Federal Question Jurisdiction over Actions Brought by Aliens against Foreign States

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ACTIONS BROUGHT BY ALIENS AGAINST
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I. INTRODUCTION

Congress enacted the Foreign Sovereign Immunities Act\(^1\) (FSIA) in 1976. The FSIA confers jurisdiction in the federal district courts over actions against foreign states that are not entitled to immunity.\(^2\) In addition, the Act codifies the restrictive theory of sovereign immunity,\(^3\) and prescribes that the presence of immunity defeats jurisdiction in suits against foreign states in all courts of the United States.\(^4\)

In *Verlinden B.V. v. Central Bank of Nigeria*,\(^5\) a Dutch corporation sued the Central Bank of Nigeria on a non-federal claim.\(^6\) The plaintiff claimed subject matter jurisdiction under the broad language of 28 U.S.C. § 1330(a).\(^7\) The district court dismissed the claim for lack of personal jurisdiction under section 1330(b), reasoning that Central Bank was entitled to immunity under the FSIA.\(^8\) The court concluded, however, that there was federal question jurisdiction under section 1330(a) in a case where an alien was suing a foreign state on a non-federal claim.\(^9\) On appeal, the Second Circuit found that section 1330(a) did attempt to confer jurisdiction in cases between aliens and foreign states involving non-federal claims, but held that such a grant of jurisdiction was unconstitutional. The court affirmed the dismissal without reaching the personal jurisdic-

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2. 28 U.S.C. § 1330(a) (1976) grants the district courts jurisdiction over "any non-jury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 of this title." *Id.*
7. *Id.* *See supra* note 4 and accompanying text.
8. *Id.* at 1302. *See infra* note 20 and accompanying text.
9. *Id.* at 1292, 1293.
This Note will first explore whether a suit between an alien and a foreign state arises "under . . . the Laws of the United States" when the only federal law in issue is the FSIA. The Note will then discuss whether subject matter jurisdiction may be based on an exercise of congressional power outside the limitations prescribed in article III of the Constitution. Third, this Note will examine the legislative history of the FSIA to determine whether Congress intended section 1330(a) to confer federal jurisdiction over suits between aliens and foreign states. Fourth, this Note will discuss whether Congress should amend section 1330(a) to constitutionally provide for federal jurisdiction in alien actions against foreign states in light of the possible international ramifications of such a grant. Finally, this Note will suggest possible amendments to the FSIA that would avoid the constitutional difficulties inherent in granting federal jurisdiction over actions between aliens and foreign states when no federal substantive law is in issue.

II. VERLINDEN B.V. v. CENTRAL BANK OF NIGERIA

Verlinden, a Dutch corporation, brought suit in federal district court to recover damages resulting from a "breach and repudiation by Central Bank of its obligation with respect to an irrevocable letter of credit." Verlinden alleged that Central Bank violated the Uniform Customs and Practices for Documentary Credits by unilaterally amending an irrevocable letter of credit. Central Bank challenged the district court's jurisdiction, claiming that section 1330(a) does not provide for subject matter jurisdiction over actions brought by aliens against foreign states when no federal law is in issue. The court found that both section 1330(a) and a similar

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10. 647 F.2d at 330.
11. U.S. CONST. art. III, § 2. There is no explicit provision in Article III, section 2 for suits between aliens and foreign states as there is for controversies between a citizen of the United States and a foreign state. See id.
13. Id. at 1287. Central Bank is an instrumentality of the government of Nigeria, and it is therefore entitled to the same degree of immunity as the government itself.
14. Uniform Customs and Practices for Documentary Credits (Rev. 1962) (The International Chamber of Commerce Brochure No. 222). See Verlinden, 488 F. Supp. at 1287, 1288 (S.D.N.Y. 1980). Central Bank contracted to purchase 240,000 metric tons of cement from Verlinden, a Dutch corporation. The bank also agreed to establish "an Irrevocable, Transferable abroad, Divisible and confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands." Id. at 1287. Verlinden alleged that Central Bank subsequently failed to establish the letter of credit according to the terms of the contract. In addition, Central Bank allegedly altered the conditions of payment after it became clear that it had purchased too much cement from several suppliers. Id.
removal provision in the FSIA\textsuperscript{15} provided for jurisdiction and removal in "any civil action"\textsuperscript{16} involving a foreign state, including an action between an alien and a foreign state.\textsuperscript{17} The court also concluded that the plain language of the FSIA prescribed "substantive, federal criteria for determining the validity of assertions of sovereign immunity" and injected a "federal element into all suits brought against foreign states."\textsuperscript{18} Consequently, the court found that "the case is one that 'arises under' a federal law because the complaint compels the application of the uniform federal standard governing assertions of sovereign immunity."\textsuperscript{19} The court, however, dismissed the case for lack of personal jurisdiction under section 1330(b).\textsuperscript{20}

The Second Circuit affirmed the district court's dismissal\textsuperscript{21} without reaching the issues of personal jurisdiction and immunity.\textsuperscript{22} It

\begin{itemize}
\item \textsuperscript{15} 28 U.S.C. § 1441(d) (1976) provides:
\begin{quote}
Any civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury . . .
\end{quote}

\item \textsuperscript{16} \textit{Id.} See \textit{Verlinden}, 488 F. Supp. at 1292.

\item \textsuperscript{17} \textit{Verlinden}, 488 F. Supp. at 1292.

\item \textsuperscript{18} \textit{Id.}

\item \textsuperscript{19} \textit{Id.}

\item \textsuperscript{20} \textit{Id.} at 1302. 28 U.S.C. § 1330(b) (1976) provides: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) . . . ." \textit{Id.} (emphasis added). The district court reasoned that because it had jurisdiction only when a foreign state is not entitled to immunity, a foreign state is subject to personal jurisdiction only when that state is not entitled to immunity. \textit{See Verlinden}, 488 F. Supp. at 1293. The court reviewed the possible exceptions to immunity and found that none were applicable in this case. \textit{Id.} at 1293-1302. The court found Central Bank to be entitled to immunity and thus not subject to personal jurisdiction under § 1330(b). \textit{Id.} at 1302. It is unclear why the court did not simply find the lack of immunity grounds for dismissal for lack of subject matter jurisdiction under § 1330(a).

\item \textsuperscript{21} \textit{Verlinden}, 647 F.2d at 330.

\item \textsuperscript{22} \textit{Id.} The Second Circuit should have considered whether asserting personal jurisdiction over Central Bank violated due process requirements. The only connection between the transaction and the United States was the involvement of the Morgan Bank in the payment of the letter of credit. \textit{See} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 297 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945). It also should have considered whether Central Bank was immune from the jurisdiction of the federal courts. If the court had found the due process requirements lacking, or if the court had found that Central Bank was entitled to immunity, there would have been no need to consider the constitutionality of asserting subject matter jurisdiction under § 1330(a). The judicial policy of avoiding constitutional construction whenever possible mandates such an approach.

\item Significantly, in four cases decided the same day as \textit{Verlinden}, and involving plaintiffs with United States citizenship, the Second Circuit used the minimum contacts test. For example, in Texas Trading & Mills Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), the court found that Nigeria had minimum contacts with the United States, and held that Nigeria was not immune from the jurisdiction of the federal courts in cases concerning contracts almost identical to those in \textit{Verlinden}. \textit{See id.} at 310-13. In \textit{Texas Trading}, the court found that Central Bank and Nigeria had "purposely availed
concluded that the controversy between the two parties did not satisfy any of the bases of subject matter jurisdiction enumerated in article III, section 2 of the Constitution. The court recognized that article III does not explicitly provide for federal jurisdiction over controversies between aliens and foreign states, and that consequently jurisdiction in *Verlinden* could be based only on the judicial power to adjudicate cases or controversies arising under the Constitution, the laws, or the treaties of the United States.

The court first reviewed possible bases of federal question jurisdiction—"themselves" of the privileges of conducting activities in the United States, and had "reason to expect to be haled before a . . . court" in the United States. *Id.* at 314-15 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) and *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977)). In addition, the court found that litigation in the United States was not "unduly inconvenient" for Nigeria and that the United States had a "manifest interest in providing effective means of redress for its residents." *Id.* at 315 (quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957)). Based on its analysis of these four factors, the court found the "minimum contacts" requirement satisfied.

Three of the factors that persuaded the court in *Texas Trading* are also present in *Verlinden*. The parties utilized a United States bank to complete their transaction. Because Central Bank also signed similar contracts with United States citizens, there is no reason to believe that litigation in the United States would have been unduly inconvenient for Central Bank. *Id.* at 314-15. Although Central Bank might not have expected litigation in the United States concerning its contract with Verlinden, it still could foresee that it might be haled into a United States court. The fourth factor, the interest of the United States, is lacking in *Verlinden*. The Second Circuit may have decided that the presence of the first three factors was enough to satisfy due process requirements, and therefore the court did not discuss the issue.

The Second Circuit's failure to address the immunity issue is less justifiable. In *Texas Trading*, the plaintiffs were United States citizens and the payment in issue was to be made in the United States. Under those facts, the court found that a breach of a letter of credit was a commercial activity that had a "direct effect" in the United States. *Id.* at 312. See 28 U.S.C. § 1605(a)(2). In *Verlinden*, the plaintiff was Dutch and payment was to be made in the Netherlands. *Verlinden*, 647 F.2d at 322. The court, however, declined to speculate as to whether a transaction involving a foreign plaintiff and a foreign payment had a "direct effect" within the United States. Thus, the immunity of Nigeria was an open question. If the district court was correct in finding Central Bank immune there was no reason to consider the constitutionality of asserting subject matter jurisdiction under § 1330(a).

23. Article III, § 2 of the United States Constitution provides that:

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 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; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

24. *Verlinden*, 647 F.2d at 325. See U.S. Const., art. III, § 2. In *Hodgson* and *Thompson v. Bowerbank*, 9 U.S. (5 Cranch.) 303 (1809), the alien plaintiffs failed to allege that the defendants were Maryland citizens. Although the Judiciary Act of 1789 gave the circuit courts jurisdiction over all suits involving aliens, Chief Justice Marshall concluded that "the statute cannot extend the jurisdiction beyond the limits of the constitution" and dismissed the case. 9 U.S. at 304.

diction under 28 U.S.C. section 1331. It found that there is jurisdic-
tion under section 1331 when: "the federal law creates the cause
of action,"27 when "the plaintiff's complaint discloses a need to inter-
pret a federal law,"28 or when "the court finds a national interest so
strong that a judge-made federal rule of decision preempts the state
law that would otherwise govern the cause."29 The court concluded
that none of these bases of jurisdiction are present in an action pre-
mised solely upon the FSIA.30

After finding that it lacked jurisdiction under section 1331, the
court considered whether federal question jurisdiction within the
scope of the "arising under" language of article III was wider than
the jurisdiction under section 1331, and if so, whether the scope of
the "arising under" language was broad enough to include a suit
brought by an alien against a foreign state. The court concluded that
a statute conferring jurisdiction over "any suit against a foreign
state" could not confer jurisdiction over suits between an alien and a
foreign state, absent a federal substantive rule of decision.31 The
court relied on Mossman v. Higginson,32 in which the Supreme Court
stated that the district courts did not have jurisdiction over a suit
between aliens when the only federal law in issue was a federal stat-
ute granting the district courts jurisdiction in all cases in which an
alien was a party.33

26. 28 U.S.C. § 1331 (Supp. V 1981) provides: "The district courts shall have origi-
nal jurisdiction of all civil actions . . . [arising] under the Constitution, laws, or treaties
of the United States."
27. Verlinden, 647 F.2d at 325. This test originated in Justice Holmes' opinion in
Supreme Court later found this test to be too restrictive. Thus, it is not the exclusive
basis of § 1331 jurisdiction. Verlinden, 647 F.2d at 326.
28. Verlinden, 647 F.2d at 326. See Smith v. Kansas City Title & Trust Co., 255 U.S.
180 (1921). See infra note 44 and accompanying text.
29. Verlinden, 647 F.2d at 326. See Clearfield Trust Co. v. United States, 318 U.S.
363, 367 (1943). In Verlinden, the court considered each of the tests as sufficient to pro-
vide jurisdiction. See Verlinden, 647 F.2d at 326-27.
30. Verlinden, 647 F.2d at 326-27. The court dismissed the first and third tests as
inapplicable. It also determined that the second test was inapplicable because the immu-
nity issue was not disclosed in the plaintiff's complaint. The only federal law involved in
the complaint was the FSIA, and since the FSIA does not confer substantive rights but
only regulates judicial practice, the complaint did not disclose a need to interpret a fed-
eral law. Id.
31. Verlinden, 647 F.2d at 328. The court asserted that the FSIA was not a statute
confering substantive rights but one regulating judicial practice. Id. at 327.
32. 4 U.S. (Dall.) 12 (1800).
33. Id. at 14. See also Hodgson and Thompson v. Bowerbank, 9 U.S. (5 Cranch.)
303 (1809). In Mossman the plaintiff failed to allege his own citizenship, thereby creating
a defect in the pleading. Thus, the question of jurisdiction over suits between a citizen
and a citizen of a foreign state was not present in Mossman. See U.S. CONST. art. III,
§ 2. See also supra note 23 and accompanying text.
Finally, the court reasoned that if section 1330(a) could give rise to federal jurisdiction, then all federal jurisdictional statutes could provide the basis of federal question jurisdiction; thus, "(t)he constitutional diversity grant would be surplusage." Thus for the concept of diversity jurisdiction to have any significance, only cases arising under federal substantive law may give rise to jurisdiction. Because the court found that the FSIA did not confer substantive rights, it held that there was no subject matter jurisdiction under section 1330(a).

III. JURISDICTION OVER ALIEN ACTIONS AGAINST FOREIGN STATES UNDER SECTION 1330(a)

A. CONSTITUTIONALITY

The principal issue in Verlinden is whether the Constitution allows the federal courts to exercise jurisdiction over suits between an alien and a foreign state when the only federal law in issue is the FSIA. Article III, section 2 of the Constitution defines the limits of federal judicial power. Section 2 of article III does not provide federal court jurisdiction over suits between an alien and a foreign state when there is no federal law in issue. Thus, this Note will focus on that section of article III granting federal court jurisdiction in all cases "arising under this Constitution, the laws of the United States, and Treaties made."

I. The Scope of the "Arising Under" Language of Article III

The Supreme Court has interpreted the phrase "arising under" primarily in cases brought under 28 U.S.C. § 1331. Section 1331, commonly known as the federal question statute, grants jurisdiction to the district courts over any case that "arises under the Constitution, laws, or treaties of the United States." In Louisville and Nashville R.R. v. Mottley, the Court held that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon

34. Id. at 329.
35. Id.
36. See supra note 30 and accompanying text.
37. Neither court considered jurisdiction based upon Congress's article I powers. Arguments on both side of those issues will be considered herein. See infra notes 71-107 and accompanying text.
38. See U.S. CONST. art. III, § 2. See also supra note 23 and accompanying text.
42. 211 U.S. 149 (1908).
those laws or that Constitution. In subsequent cases the Court stated that a suit arises under a federal law when it is clear from the plaintiff's cause of action that the right asserted depends upon the construction of a federal law and that construction is an essential element of the plaintiff's cause of action.

The exact meaning of section 1331, however, is not determinative of the constitutionality of asserting federal court jurisdiction under section 1330(a) over disputes between aliens and a foreign state. An examination of Supreme Court cases dealing with this issue reveals that the "arising under" language of article III, section 2 of the Constitution receives a broader interpretation than the identical language in 28 U.S.C. § 1331. Thus, article III may provide jurisdiction where section 1331 does not.

The Supreme Court, however, has had few opportunities to discuss the meaning of the "arising under" language of article III, section 2. In Osborn v. Bank of the United States, Chief Justice Marshall held that a case "arises under" the laws of the United States if a claimed right may be defeated by one construction of a federal law and sustained by a different construction of that same law.

43. Id. at 152. In Motley, the plaintiffs brought suit in federal district court against the railroad to compel performance of the railroad's agreement to issue free passes to the plaintiffs. The railroad made the agreement in consideration for the plaintiffs' decision to drop a prior suit. The plaintiffs' alleged that the railroad refused to perform because a subsequent Act of Congress prohibited the issuance of free passes by interstate railroads. Id. at 150-51. The Court held that the plaintiffs' cause of action was not based on a law of the United States, but only alleged an anticipated defense based on federal law. Id. at 152.

44. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1921). In Smith, the plaintiff sought to enjoin the trust company from investing funds in farm loan-bonds. The Federal Farm Loan Act authorized the bonds, but the plaintiff claimed that the act was unconstitutional in that the Constitution did not authorize the issuance of the bonds. Id. at 195-98. The Court said it was clear from the cause of action that the plaintiff's asserted right depended on the resolution of a question of federal law. Id. at 199, 201.

45. See Gully v. First National Bank in Meridian, 299 U.S. 109, 112 (1936), involving an action brought in state court against First National Bank for unpaid state taxes. Id. at 111-12. The bank removed the case to federal district court where it was dismissed on the merits. The court of appeals affirmed the dismissal and upheld the removal on the ground that Mississippi's power to tax a national bank originated in a federal statute. Thus, the suit for failure to pay a tax was based on a federal statute. Id. On appeal the Supreme Court found that the tax was a state tax and that state law created the right to sue for it. Id. at 115-16. Thus, there was no federal law creating a right essential to the plaintiff's cause of action. See id. at 112. Therefore, the district court did not have jurisdiction under § 1331 and its dismissal was improper. Id. at 118.


47. 22 U.S. (9 Wheat.) 738 (1824).
law. Marshall concluded that as long as the right is an essential ingredient of the claim it need not be explicitly stated in the cause of action. Despite the identical language, section 1331 is narrower in scope because it requires that the federal law in issue must be set forth explicitly in plaintiff's cause of action. Nevertheless, both article III and section 1331 require that the controversy involves rights dependent on federal law.

2. The FSIA as the Source of a Right Dependent on Federal Law

When an alien sues a foreign state, there is federal question jurisdiction only if the cause of action involves a right dependent on federal law. Thus, where the only federal law in issue is the FSIA, the controversy must involve some substantive right dependent on the FSIA. The FSIA, however, is not a substantive rule of law which determines the rights of the parties. The resolution of immunity issues under the FSIA determines only whether or not the court has jurisdiction; it does not determine the substantive rights of the parties.

The FSIA does prescribe "exclusive standards to be used in resolving questions of immunity." These "exclusive standards," as well as federal court determinations of immunity, bind the state courts. Although they appear to do more than regulate the jurisdiction of state and federal courts, these standards nevertheless do not affect the substantive rights of the parties.

One commentator has argued that the FSIA represents an exercise of congressional regulatory power over foreign relations and foreign commerce pursuant to article I. That commentator recognizes that the standards of immunity embodied in the FSIA define state court as well as federal court jurisdiction over actions against foreign states. To bind state courts, Congress must invoke an article I power beyond its traditional regulatory power over the federal courts. The commentator concludes that such regulatory action pursuant to article I powers represents a congressional policy concern outside of its concern with the scope of judicial power. Under this
FSIA prescribes a “uniform federal standard”56 of immunity applicable in both state and federal courts, and “injects an essential federal element into all suits against foreign states,”57 it does not satisfy the requirements of the “arising under” language of article III as construed in Osborn and the section 1331 cases. In both federal and state courts, the substantive rights of the parties are still determined solely by state law.58

Furthermore, even if the immunity standards are characterized as substantive federal law, these standards are not ingredients of the alien plaintiff’s cause of action.59 Under the FSIA, sovereign immunity is an affirmative defense which must be pleaded by the defendant.60 An anticipated defense involving federal issues, however, cannot be a basis for jurisdiction over an alien’s cause of action.61 Sovereign immunity issues do not arise until the foreign state pleads its defense. Thus, if jurisdiction in suits by aliens against foreign states is governed by the statutory federal question standards of sec-

56. See Verlinden, 488 F. Supp. at 1292.
57. Id.
58. The legislative history of the FSIA does characterize immunity as an affirmative defense to be raised by the foreign state. House Report, supra note 3 at 6616. One might argue that characterizing immunity as an affirmative defense defeats the plaintiff’s right to depend on the FSIA as a basis of jurisdiction. Regardless of how one characterizes the immunity issue, however, there is no doubt that immunity defeats only jurisdiction, not the rights of the plaintiff. See supra notes 51-52 and accompanying text.
60. House Report, supra note 3 at 6616.
tion 1331, the immunity issues clearly cannot provide the basis of federal question jurisdiction.

A suit against a foreign state is based upon section 1330(a), not section 1331. This Note will consider, therefore, whether Congress intended that the standards applied in section 1331 cases should also govern jurisdictional questions under section 1330(a), or alternatively, whether the Constitution requires a plaintiff's cause of action to depend upon a federal law. In Osborn, Chief Justice Marshall indicated that to support federal question jurisdiction a federal substantive law must be at least an ingredient of a plaintiff's cause of action. In addition, although the statutory requirements for section 1331 may not govern section 1330(a), considerations similar to those applicable to section 1331 apply to section 1330(a). Consequently, jurisdiction under section 1330(a) may be limited by the section 1331 requirements of federal question jurisdiction. If section 1330(a) can be constitutionally or statutorily limited to the section 1331 requirements, then immunity issues raised only in a foreign states' defense cannot support subject matter jurisdiction.

Congress has not prescribed any federal substantive law to govern suits against foreign states. Congress did not intend the FSIA to affect the substantive law of liability. The law governing a suit against a foreign state is the same as that governing a suit against a private party. Thus, if no other federal law is in issue, state rules of decision apply in suits against foreign countries.

In enacting the FSIA, Congress might have intended that when foreign countries are sued under state law the applicable state law has the force of federal substantive law. If this were true, state law would be incorporated in a federal rule of decision. An alien plain-

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62. The federal question statute does not exhaust the limits of federal judicial power based on the "arising under" language of article III. See supra note 46 and accompanying text.
63. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 824 (1824). Marshall concluded that "when a federal question . . . forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up." Id.
64. There is no legislative history indicating what the scope of § 1330(a) should be in regard to federal question jurisdiction. This might be because Congress never considered that aliens might sue foreign states in United States courts. In enacting the FSIA, Congress simply intended to provide a forum for United States plaintiffs. In all probability, Congress thought the diversity grant under article III, § 2 was sufficient to support the jurisdiction of § 1330(a). See infra notes 111-20 and accompanying text.
65. See supra text accompanying notes 59-61.
tiff would have a federal claim despite the fact that state law is the source of this claim. It is clear, however, that Congress never intended the FSIA to incorporate state law into a federal law of liability. Both the statute itself and the legislative history of the FSIA indicate that Congress did not intend, by incorporation of state law or otherwise, to enact a federal law of liability. Jurisdiction, therefore, cannot be based upon a FSIA-created law of liability. Without a body of federal liability law or standards of immunity as bases of federal question jurisdiction, the FSIA does not provide a basis of jurisdiction within the limits of article III.

3. Constitutionality of Subject Matter Jurisdiction Over Alien Actions Against Foreign States Outside the Limits of Article III

At least three Justices of the Supreme Court have maintained that Congress, pursuant to its article I powers, may expand federal jurisdiction beyond the limits of article III. If subject matter jurisdiction over alien actions against foreign states is constitutional even though the source of that jurisdiction is outside the limits of article III, section 1330(a) may be sufficient to support jurisdiction. Furthermore, a number of commentators suggest that some jurisdictional statutes alone may satisfy the "arising under" language of article III.

In National Mutual Insurance Company v. Tidewater, Justice

70. The FSIA does govern one area of liability; it precludes recovery of punitive damages from a foreign state. 28 U.S.C. § 1606 (1976). This is not sufficient, however, to raise a federal question if the cause of action does not claim punitive damages or if the claim is frivolous. In Verlinden, the plaintiff's cause of action did not include a right dependent on federal law. See supra notes 59-64 and accompanying text.
71. Neither the district nor the circuit court in Verlinden discussed a constitutional basis for subject matter jurisdiction outside the conventional limitations of article III. The constitutionality of jurisdiction over disputes between aliens and foreign states may already be settled for the purposes of § 1330(a). In Hodgson and Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809), the Court faced the question of whether Congress could confer jurisdiction on the federal courts over controversies between aliens. Chief Justice Marshall held that the statute conferring jurisdiction over controversies involving an alien could not "extend . . . beyond the limits of the Constitution." Id. at 304. Section 1330(a) jurisdiction is analogous to the jurisdiction in Hodgson—it confers jurisdiction in actions against foreign states. This jurisdiction may not extend beyond the limits of the Constitution. Developments since 1809, however, may have diminished Hodgson's authority. See infra notes 96-98 and accompanying text.
73. See Mishkin, supra note 46 at 192-96. See also Wechsler, Federal Jurisdiction and Revision of the Judicial Code, 13 LAW & CONTEMP. PROBL. 216, 224-25 (1948).
74. National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). Tidewater involved the validity of a statute granting jurisdiction to the federal courts over suits between citizens of the District of Columbia and citizens of the state. Three Justices (Jackson, Black, and Burton) found that article I, section 8 gave Congress power
Jackson argued that Congress, pursuant to its legislative power to govern the District of Columbia, could expand the jurisdiction of the federal courts beyond that delineated in article III.\textsuperscript{75} Professor Weschler argues that Congress should be able to confer federal jurisdiction in all cases where it has the power to enact substantive law but chooses not to do so.\textsuperscript{76} Unlike Justice Jackson’s view, this theory suggests that the Congressional grant of jurisdiction is itself a law within the meaning of the “arising under” language of article III.\textsuperscript{77} Finally, Professor Mishkin suggests that where Congress has an articulated, active policy in a given area, the “arising under” language supports federal jurisdiction over cases in that area even if the case is governed solely by state law.\textsuperscript{78}

Each of these theories has met strong criticism. Although Justice Jackson’s opinion in \textit{Tidewater} represented the majority result, six justices, two concurring and four dissenting, wholly rejected the reasoning supporting article I expansion of the judicial power.\textsuperscript{79} These Justices contended that the history of article III indicates that the authors of the Constitution clearly intended the enumerated bases of jurisdiction in article III to be the exclusive source of federal jurisdiction.\textsuperscript{80} The Justices also argued that if Congress could use article I to expand jurisdiction, there would be no limit to the powers, both judicial and non-judicial, that Congress could confer on the judiciary.\textsuperscript{81}

In his dissenting opinion in \textit{Textile Workers Union v. Lincoln Mills of Alabama},\textsuperscript{82} Justice Frankfurter criticized the Wechsler and Mishkin theories. The case arose out of the Supreme Court’s con-

\textsuperscript{75.} See \textit{id.} at 591-96. Justice Jackson contended that in fact the Supreme Court had approved of several statutes conferring jurisdiction in cases where there was no article III basis for judicial power. Notable examples of jurisdiction based on a power outside article III are statutes that provide for federal jurisdiction where a trustee in bankruptcy brings an action to recover a debt under state law, or where a party brings a claim against the United States. See \textit{infra} notes 100-106 and accompanying text for a discussion of possible article III bases of power supporting such statutes.

\textsuperscript{76.} Wechsler, \textit{supra} note 73 at 224.

\textsuperscript{77.} \textit{Id.} at 225.

\textsuperscript{78.} Mishkin, \textit{supra} note 46 at 192.

\textsuperscript{79.} See \textit{supra} note 74 and accompanying text.

\textsuperscript{80.} See National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 615-17 (1949) (Rutledge, J., concurring), at 647-50 (Frankfurter, J., dissenting), at 631-36 (Vinson, C.J., dissenting); Mishkin, \textit{supra} note 46 at 191.

\textsuperscript{81.} Justice Frankfurter suggested that Congress could expand the judicial power to include advisory opinions. National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 648 (1949) (Frankfurter, J., dissenting).

\textsuperscript{82.} 353 U.S. 448 (1957) (Frankfurter, J., dissenting).
struction of section 301 of the Taft-Hartley Act. Section 301 conferred federal court jurisdiction over contract disputes between employees and labor organizations. The Court held that section 301 required federal courts to apply federal common law in such cases.

Justice Frankfurter disagreed with the majority's conclusion that section 301 prescribed federal common law as a rule of decision. Consequently, Frankfurter had to consider the constitutionality of federal jurisdiction where there was neither diversity of parties nor an issue involving federal substantive law stated in the cause of action. He argued that traditional notions of federal question jurisdiction would be vastly extended if Congress could confer jurisdiction based solely on its potential, but unexercised, power to enact substantive legislation. Frankfurter noted that "every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts." He concluded that the judicial power could not be extended this far.

Despite the importance of determining the limits on the judicial power and upon Congress's power to extend federal jurisdiction beyond article III, the state of the law remains unclear. No majority opinion of the Supreme Court has accepted either Justice Jackson's article I theory or the "protective jurisdiction" theories. To the contrary, in Tidewater six Justices rejected Justice Jackson's article I theory. This rejection, however, was not the Court's holding; thus, the theory still may have some validity.

Although the Supreme Court has not expressly passed upon these various theories, the Court has approved several congressional statutes that are arguably justifiable only under those theories. In Osborn v. Bank of the United States, the statute in question granted

85. Id. at 456-57. Thus, the Court found that the case did arise under federal substantive law. Id. at 457.
86. Id. at 460-69 (Frankfurter, J., dissenting).
87. Id. at 473-77 (Frankfurter, J., dissenting). The majority found federal common law in issue, and thus found no need to address Frankfurter's dissent.
88. Id. at 474 (Frankfurter, J., dissenting). Frankfurter contended that only the theory that state courts were inadequate to determine a given state law could justify "protective jurisdiction" such as that suggested by Professor Wechsler. Id. at 475 (Frankfurter, J., dissenting).
89. Id. at 474 (Frankfurter, J., dissenting).
91. 22 U.S. (9 Wheat.) 738 (1824).
the Bank of the United States the right to sue and be sued in the federal courts.\textsuperscript{92} Chief Justice Marshall held that the right of the Bank to sue depended upon an interpretation of federal law. In Marshall's view, the right to sue in and of itself supported federal question jurisdiction, even if the right were not in issue in a particular case.\textsuperscript{93} In addition, the Supreme Court has implicitly approved jurisdiction in cases involving congressional statutes providing for federal jurisdiction in actions brought by trustees in bankruptcy,\textsuperscript{94} even though the actions are based upon state claims and there is no diversity of citizenship.\textsuperscript{95} Moreover, the Supreme Court has not questioned the validity of statutes granting district court jurisdiction over claims against the United States, even though some of these claims may arise solely under state law.\textsuperscript{96}

The proponents of the Jackson, Wechsler, and Mishkin theories argue that if these statutes are valid, the source of federal judicial power must be found outside the traditional limits of article III. In \textit{Tidewater}, Justice Jackson contended that by approving the bankruptcy statutes and by examining the source of congressional power to allow suits against the United States, the Supreme Court indicated that the sole source of judicial power over these actions derived from Congress's article I powers.\textsuperscript{97} Professor Mishkin, on the other hand, explains that \textit{Osborn} and the bankruptcy cases involve areas where

\begin{itemize}
\item \textsuperscript{92} \textit{Id.} at 817. \textit{Bank of the United States Act}, 1 Stat. 191, ch. 10 (1791).
\item \textsuperscript{93} \textit{Id.} at 822, 824.
\item \textsuperscript{94} See \textit{Williams v. Austrian}, 331 U.S. 642 (1947); \textit{Schumacher v. Beeler}, 293 U.S. 367 (1934).
\item \textsuperscript{95} In neither case did the Court expressly address the issue of article III jurisdiction or the source of the judicial power exercised. \textit{WRIGHT & MILLER, supra} note 46 at §§3521, 3542.
\item \textsuperscript{97} \textit{National Mutual Insurance Co. v. Tidewater Transfer Co.}, 337 U.S. 582, 591-96 (1949). In \textit{Williams v. United States}, 289 U.S. 553 (1933), the Court held that the Court of Claims was a legislative court and that the source of judicial power was not article III, but article I. \textit{Id.} The Court reasoned that the judicial power over controversies to which the United States is a party only extends to those controversies where the United States is a plaintiff, not a defendant. \textit{Id.} at 587. See U.S. CONST. art. III, § 2. In \textit{Tidewater}, Justice Jackson recognized that suits against the United States could be brought in the district courts. Thus, following \textit{Williams}, Jackson argued that because claims against the United States do not fall within the article III judicial power, Congress must have conferred jurisdiction of the federal courts outside the judicial power of article III. \textit{See National Mutual Insurance Co. v. Tidewater Transfer Co.}, 337 U.S. 582, 593 (1949).

Justice Jackson also found that Congress conferred jurisdiction outside of article III over actions brought by a trustee in bankruptcy. In \textit{Schumacher v. Beeler}, 293 U.S. 367 (1934) and \textit{Williams v. Austrian}, 331 U.S. 642 (1947), Jackson found language indicating that Congress's power to enact the statutes derived from its article I power over bankruptcy, and that there was no article III basis for federal jurisdiction. \textit{Id.} at 595. Because the bankruptcy statutes were valid, Jackson found that the expansion of judicial power outside the limits of article III must also be valid. See \textit{infra} notes 100-06 and accompanying text for an alternative explanation of the results in the above cases.
Congress has an articulated, active policy. In Mishkin’s view, such a congressional policy satisfies the “arising under” language of Article III.

Despite Jackson’s and Mishkin’s argument that the source of federal jurisdictional power must be found outside of the traditional limits of Article III, these cases and statutes may be justified within the limits of Article III.

In Osborn and the bankruptcy cases, the rights dependent on federal law were an original ingredient of the cause of action. In Osborn, Chief Justice Marshall found that the Bank’s right to sue depended on a federal law, and that this was an original ingredient of every action involving the Bank. Similarly, in the bankruptcy cases the trustee’s powers and the assignment of the bankrupt’s claims all depended on federal law. Under the
Osborn rationale, these rights are original ingredients of every action. Finally, federal jurisdiction over actions brought under the Federal Tort Claims Act, and the Tucker Act can be supported as actions arising under a federal law or as actions to which the United States is a party. All of these bases of jurisdiction are within the limits of article III.

Explanations of the above cases provide little indication of the present state of the law. A majority of the Supreme Court never has accepted or rejected any jurisdictional theory in this area. Six justices in Tidewater, although not agreeing on the result, did reject Justice Jackson's article I theory. In addition, the Court's silence regarding Mishkin's and Wechsler's theories may indicate that it will not accept such an expansion of the traditional notions of the "arising under" language. Consequently, section 1330(a) probably cannot constitutionally extend federal jurisdiction to suits brought by aliens against foreign states when no federal substantive law is in issue.

B. CONGRESSIONAL INTENT AS TO FEDERAL JURISDICTION OVER ALIEN SUITS AGAINST FOREIGN STATES

In Verlinden, both the district court and the court of appeals found that it was unclear whether Congress intended to make the FSIA and section 1330(a) applicable to alien suits against foreign

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103. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1834). Professor Mishkin recognizes that this is a possible basis for jurisdiction under article III. Mishkin, supra note 46 at 194, 195.


106. See Glidden Co., v. Zdanok, 370 U.S. 530 (1962); National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 610 (1949) (Rutledge, J., concurring). But see Williams v. United States, 289 U.S. 553, 577 (1933). Only three Justices in Zdanok were willing to overrule the Williams holding that the judicial power of article III does not extend to controversies in which the United States is a defendant. The majority, however, did recognize that the Court of Claims was an article III court. Writing for a plurality, Justice Harlan found that the judicial power of the Court of Claims was based on either the "arising under" clause or the judicial power over controversies to which the United States is a party. Glidden Co. v. Zdanok, 370 U.S. 530, 557, 562-68 (1962).

In addition, Justice Harlan would have grounded the judicial power supporting the Federal Tort Claims Act solely upon article III. Id. at 565. Some commentators, however, suggest that an action against the United States is always an action arising under federal law. Mishkin, supra note 46 at 193; Wright & Miller, supra note 46 at § 3654, 171.

107. Wright & Miller, supra note 46 at § 3562, 397-414, at § 3565, 433.
The district court looked to the statute itself to determine whether Congress intended the FSIA to confer jurisdiction over such suits. The court found that section 1330(a) conferred jurisdiction in "any non-jury civil action" against a foreign state. The court also concluded that if section 1330(a) did not provide jurisdiction in such cases "the purpose of the removal statute would be thwarted."

Despite the court's findings, there are significant indications in the legislative history of the FSIA that Congress did not intend to provide federal jurisdiction over suits between aliens and foreign states. Congress enacted the FSIA under its power to prescribe the jurisdiction of the federal courts pursuant to article I, section 8, clause 9, and article III, section 2, and under its power to make all laws necessary and proper for exercising the judicial power over controversies between "a state, or the citizens thereof, and foreign states." In this manner, Congress clearly intended FSIA suits to be brought under the diversity jurisdiction of the federal courts.

The legislative history of the FSIA, therefore, refutes any argument that Congress intended it to confer federal jurisdiction over suits brought by alien plaintiffs against foreign states. If Congress believed that under article I it could grant federal jurisdiction outside the limitations of article III, it would not have claimed that its power to enact the FSIA was based on article III. It might be argued, however, that Congress simply listed every possible constitutional basis for conferring jurisdiction, and that it did not believe that its authority to enact the FSIA had to be grounded in article III. Further, in Verlinden the court claimed that the FSIA must provide a basis for subject matter jurisdiction in order for a foreign state to be able to remove the case to federal court. In 28 U.S.C. § 1441(d) Congress intended to allow foreign states to remove to federal court; if the FSIA did not provide jurisdiction, the court concluded that this Congressional intent would be frustrated. It is significant, however, that Congress based its power to enact the removal statute exclusively upon the judicial power over actions

108. Verlinden, 488 F. Supp. at 1292; Verlinden, 647 F.2d at 320.
110. Id. The district court reasoned that if § 1330(a) did not provide federal court jurisdiction, a foreign state would not be able to remove a case from state to federal court pursuant to 28 U.S.C. § 1441(d). In such a case, the foreign state would be forced to conduct a defense in state court. The court concluded that this was contrary to Congress's intent to make a federal forum available to all foreign states. Id. See House Report, supra note 3 at 6611.
111. U.S. CONST. art. I, § 8, cl. 18; art. III, § 2, cl. 1; House Report, supra note 3 at 6611.
112. See supra note 110-11 and accompanying text.
"between a State, or the Citizens thereof, and foreign States.\textsuperscript{114} Contrary to the district court's findings in \textit{Verlinden}, therefore, Congress intended only suits between citizens and foreign states to be removable. It did not expressly provide for removal in a state court action between an alien and a foreign state.

In addition, Congress amended the diversity statute\textsuperscript{115} to exclude actions against foreign states.\textsuperscript{116} The House Report states that "[s]ince jurisdiction in actions against foreign states . . . is . . . treated by . . . § 1330, a similar jurisdictional basis under § 1332 becomes superfluous."\textsuperscript{117} Congress clearly intended section 1330 to replace former section 1332(a) with regard to suits against foreign states. It is doubtful that when Congress enacted section 1330(a) without discussion it intended to confer jurisdiction upon alien suits against foreign states—cases which previously were beyond the scope of federal jurisdiction. The purpose of the FSIA is not to protect aliens, but rather to protect United States citizens, United States businessmen, and United States property owners by granting these persons access to the federal courts in suits against foreign states.\textsuperscript{118} Although the legislative history of the FSIA frequently refers to "plaintiffs," "litigants," and "private parties,"\textsuperscript{119} this does not necessarily include foreign "plaintiffs," "litigants," and "private parties."\textsuperscript{120} When Congress enacted the FSIA it did not intend to make United States courts "international courts of claims."\textsuperscript{121}

Although the legislative history of the FSIA does not expressly indicate Congress's intention regarding alien suits against foreign states, it supports a construction of section 1330(a) limiting federal jurisdiction to actions brought by United States citizens. The judicial policy of construing statutes as consistent with the Constitution

\textsuperscript{114} U.S. CONST. art. III, § 2, cl. 1; House Report, \textit{supra} note 3 at 6632. This is especially significant in light of the district court's rationale in \textit{Verlinden}. In \textit{Verlinden}, the court claimed that the FSIA must act as a basis for subject matter jurisdiction in order for a foreign state to be able to remove its case from state to federal court under 28 U.S.C. § 1441(d). \textit{See infra} notes 109-11 and accompanying text.

\textsuperscript{115} 28 U.S.C. § 1332(a) (1976). The predecessor of section 1332(a) did not provide federal jurisdiction over suits between aliens and foreign states.

\textsuperscript{116} House Report, \textit{supra} note 3 at 6613.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.} at 6605.

\textsuperscript{119} \textit{Id.} at 6605, 6606.

\textsuperscript{120} The court of appeals in \textit{Verlinden} thought that § 1330(a) applied to foreign plaintiffs. \textit{Verlinden}, 647 F.2d at 324.

\textsuperscript{121} \textit{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. 31 (1976) [hereinafter cited as \textit{Hearings}] (statement of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep't of Justice). For a discussion of the international effects of becoming an "international court of claims," \textit{see infra} notes 142-48 and accompanying text.
whenever possible also mandates a limited interpretation of section 1330(a). Thus, it was unnecessary for the district court or the appellate court in *Verlinden* to address the constitutional issues.

IV. FUTURE CONGRESSIONAL ACTION

The clear import of *Verlinden B.V. v. Central Bank of Nigeria* is that section 1330(a) does not give the federal courts jurisdiction over suits brought by aliens against foreign states when no federal substantive law is at issue. There is, however, no constitutional limitation upon the jurisdiction of state courts. The FSIA restricts state court jurisdiction only in those cases where a foreign state is entitled to immunity. Consequently, an alien may bring a foreign state before a state court provided there are minimum contacts present to satisfy personal jurisdiction requirements. State courts, however, have no more reason to protect an alien plaintiff than do the federal courts. The question arises, therefore, as to whether Congress should open both federal and state courts to alien actions against foreign states, or whether Congress should deny aliens access to all federal and state courts in such cases.

A. POLICY CONSIDERATIONS

If the United States is the only forum available for an alien plaintiff's valid claim, it might be argued that Congress should provide a forum in which to litigate that claim. Most alien plaintiffs, however, may bring an action in the courts of their own countries. In *Verlinden*, the plaintiff's home country, the Netherlands, does not apply sovereign immunity in cases involving commercial acts. Thus, *Verlinden* could have pursued the action in his own country, a forum in which Central Bank is subject to the same standards of immunity that are present in the United States. It is significant that

122. See *supra* note 22.
123. 647 F.2d 320 (2d Cir. 1981).
125. Cf. *J. Zeevi & Sons v. Grindlay's Bank (Uganda)*, 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S. 892 (1975), cert. denied, 423 U.S. 866 (1976), a pre-FSIA case in which an Israeli company sued a Ugandan bank in New York state court. The New York Court of Appeals allowed jurisdiction over an alien action against a foreign state. Although *Zeevi* arose before Congress enacted the FSIA, the FSIA did nothing to alter state court jurisdiction over alien actions. The FSIA only restricts jurisdiction of state courts where a foreign state is entitled to immunity. Thus, the *Zeevi* case still could support New York jurisdiction over *Verlinden'*s action against the Central Bank of Nigeria.
the United States adopted the restrictive theory of immunity primarily to align United States sovereign immunity law with the sovereign immunity law of most other nations.128 Almost all Western European nations adhere to the restrictive theory of immunity.129

Although an alien plaintiff may be able to sue in his own courts, the plaintiff may not be able to recover on a judgment of those courts. The FSIA and the laws of most European countries allow a limited right of execution against a foreign state's property.130 It is unclear, however, whether Dutch law follows the restrictive theory.

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128. See Tate Letter, 26 Dep't St. Bull. 984 (1952); Hearings, supra note 121 at 33 (statement of Monroe Leigh, Legal Advisor, Dep't of State); Id. at 32 (statement of Bruno Ristau). When the State Department decided to follow the restrictive theory of immunity, Mr. Tate noted that almost all Western countries embraced some form of the restrictive theory. Tate Letter, 26 Dep't St. Bull. 985 (1952).

129. Italy applies the most restrictive theory of sovereign immunity. In Italy, there is no immunity whenever a foreign state is sued as a private person, when a foreign state has acted in the domain of private law, or when a foreign state is involved in acts involving a commercial activity. See Sucharitkul, supra note 126 at 126. Belgium was one of the first countries to adopt the restrictive theory, allowing immunity only where a foreign state has acted in its sovereign capacity. See id. at 132; Verhoeven, Immunity from Execution of Foreign States in Belgium Law, 10 NETH. Y.B. Int'l L. 73, 73 (1979). France and Germany also restrict immunity to noncommercial acts. See Sucharitkul, supra note 126 at 143-45, 148-49; Seidl-Hohenveldern, State Immunity: Federal Republic of Germany, 10 NETH. Y.B. Int'l L. 35, 55-61 (1979). Finally, the United Kingdom denies immunity if the proceedings relate to a commercial transaction, a contractual obligation to be performed in the United Kingdom, or a tort committed in the United Kingdom. See State Immunity Act, 1978, ch. 33, § 3, 4, 5.

In addition, the European Convention on State Immunity, opened for signature May 16, 1972, 74 Europ. T.S., enacted into force (1976), reprinted in 11 I.L.M. 470 (1972) [hereinafter cited as Convention on Immunity], governs sovereign immunity in disputes involving a private person of a Contracting State and another Contracting State. The Convention specifically denies immunity where the proceedings relate to a contractual obligation of the State, employment contracts, and torts. Id. at ch. I, arts. 4, 5, 11. As of 1979, only Austria, Belgium, Cyprus and the United Kingdom had ratified the Convention. See Council of Europe, Chart Showing Signatures and Ratifications of Council of Europe Conventions and Agreements, 41 (1979); Higgins, Execution of State Property: United Kingdom Practice, 10 NETH. Y.B. Int'l L. 35, 54 (1979). The Convention, however, provides an example of the acceptance of the restrictive theory of immunity in Western Europe.

130. See generally 28 U.S.C. §§ 1609-11 (1976). In Europe, only Italy grants absolute immunity from execution to a foreign state's property. Condorelli & Sbolei, Measures of Execution Against the Property of Foreign States: The Law and Practice in Italy, 10 NETH. Y.B. Int'l L. 197, 230 (1979). This immunity is limited, however, to those foreign states that grant Italy a reciprocal absolute immunity from execution in courts of the foreign state. Id. at 204, 230. Belgium has followed a highly restrictive theory of immunity from execution since 1951. Sucharitkul, supra note 126 at 136, 137. See Verhoeven, supra note 129 at 77, 78. West Germany will enforce a judgment against a foreign state's property as long as the assets involved are not used for public services. Seidl-Hohenveldern, supra note 129 at 66. The West German courts executed against the assets of the Central Bank of Nigeria in a case involving claims similar to those found in Verlinden. Id. at 67. Thus, the West German courts allowed an execution against a foreign state's property that even the FSIA would prohibit. See 28 U.S.C. § 1611 (1976). Finally, the United Kingdom will enforce a judgment against property that is "for the time being in use or intended for use for commercial purposes." State Immunity Act, 1978 c. 33, §§ 13(2)(b), 13(4).
of immunity from execution. The only applicable statutory provision allows "execution of court decisions . . . subject to the exceptions acknowledged under international law."\footnote{131} The international law relating to immunity of execution, however, is unclear.\footnote{132} At least one commentator argues for the application of article 438(a) of the Dutch Domestic Code of Civil Procedure, which denies execution of judgments only against "property intended for public service."\footnote{133} Thus, business property would be subject to execution. Under this theory, the plaintiff in \textit{Verlinden} would have been able to execute a judgment against any Nigerian business property in the Netherlands.\footnote{134}

Consequently, even if an alien plaintiff is denied access to United States courts, in all probability he still would have access to a forum where he could litigate his claim against a foreign state and execute his judgment. Denying an alien plaintiff access to a United States forum may result in an inconvenience to the alien, but it will not necessarily be fatal to the alien's claim.

In addition, an assertion of jurisdiction in suits between aliens and foreign states would deviate from current international practice. Most European countries will probably not allow a nonresident alien to sue a foreign state in their courts. There is no specific law in any European country addressing jurisdiction over suits between aliens and foreign states. Most European countries grant jurisdiction, however, only when one of the parties is domiciled in the forum.

\footnote{The European Convention on State Immunity prohibits execution against property of a Contracting State in the territory of another Contracting State. Convention on Immunity, \textit{supra} note 129, at art. 23. A Contracting State, however, must give effect to a judgment against it by a court of another Contracting State. \emph{Id.} at art. 20(1). In addition, a plaintiff may execute against the property of a Contracting State if both its own Contracting State and the defendant's Contracting State declare that they will allow such executions. \emph{Id.} at art. 26. Thus, although there is no explicit right of execution in the forum country, a citizen of one Contracting State will almost always be able to recover a judgment against another Contracting State.

\footnote{131} Article 13a \textit{Wet AB}, Dutch Civil Code, reprinted in \textit{Voskuil}, \textit{supra} note 127 at 260.

\footnote{132} Even within those European countries that adhere to the restrictive theory of immunity, the exact parameters of that immunity are not consistent from country to country. See \textit{supra} note 130 and accompanying text.

\footnote{133} \textit{See} Article 13a \textit{Wet AB}, Dutch Civil Code, reprinted in \textit{Voskuil}, \textit{supra} note 127 at 261, 262.

\footnote{134} If Nigeria has no property in the Netherlands, Verlinden may still be able to recover in the United States, either in state court, \textit{see} \textit{Uniform Foreign Money Judgments Recognition Act}, §§ 1-11; \textit{N.Y. CIV. PRAC. LAW} §§ 5301-09 (McKinney 1978), or in federal court, \textit{see} 28 U.S.C. §§ 1609-11 (1976). Because § 1609 grants a foreign state immunity from execution in, but not from the jurisdiction of the federal courts, the federal courts may have jurisdiction in actions by aliens against a foreign state. \textit{Cf.} 28 U.S.C. § 1604 (1976). Thus, the federal rules on execution may provide a federal question in actions on a judgment. \textit{See} \textit{supra} notes 37-107 and accompanying text for discussion on jurisdiction over an original cause of action brought by an alien.
state. The EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters grants jurisdiction only in cases where one of the parties is domiciled in the forum state. Thus, because a foreign state cannot be regarded as a domiciliary of another state, most European countries would grant jurisdiction in actions brought by alien plaintiffs against foreign states only if the alien plaintiff were a domiciliary of the forum state. The European standard does not permit a nonresident alien to bring a foreign state into the courts of a European country. Thus, the United States would deviate from accepted European practice if it opened its courts to all alien actions brought against foreign states.

It is unclear what the precise international effects might be if Congress did confer federal court jurisdiction over suits between aliens and foreign states. Principles of international comity and sovereignty have always played a primary role in a forum state's decision regarding whether or not to assert jurisdiction over a foreign country. Such considerations have prompted courts to refrain from adjudicating the validity of acts of state. Similarly, infringe-

135. Italy, Belgium, the Netherlands, France, Germany, and Luxembourg all recognize a defendant's domicile in the forum as a sufficient jurisdictional basis. See I.G. DELAUME, TRANSNATIONAL CONTRACTS, §§ 8.12, 21.22 (1980). In addition, in France and Luxembourg there is jurisdiction if the plaintiff or defendant is a native of the foreign country. See French Civil Code, art. 14, 15, reprinted in DELAUME, supra at § 8.02. Only West Germany and Denmark are willing to assert jurisdiction in cases where neither the plaintiff nor the defendant is a citizen or a domiciliary of the foreign country, as long as the defendant owns property in the forum state. See DELAUME, supra at §§ 8.10, 8.17, 8.18. Thus, an alien plaintiff could sue an alien defendant in the West German courts if the defendant owned property in West Germany.


137. Id. at art. 2, 4. For example, a United States citizen domiciled in France would be able to bring an action in a French court against a Canadian citizen domiciled in Canada. See DELAUME, supra note 135 at §§ 8.11, 8.18-20. Thus, he may also be able to sue a foreign state in the French courts.

138. One could argue that opening the courts of the United States to all suits by aliens against a foreign state would not deviate from the European practice. In the European cases, the basis of jurisdiction is personal jurisdiction. Because a United States court would impose a similar personal jurisdiction requirement on all suits by aliens against a foreign country, there might not be a substantial discrepancy between the United States and European practices. In European courts, however, a foreign state could never be a “domiciliary” of a foreign country; thus, only an alien plaintiff domiciled in the foreign state could sue a foreign state. In the United States, on the other hand, if the courts had jurisdiction over alien actions under facts such as those presented in Verlinden, this jurisdiction would include all alien actions regardless of whether the alien was a United States domiciliary. Thus, despite the similar personal jurisdiction tests, there would be a substantial discrepancy between the United States and European practices.

139. One of the fundamental rationales for the theory of absolute immunity is that a foreign sovereign never intends to subject himself to “jurisdiction incompatible with his dignity, and the dignity of his nation.” Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

ment of sovereignty has been a volatile issue in establishing the boundaries of the extraterritorial application of United States antitrust laws.\textsuperscript{141} Significantly, in drafting the FSIA Congress recognized the "potential sensitivity of actions against foreign states."\textsuperscript{142} Surely foreign sensitivity to United States actions would increase if the United States extended jurisdiction to suits brought by aliens against foreign states.

In view of the "potential sensitivity" of asserting jurisdiction over actions between aliens and foreign states, opening the courts of the United States to such suits might invite retaliatory action by other countries. Foreign states have often taken steps to avoid compromising their sovereignty.\textsuperscript{143} These nations might retaliate by opening their courts to alien actions against the United States,\textsuperscript{144} by attempting to avoid United States courts by reducing their commercial activity affecting the United States,\textsuperscript{145} or by enacting legislation to block the effects of the adjudication of alien actions in the courts of the United States.\textsuperscript{146}

Of course, foreign nations may also retaliate against the assertion of jurisdiction by the United States over foreign states in actions brought by United States citizens. The United States' interest in providing its citizens with a forum in which to litigate their claims, how-


\textsuperscript{142} House Report, supra note 3 at 6631.

\textsuperscript{143} For example, consider the decline of foreign state arbitration in London prior to enactment of the Arbitration Act, ch. 42. Before the Act, the High Court in England could intervene in arbitration proceedings to require litigation of "any question of law" and to decide issues of law. See Arbitration Act, 1950, 14 Geo. 6, ch. 27, § 21. Consequently, a foreign state that submitted to arbitration in England also risked submitting to the jurisdiction of the English courts. Rather than compromise their sovereignty, most foreign states simply avoided arbitration in London. Shenton & Toland, \textit{London as a Venue for International Arbitration: The Arbitration Act, 1979}, 12 LAW & POL'Y INT'L BUS. 643, 651 (1980).

\textsuperscript{144} In both Italy and Belgium jurisdiction based on the nationality or domicile of a party is intended as a retaliatory measure against the French jurisdictional rule. DeLaueme, supra note 135 at §§ 8.08, 8.09, 8.16, 8.17. See supra note 128 and accompanying text.

\textsuperscript{145} See 28 U.S.C. § 1611 (1976) (disallowing executions on funds of central banks to avoid discouraging foreign deposits.) House Report, supra note 3 at 6630. This is similarly applicable to cases in which alien suits are allowed because the commercial activity of a foreign state defeats immunity. See 28 U.S.C. § 1605(a)(2) (1976).

\textsuperscript{146} Compare with blocking legislation enacted to resist antitrust enforcement. Marks, supra note 141 at 153, 154.
ever, outweighs the harm of any possible retaliation.147 The United States interests in providing alien plaintiffs a forum are not nearly as strong. Most aliens have alternative forums in which to press their claims.148 Although the United States may have some interest in resolving such disputes where a foreign state's commercial activity affects the United States,149 this interest is minimal; allowing these suits into United States courts primarily benefits the alien plaintiff. Allowing alien plaintiffs to sue foreign states in United State courts is of no direct benefit to United States citizens. In enacting the FSIA, Congress recognized that granting federal jurisdiction over cases in which the United States has little interest could “give rise to serious friction in United States' foreign relations.”150 Congress consequently prohibited jurisdiction based merely upon attachment of property within the United States.151 Similar caution is appropriate when considering jurisdiction over alien actions against foreign states.

B. CONGRESSIONAL ACTION

Congress should not open the federal courts to all alien actions against foreign states. Providing jurisdiction in all such cases, even if the foreign state is not entitled to immunity, would alienate foreign nations without promoting any significant United States' interests. Denying jurisdiction does not seriously injure an alien's ability to litigate a claim. Because in most cases an alien may sue in his own courts, there is no need to provide him with a United States forum. Thus, Congress should not provide federal jurisdiction in alien actions against foreign states except where there is a significant United States' interest expressed in federal law. In addition, Congress should restrict state court jurisdiction over alien actions against foreign states in order to prevent state courts from offending foreign states. The following draft of § 1330(a) provides a possible solution:

§ 1330(a)(1): The district courts shall have original jurisdiction . . . of any nonjury civil action, either arising under a federal law other than the Foreign Sovereign Immunities Act, or brought by a citizen, against a foreign state.

(2): State Courts shall not have jurisdiction over suits brought by a non-resident alien and not arising under a law of the United States other than the Foreign Sovereign Immunities Act.

147. See Hearings, supra note 121 at 30 (statement of Ristau).
148. See supra notes 126-34 and accompanying text.
150. House Report, supra note 3 at 6626.
This draft statute restricts suits between aliens and foreign states and provides federal courts with jurisdiction. It also allows state courts to retain jurisdiction in suits brought by United States citizens. Finally, it provides for federal and state court jurisdiction in suits involving federal substantive law. The legislative history of such a statute should make clear that federal substantive "law" does not include federal law governing immunity and that the FSIA does not represent a federal substantive law of liability.

If Congress concludes, however, that federal courts should be open to alien actions against foreign states, it must enact federal substantive law to provide the constitutional basis of such jurisdiction. Congress can accomplish this by incorporating applicable state law into a federal law of liability, or by changing sovereign immunity and its exceptions into substantive federal law unrelated to jurisdiction. Such action, however, is inadvisable.

V. CONCLUSION

The Second Circuit's conclusion in Verlinden that section 1330(a) and the FSIA are purely jurisdictional is correct. The court, however, failed to respond to the district court's arguments that the FSIA governs substantive federal issues. In addition, because the court found that the FSIA is a jurisdictional statute, it did not consider whether the Constitution requires that the FSIA be an original ingredient in the plaintiff's cause of action in order for the case to arise under the law of the United States. Finally, the court failed to discuss jurisdiction based solely upon Congress's article I powers.

This Note concludes that there is no federal question jurisdiction in an alien action against a foreign state where the FSIA is the only federal law in issue. First, the issues of immunity in the FSIA are not substantive federal law. Resolution of immunities issues determines jurisdiction; it does not affect the substantive rights of the parties. State law continues to govern liability. Second, sovereign immunity is an affirmative defense; it is not an original ingredient of the plaintiff's cause of action. Third, the FSIA cannot support jurisdiction simply as a jurisdictional statute. Congress may not confer jurisdiction through its article I powers, but must extend the judicial power within the limits of article III. Finally, Congress did not intend section 1330(a) to confer jurisdiction over alien actions against foreign states. Thus, it is clear that there is no jurisdiction in Verlinden-type cases.

152. See supra notes 37-107 and accompanying text.
153. See supra notes 58, 68-70 and accompanying text.
Congress should not confer jurisdiction in suits brought by alien plaintiffs against foreign states. There is no need to provide alien plaintiffs with a United States forum when alternative forums exist in the plaintiffs' home countries—countries which in most cases apply the restrictive theory of sovereign immunity. In addition, asserting jurisdiction over such suits could unnecessarily alienate foreign states which might consider such an assertion an infringement upon their sovereignty.

Finally, Congress should clarify its intention and specifically exclude alien plaintiffs from enjoying a grant of jurisdiction under section 1330(a). To avoid alien suits in state courts Congress should, through its article I powers, restrain state courts from asserting jurisdiction in suits between alien plaintiffs and foreign states. In sum, Congress should clarify the jurisdiction of United States federal and state courts over actions brought by alien plaintiffs against foreign states.

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