

March 2013

PORTUGAL

Preliminary note

In view of the forthcoming meeting of the CAHDI, and recalling paragraphs 13 and 28 of the draft report of the Committees' 44th meeting (Paris, 19-20 September 2012), under which delegations are invited to submit or update their contributions to the CAHDI databases, please find enclosed herewith Portugal's contribution to the database on State Practice Regarding State Immunities.

The present Report contains ten judicial decisions (Supreme Court and District Court) on State Immunities, compiled and treated by the national coordinator (Department of Legal Affairs of the Ministry of Foreign Affairs). These decisions reflect the evolution of national case law since Portugal last submitted contributions to the database, in November 2005.

a	Registration no.	P/1
b	Date	18-02-2006
c	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) - Appeal
d	Parties	Austria (State) vs Embassy's locally contracted personnel (individual);
e	Points of Law	<ul style="list-style-type: none"> • The Embassy is a representation of the foreign State, its acts, whether <i>ius imperi</i> or <i>ius gestionis</i>, are acts of the foreign State; • Foreign States enjoy immunity for acts <i>iure imperii</i> but not for acts <i>iure gestionis</i>, that is to say when it acts in the same way as a private person in relations governed by private law, such as commercial activities;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 05S3279
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	<p>In an appeal filed with the Supreme Court by Austria, the Court considered that the foreign State acted as a private entity (<i>ius gestionis</i>) vis-à-vis the request to reintegrate a laid off worker; the Court acknowledged the co-existence of two legal doctrines, that of absolute State immunity which is the logical consequence of the principle <i>par in parem non habet imperium</i>, by virtue of which one State is not subject to the jurisdiction of another State, and that of relative State immunity, which is tending to predominate. In this regard, the Court argued that article 8.º of the Portuguese Constitution reflects the principle <i>par in parem non habet imperium</i>, however courts also take into account that currently the State also acts as a private person, in legal relations governed by private law, particularly when pursuing commercial activities.</p> <p>The Court also highlighted that the foreign States' entitlement to immunity depends on the task for which the workers were hired (administrative or clerical staff duties lack <i>iure imperii</i>) and whether the activity of hiring a person to perform that task was one in which a private party could engage (as hiring a gardener or a domestic worker).</p>

a	Registration no.	P/2
b	Date	29-05-2012
c	Author(ity)	Supreme Court (Supremo Tribunal de Justiça) - Appeal
d	Parties	São Tomé e Príncipe (State) vs Hospital Egas Moniz (individual)
e	Points of Law	<ul style="list-style-type: none"> • Foreign States enjoy immunity for acts <i>iure imperii</i> but not for acts <i>iure gestionis</i>, that is to say when it acts in the same way as a private person in actions governed by private law, as commercial activities; • Relevance of the United Nations Convention on Jurisdictional Immunities of States and their Property, as consuetudinary law (the Convention is not yet into force, albeit Portugal is one of the few contracting Parties);
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 137/06.2TVLSB.L1.S1
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaris)	<p>In a case concerning due payments to the National Health Service (NHS) healthcare, the Court decided in accordance with the principle “<i>in dubio pro immunitatem</i>”, by virtue of which one State is not subject to the jurisdiction of another State.</p> <p>The Court took into account the fact that foreign nationals from non-EU countries have no automatic right to NHS healthcare and that the right of the individual emerged from a bilateral Cooperation Agreement between Portugal and São Tomé e Príncipe. The Court also acknowledged that contemporary doctrine and case law favor a restrictive approach to immunity from jurisdiction and considered that the <i>United Nations Convention on Jurisdictional Immunities of States and their Property</i>, although not yet into force, should help national Courts to overcome divergent interpretation of the restrictive theory.</p>

a	Registration no.	P/3
b	Date	14-01-2010
c	Author(ity)	Supreme Court (Supremo Tribunal Administrativo) - Appeal
d	Parties	Laboratório Internacional Ibérico de Nanotecnologia (International Organization) vs individual
e	Points of Law	<ul style="list-style-type: none"> • Immunity from jurisdiction (limitation of the adjudicatory power of national courts) and immunity from execution (limits enforcement powers of national courts or other organs) are applicable to foreign States and to International Organizations; • International competence of national courts regarding International Organizations;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 01062/09
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	Following the cancellation of a public tender, the party (International Organization) argued that national courts were internationally incompetent to rule over the case; The Court ruled that the international competence of national courts had to be examined vis-à-vis the definition of immunity from jurisdiction of International Organizations; This aspect was examined by the Court with reference to article 5.º of the Agreement between the Portuguese Republic and the Laboratory.

a	Registration no.	P/4
b	Date	22-06-2005
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) - Appeal
d	Parties	Austria (State) vs individual
e	Points of Law	<ul style="list-style-type: none"> Foreign States enjoy immunity for acts <i>iure imperii</i> but not for acts <i>iure gestionis</i>, that is to say when it acts in the same way as a private person in a legal relation governed by private law, as commercial activities or labor issues;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 2014/2005-4
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	<p>Following the layoff of a locally contracted staff member of the Austrian Embassy in Lisbon, the Court considered that the foreign State (represented by the Embassy) did not enjoy immunity from jurisdiction. The Court noted that contemporary doctrine and case law favor a restrictive approach to immunity from jurisdiction; however, the Court recognized that there are divergent interpretations of the restrictive theory of State immunities and acknowledged national courts' difficulties in distinguishing acts of <i>ius imperii</i> from acts of <i>ius gestionis</i>.</p> <p>The Court referred to previous case law - Supreme Court Decision of 13.11.2002 - which was already mentioned in Portugal's previous national report on State Immunities, submitted in November 2005; in that particular case, since the party (individual) performed administrative tasks under the supervision the Embassy's Commercial Counselor, the Court ruled that the State acted as a private person in a legal relation governed by private law.</p>

a	Registration no.	P/5
b	Date	21-09-2005
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) - Appeal
d	Parties	Venezuela (State) vs individual
e	Points of Law	<ul style="list-style-type: none"> • Foreign States are immune from jurisdiction relating to their "public acts" (<i>acta jure imperii</i>) but are not immune from jurisdiction for their "private acts" (<i>acta jure gestionis</i>), including commercial activities and labor issues; • Mass layoff actions are an exception to the aforementioned rule;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 4107/2005-4
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	The Courts referred previous case law and embraced the restrictive doctrine of foreign State immunity regarding labor issues; in this case, the Court considered that the foreign state enjoyed immunity from jurisdiction in respect to a mass layoff action, taking into account that the reason of the mass layoff was an overarching reform of consular affairs as a pillar of the reform of the Ministry of Foreign Affairs of Venezuela (<i>ius imperii</i>);

a	Registration no.	P/6
b	Date	06-05-2008
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) -Appeal
d	Parties	Mozambique (State) vs individual
e	Points of Law	<ul style="list-style-type: none"> Foreign States are immune from jurisdiction relating to their "public acts" (<i>acta jure imperii</i>) but are not immune from jurisdiction for their "private acts" (<i>acta jure gestionis</i>), including commercial activities;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 10414/2007-1
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	Following the layoff of a locally contracted staff member of the Mozambican Embassy in Lisbon, the District Court considered that the party (Mozambique) acted as a private person (<i>ius gestionis</i>). The Court recognized the co-existence of two theories, that of absolute State immunity which is the logical consequence of the principle " <i>par in parem non habet imperium</i> ", by virtue of which one State is not subject to the jurisdiction of another State that of relative State immunity which is tending to predominate, since the State also acts as a private person in legal relations governed by private law.

a	Registration no.	P/7
b	Date	10-05-2007
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) -Appeal
d	Parties	Portugal (Portuguese Consulate in Rio de Janeiro) vs individual
e	Points of Law	<ul style="list-style-type: none"> Foreign States are immune from jurisdiction relating to their "public acts" (<i>acta jure imperii</i>) but are not immune from jurisdiction for their "private acts" (<i>acta jure gestionis</i>), including commercial activities;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 750/2007-6
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	<p>Following the layoff of a locally contracted staff member of the Portuguese Consulate in Rio de Janeiro, the District Court considered that the party (Portugal) acted as a private actor (<i>ius gestionis</i>);</p> <p>The Court recognized the co-existence of two theories, that of absolute State immunity which is the logical consequence of the principle "<i>par in parem non habet imperium</i>", by virtue of which one State is not subject to the jurisdiction of another State, and that of relative State immunity, which is tending to predominate since the State currently also acts as a private person in legal relations governed by private law.</p>

a	Registration no.	P/8
b	Date	08-10-2008
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) -Appeal
d	Parties	Japan (state) vs individual
e	Points of Law	<ul style="list-style-type: none"> • Distinction between foreign State Immunities and Diplomatic or Consular immunities; • Service of process by instituting a judicial proceeding against a foreign State; article 22.º of the Vienna Convention on Diplomatic Relations (inviolability of the Mission) is applicable to the Diplomatic agent and the Diplomatic Mission but not to foreign States);
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º 4830/2008-4
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	The State of Japan claimed that service of process instituting a proceeding against a foreign State should be effected by transmission through diplomatic channels to the Ministry of Foreign Affairs, according to article 22.º of the Vienna Convention on Diplomatic Relations, on grounds that the premises of the mission shall be inviolable; the Court, however, considered that the said provision of the Vienna Convention is not applicable to the foreign State;

a	Registration no.	P/9
b	Date	17-05-2011
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) -Appeal
d	Parties	São Tomé e Príncipe (State) vs a Hospital Egas Moniz (individual)
e	Points of Law	<ul style="list-style-type: none"> • Foreign States are immune from jurisdiction relating to their "public acts" (<i>acta jure imperii</i>) but are not immune from jurisdiction for their "private acts" (<i>acta jure gestionis</i>), including commercial activities; • The Embassy is a representation of the foreign State, its acts, whether <i>ius imperi</i> or <i>ius gestionis</i>, are acts of the foreign State, therefore the judicial proceedings should be against the State not the Embassy; • Article 22.º of the <i>United Nations Convention on Jurisdictional Immunities of States and their Property</i> (service of process instituting a proceeding against a foreign State should be effected by transmission through diplomatic channels to the Ministry of Foreign Affairs);
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º137/06.2TVLSB.L1-7
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	The District Court ruled that São Tomé e Príncipe did not have immunity from jurisdiction, despite the nature of the services at stake (National Health Services healthcare within the framework of a bilateral cooperation Agreement); the Court considered that the foreign State contracted with the Hospital as a private person, in a legal relation governed by private law (distinction between acts <i>iure imperii</i> and acts <i>iure gestionis</i>).

a	Registration no.	P/10
b	Date	16-05-2012
c	Author(ity)	District Court (Tribunal da Relação de Lisboa) -Appeal
d	Parties	Venezuela (State) vs individual
e	Points of Law	<ul style="list-style-type: none"> Foreign States are immune from jurisdiction relating to their "public acts" (<i>acta jure imperii</i>) but are not immune from jurisdiction for their "private acts" (<i>acta jure gestionis</i>), including commercial activities;
f	Classification n.º	
g	Source(s)	www.dgsi.pt
h	Additional Information	Case n.º327/09.6TTFUN.L1-4
i	Full Text – extracts –	Summary and full text (Portuguese): annex 1
j	translation (summaries)	<p>The Court recognized the co-existence of two theories, that of absolute State immunity which is the logical consequence of the principle "<i>par in parem non habet imperium</i>", by virtue of which one State is not subject to the jurisdiction of another State, and that of relative State immunity which is tending to predominate since the State currently also acts as a private person, in legal relations governed by private law.</p> <p>The District Court argued that the aforementioned principle must be interpreted in accordance with the distinction between acts <i>iure imperii</i> and acts <i>iure gestionis</i> and considered that the State of Venezuela acted as a private entity (<i>ius gestionis</i>).</p>