ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-920

TITLE VERLINDEN B. V.,
v. Petitioner
CENTRAL BANK OF NIGERIA

PLACE Washington, D.C.

DATE January 11, 1983

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ALDERSON REPORTING

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IN THE SUPREME COURT OF THE UNITED STATES

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VERLINDEN B. V.,

Petitioner

v. : Case No. 81-920

CENTRAL BANK OF NIGERIA

- -x

Washington, D.C.

Tuesday, January 11, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

ABRAM CHAYES, ESQ., Cambridge, Mass.; on behalf of the Petitioner.

PAUL M. BATOR, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

STEPHEN N. SHULMAN, ESQ., Washington, D.C.; as amicus curiae.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Berlinden against Central Bank of Nigeria.

Mr. Chayes, you may proceed whenever you're ready.

ORAL ARGUMENT OF ABRAM CHAYES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHAYES: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case may appear at first glance to be a technical and abstract one, but it touches directly and deeply the power of the national government to regulate and protect the foreign relations of the United States.

Congress in 1976, acting in the exercise of its powers over foreign affairs and foreign commerce, enacted the Foreign Sovereign Immunities Act which was comprehensive legislation establishing circumstances and conditions in which suit may be brought in the courts of this country against foreign sovereigns and the procedures regulating such suits.

The question here is whether as an aspect of this legislation Congress can, within the meaning of Article III of the Constitution, ensure that all such

suits against foreign sovereigns may be brought in the federal courts, the courts of the nation.

The court below, the Second Circuit, held that there was an impenetrable constitutional barrier to this congressional choice. Why? The plaintiff here, petitioner in this Court, is Verlinden B. V., a Dutch corporation. Thus, the suit is between a foreign corporation and a foreign sovereign.

The diversity clauses of Article III do not cover such a suit. They cover suits between a citizen of the United States and a foreign sovereign, but not between an alien and a foreign sovereign. So recourse must be had to the arising underclause of Article III which grants jurisdiction in a constitutional sense to the federal judiciary over suits arising under the laws of the United States. But Judge Kaufmann below held that this case does not arise under the laws of the United States, and so he dismissed on the constitutional grounds.

It is our contention here and the main propositon in this case that the case does indeed arise under a law of the United States, and that law is the Foreign Sovereign Immunities Act. Jurisdiction in this --

QUESTION: Absent that act what would be the

situation in this case?

MR. CHAYES: Absent that act we don't believe there would be jurisdiction.

QUESTION: Wouldn't be anything.

MR. CHAYES: No, sir. Jurisdiction in this case is founded on the special jurisdictional section of the Foreign Sovereign Immunities Act that codified in 28 USC 1330; and that provides for original jurisdiction in the federal courts without regard to a mounting controversy of any nonjury civil action against a foreign state with respect to which the foreign state is not entitled to immunity. So in order for jurisdiction to attach, the foreign state defendant must be one -- must be not entitled to immunity with respect to the claim asserted.

QUESTION: Mr. Chayes, is the absence of sovereign immunity as defined in the act an element of the plaintiff's cause of action, or is it an affirmative defense, in your view?

MR. CHAYES: We believe it is an element of the plaintiff's case, because it is a jurisdictional requirement under 1330 that sovereign immunity must be absent the federal rules, and in the absence of the federal rules, general pleading principles require that the plaintiff plead and prove subject matter

jurisdiction in order to establish his case.

We did so in this case. The situation is such that the defendant cannot waive or concede subject matter jurisdiction, because as we know and as happened in this case, the absence of subject matter jursidiction can be raised by the court sua sponte or by any party at any time during the course of the case; and that's what happened here. So -- and the act provides, indeed, that in case of a default the court must determine that -- on the evidence that the plaintiff is entitled to recover, which means that he must determine that there is no immunity. And the cases in the lower courts in which there have been defaults have followed that practice.

So that within the narrowest notion of the arising underclause, as Your Honor suggested, the federal question of the sovereign immunity of the defendant is a central element of plaintiff's claim -- of plaintiff's case in every instance arising under the act.

But I should say that the act is much more than a jurisdictional statute or a mere authorization to sue. The Foreign Sovereign Immunities Act represents a major departure in U.S. policy. Until the act was passed, the ability of a private party to sue a foreign state was totally a matter of the discretion of the

executive branch of the national government. No case against a foreign state could be brought in a state or federal court where the executive branch suggested immunity. Now, up until --

QUESTION: Why was that, Mr. Chayes?

MR. CHAYES: Well, that was because of the opinions of this Court.

QUESTION: So it was a -- Do you think it was grounded in the Constitution?

MR. CHAYES: No. The doctrine dates, of course, from the Schooner Exchange, one of Chief Justice Marshall's great opinions, in which, alluding to the fact, which has been a dominant theme in soveriegn immunity jurisprudence, that every case against a foreign sovereign touches the dignity of the foreign sovereign, and involves the foreign relations of the country, Justice Marshall established the principle in the Schooner Exchange that foreign sovereigns were absolutely immune. That is, no case of any kind could be brought against a foreign sovereign in the courts of the United States.

In cases that arose from time to time, for example, when a case was initiated by the attachment of a commercial vessel owned by the foreign sovereign, the sovereign might appeal to the Department of State to

suggest immunity. That is to suggest to the Court that this was a case in which immunity was appropriate. When the State Department --

QUESTION: Mr. Chayes, before the Foreign Sovereign Immunities Act, there would have been no jurisdictional basis for a federal court to entertain this particular suit, would there?

MR. CHAYES: It is not clear, Your Honor. That is, until 1952, there were no in personam jurisdiction against a foreign sovereign. The cases were begun by attachment of a foreign sovereign's property, but I think you are correct. It is what -- the question that the Chief Justice asked earlier. Until the Foreign Sovereign Immunities Act was enacted, it does not appear that there was jurisdiction for a suit by an alien versus a foreign sovereign, although I can't say for sure that no such cases were brought.

In 1952, as you know, again, as a matter of executive policy, the United States government adopted the restrictive view of foreign sovereign immunity, and the State Department indicated that it would not suggest immunity in cases growing out of the commercial acts of foreign sovereigns. But that was an act of grace on the part of the Department of State. The Department of State was not bound by that, and in fact in some cases

involving commercial acts the State Department did suggest immunity.

The jurisprudence of this Court tells us that the Court, this Court, the state courts, and the federal courts were bound by the executive -- by the executive suggestion and could not disregard it, and in the absence of a suggestion, the Republic of Mexico versus Hoffman tells us that the Court had to follow the policies enunciated by the State Department.

But as I said, the Foreign Sovereign Immunities Act has changed all of that. In the first instance, it judicializes the whole field of foreign sovereign immunity, and remits the question of sovereign immunity to judicial determination. Second, it codifies the restrictive theory of immunity, and subjects foreign sovereigns to suit in cases arising out of commercial transactions, ordinary torts, and that sort of thing, directly parallel, both in concept and language, to the Tucker Act and the Federal Tort Claims Act, by which the United States has consented to sue against itself.

QUESTION: Would you say, Mr. Chayes, that this dichotomy that was developed in 1952 is somewhat analogous to the old concept of proprietary and governmental functions?

MR. CHAYES: Yes. Exactly so, Mr. Chief

Justice. In fact, we used to talk about it in Latin and call it use imperii and use guesti, but it was the same general kind of distinction. That is, now the Act doesn't quite take the old line. It says, when the foreign sovereign makes a contract, it doesn't matter whether it is a contract for guns for the army or for wheat for the starving poor, that is contract, and the government ought to respond according to the laws of contract. It doesn't matter what the ultimate purpose of the contract is.

Or if the ambassador's car strikes a person, the government ought to be liable, even though that was the ambassador carrying out political functions of the government. But it's the same general conception, Your Honor.

QUESTION: Assuming that a foreign country had no assets in this country, how would you --

MR. CHAYES: You could not enforce if there were no assets. Of course, the situation until the enactment of the Foreign Sovereign Immunities Act in 1976 was, you could never get attachment against foreign assets. One of the major departures of the Act was to provide for enforcement of the judgment by attachment of the assets.

The Act also defined the causes of action

which would lie against the foreign sovereign and the extent of liability, so that we see here an extended, comprehensive legislative pattern, legislative structure dealing with the entire range of actions against a foreign sovereign expressly made binding on both state and federal courts as a pre-emptive exercise of federal supreme legislative power.

Now, there is no doubt that this case falls within the statute. It arises -- it is a suit on a contract, a contract for the purchase of cement. The defendant was -- The Central Bank of Nigeria is a foreign sovereign. It repudiated the letter of credit that financed the contract. The whole thing was a commercial transaction.

The court below in identical cases involving U.S. corporate plaintiffs held that the contacts with the United States were sufficient to bring this transaction within the purview of Section 1605(a)(2) of the Act dealing with commercial claims. And second, the Act applies as a matter of interpretation to suits -- statutory interpretation, to suits against an alien -- excuse me, suits brought by an alien against a foreign sovereign.

The statute says that. It says any civil action. Both courts below agreed that the statute

extends to suits brought by an alien plaintiff. The government's brief, which represents the views of the Justice Department and the State Department, the two excecutive departments that were the draftsmen of the Act, agrees that the statute extends to suits by an alien.

It is the only way that Congress could have fulfilled its twin purposes, which were to provide judicial protection for American business enterprise in the courts in suits against a foreign sovereign, and at the same time to concentrate that litigation in the federal courts.

And finally, I think it makes -- it is important to note at this point that there is no problem here of opening the floodgates to a whole series of suits with which the United States has no connection, no interest, no concern. That would be inappropriate for determination by the federal courts.

QUESTION: Mr. Chayes, you made the statement that it was the purpose of the Act to concentrate the litigation in the federal courts.

MR. CHAYES: Yes, sir.

QUESTION: As opposed to state court suits?

MR. CHAYES: Yes, indeed, Your Honor. The court -- the Act permits suit in the state court, but

subject to a power of removal by the foreign defendant, so any suit begun in a state court may be removed by the foreign defendant at any time. It is not subject to the usual time limit on removal.

The fact of the matter is, of course, that most actions that have been begun in state courts have in fact been removed, and the Congress in the legislative history stated that the purpose of the removal jurisdiction was to provide for concentration of the suits -- of the litigation in the federal courts, for two reasons. First, to ensure uniformity of decision, and second, to ensure that the delicacy and sensitivity of the question of suits against a foreign sovereign would be recognized in the courts of the nation, the nation being the one that bears international responsibility for the acts of the judicial department.

So, there is no doubt that that was the purpose of the statute. I do want to say that -- what I started, that there is no problem here of a flood of litigation that would be inappropriate for determination in the federal courts. Congress established a different set of thresholds and limits than the party plaintiff. It required in 1605(a) and 1605, 6, and 7, the statutes withdrawing -- the sections withdrawing immunity, it

required that for immunity to be withdrawn, the transaction in suit had to have substantial connection with the United States, as was the case here, where the transaction was financed through the Morgan Bank in New York.

So, the alien will not be able to bring suit unless the transaction has substantial connection with the United States, and once that is so, it seems to me hard to argue that suits against a foreign sovereign are not most appropriate for determination in the federal courts. That goes all the way back to Alexander Hamilton, who in the 81st Federalist said that since the nation will be responsible for the judgment of its courts in suits touching foreign citizens and foreign affairs, the nation -- the courts of the nation should have jurisdiction to hear them.

We maintain that the statute as so construed is constitutional. It is constitutional for the reason I gave in the answer to Justice O'Connor's question that the plaintiff's case contains a necessary federal element, the absence of immunity, and it is constitutional under the teaching of the Osborn case, which says that where Congress has legislated on a matter within its competence, here the foreign relations of the United States, and has legislated

comprehensively, it may grant jurisdiction to cases arising within that -- within the ambit of that legislative program, even though the particular case may not be governed on the merits by federal law.

So, for those two reasons, it seems to me the jurisprudence of this Court makes it clear that the statute as construed is constitutional, and this cases arises under the Constitution and laws of the United States within the meaning of Article III.

QUESTION: We don't need to decide the case on any broader basis for you to win than to say that the Congress may vest the decision of any federal question on that.

MR. CHAYES: Yes. I will -- I --

QUESTION: Whether it is in defense or --

MR. CHAYES: That is correct. You don't have to decide it on any broader basis than the basis that was involved in my response to Justice O'Connor's question, and we feel that on that basis it is a very easy case. It is no different than the Federal Tort Claims Act, in which -- which this Court has said cases under the Federal Tort Claims Act arise under the Constitution and the laws of the United States. That is exactly what this is.

And therefore, although it seems to me

perfectly clear that the Osborn rationale covers this case, you are quite right, Justice White, that you don't have to go anywhere near that far to decide in our favor.

QUESTION: Does that still leave you with the question of a substantial connection?

MR. CHAYES: No, Your Honor. That issue was decided in the consolidated appeal below, with respect to five cases that were identical in terms of substantial connection with this case. All of those five cases, the court of appeals found, had the substantial connection, in Texas Trading, Texas Milling and Trading versus the Republic of Nigeria.

The only thing that differentiated those five cases from this one was the citizenship of the plaintiff, and the legislative history says that the citizenship of the plaintiff should not constitute a connection, and of course the jurisprudence of this Court under International Shoe suggests the same thing.

I would like, if I may, Your Honors, to reserve the rest of my time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Bator?

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

ON BEHALF OF U. S. AS AMICUS CURIAE

MR. BATOR: Mr. Chief Justice, and may it

please the Court, it is the government's submission in this case that important diplomatic and foreign relations interests of the United States will be adversely affected if the holding of the court of appeals is affirmed, and if suits by foreigners against foreign countries are relegated to the state courts.

The single most critical proposition relevant to this case is one that oddly enough nobody disputes at all. That proposition is that it is for Congress to decide, as a matter of federal law, whether and on what conditions a foreign country should be amenable to suit in an American court, whether by a plaintiff or an American -- a foreigner or an American citizen.

Nobody argues that this question is reserved to the states or is governed by state law. Under its regulatory Article I authority, Congress has power to decide as a matter of the diplomatic foreign relations and foreign commerce interests of the United States, whether foreign countries should be amenable to suit.

QUESTION: Well, do you think under Article I Congress could simply pass a statute that said any time a foreign government wants to sue or be -- or someone wants to sue a foreign government in this country, we aren't laying down any sort of law at all to govern the suits, but the federal district court shall have

original jurisdiction?

MR. BATOR: There would be an antecedent question in that case, Justice Rehnquist, which is whether the transaction sued on has such connection to the United States that it is a legitimate, rational --

QUESTION: Well, supposing Congress said, we don't care whether the transaction had any rational connection. We want all such suits brought here. And in this particular case there was no connection at all.

MR. BATOR: Well, I can conceive of a case where the suit by a foreigner against a foreign country would be so foreign to any substantive American concern whatever that it shouldn't be in an American court at all.

QUESTION: Even though Congress had said it should?

MR. BATOR: It is conceivable that there is a case that has nothing to do with the United States, and where it shouldn't be in an American court at all, but this statute and this case is so far from that extreme problem that really this Court, I think, does not need to be concerned with it.

QUESTION: Under what provision of the Constitution would you determine under Justice Rehnquist's example that it could not be in the federal

court?

MR. BATOR: I assume that the relevant question whether it would be a rational judgment by Congress to decide that in regulating the foreign relations and foreign commerce of the United States, the case should be assigned to an American court. I would say that that would --

QUESTION: You would have to rest it on the federal protective jurisdiction concept. Is that right?

MR. BATOR: It may be -- it may be that -- you see, if the case is going to be in an American court, then it seems to me there clearly must be protective jurisdiction to put it in a federal court. That is, it seems to me that this question could be divided into two parts. The first -- and the concern in this case might be thought of in two stages.

The first is under what circumstances should an American court have jurisdiction to adjudicate, and that is the question that is subject to Congress's regulatory power. Now, if that question is answered in the affirmative, that the transaction between the foreigner and the foreign government is sufficiently American to make it legitimate to authorize an American court to adjudicate it, then the question is whether the Constitution requires Congress nevertheless to leave the

matter to a state court.

Now, on that point, the diplomatic and foreign relations interest of the United States comes into play, because in this Court's jurisprudence and in the legislative history of this statute, the one thing that was clear was the judgment that a uniform, sensitive national resolution of the question of the amenability of a foreign government to sue in the courts of this country needed a federal national solution.

QUESTION: Under your view, Mr. Bator, as I understand it, then, you think we cannot simply resolve the case by dealing with the arising under question discussed by Mr. Chayes, but in fact have to also discuss the protective jurisdiction question. Is that right?

MR. BATOR: No, I believe I misspoke if that is the impression I gave. I think that this is a clear arising under case, and no, the Court does not need to go into fancy problems of protective jurisdiction. Why? In this case, Congress has exercised its undoubted Article I regulatory authority to create a regulatory scheme, which is the -- the scheme governing the amenability of foreign governments to sue.

Now, if there is one thing clear about the arising under clause, it is that if Congress has an

Article I power to create a regulatory scheme, it has a matching Article III power under the arising under clause to call on federal trial courts to apply and interpret and enforce that scheme. That is, the surprising conclusion of the court of appeals in this case was that although Congress has power as a matter of federal law to regulate the question of amenability, the Constitution requires it to leave the enforcement of its regulatory scheme to a state court.

Now, it is that proposition that turns the Osborn case on its head. In this case, the Court does not need to worry about some of the more far-reaching conclusions of Chief Justice Marshall in Osborn, just as it doesn't, I think, really need to worry about protective jurisdiction, because this case is within the core of the arising under clause as interpreted in Osborn.

In this case, Congress has enacted a comprehensive statute which governs this important and sensitive diplomatic issue, and now it says the enforcement of that question and the decision of issues under this statute should be in the hands of the federal courts.

Under the opinion of the court of appeals in this case, we are in this really anomalous situation.

That judgment says that this plaintiff must now sue Nigeria in a state court. What is going to happen in the state court?

QUESTION: Well, in the state court it could be moved rather readily, couldn't it?

MR. BATOR: It could be removed, Mr. Chief Justice?

QUESTION: Yes, could it? Could it?

MR. BATOR: Well, in order for the case to be removable by the foreign government, it would have to first be determined that it is a case arising under federal law for purposes of Article III. That is to say, if this statute is unconstitutional in the way it confers original jurisdiction, it would be very hard to see how it is constitutional in allowing a defendant to remove the case to federal court.

QUESTION: Does this case arise under the '76 Act?

MR. BATOR: Yes, Mr. Chief Justice. This case arises directly, as Chief Justice Marshall explicated the clause, under this Act because in order for this case to be in the court, at the forefront of the case, the district court must decide the applicability and the meaning of this regulatory scheme which Congress enacted pursuant to its Article I power.

And that is what the district court did in this case. It wrote an elaborate opinion on the question whether Nigeria's contacts in this case were sufficient to lift its immunity.

QUESTION: What did Congress say about state court jurisdiction in the '76 Act?

MR. BATOR: Congress permitted plaintiffs to choose a state court, but Congress very plainly said that in any case where the plaintiff chooses a state court, the defendant foreign government has an automatic right to take it to federal court, and Congress in its reports made it very clear why it wished that removal power to exist.

The report of the Senate and the House says, in view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a federal forum actions brought against it.

QUESTION: Is there any explanation in the legislative history as to why the state court jurisdiction provision was given and -- with one hand and taken away with the other?

MR. BATOR: I think, Your Honor, that the Congress did not feel it wanted to cut down on the

plaintiff's right to choose a forum if the foreign government agreed to stay in state court. As a practical matter, I don't think it's very significant, because we are informed by the State Department that it is absolutely routine for foreign countries to remove these cases, because foreign countries themselves have given ample notice that they want suits against them brought in the court of national dignity. And that was another reason for the enactment of this statute.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Very well. Mr. Shulman.

ORAL ARGUMENT OF STEPHEN N. SHULMAN, ESQ.,
BY INVITATION OF THE COURT, AS AMICUS CURIAE
IN SUPPORT OF JUDGMENT BELOW

MR. SHULMAN: Mr. Chief Justice, and may it please the Court, this is a suit on a letter of credit. The only federal question or issue in this case is whether the respondent, a foreign sovereign, is immune. That issue can be decided by a state court. The Foreign Sovereign Immunities Act applies to courts of the United States or of the states. A state court can apply the Foreign Sovereign Immunities Act in determining immunity just as it applies the U.S. Constitution in determining the due process limitations on personal jurisdiction.

The case of Texas Trading v. -- Texas Trading

and Milling Corporation v. Federal Republic of Nigeria, to which Mr. Chayes referred, illustrates this point. In that case, the Court found that Nigeria's activity in purchasing cement amounted to a commercial activity outside of the United States under the FSIA. It found that harm to United States companies that were not paid on their letters of credit constituted a direct effect in the United States under the FSIA.

The Court then turned to an analysis of the contacts with the forum necessary to sustain personal jurisdiction. The Court there found that Nigeria's extensive use of the Morgan Guaranty Trust Company, through which it had advised the letters of credit, constituted a purposeful availing itself of the privilege of conducting activities in the United States under the rule of Hanson v. Denckla and International Shoe.

Now, the fact that the court of appeals cited Hanson v. Denckla and International Shoe and interpreted those decisions did not make this case one that arises under the Constitution of the United States. By the same token, the fact that the court applied the FSIA in determining whether or not there was commercial activity and a direct effect does not make this case one that arises under the laws or a law of the United States.

The case clearly does not meet the well pleaded complaint rule set forth in the landmark case of Louisville and Nashville Railroad v. Mottley.

This Court should construe the Foreign Sovereign Immunities Act to provide jurisdiction only when the plaintiff is a citizen. This is the same thing that this Court did in 1800 when it was considering the Judiciary Act providing jurisdiction when an alien was a party. The Court there in Mossman v. Higginson held that the other party had to be a citizen, and the rule of strict construction set forth in Romero versus International Terminal Operating Company would support this Court in interpreting the statute to require that the plaintiff be a citizen where there is not a federal question, where there is not a case arising under.

QUESTION: The court of appeals didn't agree with you on that point, did it? I mean, it -- I take it it would have liked to construe the statute that way, but it felt it just couldn't.

MR. SHULMAN: That is correct, Justice Rehnquist. I am arguing in support of the judgment below, and this is an additional ground which I believe is available to support the judgment. The court below did agree with the analysis that Mr. Chayes and Mr. Bator had put on the case, which is that the Congress

intended the statute to apply when an alien was a plaintiff. However, that analysis is not supported by the legislative history of the case.

The legislative history shows that what the statute was designed to do was to adopt a restricted standard of immunity and to have those standards determined judicially rather than politically by the executive department. It does not show a purpose to expand the jurisdiction of federal courts beyond the diversity and federal question jurisdiction scope that they previously had. The Congress did contemplate that there would be FSIA cases in federal courts, of course, and normally there will be litigation in the federal courts, because normally the plaintiff will be a citizen of the United States.

The Texas Trading case again illustrates that point. There were four companies there, all of whom were citizens of the United States.

When the plaintiff is not a citizen, and when the claim at issue is not federal, Article III forecloses federal jurisdiction. All that the Foreign Sovereign Immunities Act does in those circumstances is to provide authority to pursue the claim. It is much like the statute which allowed a suit at law but not a summary attachment to collect the Puerto Rican tax in

Puerto Rico v. Russell and Company.

It is like the Act of Congress limiting the immunity of national banks from state taxation in Gully v. First National Bank. The provision of authority to pursue the claim does not constitute the creation of the case arising under the laws of the United States.

QUESTION: But according to Mr. Chayes, to properly plead a case that will entitle you -- the district court to have jurisdiction, you have to plead not only that it is a foreign sovereign, but that it is not entitled to immunity.

MR. SHULMAN: That is correct, Justice Rehnquist, but the reason why you must plead it is because the federal rules require you to make a statement of the jurisdictional basis of the claim, and that same rule, which I believe is Federal Rule 8, goes on to say that the claim itself is set forth separately. In fact, the rule shows that the jurisdictional statement is not part of the claim.

QUESTION: And the statute requires it. The statute requires that there be no immunity. Section 3, 1330A. Doesn't it say that?

MR. SHULMAN: Your Honor, the statute provides for jurisdiction when the foreign state is not immune. That is correct.

QUESTION: The state is not entitled to immunity.

MR. SHULMAN: That is correct, Your Honor.

QUESTION: Well, if the statute says it, you certainly have to allege it.

MR. SHULMAN: You allege it as part of your jurisdictional statement.

QUESTION: The statute says so.

MR. SHULMAN: Justice Marshall, let me draw your attention to the legislative history of this statute, which is cited in the brief filed by Guinea as an amicus curiae, and I quote from the House report as follows: "An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."

We believe that the issue of sovereign immunity is an affirmative defense. We would answer the question that Justice O'Connor asked Mr. Chayes contrary to the way he answered it. It is true that the jurisdictional allegations in the complaint will refer to the Foreign Sovereign Immunities Act. It also happens, by the way, that one of the amicus briefs filed in this case urges that the court solve the constitutional difficulty by treating it as if it was

not --

QUESTION: In this case, didn't the complaint set forth the reasons against sovereign immunity? They went into a little detail on it, didn't they? Or did I read it wrong?

MR. SHULMAN: Well, Your Honor, I do not have the specific complaint of the Verlinden Company in this case.

QUESTION: Well, this is a couple of weeks ago.

MR. SHULMAN: But the --

QUESTION: I am trying to see how much of an issue this is.

MR. SHULMAN: It is not -- It is not an issue in the sense of arising under. It is an issue in the sense that it is a decision that needs be made in a case under the Foreign Sovereign Immunities Act. No one challenges that before a state can be held liable, the state must be held to be not immune. The standards on which that statement, that decision would be made are federal standards. That does not mean that that constitutes a case arising under the law of the United States for purposes of original federal jurisdiction.

QUESTION: Well, don't you have to allege all of the jurisdictional elements? For instance, in a

diversity case, I take it you have to allege that A is a citizen of Connecticut, B is a citizen of Rhode Island, and there is more than whatever the jurisdictional amount requirement is in controversy. Analogously to that, wouldn't you have to allege in your jurisdictional allegations here that this claim is one with respect to which the foreign state is not entitled to immunity?

MR. SHULMAN: That is correct, Justice Rehnquist, but the logical extension of that point in terms of the point that Justice Marshall was making would mean that a diversity case was a case arising under a federal law, because you had to plead in your case as an element of your case the diverse citizenship of --

QUESTION: Well, but I think the difference is, diversity, the diversity statute confers jurisdiction only, without any substantive requirement. Here you do have the substantive requirement that is in effect part of a jurisdictional requirement that the claim of sovereign immunity be not substantively made out under the Act.

MR. SHULMAN: That doesn't vary appreciably from the fact that you have to determine what the citizenship of a corporation is, and the standard, which is that the corporation would be a citizen of the states

in which it does business and the state in which it is incorporated, is a substantive law, if you will, in that same sense.

QUESTION: But there has to be a line somewhere. How about the Federal Arbitration Act? All you have to allege is that it is a contract, and provides for arbitration.

MR. SHULMAN: The Federal Arbitration Act, of course, does not provide jurisdiction.

QUESTION: Oh, yes, it does, doesn't it?

MR. SHULMAN: I don't believe so.

QUESTION: I thought it is a basis for federal jurisdiction. Didn't the Polygraph case, that Bernhard against Polygraph --

MR. SHULMAN: Mr. Justice, my impression of the Arbitration Act is that it is not jurisdictional.

QUESTION: Must the complaint affirmatively recite that the transaction on which the claim is based was a transaction involving the proprietary commercial interests of the sovereign? Must that be affirmatively stated in the complaint as a basis for jurisdiction?

MR. SHULMAN: I think the answer to that question, Mr. Chief Justice, is no. What the complaint must allege is that there is jurisdiction under Section 1330. 1330 says that the --

QUESTION: You let it go to the proof, the evidence, to determine that it was a proprietary commercial function. Is that it?

MR. SHULMAN: Because, among other things, that is not the only basis for determining non-immunity. There is also non-immunity when there has been a waiver of immunity. And as I read to the Court from the legislative history, one instance in which a waiver takes place is by the foreign sovereign failing in its responsive pleading to assert the defense.

QUESTION: Mr. Shulman, may I ask you another question? Let me assume that we are over the statutory hurdle. I understand you rely very heavily on that. And then to the Constitutional problem. And then I assume also with you that the allegation under the federal statute is that the immunity question is a defensive question rather than part of the affirmative claim. Would you nevertheless agree that if the case had been brought in a state court, and the only defense was sovereign immunity, that there would be appellate jurisdiction in this Court to review a state court judgment against the foreign sovereign?

MR. SHULMAN: Yes, there certainly would.

QUESTION: Does it not then follow that within the meaning of Article III, that the case arises under

the laws of the United States?

MR. SHULMAN: No, it does not follow, because Article III requires two things. One is arising under the laws of the United States, and the other is a case or controversy. You must have a case or a controversy arising under the laws of the United States. If this case had been decided in a state court, and the foreign state were held to be not immune, and the state court went on to hold that the letter of credit was not breached, this Court would not review the immunity --

QUESTION: If the letter was not breached, but assume they enter a judgment against the foreign sovereign, is my hypothetical.

MR. SHULMAN: In the case where the judgment was entered against the foreign sovereign --

QUESTION: Right.

MR. SHULMAN: -- then this Court would review, and in that case you would have a case or controversy.

QUESTION: You would have a case arising under this constitutional or federal law.

MR. SHULMAN: That's correct. That's correct.

QUESTION: Why don't we have that now, then?

MR. SHULMAN: Because in the context of original jurisdiction --

QUESTION: But the Article III doesn't draw

that distinction.

MR. SHULMAN: The whole basis of the independent state ground rule, Your Honor, is, I believe, that whenever the Court has appellate jurisdiction, it does not necessarily follow that a federal court had original jurisdiction.

QUESTION: I know that is true as a statutory matter, but just confining our attention to the language of the first few words of Article III, Section 2, I am not sure that you don't have a problem.

MR. SHULMAN: I believe that is because you are excluding from that confining the words "case or controversy."

QUESTION: But we do have a case or controversy.

MR. SHULMAN: Because you do not have a case or controversy under -- involving the Foreign Sovereign Immunities Act until that issue is raised and litigated. You could have a case brought by a plaintiff against a foreign sovereign, let us say in a state court, removed by the foreign sovereign, who does not go on to assert immunity, and the case would go through the federal court without a federal issue ever having come up.

In that case, it would have been an improper

exercise of federal jurisdiction. Conversely, you could have a state --

QUESTION: But that case would not have been reviewable here, either. If it stayed in the state court, and there was no federal -- no defense of sovereign immunity, the only defense was that we paid the bill, or whatever it might be, there would be no federal question for us to review.

MR. SHULMAN: That's correct.

QUESTION: So it seems to me that as long as the sovereign immunity defense is maintained, and if you agree that we would have appellate jurisdiction over a state case which has no other federal question in it, then does it not follow within the meaning of Article III that that case arises under federal law?

MR. SHULMAN: No. It does follow within the meaning of Article III that that case or controversy arises under federal law for purposes of appellate jurisdiction, because at that point in the schedule, you have a case or controversy. You do not have a case or controversy for purposes of original jurisdiction.

QUESTION: What if on these facts the case had been brought prior to 1976 and before the Act? What would you --

MR. SHULMAN: Prior to 1976, there would be no

basis for federal jurisdiction in this case.

QUESTION: Even if the executive branch raised no objection?

MR. SHULMAN: There would have been no way to get into the federal court. There is no federal coloration to the case.

QUESTION: How about state court?

MR. SHULMAN: The case could have been brought in a state court. Then you would have had a question of whether or not the executive branch would choose to make a suggestion of immunity or not. And that seems to me to be what the point is. There is no great unusual aspect to a state court making a decision on a federal question.

QUESTION: But now, in 1976, Congress has said a suit may be brought in states and granting removal jurisdiction to a federal court, has it not?

MR. SHULMAN: That's correct, and I believe --

QUESTION: Then does that act -- does not that action arise under that statute?

MR. SHULMAN: Mr. Chief Justice, the question of when a claim arises, a claim arises under a statute involves whether or not the source of the right that you are asserting is a federal law or not. This is the -- the fact that there is lurking in the background of the

case somewhere a federal issue does not make the case one arising under a federal law. It makes it a case in which a federal question is presented which may eventually be reviewable by this Court on appellate jurisdiction, because there is then a case or controversy. But it does not mean that it becomes a matter of original jurisdiction in the district court.

Now, I would like to say a word about the protective jurisdiction concept which has floated about the briefs a bit, and specifically the petitioner's brief raises four areas in which it suggests that there is a protective jurisdiction of some sort here.

Those four areas are the Osborn v. Bank of United States area which Mr. Bator also sought to assert as a basis, the removal of state proceedings against federal officers for actions under color of their office, the authority of a bankruptcy trustee to sue in federal court on a state law claim, and then the National Mutual Insurance Company v. Tidewater Transfer case and the Textile Workers Union v. Lincoln Mills case.

Now, in the first three of those suggested bases of protective jurisdiction, you see the difference between a true federal interest in the ultimate disposition of the case and a collateral federal

interest in one question in the issue.

In Osborn, the basic powers of the bank, the rights and liabilities of the bank, the whole aspect of the bank was a matter of federal interest. In the removal cases, the federal interest was the assurance that federal officers would not be impeded in the performance of their duties by states.

QUESTION: Why is that -- Why would you say that is arising under, or why would you say that -- certainly the substantive rule of those removal cases isn't necessarily federal law.

MR. SHULMAN: That's correct, Your Honor, but the necessity for a federal officer to be able to perform his duties without impediment by the state is a federal matter of -- basic to the whole issue.

QUESTION: You don't think the federal government has the same sort of an interest in assuring foreign governments that they can litigate in the right forum?

MR. SHULMAN: That is exactly the point that I am trying to get at, Mr. Justice White, and it is that there is a difference between the federal interest in the ultimate issue at stake and the federal interest in an issue along the way, that the issue, the ultimate issue at stake here is whether or not this letter of

credit has been breached, and whether or not this letter of credit is enforceable, and the federal government doesn't have any interest in that question at all.

QUESTION: It's got an interest in not making some foreign government made. It probably has more of an interest than it has in making sure some employee doesn't get mad.

MR. SHULMAN: It's interest in making sure that a foreign sovereign does not get mad can be adequately taken care of through appellate review of state court determinations on non-federal issues with non-diverse parties.

QUESTION: That's a long way around the mulberry bush, isn't it?

MR. SHULMAN: You know, the state has an interest, the state has an interest in making determinations as to the enforceability of contracts within its state. The state has an interest in that. The state -- The states kept to themselves the interest to exercise those interests except in those areas where there was a federal case because the action arose under the laws or where there was diversity. Here you don't have that.

QUESTION: Didn't Congress say that they had an interest in this?

MR. SHULMAN: Yes, they did. Every now and again Congress enacts some constitutional statute.

QUESTION: Well, who better -- What better arm of government is to determine that, what the federal interest is, than Congress?

MR. SHULMAN: Your Honor, Congress clearly is the arm of government to determine what its federal interest is.

QUESTION: And Congress said that in this type of case, the federal courts shall be open to this type of action.

MR. SHULMAN: And this Court -- Then this Court sits to ensure that the Congress does not open federal courts to cases --

QUESTION: Then it violates the Constitution of the United States, the action of Congress? Does it?

MR. SHULMAN: If it calls for --

QUESTION: Does it?

MR. SHULMAN: Yes.

QUESTION: It does violate the Constitution?

MR. SHULMAN: Yes. Yes.

QUESTION: What provision?

MR. SHULMAN: Article III of the Constitution, which provides that the judicial power shall exist only in cases or controversies where there is a case arising

under the laws --

QUESTION: Doesn't it also say Congress shall determine the jurisdiction of the federal courts?

MR. SHULMAN: No, it does not, Your Honor. It says Congress shall establish such inferior courts, but the Constitution establishes the judicial power of the United States, not the Congress.

QUESTION: And what in the Constitution decided that you cannot determine this action, this case?

MR. SHULMAN: Your Honor, the Article III --

QUESTION: I will make the question simpler.

MR. SHULMAN: Thank you.

QUESTION: What, if anything, is there in the Constitution that says that this case shall not be decided by this Court?

MR. SHULMAN: There is nothing in the Constitution that says this case shall not be decided by this Court. This case should be decided by this Court. But this case could not have been brought as a matter of original jurisdiction in the district court.

QUESTION: Could not?

MR. SHULMAN: Right. It was, improperly, and this Court will have to decide that.

QUESTION: I know we will.

MR. SHULMAN: That is the function of the judiciary, is to determine the constitutionality of legislative encroachments on the judiciary. Just as this Court can't render advisory opinions, district courts cannot be given original jurisdiction over non-federal cases which are not diverse.

QUESTION: Is the statute unconstitutional?

MR. SHULMAN: If it means that the plaintiff does not have to be a citizen, it is unconstitutional, Your Honor. I believe that the statute can be read to say that the plaintiff needs be an American citizen, in which case the statute would not be unconstitutional. The statute is also not unconstitutional when the claim at issue is a federal claim. It is only in the context where it is a state claim that is involved.

QUESTION: Mr. Shulman, in your reference to the protective jurisdiction, you took care of the first three problems, but you didn't get to Tidwater.

MR. SHULMAN: All right. Thank you. In the Tidewater case, the petitioner's argument is based on what subsequent commentary has shown to be the only defensible basis for the decision, but there was no majority in Tidewater in favor of protective jurisdiction.

And in Lincoln Mills, the petitioner also

turns to commentary for support, but the majority of the court in Lincoln Mills premised its decision on the fact that there would be a federal common law applied which is an action arising under, and the federal common law to be applied was on the subject matter that the cases are about, which is the enforcement of collective bargaining agreements, the ultimate issue, the federal issue in the disposition of the case.

Here, the ultimate disposition is simply of a letter of credit. That is not a matter of federal law. It is not a matter of federal common law, statutory law, or constitutional law. The judgment below should be affirmed. Thank you.

CHIEF JUSTICE BURGER: Thank you.

Mr. Chayes, you have two minutes remaining.

ORAL ARGUMENT OF ABRAM CHAYES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CHAYES: Mr. Chief Justice -- Thank you.

First, as to your question whether this case could have been brought before 1976, the answer is no. What happened in 1976 was that the Congress exercised its Article I legislative power, and by doing so created as an essential aspect, as an essential part of the plaintiff's case here the issue of sovereign immunity.

As Justice Marshall suggested, that was

pleaded in our complaint. At AA in the record, the jurisdictional paragraph refers to Section 1330, and if you look at Paragraphs 7 to 15 -- to 12 of the record and then throughout the record, you will see allegations of connections with the United States designed to show that the claim is a proprietary -- based on a proprietary rather than a governmental action, and that it falls within 1605(a)(2).

That this is an essential part of the plaintiff's case is proved by the Mine versus Guinea case, the very case that provided the basis of the amicus suggestion of interest. That case has been dismissed below by the Court of Appeals of the District of Columbia. Although it raised the same issue that was here, the court of appeals never reached that issue, because it found, examining the issue of immunity, that Guinea was immune in that case, and therefore there was no subject matter jurisdiction, and it dismissed.

It did that not as a matter of defense on the merits, but as a threshold question at the outset of the case, just as we contend and as Justice O'Connor suggested in her question.

Now, I would like to leave with the Court the following point. These cases will not go away if the Court sustains the court of appeals' opinion. These

cases will not just disappear. They go to the state courts. We can imagine a case in which Olympian York Company owns -- a Canadian company owns real estate in the city of New York. An embassy in the U.N. rents real estate from the company, and doesn't pay its rent. The company has to sue it if the -- Judge Kaufman's opinion is right in the housing court of the city of New York. That is, the foreign sovereign has to be dragged into the housing court of the city of New York and defend its lease.

QUESTION: Well, that is if the operation of an embassy is a proprietary function.

MR. CHAYES: No, because it is a lease, and it would be a commercial contract within the meaning of 1605(a)(2). And there would be no removal, because, as said before, if there is no original jurisdiction constitutionally, there can be no removal.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:09 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Verlinden B. V. (Petitioner) v. Central Bank of Nigeria

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