4-1-1984

Toward a Clarification of the "Arising Under" Clause of the United States Constitution: A Revival of the *Osborn* Test

Sharon L. Blake

Toward a Clarification of the "Arising Under" Clause of the United States Constitution: A Revival of the *Osborn* Test

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

On April 21, 1975, the Republic of Nigeria contracted to purchase 240,000 tons of cement for a total contract price of $14,400,000 from Verlinden, B.V., a Dutch corporation with its principal place of business in Amsterdam, Netherlands. The contract was to be financed through an irrevocable, divisible and confirmed letter of credit in favor of Verlinden.

Verlinden brought suit against the Central Bank of Nigeria, as an instrumentality of the Nigerian government, in the United States District Court for the Southern District of New York for anticipatory breach of the letter of credit. Jurisdiction was based on the Foreign Sovereign Immunities Act of 1976 (FSIA).[1] The Central Bank moved to dismiss the suit for lack of subject matter and personal jurisdiction. On April 21, 1980, the District Court held that, under the FSIA, foreign plaintiffs were permitted to sue a foreign state or its instrumentality in the federal courts, but dismissed the suit because the transaction involving the letter of credit was not a sufficient contact with the United States as required by the FSIA.[2] Verlinden appealed the decision to the United States Court of Appeals for the Second Circuit, which affirmed the dismissal on other grounds.[3] It held that the FSIA exceeded the scope of article III of the Constitution because neither the "diversity"[4] nor the "arising under"[5] clauses were broad enough to support jurisdiction between a citizen of a foreign state and a foreign sovereign based on a non-federal cause of action. After the decision was announced, the United States moved for leave

1. Pub. L. No. 94-583, 90 Stat. 2891-98, 28 U.S.C. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d) and 1602-1611 (1976).

2. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980).

3. Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2nd Cir. 1981). The appeals court had jurisdiction based on 28 U.S.C. § 1291.

4. U.S. CONST. art. III, § 2, cl. 1.

5. *Id.*

to intervene and for rehearing on the grounds that the court of appeals had not complied with 28 U.S.C. § 2403.[6] This motion was denied without explanation. Upon application by Verlinden to the Supreme Court, a writ of certiorari was granted.[7] The Court reversed and remanded, *held*: (1) The FSIA codifies, as a matter of federal law, the restrictive theory of foreign sovereign immunity; (2) Under section 1330(a) of the FSIA, a foreign plaintiff may sue a foreign sovereign in the United States courts; (3) Congress did not exceed the scope of article III by granting federal district courts original jurisdiction over certain suits by foreign plaintiffs against foreign sovereigns, where the rule of decision is to be provided by non-federal law.[8] *Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962 (1983).

Under its contract with Verlinden, the Nigerian government had agreed to establish a letter of credit through the Slavenburg's Bank, Amsterdam, Netherlands. The letter was established as agreed in favor of Verlinden for the contract amount, except that the letter was made payable through the Morgan Guaranty Bank in New York rather than Slavenburg's Bank.[9] Verlinden contended this to be in contradiction to the agreement and that the letter of credit was at variance with the contract in that it was unconfirmed and not divisible and, therefore, commercially ineffective and unusable.[10]

The contract between Verlinden and the Republic of Nigeria provided for monthly shipments of 20,000 metric tons of cement, commencing forty-five days after receipt of the letter of credit. Demurrage[11] was to be paid at a maximum of $3,500 per day per ves-

---

6. Section 2403 provides that in any action in which the constitutionality of an act of Congress affecting the public interest is drawn into question that the court should notify the Attorney General.

7. Verlinden B.V. v. Central National Bank of Nigeria, 454 U.S. 1140 (1982).

8. The court of appeals notes that the law governing the suit is the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce or the law of New York. The Supreme Court does not determine which choice of law would apply, only that non-federal law would be applicable.

9. Morgan Guaranty acted as an advising bank and took no independent responsibility for guarantying the letter of credit.

10. During the course of their dealings, the Central Bank issued amendments to the letter of credit attempting to render it consistent with the contract, but as to which the plaintiff was not advised until September 1975. The letter of credit, therefore, was never confirmed. Morgan Guaranty was prepared to confirm the letter but awaited the payment of confirmation charges by Verlinden.

11. Demurrage is a type of extended freight or stipulated damages which is paid by the receiver for delays in loading or unloading cargo.

sel if the discharge of cargo was not completed at a rate of at least 1,000 tons per day as of the first day after a vessel's arrival in Lagos Apapa, the port of Nigeria. The letter of credit was inconsistent in this regard in that it did not indicate when demurrage payments would commence.

In addition to the contract with Verlinden, Nigeria had contracted to purchase cement from more than sixty-eight other suppliers on 109 contracts. The result of this ambitious development program by the Nigerian government was a bottleneck of ships in the ports of Nigeria.[12] In order to protect its own interests, the Central Bank, in mid-September 1975, directed its correspondent bank, Morgan Guaranty, to adopt certain amendments to all their outstanding irrevocable letters of credit in connection with cement contracts. Under these amendments, demurrage payments would be stopped unless certified by the Central Bank. The only circumstance under which these payments would be certified was if the shipments were cleared with the Bank two months prior to their arrival in Nigerian waters.[13] These amendments were unilaterally adopted by the Bank without the consent of Verlinden.[14]

Based on the issuance of the letter of credit, Verlinden, in August of 1975, had subcontracted with another European concern, Interbuco Anstalt of Vaduz, Liechtenstein, for the purchase of cement.[15] It was Verlinden's position that the Central Bank could be held responsible, due to its breach, for liquidated damages under the subcontract with Interbuco. Verlinden brought suit seeking $4,660,000 in damages for payments already made and/or owing to Interbuco, lost profits from the contract with Nigeria, and counsel fees and expenses. Verlinden also sought punitive damages in a like amount.

Since the signing of the Constitution, there has been much

---

12. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2nd Cir. 1981); and *Direct Financial Effect under the Foreign Sovereign Immunities Act*, 14 LAW. AM. 2, 361-65 (1982).

13. Under the terms of the contract between Verlinden and Nigeria, the contract was to be governed by the laws of the Netherlands, and disputes were to be resolved by arbitration before the International Chamber of Commerce, Paris, France.

14. These unilateral amendments made by the Central Bank through Morgan were in violation of the Uniform Customs and Practice for Documentary Credits, stipulated to be followed under the contract. The Uniform Customs and Practice allows for amendments only by the agreement of all parties concerned. The International Chamber of Commerce Brochure No. 222 (1962 Rev.), art. 3.

15. 488 F. Supp. at 1288.

confusion among legal scholars, lawyers and judges regarding the proper scope of the "arising under" clause.[16] This note will articulate the state of the law concerning the scope of this clause in light of this case. In so doing, it will be necessary to first consider and elaborate on the history and content of the Foreign Sovereign Immunities Act, as does the Court. This note will only briefly discuss the ancillary holdings in the case.

History of Foreign Sovereign Immunity in the United States

In its opinion,[17] the Supreme Court relied on the leading case of *The Schooner Exchange v. M'Faddon*[18] for the origin of the development of absolute foreign sovereign immunity in this country. In that case, an American sought to claim title to an armed vessel of France within a United States port.[19] In deciding whether jurisdiction would lie against the foreign sovereign, Chief Justice Marshall reasoned that, although the jurisdiction of the United States or any nation within its own territory is exclusive, implicit in our consent to allow a foreign sovereign to enter this country is a waiver of such jurisdiction, unless withdrawn by the legislature or executive.[20] The policy behind granting such a waiver would be the promotion of intercourse between foreign nations and the preservation of their dignity.

The *Verlinden* Court noted that foreign sovereign immunity, as made clear by *The Schooner Exchange*, is a matter of grace and comity within the courts' authority. The courts could defer to the political branches to determine whether they should take jurisdiction of a particular case without violating the Constitution. This practice was firmly established by the 1940's.[21] In *Ex parte Republic of Peru*,[22] the Court held that, in the absence of a determina-

16. The "arising under" clause of the Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . . "

17. Chief Justice Burger delivered the opinion of the Court. There was no dissenting opinion.

18. 7 CRANCH 116, (1812).

19. It was alleged that the vessel, while sailing from Baltimore to St. Sebastians in Spain, was violently and forcibly taken by persons acting under the decrees of Napoleon, the Emperor of France. *Id.*

20. "A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license [to enter the country] has been obtained." *Id.* at 137.

21. 103 S. Ct. at 1967-68.

22. 318 U.S. 578 (1943).

tion by the State Department, the district court would have jurisdiction to decide whether the vessel seized was of a character subject to immunity. However, the Court held, in accordance with well-established principles, that the exercise of such jurisdiction, where the State Department had recognized the claim of immunity, would embarrass the executive branch in its conduct of foreign affairs.[23] As in *The Schooner Exchange*, the Court viewed the judicial seizure of a ship belonging to a foreign sovereign as a serious challenge to the dignity of the foreign sovereign, affecting our friendly relations with that nation. Therefore, the Court in *Ex parte Peru*[24] placed a requirement on the judiciary to accept and follow the executive determinations in matters of sovereign immunity.

Immunity was not granted by the Court in *Republic of Mexico v. Hoffman*,[25] where a ship was owned but not operated by a foreign sovereign. Although the State Department had not made a determination in that case, it was held that the courts were restricted in their determination to follow the established policy of the department. "The courts [were not] to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[26]

The practice by most nations at this time was to limit their power to subject foreign states to judicial process for public noncommercial acts, but otherwise to permit suit. The American standard was broader; the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.[27] Then in 1952, the State Department issued the Tate letter[28] announcing its change in policy and adoption of the restrictive theory of sovereign immunity, which was more consistent with international practice. Under the restrictive theory, immunity is confined to the strictly public acts of a sovereign, *acta jus imperii*, and does not extend to its commercial acts, *acta jus gestionis*. According to the Tate letter, whether or not a sovereign was immune from liability depended on the nature of its activity and not its purpose or

23. *Id.* at 586-90.
24. *Id.*
25. 324 U.S. 30 (1945).
26. *Id.* at 35.
27. 103 S. Ct. at 1968.
28. The "Tate Letter" by Acting Legal Adviser Jack B. Tate of May 19, 1952, 26 State Dep't Bull. 984-85 (1952).

character.[29]

The State Department continued to remain involved and would from time to time issue its suggestions of immunity. Two bodies of law eventually developed; that of the State Department and that of judicial precedent.[30] In essence, the foreign sovereign was able to choose the forum, either by seeking a suggestion of immunity from the State Department or by relying on the case law of the particular court which had jurisdiction. The courts attempted to grant immunity based on established principles, while the State Department often granted immunity for political considerations in difficult situations.[31] The *Verlinden* Court noted that State Department decisions were inconsistent and frequently granted immunity when not required by the restrictive theory and in general were less impartial than court decisions would have been.[32] Thus, the courts' deference to the State Department frequently resulted in an embarrassment to the executive.[33]

The Foreign Sovereign Immunities Act

In 1976, the FSIA was passed. For the most part, the FSIA codified as a matter of federal law the restrictive theory of sovereign immunity as announced in the Tate letter.[34] The act withdraws the need for State Department involvement, except in exceptional situations,[35] and provides a uniform standard, not subject to case-by-case diplomatic pressures.[36]

The Court in *Verlinden* concerned itself with the provisions and operation of the FSIA, which it considered to be, and repeatedly referred to, as a complex substantive statute.[37] Under the

---

29. *Id.*

30. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. IN WORLD PUB. ORD., 1, 6-7, 34-39 (1976).

31. *See id.* at 15, 38-42, for a discussion on the difficulty in following State Department decisions which were frequently rendered with no reasons given other than the single statement quoted from the Tate Letter: "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*juri imperii*) of a state, but not with respect to private acts (*juri gestionis*)."

32. 103 S. Ct. at 1967-68.

33. *See* Weber *supra* note 30 at 40-42.

34. 103 S. Ct. at 1968.

35. Weber, *supra* note 30 at 46-48. The State Department can still exercise its inherent foreign policy power to prevent any judicial antagonism.

36. 103 S. Ct. at 1968. *See also* H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604.

37. Throughout the opinion, the Court refers to FSIA as a substantive statute. *See* 103

FSIA, a foreign sovereign is immune from liability unless an exception to immunity is met under the Act, including an express or implied waiver of immunity by the foreign sovereign.

Section 1330 of the FSIA provides for original jurisdiction in the district courts, without regard to the amount in controversy, of any non-jury civil action against a foreign state (as defined by section 1603(a) of the Act). The Court, quoting from the House Report on the Act, noted that the lack of an amount in controversy contributes to the purpose of Congress by encouraging suits to be brought in the federal courts.[38] Congress, however, did not make jurisdiction exclusive.[39] Under this section, subject matter and personal jurisdiction[40] apply in all actions against a foreign state, not entitled to immunity under international agreement or under sections 1605 and 1607 of the FSIA. Additionally, this section provides that personal jurisdiction over a foreign state be made by service as described in section 1608 of the Act.[41]

Section 1332 (a)(2)-(3) of the Diversity of Citizenship Statute is amended by the Act to delete references to "foreign states" since section 1330 now includes such jurisdiction without regard to an amount in controversy.[42]

Section 1391 of the FSIA provides the methods by which venue may by obtained.

Section 1441, the removal provision, significantly contributes to the consolidation of actions under the FSIA in federal court by providing for removal of any civil action brought in state court against a foreign state, as defined in the Act.[43]

The intent and purposes of Congress in enacting the FSIA are

S. Ct. at 1965, 1967 (n.5), 1969, 1970, 1971, 1973, for numerous references to it as a substantive statute.

38. 103 S. Ct. at 1969, n. 13.

39. It is probable that Congress had doubts as to the constitutionality of the Act when basing jurisdiction on the "arising under" clause in such a situation as presented here and provided for concurrent jurisdiction in the event that this portion of the Act was found unconstitutional. If its intent were to consolidate actions in the federal courts, it would appear that exclusive jurisdiction might have better served this goal in the rare situation that the defendant did not remove the action.

40. 103 S. Ct. at 1967, n.5.

41. This, in effect, is a federal long-arm provision modeled after the long-arm statute enacted for the District of Columbia. H.R. REP. No. 94-1437, 7 (1976).

42. The Act also adds sub-paragraph (4) to section 1332(a) so as to continue to provide for jurisdiction on the basis of diversity between a foreign state as plaintiff and citizens of one or more states of the United States, subject to the $10,000 amount in controversy.

43. 103 S. Ct. at 1969.

stated in section 1602. One purpose is to serve the interest of justice and protect the rights of foreign states and other litigants by providing jurisdiction in the federal courts. Another purpose of the Act is to provide for uniform decisions in the federal and state courts.[44] Additionally, this section notes that, in accordance with international law, foreign states may be subjected to liability for their commercial activities and that their commercial property may be levied upon in satisfaction of judgments in connection with such activities.[45]

Section 1603 provides important definitions for certain terms of the FSIA, including that of a "foreign state" and an "agency or instrumentality of a foreign state."[46] In order to determine if the Central Bank of Nigeria qualified as an agency or instrumentality, definitions of this section would necessarily be applied. This section also defines "commercial activity," a crucial definition in any application of the FSIA. Consistent with the Tate letter, the commercial character of an activity is to be determined by the courts based on the nature of the conduct or transaction and not its purpose.[47] Another important term, a "commercial activity carried on in the United States by a foreign state," is defined to require that the commercial activity have substantial contact with the United States.

Section 1604, partially reiterating section 1330 of the Act, makes foreign states immune from suit in the federal and state courts, unless one of the exceptions under the general exceptions of sections 1605 and 1607 are met. Exceptions to immunity included in section 1605 are, *inter alia*, implicit or explicit waiver by a foreign state of its immunity; actions based upon the commercial activity of a foreign state carried on in the United States or causing a direct effect in the United States; actions concerning rights in property allegedly taken in violation of international law, where the property is in the United States in connection with a commer-

---

44. *See* H.R. REP. No. 94-1487, at 32, discussing the importance of developing a uniform body of law.

45. "Finally, current standards of international law concerning sovereign immunity add content to the 'commercial activity' phrase of the FSIA. Section 1602 of the Act, entitled 'Findings and Declaration of Purpose,' contains a cryptic reference to international law, but fails wholly to adopt it." Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 310 (2nd Cir. 1981) (footnote omitted).

46. The Court must interpret this section of the Act to determine if the Central Bank qualifies as an agency or instrumentality of a foreign state.

47. Much latitude is left to the courts to determine whether an activity qualifies as a "commercial activity" under the FSIA. H.R. REP. No. 94-1487, at 16.

cial activity; actions involving rights in property in the United States acquired by inheritance or gift or rights in real estate located in the United States; actions for certain torts committed within the United States; and certain actions in admiralty involving maritime liens on vessels or cargo. Section 1607 provides an exception from immunity for certain counterclaims brought against a foreign sovereign.

Every suit alleging jurisdiction under the FSIA requires the application of section 1605 or 1607. It was under section 1605 that the district court dismissed the *Verlinden* case, holding that the alleged anticipatory breach of the letter of credit was not based on a commercial activity with sufficient direct effect in the United States.[48]

If an exception to immunity is found, then section 1606 is activated. This section provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[49] Under one of the tests applied by the court of appeals, it found that no new cause of action was created under this provision and that the suit could not, therefore, qualify as "arising under" the laws of the United States.[50] In contrast, appellants urged the Supreme Court to sustain the constitutionality of the FSIA on the basis that this section created a federal cause of action.[51]

Section 1608 deals with the manner of service, time to answer and default. The FSIA does not permit default judgment unless the claimant establishes his right to relief by sufficient evidence. Although the House Report on the FSIA stated that foreign sovereign immunity was to be raised as an affirmative defense,[52] a court

---

48. The district court held that no exception to the Act could be found upon which to base jurisdiction for the suit against the Central Bank. All the activity under the contract had taken place outside of the United States except for the confirming of the letter of credit through the Morgan Bank in the United States. This was thought by the court not to have a substantial enough direct effect in the United States to maintain jurisdiction. It further noted that such a practice could have a negative effect on commercial trade in New York since the mere act of confirming credit through one of its banks could subject a party to jurisdiction in the United States.

49. 28 U.S.C. § 1606. In addition, this section provides that no recovery for punitive damages is permitted under the Act.

50. 647 F.2d at 326. The Court noted that the tests used by the court of appeals were misapplied to the Act and were only relevant to claims based on section 1331, the general federal question statute. 103 S. Ct. at 1972.

51. 103 S. Ct. at 1972, n. 22.

52. H.R. REP. No. 94-1487, at 17.

would be compelled to apply the provisions of the act, even if the party did not appear.[53]

Section 1609, symmetrical to section 1604, generally provides that the property of a foreign state is immune from attachment and execution except as provided under sections 1610 and 1611 or by international agreement. Sections 1610 and 1611 permit attachment and execution only under a narrow set of circumstances and are generally more restrictive than required by international law.[54]

Thus, it is apparant that any action brought under the FSIA would require the application of several of its provisions as well as, under certain circumstances, the interpretation of various international agreements to determine whether suit could be brought against the foreign sovereign.

Foreign Plaintiff May Sue Foreign Sovereign Under the FSIA

Against this background, the Supreme Court turned to the issue of whether the FSIA, as written, would permit a foreign plaintiff (Verlinden) to sue a foreign sovereign (Central Bank) in the courts of the United States. The Court found that the FSIA permitted a foreign plaintiff to bring suit as long as the "substantive" requirements of the act were met.[55] In agreement with the district court and the court of appeals, the Supreme Court found that on its face the clear language of the Act permitted such a suit, since the Act contained no limitations as to the citizenship of a plaintiff, but rather broadly conferred jurisdiction over "any non-jury civil action against a foreign state."[56] Looking to the legislative history of the act as a whole, the Court found no intent by Congress to limit access to the courts to American citizens only. The Court reasoned further that the requirements of "substantial contact"[57] and "direct effect in the United States"[58] would prevent the courts from becoming international courts of claims with unlimited jurisdiction.

---

53. *Id.* at 1971, n. 20.
54. Weber *supra* note 30, at 22-23.
55. 103 S. Ct. at 1970.
56. *Id.* at 1969, quoting 28 U.S.C. § 1330(a).
57. 28 U.S.C. § 1603(e).
58. 28 U.S.C. § 1605(a)(2).

Constitutionality of the FSIA

The Court in *Verlinden* then addressed the key issue in the case: the constitutionality of the FSIA where jurisdiction is based on the "arising under" clause[59] and where the rule of decision is to be provided by non-federal law.[60] The "arising under" clause states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."[61]

The dispute in *Verlinden* was to be governed by non-federal law, relative to the anticipated breach of the letter of credit.[62] Since no diversity existed between the parties,[63] jurisdiction was asserted as arising under a federal law, the Foreign Sovereign Immunities Act. To sustain the constitutionality of the FSIA, under the circumstances presented, there had to be some provision in the Constitution upon which the grant of jurisdiction could be based.[64]

In order to determine whether the cause of action presented in the *Verlinden* case would properly lie within the original jurisdiction of the district court based upon the "arising under" clause, the Court reawakened the test established by Chief Justice Marshall in 1824 in *Osborn v. Bank of the United States*.[65] The *Osborn* test, which determines whether there is sufficient foundation for jurisdiction under the "arising under" clause as quoted by the Court, is: "[T]he 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."[66] According to *Osborn*, the scope of article III is clear. Its powers are coextensive with the powers of the other two branches of the government. This is necessary so that the judiciary can be competent to give efficacy to all of the laws passed by Congress. Likewise, the executive

59. The issue in this case is concerned with the proper scope of jurisdiction based directly on the Constitution under the "arising under" clause. Jurisdiction under the FSIA is not based on the general federal question statute, 28 U.S.C. § 1331.

60. *See supra* note 8.

61. U.S. CONST. art. III, § 2, cl. 1.

62. *See supra* note 8.

63. The diversity clause has not been interpreted to be broad enough to confer jurisdiction over actions by foreign plaintiffs, since a foreign plaintiff is not a "State, or [a] Citize[n] thereof." 103 S. Ct. at 1970, citing Mossman v. Higginson, 4 Dall 12 (1800).

64. Kline v. Burke Construction Co., 260 U.S. 226 (1923).

65. 9 Wheat 738 (1824).

66. *Id.* at 822.

branch would have equal power to execute all of the laws.[67]

In *Osborn*, the United States Bank sought an injunction to prohibit Osborn, a state auditor, from proceeding against the bank to collect a tax for operating in the state contrary to its laws. Under the federal charter creating the Bank, it was given the power "to sue and be sued" in all state courts of competent jurisdiction and in any circuit court of the United States.[68] This was interpreted as the equivalent of conferring jurisdiction on the federal courts.[69] In addition, the charter defined the duties of the Bank. It was similarly contended in *Osborn* that the question presented did not arise under the laws of the United States because the final determination depended on several general principles of state law and not any federal act of Congress.[70] Marshall applied his test and determined, to the contrary, that but for the law creating the Bank and giving it the right to sue, the case never would have existed.

According to *Osborn*, once the test was applied and a federal issue found as an ingredient in the case, all other issues could be decided as incidental to the federal jurisdiction. The *Osborn* Court was concerned that to do otherwise could result in the federal courts never having a whole case to decide, but only the particular issue requiring the construction of the laws of the United States as an insulated point on appeal.[71] A further concern of the *Osborn* Court was that the laws of the United States be interpreted and applied uniformly.

Despite criticism leveled at the test applied in *Osborn* in recent and past years as being overly broad, the Court in *Verlinden*

---

67. *Id.* at 818-19.

68. *Id.* at 817.

69. *Id.* at 817-18.

70. The opinion in *Osborn* proceeds to discuss in detail the situation that would be presented if the Bank were asserting a claim under a state law contract action rather than the right for the state to tax a federal entity, the Bank. This is so that it can decide all cases in which the Bank might be involved. *See* discussion C. WRIGHT, LAW OF FEDERAL COURTS § 17, 63-65 (3d ed. 1976). *See* companion case: Bank of the U.S. v. Planter's Bank of Georgia, 9 Wheat 904 (1824).

71. The reasoning in *Osborn* was further based on the principle that in any case where original jurisdiction could be granted to the federal courts, appellate jurisdiction could also be granted. In actuality, there appears to be a distinction between original and appellate jurisdiction. If the adequate state grounds doctrine applied, for example, then the federal courts would not be able to review the case even though there was a federal question contained in the case. *See* discussion, J.NOWAK, R.ROTUNDA, J.YOUNG, CONSTITUTIONAL LAW 85-89 (1978).

referenced *Osborn* as the controlling case regarding the proper scope of article 3, "arising under" jurisdiction. Justice Johnson dissented in the *Osborn* case on the grounds that the test was too speculative—granting jurisdiction merely on the ground that a federal question might be raised—and feared that the jurisdiction of the state courts would be invaded under such a test.[72] Justice Frankfurter, in the dissenting opinion of *Textile Workers Union v. Lincoln Mills*,[73] raised similar concerns. The court of appeals in *Verlinden* discounted the opinion in *Osborn* as consisting of dictum.[74] It thought *Osborn* should be limited to its narrow facts, based on the state of the nation at a time when the national bank needed to be protected from the states. The Supreme Court brushed aside such criticism, asserting that the question presented in *Verlinden* did not merely present a possibility of involving a federal law but fit squarely within the test: "[A] suit against a foreign state under this Act necessarily raises questions of federal law at the very outset, and hence clearly 'arises under' federal law as that term is used in article III."[75]

Foreign Relations Power

Next, the *Verlinden* Court considered from what constitutional source Congress derived the substantive power to enact the FSIA. It found the source to be:

> its powers to prescribe the jurisdiction of Federal courts, art. I, § 8, cl. 9; to define offenses against the 'Law of Nations,' art. I, § 8, cl. 10; to regulate commerce with foreign nations, art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, art. I, § 8, cl. 18.[76]

The Court noted the undisputed power of Congress in the area of foreign relations to regulate the circumstances under which a foreign sovereign may be amenable to suit in the United States. As a

---

72. 9 Wheat at 871-903. It is article 3 which is chiefly responsible for the allocation of cases between the federal and state courts in our federalist system of government. Justice Johnson did not necessarily find the majority opinion in *Osborn* beyond the scope of the Constitution, but rather found that the consequences from such an interpretation would be too great. At the same time, he indicated the possibility that the necessary and proper clause had taken on greater powers than anticipated by the creators of the Constitution, but that one branch of the government could not remodel the Constitution for another branch.

73. 353 U.S. 448, 460-546 (1957).

74. 647 F.2d at 329.

75. 103 S. Ct. at 1971.

76. *Id.* at 1962, n. 19.

further argument of the strength of the federal law aspect of the FSIA itself, the Court emphasized the very sensitive federal issues raised by such regulation and cited *Banco Nacional de Cuba v. Sabbatino*[77] and *Zschernig v. Miller*.[78]

The situation presented in *Sabbatino*, prior to the enactment of the FSIA, originated from a suit brought by a Cuban governmental agency against a commodities broker for conversion of bills of lading on a shipment of sugar. The Cuban government also sought an injunction against Sabbatino, the temporary receiver for the New York assests of C.A.V., a Cuban company owned by American nationals, to prevent him from obtaining the proceeds of the bills of lading. The issue on appeal to the Supreme Court was whether a counterclaim by the defendants could be maintained against the Cuban government for expropriation of the sugar from its former owner, C.A.V., in view of the "act of state" doctrine.[79]

The *Sabbatino* Court spoke of the very important and transcending interest in national policy involved in the case. Justice Harlan, who delivered the opinion, relied on a line of cases before it which had interpreted the "act of state" doctrine: "[t]he rule 'does not deprive the courts of jurisdiction once acquired over a case. . . . To accept a ruling authority and to decide accordingly is not a surrender or abandonment of jurisdiction but is an exercise of it.' "[80]

The *Sabbatino* Court determined that the rule of decision, the "act of state" doctrine, which governed the case was uniquely federal in nature.[81] Although not required by the Constitution, Harlan noted that the constitutional underpinnings for the "act of state" doctrine arose out of the basic relationships between the branches of the government in our system of separation of powers. "[W]e are constrained to make it clear that an issue concerned with a

77. 376 U.S. 398 (1964).

78. 389 U.S. 429 (1968).

79. The "act of state" doctrine precludes the courts from inquiring into the public acts of a foreign sovereign, which it committed within its own territory. The policy reason behind the doctrine is to prevent embarrassment to the executive branch. The Cuban government had expropriated the sugar of certain listed companies in response to a reduction of sugar quotas by President Eisenhower.

80. 376 U.S. at 418 (quoting Ricaud v. American Metal, 246 U.S. 304, 309 (1918)).

81. The rule of decision announced in *Sabbatino* was that the Judicial branch would not examine the validity of a taking of property committed within its own territory by a foreign sovereign, where the foreign sovereign is recognized by the United States. This was held even if the action of the foreign sovereign committed within its own territory was contrary to international law.

basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[82]

The *Sabbatino* Court also indicated that the task of passing on the validity of foreign acts of state involved delicate problems which could hinder our country's goals or the goals of the community of nations as a whole. The *Sabbatino* Court noted the problem which could result if the federal and state courts were left to formulate their own rules, *e.g.*, decisions by state courts might be based on parochial concerns.[83]

In the other case relied on by the Court as establishing the primacy of federal concerns in the area of foreign relations, *Zschernig v. Miller*,[84] an Oregon statute[85] stating conditions under which an alien not residing in the United States could inherit property was held to be an intrusion by the state into the field of foreign relations. This was held even though the descent and distribution of property is peculiarly within the province of the state.[86] The *Zschernig* Court found that the statute required an inquiry into the policy of a foreign nation for the purpose of determining whether that nation allowed a reciprocal right for United States citizens to receive property and payments from its estates and whether it allowed its citizens to receive the proceeds from Oregon estates without confiscation. The *Zschernig* Court found this to be an illegal inquiry. Although state courts could construe laws regarding foreign nations, they could not interfere with international affairs and national foreign policy.[87] The application of the state statute was considered to be a judicial criticism of those nations adhering to a more authoritarian basis of government than that of the United States and affected international relations in a "persistent and subtle way."[88] Thus, *Zschernig* established the extent of the primacy of foreign relations as a federal issue which the Supreme Court would protect.[89]

---

82. 376 U.S. at 425 (footnote omitted).

83. *Id.* at 425 relying on comments made by Judge Philip C. Jessup of the International Court of Justice.

84. 389 U.S. 429.

85. ORE. REV. STAT. § 111.070 (1957).

86. 389 U.S. at 440-41.

87. *Id.*

88. *Id.* at 440.

89. The facts in this case may present an exceptional situation, but if regulations, even

Viewed against the backdrop of these very sensitive federal interests, the Court concluded that the FSIA took on the aspect of a federal substantive statute. Additionally, it emphasized that every case would require an application of the provisions of the act.[90] Since Congress enacted the FSIA pursuant to its Constitutional authority to regulate foreign relations it is differentiated from a purely jurisdictional statute by the Court.

Statutory Federal Question Jurisdiction—The Well-Pleaded Complaint Rule

Before concluding, the Court discussed the wide variance of the court of appeal's decision with its own. It attributed this variance to the substantial reliance by the court of appeals on cases construing the statute granting general federal question jurisdiction, 28 U.S.C. § 1331, and its predecessors. Although section 1331 almost mirrors the words of the "arising under" clause, courts have interpreted it less broadly than the constitutional clause.[91] The FSIA, however, grants jurisdiction based directly on the Constitutional clause.[92] Such reliance by the court of appeals led it to apply the "well-pleaded complaint" rule in its determination of whether a federal issue existed sufficient to maintain federal jurisdiction.[93]

The *Verlinden* Court cited *Gulley v. First National Bank*[94] to explain the "well-pleaded complaint" rule. Under this rule, a court must determine whether a federal issue has been presented by reference to the plaintiff's complaint only. Even if it is apparent that such an issue would be raised in the answer to the complaint or in defendant's petition for removal, this would not be sufficient for presenting a federal question. In addition, a court may not consider any allegations in the complaint which go beyond a statement of the plaintiff's cause of action, even if in anticipation of a proba-

---

in traditional areas of state power, interfere with the nation's foreign policy, according to *Zschernig*, they would have to bow to federal policy.

90. 103 S. Ct. at 1971. *See* discussion of the operation of the provisions of the FSIA *supra* pp. 7-11.

91. 103 S. Ct. at 1971-72. The court of appeals did recognize the distinction between the "arising under" clause of the Constitution and 28 U.S.C. § 1331. However, it confused the test to be applied in measuring the scope of the "arising under" clause with that of the statute.

92. The "arising under" clause of the Constitution provides the appropriate basis for the statutory grant of jurisdiction under the FSIA. 103 S. Ct. at 1970.

93. 103 S. Ct. at 1971-72.

94. 299 U.S. 109 (1936).

ble defense.[95] This rule, which originated in 1877 in *Gold-Washing & Water Co. v. Keyes*,[96] is still viable today. It is thought this rule stemmed from the theory that unless a federal question was presented in the complaint, the court would lack jurisdiction to take any action in the case.[97] As the court of appeals thought that the question of foreign sovereign immunity arose as an affirmative defense and viewed this rule applicable, it held that Verlinden's complaint failed to disclose a need to interpret federal law.[98]

Gulley concerned a suit brought in state court by the Tax Collector of Mississippi to recover overdue taxes from the First National Bank in Meridian, which had assumed the debt under contract. The defendant removed the case to federal court on the basis that the right of the state to tax the shares of national banks was granted by a federal statute.[99] The *Gulley* Court held that no federal question was presented.

Justice Cardozo, in writing the *Gulley* opinion in 1936, listed the numerous tests applied by the courts to determine jurisdiction under the general statutes providing federal question jurisdiction. The first test noted by the *Gulley* Court was that the right or immunity created by the Constitution or the laws of the United States must be an essential element of the cause of action. In accordance with the *Osborn* test, it was required that the right or immunity be such that it would be supported under one construction of the Constitution or laws and defeated under another. Another test enumerated by Cardozo further required that there be a genuine and present controversy and not merely a conjectural one.

Thus, a number of limitations were engraphed onto the determination of a federal cause of action for purposes of statutory federal question jurisdiction. In general, these limitations were adopted by the courts to prevent the federal courts from being clogged with too many cases, especially cases involving insubstantial federal questions.[100] In addition, the "well-pleaded complaint" rule applied as a limitation, often making it difficult to determine

---

95. *Id.* at 112-13.

96. 96 U.S. 199 (1877).

97. C. WRIGHT, LAW OF FEDERAL COURTS § 18, 69. (3d ed. 1976).

98. 103 S. Ct. 1972.

99. Removal was sought by the First National Bank on the ground that the suit was one arising under the United States Constitution. Judicial Code 28, 28 U.S.C. § 71.

100. *See* Paul J. Mishkin, *The Federal "Question" in the District Courts* COL. L. REV. 157-96, describing the different treatments of the words "arising under," as varying according to the instrument in which they appear.

if a genuine and present controversy was presented for purposes of statutory federal question jurisdiction.[101]

Finally, *Gulley* relied on the test in *Puerto Rico v. Russel & Co.*,[102] which required that the nature of the cause of action and not its source be considered.[103] The *Gulley* Court denied the claim by defendants to remove because it was improper to base statutory federal question jurisdiction on a federal law, which was the source of the authority of the state to tax the bank, since that law was too remote and unimportant to the cause of action for back taxes.[104] Although the right to tax the bank could have been an ingredient in the case under the *Osborn* criteria, it was rejected for purposes of statutory federal question jurisdiction.

Early tests interpreting federal question statutes were less restrictive than the later tests applied by the courts.[105] The *Gulley* Court noted modern federal statutes enacted specifically to narrow the scope of federal jurisdiction in certain instances, such as the statute abolishing federal incorporation as a basis for jurisdiction unless the United States holds more than one-half of the stock.[106] In elegant prose, Cardozo noted the gloss which the courts have systematically applied:

> [T]here has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[107]

The limitations cited in *Gulley* are not limitations on the constitutional power of Congress to confer jurisdiction. The *Verlinden*

---

101. WRIGHT, *supra* note 97.
102. 288 U.S. 476 (1933).
103. *Id.*
104. 299 U.S. at 116.
105. *Id.* at 113.
106. *Id.*
107. *Id.* at 118.

Court relied on *Shoshone Mining Co. v. Rutter*[108] to clarify that "arising under" jurisdiction under the Constitution is broader than statutory federal question jurisdiction. In *Shoshone*, an adverse suit was brought, based upon a federal statute,[109] to determine rightful possession of a mining claim. The federal statute provided that adverse claimants of mining claims had the right to bring suit in courts of competent jurisdiction to determine who had the land patent.[110] The *Shoshone* Court concluded that the federal statute in question was itself not a jurisdictional one; the statute contained no express grant of jurisdiction, either exclusive or concurrent, to the federal courts. Jurisdiction, therefore, would have to be based on either the diversity or general federal question statutes and would have been subject to a $2,000 amount in controversy.[111]

The *Shoshone* Court noted that, by virtue of its article IV power,[112] Congress had the right to regulate the disposition of public property. Thus, article IV along with the "arising under" clause of the Constitution gave Congress unlimited power to provide that any controversy of a judicial nature concerning the disposition of public lands be confined to the jurisdiction of the federal courts.[113] "The question, therefore, is not one of the power of Congress, but of its intent."[114] The *Shoshone* Court rationalized that Congress must not have deemed the matter of jurisdiction within the federal courts essential to the administration of the land laws and left the major portion to be determined by the state courts. In contrast, the intent of the FSIA was to consolidate suits within the federal courts to create and maintain a uniform standard.[115]

Weighing heavily the intent of Congress, the *Shoshone* Court concluded that the controversy presented by the complaint did not

---

108. 177 U.S. 505 (1900).

109. REV. STAT. 629, 25 STAT. 433, § 2326.

110. *Id.*

111. Because not every suit involving an adverse action would involve a construction of a law of the United States, but would depend on state law or more frequently be merely a question of fact, the Court in *Shoshone* held that an adverse suit is not in itself sufficient to vest jurisdiction in the federal courts. 177 U.S. at 507-510.

112. Congress has the power under U.S. CONST., art. IV, §3, cl. 2, "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

113. 177 U.S. at 506.

114. *Id.*

115. " '[I]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area,' H.R. Rep. No. 94-1487, at 32, the Act guarantees foreign states the right to remove any civil action from a state court to a federal court, id." 103 S. Ct. at 1969.

raise a federal issue sufficient to vest jurisdiction in the federal courts under the federal question statute. It determined that not every suit to enforce an adverse mining claim would involve a construction of the law of the United States but would more probably depend on state law or be merely a question of fact. It contrasted the federal mining statute as a basis for jurisdiction with a federal statute incorporating an entity, such as in *Osborn*, which would involve a construction of a law of the United States in every case; *i.e.*, whether the corporation had acted within the scope of its authority under the incorporating statute. As the *Shoshone* Court stated:

> A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a controversy, for the thing to be decided is the extent of the right given by the statute.[116]

The FSIA: Jurisdictional vs. Regulatory Statute?

The Court went on to contrast jurisdictional statutes, which do nothing more than confer jurisdiction over a class of suits,[117] with that of the FSIA. The FSIA was considered to be more than a jurisdictional statute in that it sought to regulate under its foreign commerce power and other specific article I powers.[118] The Court pointed to *The Propeller Genessee Chief v. Henry Fitzhugh*[119] case, in contrast to the *Verlinden* case, as presenting an example of a purely jurisdictional statute concerned only with the access to the courts of a class of suits. *Propeller Genesee* involved a tort claim for damages from a collision on Lake Ontario, brought by the owner of a vessel against the owner and master of the Propeller Genesee Chief. The suit was brought in the District Court for the Northern District of New York pursuant to the Act of February 26, 1845,[120] permitting jurisdiction for certain cases occurring on lakes and navigable waters. A threshold issue in the case was the consti-

116. 177 U.S. at 510.

117. The Court noted that the court of appeals had apparently concluded that a jurisdictional statute could never constitute the federal law under which an action arose through its examination of such statutes. 103 S. Ct. at 1973.

118. 103 S. Ct. at 1973.

119. 12 Hon. 443 (1852).

120. 5 Stat. 726.

tutionality of the federal statute. It was thought that the grant by the statute of jurisdiction to the district courts could not be upheld under the admiralty clause of article III of the Constitution[121] because that clause had only been applied to vessels on the high seas or tide waters.[122] Therefore, it was urged that the statute was supported as an exercise of power under the Commerce Clause.

On appeal, the *Propeller Genesee* Court held that no regulations of commerce nor any provision relating to shipping or navigation were contained in the statute. The statute merely extended jurisdiction in all cases of contract or torts concerning steamboats or other vessels greater than 20 tons, licensed for the coasting trade and employed in the business of commerce and navigation between ports in different states or territories.[123] The statute further provided that jurisdiction was limited to cases, at the time of the passage of the act, which would have been under the admiralty jurisdiction had the vessel been on the high seas. The statute would have to be interpreted, in each case, to determine whether the particular vessel qualified for jurisdiction. Nevertheless, the *Propeller Genesee* Court could find no intent to regulate commerce on the part of Congress, and declined to uphold the validity of the statute because jurisdiction did not arise under any proper regulation, pursuant to the commerce power.[124] Not considered by the *Propeller Genesee* Court was whether the jurisdictional scheme itself would serve to promote any federal interests under the commerce clause.

Contrasting the statute presented in that case with the FSIA, the *Verlinden* Court noted that the intent in enacting the FSIA was to provide comprehensive rules to govern foreign sovereign immunity. It considered the jurisdictional aspects of FSIA to be a part of that "comprehensive scheme."[125] For support of the principle that foreign sovereign immunity represented a body of substantive law, the Court turned to two cases, which it had cited ear-

---

121. U.S. CONST., art. III, § 2, cl. 1 provides "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

122. On appeal, however, the Supreme Court in *Propeller Genesee* did uphold the jurisdictional grant under the Admiralty Clause of the Constitution, concluding that the lakes and waters connecting them were public waters within the jurisdictional grant of that Constitutional clause.

123. 12 How. at 451-52.

124. *Id.*

125. 103 S. Ct. at 1973.

lier in its opinion: *Ex parte Peru*[126] and *Mexico v. Hoffman.*[127]

Hoffman determined that the standard to be adhered to by the judiciary in deciding whether to grant immunity to a sovereign was that the decision must be rendered in conformity with the principles established by the State Department, which was charged by the Constitution with the conduct of foreign affairs. The *Hoffman* Court noted that, in order to render its decision, it would have to determine, for example, the character of a vessel and its operation. The *Hoffman* Court considered a decision concerning immunity to be very important: "Every judicial action exercising or relinquishing jurisdiction over . . . a foreign government has its effect upon our relations with that government."[128] Likewise, the Supreme Court in *Ex parte Peru*[129] noted that such an exercise of jurisdiction could be a threat to the dignity of a foreign nation, effecting our foreign relations with that nation.

Thus, the *Verlinden* Court concluded that the scheme of the FSIA, channeling cases away from the state courts and into the federal courts, in order to achieve a uniform standard, was an aspect of substantive federal law based on Congress's foreign relations and foreign commerce powers.[130]

The Court also contrasted the FSIA with the purely jurisdictional statute in *Mossman v. Higginson*,[131] which conferred jurisdiction on federal courts over actions "where an alien is a party."[132] The statute was found to be beyond the scope of Article III, both in regard to diversity jurisdiction and "arising under" jurisdiction, where there was an action by one alien against another alien. The problem with that statute in contrast to FSIA was that it did not regulate.[133]

Application of the Osborn Test

The Court ended its opinion by applying the *Osborn* test to *Verlinden*. If the Court were to determine that none of the excep-

126. 318 U.S. at 578.
127. 324 U.S. at 30.
128. *Id.* at 35.
129. 318 U.S. at 578.
130. 103 S. Ct. at 1973.
131. 4 Dall. 12 (1800).
132. *Id.*
133. 103 S. Ct. at 1973.

tions[134] to immunity under the FSIA were met, then the plaintiff would not have the right to bring suit in any court in the United States. Under an opposite construction of the FSIA, the suit would lie. The Court concluded that: "The resulting jurisdictional grant is within the bounds of article III, since every action against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law, within the meaning of article III."[135]

The case was then remanded by the Supreme Court to the Court of Appeals to determine whether an exception to immunity could be found to satisfy the substantive requirements of the FSIA so that Verlinden could proceed with the action.

Protective Jurisdiction

In a footnote to its opinion, the Court maintained that the constitutionality of the FSIA could be easily demonstrated and that no such considerations of "protective jurisdiction" theories were necessary.[136] "Protective jurisdiction" may be defined as that theory which permits jurisdiction under the "arising under" clause of the Constitution based on a jurisdictional statute alone, if that statute protects a significant federal interest. In general, the significant federal interest must be in strong need of protection.[137] Such interests may vary and are thought to include forum-based interests where there is a special need for uniformity of decision and a uniform application of procedural rules, and where states may render parochial and partial decisions.[138] The theory may even apply where there is a need to confer jurisdiction so that the courts may develop an area of judicially created federal common law.[139]

The "arising under" clause provides jurisdiction where a case is governed by substantive federal law. However, a primary purpose of the establishment of federal jurisdiction in the Constitution was for the protection of congressionally-created interests or

134. 28 U.S.C. §§ 1605, 1607. *See* discussion *supra* pp. 7-11.

135. 103 S. Ct. at 1973.

136. 103 S. Ct. at 1970, n. 17.

137. Protective jurisdiction would be applicable where the rule of decision is to be based on state or other nonfederal law. *See* Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933-1025 (1982); *See also* Wright, *supra* note 93, §20, 77-79.

138. *See* Rosenberg, *The Theory of Protective Jurisdiction*, *supra* note 137, at 947-54.

139. *Id.*

other federal interests.[140] Thus, it is possible that theories of "protective jurisdiction" may be constitutionally sound.

Proponents of "protective jurisdiction" vary as to its correct scope.[141] Some commentators would allow such jurisdiction where any interest is involved which could have been regulated under an Article I power by Congress,[142] while others require that there be "an articulated and active federal policy" before the Article I power is appropriate to confer jurisdiction.[143]

Ironically, the principal case relied on by the *Verlinden* Court is the case which is most often credited with establishing the theory of protective jurisdiction, *Osborn v. Bank of the United States*.[144] In that case, Congress had articulated a policy of establishing a federal banking system. In order to protect its newly formed banks from antagonistic state court decisions, it was necessary to provide a federal forum. However, a further requirement in the *Osborn* test was that a federal law be an original ingredient in the suit. The original ingredient in *Osborn* was the bank's very existence as a creature of federal law.[145] Although not discussed by the Court, jurisdiction in *Verlinden* could also have been sustained under a theory of protective jurisdiction.

The FSIA was prompted by the need to provide for uniform standards in the determination of foreign sovereign immunity. Although jurisdiction in the federal courts is not exclusive under the Act, the broad removal provision steers cases out of the state courts so that local interests and prejudices can be avoided. This scheme promotes a significant federal interest: the favorable maintenance of our foreign relations and foreign commerce under Article I. Such an interest, based on the analysis in *Sabbatino* and *Zschernig*, would be great enough to allow for federal jurisdiction

---

140. P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 844-850 (2d ed. 1973).

141. "[C]ourts were thought of as indispensible instruments for the vindication of national authority." *Id.* at 6, n.19.

142. Professor Wechsler would allow a grant of "protective jurisdiction" wherever Congress has substantive legislative power. Wright, *supra* note 93, §20, n.2. *See* Wechsler *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 224-25 (1948).

143. Professor Mishkin would limit such jurisdiction to those areas of the law where Congress has an articulated and active policy regulating a field. Wright, *supra* note 93, §20, n.2. *See* Mishkin, *The Federal "Question" Jurisdiction of the District Courts*, 53 COLUM. L. REV. 157, 184-96 (1953).

144. 9 Wheat. 738 (1824).

145. *Id.* at 822-28.

under a theory of "protective jurisdiction."

Support for the application of such a theory can be found in the cases of *Schumacher v. Beeler*[146] and the *Williams v. Austrian*,[147] which were not cited by the *Verlinden* Court in its opinion. *Schumacher* concerned the interpretation of section 23(b) of the Bankruptcy Act.[148] The District Court in *Schumacher* had dismissed a suit brought by a trustee in bankruptcy against a sheriff to enjoin the sale of property, executed on by the State, for lack of jurisdiction. On appeal, the Supreme Court in *Schumacher* held: "[C]ongress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such [trustee] suits[149] and could prescribe the conditions upon which the federal courts should have jurisdiction."[150]

Thirteen years later, in 1947, in the *Austrian* case, the Court assumed without discussion that Congress had the power to confer jurisdiction in a trustee suit, based on its article I bankruptcy power, and without the usual article III grounds for federal jurisdiction. *Austrian* involved a suit by the reorganization trustee against certain officers and directors alleged to have conspired to misappropriate assets of a corporation prior to its reorganization. State law governed the disposition of both the *Schumacher* and *Austrian* cases.

While federal jurisdiction could serve the uniform and efficient development of bankruptcy matters, state courts are consequently deprived of their jurisdiction.[151] In regard to this expansion, the *Austrian* Court noted, however, that it must bring about Congressional policy without comment as to the advisability of the action taken by Congress. "Judicial drives to limit the jurisdiction of federal courts should not lead to decision falling short of complete

---

146. 293 U.S. 367 (1934).

147. 331 U.S. 642 (1947).

148. 11 U.S.C. § 46 (a), (b). Section 23(a) provides: "The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees. . . . "

Pursuant to section 23(b), trustee suits are to be brought in the court where the bankrupt might have brought them had no bankruptcy proceeding been brought unless consent were given by the adverse party or in the case of certain exceptions relating to fraudulent transfers and voidable preferences under sections 60(b), 67(e) and 70(e).

149. These trustee suits were undisputably governed by state law.

150. 293 U.S. at 374.

151. *See* dissenting opinion, 331 U.S. at 662-68.

effectuation of statutory scheme."[152]

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[153] a split court rejected the theory that article I itself could empower Congress to confer jurisdiction on courts beyond the limits imposed by article III. "Protective jurisdiction," being a more subtle theory, seeks to sustain jurisdiction within the limits of article III.[154] A chief criticism of this theory, however, came from Justice Frankfurter:

> The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III.[155]

Federal Common Law

In *Verlinden*, a more conservative approach than that of "protective jurisdiction" for sustaining jurisdiction could have been the Court's adoption of federal common law. A case arising under federal common law is one arising under the laws of the United States and presents a true federal question.[156] The instances in which federal common law have been created are, however, few and restricted.[157]

Known for its adoption of federal common law, *Clearfield Trust Co. v. U.S.*[158] concerned a suit brought by the United States to recover payment on a forged check drawn on the Treasurer of the United States. The *Clearfield* Court noted that because the issuance of commercial paper by the United States was on a vast scale, the application of state law would result in exceptional uncertainty, "making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule

---

152. *Id.* at 662.

153. 337 U.S. 582 (1949). The case concerned the validity of a statute permitting citizens of the District of Columbia to bring suit in the federal courts against citizens of a state.

154. Wright, *supra* note 93, at §20, 77.

155. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 474-75 (1957).

156. WRIGHT, *supra* note 97, at §60, 282.

157. *Id.* at 283.

158. 318 U.S. 363 (1943).

was plain."[159]

In *Textile Workers Union of America v. Lincoln Mills of Alabama*,[160] the Supreme Court also held that in the area of collective bargaining contracts, courts may fashion common law. Although the Court in that case was faced with the problem of whether section 301 of the Labor Management Relations Act of 1947[161] was a purely jurisdictional statute, it interpreted the statute as an authorization to adopt federal common law.

Likewise, the Court in *Verlinden* could have interpreted the FSIA as presenting a similar mandate. In fact, the petitioners urged that section 1606 of the Act, setting out a general rule that the foreign sovereign is to be held "liable in the same manner and to the same extent as a private individual,"[162] rendered every claim under the Act a federal cause of action.[163]

Sabbatino is also recognized as allowing adoption of federal common law in the area of foreign relations.[164] The Court in that case noted that federal common law may be adopted when it is necessary to protect uniquely federal interests, the ultimate authorization generally being derived from a statute.[165] If section 1606 of the Act had been interpreted as a mandate to adopt federal common law, then the action brought by *Verlinden* for anticipatory breach of the letter of credit would have been resolved under principles of federal law and clearly would have "arisen under" the Constitution.

Conclusion

It has always been particularly problematic to determine jurisdiction in a case where the cause of action appears to be determined by state law, but where some federal law is also an ingredient in the suit. The Court, presented with this problem in *Verlinden*, applies the *Osborn* test. Under such a test, the scope of jurisdiction under the "arising under" clause of article III is very expansive. Whether jurisdiction can be maintained as a federal

159. 318 U.S. at 367.
160. 353 U.S. at 448.
161. 29 U.S.C. § 185 (1947).
162. 28 U.S.C. §1606. *See* discussion *supra*, at p. 9.
163. 103 S. Ct. at 1972, n. 22.
164. BATOR, *supra* note 140, at 806-09.
165. 376 U.S. at 423-25.

question under article III depends on whether the outcome would vary based on the interpretation of the federal law. The Court's application of the *Osborn* test fails because even with a purely jurisdictional statute, it is likely that a suit may be brought under one construction of the statute and not under another construction of the statute. Before applying the *Osborn* test, the Court goes to lengths to label and determine that the FSIA is a substantive statute. Thus, although not a requirement of the test, the law relied on must be substantive; a purely jurisdictional statute would be insufficient to base jurisdiction under the "arising under" clause of the Constitution.

The Court in *Verlinden* was faced with a statute that on its surface concerns access to the courts like any other jurisdictional statute regulating the types of actions which may be brought in a particular court. The Court had to pursue a course that was very close to that it would have taken under a theory of "protective jurisdiction." The same factors which make the FSIA a substantive statute would have also justified the application of a theory of "protective jurisdiction." It is the peculiar need to provide a comprehensive scheme of jurisdiction in the federal courts which makes the FSIA a regulatory statute under the foreign relations power of the Constitution.

Verlinden may be a step toward the acceptance of the "protective jurisdiction" theory in the future. It is understandable that the Court would be reluctant to sustain jurisdiction under such a theory, which hypothetically could equip Congress with much power and upset the distribution of cases between state and federal courts. A carefully circumscribed theory of "protective jurisdiction," however, would alleviate such concerns and could provide a coherent and efficient basis for allowing jurisdiction in certain circumstances where necessary to protect important federal interests. The Court also chose not to adopt federal common law as the justification to sustain jurisdiction. This would have been an intrusion into traditional areas of state law, with the consequence that every case concerning a foreign sovereign, regardless of the subject matter of the suit, would than have been governed by federal law. Instead, the Court in *Verlinden* maintained that the FSIA is a substantive statute and sustained jurisdiction under standard theories of "arising under" jurisdiction.

SHARON L. BLAKE