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No. 92-7222

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRANSAERO, INC.,

Plaintiff-Appellee,

v.

LA FUERZA AEREA BOLIVIANA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE UNITED STATES

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INTRODUCTION

The United States submits this brief as amicus curiae in response to this Court's order of March 7, 1994, inviting "the United States to file a brief amicus in this case, shedding light upon the proper interpretation of the Foreign Sovereign Immunities Act as it relates to this action." We welcome the Court's invitation in this matter since the proper application of the Foreign Sovereign Immunities Act (hereafter "the FSIA" or "the Act") is of considerable importance to both the Department of State and the Department of Justice.

From studying the district court ruling and the briefs filed by the parties, we understand the principal question in this

appeal to be the following: whether the Bolivian Air Force should be considered the Bolivian state itself for the purpose of service of process under the FSIA, or whether that entity is an "agency or instrumentality" of Bolivia under the statute, which would allow easier service.

Our position on this question, as explained below, is that the armed forces of a sovereign nation are presumptively part of the state itself under the FSIA, but that this presumption can be rebutted by a showing of separateness. The armed forces of different nations vary widely and, in light of the factors set forth in the FSIA and its legislative history, there may be instances in which an entity connected with a foreign military department is properly treated as an agency or instrumentality of a foreign state, rather than as part of the state itself.

In our view, the key question is how separate from the central state is the entity involved. This inquiry requires examining, among other factors, the nature of the entity's core function and the substance of the relationship to the state. Because the district court here did not take these points into account, we disagree with the analytical approach used by that court.

Since we have not had an opportunity to study closely the full record in this case or to explore in depth the history, current role, and powers of the Bolivian Air Force in particular, we do not take a position as to whether that entity should be treated as an integral part of the central Bolivian state for the

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GLOSSARY

In this brief, we use the term "FSIA" to mean the Foreign Sovereign Immunities Act.

purpose of service under the FSIA.

We emphasize also that we take no position regarding the underlying merits of the dispute here. Nor do we express a view regarding the contention by plaintiff Transaero, Inc. that the facts show that it substantially complied with all requirements of the FSIA, and that such substantial compliance is sufficient for jurisdiction under that statute.

DISCUSSION

1. The Statutory Scheme

As the briefs of the parties indicate, the FSIA draws a distinction between "a foreign state or political subdivision of a foreign state" and "an agency or instrumentality of a foreign state" for the purpose of service. See 28 U.S.C. § 1608(a) and (b).[1] Service is more difficult upon a foreign state than on its agencies and instrumentalities. Ibid.

In its definitional section, the FSIA provides a definition of "foreign state, **except as used in section 1608**" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," which is then defined in the next subsection of the statute. 28 U.S.C. § 1603(a) (emphasis added). 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

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[1] The pertinent parts of the FSIA are reprinted in an addendum at the end of this brief.

other ownership interest is owned by a foreign state or political subdivision thereof," and (3) is not a citizen of the United States or a creation of a third country. 28 U.S.C. § 1603(b).[2]

Thus, the definition of "foreign state" for most FSIA purposes broadly includes the state itself as well as its agencies and instrumentalities. But by the express reservation highlighted above, this combined definition does not apply to the issue of service. Rather, a "foreign state [and its] political subdivisions" are considered differently from an "agency or instrumentality of a foreign state" for the purpose of service. 28 U.S.C. § 1608(a) and (b).

The FSIA treats a foreign state and its agencies and instrumentalities differently for several other matters as well. The statute makes the state alone immune from punitive damages (28 U.S.C. § 1606), and provides broader venue when a suit is filed against an agency or instrumentality (28 U.S.C. § 1391(f)(3)). And, the statute recognizes this distinction for attachment and execution purposes. 28 U.S.C. § 1610(b). In addition, the FSIA renders certain military property immune from attachment and execution. 28 U.S.C. § 1611(b)(2).

Thus, for certain matters, the FSIA's language establishes different rules for foreign states, coupled with their political subdivisions, as opposed to their agencies and instrumentalities. In drawing these distinctions, the FSIA sought to preserve for

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[2] Although the FSIA thus sets out three factors, our understanding from the briefs of the parties is that the second two of these are not in dispute here.

foreign states the protections traditionally accorded under international practice, but not to provide a potential windfall for state commercial entities, which form the bulk of agencies and instrumentalities. The statute emphasizes the need to determine that a defendant is a "separate legal person" from the state before it accords the entity less protection. In doing so, the FSIA focuses on the degree of independence of an entity from the central state. See 28 U.S.C. § 1603(b).

The statute's legislative history provides some guidance, but no definitive answer, regarding which entities are part of the state itself or its political subdivisions, and which are instead agencies or instrumentalities.

The House of Representatives Report on the FSIA first explains that the term "'political subdivisions' include[s] all governmental units beneath the central government, including local governments." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 15 (1976) (reprinted in 1976 United States Code Cong. & Admin. News at 6604).[3] It then essentially repeats the statutory language concerning the meaning of an agency or instrumentality. Ibid.

This report explains that "[t]he first criterion [for being an agency or instrumentality], that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the

[3] The Senate Report on this legislation is quite similar to the House Report, and thus adds nothing to the inquiry here. See S. Rep. No. 94-1310, 94th Cong., 2d Sess. (1976).

foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name." Ibid.

The House Report concludes its discussion of this subject with the explanation that "[a]s a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name." Id. at 15-16.

This discussion in the House Report establishes that an agency or instrumentality can take any of a wide range of forms. Significantly, the listing of this broad range of types of entities is introduced by the statement that an agency or instrumentality "could assume" these forms. Thus, the House Report does **not** state that any entity that is in one of these forms **must** be considered an agency or instrumentality, rather than part of the central state or one of its political subdivisions. Instead, it merely describes some of the forms that an agency or instrumentality could take.

The earlier portion of the House Report addressing the first criterion for an agency or instrumentality -- that it be a "separate legal person" -- states that this criterion is "intended to include" various types of entities which can do

certain things in their own names, such as sue and be sued, contract, or hold property.

If taken at face value, these words from the House Report would have a vast reach because they suggest that the FSIA term "separate legal person" is intended to include any entity that, even in a purely formalistic sense, can "sue or be sued in its own name, contract in its own name or hold property in its own name." Id. at 15. Such a reading of the legislative history would mean that a great array of government entities -- indeed, most likely an overwhelming majority of such entities -- would be legal persons separate from the state because, to be so defined, they would merely need the authority to enter into contracts in their own names, one of the attributes described in the House Report.

It is helpful in considering this matter to view how such a rule would be applied reciprocally abroad. A literal reading of the House Report language, if applied reciprocally, could mean that the United States Air Force would be considered in a foreign court a legal person separate from the United States itself because that entity can, and often does, enter into contracts in its own name.[4] However, the United States Air Force does not own

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[4] Transaero points out in its appellate brief (at 26 n.10) that the United States Air Force is an agency of the United States under domestic law concerning suits against such entities. See, e.g., 28 U.S.C. § 451. While true, this point is not relevant here, and we do not understand Transaero to be arguing that the United States Air Force would properly be considered in foreign courts an "agency or instrumentality" of the United States as opposed to an integral part of the central government. Our domestic law does not draw distinctions for suit purposes

property in its own name, cannot be sued in court its own name for commercial claims (which can instead be raised only against the United States in the Court of Federal Claims, see 28 U.S.C. §§ 1491 and 1494), and cannot sue in its own name.[5] Further, judgments in commercial cases involving the United States Air Force do not come from some separate fund held by the Air Force, but instead are paid by the United States. 28 U.S.C. § 2517.

In addition, a mechanical reading of the House Report would mean that the United States Department of State and the Department of Defense are legal persons separate from the United States simply because these entities too can, and do, enter into contracts in their own names.

The FSIA cannot properly be read such that entities like the United States Air Force, the State Department, and the Defense Department would in foreign courts be considered legal persons separate from the United States. We are aware of no indication that Congress intended such a result. As described next, relevant Supreme Court precedent and international practice help

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between agencies of the United States, which includes its large Executive Branch departments, and the central government itself. Hence, the fact that the United States Air Force is an agency for domestic law purposes, such as suits under the Administrative Procedure Act, does not help in determining whether it would be considered merely an agency or instrumentality for purposes of suit in a foreign court.

[5] We note that in the Federal Circuit, an appeal from the Armed Services Board of Contract Appeals in a case involving a contract with the Air Force would be captioned "X Corp. v. (name of the Secretary of the Air Force)," under that court's local practice. That court follows this procedure simply to lessen docket confusion regarding different cases filed by the same company.

give meaning to the FSIA by drawing reasonable lines between a state itself and its separate legal persons, i.e. agencies and instrumentalities.

2. An Entity Whose Core Function Is To Provide For The Military Defense Of The State Should Generally Be Presumed To Be Part Of The State Itself.

Early in our history, Chief Justice Marshall wrote for the Supreme Court that, for the purpose of treatment in our courts, a foreign military unit is to be considered part of the foreign state. In The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), the Court faced a claim for attachment of a ship that had originally been owned by the American claimants, but had been seized by the French and was now a French "armed national vessel" (id. at 135) in the port of Philadelphia.

Chief Justice Marshall reported that the ship "constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; [and] is employed by [the French head of state] in national objects." Id. at 144. Consequently, he explained that "interference" with the vessel "cannot take place without affecting his power and his dignity." Ibid.

Significantly, the Chief Justice then instructed "that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation." Id. at 145. Moreover, "[a] prince, by acquiring private property in a foreign country, may possibly

be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern." Ibid.

This ruling in The Schooner Exchange does not address the precise question facing this Court today, and its holding has been eroded somewhat by Congress through the FSIA, which does allow suits against military entities, under appropriate circumstances. Nevertheless, Chief Justice Marshall there drew on "general principles" (id. at 136) in concluding that a military entity is tied directly to the sovereign because of its function.

Even though Congress through the FSIA has restricted the recognition of broad immunity applied in The Schooner Exchange, it retained in the statute a significant aspect of that rule by excepting military property from attachment and execution. Specifically, property that "is, or intended to be, used in connection with a military activity and (A) is of a military character, or (B) is under the control of a military authority or defense agency" is specially protected. 28 U.S.C. § 1611(b)(2). Thus, the FSIA continues to recognize the special nature of the military function.

This accords with international practice. The International Law Commission of the United Nations General Assembly has in its

Report of the International Law Commission on the Work of its Forty-Third Session (29 April-19 July 1991) defined certain terms used in its Draft Articles on the Jurisdictional Immunities of States and Their Property. This report explains that the term "State" is made up of various components, which are separately defined and discussed. The first of those are "the State and its various organs of government." Id. at 12. These "State organs or departments of government comprise the various ministries of Government, **including the armed forces**, the subordinate divisions or departments within each ministry, such as embassies, special missions, and consular posts and offices, commissions, or councils which need not form part of any ministry but are themselves autonomous State organs answerable to the central Government or to one of its departments, or administered by the central Government." Id. at 17-18 (footnotes omitted; emphasis added).[6]

The International Law Commission report later lists "agencies or instrumentalities of the State" also as being part of the State (id. at 13), but separately defines them as entities different from the armed forces and the departments of government. It rightly observes though that "[t]here is in practice no

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[6] Accord G. Varges, "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention," 26 Harv. Intl. L.J. 103, 124 (1985) (commenting upon the International Law Association Draft Articles for a Convention on State Immunity, and describing as "integral arms of the state" cabinets, ministries, and departments "along with armed forces and other traditionally recognized organic parts of the state").

hard-and-fast line to be drawn between agencies or instrumentalities of a State and departments of government." Id. at 23.

In sum, there is a long tradition in the law of the United States -- dating from 1812, and based on generally recognized principles even at that time -- of treating the armed forces as indistinct from the sovereign itself. This tradition accords with current international practice.

Accordingly, it would have been a revolutionary shift for Congress to have decided in the FSIA to consider the armed forces, whose core function is defense of the state, as a "separate legal person," and thus an agency or instrumentality of a state as opposed to being an integral part of the state itself, absent strong evidence to the contrary. We are aware of no indication that Congress meant to accomplish such a radical change; indeed, the opposite is suggested. Cf. H.R. Rep. No. 94-1487, supra, at 12 ("[t]he bill is not intended to affect the substantive law of liability. Nor is it intended to affect * * * the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong").

The little case law that directly addresses the issue presented here agrees with this view. In Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 398 (E.D. Va. 1984), the court determined that the Argentine Naval Commission was a procurement body for the Argentine Navy, staffed by military

officers. As such, there was "no basis to differentiate [the Commission's] existence as separate from the Argentine Navy," and it was therefore found to be part of the foreign state rather than an agency or instrumentality under the FSIA. Id. at 400.

The district court in Marlowe v. Argentine Naval Commission, 604 F. Supp. 703, 707 (D.D.C. 1985), heavily relied upon the reasoning in Unidyne, and focused on the role of the Argentine Navy Commission in finding it to be part of the state itself.

By contrast, in Bowers v. Transportes Navieros Ecuadorianos (Transnave), 719 F. Supp. 166 (S.D.N.Y. 1989), the court found an Ecuadorian steamship carrier to be an agency or instrumentality of Ecuador even though it "belongs to the National Armed Forces" (id. at 170). The court explained that the steamship company had the goal of "strengthening of the National Merchant Marine by engaging in commercial maritime and coastal waterway transport, as well as engaging the active participation of Ecuador in worldwide navigation activities." Ibid.

This entity had its own assets, independent of the Ecuadorian Navy, could establish branches in foreign countries and Ecuador, and could "join maritime-type organizations and associate with other shipping and foreign companies." Ibid. The entity had its own budget, and conducted business and contracts in its own name. Ibid. Under these combined circumstances, the district court's conclusion may well be correct, but this does not suggest that the outcome should be the same for the armed forces themselves, whose core function is defense of the state.

3. An Inquiry Into The Separate Legal Nature Of An Entity Should Consider Not Just The Form, But Also The Substance Of The Relationship To The State.

As described above, Congress sought to identify agencies and instrumentalities by questioning whether an entity is a separate legal person. The House Report then lists several factors that help identify such entities. In considering these factors, the courts should seek to give meaning to what Congress was trying to achieve, and look to the substance of the relationship -- not just, for example, the mere procedural point of whether an entity's name can appear on a brief in court. The factors in the House Report are intended to illustrate separateness and should be construed in that light.

In using the term "separate legal person" in the FSIA as a way of identifying agencies or instrumentalities (28 U.S.C. § 1603(b)(1)), Congress legislated against a background of legal concepts concerning the meaning of that term. In First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) (hereafter "Bancec"), the Supreme Court drew from that same background in deciding whether or not to find that a Cuban entity should be given separate juridical status in United States courts. Therefore, while the Supreme Court there specifically found that the FSIA did not govern that case (id. at 621), its opinion in Bancec is relevant and helpful in analyzing the question of whether an entity should be treated as a legal person separate from the state.

In Bancec, the Supreme Court noted that government instru-

mentalities are typically created as separate juridical entities, "with the powers to hold and sell property and to sue and be sued" (id. at 624), attributes also identified in the House Report. The Court further explained that "[e]xcept for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply." Ibid.

Given these attributes, governmental instrumentalities can, as the Supreme Court observed, "manage their operations on an enterprise basis while [attaining] a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies." Bancec, 462 U.S. at 624-25 (footnote omitted).

Finally, the Supreme Court noted in Bancec that an "instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties." 462 U.S. at 625-26.

The opinion in Bancec suggests that, in evaluating the criteria of separateness discussed in the FSIA House Report, the courts should consider factors such as the financial separateness of an entity as well as the ultimate liability for its acts. This point is reflected partially in the FSIA's provisions. A foreign state, but not its agencies and instrumentalities, is immune from an award of punitive damages. See 28 U.S.C. § 1606.

If the state itself is liable for judgments against a particular foreign governmental entity, that entity is likely not merely an agency or instrumentality since such a determination would in effect make the state liable for punitive damages.

In light of this point, as well as Bancec and the concepts upon which it is based, the source of liability for a judgment against a foreign entity and the financial structure of the entity should be among the factors taken into account in considering the criteria in the House Report.

CONCLUSION

Accordingly, we believe that the district court here erred in two respects regarding its application of the FSIA.

First, the court should have looked to the core function of the Bolivian Air Force in trying to determine that entity's status in relation to the Bolivian state. There should be a presumption that the armed forces, whose core function is defense of the nation, are part of the central state and not merely an agency or instrumentality of it. This presumption is not absolute, but should control in the absence of strong evidence of juridical separateness.

Second, in determining whether an entity is a separate legal person, the district court should have looked to the substance behind the criteria described in the legislative history, and focused its inquiry on factors such as where the liability for a judgment against the Bolivian Air Force would lie, and whether the Air Force operated with assets separate from those of the

central state. If the judgment would essentially be one against the state and an entity's assets are not separate from those of the state, then the entity is not a legal person separate from the state even if, in a formalistic sense, that entity can enter into contracts in its own name, and sue or be sued in its own name.

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