

Client Bulletin

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Illinois Federal Court Finds That Foreign Sovereign Immunities Act Precludes Suits In United States Against Peruvian Airline For Damages Arising From 2005 Accident

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602, protects foreign governments, their agencies or instrumentalities and entities qualifying as an organ of a state, from suit in the United States subject to specific exceptions. In *Vivas v. The Boeing Company*, 2007 WL 2409742 (N.D. Ill. Aug. 21, 2007), the Court decided that none of the exceptions applied, that TANS was an organ of the State of Peru and therefore that there was no subject matter jurisdiction in the United States over claims which arose from the 2005 crash of a TANS flight in Peru.

TANS was created as the state carrier of Peru pursuant to a Peruvian supreme decree in 1963. TANS provided access to remote areas of Peru, served as the presidential aircraft fleet and transported Peruvian troops as needed. All TANS' pilots were active duty Peruvian Air Force personnel. In 1999, the Peruvian Government ordered all government entities holding shares in any companies on behalf of the Peruvian Government to transfer them to a new entity charged with managing all state owned enterprises. This entity, called FONAFE, owned 100% of the shares of TANS, FONAFE appointed the TANS' General Manager and received all of TANS profits which were transferred to the Peruvian Treasury.

Neither party disputed that TANS itself was not a foreign state nor a political subdivision of Peru. Therefore, TANS could qualify as a "foreign state" only if it was an agency or instrumentality of a foreign state under 28 U.S.C. § 1603(b). Whether TANS qualified as

an agency or instrumentality was dependent upon whether it was an organ of Peru or of a political subdivision of Peru, or FONAFE was a political subdivision of Peru.

The U. S. Supreme Court held in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), that a corporation is an instrumentality of a foreign state under the ownership prong of §1603(b) only if the foreign state itself owns a majority of the corporation's shares. However, in cases, like *Vivas*, where the issue is whether the company could nevertheless qualify as an agency or instrumentality under the organ prong of Section 1603(b), there is no clear test and the courts must examine a number of factors regarding the creation, structure, and operation of the entity. The *Vivas* Court first examined whether TANS was an organ of the State of Peru. The circumstances of TANS' creation and termination (TANS was liquidated by means of a supreme decree on July 15, 2006) weighed heavily in favor of TANS being considered to be an organ of the State of Peru. TANS, said the Court, is similar to the United States Air Force. It serves the government's public purposes of transporting military personnel around the country, had little or no operational or financial autonomy, took orders directly from the Peruvian Government through FONAFE, and was financially inseparable from FONAFE.

Plaintiffs argued that TANS could not be an agency or instrumentality of a foreign state because it was able to contract in its own name and agreed to be subject to all applicable laws with respect to its contractual obligations. TANS further had agreed in its contracts with third parties that it would not assert governmental immunity as a defense to its obligations. Finding that these facts did not weigh strongly against a finding that TANS was an "organ" of the Peruvian state for purposes of the FSIA, the court concluded that TANS had made a *prima facie* showing that it was an organ and thus an agency or instrumentality of the Peruvian Government for the purposes of

§1603(b). The Court cited *Shirirbokova v. CSA Czech Airlines, Inc.*, 335 F.Supp. 2d 989 (D. Minn. 2004), in which it was found that the CSA Czech Airlines, which had been continuously owned and operated by the Government of Czech Republic, and which was 91% indirectly owned by the Government, qualified as an “organ” of the state. Accordingly, resting its decision on the fact that TANS was an organ of the Peruvian state, rather than the fact that FONAFE owned a majority of the shares of the stock, the Court determined that TANS was entitled to sovereign immunity.

Finding that none of the exceptions to sovereign immunity applied, and holding that the fact that United States citizens were killed in a foreign plane crash outside the United States did not constitute a commercial activity in Peru which caused the direct effect in the United States, the Court rejected the assertion of jurisdiction over TANS and granted dismissal of the Complaint. All of the passenger cases filed against TANS in the Federal District Court were dismissed since there was no basis for the assertion of jurisdiction over TANS. The cases were remanded as against all other defendants in the Circuit Court of Cook County, from whence they had been removed pursuant to the provisions of the FSIA.



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