FOREIGN RELATIONS—JURISDICTION—FEDERAL JURISDICTION OVER FOREIGN CITIZENS' NONFEDERAL CLAIMS AGAINST FOREIGN SOVEREIGNS HELD CONSTITUTIONAL—*Verlinden B.V. v. Central Bank of Nigeria*, 103 S. Ct. 1962 (1983).

When President Gerald R. Ford signed the Foreign Sovereign Immunities Act (FSIA)[1] into law on October 22, 1976, he hailed the statute as "carr[ying] forward a modern and enlightened trend in international law."[2] The enactment of the FSIA provided American courts, for the first time, with exclusive and comprehensive guidelines for adjudicating issues of sovereign immunity when they are raised as a defense[3] in actions against foreign states.[4] While its draftsmen successfully incorporated several significant substantive and procedural

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[1] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-1611) (amending 28 U.S.C. §§ 1332, 1391, 1441 (1976)) [hereinafter cited as FSIA]. The signing of the FSIA concluded the arduous legislative process endured by proponents of the restrictive theory of sovereign immunity. See *infra* text accompanying notes 93-97 for a discussion of this theory. The first bill designed to regulate sovereign immunity was introduced by Senator Sam Ervin in 1961. S. 3795, 87th Cong., 2d Sess., 108 CONG. REC. 22460 (1962). Its primary purpose was "to provide means of redress for the unlawful seizure of American property by foreign governments." *Id.*

In 1973, legislation drafted jointly by the Departments of State and Justice was introduced into both Houses of Congress, von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 43 (1978), providing for the first comprehensive statutory scheme for adjudicating claims of sovereign immunity. S. 566, 93d Cong., 2d Sess., 119 CONG. REC. 2213 (1973) (statement of Senator Hruska); *see also* Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAW. 408 (1974); Comment, *The Impact of S. 566 on the Law of Sovereign Immunity*, 6 L. & POL'Y INT'L BUS. 179 (1974). This legislation was not enacted, however, because of opposition by the admiralty bar over certain maritime provisions. von Mehren, *supra*, at 44. The Departments of State and Justice revised the bills, and the present draft of the FSIA was reintroduced in both Houses of Congress on October 31, 1975. *Id.*

[2] 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

[3] "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." H.R. REP. No. 1487, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606 [hereinafter cited as HOUSE REPORT, with page citations to 1976 U.S. CODE CONG. & AD. NEWS]. Sovereign immunity constitutes an affirmative defense, and it must be specially pleaded by a foreign state defendant, which bears the burden of producing sufficient evidence to support its immunity claim. *Id.* at 6616. For a discussion of the development of the doctrine of sovereign immunity, see *infra* text accompanying notes 55-60.

[4] HOUSE REPORT, *supra* note 3, at 6610. By enacting the FSIA, Congress accomplished four specific objectives. *Id.* at 6605. First, the FSIA codified the restrictive theory of sovereign immunity. *Id.*; *see also infra* note 112 and accompanying text. Second, the FSIA transferred the determination of sovereign immunity in individual cases from the State Department to the judiciary. HOUSE REPORT, *supra* note 3, at 6605-06; *see also infra* note 113 and accompanying

concepts into the FSIA,[5] the sparsity of the statute's language has occasioned frequent litigation in which courts have attempted to delineate the scope of its various provisions.[6] Among the issues which are left unclear by the terse language of the FSIA and the various cases which had construed it was whether 28 U.S.C. § 1330(a)[7] authorizes a foreign plaintiff to maintain a suit against a foreign state in a United States district court on a nonfederal cause of action.[8]

On its face, section 1330(a) fixes no limitation upon the nationality of a potential plaintiff,[9] and it appears that Congress never envisioned the possibility that foreign citizens might utilize the provision as the basis for bringing actions against foreign states.[10] The Supreme

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text. Third, the FSIA provides the means both for obtaining *in personam* jurisdiction over a foreign state and for making service of process upon it. HOUSE REPORT, *supra* note 3, at 6606. Fourth, the FSIA empowers a successful plaintiff to enforce his judgment against a foreign state. *Id. See generally Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 25-26 (1976) [hereinafter cited as *1976 Hearings*] (testimony of Monroe Leigh, Legal Advisor, Dep't of State). The FSIA does not alter either the substantive law of liability or the law of diplomatic and consular immunity. HOUSE REPORT, *supra* note 3, at 6610.

[5] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). The FSIA resolves three issues of critical importance in an action against a foreign state: (1) whether sovereign immunity can be pleaded as a defense; (2) whether the court can properly exercise subject matter jurisdiction over the claim; and (3) whether personal jurisdiction over the defendant has been properly obtained. *Id.*

[6] *See, e.g.*, Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981) (due process analysis must be utilized in determining whether personal jurisdiction can be obtained under FSIA), *cert. denied*, 102 S. Ct. 1012 (1982); Rex v. Cia. Pervana de Vapores, S.A., 660 F.2d 61 (3d Cir. 1981) (upholding nonjury trial requirement of FSIA against seventh amendment challenge), *cert. denied*, 102 S. Ct. 1971 (1982); Corporation Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980) (FSIA does not apply retroactively), *cert. denied*, 101 S. Ct. 863 (1981); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) (foreign state defendant in multiparty suit may remove entire action from state to federal court under FSIA); Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (waiver exists under FSIA where contract includes arbitration agreement). *See generally* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979).

[7] For the text of this section, see *infra* note 9.

[8] Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1965 (1983).

[9] The section reads:

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

28 U.S.C. § 1330(a) (1976).

[10] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 324 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983) ("Congress formed no clear intent as to the citizenship of plaintiffs under the [FSIA]. It probably did not even consider the question."); *see also* Kane,

Court addressed this substantial question in *Verlinden B.V. v. Central Bank of Nigeria*,[11] and determined both that section 1330(a) authorizes a foreign citizen to bring suit against a foreign state in a United States district court on a nonfederal claim[12] and that Congress, in granting such subject matter jurisdiction, did not exceed the scope of its authority under article III of the Constitution.[13] Although the full import of the Court's decision cannot readily be ascertained, it appears likely that American courts increasingly will be chosen as the forum for disputes between foreign citizens and foreign states.[14]

The transaction which provoked the *Verlinden* litigation epitomizes the type of commercial dealings between a state and a private entity which have become prevalent in the global marketplace.[15] In 1975, the West African state of Nigeria, its economy vivified by the sharp worldwide increase in the price of petroleum,[16] embarked upon a monumental spending program aimed at transforming itself into a modern industrial society.[17] The projects contemplated as part of this program required Nigeria to purchase massive quantities of cement,[18]

Suing Foreign Sovereigns: A Procedural Compass, 34 STAN. L. REV. 385, 389-90 (1982) (no clear congressional intent evidenced as to whether FSIA available to foreign plaintiffs).

[11] 103 S. Ct. 1962 (1983).

[12] *Id.* at 1969; *see also infra* text accompanying notes 120-29.

[13] *Verlinden*, 103 S. Ct. at 1973; *see also infra* text accompanying notes 130-54. For the text of art. III see *infra* note 132.

[14] *See generally* Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1861, 1861-62 (1981) (describing increased ease with which foreigners can prosecute claims in United States); *1976 Hearings*, *supra* note 4, at 33 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Dep't of Justice) (anticipating additional suits). *But see id.* at 31 (long-arm provision of FSIA will assure that "our courts are not turned into small 'international courts of claims' "); Kane, *supra* note 10, at 389 n.26 (FSIA long-arm provision will prevent American courts from being clogged with all-foreigner suits).

[15] *See* Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356 (C.A.). "Governments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial in their nature." *Id.* at 386.

[16] N.Y. Times, Feb. 11, 1975, at 59, col. 1.

[17] *Id.* Nigeria's five year development plan called for a total expenditure of $100 billion. N.Y. Times, Dec. 4, 1975, at 63, col. 2. Forty-five billion dollars of this sum was to be applied to programs which included, *inter alia*, increasing agricultural production, providing free primary and secondary education for all school age children, development of Nigeria's steel and petrochemicals industries, construction of additional oil refineries, and construction of roads and airports. N.Y. Times, Feb. 11, 1975, at 59, col. 1.

[18] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 302 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). Nigerian planners estimated that the various projects would require five million tons of cement during 1975, but for reasons unknown, the Nigerian government contracted to purchase 21 million tons. N.Y. Times, Dec. 4, 1975, at 63, col. 2; *see infra* note 31 and accompanying text.

and the government entered into myriad contracts with cement suppliers from around the world.[19]

Among these firms was a Dutch corporation, Verlinden B.V. (Verlinden), which on April 21, 1975 agreed to furnish 240,000 metric tons of Portland Cement at a price of sixty United States dollars per ton.[20] In exchange, the government of Nigeria promised to establish, within twenty-one days of the execution of the agreement, an "Irrevocable, Transferable abroad, Divisible and confirmed Letter of Credit in favour of the seller for the total purchase price" through the financial institution chosen by Verlinden to confirm the transaction, in this case Slavenburg's Bank of Amsterdam.[21] The contract also stipulated

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[19] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 303 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). In all, Nigeria entered into 109 contracts to purchase cement from 68 separate suppliers. *Id.*

[20] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). The total contract price was $14,400,000. *Id.*

[21] *Id.* (footnote omitted). A letter of credit is a device used to guarantee that a seller will be paid when he ships merchandise to a buyer. Colleran, *Commercial Letters of Credit*, in THE INTERNATIONAL BANKING HANDBOOK 239 (W. Baughn & D. Mandich eds. 1983). Letters of credit operate as follows: a buyer (the "account party") establishes a letter of credit with his bank (the "issuing bank"), in favor of the seller (the "beneficiary"). The issuing bank agrees to make payment when the beneficiary proves that the shipment has taken place by presenting specified documents. *Id.*

Letters of credit facilitate international commercial transactions by assuring that the beneficiary will be paid so long as his shipment conforms with the letter's terms, while guaranteeing that the account party will not be required to make payment until he receives documentation that the shipment has been made. *Id.* at 240. Letters of credit may be either revocable or irrevocable. U.C.C. § 5-103(1)(a) (1978). An irrevocable letter of credit may not be modified or withdrawn without the consent of both the account party and the beneficiary. *See* 5 U.C.C. SERV. (MB) ¶ 51.02 (1982); *see also* Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 322 n.7 (2d Cir. 1981) (describing irrevocable letter of credit), *rev'd and remanded*, 103 S. Ct. 1962 (1983). The confirming bank, which is generally a correspondent of the issuing bank, "in effect issues its own credit which will usually have the same terms and conditions of the original [letter of credit]." 5 U.C.C. SERV. (MB) ¶ 52.29 (1968 Rel. No. 1); *see also* Hamzeh Malass & Sons v. British Imex Indus., Ltd., [1958] 2 W.L.R. 100 (C.A.). "A vendor of goods selling against a confirmed letter of credit is selling under the assurance that nothing will prevent him from receiving the price." *Id.* at 102. For a detailed description of the mechanics of letters of credit, see Colleran, *supra*, at 239-51.

Under the terms of the Nigerian cement contracts, whenever a vendor fully loaded a vessel and insured the cargo to Nigeria it was entitled to present certain documents to the confirming bank in exchange for its payment. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982); *see also* National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 627 n.3 (S.D.N.Y. 1978) (describing required documents), *aff'd*, 597 F.2d 314 (2d Cir. 1979). Since the letters of credit were confirmed, the confirming banks were obliged to pay the vendors even if, for any cause, the vessels never reached Nigeria. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982).

that the maximum demurrage rate would be $3,500 per diem.[22] Dutch law was chosen to govern the contract, and it was agreed that any discord would be settled through arbitration conducted by the International Chamber of Commerce in Paris.[23]

Nigeria established the letter of credit with the Central Bank of Nigeria (Central Bank) on June 23, 1975.[24] The credit that was established, however, contained terms which deviated materially from the provisions specified in the contract.[25] Significantly, the letter of credit was unconfirmed[26] and was made payable through a New York bank, Morgan Guaranty Trust Company (Morgan), rather than Slavenburg's Bank, the choice of Verlinden.[27] In response to Verlinden's protests over the unilateral variance of the contractual terms,[28] Nigeria made piecemeal amendments to the letter of credit in order to render it commercially usable.[29] On August 21, 1975, acting in reli-

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[22] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Demurrage is defined as "a penalty imposed upon a consignee when a vessel is delayed in discharging its cargo." National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 627 n.1 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *see also* Hellenic Lines, Ltd. v. Director Gen. of India Supply Mission, 319 F. Supp. 821 (S.D.N.Y. 1970) (discussing demurrage), *aff'd*, 452 F.2d 810 (2d Cir. 1971).

[23] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983).

[24] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 322 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). The Central Bank of Nigeria (Central Bank) is an instrumentality of the Nigerian government and occupies a position comparable to the United States Federal Reserve. *Id.* at 322.

[25] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983).

[26] *Verlinden*, 103 S. Ct. at 1965-66. Pursuant to the unconfirmed letter of credit, Morgan functioned merely as an advising bank. *Id.* at 1066 n.l. As such, its duties were limited to providing Verlinden with notice of the issuance of credit by Central Bank. *See* U.C.C. § 5-103(1)(e)(1978); *see also supra* note 21 and accompanying text. It was not required to guarantee independently the letter of credit. *Verlinden*, 103 S. Ct. at 1966 n.1.

[27] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Nigeria's substitution of Morgan as advising bank in all of its cement purchase contracts was consistent with the long term banking relationship between them. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). Morgan served as Nigeria's correspondent bank in the United States with unlimited drawing rights. *Id.* at 304-05. In addition, Morgan advised $200 million in Nigerian letters of credit, while confirming additional credits of $70 million. *Id.* at 305.

[28] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Additionally, Verlinden complained that, unlike the contract, the letter of credit did not specify the time at which demurrage payments would commence. *Id.*

[29] *Id.* Morgan advised Verlinden of these amendments, although it never confirmed the letter of credit. *Id.* That the amendments constituted a breach of the letter of credit was acknowledged by both parties and was not an issue at trial. *Id.* at 1288.

ance upon the contract, Verlinden awarded a subcontract to Interbuco, a Liechtenstein corporation, whereunder Interbuco agreed to furnish cement to Verlinden at fifty-nine dollars per ton.[30]

During the summer of 1975, as hundreds of ships laden with cement crowded into the harbor of Lagos/Apapa, the Nigerians realized they had drastically overbought.[31] By August, with the harbor hopelessly jammed[32] and with demurrage costs accruing at an astronomical rate, Nigeria took drastic action.[33] It issued a directive requiring ships transporting cement to transmit certain information to its ports authority two months prior to sailing, and refused entry to those vessels which failed to comply.[34] This step failed to alleviate the overcrowding, however, and in late September, Central Bank ordered Morgan, as well as the various other advising banks, to cease making payments under the letters of credit.[35] As a result, cement suppliers brought actions against Nigeria and/or Central Bank in courts around the world.[36]

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[30] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 322 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). The subcontract included a liquidated damages clause under which Verlinden agreed to pay Interbuco five dollars per ton in the event that it failed to accept the cement. *Id.*

[31] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 305 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). Although Nigerian planners calculated that five million tons of cement would be required in 1975, the government ordered over 20 million tons. N.Y. Times, Dec. 4, 1975, at 63, col. 2. One possible explanation for Nigeria's overzealousness was that, in the past, it had received no more than 20% of the cement it had ordered. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 305 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). To compound Nigeria's dilemma, Apapa, its only major port, was capable of discharging only five million tons of cargo annually. N.Y. Times, Oct. 19, 1975, at 12, col. 4.

[32] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 305 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). In July 1975, over 400 ships clogged Apapa harbor. *Id.* The morass was described by one maritime expert as "the worst shipping jam in modern history." *The Cement Block*, TIME MAG., Oct. 27, 1975, at 34.

[33] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 305 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). Some ships were collecting over $1,000 a day while waiting to be unloaded while the total demurrage costs during the period from March to October 1975 was $18 million. N.Y. Times, Oct. 19, 1975, at 12, col. 3. There were even reports of shipowners who dispatched antiquated vessels to Apapa for the sole purpose of collecting demurrage. *The Cement Block*, *supra* note 32, at 34.

[34] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 305 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982).

[35] *Id.*

[36] *Id.* at 305-06; *see also id.* n.15 (providing partial list of these lawsuits). Nigeria succeeded in partially mitigating the effect of its repudiation by settling with over 40 of its suppliers. *Id.* at 305-06.

Verlinden initiated its action against Central Bank in the United States District Court for the Southern District of New York,[37] asserting that the unilateral amendments to the letter of credit amounted to an anticipatory breach of that instrument.[38] It alleged jurisdiction under section 1330(a), which invests the federal district courts with original jurisdiction over actions against foreign states, provided either that the state waive its immunity, or that a connection exist between the lawsuit and the United States within the meaning of section 1605.[39] Central Bank refuted the claim of jurisdiction, arguing that the FSIA is essentially a procedural statute which does not confer upon the federal courts subject matter jurisdiction over an action between a foreign plaintiff and a foreign state based upon a claim arising under

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[37] At this point, it is necessary to reiterate the distinction between the two independent obligations that were created among Verlinden, Nigeria, and Central Bank. The contract between Verlinden and the government of Nigeria required Nigeria to establish a letter of credit in Verlinden's favor within 21 days. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983); *see also supra* notes 21-23 and accompanying text. The letter of credit constituted a unique agreement between Verlinden and Central Bank, whereunder Central Bank was required to pay Verlinden through the conduit of Morgan. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287, 1301 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983); *see also supra* notes 21-23 and accompanying text.

It is significant that Verlinden elected to sue Central Bank on the breach of the letter of credit, rather than Nigeria for breach of the contract, because it was the *contract* which provided for governance of Dutch law and for settlement by arbitration. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983); *see also supra* note 23 and accompanying text.

Nowhere in the three opinions generated by the Verlinden litigation was Verlinden's motivation behind bringing the suit in the United States, as opposed to the Netherlands, disclosed. Presumably, the property in the Netherlands owned by Nigeria, if any, upon which Verlinden could execute under Dutch law to satisfy its judgment was inadequate. Nigeria, however, did possess sizeable holdings in the United States in the form of accounts in the Federal Reserve Bank of New York. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982). Since Central Bank, although the nominal defendant, was an instrumentality of Nigeria, *see supra* note 24, Verlinden could, if it prevailed in its litigation, execute upon these accounts pursuant to § 1610(b)(2). *See* 28 U.S.C. § 1610(b)(2) (1976); *see also* House Report, *supra* note 3, at 6628.

[38] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1288 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Verlinden sought compensatory and punitive damages totalling $4.66 million. *Id.*

[39] *Id.*; see also *supra* note 9 for text of § 1330(a) & *infra* note 42 for pertinent text of § 1605. Section 1330(a) raises a presumption that a foreign state is entitled to sovereign immunity. The presumption may be rebutted, however, if one of the exceptions enumerated in § 1605 attaches. 28 U.S.C. § 1330(a)(1976); *see* Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity (Part I)*, 85 Com. L.J. 167 (1980)(describing mechanics of FSIA); *see also* House Report, *supra* note 3, at 6612 (same).

the law of an American state or common law.[40] The district court, however, construed section 1330(a) to allow such a suit.[41] Verlinden's complaint was dismissed, nonetheless, as the court determined that the presumption of immunity to which Central Bank, as an instrumentality of Nigeria, was entitled under the FSIA[42] had not been successfully rebutted.[43]

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[40] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1289 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Central Bank's basic contention was that the FSIA merely regulates the conditions under which foreign sovereigns may be sued in United States courts; and does not create a substantive cause of action. Since an action for breach of contract ordinarily is governed by state law, Central Bank reasoned that a federal court had no subject matter jurisdiction over the claim. *Id.* For a discussion of the limitations on jurisdiction imposed by the diversity clause of article III, see *infra* notes 131-33 and accompanying text.

[41] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1292-93 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Judge Weinfeld examined the language of § 1330(a) and observed that it does not limit the nationality of potential plaintiffs. *Id.* at 1292; *see also supra* note 9. Turning to the legislative history, he found such conflicting references as to "parties" and to "our citizens," and was unable to discern a clear congressional intent regarding who could sue as plaintiff under § 1330(a). *Verlinden*, 488 F. Supp. at 1292; *see* House Report, *supra* note 3, at 6604-05. Thus, Judge Weinfeld was compelled to follow the "broad and inclusive" statutory language. *Verlinden*, 488 F. Supp. at 1292.

[42] *See supra* note 39 and accompanying text; *see also* 28 U.S.C. § 1605 (1976). Section 1605 provides, in pertinent part:

> (a) A foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States in any case—
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> (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;
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> (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 activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. (emphasis supplied). *See generally* House Report, *supra* note 3, at 6616-21 (analyzing § 1605).

[43] Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1302 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). The court was unable to pinpoint a sufficient nexus between the transaction and the United States to rebut Central Bank's presumed immunity pursuant to § 1605(a)(2). *Id.* at 1294-1300. Specifically, Judge Weinfeld found no " '[c]ommercial [a]ctivity [c]arried on in the United States,' " since the transaction was conducted entirely outside the United States, between foreigners. *Id.* at 1294 (quoting § 1605(a)(2)). Although Morgan served as advising bank, the court assessed New York's relationship to the transaction as "transitory and insubstantial." *Id.* at 1297.

The court also rejected Verlinden's contention that the decree repudiating the letter of credit was effected in New York, thus qualifying it as an " '[a]ct [p]erformed in the United States in connection with a [c]ommercial [a]ctivity of the [f]oreign [s]tate [e]lsewhere.' " *Id.* (quoting § 1605(a)(2)). Finally, the district court could discern no " '[a]ct. . .[o]utside the United States. . . [c]aus[ing] a [d]irect [e]ffect in the United States.' " *Id.* at 1297-1300 (quoting § 1605(a)(2)). It

The United States Court of Appeals for the Second Circuit affirmed the dismissal of the complaint,[44] although for different reasons. Like the district court, the court of appeals answered the threshold question by construing the language of section 1330(a) as empowering the federal courts to adjudicate an action between a foreign citizen and a foreign state based on a nonfederal cause of action, so long as the immunity of the foreign state defendant has been rebutted.[45] It did not, however, review the district court's finding that Verlinden had not rebutted the presumption of Central Bank's immunity.[46] Instead, it passed on the constitutionality of section 1330(a), and concluded that Congress had exceeded the scope of its authority under article III of the Constitution by conferring upon the federal courts subject matter jurisdiction over such a suit.[47]

The Supreme Court granted certiorari[48] and reversed the Second Circuit's judgment.[49] Agreeing with both lower courts that section 1330(a) permitted Verlinden to maintain its action,[50] the Court also held that the enactment of the provision represented a constitutionally valid grant of subject matter jurisdiction.[51] Since the court of

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found unpersuasive Verlinden's theory that Morgan's repudiation injured New York's reputation as a world financial center. *Id.* at 1298.

Moreover, the district court was unable to construe a waiver, either express or implied, on the part of Central Bank. *Id.* at 1300-02. Although the court acknowledged the precedent for implying a waiver of sovereign immunity where a state has accepted an arbitration clause in a contract to which it is a party, it reiterated that the letter of credit, which was the subject of the suit, had no such clause. *Id.* at 1301; *see* Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (waiver exists under FSIA where contract includes arbitration clause); *see also* House Report, *supra* note 3, at 6617 ("[w]ith respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country. . .").

[44] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983).

[45] *Id.* at 324; *see supra* note 39 and accompanying text.

[46] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 324 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983).

[47] *Id.* at 330. The court of appeals surveyed the provisions contained in article III which authorize Congress to grant jurisdiction to the federal courts. *Id.* at 324. Judge Kaufman found the diversity clause inapposite, because it applies solely in cases to which the citizen of a state is a party. *Id.* at 325; *see* U.S. Const. art. III, § 2, cl. 1. Similarly, he rejected the arising under clause as a legitimate source of congressional authority to enact § 1330(a), Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 330 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983), because he deemed the FSIA to be a procedural rather than substantive enactment. *Id.* at 326-27; *see* U.S. Const. art. III, § 2, cl. 1. He reasoned that a case cannot constitutionally "arise under" a purely procedural statute, *Verlinden*, 647 F.2d at 327, and that, accordingly, Verlinden's complaint did not aver a violation of any federal law. *Id.*

[48] 454 U.S. 1140 (1982).

[49] *Verlinden*, 103 S. Ct. at 1062.

[50] *Id.* at 1970; *see infra* notes 120-28 and accompanying text.

[51] *Verlinden*, 103 S. Ct. at 1973; *see infra* notes 130-55 and accompanying text.

appeals had predicated its affirmance upon the constitutional question,[52] and failed to review the district court's holding that Verlinden did not rebut Central Bank's presumed immunity,[53] the Court was obliged to remand the case to that tribunal for determination of the threshold question.[54]

The doctrine of sovereign immunity has as its origin the ancient concept that a king is divinely annointed, and therefore infallible.[55] It was thought that a monarch was incapable of committing a wrongful act within his own realm.[56] Gradually, kings and queens began to extend personal immunity to their fellow sovereigns in order that they might be afforded similar treatment during their travels.[57] When the monarchical form of government was supplanted by constitutional governments, the state assumed the role of sovereign.[58] Thus, by the

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[52] *See supra* note 47 and accompanying text.

[53] *See supra* note 43 and accompanying text.

[54] *Verlinden*, 103 S. Ct. at 1973-74.

[55] T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION 8 (1970); *see also* Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 185, 215 A.2d 864, 889 (1966) (Musmanno, J., dissenting) (discussing early history of sovereign immunity doctrine).

[56] T. GIUTTARI, *supra* note 55, at 7-8. There developed, at common law, the notion that "the king can do no wrong." *Id.* at 8. This concept formed the foundation of the absolute theory of sovereign immunity. von Mehren, *supra* note 1, at 34; *see infra* notes 59-61 and accompanying text. The status of a sovereign before the law was characterized by one nineteenth century English court as follows:

> "[T]he maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. . . .As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise."

von Mehren, *supra* note 1, at 34 n.7 (quoting Feather v. Regina, [1865] 6 B. & S. 257, 258). Notwithstanding this historical basis, Justice Holmes was impressed by the pragmatic essence of the theory of sovereign immunity, noting that "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

[57] T. GIUTTARI, *supra* note 55, at 8. The extension of personal immunity to foreign monarchs was also the origin of the age old custom of the inviolability of ambassadors accredited to foreign states. T. GIUTTARI, *supra* note 55, at 7. *See generally* M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY (1936) (exhaustive historical analysis of diplomatic and consular immunity).

[58] C. FENWICK, INTERNATIONAL LAW 213 (2d ed. 1934); *see also* Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 186, 215 A.2d 864, 889 (1966) (Musmanno, J., dissenting) (describing transition from monarchical to constitutional government); *cf.* T. HOBBES, LEVIATHAN 141 ("The Soveriegn [sic] of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civill Lawes.").

nineteenth century, it was an accepted tenet of international law that all states were juridically coequal, and that no state could exercise jurisdiction over another.[59] The latter concept, construed strictly, became known as the absolute theory of sovereign immunity.[60]

This theory was firmly embraced as part of American jurisprudence in 1812 in Chief Justice Marshall's landmark opinion in *The Schooner Exchange v. McFaddon*.[61] In that case, an American merchant vessel had been seized by individuals acting on behalf of the French Emperor Napoleon, and armed as a warship.[62] When the vessel entered the port of Philadelphia for repairs it was attached in pursuance of a libel filed by American citizens claiming to be its true owners.[63] The United States Attorney interceded on Napoleon's behalf and urged that the attachment be quashed since the conversion had occurred within the French realm, under its law, and outside the jurisdiction of the United States.[64] Chief Justice Marshall, while noting that a state's jurisdiction within its own borders is plenary,[65] recognized that as a matter of comity every state relinquishes its jurisdiction over foreign sovereigns engaged in friendly acts within that state territory.[66] He concluded that an armed vessel of a foreign sovereign, entering an American port in time of peace and in accordance with customary international law, is impliedly immune from American jurisdiction.[67]

The Marshall opinion in *The Schooner Exchange* was recognized by later courts as the origin of the absolute immunity doctrine in American law,[68] and served as the springboard for its subsequent

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[59] T. GIUTTARI, *supra* note 55, at 5.

[60] *Id.* at 3, 5.

[61] 11 U.S. (7 Cranch) 116 (1812).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 117. An important factor in the decision of the United States to intervene on behalf of Napoleon in the libel was the fact that it enjoyed friendly relations with France. *Id.* One could conjecture that this factor weighed heavily in the Court's decision, inasmuch as the relationship between the United States and Great Britain was decidedly chilled in 1812, thus probably increasing the significance of close ties with Britain's leading European rival.

[65] *Id.* at 135. "The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself." *Id.*

[66] *Id.* at 136. The Chief Justice acknowledged that the absolute equality of sovereigns, combined with the mutual benefit derived from economic and political exchanges between them, "[has] given rise to a class of cases in which every sovereign is understood to waive the exercise of part of [its] complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." *Id.*

[67] *Id.* at 146.

[68] *Verlinden*, 103 S. Ct. at 1967; *see also* von Mehren, *supra* note 1, at 39-40 (Marshall opinion source of sovereign immunity in American jurisprudence). *But see* T. GIUTTARI, *supra* note 55, at 28-29, wherein the suggestion is made that Marshall's fundamental premise was not

expansion.[69] The doctrine was applied without reservation by American courts throughout the nineteenth and early twentieth centuries.[70] In the 1920's, however, the emergence of state participation in economic activities which theretofore had been conducted privately caused a number of commentators to view the extension of the doctrine as inappropriate.[71] In 1921, Judge Mack, in *The Pesaro*,[72] ruled that a merchant vessel owned by a ministry of the Italian government[73] was not entitled to immunity from attachment.[74] He thoroughly reviewed the decisions concerning the immunity of state-owned vessels,[75] as well as the status of the Pesaro before Italian

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that foreign sovereigns inherently are entitled to immunity, but that a state has absolute jurisdiction over all persons and objects within its territory, which it may choose to waive. *Id.* *See generally* B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 65-69 (1939) (discussing effect of opinion on international law).

[69] *Verlinden*, 103 S. Ct. at 1967; *see also* T. GIUTTARI, *supra* note 55, at 28 (discussing tendency of subsequent courts to cite *The Schooner Exchange* for propositions beyond narrow holding of Marshall opinion). For a discussion of the extension of sovereign immunity, see *infra* note 81 and accompanying text.

[70] T. GIUTTARI, *supra* note 55, at 35; *see, e.g.*, *Ex Parte* New York, 256 U.S. 503 (1921) (dicta); United States v. Diekelman, 92 U.S. 520 (1875); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822); The Pizarro v. Matthias, 19 F. Cas. 786 (S.D.N.Y. 1852) (No.11,199); Walley v. Schooner Liberty, 32 La. (12 Cur.) 98 (1838).

[71] T. GIUTTARI, *supra* note 55, at 63. As a consequence of the first world war, many foreign states found it necessary to nationalize important industries, including their merchant fleets. This greatly increased the opportunity for direct contact between American citizens and foreign governments and the potential for litigation between them. Under the theory of absolute immunity an injured American had virtually no recourse against a foreign state, even if the source of the injury was a purely commercial activity. Thus, many scholars opposed the continued expansion of the doctrine. *Id.*; *see also* Comment, *Restrictive Sovereign Immunity, The State Department, and The Courts*, 62 NW. U.L. REV. 397, 400-01 (1967) (describing origin of restrictive theory in post-World War I involvement of states in commercial enterprises).

[72] 277 F. 473 (S.D.N.Y. 1921), *dismissed on reh'g*, 13 F.2d 468 (S.D.N.Y.), *aff'd sub nom.* Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926).

[73] *Id.* The steamship Pesaro was owned by the Kingdom of Italy and operated by the Ministry for Railroad and Maritime Transportation. The plaintiffs, consignees of a shipment of olive oil, initiated a libel *in rem* against the vessel, seeking to enforce a claim for damage to the consignment. *Id.*

[74] *Id.* at 483.

[75] *Id.* at 474-79. Judge Mack noted that Chief Justice Marshall, in *The Schooner Exchange*, distinguished between property possessed personally by a sovereign and that held by a sovereign state. *Id.* at 476; *see also The Schooner Exchange*, 11 U.S. (7 Cranch) at 145. He observed the similarity between that distinction and Marshall's discussion of the effect caused by a state undertaking a commercial activity in Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904 (1824). *Pesaro*, 277 F. at 476 (citing *Planter's Bank*, 22 U.S. (9 Wheat.) at 904). "[W]hen a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen." *Planter's Bank*, 22 U.S. (9 Wheat.) at 907.

Judge Mack also quoted at length from the circuit court opinion in United States v. Wilder, 28 F. Cas. 601 (C.C.D. Mass. 1838) (No. 16, 694), wherein Justice Story, in dicta, distinguished

courts[76] and the significance of state participation in commercial activities[77] The judge concluded that a restrictive theory of immunity should be adopted in cases involving state-owned merchant vessels.[78]

Although *The Pesaro* represented a novel attempt to reconcile the doctrine of sovereign immunity with the changing economic reality of the twentieth century, it was not to survive long as a legal precedent.[79] A unanimous Supreme Court in *Berizzi Brothers Co. v. Steamship Pesaro*[80] strongly reaffirmed the absolute formulation of sovereign immunity adopted in *The Schooner Exchange* and extended it to all state-owned vessels, including those engaged in commercial activities.[81] The litigation concerning the Pesaro is notable because, while

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between state-owned merchant ships and naval vessels. *Pesaro*, 277 F. at 477 (citing *Wilder*, 28 F. Cas. 601). "[I]t was not decided [by the Supreme Court in *The Schooner Exchange*] that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption [as that granted to warships]." *Wilder*, 28 F. Cas. at 604; *see supra* text accompanying note 67. Judge Mack, however, also referred to Judge Gray's statement in Briggs v. Light Boat Upper Cedar Point, 93 Mass. (11 Allen) 157 (1865), that the immunity of state-owned vessels is not confined to warships. *Pesaro*, 277 F. at 478 (citing *Briggs*, 93 Mass. (11 Allen) at 157).

[76] *Pesaro*, 277 F. at 479. Although the Pesaro was owned by the Italian government, it was not immune to suit in Italian courts. *Id.* Similarly, American merchant ships were subject to ordinary process under Italian law. *Id.* at 482. These factors prompted Judge Mack to conclude that the Pesaro's immunity to suit in the United States had been waived. *Id.* at 483.

[77] *Id.* at 481. Judge Mack expressed concern that persons injured while dealing with a foreign government in a commercial setting would find themselves without redress. *Id.; see supra* note 71 and accompanying text. He also cautioned that states engaging in commercial activities would encounter prejudice, because private parties undoubtedly would prefer to deal with commercial entities amenable to suit. *Pesaro*, 277 F. at 481.

[78] *Pesaro*, 277 F. at 483. Judge Mack concluded that, because the commercial activities performed by states had become as important to them as were the noncommercial public functions they performed in earlier times, *id.* at 482, "[i]n many phases of our law to-day it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law." *Id.*

[79] The Pesaro, 13 F.2d 468 (S.D.N.Y. 1926), *aff'd sub nom.* Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926). The order issued by Judge Mack overruling the Italian government's objection to jurisdiction was vacated by consent of the parties, since the question properly before the court was limited to a plea in abatement made by the master of the Pesaro. *Id.* On rehearing before the United States District Court for the Southern District of New York, the case was dismissed "as differing from the great weight of authority in favor of the immunity of a sovereign in a case like this." *Id.* at 469.

[80] 271 U.S. 562 (1926).

[81] *Id.* at 574. Justice Van Devanter, writing for the Court, quoted at length from the Marshall opinion in *The Schooner Exchange*. *Id.* at 571-73. He rejected the contention that *The Schooner Exchange* was inapposite because it involved a warship rather than a merchant vessel, *see supra* text accompanying notes 61-63, noting that in 1812, when the decision was announced, all the world's merchant fleets were privately-owned and operated. *Berizzi Bros.*, 271 U.S. at 573. He concluded that "when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are." *Id.* at 574.

the Supreme Court decision marked the furthest extension of the absolute immunity doctrine,[82] Judge Mack's district court opinion represented its first significant judicial challenge.[83]

In the years following the Supreme Court's decision in *Berizzi Brothers* American courts gradually took a less active role in adjudicating issues of sovereign immunity, deferring instead to the determinations of the Department of State.[84] This practice culminated with the Supreme Court's decisions in *Ex Parte Republic of Peru*[85] and *Republic of Mexico v. Hoffman*[86] in the early 1940's.[87] Chief Justice Stone, who authored the Court's opinion in both cases, stressed in *Ex Parte Peru* the duty of the courts to adhere to the State Department's recommendations concerning immunity.[88] He found as the source of this duty the practical need to prevent embarrassment to the executive branch in its conduct of foreign policy.[89]

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[82] *See* T. GIUTTARI, *supra* note 55, at 74.

[83] von Mehren, *supra* note 1, at 39-40; *see also* T. GIUTTARI, *supra* note 55, at 89 n.9 (noting Mack opinion's analytical strength, despite lack of precedential value).

[84] von Mehren, *supra* note 1, at 40. Prior to 1921, various federal courts had accepted suggestions of sovereign immunity directly from the foreign government represented either by counsel or by its ambassador. T. GIUTTARI, *supra* note 55, at 113. In *Ex Parte* Muir, 254 U.S. 522 (1921), the Supreme Court outlined procedures whereby a foreign government could propound its claim of sovereign immunity, including solicitation of a suggestion of immunity by the Attorney General. *Id.* at 532-33. Justice Stone explicated the import of a suggestion of immunity by the executive branch, in Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938): "If the claim [of immunity] is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General . . . or [some] other officer acting under his direction." *Id.* at 74.

[85] 318 U.S. 578 (1943).

[86] 324 U.S. 30 (1945).

[87] von Mehren, *supra* note 1, at 40; *see also* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 8-10 (1976) (discussing role of State Department in suggesting sovereign immunity); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 547 (1977) (same). *See generally* Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963).

[88] *Ex Parte Peru*, 318 U.S. at 588. In this case, a libel was filed against a merchant ship owned by the Peruvian government. *Id.* at 580. The State Department recognized Peru's claim of immunity and requested that the Attorney General instruct the United States Attorney to suggest to the court dismissal of the libel. *Id.* at 581.

[89] *Id.* at 588. The Court explained that attaching a vessel owned by a friendly state could be viewed by that state as an affront to its dignity, causing an adverse effect upon its diplomatic relations with the United States. *Id.* The Court expressed its approval of the policy whereby an injury to an American citizen caused by a foreign state would be recompensed through diplomatic rather than judicial action. *Id.* at 589; *see also* United States v. Lee, 106 U.S. 196 (1882) (where questions of immunity could involve war or peace, determinations must be left to legislative and executive branches).

The political nature of immunity questions was further emphasized in *Hoffman*.[90] Additionally, the Court held that even if, in a particular case, the State Department did not advance a suggestion of immunity, the judiciary nonetheless could premise such a finding upon the Department's general policy.[91] This practice of judicial deference was controversial because the State Department's inherently political motivations produced inconsistent recommendations of immunity.[92]

In 1952, the State Department abruptly shifted its policy by adopting a restrictive theory of sovereign immunity.[93] In the so-called "Tate Letter"[94] the Department announced that, while it would continue to recognize a foreign state's immunity for its public acts (*jure imperii*), it would no longer consent to immunity for the state's private acts (*jure gestionis*).[95] Although the change in policy signalled by the Tate Letter clearly placed the United States in conformity with the majority of governments adhering to the restrictive theory of

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[90] *Hoffman*, 324 U.S. at 35-36.

[91] *Id.* at 38. The facts in *Hoffman* were similar to those in *Ex Parte Peru* except that the State Department merely transmitted to the trial court a request for immunity from the Mexican government, failing to offer its own suggestion. *Id.* at 31-32. The Court held that despite the lack of a specific State Department determination concerning the propriety of immunity, it could rely upon the Department's customary policy. *Id.* at 38. Since the vessel in question was owned by the Mexican government but operated by a private Mexican corporation, *id.* at 32-33, the Court affirmed the Ninth Circuit's refusal of immunity. *Id.* at 38; *see also* Weber, *supra* note 87, at 9-11 (discussing *Hoffman*).

[92] *See* Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 216 (1979). The inconsistency of State Department suggestions of immunity was particularly evident after the promulgation of the Tate Letter in 1952. *See infra* notes 104-10 and accompanying text.

[93] von Mehren, *supra* note 1, at 41. The reasons for the State Department's sudden change in policy remain unclear. T. GIUTTARI, *supra* note 55, at 188. In the period following World War II, the United States negotiated treaties with 14 different foreign states providing for mutual restrictions on the sovereign immunity of state-controlled businesses. Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964), *cert. denied*, 381 U.S. 34 (1965). It has been suggested that, in light of its newly-acquired preeminence in determining questions of sovereign immunity, *see supra* notes 84-92 and accompanying text, the State Department felt the need to clarify its position in order to obviate speculation concerning the conditions under which it would suggest immunity in the future. T. GIUTTARI, *supra* note 55, at 188. Professor Lowenfeld has offered as a possible explanation for the change of belief, on the part of the State Department, that the absolute theory could no longer be applied justly where a state chose to transact business in the same manner as a private firm. Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U. L. REV. 901, 905-06 (1969).

[94] Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General, 26 DEP'T ST. BULL. 984 (1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976) (appendix to opinion) [hereinafter cited as Tate Letter].

[95] Tate Letter, *supra* note 94, at 984.

sovereign immunity,[96] the letter contained no specific criteria for distinguishing between a state's public and private acts.[97]

In an attempt to make such a distinction, courts fashioned a number of different tests.[98] Some courts applied a "nature of the act" test, under which a public act was defined as one which only a sovereign could perform.[99] Others implemented a "purpose" test, which characterized a public act of a sovereign as one performed for a public purpose.[100] In *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*,[101] the leading case in distinguishing between public and private acts prior to the passage of the FSIA,[102] the court combined these generic tests, and developed five categories of acts for which a state would be entitled to immunity. These categories were: "(1) internal administrative acts, such as explusion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity [and] (5) public loans."[103]

During the period between its adoption of the restrictive theory of sovereign immunity and the enactment of the FSIA, the State Department developed a "quasi-judicial procedure"[104] whereby foreign governments could petition for immunity and submit briefs in

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[96] *Id.* at 984-85. Most of the text of the Tate Letter was devoted to categorizing the world's major states into those accepting the absolute theory of sovereign immunity and those following the restrictive view. *Id.* Tate concluded that, with the change in American policy, only the Soviet Union, its satellites, and perhaps the United Kingdom continued to cling to the absolute theory of sovereign immunity. *Id.* at 985.

[97] Kahale & Vega, *supra* note 92, at 212-13; Lowenfeld, *supra* note 93, at 907; von Mehren, *supra* note 1, at 41; Weber, *supra* note 87, at 15-16.

[98] Kahale & Vega, *supra* note 92, at 212.

[99] Amkor Corp. v. Bank of Korea, 298 F. Supp. 143 (S.D.N.Y. 1969); Ocean Transp. Co. v. Government of the Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967); Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (App. Div. 1962); Kahale & Vega, *supra* note 92, at 212-13. This test was expressly adopted in the FSIA. *See infra* text accompanying notes 114-15.

[100] Kingdom of Roumania v. Guaranty Trust Co., 250 F. 341 (2d Cir.), *cert. denied*, 246 U.S. 663 (1918); *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952); Kahale & Vega, *supra* note 92, at 213.

[101] 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

[102] von Mehren, *supra* note 1, at 50.

[103] *Victory Transp.*, 336 F.2d at 360 (footnote omitted). The *Victory Transport* test has been applied by numerous courts. Sea Transp. Corp. v. The S/T Manhattan, 405 F. Supp. 1244 (S.D.N.Y. 1975); Rovin Sales Co. v. Socialist Republic of Romania, 403 F. Supp. 1298 (N.D. Ill. 1975); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974); Pan Am. Tankers Corp. v. Republic of Vietnam, 296 F. Supp. 361 (S.D.N.Y. 1969); Ocean Transp. Co. v. Government of the Ivory Coast, 296 F. Supp. 703 (E.D. La. 1967); American Hawaiian Ventures v. M.V.J. Latuharhary, 257 F. Supp. 622 (D.N.J. 1966) (dicta).

[104] Kahale & Vega, *supra* note 92, at 215.

support of their positions.[105] Hearings would then be held by the Department, at which the litigants could be represented by counsel.[106] If the Department concluded that immunity was warranted, it would request that the Attorney General file a suggestion of immunity with the appropriate court through a United States Attorney.[107] Although some commentators cited the State Department policy as conducive to a flexible foreign policy,[108] many others decried its political underpinnings[109] and the inconsistent results it produced.[110]

It was against this background that the FSIA was enacted in 1976.[111] The impact of the statute upon the law of sovereign immunity was both immediate and profound. First, the FSIA codified the restrictive theory of immunity announced in the Tate Letter.[112] Moreover, the statute transferred the determination of immunity questions from the State Department and vested it exclusively in the judiciary.[113] Further, the FSIA specifically rejected the *Victory Transport*

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[105] *Id.*; *see also 1976 Hearings*, *supra* note 4, at 26 (testimony of Monroe Leigh, Legal Advisor, Dep't of State) (describing State Department's procedure for determining immunity petitions).

[106] Kahale & Vega, *supra* note 92, at 215.

[107] *Id.* at 215-16; *see also 1976 Hearings*, *supra* note 4, at 26 (testimony of Monroe Leigh, Legal Advisor, Dep't of State) (describing State Department's procedure for determining immunity petitions). Under the doctrine established in *Ex Parte Peru* and *Hoffman*, a State Department suggestion of immunity was deemed to be binding on the courts. *See supra* notes 84-92 and accompanying text. The courts also were obliged to accept a conclusion against immunity. *Victory Transp.*, 336 F.2d at 358. *But see* Ocean Transp. Co. v. Government of the Ivory Coast, 269 F. Supp. 703 (E.D. La. 1967) (although court is not bound by State Department ruling, such ruling is highly persuasive). If the State Department failed to render a determination concerning a petition for immunity, the court was authorized to do so itself. *Victory Transp.*, 336 F.2d at 558-59.

[108] *See* Cardozo, *supra* note 87, at 462, 498. In particular, Professor Cardozo has expressed the view that the government must act as a unified entity in the province of foreign relations and that the executive branch is better equipped than the judiciary to evaluate the multitude of factors necessary to maintain a successful foreign policy. *Id.*; *see also 1976 Hearings*, *supra* note 4, at 61-67 (statement and testimony of Prof. Cardozo).

[109] *See* Kahale & Vega, *supra* note 92, at 216.

[110] *See, e.g.*, Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (suggestion of immunity in attachment of Cuban merchant vessel); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971) (fact that contract involved grain sale to India does not preclude suggestion of immunity), *cert. denied*, 404 U.S. 985 (1972); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (suggestion of immunity in attachment of Cuban merchant vessel); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966) (suggestion of immunity in attachment of Venezuelan merchant vessel). In none of these cases should immunity have been suggested under a strict application of the *Victory Transport* standards.

[111] See *supra* note 1 for a brief legislative history of the FSIA.

[112] *Verlinden*, 103 S. Ct. at 1968; *see also* House Report, *supra* note 3, at 6605 (one objective of FSIA is to codify restrictive theory of immunity).

[113] *See* von Mehren, *supra* note 1, at 45; *see also* Kahale & Vega, *supra* note 92, at 219-20 (discussing shift from State Department to judiciary); House Report, *supra* note 3, at 6605-06 (one objective of FSIA is to ensure that restrictive principle of immunity is applied in American

factors as a test for distinguishing between public and private acts of a state[114] in favor of the "nature of the act" approach.[115] Finally, an instrumental facet of Congress' attempt to provide uniformity in the law of sovereign immunity through the FSIA was the jurisdictional grant contained in section 1330(a).[116]

One issue which escaped consideration by the statute's draftsmen, however, was whether under section 1330(a) a foreign plaintiff may bring suit against a foreign state in a federal court on a nonfederal cause of action.[117] In *Verlinden*, the Supreme Court answered this question in the affirmative.[118] Its decision potentially enlarged the role of American courts in promoting the integrity of the world's financial markets, thereby conferring substantial benefits upon the American banking industry.[119]

Chief Justice Burger, writing for a unanimous Court, began his analysis by affirming the determination of both lower courts that Verlinden was entitled to bring an action under the FSIA.[120] Scrutinizing section 1330(a), he ascertained no facial restriction upon the nationality of a plaintiff in a suit against a foreign state.[121] Moreover, his review of the enactment's legislative history proved to be inconclusive on this point.[122] He noted that the House Report[123] disclosed conflicting references to the citizenship of potential plaintiffs, including "any claim,"[124] "parties,"[125] "American citizens,"[126] and "our citizens."[127] Yet viewing the legislative history *in toto*, the *Verlinden* Court found it to evince a congressional intent not to limit the nationality of plaintiffs in FSIA actions.[128] The Court expressed confidence

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courts). Under the FSIA, subject matter jurisdiction over suits involving foreign states is ascertained by mechanical application of § 1330(a). *See supra* note 39 and accompanying text.

[114] *See supra* notes 101-03 and accompanying text.

[115] See *supra* note 42 for pertinent text of § 1605.

[116] *See Verlinden*, 103 S. Ct. at 1973.

[117] *See supra* note 10 and accompanying text.

[118] *Verlinden*, 103 S. Ct. at 1970.

[119] *See infra* notes 174-93 and accompanying text.

[120] *Verlinden*, 103 S. Ct. at 1969.

[121] *Id.*; see *supra* note 9 for text of § 1330(a).

[122] *Verlinden*, 103 S. Ct. at 1969.

[123] HOUSE REPORT, *supra* note 3.

[124] *Verlinden*, 103 S. Ct. at 1969; HOUSE REPORT, *supra* note 3, at 6611.

[125] *Verlinden*, 103 S. Ct. at 1969; HOUSE REPORT, *supra* note 3, at 6604.

[126] *Verlinden*, 103 S. Ct. at 1969; HOUSE REPORT, *supra* note 3, at 6605.

[127] *Verlinden*, 103 S. Ct. at 1969; HOUSE REPORT, *supra* note 3, at 6605. In his signing statement, President Ford noted, "[the FSIA] will enable American citizens and foreign governments alike to ascertain when a foreign state can be sued in our courts." 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

[128] *Verlinden*, 103 S. Ct. at 1969.

that the nexus between the lawsuit and the United States which is required by section 1605 would prevent American courts from being inundated with actions brought by foreign citizens against foreign states.[129]

The Court next addressed the question whether Congress, by endowing the federal courts with subject matter jurisdiction over suits brought by foreign citizens against foreign states on nonfederal claims, exceeded the scope of its authorization under article III.[130] Employing as a benchmark the familiar principle that congressional authority to enlarge the jurisdiction of federal courts is stringently limited by the Constitution,[131] the Court proceeded to analyze the provisions within article III which outline the scope of federal court jurisdiction.[132] It summarily rejected the diversity clause as a possible source of congressional power to enact section 1330(a), observing that the clause speaks only to actions brought by citizens of an American state, thus precluding suits solely between foreign parties.[133]

The *Verlinden* Court found adequate support for the grant of subject matter jurisdiction, however, in article III's "arising under" clause.[134] It observed that in *Osborn v. Bank of the United States*,[135] "arising under" jurisdiction had been given an expansive interpretation, and was extended to any action in which application of a substantive federal statute might be required.[136] Chief Justice Burger then

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[129] *Id.* at 1969-70; see *supra* note 42 for a pertinent text of § 1605; *see also supra* note 39 and accompanying text.

[130] *Verlinden*, 103 S. Ct. at 1970.

[131] *Id.* (citing Kline v. Burke Constr. Co., 260 U.S. 226 (1922); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809)).

[132] *Id.*; U.S. CONST. art. III, § 2, cl. 1 proclaims:

> 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*;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and *between a State, or the Citizens thereof, and foreign States, Citizens or Subjects*.

Id. (emphasis supplied).

[133] *Verlinden*, 103 S. Ct. at 1970; *see also supra* note 132. For the purpose of article III, a foreign plaintiff cannot constitute a state or citizen thereof. *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13 (1800) (narrowly construing statute to foreclose jurisdiction over suit between two aliens).

[134] *Verlinden*, 103 S. Ct. 1970-71; *see supra* note 132.

[135] 22 U.S. (9 Wheat.) 738 (1824).

[136] *Id.* at 823; *Verlinden*, 103 S. Ct. at 1970-71. The *Verlinden* Court expressly eschewed the task of defining the breadth of "arising under" jurisdiction. *Verlinden*, 103 S. Ct. at 1971.

pointed to the unmistakably substantive character of the FSIA.[137] He reasoned that Congress, bearing primary responsibility for foreign commerce and foreign relations, possesses a substantial interest in delineating the circumstances under which foreign states may be answerable to suit in the United States.[138] In light of this interest, the Chief Justice concluded that Congress was entitled to utilize its article I powers[139] by enacting a comprehensive statutory scheme to govern the amenability of foreign sovereigns to actions brought against them in American courts.[140]

The *Verlinden* Court rebuked the Second Circuit for its reliance upon cases construing the statutory grant of "arising under" jurisdiction contained in 28 U.S.C. § 1331, the federal question jurisdiction provision.[141] In particular, the Court was unimpressed with the appeals court's determination that Verlinden had failed to satisfy the

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Although the Court conceded that a broad reading of *Osborn* might justify federal jurisdiction whenever there exists a remote chance that a federal question might be presented, *id.* (citing Textile Worker's Union v. Lincoln Mills, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting)), it reasoned that, "a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law." *Id.*

Interestingly, in its reliance upon *Osborn*, the *Verlinden* Court failed to address the conclusion of the court of appeals that that case should be limited to its unique factual circumstances. In *Osborn*, the state of Ohio, notwithstanding the Supreme Court's holding in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), continued to tax the Bank of the United States. *Osborn*, 22 U.S. (9 Wheat.) at 740. The bank sought to enjoin the tax collectors who were authorized to enter and remove money from the Bank's vault. *Id.* at 740-41.

The Supreme Court affirmed the circuit court's grant of injunctive relief and held that, inasmuch as the Bank was created by a federal statute which gave it the right to sue and be sued, its action "arose under" that statute. *Id.* at 822-23. The Second Circuit, in *Verlinden*, reasoned that this factual background makes *Osborn's* precedential value dubious. Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 329 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). "A fair reading of the case depends heavily on the presence of an instrumentality of the United States as a party, and on the national government's desire to protect the Bank and itself from the rapacious states." *Id.*

[137] *Verlinden*, 103 S. Ct. at 1971.

[138] *Id.* The Court stressed that delicate foreign relations issues often arise when foreign sovereigns are compelled to submit to the jurisdiction of American courts. *Id.* (citing Zschernig v. Miller, 389 U.S. 429 (1968) (invalidating state statute providing for escheat of personalty devised to nonresident alien); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (announcing "act of state" doctrine)).

[139] *Id.* at 1971 n.19. The article I powers upon which Congress relied when it enacted the FSIA included: art. I, § 8, cl. 3 (power to regulate commerce with foreign nations); art. I, § 8, cl. 9 (power to create lower federal courts); art. I, § 8, cl. 10 (power to define offenses against law of nations); art. I, § 8, cl. 18 (power to enact all laws necessary and proper to implement governmental powers). *See Verlinden*, 103 S. Ct. at 1971 n.19.

[140] *Verlinden*, 103 S. Ct. at 1971.

[141] *Id.* at 1973; *see* 28 U.S.C. § 1331 (1976). Section 1331 provides: "The district courts shall have original jurisdiction of all civil actions *arising under the Constitution, laws, or treaties of the United States.*" *Id.* (emphasis supplied).

"well-pleaded complaint" rule because its complaint sounded in contract rather than stating a federal question.[142] The Chief Justice disputed the Second Circuit's assessment that statutory "arising under" jurisdiction and article III "arising under" jurisdiction are coextensive.[143] He apparently distinguished the two types of jurisdiction by citing *Romero v. International Terminal Operating Co.*[144] for the proposition that section 1331 jurisdiction is subject to limitations which do not attach to jurisdiction granted in article III.[145] Since article III "arising under" jurisdiction is broader than statutory "arising under" jurisdiction, the *Verlinden* Court reasoned that the Second

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The Second Circuit observed that the "arising under" language within art. III, § 2, cl. 1 is nearly identical to that codified in § 1331. Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 325 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983); see also *supra* note 132 for text of art. III, § 2, cl. 1. Due to the paucity of case law interpreting art. III, § 2, cl. 1, the court of appeals turned to decisions construing § 1331. *Verlinden*, 647 F.2d at 325. Specifically, the Second Circuit examined two types of action under § 1331. *Id.* at 325-27. The first type of suit " 'arises under the law that creates the cause of action.' " *Id.* at 325 (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)). The panel found this species of § 1331 suit inapposite, because it perceived the FSIA to be merely procedural, creating no new federal cause of action. *Id.* at 326.

A second type of § 1331 action was interpreted to lie when "the plaintiff's complaint discloses a need to interpret a federal law." *Id.*; *see also* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (recognizing this type of § 1331 suit). The appeals court also rejected this characterization of Verlinden's action because the question of sovereign immunity was not contained on the face of Verlinden's well-pleaded complaint. *Verlinden*, 647 F.2d at 326-27; *see infra* note 142 and accompanying text.

[142] *Verlinden*, 103 S. Ct. at 1972. The "well-pleaded complaint" rule requires that the federal question upon which a plaintiff alleges jurisdiction of a federal court be present on the face of his well-pleaded complaint, and not anticipated as a defense. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153 (1908); *see also* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3566 (describing application of rule in § 1331 actions). The Second Circuit reasoned that the FSIA was not a substantive enactment, and that sovereign immunity thus could be raised only as an affirmative defense by Central Bank. *See* Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 326 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). Therefore, it concluded, Verlinden could not utilize the FSIA as an appropriate federal statute upon which to predicate federal question jurisdiction. *Id.* at 327.

[143] *Verlinden*, 103 S. Ct. at 1972.

[144] 358 U.S. 354 (1959).

[145] *Verlinden*, 103 S. Ct. at 1972; *see also Romero*, 358 U.S. at 379 n.51. "[T]he many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." *Id.*; *see also* Powell v. McCormack, 395 U.S. 486 (1969) (jurisdictional grant in § 1331 not equivalent to potential federal jurisdiction under article III); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (implying Congress did not fully utilize its article III authority when enacting the predecessor of § 1331). *See generally* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953) (discussing differences between statutory and article III "arising under" jurisdiction). Unfortunately, the *Verlinden* Court failed to elaborate on the limitations placed on statutory "arising under" jurisdiction. *See Verlinden*, 103 S. Ct. at 1972.

Circuit's emphasis on cases brought under section 1331 and on the well-pleaded complaint rule was inappropriate.[146]

Chief Justice Burger's principal criticism of the Second Circuit's decision involved that panel's depiction of the FSIA as a procedural, as opposed to substantive, enactment.[147] He felt the appeals court erred in following several Supreme Court decisions in which attempts by Congress "to confer jurisdiction on federal courts simply by enacting jurisdictional statutes" were overturned.[148] The *Verlinden* Court noted that the statutes struck down in those cases were purely jurisdictional, and devoid of any substantive object or purpose.[149] In contrast, the Court characterized the FSIA as a substantive statute, its jurisdictional provisions constituting "simply one part of [its] comprehensive scheme.[150] That scheme, explained the Court, regulates both the types of actions to which foreign states are amenable in American courts and the criteria governing sovereign immunity.[151]

The *Verlinden* Court surmised that Congress, in enacting the FSIA, intentionally sought to divert actions against foreign sovereigns away from state courts and into the federal system in order to minimize the potential for inconsistent dispositions.[152] Finally, the Court

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[146] *Verlinden*, 103 S. Ct. at 1972.

[147] *Id.* at 1972-73; *see also* Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 329 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). In arriving at this conclusion, the court of appeals relied heavily upon Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800). *Verlinden*, 647 F.2d at 328-29. In *Mossman*, the Supreme Court held that Congress exceeded the scope of its constitutional authority by enacting a statute which conferred jurisdiction over a suit between two aliens. *Mossman*, 4 U.S. (4 Dall.) at 14. The Court reasoned that the Act in question would permit actions between two aliens, thereby violating the diversity clause of article III. *Id.*; *see supra* note 132. The Second Circuit found the *Mossman* Court's reasoning persuasive. *See Verlinden*, 647 F.2d at 328. If Congress were permitted to expand the jurisdiction of the federal courts merely by enacting a jurisdictional statute, there would be "no limits on [its] judicial power at all, and a *sine qua non* of constitutional analysis instructs that this power [be] limited." *Id.*

[148] *Verlinden*, 103 S. Ct. at 1972; *see, e.g.*, The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852) (jurisdictional statute alone insufficient basis for "arising under" jurisdiction); Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) (rejecting grant of jurisdiction to federal courts over any action to which alien is party).

[149] *Verlinden*, 103 S. Ct. at 1973 (quoting The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 451 (1852)). "[T]he statutes at issue in [the] prior cases sought to do nothing more than grant jurisdiction over a particular class of cases." *Id.*

[150] *Id.* The Court pointed to the purpose of the FSIA, as stated in the House Report: "[The Act sets] forth comprehensive rules governing sovereign immunity." HOUSE REPORT, *supra* note 3, at 6610.

[151] *Verlinden*, 103 S. Ct. at 1973.

[152] *Id.* Toward this end, Congress has been successful. Since the FSIA went into effect in 1977, only one action against a foreign sovereign has been brought in a state court. Note, *supra* note 14, at 1861 n.1; *see* Gittler v. German Information Center, 95 Misc. 2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978).

reiterated that the claim of a plaintiff who is unable to rebut the presumed immunity of a foreign state[153] will be barred in all American courts.[154] Thus, the Court concluded that the FSIA composes a body of substantive federal law, enacted by Congress as a valid exercise of its article I powers.[155] While the district court held that Verlinden did not successfully rebut the presumed immunity of Central Bank,[156] the court of appeals never reviewed that determination, confining its decision to the constitutional question.[157] The *Verlinden* Court therefore remanded the action to the Second Circuit to resolve that threshold issue.[158]

In concluding that Congress acted within its article III authorization by conferring upon the federal courts subject matter jurisdiction over disputes between foreign citizens and foreign sovereigns, the *Verlinden* Court adopted the following syllogism: First, under *Osborn*, Congress may invest the federal courts with jurisdiction over any case or controversy wherein application of a federal law might be required;[159] second, a suit brought under section 1330(a) raises a question of federal substantive law.[160] Therefore, section 1330(a) represents a constitutionally valid jurisdictional grant.[161]

Chief Justice Burger correctly classified the FSIA as a substantive enactment.[162] As declared by its draftsmen, the Act is intended to be a comprehensive scheme, providing not only the rules governing ingress to the federal courts, but all necessary standards pertaining to sovereign immunity.[163] The FSIA is dispositive of the issue of whether a plaintiff can bring suit against a foreign state in any American court: If the sovereign's presumed immunity cannot be rebutted by application of one of the exceptions to immunity found in section 1605, the plaintiff's claim will be barred.[164]

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[153] *See supra* notes 39 & 41 and accompanying text.

[154] *Verlinden*, 103 S. Ct. at 1973.

[155] *Id.*

[156] *See supra* note 43 and accompanying text.

[157] *See supra* note 46 and accompanying text.

[158] *Verlinden*, 103 S. Ct. at 1974.

[159] *Id.* at 1971.

[160] *Id.*

[161] *Id.* at 1973.

[162] *Id.*

[163] *Id.*; *see also* HOUSE REPORT, *supra* note 3, at 6604. "The purpose. . .[of the FSIA]. . .is to provide when and how parties can maintain a lawsuit against a foreign state. . .in the courts of the United States *and to provide when a foreign state is entitled to sovereign immunity.*" *Id.* (emphasis supplied).

[164] *Verlinden*, 103 S. Ct. at 1973; *see also supra* note 39 and accompanying text.

Nevertheless, the brevity of the Court's argument establishing its major premise is disconcerting. In determining that the arising under clause provided an adequate basis for the grant of subject matter jurisdiction contained in section 1330(a), Chief Justice Burger relied solely upon *Osborn*, embracing it as the controlling precedent.[165] He altogether failed to address the Second Circuit's conclusion that the *Osborn* decision merely reflected the Court's necessary response to exigent circumstances, and thus should be limited to its own facts.[166] If *Osborn* truly is *sui generis*, as has been suggested,[167] then the Court's major premise is invalid, and the constitutional foundation for its recognition of section 1330(a) subject matter jurisdiction is seriously weakened. It is curious, therefore, that the Court neither provided additional support for its reliance upon "arising under" jurisdiction nor refuted the Second Circuit's characterization of *Osborn*.

A credible argument can be advanced that the Court's dependence upon *Osborn* was unnecessary. Although Chief Justice Burger dismissed the Second Circuit's emphasis upon statutory "arising under" jurisdiction,[168] his conclusion that the FSIA constitutes a substantive federal statute would appear to justify a determination that jurisdiction existed under section 1331.[169] Such an analysis would foreclose any potential criticism following the Court's questionable employment of *Osborn*. It is possible, however, that the Court preferred to utilize *Osborn* rather than to expand jurisdiction under section 1331.

The cursory quality of the Court's constitutional analysis suggests that its decision was heavily influenced by other considerations. One such factor may have been the interest of the United States in the extraterritorial application of its law in the international economic context.[170] The last twenty-five years have witnessed a rapid expan-

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[165] *Verlinden*, 103 S. Ct. at 1970; *see supra* notes 134-36 and accompanying text.

[166] *See supra* note 136.

[167] Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 329 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983); *see, e.g.*, Textile Worker's Union v. Lincoln Mills, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting) (*Osborn* premised upon special circumstances); The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852) (refusing to extend *Osborn* to cases wherein United States not a litigant). *But see* The Pacific R.R. Removal Cases, 115 U.S. 1 (1885) (applying *Osborn* to federally-chartered corporations).

[168] *Verlinden*, 103 S. Ct. at 1972.

[169] *See* Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 325-26 (2d Cir. 1981), *rev'd and remanded*, 103 S. Ct. 1962 (1983). If the FSIA is a substantive federal statute, as the *Verlinden* Court concludes, then an action brought thereunder appears to qualify as the type of § 1331 suit "in which the plaintiff's complaint discloses a need to interpret a federal law." *Id.* at 326; *see supra* note 141 and accompanying text.

[170] *See* Feinberg, *Economic Coercion and Economic Sanctions: The Expansion of United States Extraterritorial Jurisdiction*, 30 AM. U.L. REV. 323 (1981). "With respect to economic

sion in the application of American law extraterritorially,[171] particularly in the areas of antitrust[172] and securities law.[173] There are substantial inducements to broadening the jurisdiction of American courts over actions between foreign citizens and foreign states as well.

That the United States should elect to provide a forum for resolving foreign citizen-foreign state disputes under its law is the natural consequence of two factors: (1) the tangible benefits the United States derives from her enhanced attractiveness as a situs of international commercial dealings;[174] and (2) the leading role her financial institutions play in facilitating international commerce.[175] American banks are major actors in international financial markets.[176] Indeed, the

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policy in general and competition in particular, the federal courts and the Congress have promoted vigorously the notion that federal law must react to conduct engaged in outside the United States that constitutes a threat to cherished domestic and political economic values." *Id.* at 324.

[171] Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257 (1980).

[172] Feinberg, *supra* note 170, at 323; *see also* Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (describing evolution of extraterritorial reach of antitrust laws). *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 29-87 (2d ed. 1973) (indepth discussion of evolution).

[173] Feinberg, *supra* note 170, at 323; *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.) (security law antifraud provisions applicable to losses from securities sales to Americans residing abroad even where all material acts occurred outside United States), *cert. denied*, 423 U.S. 1018 (1975); Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the U.S. Securities Laws*, 59 N.C.L. REV. 663 (1981) (detailed analysis of extraterritorial expansion of United States securities law).

[174] *See* Comment, *The State Immunity Act of 1978*, 42 MOD. L. REV. 72 (1979). The importance to the national economy of providing a forum for resolving transnational commercial disputes is amply demonstrated by the following statement of Britain's Solicitor-General in urging enactment of the State Immunity Act:

> The position now obtaining in the courts of the United States [as the result of the passage of the FSIA] accords with the interests of all those who, in commerce or finance, engage in transactions with foreign states. Unless we change our law, much of the work connected with these transactions—an important invisible export—could be lost to this country.

Id. at 73 (quoting H.C. Deb., vol. 949, col. 412 (May 4, 1978) (statement of Solicitor General Archer)).

A primary attraction of an American forum for adjudicating such disputes is the well-defined body of commercial statutory and case law that exists in this country. *See* Note, *supra* note 14, at 1870 (discussing American interests in foreign citizen—foreign state suits). If, for instance, a foreign government incurs a debt in connection with a private agreement effected in the United States, payment will be enforced under American law. *Id.*

[175] *See* Haley & Seligman, *The Development of International Banking by the United States*, in THE INTERNATIONAL BANKING HANDBOOK 43-45 (W. Baughn & D. Mandich eds. 1983).

[176] *Id.* Although American banks as a group are less active in foreign lending than their European counterparts, they are, nonetheless, a primary international source of capital. *Id.* To illustrate, of the $1.323 trillion outstanding in international loans by private banks in 1980, some $319 billion was extended by American banks. *Id.* at 44.

nation's largest banks have grown to depend upon making international loans.[177] Foreign governments and their instrumentalities, particularly those of the less developed countries, are recipients of a significant portion of these loans.[178] Scholars and international bankers have noted that the United States government, as well as its banking industry, is vitally concerned both with securing repayment of outstanding loans to foreign governments and with maintaining the inviolability of the international financial markets as an institution.[179]

One aspect of international economic reality which has become apparent in recent years is the heightened integration of the world's capital markets.[180] It follows that the failure of any government to honor its foreign debt generates serious repercussions which reverberate throughout the banking industry in the United States. Thus, Congress undoubtedly has an interest in preserving the integrity of these markets by affording a remedy for private lenders, whether domestic or foreign, who are injured by a foreign government's disavowal of its debts.[181]

The factual background of *Verlinden* exemplifies the economic disorder which can arise when a sovereign disclaims the financial responsibilities it has undertaken. The Nigerian cement fiasco has been described by one court as "one of the most enormous commercial

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[177] *Id.* at 45. In 1980, international loans accounted for 48.2% of all loans made by the nine largest American banks, including Citibank (58.3%), Chase Manhattan (56.6%), Morgan Guaranty (55.5%), and Manufacturer's Hanover (51%). *Id.*

[178] Greene, *Government Borrowing in the International Financial Markets*, in THE INTERNATIONAL BANKING HANDBOOK 137-38 (W. Baughn & D. Mandich eds. 1983). While in 1981, loans to foreign public borrowers constituted 17% of all international loans by American banks, the percentage bears an inverse relationship to the wealth of the borrower. *See id.* at 138. Thus, approximately 31% of all loans to non-oil producing lesser developed countries were made to public borrowers. *Id.*

[179] *See, e.g.*, Zombanakis, *The International Debt Threat*, ECONOMIST, Apr. 30, 1983, at 11. "International indebtedness is probably the most pressing problem on the world economic horizon." *Id.*

[180] *See* Korth, *International Financial Markets*, in THE INTERNATIONAL BANKING HANDBOOK 9-13 (W. Baughn & D. Mandich eds. 1983). This phenomenon can be traced to two distinct developments. First, the financial markets of the major industrialized states have become increasingly interdependent as the result of recent innovations in communications, transportation, and financial control techniques. *Id.* at 13. Additionally, the advent of the Euromarkets, i.e., markets for currencies, bonds, and commercial paper outside the state wherein they originated, *id.* at 9-10, has given rise to a uniquely international financial market. *Id.* at 13.

[181] *See* Zombanakis, *supra* note 179, at 13. This interest is illustrated graphically by examining the outstanding loans of major American banks as a percentage of the banks' equity. Zombanakis demonstrates that the outstanding loans of 10 leading American banks to Brazil, Mexico, and Venezuela constitute on an average 132% of each bank's equity. This situation places banks in a highly unfavorable position. "[W]hen lenders are involved with a borrower to the point where their own solvency is at stake, it is the borrower that dictates and the lender that follows." *Id.*

disputes in history."[182] Sixty-eight international suppliers contracted to supply cement,[183] and Nigeria's decision to repudiate those contracts left in its wake lawsuits throughout the world.[184] Such financial irresponsibility cannot fail to have a deleterious effect upon the atmosphere of the world's financial markets. Yet inasmuch as both state participation in transnational commercial dealings[185] and receipt by foreign states of loans from private banks[186] have become commonplace, the potential for additional large scale renunciations by foreign sovereigns of their financial obligations is ominous.[187]

In view of the prominent position in the international financial network occupied by the leading American capital markets,[188] however, the United States is uniquely situated by virtue of the *Verlinden* decision to provide a forum for resolving such controversies. Under *Verlinden*, whenever a financial transaction between a foreign citizen and a foreign state satisfies the nexus requirement prescribed in the FSIA,[189] the aggrieved foreign plaintiff may invoke the jurisdiction of United States courts and seek the redress available under American law. While concern has been voiced that the FSIA will proliferate the number of foreign citizen-foreign state suits before American courts,[190] it appears that the statute's long arm provision[191] will restrict

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[182] Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 302 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1012 (1982).

[183] *See supra* note 19 and accompanying text.

[184] *See supra* note 36 and accompanying text.

[185] *See supra* note 15 and accompanying text.

[186] *See supra* note 178 and accompanying text.

[187] The reality of this potential was demonstrated by Brazil's unilateral declaration of its inability to repay its loans in 1982. Zombanakis, *supra* note 179, at 13. As a result of this declaration "banks had no choice but to concede to [Brazil's] requests by a certain date, . . . otherwise the country would declare itself insolvent." *Id.*

[188] *See* H. REED, THE PREEMINENCE OF INTERNATIONAL FINANCIAL CENTERS 17-42 (1981). Professor Reed conducted a thorough empirical study, using a host of variables, to ascertain the comparative rankings of the world's leading financial centers. In his research, he distinguished between financial centers, which he defined as "a central location where the financial transactions of an area are coordinated and cleared," *id.* at 1, and banking centers. *Id.* at 14. Although he concluded that in 1980 London was the world's foremost financial center, he found that New York ranked second, San Francisco eighth, and Chicago ninth. *Id.* at 29. In terms of international banking centers, Professor Reed determined that London and New York were together ranked first, with San Francisco and Chicago tied for eighth. *Id.* at 21.

[189] *See supra* note 39 and accompanying text.

[190] *See 1976 Hearings*, *supra* note 4, at 33 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Dep't of Justice) ("Once. . .[the FSIA is enacted]. . .there is a likelihood. . .that there might be more suits."); Note, *supra* note 14, at 1862 ("Because [the FSIA] grants foreigners easier access to United States courts, the number of suits filed in this country by foreigners against foreign states may well increase.").

[191] 28 U.S.C. § 1330(b) (1976). The section reads: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under [§

justiciable actions to those bearing a significant connection to this country.[192]

Whether *Verlinden* will be useful as a means by which United States courts can play a part in maintaining the integrity of the world's financial markets, however, will rest in part upon the outcome of the remand. Essentially, the court of appeals' function on the remand will be to determine what type of commercial activity constitutes a sufficient connection with the United States under section 1605 to rebut the presumed immunity of a foreign sovereign.[193] If the appeals court gives section 1605 an expansive reading, and construes the act of an American bank in advising a letter of credit issued by a foreign state in favor of a foreign beneficiary to satisfy the nexus requirement, the broad implications of *Verlinden* may well be actualized.

Even if the Second Circuit reaches a contrary result on remand, however, two factors militate against dilution of *Verlinden's* potential as a vehicle for ameliorating the uncertainties faced by domestic and foreign financial institutions when they extend credit to foreign states. First, the concern of the appeals court on remand rests solely with the narrow issue of whether the mere act of advising a letter of credit is sufficient to satisfy the nexus requirement under section 1605.[194] Second, the Supreme Court's unusual reliance upon *Osborn*[195] points to a strong judicial desire to find federal court jurisdiction over suits brought by foreign citizens against foreign sovereigns.

When the decision of the Supreme Court in *Verlinden* is viewed through the optic of its potentially beneficial impact upon the Ameri-

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1330(a)] where service has been made under section 1608 of this title." *Id.* For a discussion of this provision, see HOUSE REPORT, *supra* note 3, at 6612.

[192] *See 1976 Hearings*, *supra* note 4, at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Div., Dep't of Justice). "[T]he long arm feature of [the FSIA] will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.' " *Id.*; *see also* Kane, *supra* note 10, at 389 n.26 (long-arm provision should prevent suits between foreigners from clogging American courts).

[193] Specifically, the appeals court must determine whether the act of an American bank in advising a letter of credit issued by a foreign state constitutes a "commercial activity carried on in the United States by a foreign state," § 1605 (a) (2); or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," *id.*; or "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [that] causes a direct effect in the United States." *Id.* For a discussion of the district court's analysis of § 1605(a)(2), see *supra* note 43 and accompanying text.

[194] Thus, an affirmation by the Second Circuit of the district court's dismissal of Verlinden's complaint will leave open whether other acts of an American bank, such as confirming a letter of credit issued by a foreign state in favor of a foreign beneficiary, will satisfy § 1605.

[195] See *supra* notes 165-69 and accompanying text.

can banking industry, it is possible to forgive the Court for its strained constitutional analysis. The recognition that a ready forum and a predictable body of law are available to adjudicate international financial disputes should serve to allay the apprehension of private lenders that their loans to foreign states will be dishonored.

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