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Nelson v. Saudi Arabia - Subject Matter Jurisdiction under the Foreign Sovereign Immunities Act of 1976

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NELSON V. SAUDI ARABIA - SUBJECT MATTER JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976.

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THE Foreign Sovereign Immunities Act of 1976 (FSIA)[1] was enacted to establish clear standards for both state and federal courts to resolve questions of sovereign immunity.[2] The FSIA provides exceptions to sovereign immunity and guidelines to determine whether a court lacks subject matter jurisdiction. The language of the statute, nevertheless, has been subject to inconsistent interpretations by the courts, the legislative history notwithstanding.

In *Nelson v. Saudi Arabia*,[3] the Eleventh Circuit adopted the "jurisdictional nexus" approach used by a growing number of courts in resolving the issue of subject matter jurisdiction under the FSIA. This method requires a connection between the act complained of and the commercial activity conducted by the foreign state. The courts, however, have applied different approaches for determining subject matter jurisdiction. This Note will review the history of the FSIA, and discuss the competing theories used by the courts for determining subject matter jurisdiction. In this respect, this Note will also discuss the commercial activities exceptions. Finally, this Note examines the holding in *Nelson* in light of the facts presented in the case and the current state of the law.

I. THE HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. Absolute Immunity

Sovereign immunity is an international law doctrine mandating that under certain circumstances, domestic courts must forego jurisdiction over a foreign state.[4] Prior to the enactment of the FSIA, the United States had virtually granted absolute immunity from liability to for-

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1. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 26 (codified as amended in scattered sections of 28 U.S.C.).

2. H.R. REP. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

3. 923 F.2d 1528 (11th Cir. 1991).

4. H.R. REP. No. 1487, at 8.

eign sovereigns for suits in this country. The Supreme Court in *The Schooner Exchange v. M'Faddon*,[5] considered the basis for the absolute theory of sovereign immunity,[6] and exempted a foreign armed vessel from American jurisdiction. The Supreme Court held that each sovereign had full and absolute jurisdiction within its own territory and that each sovereign waived a part of that exclusive jurisdiction over certain activities of foreign sovereigns.[7] One such waiver is the exemption from arrest or detention if present within a foreign state.[8] *The Schooner Exchange* decision emphasized that foreign sovereign immunity rested on principles of comity.[9] Consequently, for over a century, the United States consistently gave deference to the decisions of the Executive branch in resolving issues pertaining to foreign sovereign immunity.[10]

B. Restrictive Theory

In 1952, however, the State Department announced in the Tate Letter[11] that it was adopting the "restrictive" theory of sovereign immunity. Under this theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts . . . of a state, but not with respect to private acts . . . ."[12] One of the reasons for the State Department's adoption of this theory was the increasing involvement of foreign governments in commercial activity with private American citizens.[13] The State Department decided that this theory, when applied, provided the means through which such private citizens could invoke the courts for determining their rights.[14]

In *Verlinden B.V. v. Central Bank of Nigeria*,[15] the Supreme Court noted that because the initial onus of deciding questions of sovereign immunity still rested with the Executive, the application of the restrictive theory was not as successful as the State Department had anticipated. Foreign governments began to use diplomatic pressure to

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5. 11 U.S. (7 Cranch) 116 (1812).

6. Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.A., 923 F.2d 380, 384 (5th Cir. 1991).

7. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137.

8. *Id.*

9. *Id.* at 135-136.

10. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

11. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *in* 26 Dept. of State Bull. 984 (1952).

12. *Id.* at 984.

13. *Id.* at 986.

14. *Id.*

15. 461 U.S. at 487.

obtain immunity, and thus, the State Department often suggested immunity in instances where, had the restrictive theory been applied, immunity would not have been granted.[16] Other problems arose when foreign sovereigns sought immunity not through the State Department, but through the courts.[17] When these occasions arose, the courts relied on prior State Department decisions. Hence, two significantly different branches of government were making decisions on sovereign immunity, resulting in a set of standards that was neither clear nor consistent.[18]

This inconsistency led Congress to pass the FSIA which codifies the restrictive theory of sovereign immunity. The FSIA embodies a comprehensive set of rules governing foreign sovereign immunity.[19] The FSIA was especially designed to have only one governmental branch, the courts, making decisions concerning sovereign immunity. By giving the courts carte blanche to decide such matters, Congress made it possible for the courts to stop deferring to suggestions of immunity from the Executive.[20] The intent of the FSIA was to establish consistency for determining sovereign immunity; however, the courts have failed to create consistency by applying different theories to establish sovereign immunity.

II. THE COMMERCIAL ACTIVITIES EXCEPTION

The FSIA grants immunity to foreign sovereigns, their agents and instrumentalities[21] in federal and state courts.[22] However, "[t]he 'absence of immunity is a condition to the presence of subject matter jurisdiction.'"[23] To determine whether the court has jurisdiction over a party, the courts look at the status of the party at the time the act

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16. *Id.*
17. *Id.*
18. *Id.* at 488.
19. H.R. REP. No. 1487, at 12.
20. *Id.*
21. An "agency or instrumentality of a foreign state" means any entity:
    (1) which is a separate legal person, corporate or otherwise, and
    (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
    (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b) (1988). The legislative history explains that an agency or instrumentality is subject to the same exceptions of the FSIA as a foreign state itself. H.R. REP. No. 1487, at 15.

22. 28 U.S.C. § 1604.
23. Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97, 99 (8th Cir. 1989) (quoting Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983)).

complained of occurred.[24] The party claiming the absence of immunity has the burden of proof to establish subject matter jurisdiction.[25] Once a court has determined that it has subject matter jurisdiction, the burden of proof shifts to the foreign state[26] to demonstrate that its conduct does not fall within one of the exceptions to immunity identified in the FSIA.[27]

The "commercial activity" exception of the FSIA provides a challenge to sovereign immunity, for under this exception jurisdictional immunity does not extend to commercial or private acts.[28] The statute specifies that a foreign sovereign shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state [Clause 1] . . . ."[29] Although Congress defined a commercial activity in the FSIA,[30] the courts have differed in their interpretation of the terms "commercial activity," "substantial contact" and "based upon."

A. Defining Commercial Activity

1. The Nature/Purpose Distinction

A "commercial activity" as defined by the FSIA is "either a regular course of commercial conduct or a particular commercial transaction or act . . . [the character of which is] determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[31] Courts must, therefore, look to the commercial nature of the activity in defining a commercial activity. In establishing this definition, Congress intended to preclude for-

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24. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 450 (6th Cir. 1988).
25. *Id.* at 451.
26. H.R. REP. No. 1487, at 17.
27. 28 U.S.C. § 1605.
28. 28 U.S.C. § 1605(a)(2).
29. *Id.* The statute states that a foreign state shall not be immune from American jurisdiction in any case:

> [I]n which the action is based upon a commercial activity carried on in the United States by the foreign state [Clause 1]; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere [Clause 2]; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [Clause 3].

Id. Clause 1 is the only relevant clause for purposes of this case Note.

30. 28 U.S.C. § 1603(d). *See infra* text accompanying notes 32-48. As a guide, Congress lists the following activities carried on by a foreign state as commercial: "sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation." H.R. REP. No. 1487, at 16.
31. 28 U.S.C. § 1603(d).

eign governments from constantly claiming sovereign immunity.[32] If the activity engaged in is for profit or if it involves a single contract that could be made by a private person, then such activity is commercial in nature.[33] By contrast, if the activity is one which only a sovereign state can perform, then the activity is noncommercial in nature.[34] The procurement of goods and services by a foreign state from private parties is essentially a commercial activity, even though not entered into for profit.[35] Congress has given the courts great discretion in determining a commercial activity.[36]

The courts have had difficulty distinguishing a commercial activity from a purely sovereign act because "nature" and "purpose" are "closely-knit concepts."[37] In *Weltover v. Republic of Argentina*, creditors sued the Argentinian government and its Central Bank to recover principal and interest due on certain bonds. In finding this issuance of bonds and subsequent breach a commercial activity, the court decided that "[w]hen the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome."[38] In *Segni v. Commercial Office of Spain*,[39] however, the Seventh Circuit acknowledged that determining the nature of an act requires inquiry into the purpose of the act. Moreover, the court recognized that the difficulty of determining the nature of an act lies in deciding where nature ends and purpose begins.[40] The court in *Segni* was faced with deciding whether the hiring of a marketing agent by the Spanish government was by its very nature a commercial activity, since the underlying purpose of the hiring—to promote the sales of Spanish wine in the United States for the Spanish government as part of a government policy—was not only commercial but also public.[41] The court, recognizing that the House Report of the FSIA included the employment of agents in the definition of a commercial activity, concluded that the hiring of a marketing agent, an activity in which a

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32. *See* Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 150 (2d Cir. 1991) (an overbroad definition of the conduct would almost always result in the characterization of the commercial activity as sovereign in nature).

33. H.R. REP. No. 1487, at 16.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Weltover*, 941 F.2d at 150. *See also* Segni v. Commercial Office of Spain, 835 F.2d 160, 163 (7th Cir. 1991) (stating in dicta that "the terms 'nature' and 'purpose' are not totally discrete.").

38. 941 F.2d at 150.

39. 835 F.2d at 164.

40. *Id.*

41. *Id.*

private person could engage, was a commercial activity.[42] The Spanish government, therefore, was not entitled to immunity.[43]

The Fifth Circuit faced the same dilemma in *De Sanchez v. Banco Central de Nicaragua*.[44] The Banco Central of Nicaragua issued a check to the plaintiff, Mrs. Sanchez, drawn on Banco Central's account in New Orleans. Banco Central's president issued an order to stop payment. Consequently, Mrs. Sanchez was unable to cash the check, and she filed suit against Banco Central. The court noted that the issuance of the check could be characterized either as a commercial activity, a bank sale of foreign exchange, or a public act, a regulation by Nicaragua of its foreign exchange reserves.[45] The court decided that because Banco Central was regulating its foreign exchange when it issued the check, the nature of which is governmental, Banco Central was immune from suit.[46]

Fortunately, most factual situations involve a clear cut decision.[47] Once a foreign state enters the marketplace as a sovereign actor, then any subsequent breach of a contract retains the sovereign nature, and the foreign state is immune from suit. Conversely, if the foreign state enters the marketplace as a commercial actor, then a subsequent contractual breach retains the commercial nature, and the foreign state is not immune from suit.[48]

B. Substantial Contacts

Under the FSIA, a commercial activity "carried on" in the United States by a foreign state is defined as activity "having substantial contact with the United States."[49] Congress interprets this language to

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42. *Id.* at 165-66.

43. *Id.*

44. 770 F.2d 1385 (5th Cir. 1985).

45. *Id.* at 1392.

46. *Id.* at 1394.

47. *See* Schoenberg v. Exportadora de Sal S.A., 930 F.2d 777, 780 (9th Cir. 1991) (appeasing a majority stockholder, even if the stockholder is the Mexican government, constitutes a commercial activity); Brewer v. Socialist People's Republic of Iraq, 890 F.2d 97, 101 (8th Cir. 1989) (entering into an employment contract with Iraq in the U.S. and subsequently breaching the contract is a commercial activity); Gregorian v. Izvestia, 871 F.2d 1515, 1521 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 237 (1989) (publication of an allegedly libelous article by an official Soviet agency was governmental in nature); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980) (involuntarily re-routing passengers to comply with governmental immigration laws is not a commercial activity); Trans-Orient Marine, Corp. v. Star Trading & Marine, Inc., 736 F. Supp. 1281 (S.D.N.Y. 1990), *modified*, 925 F.2d 556 (2d Cir. 1991) (Sudan's hiring of a shipping agent in the U.S. constitutes a commercial activity); Friedar v. Government of Israel, 614 F. Supp. 395, 398 (S.D.N.Y. 1985) (recruiting soldiers and training the military are entirely governmental activities).

48. *De Sanchez*, 770 F.2d at 1394.

49. 28 U.S.C. § 1603(e).

mean "commercial transactions performed in whole or in part in the United States."[50] Although no set of consistent rules prevails, a case-by-case analysis indicates that performing certain activities in the United States will be sufficient to satisfy the substantial contact requirement.

For example, in *Jones v. Petty Ray*,[51] a wrongful death action was brought by the plaintiff against the government of Sudan. The decedent was employed by Geophysical Geosource Inc. (Geosource) as an engineer. Geosource worked under a contract assigned to Total Soudan Inc. and was recruited by Total Exploration, a French corporation under a production share agreement with the Sudanese government to drill and develop the natural resources of that country, a noncommercial activity.[52] The production sharing agreement was not signed in the United States nor was an American entity a party to the agreement. Further, the drilling operations were not to be performed in the United States, nor was the contract subject to the laws of the United States.[53] Consequently, the court held that it could not exercise subject matter jurisdiction over Sudan because any connection between the mining agreement and any activity in the United States was too attenuated.[54] Thus, this case suggests that activities such as signing a contract in the United States, performing the terms of the contract in the United States, and subjecting the contract to the laws of the United States, might constitute substantial contact.[55]

In *Gibbons v. Udaras na Gaeltachta*,[56] the court used a two-part test to determine whether an activity had substantial contact with the United States. The court recognized that where the commercial activity involves a contract, substantial contacts with the United States depends on whether substantial contractual negotiations took place in

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50. H.R. REP. No. 1487, at 17.

51. 722 F. Supp. 343 (S.D. Tex. 1989).

52. *Id.* at 346-47.

53. *Id.*

54. *Id.*

55. Similarly, in Schoenberg v. Exportadora de Sal S.A., 930 F.2d 777 (9th Cir. 1991), the issue of substantial contact was decided based on the circumstances of the case. The Ninth Circuit decided that a round-trip flight between California and Mexico arranged by a Mexican corporation, mostly owned by the Mexican government, constituted substantial contact with the United States. *Id.* at 781. The round-trip arrangements were made in the U.S., and the arrangements were made for the entire round-trip, not for segments of the trip within Mexico.

56. 549 F. Supp. 1094 (S.D.N.Y. 1982). Suit was brought by two U.S. citizens against two industrial development entities of the Republic of Ireland for breach of contract, fraud, tortious interference of contract relations, and taking property in violation of international law. *Id.* at 1100.

the United States, or whether significant aspects of the contract were to be carried out in the United States.[57]

The court in *Gould, Inc. v. Pechiney Ugine Kuhlmann*,[58] had to decide if a French corporation (Pechiney), the majority of whose shares were directly or indirectly owned by the French government, should be granted immunity from suit by an American corporation (Gould). Gould alleged, among other things, that Pechiney engaged in unfair competition and illegally appropriated Gould's trade secrets from one of Gould's engineers, a former employee.[59] The court concluded that if enough evidence were presented to support the contentions, then extensive representation by Pechiney in the United States to negotiate and plan a joint venture with the former employee would constitute substantial contact with the United States.[60]

Jones, Gibbons, and *Gould*, indicate that considerable negotiations in the United States might constitute substantial contact. Preliminary contractual negotiations, however, do not constitute substantial contact.[61] In *Zedan v. Saudi Arabia*, the plaintiff, an American citizen, was recruited by a telephone call to work as an engineer on a project in Saudi Arabia. The plaintiff sued Saudi Arabia for breach of contract claiming that the recruiting phone call constituted a commercial activity having substantial contact with the United States[62] The court, however, recognized that all the dealings, except the phone call, were carried on in Saudi Arabia, and thus, the mere recruitment phone call did not constitute substantial contact.[63] Furthermore, the court acknowledged that "[n]othing in the legislative history suggests . . . that Congress intended jurisdiction under the first clause to be based upon acts that are not themselves commercial transactions, but are merely precursors to commercial transactions."[64]

The determination of the issue of substantial contact clearly has to be made on a case-by-case basis. However, the case law reveals a common element that must be present to constitute a finding of substantial contact: most, if not all, of the commercial activity conducted by a foreign government must be carried on in the United States.

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57. *Id.* at 1113.
58. 853 F.2d 445, 447 (6th Cir. 1988).
59. *Id.*
60. *Id.* at 453. *See also* Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1019-20 (2d Cir. 1991) (placing a negotiable promissory note with an American corporation without restricting the note's negotiability constitutes substantial contacts with the U.S.).
61. Zedan v. Saudi Arabia, 849 F.2d 1511, 1513 (D.C. Cir. 1988).
62. *Id.*
63. *Id.*
64. *Id.*

C. *The "Based Upon" Definition*

Under the Clause 1 of the commercial activity exception, a cause of action must be "based upon" a commercial activity.[65] The courts have had trouble agreeing on the specific meaning of this language. For example, in *Gould, Inc. v. Mitsui Mining & Smelting Co.*,[66] the Sixth Circuit read "based upon" to mean "that the cause of action [must] arise from [a] commercial activity in the United States,"[67] the commercial activity being the jurisdictional element that the plaintiff is required to prove.[68] In *Santos v. Compagnie Nationale Air France*,[69] the court concluded that an action is "based upon" events (the legal elements of a claim) in the United States only when those events prove the claim.[70] This approach, the court stated, is consistent with the plain language of the FSIA.[71] In *Santos*, the Seventh Circuit emphasized the element of duty by noting that it is found only within the scope of Clause 1 because an American court would have jurisdiction if a foreign state owed a plaintiff some duty arising from the commercial activity, regardless of the fact that the breach of the duty occurred outside the United States.[72]

The courts have used four different tests for determining the meaning of "based upon" under Clause 1. The literal approach is described by the court in *Gibbons v. Udaras na Gaeltachta*.[73] The court stated that a literal interpretation of Clause 1 "requires that the cause of action be directly 'based upon' the defendant foreign state's commercial activity in the United States, not merely 'based upon' an act performed by the defendant 'in connection with' that commercial activity."[74] Under the literal approach, therefore, the cause of action must be "based upon" an act performed in the United States in connection with the commercial activity carried on in the United States.[75] The *Gibbons* court rejected this approach because it does not confer subject matter jurisdiction "over a cause of action based upon an act

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65. 28 U.S.C. § 1605 (a)(2).
66. 947 F.2d 218 (6th Cir. 1991).
67. *Id.* at 221.
68. *Id.*
69. 934 F.2d 890 (7th Cir. 1991).
70. *Id.* at 893.
71. *Id.*
72. *Id.* at 893 n.3. The term "duty" as used here means a legal obligation of performance, care or observance.
73. 549 F. Supp. at 1108-09.
74. *Id.* at n.5. The commercial activity exception to the sovereign immunity defense "does not depend on the locus of the specific act sued upon, but rather on the locus of the commercial activity in connection with which the act sued upon was performed." *Id.*
75. *Id.*

performed abroad in connection with that [commercial] activity."[76] This reasoning, the court noted, was also rejected by the Third Circuit in *Sugarman v. Aeromexico*[77] as being contrary to the intent of the FSIA's framers.[78] The court in *Sugarman* points out that Clause 2 of the commercial activity exception covers acts performed in the United States, therefore, it would be unlikely that Congress would also include such acts in Clause 1.[79] The *Gibbons* court reiterates that the applicability of Clause 1 is not dependent on where the act occurred, but rather, on where the commercial activity takes place, and it is to this commercial activity that the act must be connected.[80] Hence, even if the act was performed outside the United States, as long as the act was in connection with a commercial activity performed in the United States, the court may exercise subject matter jurisdiction.[81]

The second approach is a "bifurcated literal and nexus approach"[82] adopted in *Gilson v. Republic of Ireland*.[83] In *Gilson*, the plaintiff, an engineer, alleged that two of the defendants, acting as instrumentalities of the Republic of Ireland, induced him into a venture to develop quartz crystals. While setting up the operation in Ireland, the plaintiff revealed proprietary information on the process. Subsequently, Gilson claimed that his equipment and patent rights were converted by the defendants for their own use, thereby interfering with other contractual obligations with another Irish company.[84] Under the *Gilson* "bifurcated literal and nexus approach" test, a direct causal connection must be shown between the commercial activity of the foreign state in the United States and the acts giving rise to the plaintiff's claims, or the plaintiff must show that the act is an element of the claim.[85] The court in *Gilson* applied its own interpretation of the tests used in *Sugarman* and *Velidor v. L/P/G Benghazi*[86] as authority for its ruling

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76. *Id.*

77. 626 F.2d 270 (3d Cir. 1980).

78. *See also* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 202 (5th Cir. 1984) (concluding that Clause 1 should not be taken literally because the drafters of the FSIA did not intend such a narrow interpretation).

79. 626 F.2d at 273.

80. 549 F. Supp. at 1108-09 n.5. "In other words, where the defendant has performed an act in connection with a commercial activity carried on in the United States, Clause 1 confers subject matter jurisdiction over a cause of action based upon that act regardless of where the act occurred." *Id.*

81. *Id.*

82. *Vencedora*, 730 F.2d at 200.

83. 517 F. Supp. 477 (D.C. 1981), *modified*, 682 F.2d 1022 (D.C. Cir. 1982).

84. *Id.* at 479.

85. 682 F.2d at 1027 n.22. *See also Santos*, 934 F.2d at 893 (concluding that an action is "based upon" events if such events are a legal element of the action).

86. 653 F.2d 812 (3d Cir. 1981), *cert. denied*, 455 U.S. 929 (1982). Both the *Sugarman* and the *Velidor* courts have adopted the nexus approach.

even though the tests used in those cases differed from the tests used in *Gilson*. The court in *Gilson* was, in fact, interpreting the "based upon" standard of Clause 2, not Clause 1.[87] The court in *Gibbons* suggested that the *Gilson* court's "based upon" standard may be applicable to all three clauses of the commercial activity exception.[88]

The "doing business" test "requires only that the foreign sovereign conduct a regular course of business activity in the United States; there is no requirement that the particular business transaction or acts giving rise to the cause of action be connected to the United States."[89] *In Matter of Rio Grande Transport, Inc.*,[90] the *Yellowstone*, a ship owned by the plaintiff, collided with another ship owned by CNAN, an Algerian national shipping company. The *Yellowstone* sank and several of its crew died. CNAN sought a declaratory judgment as to its immunity from suit under the FSIA. The court adopted the "doing business" approach, reasoning that Congress intended to give courts extensive rein to exercise subject matter jurisdiction over the commercial activities of foreign states similar to that given to state courts for exercising long-arm jurisdiction.[91] The "doing business" approach, however, has subsequently been rejected for Clause 1 analysis by several courts.[92]

An increasing number of courts have adopted the "nexus" test.[93] In *Vencedora*, CNAN, an Algerian corporation responsible for supervising Algeria's harbor, seized a Panamanian vessel which was abandoned and later destroyed in a storm in Algeria. Subsequently, the owner of the vessel brought suit against the Algerian government and its instrumentality alleging that the defendants tortiously deprived the plaintiff of the vessel.[94] Jurisdiction was asserted on the basis of

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87. 682 F.2d at 1027. Under Clause 2, there must be a "material connection . . . between the plaintiff's cause of action and the act performed in the United States." *Stena Rederi AB*, 923 F.2d at 388.

88. 549 F. Supp. at 1109. Note that under Clause 3, the conduct in question must have a foreseeable, substantial, and direct effect in the United States.

89. Barnett v. Iberia Air Lines of Spain, 660 F. Supp. 1148, 1151 (N.D. Ill. 1987).

90. 516 F. Supp. 1155 (S.D.N.Y. 1981).

91. *Id.* at 1162.

92. *See Vencedora*, 730 F.2d at 202. For an analytical discussion of the *Vencedora* decision, see W. Peter Simon, *Foreign Sovereign Immunity Act-Commercial Activities Exception-Requisite Relationship Among Foreign Sovereigns Commercial Activity, The United States, and the Cause of Action for Federal Jurisdiction to Exist,* Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigacion, 730 F.2d 195 (5th Cir. 1984), 9 SUFFOLK TRANSNAT'L L.J. 129 (1985).

93. *Santos*, 934 F.2d at 892; *Stena Rederi AB*, 923 F.2d at 386; American West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793 (9th Cir. 1989); *Velidor*, 653 F.2d at 820; Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578 (E.D. Pa. 1985), *aff'd*, 800 F.2d 1140 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1986); and *Barnett*, 660 F. Supp. at 1151.

94. 730 F.2d at 197.

CNAN's continuing business in the United States.[95] The court dismissed the case for lack of subject matter jurisdiction on the grounds that there was no nexus between the commercial activity carried on in the United States by the Algerian government's instrumentality and the alleged tortious acts.[96] The nexus determination must focus "on whether the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character."[97]

In *Sugarman*, the plaintiff, a passenger on Aeromexico, sued that airline for injuries he allegedly suffered while waiting for a delayed flight to New York City in a Mexican airport.[98] Aeromexico, a corporation wholly owned by the Mexican government, had operations in New York. Sugarman asserted a jurisdictional nexus because of Aeromexico's operations in New York. The plaintiff alleged a jurisdictional nexus by relying on the fact that he had bought the tickets to Mexico from a travel agency in the United States. Using Clause 1 of the commercial activity exception, the court found a nexus between Sugarman's injuries and Aeromexico's commercial activities carried on in the United States.[99] The court emphasized that under Clause 1 the commercial activity and not the injury has to occur in the United States. The court seemed to place some importance on the fact that not only were the travel tickets purchased in New Jersey but the injuries occurred on the midpoint of the trip, the homeward journey to the place where Aeromexico's commercial activity started and would be ending,[100] the United States.

These cases seem to require two distinct bases for finding a nexus. First, there must be a sufficient connection between the foreign government's commercial activity and the United States. Second, there must also be a nexus between the commercial activity of the foreign government and the plaintiff's claim.[101]

III. NELSON V. SAUDI ARABIA: HISTORY OF THE CASE

In 1983, the plaintiff, Scott Nelson, noticed a printed advertisement recruiting personnel for the King Faisal Specialist Hospital (Hospital) in Riyadh, Saudi Arabia. The Hospital Corporation of America

95. *Id.* at 199.
96. *Id.* at 203-04.
97. *Arango*, 621 F.2d at 1379.
98. 626 F.2d at 271.
99. *Id.* at 273.
100. *Id.*
101. *See Stena Rederi AB*, 923 F.2d at 386.

(HCA), an independent corporation, was under contract with the Saudi Arabian government to recruit employees for the Hospital.[102] Mr. Nelson subsequently submitted an application and was later interviewed in Saudi Arabia for the job. Upon his return to the United States, the plaintiff signed an employment contract in Florida on November 1983 to work in Saudi Arabia as a monitoring systems engineer. In December of that year, Mr. Nelson began working in that capacity at the Hospital.[103]

The nature of his job entailed "the development and expansion of electronic monitoring and control systems capabilities."[104] In March 1984, he reported certain safety hazards he had discovered during the course of his duties to an investigative commission of the Saudi government.[105] Six months later, he was called to the security office of the Hospital by agents of the Hospital and was taken directly to a jail cell, where he was imprisoned for thirty-nine days without an explanation.[106] During this period, the plaintiff alleged that he was "shackled, tortured and beaten" by agents or employees of the Hospital.[107]

Mr. Nelson filed suit for compensatory and punitive damages under sixteen counts against the Saudi government, the Hospital and Royspec, a publicly owned Saudi corporation which is a purchasing agent for the Hospital. Mr. Nelson averred that the district court had subject matter jurisdiction under the FSIA. The Saudi government moved to dismiss for lack of jurisdiction.[108] The district court granted the Saudi government's motion to dismiss the action. Using the "substantial contact" test, the court found the connection between the defendants' acts and the recruitment activities insufficient to find jurisdiction.[109] Alternatively, the court concluded that even if the "substantial contact" test was satisfied, no nexus existed between the recruitment activities and Mr. Nelson's action.[110] The Eleventh Cir-

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102. *Nelson*, 923 F.2d at 1530.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* Saudi Arabia contends that Mr. Nelson's claims are based upon the Saudi government's exercise of police power. *Id.*

107. *Id.* The plaintiff further alleged that a Saudi Arabian government official tried to barter his freedom with the sexual favors of his wife, Vivian Nelson. *Id.* The Saudi government denied any claim of physical abuse and contended that the arrest was the result of Mr. Nelson's submitting, along with his employment application, a false diploma from the Massachusetts Institute of Technology. Mr. Nelson admitted this charge. *See* Matias A. Vega, *Sovereign Immunity—Commercial Activity—Exercise of Police Power—Jurisdictional Nexus*, 85 AM. J. INT'L L. 557 (1991).

108. *Id.*

109. *Id.*

110. *Id.*

cuit, however, reversed the decision and remanded the case to the district court.

IV. ANALYSIS

Under Clause 1 of the commercial activities exceptions to sovereign immunity, a court has subject matter jurisdiction over a foreign state if the plaintiff's "action is based upon a commercial activity [of a foreign country] carried on in the United States."[111] The commercial activity, however, must have a substantial contact with the United States.[112] The Eleventh Circuit, applied the nexus approach and decided that it had subject matter jurisdiction over Saudi Arabia and Royspec.[113] In reaching this conclusion, however, the court failed to address whether the recruitment and hiring of Mr. Nelson constituted a commercial activity. The nature of the commercial activity at issue was essentially private, and so was its purpose (employment as a monitoring systems engineer). The Saudi government was not hiring Mr. Nelson as either diplomatic, civil service or military personnel[114] which are governmental activities. The employment of American citizens or third country nationals by a foreign government in the United States is considered a commercial activity by Congress.[115] Moreover, the recruitment and hiring of technical personnel is an activity in which a private person or corporation can engage.[116] The Saudi government, therefore, was involved in a commercial activity and thus could not claim sovereign immunity.

In addition, the court failed to determine whether Saudi Arabia's commercial activities had substantial contact with the United States. Under the *Gibbons* two-part test, "substantial contact" occurs when substantial contractual negotiations take place in the United States or when substantial aspects of a contract are to be performed in the United States.[117] Although the contract was signed in the United States, the contractual negotiations took place in Saudi Arabia. The recruitment constituted only preliminary contractual negotiations. Furthermore, substantial aspects of the contract were not to be performed within the United States because Mr. Nelson would work exclusively in Saudi Arabia. Thus, Mr. Nelson's claim fails the *Gibbons*

111. 28 U.S.C. § 1605(a)(2).
112. 28 U.S.C. § 1603(e).
113. According to the definition of "agent or instrumentality," the Hospital and Royspec qualified as agents of Saudi Arabia.
114. H.R. REP. No. 1487, at 16.
115. *Id.*
116. *Id.*
117. 549 F.Supp. at 1113.

test because substantial contact did not occur between Saudi Arabia and the United States.[118] Therefore, the court lacked jurisdiction under Clause 1.

Furthermore, the court failed to establish whether HCA, a wholly owned American corporation conducting the recruiting, negotiated its 1973 agency contract with Saudi Arabia in the United States. If the contract was signed in the United States, it is arguable that substantial contacts could be asserted by Mr. Nelson, given the *Pechiney* decision, which calls for extensive representation in the United States.[119]

The finding by the Eleventh Circuit of a nexus between the recruitment and hiring of Mr. Nelson and his subsequent detention and torture is somewhat flawed. To establish the Clause 1 commercial activities exception under the nexus approach, the plaintiff has the burden of showing that the acts for which damages are sought are "based upon" the foreign sovereign's commercial activity. Mr. Nelson's detention and torture by the government were not related to the advertisement and recruitment—the commercial activity upon which the jurisdictional nexus is based—but rather to his employment. The FSIA states that "[t]he commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act."[120] The recruitment of Mr. Nelson is the "nature" of the activity carried on in the United States, and his employment is the ultimate "purpose" of the recruitment. Nevertheless, the court holds that the detention and torture of Mr. Nelson "are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia."[121] The court stretched the nexus requirement to obtain subject matter jurisdiction.[122] The court, in essence, seems to be inextricably linking the employment and the recruitment, and thus to find a nexus with one is to find a nexus with the other. This reasoning is fallacious in light of Congress' definition of a commercial activity. The recruitment by its nature is distinct from the employment.

Additionally, the Eleventh Circuit assumes, despite the lack of evidence, that the detention and torture are in fact "based upon" Mr.

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118. The *Zedan* decision supports this reasoning because the court there held that recruitment of an engineer in the U.S. by telephone did not meet the substantial contact requirement. 849 F.2d at 1515.

119. 853 F.2d at 453.

120. 28 U.S.C. § 1603(d).

121. *Nelson*, 923 F.2d at 1535.

122. Vega's article questions whether the Eleventh Circuit's decision will affect employment-based suits where initial recruitment is carried out in the U.S., but where the claims are based on acts which occur years later into the employment relationship. Vega, *supra* note 107, at 560 n.20. The *Zedan* decision, however, seems to allay this fear.

Nelson's employment. Mr. Nelson was not told why he was imprisoned, nor was he ever accused of a crime.[123] There is nothing presented in the facts of the case to connect the detention and torture to his employment in Saudi Arabia. The Saudi government did not shed any light on that issue either, but merely stated that the plaintiff's claims were based upon "the governmental exercise of police power in a foreign country."[124] It appears, therefore, that the Eleventh Circuit relies exclusively on Mr. Nelson's assumptions to find the nexus between his cause of action and the commercial activity.[125]

The court's reasoning for exercising subject matter jurisdiction over Royspec also seems flawed. Under Clause 1, a jurisdictional nexus is required between the commercial activity in the United States and the cause of action. Royspec maintained an office in Maryland and acted as purchasing agent for the Hospital. In case of emergency, Mr. Nelson's family could have contacted him through Royspec's Maryland office.[126] Royspec, however, had no part in the recruitment or hiring of Mr. Nelson, nor did Royspec employ him. Yet the Eleventh Circuit concludes that Nelson's claim was "based upon" Royspec's commercial activity as a purchasing agent.[127] Ultimately, the court seemed to be relying on the mere presence of Royspec in the United States, which is not the test under Clause 1 of the commercial activities exception.[128]

V. CONCLUSION

As revealed by the holding in *Nelson*, courts are still not clear about how to apply the commercial activities exception in sovereign immunity cases. Despite the intent of Congress when it enacted the FSIA to provide uniform guidelines to American courts, there is still inconsistency in their application. Clause 1 of the commercial activities excep-

123. *Nelson*, 923 F.2d at 1530.

124. *Id.* at 1534.

125. The *Nelson* decision has left the Executive branch concerned about American courts questioning and punishing foreign sovereigns for their police activities as the converse could also be a possibility. The defendants have filed a petition for a rehearing en banc. The U.S. government submitted a Statement of Interest with the petition. *See* Vega, *supra* note 107, at 559 nn.15-16. *See also* Saudi Arabia v. Nelson, 112 S. Ct. 436 (1991) (inviting the Solicitor General to file a brief to express the views of the U.S.).

126. *Nelson*, 923 F.2d at 1536. There is also some dispute as to whether the telex designation "Rospec" on four telegrams to Nelson is the designation for Royspec. *Id.*

127. *See* Vega *supra* note 107, at 560 n.19 (assertion of jurisdiction is relevant if a "minimun contacts" due process inquiry is the test).

128. Even though the Eleventh Circuit determined that it had subject matter jurisdiction, the punitive damages that Nelson seeks will not prevail because under the FSIA punitive damages are usually not assessed against foreign states.

tion was misapplied in *Nelson*. The Eleventh Circuit, in trying to obtain subject matter jurisdiction, proceeded to rely exclusively on the assumptions of the plaintiff. Further, in asserting subject matter jurisdiction over Royspec, the court seemed to rely on a personal jurisdiction 'minimum contacts' test, which is not applicable under the commercial activities exception of the FSIA. The *Nelson* holding, will no doubt be alluded to in future opinions, which does not augur well for the future uniformity and consistency in the application of the FSIA. The Supreme Court, therefore, should grant certiorari to resolve the inconsistency of the circuit courts.