UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 10 | Number 1 Article 11

Winter 1985

Exploring the Nexus Test for Asserting Jurisdiction under the Foreign Sovereign Immunities Act: Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)

Ronald Rogers

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Part of the Commercial Law Commons, and the International Law Commons

Recommended Citation

Ronald Rogers, *Exploring the Nexus Test for Asserting Jurisdiction under the Foreign Sovereign Immunities Act: Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*, 10 N.C. J. Int'l L. & Com. Reg. 263 (1985).
Available at: http://scholarship.law.unc.edu/ncilj/vol10/iss1/11

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Exploring the Nexus Test for Asserting Jurisdiction Under the Foreign Sovereign Immunities Act: *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*

In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation (C.N.A.N.)*[1] the United States Court of Appeals for the Fifth Circuit confronted the issue whether commercial activity in the United States that is unrelated to the plaintiff's cause of action is sufficient for United States courts to assert jurisdiction over a foreign governmental defendant. Cases involving foreign governmental defendants operate outside the minimum contacts jurisdictional framework and are governed instead by the Foreign Sovereign Immunities Act (FSIA).[2] The ambiguous language of the FSIA in general, and section 1605(a)(2) in particular, has rendered it difficult for courts to determine the scope of the jurisdiction granted.

In *Vencedora* the court rejected plaintiff's argument that the "substantial contacts" clause of section 1605(a)(2) is analogous to a state long-arm "doing business" statute, and therefore, confers jurisdiction in cases in which the defendant carries on a sufficient volume of unrelated commercial activity in the United States. Instead of applying a doing business jurisdictional test, the court posited a "commercial nexus" test. Under this test, to assert subject matter jurisdiction, a court must connect the cause of action to the foreign governmental agency's commercial activity in the United States. Under the facts of *Vencedora*, such a nexus was found not to exist.[3]

The dispute in *Vencedora* arose when plaintiff's tanker, the Kapetan Marcos, en route to Spain with a cargo of Egyptian oil, caught fire and was abandoned 170 miles off the Algerian coast. Compagnie Nationale Algerienne De Navigation (CNAN), a publicly owned corporation of the Algerian government, dispatched tugs to retrieve the vessel. CNAN refused to release the ship until plaintiff, a Panamanian corporation, posted a bond securing compensation for

---

1 730 F.2d 195 (5th Cir. 1984).

2 28 U.S.C. §§ 1330, 1332(a)(2),(3),(4), 1391(f), 1441(d), 1602-1611 (1982). The FSIA is tailored to comport with the traditional requirements of minimum contacts.

3 *Vencedora*, 730 F.2d at 203-04.

the salvage service. The parties were unable to agree on a figure and the Kapetan Marcos remained in Algerian waters, cargo intact.[4]

Following a storm that ran the ship aground, Algerian officials notified plaintiffs that the ship was a "wreck" within the definition of the country's maritime code. Consequently, they declared plaintiff's ownership rights void. The Algerian Code stipulates that forfeited wrecks are subject to public sale, with the proceeds earmarked for the Establishment for Social Protection of Seamen.[5] Plaintiffs brought suit against CNAN for tortious deprivation of property.[6]

The United States District Court for the Southern District of Texas dismissed the complaint for lack of subject matter jurisdiction over defendant. The Fifth Circuit Court of Appeals affirmed, rejecting plaintiffs' contention that the court acquired jurisdiction under either the commercial exceptions or expropriation sections of the FSIA. The court focused its discussion on the commercial exceptions, dispensing with the expropriation section in cursory fashion.[7]

The court held that CNAN's general commercial conduct in the United States did not, standing alone, create an environment in which plaintiffs could invoke the commercial exceptions. The absence of a nexus between defendant's commercial activity in the United States and its salvage operation in the Mediterranean prompted the court to dismiss the case.

The court noted several reasons for favoring a nexus test interpretation of the commercial exceptions clause over plaintiffs' doing business construction. First, it noted that the international community is more favorably disposed to the nexus concept.[8] Second, it contrasted the language of the commercial exceptions section to that contained in the expropriation section. The latter's unmistakable reference to a doing business test, the court reasoned, illustrates that Congress knew the proper wording for defining the test. The absence of such language in the commercial exceptions section there-

---

[4] *Id.* at 196.

[5] *Id.* at 196-97.

[6] *Id.* at 197.

[7] *Id.* at 204. The court held that defendant's possession and control over the Kapetan Marcos was not tantamount to ownership or operation. Therefore, § 1605(a)(3) did not apply. It suggested the agency that began forfeiture proceedings against the ship could be accused of exercising ownership, but it did not do business in the United States. Section 1605(a)(3) is rarely used by aggrieved plaintiffs. *But see* De Sanchez v. Banco Central De Nicaragua, 515 F. Supp. 900 (E.D. La. 1981) (§ 1605(a)(3) applied because the United States was focal point of transaction). *See* Dellapenna, *Suing Foreign Governments and their Corporations*, Part II, 85 COM. L.J. 228, 233-34 (1980) for a terse overview of § 1605(a)(3). For an earlier study of the expropriation question, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRASNAT'L L. 33, 57-61 (1978). The expropriation issue is also discussed in Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law In Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 252-58 (1979).

[8] *Vencedora*, 730 F.2d at 202.

fore indicates that Congress consciously had chosen not to adopt it.[9]

Third, the court observed that the larger volume of litigation resulting from a doing business construction might overburden the courts.[10] Fourth, it noted that the Fifth Circuit itself had moved toward the test in an earlier decision.[11] Finally, the opinion stressed the need for uniformity among the courts in the area of sovereign immunity, alluding to the Third Circuit's adoption of the nexus approach.[12]

Judge Higginbotham dissented, stating that the court had placed undue emphasis on finding a connection between the cause of action and defendant's commerical activity in the United States. He accepted the doing business test, arguing that it was consistent with Congress' objective of expanding subject matter jurisdiction over foreign governments acting commercially. According to Higginbotham, Congress' silence should be construed as tacit approval of a doing business construction of the commercial exceptions. He agreed with his colleagues, however, that the expropriation section did not apply.[13]

Both the commercial and expropriation sections emanate from the restrictive sovereign immunity doctrine, which is premised on the notion that foreign sovereigns should not enjoy blanket immunity from suit.[14] Although the United States generally has adhered to the doctrine since the early 1950s,[15] it was not until 1976 that Congress codified the restrictive theory by adopting the FSIA.[16]

The FSIA transferred the power to decide whether a foreign government could invoke sovereign immunity from the State Department to the Judiciary.[17] The presumption under the FSIA is that the

---

[9] *Id.*

[10] *Id.*

[11] *Id.* at 203. *See* Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980); *see also infra* notes 38-39 and accompanying text.

[12] *Vencedora,* 730 F.2d at 203.

[13] *Id.* at 205 (Higginbotham, J., concurring in part and dissenting in part).

[14] Under "this view, a foreign sovereign acting in a private capacity could be sued for wrongs arising from those private acts in the ordinary courts of the host country. For wrongs arising out of a foreign sovereign's public acts, the only redress would be found, if at all, in the courts . . . of that foreign sovereign." Dellapenna, Part II, *supra* note 7, at 230.

[15] 26 U.S. DEP'T ST. BULL. 984, 985 (1952). This document, known as the "Tate letter," formally announced that the United States was abandoning the doctrine of absolute immunity for foreign sovereigns.

[16] 28 U.S.C. §§ 1330, 1332(a)(2),(3),(4), 1391(f), 1441(d), 1602-1611 (1982).

[17] H.R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6606 [hereinafter cited as "HOUSE REPORT"]. As one commentator has put it, plaintiffs are "no longer . . . forced to compete with the foreign policy interests of the United States for the State Department's favor." Kahale & Vega, *supra* note 7, at 220.

This is not to say the executive branch's involvement was without benefit. Before enactment of the FSIA, the State Department conveniently ferreted out frivolous claims, obviating the burdens of litigation. Under current law, by contrast, a foreign sovereign must respond directly to the charge in court, a process that surely encourages plaintiffs to

defendant is entitled to sovereign immunity.[18] The presumption is overcome, however, when a court concludes that one of the FSIA exceptions applies. By eliminating the defendant's sovereign immunity claim, the requirements of personal and subject matter jurisdiction are also satisfied, and the court may proceed to the merits of the case.[19]

The commercial exceptions section, section 1605(a)(2), has been characterized as "the core of FSIA."[20] It describes three situations in which a defendant may not assert sovereign immunity. All three exceptions use the term "commercial activity," which is defined as "either a regular course of commercial conduct or a particular commercial transaction or act."[21] The first exception denies foreign sovereign immunity when "the action is based upon a commercial activity carried on in the United States by the foreign state."[22] Section 1603(e) further explains that this means "commercial activity carried on by such state and having 'substantial contact' with the United States."[23] A defendant's actions may fall within this "substantial contacts" exception despite the fact that the actions were partially performed outside the United States.[24]

The second exception, the "territoriality exception," abolishes immunity in suits based upon acts "performed in the United States in connection with a commercial activity of a foreign state elsewhere."[25] The third exception, the "direct effects" exception, eliminates immunity in cases in which an act occurs outside the United States "in connection with a commercial activity of the foreign state elsewhere which . . . causes a direct effect in the United States."[26]

The legislative history of the commerical exceptions section reveals that Congress intended to allow a significant measure of interpretative discretion.[27] Consequently, the appellate and district courts have articulated differing constructions.

Two decisions by the Third Circuit discuss the substantial con-

---

pursue frivolous claims. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 198-99 (1981).

[18] *See* Dellapenna, *Suing Foreign Governments and their Corporations*, Part I, 85 COM. L.J. 167 (1980). *But see* Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STANFORD L. REV. 385, 386 (1982) (contending that sovereign immunity is usually treated as an affirmative defense).

[19] *See* Kane, *supra* note 18, at 386-87. Section 1330(a) conveys subject matter jurisdiction; § 1330(b) grants personal jurisdiction whenever § 1330(a) is met.

[20] Dellapenna, Part II, *supra* note 7, at 230.

[21] 28 U.S.C. § 1603(c) (1982).

[22] *Id.* § 1605(a)(2).

[23] *Id.* § 1603(e).

[24] HOUSE REPORT, *supra* note 17, at 6615.

[25] 28 U.S.C. § 1605(a)(2) (1982). For the purposes of this note the second exception will be referred to as the "territoriality clause."

[26] *Id.*

[27] HOUSE REPORT, *supra* note 17, at 6615.

tacts clause of the FSIA's commercial exceptions section. In *Sugarman v. Aeromexico*[28] the court applied the clause to hold liable a foreign government-owned airline that had caused personal injury to an American in Mexico. Plaintiff had suffered a heart attack while awaiting an overdue flight back to the United States. Focusing on defendant's commercial contact with plaintiff in the United States, the *Sugarman* court found substantial contact. Significantly, it used the word "nexus" to describe the relation between plaintiff's claim and defendant's commercial activity in the United States.[29]

In *Velidor v. L/P/G Benghazi*[30] Yugoslavian seamen sued their employers for nonpayment of wages. As in *Sugarman*, the *Velidor* court examined defendant's related commercial activity in the United States and found that the substantial contacts clause applied. It observed that the foundation of plaintiffs' cause of action, the Seaman's Wage Act, became operative only upon the vessel's entry into American waters, thus overcoming the presumption of sovereign immunity. The court stated, however, that the determination turned upon finding "a nexus between the plaintiff's grievance and the sovereign's commercial activity."[31]

In *Gemini Shipping v. Foreign Trade Organization for Chemicals and Foodstuffs*[32] the Second Circuit applied the substantial contacts clause to uphold jurisdiction in a suit against a foreign sovereign. The Syrian government had purchased rice in the United States and had agreed to pay any demurrage incurred during shipping.[33] Subsequently, Syria refused to honor its promise to pay, and Gemini brought suit in the United States. The court refused Syria's claim of sovereign immunity, because Syria's promise to pay demurrage arose out of the purely commercial contract to purchase rice in the United States.[34]

The Second Circuit also interpreted the substantial contacts clause in *Ministry of Supply v. Universe Tankships, Inc.*[35] In *Universe Tankships* Egypt had purchased wheat in the United States. Plaintiff filed a claim against Egypt for wrongfully delaying the ship that carried the wheat. Viewing the wheat sale in its entirety and treating the delay as merely the last leg of the commercial activity, the court

---

[28] 626 F.2d 270 (3rd Cir. 1980).

[29] *Id.* at 271-73. The delayed flight was to return plaintiff to the United States; the tickets for the trip were purchased there; the injury occurred in the midst of a round trip package; and the suffering continued after his return to the United States.

[30] 653 F.2d 812 (3d Cir.), *cert. denied*, 455 U.S. 929 (1981).

[31] *Id.* at 820.

[32] 647 F.2d 317 (2d Cir. 1981).

[33] Demurrage is a daily fine assessed against a chartering party if the ship is not returned to its owner by the end of the charter period. BLACK'S LAW DICTIONARY 389 (5th ed. 1979).

[34] *Gemini Shipping*, 647 F.2d at 319. The court stated that "the guarantee was part and parcel of the rice sale." *Id.*

[35] 708 F.2d 80 (2d Cir. 1983).

found substantial contact. From this perspective, the course of conduct clearly centered in the United States.[36]

The District of Columbia Circuit interpreted the FSIA's territoriality clause in *Gilson v. Republic of Ireland.*[37] In *Gilson* plaintiff brought suit against two agencies of the Irish government for converting his quartz crystal equipment, business expertise, and patent rights. Although defendant's acts were consummated in Ireland, their roots were traced to Irish activity in the United States sufficient to hold defendant liable.[38]

The Fifth Circuit applied the substantial contacts clause in *Arango v. Guzman Travel Advisors Corp.*,[39] a tort and contract action against a Dominican Republic airline for involuntarily deporting plaintiffs from the Dominican Republic. Defendant had sold airline tickets and tourist cards in the United States, including those purchased by plaintiffs. Plaintiffs' grievances stemmed from the airline's ticket sales, which provided the necessary link to the airline's commercial conduct in the United States.[40]

Although the appellate courts had heard several commercial exceptions cases, none had squarely addressed the doing business issue. The concept, however, had been litigated in several district courts prior to *Vencedora. Harris v. Vao Intourist, Moscow*,[41] for example, expressly repudiated the application of doing business to the substantial contact clause.[42] *Harris* concerned the death of an American in a fire at a state-owned hotel in Moscow. The court refused to regard the Soviet Union's unrelated tourism activities within the United States as sufficient to assert jurisdiction.[43]

The *Harris* court's position that the substantial contacts clause demands a relationship between the cause of action and the defendant's commercial activity in the United States stems from its observation that the commercial activities exception does not contain language paralleling a typical state doing business long-arm provi-

---

[36] *Id.* at 84. The court noted that cargo arrangements took place in the United States, and that the Ministry had consented to a provision that carriage of goods would not officially end until the ship unloaded.

[37] 682 F.2d 1022 (D.C. Cir. 1982).

[38] *Id.* at 1027. Plaintiff's business was located in Ireland, where he personally directed operations at the time of the alleged misconduct. The court observed that "an unbroken chain of events" began "when plaintiff contracted with defendant GE in the United States, with the participation of defendant IDA's New York office, and involving the active collusion of all defendants to entice plaintiff to leave the United States for Ireland." *Id.*

[39] 621 F.2d 1371 (5th Cir. 1980). *See supra* note 11 and accompanying text.

[40] *Arango*, 621 F.2d at 1379-80.

[41] 481 F. Supp. 1056 (E.D.N.Y. 1979).

[42] The *Harris* decision has influenced many scholarly works. *See* Dellapenna, *Suing Foreign Governments and their Corporations*, Part IV, 85 COM. L.J. 364, 365 (1980).

At least one commentator viewed the court's opinion as the settled interpretation of doing business. Hill, *supra* note 17, at 224.

[43] *Harris*, 481 F. Supp. at 1061.

sion.[44] Conceding that Congress modeled the FSIA after the District of Columbia's long-arm statute,[45] the court distinguished it from the "traditional 'doing business' presence basis," by noting that each provision of the District of Columbia statute requires that the specific activity described "give rise to the 'claim for relief.' "[46]

The court in *Rio Grande Transport, Inc. v. Compagnie Nationale Algerienne De Navigation*[47] reached the contrary conclusion. The court's endorsement of the doing business concept rested upon its belief that congressional intent mandated a broad interpretation of commercial activity under the FSIA. In *Rio Grande Transport* several employees were killed or injured when their ship collided with a CNAN vessel in the Mediterranean Sea. Despite the absence of a connection between the accident and CNAN's commercial affairs in the United States, the court exercised subject matter jurisdiction.[48]

Within a year, however, the same court in *Gibbons v. Udaras na Gaeltachta*[49] failed to adopt the doing business concept, although the facts clearly supported its application, since defendants had conducted substantial unrelated activity in the United States. Instead, the court relied on connections between the causes of action and defendant's commercial activity in the United States. Plaintiffs brought suit in the United States against two agencies of the Irish government that had lured them into launching an unsuccessful business in Ireland. The court referred to the parties' negotiations in the United States, as well as the equipment plaintiffs had purchased in the United States for use in Ireland, as evidence that defendant had met the substantial contacts test. The *Gibbons* court emphasized that the activities inside the United States were connected with the causes of action.[50]

---

[44] *Id.* at 1061. The court compared the clause to the "transaction" of business clauses appearing in many long-arm statutes. From this, it gleaned that Congress had designed the clause to cover specific business deals in the United States.

[45] HOUSE REPORT, *supra* note 17, at 6612. Congress announced that § 1330(b) was "patterned after the long-arm statute Congress enacted for the District of Columbia." *Id.*

[46] *Harris*, 481 F. Supp. at 1062. The court also distinguished the D.C. long-arm statute from that of New York, which upholds traditional doing business as a jurisdictional basis. *Id.* at 1059-60. For a good discussion of the substantial contact section and doing business, see Dellapenna, Part IV, *supra* note 42, at 365-66.

Other courts have taken a different view of the relationship between the FSIA and the District of Columbia's long-arm statute. *See* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1109 n.3 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 71 (1983). The court found it significant that the legislative history addressed personal jurisdiction, not subject matter jurisdiction, when alluding to the similarity between the FSIA and the District of Columbia's long-arm statute. The substantial contacts clause, it cautioned, bears no resemblance to the D.C. statute.

[47] 516 F. Supp. 1155 (S.D.N.Y. 1981). For a critique of the holding, see 15 VAND. J. INT'L L. 615 (1982).

[48] *Rio Grande*, 516 F. Supp. at 1162.

[49] 549 F. Supp. 1094 (S.D.N.Y. 1982). For a detailed analysis of the decision see Note, *Sovereign Immunity*, 10 BROOKLYN J. INT'L L. 255 (1984).

[50] *Gibbons*, 549 F. Supp. at 1109, 1111.

While both the majority and the dissent in *Vencedora* relied on previous appellate court decisions, those decisions concern entirely different fact situations. In each case, the court recognized that the action physically had occurred outside the United States. *Arango*, for example, dealt with the treatment plaintiffs had received in the Dominican Republic. This did not comport with the substantial contacts requirement that the commercial activity occur in the United States. The courts remedied this problem by viewing the litigated act as a dependent part of the defendant's commercial activity in the United States.[51]

Instead of focusing upon the wrongful delay in unloading the ship in Egypt, the court in *Universe Tankships* considered the overall wheat sale and concluded that the unloading was merely a component of a larger affair principally conducted in the United States.[52] The court in *Sugarman* also attempted to find a bridge to commercial activity in the United States. In isolation, plaintiff's heart attack in Mexico does not provide a basis for applying the substantial contacts clause. As a part of plaintiff's overall commercial dealings with defendant, however, it may be considered a component of commercial activity in the United States.[53] Linking defendant's act with a specific commercial activity in the United States was a major factor in these cases.[54]

Unlike earlier court of appeals cases, plaintiffs in *Vencedora* made no effort to connect the litigated act to related commercial conduct in the United States. Instead, they based their claim on defendant's total volume of commercial activity in the United States. Essentially, the *Vencedora* court was asked to examine the substantial contacts clause from a new perspective.

The *Vencedora* court conceded that *Rio Grande* and *Universe Tankships* could be interpreted as authority for the doing business test.[55] The court did not accord much weight to language in *Universe Tankships* resembling the traditional test: "We believe this reading is too broad since the parties did not raise the 'doing business' issue."[56] The court, however, neglected to add that the plaintiff in *Universe Tankships* did not need to develop the doing business argument. He simply tied the problem of unloading into a larger commercial affair in the United States—the overall wheat sale. Moreover, the *Vencedora* court failed to mention that opinions cited in support of the nexus

---

[51] *Arango*, 621 F.2d at 1379.

[52] *Universe Tankships*, 708 F.2d at 84-85.

[53] *Sugarman*, 626 F.2d at 273.

[54] One writer has suggested that in deciding jurisdiction, the courts have elevated acts motivated by contractual commitments over acts not performed pursuant to a contract. Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1491-97 (1983).

[55] *Vencedora*, 730 F.2d at 201 n.12.

[56] *Id.*

test were silent on the doing business issue. The court's tactic for neutralizing the earlier dictum underscored that plaintiff's argument distinguishes *Vencedora* from any previous court of appeals decision.

Facing a case of first impression, the *Vencedora* court sought refuge in the language of the commercial exceptions section. The court used the "based upon" phrase in each of the three clauses as a bridge to analogize to earlier decisions.[57] A literal reading of "based upon a commercial activity in the United States" suggests that the substantial contacts clause requires that the litigated act must itself occur in the United States. In *Sugarman* the court rejected this interpretation, contrasting the requirements in the other two clauses that the act occur in or have a direct effect in the United States with the substantial contacts clause's silence.[58] The *Sugarman* court presumed that the omission was deliberate, permitting a court to assert jurisdiction although the act occurred elsewhere. Thus, the "based upon" phrase did not operate as a restraint on the substantial contacts clause.

The *Vencedora* court used this established interpretation as a subtle springboard to a more radical proposition: that the "based upon" phrase mandated that all substantial contact clause cases have a nexus to the commercial activity in the United States.[59] According to *Vencedora*, the district court in *Gibbons* had extended the nexus construction of "based upon" from the territoriality clause to the two other commercial exception clauses.[60] Actually, the *Gibbons* court was addressing the silence issue raised in *Sugarman*.[61] While dictum in *Gilson* discouraged a doing business reading, the court did not absolutely reject the notion: "If plaintiff cannot show the requisite nexus between defendants' acts . . . in the United States and his cause of action, then contact with the United States . . . will be *perhaps* decisively, attenuated."[62]

In reading a nexus requirement into the "based upon" phrase found in all three clauses of the commercial exceptions section, *Vencedora* does not add to either the territoriality or direct effects clauses. Those clauses address causal connection situations, both using the word "connection." The *Vencedora* court surmised that Congress had written the "based upon" language into all three clauses, though functionally the phrase only modifies the substantial contacts clause.

---

[57] *Id.* at 200.

[58] *Sugarman*, 626 F.2d at 273.

[59] *Vencedora*, 730 F.2d at 200-02. While the *Gilson* court had searched for a connection, its inquiry may be attributed to the specific language of the territoriality clause. *Gilson*, 682 F.2d at 1027.

[60] *Vencedora*, 730 F.2d at 200.

[61] *Gibbons*, 549 F. Supp. at 1109 n.5.

[62] *Gilson*, 682 F.2d at 1027 n.22 (emphasis added).

At the same time, however, the court agreed with *Sugarman* that "based upon" does not mean that under the substantial contacts clause the act must occur in the United States.[63] *Sugarman* stated that the locus of the act is addressed in the other two clauses, so that the absence of "locus" from the substantial contacts section indicates that it is not important. If the "based upon" language is construed to require that the act occur in the United States, it would operate as a restraint upon the substantial contacts clause, without adding anything to the other two clauses. *Sugarman* concluded that Congress would not have written the "based upon" language into all three clauses intending it to modify only one.[64] It may be stated that *Vencedora* stands for the *Sugarman* proposition that Congress did not intend to add a "locus" restraint on the substantial contacts clause with the "based upon" phrase. Yet *Vencedora* adds the same phrase to all three clauses to require a nexus although only one clause is affected. This inconsistent treatment of the "based upon" phrase weakens the decision.

Despite this inconsistency, the *Vencedora* opinion embodies the spirit of earlier court of appeals decisions. Previous decisions avoided the doing business interpretation, even in instances in which it could be asserted, suggesting reservations regarding its applicability. Many plaintiffs had an opportunity to argue doing business in the alternative, yet the record is devoid of any such attempts. Although doing business was not asserted in *Sugarman* and *Arango*, the defendants were airline companies, a category of commercial activity specifically mentioned in the legislative history as a "regular course of commercial activity."[65] Similarly, the plaintiff in *Gilson* did not attempt to emphasize the defendant's unrelated contacts with the United States.[66]

In another sense, however, *Vencedora* deviates from the spirit of earlier cases. While the court marshalled support of the nexus approach for the sake of uniformity, it resulted in a finding for defendant—cutting against a line of decisions in which the defendants' claims of sovereign immunity were dismissed.[67] This past bias against the defendant, to a large extent, may be attributed to the courts' obvious efforts to help aggrieved American citizens who otherwise would be left without a remedy.[68] Yet this explanation is not fully satisfactory. Attempting to achieve uniformity, *Vencedora*

---

[63] *Vencedora*, 730 F.2d at 200.

[64] *Sugarman*, 626 F.2d at 273.

[65] *See* HOUSE REPORT, *supra* note 17, at 6606-07.

[66] *Gilson*, 682 F.2d at 1027.

[67] In the appellate decisions previously discussed (*Sugarman*, *Velidor*, *Gemini*, *Universe Tankships*, *Gilson*, and *Arango*), the courts found a basis for asserting jurisdiction over the foreign defendants. While the courts invoked different reasoning, their uniformity in result is notable.

[68] *See Gilson*, 682 F.2d at 1028.

cites *Velidor*, which held that foreign plaintiffs could sue a foreign government in a United States court.[69] This holding was based on a very attenuated substantial contact: defendant's ship fortuitously had sailed into an American court after plaintiffs had quit on the high seas.[70]

Nevertheless, the call for uniformity is strong, and future courts will undoubtedly refer to *Vencedora* when confronted with the substantial contacts clause. The call for consistency does not conflict with any previous commercial exceptions cases. Also, the ease with which the nexus test may be applied favors its widespread adoption.

The *Vencedora* decision essentially draws a line beyond which a foreign governmental entity could not be subject to suit. The case signals a halt to the steady erosion of the sovereign immunity doctrine. By employing a nexus test, however, the court solidified previously established inroads on the doctrine. Henceforth plaintiffs will have to demonstrate a link, albeit a tenuous one, between the cause of action and the defendant's commercial activity in the United States before a court will hear a case on its merits.

The *Vencedora* court mishandled an ideal opportunity to resolve a confused area of FSIA law. The significant shortcomings of the decision stem from the court's myopic preoccupation with statutory construction. The reasoning in *Vencedora* is strained because it rests on the dubious presupposition that Congress had considered the doing business issue and had incorporated its decision into the statute. Congress, however, drafted the FSIA in a vague fashion to give the courts wide latitude.[71] Rather than acknowledging that the technical language of the FSIA was meant only as a general guide, the court insisted on scrutinizing the FSIA to uncover congressional intent.

The court should have looked beyond the statute to ascertain legislative intent. At times the court exhibited such a willingness, as when it declared that the doing business test was not internationally respected. The United States adopted the restrictive sovereign immunity doctrine to conform to the international mainstream.[72] A strong argument may be made that Congress did not intend to stray from these waters by adopting the more controversial doing business construction. Unfortunately, the court failed to develop fully this interpretation.

Had the *Vencedora* court approached the doing business issue from a broader perspective, it is not certain that it would have imposed the nexus test on the substantial contacts clause. Although the need for international respect had operated as a restraint, Con-

---

[69] *Velidor*, 653 F.2d at 814.

[70] *Id.* at 820.

[71] HOUSE REPORT, *supra* note 17, at 6615.

[72] *Id.* at 6607-08.

gress clearly passed the FSIA to help American citizens obtain judgments against foreign defendants.[73] In this light, a doing business interpretation seems desirable.[74]

The *Vencedora* court clarified this area, inasmuch as it reduced the substantial contacts clause to a mirror of its two counterparts, which explicitly mandate a nexus—a result probably not intended by the drafters of the commercial exceptions section. Perhaps future courts will question this result, and will discover a sounder foundation for supporting a commercial nexus requirement in "substantial contact" clause suits.

—RONALD ROGERS

---

[73] *Id.* at 6505.

[74] The fact that this case did not involve an American plaintiff weakens this argument, but hardly justifies *Vencedora*'s dismissal of the entire doing business concept.

Before Congress adopted the FSIA, foreign plaintiffs were precluded from suing foreign defendants in United States courts due to a lack of diversity. Dellapenna, Part IV, *supra* note 42, at 370. The Justice Department advised Congress that the proposed legislation would not turn the nation's courts into "international courts of claims." *Id.* From this, one may glean that Congress intended to favor American plaintiffs over foreigners.