UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 12 | Number 2 Article 8

Spring 1987

Von Dardel v. Union of Soviet Socialist Republics: An Expansive Interpretation of the Foreign Sovereign Immunities Act

Matthew B. Merrell

Von Dardel v. Union of Soviet Socialist Republics: An Expansive Interpretation of the Foreign Sovereign Immunities Act

As the level of interdependence among the United States and other nations grows, the need for a practical and balanced approach to the doctrine of sovereign immunity by the courts of the United States becomes more important. Because of liberal U.S. discovery rules and often lucrative jury awards, U.S. courts are an attractive place for foreign plaintiffs to bring suit. For this reason, U.S. courts must maintain a standard for the consistent application of the sovereign immunity doctrine to limit the class of foreign plaintiffs who may bring suit in the United States.

The privilege of sovereign immunity, which exempts foreign sovereigns from the jurisdiction of U.S. courts, is governed by the Foreign Sovereign Immunities Act (FSIA).[1] The FSIA establishes a presumption of sovereign immunity for foreign sovereigns subject to a series of exceptions enumerated in the Act.[2] If the conduct of the foreign sovereign falls within one of these exceptions, a U.S. court may exercise jurisdiction over the foreign state.

In *Von Dardel v. Union of Soviet Socialist Republics*[3] the U.S. District Court for the District of Columbia examined the sovereign immunity defense. The court addressed the issue whether a foreign state may assert the defense of sovereign immunity for acts performed solely within its own territory. The court held that the sovereign immunity defense was not available to the Soviet Union in a suit brought by two foreign plaintiffs for conduct performed within the Soviet Union.[4] The court determined, therefore, that it had personal and subject matter jurisdiction.

The facts of the *Von Dardel* case date back to the final months of World War II. In July 1944, Raoul Wallenberg joined the Swedish diplomatic corps in Budapest, Hungary to assist Sweden and the United States in their efforts to save the lives of thousands of Jewish

---

[1] Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982) [hereinafter Foreign Sovereign Immunities Act].

[2] 28 U.S.C. §§ 1604, 1605 (1982). *See infra* notes 33-38 and accompanying text.

[3] 623 F. Supp. 246 (D.D.C. 1985).

[4] *Id.*

people from extermination by the Nazis.[5] While exercising the protection of his full diplomatic immunity, Wallenberg used money and other means of support to save nearly one hundred thousand Jews. Six months after arriving in Hungary, Wallenberg was arrested by the invading armies of the Soviet Union. His precise whereabouts and status have not been ascertained to date.[6] In 1957 a Soviet official publicly claimed that Wallenberg had died in a Soviet prison nearly ten years earlier.[7] During the many years following his disappearance, however, a steady flow of reports from former Soviet prisoners indicated that Wallenberg did not die in 1947 as the Soviets had claimed, but that he remained alive and in the Soviets' custody.[8]

Guy Von Dardel, Wallenberg's half brother, and Sven Hagstromer, Wallenberg's Swedish appointed legal guardian, both Swedish citizens, brought suit in a U.S. district court against the Union of Soviet Socialist Republics (Soviet Union) for the unlawful seizure, imprisonment, and possible death of Raoul Wallenberg.[9] The summons, complaint, and a discovery request with a notice of suit and Russian translation of the documents were processed through the U.S. Department of State. This information was then delivered to and served upon the Soviet Ministry of Foreign Affairs in Moscow in accordance with the FSIA.[10] Because the Soviet Union's only response to the documents was a diplomatic note to the U.S. embassy in Moscow asserting absolute sovereign immunity in all non-Soviet courts, the plaintiffs moved for a default judgment.[11] The court determined that it had personal jurisdiction since the defendant could be found in the United States through its agents and instrumentalities.[12] Furthermore, the court determined that subject matter jurisdiction was appropriate under the FSIA since this was a civil action arising under the "laws, or treaties of the United States."[13]

The *Von Dardel* court premised its finding of subject matter jurisdiction under the FSIA on four bases. First, since the Soviet Union

---

[5] *Id.* at 248.

[6] *Id.* at 249.

[7] *Id.* Deputy Foreign Minister Andrei Gromyko admitted that Wallenberg had been a prisoner in the Soviet Union. However, in a note delivered to the Swedish embassy in Moscow dated February 6, 1957, Gromyko stated that Wallenberg had died of natural causes on July 17, 1947. *Id.*

[8] *Id.* at 249-50.

[9] *Id.* at 250.

[10] *Id.* The provisions for service of process are set forth in 28 U.S.C. § 1608 (1982).

[11] *Von Dardel*, 623 F. Supp. at 250.

[12] *Id.* The court noted that its assertion of personal jurisdiction must comport with the due process requirements of International Shoe v. Washington, 326 U.S. 310 (1945).

[13] *Von Dardel*, 623 F. Supp. at 250 (citing Letelier v. Republic of Chile, 502 F. Supp. 259, 266 (D.D.C. 1980)). The court also found subject matter jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982). The analysis of this statute is beyond the scope of this note.

deliberately chose to forego raising sovereign immmunity as an affirmative defense, it lost whatever entitlement to immunity it had under the terms of the Act.[14] Second, since Congress intended to incorporate the principles of international law into the FSIA, the Soviet Union's alleged violations of those principles precluded its assertion of immunity.[15] Third, since the FSIA provides that immunity is subject to international agreements to which the United States is a party[16] and acts by the Soviet Union have contravened such existing international agreements, the FSIA could not shield the defendant from liability.[17] Fourth, through its ratification of certain human rights agreements, the Soviet Union implicitly waived its immunity for violations of those agreements.[18]

Although the Foreign Sovereign Immunities Act clarifies the circumstances under which the sovereign immunity defense is applicable, the history of the sovereign immunity doctrine is tumultuous. The classic expression of the doctrine was first set forth in *The Schooner Exchange v. M'Faddon.*[19] In defining the fundamental principle of sovereign immunity, the Supreme Court held that immunity for foreign warships coming into American ports was implied, and that while operating within U.S. territory and acting in a friendly manner, all ships should be exempt from the jurisdiction of U.S. courts.[20] The Court added, however, that the nation extending immunity to a foreign sovereign may destroy it at any time[21] since it was not a constitutional right, but rather a privilege extended by the United States based on grace and comity.[22]

Although the narrow holding in *The Schooner Exchange* extended immunity only to public warships of a foreign sovereign, the decision was interpreted as granting absolute immunity to all foreign sover-

---

[14] *Von Dardel*, 623 F. Supp. at 252-53.

[15] *Id.* at 254.

[16] The statute provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-07 of this chapter.

28 U.S.C. § 1604 (1982).

[17] *Von Dardel*, 623 F. Supp. at 254-55. The court expressly referred to the Vienna Convention on Consular Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

[18] *Von Dardel*, 623 F. Supp. at 255-56.

[19] 11 U.S. (7 Cranch) 116 (1812). *The Schooner Exchange* was a French warship that docked in a Philadelphia port and was seized by U.S. citizens who claimed that it was an American ship which had been illegally confiscated by the French. *Id.* at 117.

[20] *Id.* at 147.

[21] *Id.* at 146.

[22] *Id.* at 136. *Accord* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Berizzi Bros., Co. v. The Pesaro, 271 U.S. 562 (1926); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

eigns.[23] Absolute sovereign immunity effectively exempted foreign states from the jurisdiction of U.S. courts.[24]

By the middle of the twentieth century, courts had substantially eroded the doctrine of absolute immunity for foreign sovereigns.[25] Subsequently, courts developed the "restrictive theory" of sovereign immunity under which immunity was granted only for the public acts of a sovereign. Disputes arising out of the foreign state's private or commercial acts were subject to the jurisdiction of U.S. courts.[26] The "restrictive theory" was designed to permit a foreign state to conduct its public acts free from the possibility of suit in a U.S. court.[27] In practice, the courts deferred to the U.S. State Department to resolve claims for sovereign immunity. Because of foreign policy considerations, however, the State Department's recommendations on each claim for sovereign immunity often turned not on the public or private nature of the act, but rather on the foreign policy implications of the claim.[28]

In 1976 Congress enacted the Foreign Sovereign Immunities Act[29] which sets forth a comprehensive set of standards by which foreign sovereign immunity is granted.[30] The Act precludes the executive branch from having any role in the determination of when sovereign immunity shall be granted.[31] Additionally, the Act assures all parties that the immunity determination will be made on purely legal grounds that comport with due process considerations.[32]

The Act sets forth a presumption of immunity for the foreign state subject to a host of general exceptions.[33] If the foreign state

---

[23] *Verlinden*, 461 U.S. at 486; Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39-40 (1978).

[24] Von Mehren, *supra* note 23, at 34. The theory of sovereign immunity embraced by the courts was in step with early nineteenth-century theories of absolute sovereignty. *Id.*

[25] In *Ex parte* Peru, 318 U.S. 578, 588 (1943), the Court established a new procedure of granting immunity at the request of the State Department. It had become an accepted practice for the State Department to make recommendations upon claims of foreign sovereigns for immunity. *Id.* Thus, in Republic of Mex. v. Hoffman, 324 U.S. 30 (1945), the Court established parameters on its rulings on immunity claims by its determination that because of the sensitive nature of foreign relations, the Court would defer to the executive branch's recommendations. *Id.* at 35.

[26] Tate, *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Sovereigns*, 26 DEP'T ST. BULL. 984 (1952); *see* Note, *Federal Question Jurisdiction—The Foreign Sovereign Immunities Act of 1976*, 17 CREIGHTON L. REV. 885, 897 (1984).

[27] Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1965).

[28] Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861, 1863 (1981).

[29] Foreign Sovereign Immunities Act, *supra* note 1.

[30] 28 U.S.C. §§ 1605, 1607 (1982).

[31] H.R. REP. NO. 1487, 94TH CONG., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6606 [hereinafter H.R. REP. NO. 1487, with pages cited to 1976 U.S. CODE CONG. & ADMIN. NEWS].

[32] H.R. REP. NO. 1487, *supra* note 31, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.

[33] 28 U.S.C. § 1604 (1982). *See supra* note 16.

waives immunity[34] or engages in a commercial activity having a direct connection with the United States,[35] immunity from suit will not be granted. Similarly, disputes concerning rights to property with a sufficient connection to the United States which is confiscated in violation of international law will not give rise to the immunity defense to a foreign sovereign.[36] Finally, if the foreign state faces claims either to recover damages for certain torts[37] or to enforce a maritime law,[38] the sovereign immunity defense will be denied. Without this defense, the foreign state may be subject to the jurisdiction of U.S. courts.

---

[34] 28 U.S.C. § 1605(a)(1) (1982). The statute 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.

Id.

[35] *Id.* § 1605(a)(2). The statute provides that immunity will not be granted in any case:

> (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 connection 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 act of the foreign state elsewhere and that act causes a direct effect in the United States.

Id.

[36] *Id.* § 1605(a)(3), (4). The statute provides that immunity will not be granted in any case:

> (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 and 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.

Id.

[37] *Id.* § 1605(a)(5). The statute provides that immunity will not be granted in any case:

> (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 claim shall not apply to—
>
> . . . .
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Id.

[38] *Id.* § 1605(b). The statute provides:

> (b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or a cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state[;]
>
> . . . .

Id.

The legislative history of the FSIA provides guidelines as to the intended scope of the Act. In enacting the FSIA, Congress intended that in order for an immunity exception to apply, there must be either some connection between the claim and the United States, or an express or implied waiver of its immunity by the foreign state.[39] In testimony before the House Judiciary Committee, the Act's principal draftsman, Bruno Ristau, cautioned that "our courts [might be] turned into small international courts of claim . . . open . . . to all comers to litigate any dispute which any private party may have with any foreign state anywhere in the world."[40] By requiring some relationship between the claim and the United States, Congress protected against the danger of unlimited litigation. Ristau further testified that the Act was designed not only to grant U.S. courts jurisdiction over foreign entities engaging in commercial activities in the U.S., but also to give American parties effective redress in domestic courts for disputes arising in the United States.[41]

Since the passage of the FSIA in 1976, there has been much litigation involving the proper application of the Act. In *Yessenin-Volpin v. Novosti Press Agency*,[42] one of the first cases applying the FSIA, the plaintiff brought suit against two Soviet entities for publishing allegedly libelous articles outside the United States which were distributed in the United States.[43] The district court noted that under the FSIA a court "must engage . . . in a close examination of the underlying cause of action" to determine whether sovereign immunity will be granted.[44] If the cause of action falls within one of the exceptions to immunity set forth in section 1605 of the Act,[45] then immunity is not appropriate.[46]

The plaintiff alleged that the Soviet Union's conduct fell within the exception for commercial activity performed elsewhere which has a direct effect in the United States.[47] The court held, however, that the conduct of the defendants did not amount to "commercial activity" as defined by the FSIA,[48] but rather was "official commentary of

---

[39] H.R. REP. NO. 1487, *supra* note 31, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6612.

[40] *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 29 (1973).

[41] *Id.*

[42] 443 F. Supp. 849 (S.D.N.Y. 1978).

[43] *Id.* at 854-55.

[44] *Id.* at 851.

[45] *See supra* notes 34-38 and accompanying text.

[46] *Yessenin-Volpin*, 443 F. Supp. at 854.

[47] *Id.* at 855. *See supra* note 35.

[48] *Yessenin-Volpin*, 443 F. Supp. at 856. The court relied on 28 U.S.C. § 1603(d) (1982) which states:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

the Soviet government."[49] Since the Soviet Union's activity was essentially public or governmental in nature, the court granted jurisdictional immunity, noting that to do otherwise would "contravene the spirit of sovereign immunity and the letter of the [FSIA]."[50]

Two years later, in *Letelier v. Republic of Chile*[51] the District Court for the District of Columbia addressed the issue whether a defendant's failure to formally appear in an action was a waiver of the sovereign immunity defense.[52] The plaintiffs brought suit against the Republic of Chile alleging that the Chilean government directed the assassination of a dissident leader in the United States.[53] Utilizing diplomatic notes sent to the U.S. State Department, the Chilean government challenged the district court's jurisdiction.[54] Although the Chilean government did not meet the preferred procedure under the FSIA by making a formal court appearance,[55] the court nonetheless addressed the issue whether sovereign immunity existed.[56]

Because Chile consistently opposed the court's jurisdiction, albeit in an unorthodox manner, the district court struck down an earlier default judgment against the Republic of Chile for its failure to make a court appearance. The court found jurisdiction over the foreign state based on the immunity exception set forth in section 1605(a)(5) of the FSIA.[57] Thus, the Chilean government's failure to make a formal appearance did not amount to a waiver of the sovereign immunity defense. Although the district court's finding of jurisdiction over the Chilean government was reversed on appeal,[58] the district court's recognition that jurisdiction must be based on the exceptions to immunity set forth in the FSIA and not on the foreign state's failure to appear in court, was implicitly approved by the Second Circuit Court of Appeals.[59]

The exceptions to sovereign immunity under the FSIA were also examined in *Persinger v. Islamic Republic of Iran*.[60] In that case, the plaintiffs were a former U.S. hostage and his parents who brought

---

Id.

[49] *Yessenin-Volpin*, 443 F. Supp at 856.

[50] *Id.*

[51] 488 F. Supp. 665 (D.D.C. 1980), *rev'd on other grounds*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985).

[52] *Id.* at 667.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 668. Although the FSIA contains no express provisions dealing with the procedure for raising the sovereign immunity defense, House Judiciary committee reports concerning the FSIA state that "sovereign immunity is an affirmative defense which must be specially pleaded." H.R. REP. No. 1487, *supra* note 31, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615.

[56] *Letelier*, 488 F. Supp. at 668.

[57] *Id.* at 673. *See supra* note 37.

[58] 748 F.2d 790 (2d Cir. 1984).

[59] *Id.* at 793.

[60] 729 F.2d 835 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880 (1984).

suit against Iran for injuries inflicted during the seizure and detention of American personnel in the U.S. embassy in Teheran.[61] In granting sovereign immunity to Iran from such claims, the U.S. Court of Appeals for the District of Columbia Circuit reasoned that in determining a claim of sovereign immunity a court's inquiry must begin with the presumption that a foreign state shall be immune from the jurisdiction of U.S. courts.[62] The court's analysis should then focus on the exceptions to the immunity established by the FSIA.[63] The court concluded that U.S. embassies abroad are not part of U.S. territory for jurisdictional purposes; therefore, Congress did not intend to exercise jurisdiction over foreign sovereigns for tortious acts committed on U.S. embassy premises.[64] According to the *Persinger* court, the tort and the injury must occur in the United States to fall within the section 1605(a)(5) exception to the FSIA.[65]

Other courts dealing with facts similar to those in *Persinger* have been consistent with that court's holding.[66] In *McKeel v. Islamic Republic of Iran*,[67] the Ninth Circuit Court of Appeals agreed with the *Persinger* court in holding that U.S. embassies are not within the territorial jurisdiction of the United States. Therefore, the exception to immunity set forth by section 1605(a)(5) for "personal injury . . . occurring in the United States and caused by the tortious act or omission of that foreign state"[68] did not apply to Iran.[69] The court explained that "nothing in the legislative history suggests that Congress intended to assert jurisdiction over foreign states for events occurring wholly within their own territory."[70]

The Supreme Court has also recognized the need for some degree of U.S. interest in a court proceeding in order for the action to fall within the sovereign immunity exceptions. In *Verlinden v. Central Bank of Nigeria*,[71] a breach of contract action brought by a Dutch corporation against an entity of the Nigerian government, the Supreme Court upheld the constitutionality of the FSIA.[72] The Court held that the legislative history of the Act does not reveal an intent to limit

---

[61] *Id.* at 837.

[62] *Id.* at 838. *See supra* note 33.

[63] *Id.* at 838. *See supra* notes 34-38.

[64] *Id.* at 839.

[65] *Id.* at 842. *See supra* note 37.

[66] "In Williams v. Iran, 692 F.2d 151 (D.C. Cir. 1982), and Lauterbach v. Iran, 692 F.2d 150 (D.C. Cir. 1982), the [*Persinger*] court affirmed lower court judgments dismissing plaintiffs' claims against Iran for the reasons stated in [the *Persinger* opinion]." 729 F.2d at 838, n.3.

[67] 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984). Twelve former hostages and the wives of two ex-hostages brought suit against Iran for damages suffered during and after their captivity. *Id.* at 585.

[68] 28 U.S.C. § 1605(a)(5) (1982). *See supra* note 37.

[69] *McKeel*, 722 F.2d at 587.

[70] *Id.* at 588.

[71] 461 U.S. 480 (1983).

[72] *Id.* at 494.

the jurisdiction to actions brought only by U.S. citizens.[73] The Court added, however, that Congress enacted "substantive provisions requiring some form of substantial contact with the United States for United States courts to assert subject matter jurisdiction."[74] In dictum, the Court noted that even if a foreign state has waived its immunity, the doctrine of *forum non conveniens*[75] can still be applied.[76] Thus, despite a waiver of its immunity, a foreign state may not consent to jurisdiction in the United States for an act wholly unrelated to the United States if a foreign forum would be more appropriate.

In the recent case of *Frolova v. Union of Soviet Socialist Republics*,[77] a U.S. citizen brought an action against the Soviet Union for damages related to the Soviet Union's twelve-month delay in permitting the plaintiff's husband to emigrate to the United States from Moscow.[78] The plaintiff argued that the Soviet Union should be denied sovereign immunity because the FSIA is "[s]ubject to existing international agreements,"[79] such as the United Nations Charter[80] and the Helsinki Accords,[81] which may be enforced by private litigants.[82] The court noted that although treaties ratified by the United States are the supreme law of the land,[83] such agreements may not be the basis of claims in private lawsuits unless they are intended to be self-executing.[84] Whether the parties intend for the treaty to be self-executing should be determined by examining the language and purpose of the treaty.[85]

The plaintiff relied on articles 55 and 56 of the United Nations

---

[73] *Id.* at 490.

[74] *Id.*

[75] The doctrine of *forum non conveniens* refers to the "discretionary power of [a] court to decline jurisdiction when [the] convenience of [the] parties and [the] ends of justice would be better served if [the] action were brought and tried in another forum." BLACK'S LAW DICTIONARY 589 (5th ed. 1979).

[76] *Verlinden*, 461 U.S. at 490, n.15.

[77] 761 F.2d 370 (7th Cir. 1985).

[78] *Id.* at 371.

[79] 28 U.S.C. § 1604 (1982). *See supra* note 16.

[80] U.N. CHARTER arts. 55, 56.

[81] Helsinki Accords (Conference on Security and Cooperation in Europe: Final Act), 73 DEP'T ST. BULL. 323 (1975).

[82] *Frolova*, 761 F.2d at 373.

[83] *Id.*; *see* U.S. CONST. art. VI.

[84] *Frolova*, 761 F.2d at 373. To determine whether a treaty is self-executing, a court will examine a number of factors:

> (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right; and (6) the capability of the judiciary to resolve the dispute.

Id. The issue of whether a treaty is self-executing is a matter of interpretation for the courts. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154(1) (1965).

[85] *Frolova*, 761 F.2d at 373.

Charter[86] and on certain provisions in the Helsinki Accords[87] dealing with (1) contacts and regular meetings on the basis of family ties; (2) reunification of families; and (3) marriage between citizens of different states. The *Frolova* court held that the articles from the United Nations Charter were only "declarations of principles, not a code of legal rights."[88] Similarly, the court found that the Helsinki Accords "create obligations on the signatory countries and establish goals which the nations will try to reach on their own."[89] No right to enforce either agreement is conferred upon individual citizens.[90] Thus, the court concluded that neither treaty is intended to be self-executing.[91]

The plaintiff in *Frolova* also argued that the Soviet Union had implicitly waived its defense of sovereign immunity by its failure to

---

[86] Article 55 provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination among peoples, the United Nations shall promote:
>
> . . . .
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER, art. 55.

Article 56 provides:

> All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

U.N. CHARTER, art. 56.

[87] The section on marriage between citizens of different states sets forth:

> The participating States will examine favourably and on the basis of humanitarian considerations requests for exit or entry permits from persons who have decided to marry a citizen from another participating State.
>
> . . . .
>
> In dealing with requests from couples from different participating States, once married, to enable them and their minor children of their marriage to transfer their permanent residence to a State in which either one is normally a resident, the participating States will also apply the provisions accepted for family reunification.

Helsinki Accords (Conference on Security and Cooperation in Europe: Final Act), 73 DEP'T ST. BULL. 340 (1975).

The provisions on family reunification state in relevant part:

> The participating States will deal in a positive and humanitarian spirit with the applications of persons who wish to be reunited with members of their family, with special attention being given to requests of an urgent character . . . .
>
> They will deal with applications in this field as expeditiously as possible.
>
> . . . .
>
> Until members of the same family are reunited meetings and contacts between them may take place in accordance with the modalities for contacts on the basis of family ties.

Id.

[88] *Frolova*, 761 F.2d at 374.

[89] *Id.* at 375.

[90] *Id.* at 374.

[91] *Id.* at 374-76.

appear in the action.[92] In finding that the Soviet Union had not waived its immunity, the court reasoned that "even in cases in which the defendant has not entered an appearance, the district court has an obligation to satisfy itself that the defense of sovereign immunity is not available before it has subject matter jurisdiction."[93] Dismissing the suit, the *Frolova* court held that the Soviet Union neither explicitly waived its sovereign immunity by signing the United Nations Charter and Helsinki Accords, nor implicitly waived its immunity by failing to make a formal court appearance.[94]

The court's assertion of subject matter jurisdiction in *Von Dardel* is inconsistent with the above precedents. The *Von Dardel* court's holding that the Soviet Union's failure to affirmatively plead the defense of sovereign immunity was an implicit waiver of the defense is contrary to the presumption of sovereign immunity set forth in the Act.[95] The court's conclusion is contrary to the *Frolova* and *Letelier* analyses which require that even if the foreign state fails to appear to affirmatively plead the sovereign immunity defense, the court must still examine whether the defendant's conduct falls within one of the exceptions to immunity.[96]

The *Von Dardel* court also concluded that the FSIA should be interpreted consistently with universally recognized principles of international law.[97] When a "clear and egregious violation of a well-established and universally recognized standard of international law [occurs], courts have recognized the need for an appropriate exercise of jurisdiction."[98] In fact, courts have rarely exercised such a power. The court in *Von Dardel* relied on the exceptional case of *Bernstein v. N.V. Nederlandsche — Amerikaansche Stoomlvaart — Maatschappif*.[99] The *Bernstein* case involved extraordinary circumstances in post-World War II Europe concerning the settlement of reparation

---

[92] *Id.* at 378.

[93] *Id.* The court also relied on Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), which pointed out that "[u]nder the Act . . . subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." *Id.* at 493 n.20.

[94] *Frolova*, 761 F.2d at 374-78.

[95] *See supra* notes 16, 33 and accompanying text.

[96] *See supra* notes 51-57 and 92-94 and accompanying text. Similarly, other courts have been reluctant to find a waiver of immunity based on the foreign state's absence in the litigation. In Castro v. Saudia Arabia, 510 F. Supp. 309, 311-12 (W.D. Tex. 1980), the court found that the foreign state did not waive its right to sovereign immunity by failing to answer prior to the issuance of a default judgment. *Accord* Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 727 F.2d 274, 277-78 (2d Cir. 1984).

[97] *Von Dardel*, 623 F. Supp. at 253. The court does not explain what these principles of international law are.

[98] *Id.*

[99] 210 F.2d 375 (2d Cir. 1954).

claims for property confiscated by Nazi officials.[100] The *Bernstein* court found subject matter jurisdiction after the U.S. State Department recommended a policy of allowing victims of the war accessibility to U.S. courts.[101] The *Bernstein* court, therefore, deferred to the State Department's "supervening expression of Executive policy,"[102] and not to an overriding concern for principles of international law.

Although the *Von Dardel* court recognized that Congress did not make a specific reference to the doctrine of international law when it enacted the FSIA, it discounted the omission as not of primary importance to the Act.[103] The court stated that if the FSIA is interpreted to bar suits against foreign governments for violations of international law, it would preempt other U.S. laws designed to safeguard the rights of diplomats[104] and other internationally protected persons.[105] Thus, the court's holding that a foreign plaintiff may bring suit against a foreign state in a U.S. court for violations of general principles of international law creates a new substantive right under the FSIA which was not the intention of the legislation. The purpose of the legislation was, in part, to codify the "restrictive" doctrine of sovereign immunity as recognized in international law and as practiced since 1952;[106] the Act was not intended to create new substantive rights. The FSIA sets forth the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states."[107] The language of the statute does not create an exception to sovereign immunity for alleged violations of international law.[108]

Oddly, the *Von Dardel* court denied immunity to the Soviet Union for violations of international law regarding a Swedish diplomat while other U.S. courts have granted immunity to Iran for the violation of international law regarding American diplomats.[109] The

---

[100] *Id.* at 376.

[101] *Id.*

[102] *Id.*

[103] *Von Dardel*, 623 F. Supp. at 254.

[104] The Alien Torts Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1982).

[105] 28 U.S.C. § 1116 (1982). The statute provides:

> (a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished . . . .
>
> . . . .
>
> (c) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present in the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender.

Id. See also 18 U.S.C. § 1201 (1982).

[106] H.R. REP. NO. 1487, *supra* note 31, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605.

[107] *Id.* at 6610.

[108] *See supra* notes 34-38 and accompanying text.

[109] *See supra* notes 60-70 and accompanying text.

kidnapping of U.S. embassy personnel in Iran in 1979 has a much more substantial connection with the United States than the kidnapping of a Swedish diplomat in Eastern Europe in 1945. Yet, the ruling in *Persinger* and subsequent cases clearly demonstrated that the connection between Iran's conduct and the United States was insufficient to deny the immunity defense to Iran.[110]

The *Von Dardel* court also relied on international agreements between the Soviet Union and the United States to find jurisdiction. Section 1604 of the FSIA provides that immunity is subject to international agreements to which the United States is a party.[111] The court concluded that where the substantive provisions of the Act conflict with any international agreement, the provisions must be preempted to the extent necessary to allow the full application of such agreement.[112] The court cited two treaties to which both the United States and the Soviet Union are signatories[113] and found that if the FSIA shielded the Soviet Union from liability for its conduct, the Act would be in conflict with the terms of the treaties and would thwart the effective operation of these international agreements.[114] The *Frolova* court noted that a treaty must be self-executing in order to give rise to a private claim.[115] If a treaty is not self-executing, the relationship between a private claim and the treaty is too tenuous to create a substantive right which may be enforced in U.S. courts.[116]

Each of the treaties cited by the *Von Dardel* court contains a provision by which its terms may be enforced.[117] Although the Soviet Union signed both treaties, it chose not to be bound by the enforcement provisions of either treaty, indicating a clear intention that the

---

110 *Id.*

111 28 U.S.C. § 1604 (1982). *See supra* note 16.

112 *Von Dardel*, 623 F. Supp. at 254-55.

113 Vienna Convention on Consular Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

114 *Von Dardel*, 623 F. Supp. at 255. Article 29 of the Vienna Convention on Consular Relations provides that "[t]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity." Vienna Convention on Consular Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502.

Article 2 of the Convention on the Prevention and Punishment of Crimes provides that "[t]he intentional commission of . . . a murder, kidnapping or other attack upon the person or liberty of an internationally protected person. . . shall be made by each State Party a crime under its internal law." Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

115 *See supra* notes 84-85 and accompanying text.

116 Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976); *see also supra* note 84.

117 The Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, T.I.A.S. No. 7502, accompanied the Vienna Convention on Consular Relations. The Optional Protocol provided that disputes concerning the interpretation or application of the Vienna Convention on Consular Relations should be de-

treaties not be self-executing.[118] Before concluding that a foreign state may be sued in the United States, U.S. courts have required convincing evidence that a foreign state intended to waive sovereign immunity when ratifying a treaty.[119] Clearly, the Soviet Union did not intend to submit itself to claims by private litigants in U.S. courts based on these two treaties.

Additionally, the *Von Dardel* court examined principles of international law in concluding that the Soviet Union had implicitly waived its immunity. Pursuant to section 1605(a)(1) of the FSIA,[120] a foreign state may either explicitly or implicitly waive immunity. The *Von Dardel* court determined that the Soviet Union had explicitly recognized fundamental principles of diplomatic immunity as expressed in certain international treaties.[121] Through its alleged breach of the principles encompassed in those agreements, the Soviet Union had implicitly waived its immunity.[122] A contrary result, according to the court, would "rob each of those agreements of substantive effect, and would render meaningless the act of the Soviet Union in signing them."[123]

Although the case law in the area of an implicit waiver of sovereign immunity is not settled,[124] it seems clear that an implicit waiver such as that found by the *Von Dardel* court was not intended by the drafters of the FSIA. The legislative history of the Act cites examples of implicit waivers which require affirmative action, such as an agreement that the law of another country will govern the contract, or a responsive pleading in which the defense of sovereign immunity is not raised.[125] Since the Act provides no precise limitation on the implied waiver doctrine, some commentators have argued that courts should be able to expand the doctrine to encompass forms of

---

cided by the International Court of Justice. *Id.* art. I. The Soviet Union chose not to be bound by the Vienna Convention and did not sign the Optional Protocol.

Also, the Convention of the Prevention and Punishment of Crimes contained a provision compelling disputes between states concerning the interpretation and application of the Convention to be resolved by the International Court of Justice. Art. 13, para. 1, 28 U.S.T. 1975, T.I.A.S. No. 8532. Pursuant to article 13 of the Convention, the Soviet Union declared that it did not consider itself bound by paragraph 1 of the article. *Id.* at para. 2.

[118] *See Frolova*, 761 F.2d at 376.

[119] *Id.* at 378. *See* O'Connell Machinery Co. v. M.V. Americana, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344 (11th Cir. 1982); Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414 (D.D.C. 1983).

[120] *See supra* note 34.

[121] *See supra* note 113 and accompanying text.

[122] *Von Dardel*, 623 F. Supp. at 256.

[123] *Id.*

[124] Note, *The Foreign Sovereign Immunities Act*, 3 N.C.J. INT'L L. & COM. REG., 206, 219 (1977).

[125] H.R. REP. No. 1487, *supra* note 31, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6617. An express waiver would be an explicit act such as a waiver of immunity contained in either a treaty with a foreign state or a contract with a private party. *Id.*

implied waivers not cited in the legislative history.[126] Most courts, however, have interpreted the Act restrictively requiring adherence to either the examples set forth in the legislative history or similar actions.[127]

The *Von Dardel* decision is strikingly deficient in its analysis of certain important issues which it deemed irrelevant to its inquiry. Most commentators agree that the FSIA requires some substantive contact with the United States before subject matter jurisdiction can be found.[128] The Supreme Court in *Verlinden* interpreted the language of the Act as restricting the class of potential plaintiffs by requiring substantive contact with the United States.[129] In *Von Dardel* the court ignored the negligible relationship between the plaintiff's claim, the defendant's alleged misconduct, and the United States, and found subject matter jurisdiction without a showing of substantive contact between the cause of action and the United States.[130]

The *Von Dardel* court also failed to discuss the doctrine of *forum non conveniens*.[131] While the United States may have an interest in allowing its courts to resolve some disputes between foreign states,[132] it may not be convenient for the parties to litigate the case in the United States. Since the Act does not affect the doctrine of *forum non conveniens*, suits should be brought in the foreign forum if it will be more convenient for the parties, or if the foreign state has a greater interest in the suit.[133] Whether U.S. interests may be adversely affected by resolving a dispute in U.S. courts should also be considered.

The plaintiffs in *Von Dardel* were Swedish citizens bringing an

---

[126] Note, *supra* note 124, at 219 (courts should be free to expand the doctrine of implicit waiver); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 553 (1977) (scope of implied waiver should be given wide breadth).

[127] *Frolova*, 761 F.2d at 378 (no waiver absent a conscious decision to take part in the litigation and a failure to raise the immunity defense); *Castro*, 510 F. Supp. at 312 (no waiver despite defendant's failure to answer timely); Ipitrade Int'l v. Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978)(waiver based on agreement to arbitrate in foreign states).

[128] Note, *Federal Question Jurisdiction*, 17 CREIGHTON L. REV. 885, 912 (1984); Note, *Foreign Plaintiffs May Constitutionally Sue a Foreign State Under the Foreign Sovereign Immunities Act on a State Cause of Action in a United States Federal Court*, 19 TEX. INT'L L.J. 499, 510 (1984); Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 VA. L. REV. 893, 918 (1982); Note, *Suits by Foreigners*, 90 YALE L.J. 1861, 1875-79 (1981).

[129] *Verlinden*, 461 U.S. at 490.

[130] The action involves foreign plaintiffs bringing suit against the Soviet Union for alleged misconduct against a foreign diplomat in the Soviet Union commencing over 40 years ago. Clearly, the action has no relationship with the United States.

[131] *See supra* note 75.

[132] Interests protected by allowing foreign party suits in U.S. courts include suits which involve debts incurred in the United States, undesirable behavior affecting the United States, or a substantive law in the United States of which a party seeks to take advantage. Note, *Suits By Foreigners*, *supra* note 128, at 1868-71.

[133] *Id.* at 1871-72.

action on behalf of a Swedish diplomat against the Soviet Union for conduct performed within the Soviet Union. Based on the doctrine of *forum non conveniens*, Sweden had a greater interest than the United States in determining the status of its diplomat and recovering damages from the Soviet Union for his treatment. The convenience of calling witnesses and obtaining evidence would further justify bringing the suit in Sweden.

The *Von Dardel* court also failed to consider the ramifications of its decision. The *Von Dardel* interpretation of the FSIA invites a logjam in already-crowded federal courts by placing the United States in the unenviable position of trying to police the world. Many foreign states may object to defending actions in U.S. courts which could have been brought in the foreign state.[134] Yet, the holding in *Von Dardel* places U.S. courts in the position of providing a forum for a broad class of foreign plaintiffs.

Ramifications of the decision also extend into the realm of foreign policy. Although the FSIA specifically precludes foreign policy considerations in the determination of each claim for sovereign immunity, foreign policy implications are inevitably involved. The extension of jurisdiction over the Soviet Union or any other foreign state in the manner used in *Von Dardel* may affect the sensitive nature of U.S. foreign relations. Not only may the foreign state cool relations with the United States, but it also may retaliate by providing its own courts as a forum for suits against the United States by foreign plaintiffs.

The plaintiffs in *Von Dardel* were not of the type that Congress intended to allow into U.S. courts by enacting the FSIA. Although the plaintiffs' claim had no substantive contact with the United States, the *Von Dardel* court extended jurisdiction. In addition, the court's finding that the Soviet Union implicitly waived the sovereign immunity defense by failing to participate in the litigation is contrary to the presumption of immunity set forth in the Act and is misaligned with other courts' interpretations of the Act. Moreover, the *Von Dardel* court's finding of an explicit waiver was based on the Soviet Union's agreement to treaties which the Soviet Union expressly intended not to be self-executing. Finally, the court's decision ignores judicial doctrines, such as *forum non conveniens*, and disregards foreign policy considerations, such as the ruling's effect on the foreign state. In future decisions regarding sovereign immunity, U.S. federal courts should be sensitive to the shortcomings of the *Von Dardel* court's holding and should apply a more narrow construction of the FSIA.

MATTHEW B. MERRELL

[134] *Id.* at 1874.