurisdiction under the “arising under” language of Article III. In *Textile Workers Union v. Lincoln Mills*,⁸² Justice Frankfurter pointed out that “[one] would not be justified in perpetuating a principle that permits assertion of original federal jurisdiction on the remote possibility of the presentation of a federal question.”⁸³ Furthermore, the Court has previously held that “[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit.”⁸⁴ In *Verlinden*, the Court determined that there was much more than a mere possibility of a federal question,⁸⁵ and therefore refrained from making any dispositive pronouncements on the exact boundaries of Article III jurisdiction.⁸⁶

The Court further explained that suits involving foreign states are inherently federal in nature, and therefore any suit brought under the FSIA *prima facie* “arises under” federal law.⁸⁷ The Court stated that since “[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, . . . primacy of federal concerns is evident.”⁸⁸

There is no question that the FSIA is based on the federal concerns that the Court recognized in *Verlinden*. Congress has the authority under its Article I powers⁸⁹ to regulate foreign commerce and foreign relations, and the FSIA was designed to promote these federal interests.⁹⁰ The Act requires that anytime a suit is brought against a foreign sovereign, “the court must satisfy itself that one of the exceptions [to

⁷⁹ 22 U.S. (9 Wheat) 728 (1824).

⁸⁰ *Id.* at 822.

⁸¹ See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF FEDERAL POWER* 61 (1980).

⁸² 353 U.S. 448 (1957).

⁸³ *Id.* at 471 (Frankfurter, J., dissenting).

⁸⁴ *Gully v. First National Bank*, 299 U.S. 109, 115 (1936).

⁸⁵ *Verlinden*, 103 S. Ct. at 1971.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Under U.S. CONST., art. I, §8, Congress has the power to prescribe the jurisdiction of federal courts (cl. 9), to define offenses against the “Law of Nations” (cl. 3), and to make any laws necessary and proper to execute the Government’s powers (cl. 18).

⁹⁰ H.R. REP. NO. 1487, *supra* note 3, at 12-13, 32.

sovereign immunity] applies—and in doing so it must apply the detailed federal law standards set forth in the Act.”⁹¹ Therefore, the FSIA is more than just a jurisdictional statute because it imposes substantive, not merely procedural, law.⁹²

The FSIA does regulate federal jurisdictional questions concerning cases involving foreign states, but this is not the Act’s sole purpose or function. The FSIA was designed to set forth “*comprehensive* rules governing sovereign immunity.”⁹³ The Court in *Verlinden* therefore concluded that “[t]he Act thus does not merely concern access to the federal courts.”⁹⁴ Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.”⁹⁵ Congress was therefore within its powers to grant federal courts jurisdiction over such cases as part of the implementation of a comprehensive regulatory statute.⁹⁶

The Court also held that the well-pleaded complaint rule does not apply in cases involving suits by foreigners against foreigners brought under the FSIA.⁹⁷ This rule, in a nutshell, states that a case will be said to “arise under” federal law only if the presence of the federal issue or issues can be ascertained from the plaintiff’s well-pleaded complaint; i.e., a complaint that does not anticipate possible federal defenses that the defendant might raise.⁹⁸ In *Verlinden*, the question of sovereign immunity arose solely as an affirmative defense and was not apparent from the face of *Verlinden*’s complaint.⁹⁹ The Court reasoned that the well-pleaded complaint rule applies only to *statutory* grants of “arising under” jurisdiction such as 28 U.S.C. § 1331,¹⁰⁰ which provides that district courts shall have general federal question jurisdiction over any case that “arises under” the laws of the United States. By contrast, the *Verlinden*

⁹¹ *Verlinden*, 103 S. Ct. at 1971.

⁹² Previous courts had made conflicting statements as to whether the claim of sovereign immunity is jurisdictional in nature. See *In re The Nevada*, 11 F.2d 511 (1926), *cert. denied*, 273 U.S. 700 (1926) (sovereign immunity is purely jurisdictional question); *Pan American Tankers Corp. v. Republic of Vietnam*, 201 F. Supp. 49 (1968) (sovereign immunity is substantive defense like incapacity or incompetency).

⁹³ H.R. REP. NO. 1487, *supra* note 3, at 12.

⁹⁴ The Supreme Court has struck down attempts by Congress to create jurisdiction in federal courts by simply enacting jurisdictional statutes. See, e.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1980).

⁹⁵ *Verlinden*, 103 S. Ct. at 1973.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1972.

⁹⁸ REDISH, *supra* note 81, at 72 (1980).

⁹⁹ *Verlinden*, 103 S. Ct. at 1972.

¹⁰⁰ 28 U.S.C. §1331 (1982) provides that district courts shall have general federal question jurisdiction over any case that arises under the laws of the United States.

case fell within the "arising under" clause of the Constitution, not that of § 1331. The Court cited several decisions¹⁰¹ that indicate that Article III "arising under" jurisdiction is broader than federal question jurisdiction under § 1331, despite the identical language of the two jurisdictional grants. In short, the Court concluded that cases construing § 1331 that led to the development of the well-pleaded complaint rule are simply not relevant where jurisdiction is Constitutionally based.¹⁰²

IV. POSSIBLE EFFECTS OF THE VERLINDEN DECISION

A. Tension in Foreign Relations

The decision in *Verlinden* represents a step away from the Court's view in prior decisions that the "[judiciary's] engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."¹⁰³ Any suit brought against a foreign sovereign in United States courts could have possible adverse repercussions on foreign relations. When a United States citizen is a party in the suit, the interest of the United States in the case is obvious and justifiable. But when no party is a United States citizen, the interest is less clear. For the nations of the parties' origins, such a suit could easily be considered an offensive intrusion. The United States is frequently accused of imposing its own legal values on the rest of the international community,¹⁰⁴ and an attempt to adjudicate claims between foreigners may aggravate suspicion in those nations which already view United States policies as interventionist. They may see such actions as part of a larger trend for the United States to exert stronger control over international commerce, and an infringement on their own sovereignty.¹⁰⁵

Nations of the world may be justifiably concerned that American transnational corporations, because of their size, have vast power to affect national policies. For example, the annual sales of a corporation like General Motors exceed the gross national product of all but 22 independent nations.¹⁰⁶ It is well settled that a large corporation, in addition to

¹⁰¹ See, e.g., *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

¹⁰² *Verlinden*, 103 S. Ct. at 1972.

¹⁰³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

¹⁰⁴ See, e.g., Gordon, *Extraterritorial Application of United States Economic Laws: Britain Draws The Line*, 14 INT'L LAW. 151 (1980) (describes British opposition to extraterritorial application of United States antitrust laws).

¹⁰⁵ See generally Rubin, *Multinational Enterprise and National Sovereignty: A Skeptic's Analysis*, 3 LAW & POL'Y INT'L BUS. 1, 10 (1971).

¹⁰⁶ *Multinational Corporations: Hearings Before the Subcomm. on International Trade of the Sen-*

achieving its strictly business goals, can and does affect the social values and interests of the society in which it functions.¹⁰⁷ Consequently, the already considerable tensions¹⁰⁸ caused by corporations of questionable allegiance may be heightened when these very corporations attempt to bring instrumentalities of their host nations under the reign of American law. In the extreme, these corporations may be regarded as mere conduits for the policies of the United States.¹⁰⁹

B. Inundation of United States Courts With Foreign Claimants

Although a handful of suits between foreign plaintiffs and foreign sovereigns have been successfully brought in state courts prior to *Verlinden*,¹¹⁰ the constitutionality of such suits had never been adjudicated. Now that the Supreme Court has acknowledged the viability of such suits, their number will doubtlessly increase.¹¹¹ There is a risk that our courts may soon resemble "small international courts of claims . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world."¹¹² Foreigners will be tempted to engage in forum shopping, choosing United States courts when the expected outcome under our legal system is more promising than that of their own. A number of factors could motivate a foreign plaintiff to sue in American courts, from substantive¹¹³ or procedural¹¹⁴

ate Comm. on Finance, 93d Cong., 1st Sess. 393 (app. A) (1973). General Motors' gross sales in 1969 (\$24.3 billion) exceeded the combined GNP of Venezuela, Peru and Chile (\$22.89 billion). *Id.* at 404 (Table 1).

¹⁰⁷ See generally J. GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952); *THE CORPORATION IN MODERN SOCIETY* (E. Mason ed. 1959); P. DRUCKER, *CONCEPT OF THE CORPORATION* (rev. ed. 1972).

¹⁰⁸ *Id.*

¹⁰⁹ For example, the United States government in 1980 moved, for diplomatic reasons, to stay a number of private court actions by American corporations against Iran because, *inter alia*, a pronouncement by an American court might be perceived by Iranian authorities as reflecting the policies of the United States. See *National Airmotive Corp. v. Government & State of Iran*, 499 F. Supp. 401 (1980) (U.S. government request for stay denied); *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73 (1980) (U.S. government request for stay denied).

¹¹⁰ See *supra* note 37.

¹¹¹ See *The State Immunity Act 1978*, 42 MOD. L. REV. 72, 73 (1979), which indicates that the British version of a sovereign immunities act was enacted partly out of concern that the FSIA would make New York preferable to London as the focus of business transactions between foreign states.

¹¹² *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Judiciary Comm.* 93d Cong., 1st Sess. 31 (1973) (testimony of Senator Bruno A. Ristau).

¹¹³ For example, foreign seamen frequently bring personal injury suits against employers in American courts because foreign law allows for only meager compensation compared to that which can be obtained in the United States under the Jones Act. See Flynn, *The Application of Forum Non Conveniens in Maritime Personal Injury Actions Brought by Foreign Seamen in Federal Courts*, 1 HASTINGS INT'L & COMP. L. REV. 77, 77 n.1 (1977).

rules, to a fear on the part of the plaintiff that suit in the defendant state's own courts will be biased in favor of the defendant.¹¹⁵ A liberal policy for allowing such suits will encourage foreigners to sue in the United States when these very suits are prohibited by sovereign immunity in their own nations.¹¹⁶ The result would be an abundance of suits in our courts that, while having some contact with the United States, have far more substantial contacts with one or more foreign forums.

The danger that foreign plaintiffs will crowd United States courts, however, is lessened somewhat by the provision of § 1605 of the FSIA, which requires that the claim have a substantial nexus with the United States.¹¹⁷ The Supreme Court has observed that "Congress protected against this danger not by restricting the claim of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States."¹¹⁸ The substantial nexus requirement has been interpreted broadly to include those transactions producing a "direct effect" in the United States.¹¹⁹ In the *Verlinden* case, the nexus with the United States consisted solely of the fact that Central Bank was to pay Verlinden through an American bank,¹²⁰ leaving much room for future debate over what constitutes sufficient connection to merit jurisdiction. Under the doctrine of *forum non conveniens*,¹²¹ however, a court may dismiss such an action at its discretion if it determines that the action would more appropriately and justly be tried elsewhere, considering both the public interest and the private interests of the litigants.¹²²

¹¹⁴ For example, foreign plaintiffs engaged in litigation in their home country have been known to commence parallel actions in the United States simply to take advantage of the comparatively liberal United States federal discovery rules. R. SCHLESINGER, *COMPARATIVE LAW* 399-400 (4th ed. 1980).

¹¹⁵ See, e.g., *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 906 (1968), *modified*, 433 F.2d 686 (1970), *cert. denied*, 403 U.S. 905 (1971) (denies effect of judgment by East German court in suit between East and West German corporations because of East German courts' pronounced anti-capitalist bias).

¹¹⁶ For example, most socialist countries hold that sovereign states are *absolutely* immune from suit in other states' courts. See N. LEECH, C. OLIVER, & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM* 308 (1973).

¹¹⁷ See *supra* note 7.

¹¹⁸ *Verlinden*, 103 S. Ct. at 1970.

¹¹⁹ See *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, 674 F.2d 317 (1981).

¹²⁰ See *supra* note 1.

¹²¹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947) (Supreme Court approval of *forum non conveniens* doctrine).

¹²² The rule, however, can only be applied if there is an alternate forum available. *Wilson v. Seas Shipping Co.*, 78 F. Supp. 464, 465 (1948). Furthermore, the plaintiff's initial choice of forum must

C. Protection and Promotion of U.S. Causes

On the positive side, extending the scope of the FSIA to include suits between foreign entities may serve United States interests by promoting American causes or values and deterring behavior that may adversely affect United States citizens. Such suits may give effect to American ideals of fairness and human rights which an alternative foreign forum may not support. Furthermore, applying United States law to foreign enterprises transacting business in the United States will prevent those enterprises from enjoying an unfair competitive advantage over American businesses.

American business enterprises with foreign ties will be the principal beneficiaries of the *Verlinden* ruling. A simplistic rule that closes the federal courts to aliens would not have protected American commercial interests because much of our international trade is conducted through foreign affiliates or subsidiaries. Under the diversity statute,¹²³ a company incorporated in a foreign country is an alien for the purposes of federal jurisdiction, even if all of its offices and shareholders are within the United States.¹²⁴ Therefore, had the Court reached the conclusion that aliens could not bring suit under the Act, companies incorporated abroad but owned by American citizens would have been entirely excluded from the benefits of the FSIA.

The situation of an alien corporate plaintiff is far from trivial or unusual considering the volume of international business transacted through companies with foreign subsidiaries. For example, the ten largest United States corporations have a total of 246 foreign affiliates that are incorporated or have their principal place of business in a foreign country.¹²⁵ Studies indicate that foreign investment by American businesses is dramatically on the rise.¹²⁶ Not only are United States companies and their affiliates moving increasingly into foreign markets, but their dealings with state-owned enterprises are also increasing, a development explicitly recognized in the legislative history of the FSIA.¹²⁷ Furthermore, these state-owned enterprises—the primary targets of FSIA suits—are growing rapidly and currently account for at least fifteen per-

be accorded great weight. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Byrd v. Southern Ry.*, 203 A.2d 37, 38 (1964).

¹²³ 28 U.S.C. §1332 (1982).

¹²⁴ 28 U.S.C. §1332(a)(3),(c) (1982).

¹²⁵ INTERNATIONAL DIRECTORY OF CORPORATION AFFILIATIONS 971 (1983-4).

¹²⁶ See, e.g., Salient Features & Trends in Foreign Direct Investments, U.N. Centre on Transnat'l Corporations, U.N. Doc. ST/CTC/14 (1981).

¹²⁷ H.R. REP. NO. 1487, *supra* note 3, at 6, 7.

cent of all world trade.¹²⁸ With computer age technology breaking down the barriers of time and distance among the nations of the world, international business transactions will undoubtedly continue to increase in both scope and number.

As relationships among American businesses, their foreign subsidiaries and various foreign state-owned enterprises become increasingly complex, a mechanical exclusion of foreign plaintiffs from U.S. courts could result in gross injustice. Either party could escape the remedial purposes of the FSIA simply by transacting their business through the form of foreign affiliation. The *Verlinden* decision has therefore furthered a primary purpose of the FSIA—to protect American trade and investment overseas.¹²⁹

V. CONCLUSION

The doctrine of absolute sovereign immunity has gradually eroded so that foreign states and their instrumentalities must answer to American courts when their business dealings with the United States are not made in a public capacity. Congress embodied this relaxed view of immunity in the FSIA in order to protect American enterprises with international ties from injury by foreign parties who attempt to shield themselves from liability by claiming sovereign immunity. In the *Verlinden* case, the claim of sovereign immunity was raised by Central Bank not because sensitive international policy issues were at stake, but because Central Bank desired a convenient escape from facing the responsibilities incurred by an intentional breach of contract. By holding in *Verlinden* that the mere absence of American citizenship of the parties is not a bar to recovery under the Act, the Supreme Court furthered the protective spirit of the FSIA. The jurisdictional question in suits brought under the Act will now be based solely on whether the litigated transaction has a substantial nexus with the United States, not on an arbitrary technical standard of citizenship which may not reflect the realities of the highly intricate and intertwined workings of the international business community.

The significance of the *Verlinden* decision is readily apparent when one considers that the past decade has seen an explosion of international litigation in such diverse areas as banking, insurance, securities, commodities, product liability, corporate take-over and antitrust. The *Verlinden* decision will add to this rising tide, reflecting an outside trend

¹²⁸ Aharoni, *The State Owned Enterprise as a Competitor in International Markets*, 15 COLUM. J. WORLD BUS. 14, 15-16 (1980).

¹²⁹ H.R. REP. NO. 1487, *supra* note 3, at 6-7.

toward greater interdependence among all nations. Possible adverse repercussions of the decision such as foreign irritation at American intervention can be minimized by the responsible exercise of judicial discretion in refusing to hear highly political cases or those involving only a minor connection with the United States. The problems presented by foreigner/foreign state suits in our federal courts are small in relation to the importance of keeping the doors to United States courts open anytime American interests are involved.

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