THE EVOLUTION IN SPANISH LAW OF STATE IMMUNITY LEADING TO THE ACCEPTANCE OF THE RESTRICTIVE THEORY

Alberto Soria Jiménez
Faculty of Law in Albacete
University of Castilla-La Mancha

I. ROYAL DECREE 1654/1980 DATED 11 JULY ON THE *SERVICIO DE LO CONTENCIOSO DEL ESTADO EN EL EXTRANJERO* (OFFICE FOR JUSTICIABLE CONTROVERSIES INVOLVING THE SPANISH STATE ABROAD)

Royal Decree 1654/1980[1] regulates the criteria related to how the Spanish government can act as regards claiming immunity for the central government or for its autonomous organisms in proceedings brought before foreign courts. The restrictive interpretation as seen in the statement of purpose of this Royal Decree is based on an historical analysis of the issue[2] and includes a statement to the effect that "absolute immunity from jurisdiction can be considered to be in its final stages. Today the majority, if not all States accept the restrictive theory of immunity from jurisdiction". Both parts of this statement must be explained. First of all, the proclamation of the imminent disappearance of the absolute interpretation of State immunity is overly optimistic given that this version of jurisdictional immunity still enjoys unconditional support in many countries. The second part of the statement needs clarification because it seems equally exaggerated to claim that the restrictive interpretation is currently widely accepted in State practice since this interpretation does not yet enjoy universal approval.

The statement of purpose of the Royal Decree also establishes that "the

1. *BOE*, 16.8.1980.

2. In its Statement of Purpose, the Royal Decree states that in 1925, when the prior regulation was published in the *BOE*, "the private actions of public entities could rarely be projected beyond their own borders" and that, when in the 1940s a new regulation was promulgated, "the doctrine of State immunity before foreign courts still prevailed, not only as regards proceedings but also as regards the enforcement of judgments".

Spanish Yearbook of International Law, Volume II 1992, 45-81.

State and its organs are not invested with *imperium* when they conclude contracts abroad related to goods and services". Although it has been claimed that the use of the word *imperium* implies the acceptance of a distinction between *iure imperii* acts and *iure gestionis* acts[3], it seems clear that the Royal Decree did not define with any degree of precision just how restrictive immunity was to operate. If the Royal Decree had intended to establish the aforementioned criteria or any other criteria, it probably would have been more explicit. When faced with this lack of guidelines, *Abogados del Estado* (State Attorneys) must decide on a case by case basis if immunity from jurisdiction can be claimed or not in accordance with the only two indications found in the first two paragraphs of art. 7: that immunity can only be invoked "when it is deemed appropriate" and that only "when a claim of immunity is questioned" can a report be requested from the AJI (*Asesora Jurídica Internacional,* International Legal Service) of the *Ministerio de Asuntos Exteriores* (Ministry of Foreign Affairs) which is then binding when a decision is made to waive immunity from jurisdiction[4]. Both clarifications show Spain's acceptance of a restrictive interpretation of jurisdictional immunity as regards the defense of its rights before foreign courts.

Like art. 7 on jurisdictional immunity, art. 16 fails to define the limits of the

3. A.G. Chueca Sancho, "Inmunidad jurisdiccional del Estado extranjero: una aproximación a la práctica española", *Revista de la Facultad de Derecho de la Universidad Complutense de Madrid,* n. 65 (1981), 113—146, p. 129.

4. In keeping with art. 7.3 of the Royal Decree, "when a legal action is brought against the Spanish State in a foreign country, immunity from jurisdiction shall not be waived without prior authorization from the *Ministerio de Asuntos Exteriores* preceded by a report from the *Asesoría Jurídica Internacional*".

In the case of Diana Gayle Abbott v. the Republic of South Africa, the judgment issued by the TS on 1 December 1986, which referred the proceeding back to the *Magistratura de Trabajo* where it originated for a judgment on the merits of the case, warned this *Magistratura de Trabajo* that if it ruled to convict South Africa, before enforcing the judgment it would have to comply with art. 7 of Royal Decree 1654/1980 and request a report from the AJI, "so that during enforcement, the bilateral agreements and international practices or usages in force that could be applicable to the case would be observed, and as regards the possible existence of reciprocity, the Magistrate would contact the Government through the *Ministerio de Justicia* by way of the *Consejo General del Poder Judicial*", by virtue of the provisions of art. 278.2 of the *LOPJ*. In judgment 107/1992, the TC found the interpretation made by the TS of art. 278.2 of the *LOPJ* — which makes reference to reciprocity in relation to jurisdictional cooperation between Spanish courts and foreign judicial authorities — and art. 7 of Royal Decree 1654/1980 — which regulates the position of the Spanish State before foreign courts but not the position of a foreign State before Spanish judicial organs — to be atypical and therefore found that neither of the reports sent to the judge should be considered binding.

material scope of immunity from enforcement. It mentions neither the exceptions to this immunity nor the property belonging to the Spanish State that are subject to enforcement. On the other hand, if we compare the wording of both precepts, we seem to find a difference in the emphasis given to the defense of each of these Spanish State immunities before foreign courts. While jurisdictional immunity, in accordance with art. 7.1, can only be invoked by State attorneys when deemed appropriate, art. 16.4 states that these civil servants will seek the utmost respect for immunity from enforcement for the Spanish State in foreign countries provided that the competent Spanish authority does not order the enforcement of the judgment. Nonetheless, it seems acceptable to say that this utmost respect for immunity from enforcement does not mean that the Royal Decree advocates an absolute version of this concept, as the text subsequently alludes to "generally accepted Law in this matter"[5]. When the *Abogacía del Estado* (State Attorney's Office) feels that the enforcement of a foreign judgment might violate the immunity of the Spanish State, art. 16.5[6] stipulates that the AJI prepares a report to be used as part of the demand — made through diplomatic channels — that Spanish State's immunity from enforcement be respected.

In short, the nature of the regulations found in the Royal Decree prevents them from being considered the Spanish equivalent of the Foreign States Immunities Acts that have been enacted in several Anglo-Saxon countries for two main reasons: The first is that the Royal Decree is meant to regulate the actions of an administrative organ (the *Servicio de lo Contencioso del Estado*) abroad without trying to influence Spanish courts. The second reason, which is derived from the first, is that the Royal Decree does not contemplate the material aspects of immunity but rather deals specifically with organic questions. In any case, the general line of orientation of the Royal Decree, both in matters of jurisdictional immunity and immunity from enforcement, implies a decisive change in the actions of Spanish authorities which, in an almost systematic way, have put national interests above all else, alleging immunity for Spain without taking into consideration the nature of the State activity or of the goods in litigation.

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5. L.I. Sánchez Rodríguez, *Las inmunidades de los Estados extranjeros ante los tribunales españoles*, Madrid 1990, pp. 82—83.

6. "If the *Abogacía del Estado* in the *Ministerio de Asuntos Exteriores* finds that a foreign judgment is unequivocally contrary to the rights that international law grants to States in matters of jurisdictional immunity, or if enforcement is attempted in violation of the right to immunity which is generally accepted in these matters, the *Ministerio de Asuntos Exteriores* will be notified immediately so that it can work through diplomatic channels to demand respect for those rights, if the case arises, preceded by a report from the *Asesoría Jurídica Internacional*".

II. PARAGRAPH 2 OF ARTICLE 21 OF THE LEY ORGÁNICA DEL PODER JUDICIAL OF 1 JULY 1985

Article 21, found at the beginning of Title I (which is entitled "On the scope and limits of jurisdiction") of Book I of the *LOPJ,* includes the development of art. 117.3 of the *CE,* which states that Spanish courts and judges exercise the competences attributed to them by law. Art. 21 reflects "the external dimension of jurisdictional scope"[7]:

> "1.- Spanish courts will hear cases which arise in Spanish territory between Spaniards, between foreigners, and between Spaniards and foreigners in accordance with the provisions of this law and those of the international treaties and conventions to which Spain is a party.
> 2.- The cases of jurisdictional immunity and immunity from enforcement established by the rules of Public International Law are excepted".

Art. 21.2 of the *LOPJ* is currently the only article that regulates the immunity of foreign States before Spanish judicial organs. In this way, the Spanish lawmaker is charged with setting the limits of Spanish courts in matters of jurisdictional immunity and the immunity from enforcement of foreign States as established by the rules of Public International Law.[8] The general remission to these rules that this precept brings about means that the entire set of rules established by PIL on the immunity of foreign States is incorporated into the Spanish legal system. Spanish courts are therefore required to interpret and apply these rules, which, on the other hand, sometimes seem quite difficult to define[9]. As there is no universal convention currently in force which systematically regulates all of the aspects of State immunity, it appears that the PIL applicable in this area is essentially based on international custom. This custom is currently quite uneven in matters relating to jurisdictional immunity

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7. V. Gimeno Sendra in J. Almagro Nosete, V. Gimeno Sendra, V. Cortés Domínguez and V. Moreno Catena, *Derecho Procesal,* 2 vols., 3rd ed., Valencia 1988, vol. I, 1st part, p. 113.

8. J.D. González Campos, in P. Abarca Junco, A.L. Calvo Caravaca, J.D. González Campos, E. Pérez Vera and M. Virgós Soriano, *Derecho internacional privado,* 2 vols., 3rd ed., Madrid 1989, vol. I, p. 289.

9. As this "requires the interpreter to make an induction based on diverse data, universal or regional international conventions and the domestic practices of different States, both in the legislative arena and in the judicial and administrative sphere. This task must be done keeping in mind that the evolution of this concept is quite appreciable at the international level." STC 107/1992, 1 July; see the *BJC,* n. 135 (1992), p. 163.

and immunity from enforcement as we will see when we delve further into this question by studying the statements made on this subject by the TC in judgment 107/1992.

III. VACILLATING SPANISH CASE LAW

Spanish case law can be divided into two large periods: pre-1986 and 1986 and beyond. This classification is not the one used by Sánchez Rodríguez, who establishes two stages, one for case law which preceded the enactment of the Spanish Constitution and the other for case law subsequent to the *LOPJ*. The division proposed by this author not only leaves out the period from 1979 to 1984, but it also ignores the fact that although in legal terms the *LOPJ* can be considered a fundamental step, the real turning point for Spanish case law was in 1986 when two judgments issued by the TS established the restrictive theory in Spain.

1. The Pre-1986 Period

The resolutions issued by Spanish courts before 1986 can be considered to have the negative traits that the aforementioned professor attributed to Spanish pre-Constitutional case law on this topic. In other words, they were deficient in their theoretical underpinnings, confusing and contradictory[10]. Thus it was easy to see that there was a great deal of confusion in the Spanish case law of this period and that Spanish courts were quite impermeable to the influence of the European Convention on State Immunity or of any of Spain's neighboring legal systems, some of which had already adopted the restrictive theory.

Within Spanish case law prior to 1981, Chueca Sancho[11] distinguishes between the TS[12] and the *Tribunal Central de Trabajo*[13] (Labour Court of

10. L.I. Sánchez Rodríguez, *op. cit.*, p. 85 et seq.

11. "Inmunidad...", *loc. cit.*, pp. 125, 133—134 and 136—137.

12. See the judgment issued by the *Sala de lo Social* of the TS on 8 November 1979, in the case of M. T. T. v. the Embassy of Kuwait in J. A. Corriente Córdoba, "Inmunidad de jurisdicción. Despido de trabajador contratado por Embajada de Kuwait en España. Ley de Procedimiento Laboral. Convenio de Viena sobre Relaciones Diplomáticas" in "Jurisprudencia española en materia de Derecho internacional público y privado (1977—1981)", ADI, vol. V (1979/1980/1981), 2nd part, pp. 716—717.

13. The culmination of the defense of the absolute view can be found in the judgment issued

Appeal) which were inclined to apply the absolute theory on the one hand, and the rest of Spanish jurisdictional organs on the other. One part of this last group opted to recognize the rule of jurisdictional immunity of foreign States[14], but due to the fact that we do not know the circumstances of the cases judged, it is impossible to know with any certainty whether State immunity was accepted because the courts found that the act in question was entitled to immunity even when they applied the restrictive doctrine, or because they defended the absolute theory of immunity. Finally, the remaining Spanish jurisdictional organs adopted the restrictive theory by not recognizing the immunity of the United States of America on at least four different occasions and by expressly basing their competence to judge the actions carried out by that State on the fact that they were *acta iure gestionis* and not *iure imperii*[15]. In this way, even though this was not a firmly established criterion, the case law of at least a certain sector of Spanish jurisdictional organs at the time showed a marked tendency to differentiate between these two types of acts[16].

2. The period beginning in 1986

Spanish case law on foreign State immunities in the period ranging from 1986 to 1988 is characterized in two ways[17]. In the first place, while both the TS and in general the *Magistraturas de Trabajo*[18] tended to defend the restrictive theory of immunity, the *Tribunal Central de Trabajo* continued to find in favour of the

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by the TCT on 25 November 1976, in the X v. Consulate General of Uruguay in Spain case in which the jurisdictional immunity of the foreign State is elevated to the level of "a basic principle of international law" which is firmly established in the concept of sovereignty. See M.P. Andrés Sáenz de Santa María, "Inmunidad de jurisdicción", in "Jurisprudencia española de Derecho internacional público (1975—1976)", *ADI*, vol. IV (1977—1978), pp. 467—473.

14. These cases can be found in A. Sáinz de Vicuña, *La contratación exterior del Estado*, Madrid 1986, pp. 141—142.

15. See these cases in M. Medina Ortega, "La inmunidad del Estado extranjero", *REDI*, vol. XVI (1964—2), 241—263, pp. 258 and 262 and footnote 103.

16. Just as it is stated in the response to the third question on the questionnaire sent by Spain to the Secretary General of the United Nations regarding the study done by the International Law Commission on the question of the jurisdictional immunities of States and their property (United Nations Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, New York, 1982, p. 598).

17. A.G. Chueca Sancho and J. Díez-Hochleitner, "La admisión de la tesis restrictiva de las inmunidades del Estado extranjero en la reciente práctica española", *REDI*, vol. XL (1988—2), 7—54, p. 52 *et seq.*

18. From the time when the TS issued its judgment on 1 December 1986, several *Magistraturas*

absolute theory right up until the time it ceased to exist. From that time on, Spanish case law on this topic became more and more uniform. In the second place, practically all of the judicial resolutions issued during this period had to do with the dismissal of employees who worked in foreign embassies or consular posts in Spain. Spanish case law had established that employment contracts between an individual and a foreign embassy or consulat post fell into the *iure gestionis* functions of the sending State.

Nevertheless, even though these courts applied the restrictive theory by distinguishing between *iure imperii* and *iure gestionis* acts, the aforementioned decisions did not provide sufficient standards for the correct placement of all of the acts of a foreign State in one of the two categories. Therefore we could only guess at the criteria Spanish courts took into account when deciding whether or not to apply the restrictive theory of State Immunity in different spheres of labor relations. Not only did we not know if Spanish courts would be willing to apply this distinction in non-labour related spheres but we also did not know what method would be used to determine which acts of the foreign State were *iure gestionis* and which were *iure imperii* when the courts were indeed willing to apply this distinction.

In the situation that has been described, which is not excessively precise, STC 107/1992 bas had a significant impact. In addition to having cleared up certain unknowns, it has fully confirmed the acceptance in Spain of the relative theory on foreign State immunities in the terms that will be described later in this article.

A) The decisions handed down by the *Sala de lo Social* (Labour Division) of the *Tribunal Supremo* on 10 February 1986 (E. M. B. v. the Embassy of Equatorial Guinea) and on 1 December 1986 (Diana Gayle Abbott v. the Republic of South Africa)

For some years, Spanish case law has tended to find in favour of the restrictive thesis on foreign State immunity. This became evident when the *Tribunal Supremo* issued two different judgments, one on February 10 and

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de Trabajo have had the chance to exercise their jurisdiction in cases related to the dismissal of employees who had worked in diplomatic missions or consular posts. Even though some of these last judgments invoke the case law established in 1986 by the TS, the more recent ones base jurisdiction on domestic precepts without even considering the problem of jurisdictional immunity of foreign States (J. A. Pastor Ridruejo, *Curso de Derecho internacional público y Organizaciones Internacionales*, 4th ed., Madrid 1992, pp. 565—566).

another on December 1, 1986, by which it annuled the rulings of the lower courts and confirmed Spanish jurisdiction over suits filed against foreign States. These decisions set the foundation for the emergence of a new period of Spanish case law based on the admission of this thesis.

a) Adoption of a restrictive interpretation of immunity from jurisdiction: the difference between the jurisdictional immunity of States and the immunity of their diplomatic agents and consular officers

The TS bases the restrictive theory of jurisdictional immunity on Royal Decree 1654/1980, on art. 25.1 of the *LOPJ*, which states the specific forums of international judicial competence in labour cases, and on art. 24.1 of the *CE* which makes reference to due process of law. However, the TS basically offers two arguments that serve as the foundation for restrictions on State jurisdictional immunity: the progressive tendency in international practice to favor the restrictive version of this type of immunity to the detriment of the absolute thesis — a question that will be addressed again in relation to the statements made by the STC 107/1992 —, and the need to distinguish between State jurisdictional immunity and that of diplomatic agents and consular officers.

The need to differentiate between a State's jurisdictional immunity and that of its diplomatic agents was brought up by the TS in the case of E.M.B. v. the Embassy of Equatorial Guinea dated 10 February 1986. The *Sala Sexta* (Sixth Division) accepted an appeal in cassation against a judgment that had ruled on a wrongful dismissal case brought by a driver who worked for the aforementioned embassy[19]. In a ruling issued by the same division of the TS on December 1, 1986, in the Diana Gayle Abbott v. the Republic of South Africa case related to a wrongful dismissal suit brought by a bilingual secretary who had worked for the aforementioned embassy, the court reaffirmed that articles 31 of the 1961 Vienna Convention on Diplomatic Relations (from here on called the CDR) and 43 of the 1963 Vienna Convention on Consular Relations (hereinafter called the CCR) which the *Magistratura de Trabajo* had used as grounds to declare its lack of jurisdiction, "only accord immunity to foreign diplomatic agents and consular officers on their behalf and not to the State that they represent"[20].

De la Villa[21] believes that Spanish courts applied the CDR and the CCR because the defendants were diplomatic agents and consular officers. In his

19. *AR.Rep.J.*, vol. LIII (1986—1), n. 727.

20. *Ibid.*, vol. V, n. 7231.

21. "Anotaciones sobre la demanda en juicio contra Estados extranjeros", *Revista de Política Social*, n. 141 (1984), 7—27, p. 24.

opinion, the judicial decisions would most likely have been different if the claims had been against a foreign State and the diplomatic mission or consular post had been used simply as a channel to effect service of process. A claim can be filed against a State, an embassy or a consular post as well as against the head of the diplomatic mission or consular post or against the diplomatic agent or consular officer who concludes an employment contract on behalf of the State that he or she represents. However, State immunities only apply when a claim is filed against a foreign State or one of its organs even if, in terms of notification, it is filed against one individual in particular[22]. Therefore it seems that given the absence of specific provisions in the CDR and the CCR, the regulation of contracts concluded by diplomatic missions or consular posts must be governed by the rules on State jurisdictional immunity as these missions and posts are organs of the State[23].

The provisions of the CDR and the CCR therefore only contemplate persons through whom a State concludes a contract. Therefore, if litigation should arise, the defendant would be the contracting State and not the diplomatic agent or consular officer who had concluded the contract on behalf of the State, even though the service of process is effected through this agent or officer[24].

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22. L.I. Sánchez Rodríguez, *op. cit.*, pp. 94—96.

23. J.A. Pastor Ridruejo, *op.cit.*, p. 566.

24. STC 107/1992 points out that Spanish courts should not exclusively apply the CDR and the CCR in order to resolve State immunity cases as these conventions only regulate the immunity of diplomatic agents and consular officers and that of property owned by the diplomatic mission and consular post. The TC distinguishes between State immunities and those that are "of an absolute or quasi-absolute nature such as the ones pertaining to diplomatic agents and consular officers or the inviolability of diplomatic and consular sites and their property... The immunities of a foreign State and other types of immunities in international law (especially diplomatic and consular immunities) should not be confused or identified. Independent of the fact that these immunities may overlap in certain situations, it is true that they are two different institutions and it is not right that the reference that art. 21.1 of the *LOPJ* makes to international rules is solely based on the Vienna Conventions on Diplomatic and Consular Relations as regards cases on the immnnity of foreign States and their organs" [*BJC*, n. 135 (1992), p. 164].

The TC recognizes the possible overlap of immunities, especially State immunity from enforcement and immunity for proporty owned by diplomatic missions and consular posts when the only property of a foreign State that is found in Spanish territory belongs to the embassy or consular post and there is no other State property subject to enforcement. The TC states that neither the CDR nor the CCR "can determine if immunity from enforcement of the State of South Africa was absolute or relative. They can only exclude certain kinds of assets — those owned by the South African Embassy — from forced enforcement." Finally, property owned by the embassies or consular posts — which are indeed organs of the State — is State property, and as it is used to carry

b) The gradual abandonment of an absolute interpretation of immunity from enforcement

The direct consequence of the fact that in Spanish case law the absolute thesis of jurisdictional immunity prevailed until 1986 is that Spanish practice on immunity from enforcement generally tended to accept an absolute version of immunity as well up until that same year. This situation seemed to change radically once the two aforementioned TS judgments were handed down in 1986. In addition to the fact that the TS introduced the question of immunity from enforcement in these rulings, by abandoning the absolute thesis of jurisdictional immunity, the judgments themselves clearly recognized the possibility that rulings against foreign States could be enforced and thereby the absolute version of immunity from enforcement was discarded. Nevertheless, in the 1986 judgments the TS did not make any statement whatsoever as to the scope that should be assigned to this immunity and not even in art. 21.2 of the *LOPJ* is there any reference to any State property being subject to enforcement. On the other hand, the TS does stipulate reciprocity as the exclusive criterion for the acceptance or rejection of immunity from enforcement. This is rather surprising given that this criterion is quite unusual in foreign and international practice[25].

According to the reasoning put forth by the TS, it seems that the judgments that ruled against a foreign State should, by virtue of Spanish law, be enforced if so requested by either of the parties, but the immunity from enforcement that Public International Law (PIL) grants to specific categories of State property must always be respected. Finally, Spanish case law regarding the enforcement of judgments that rule against foreign States seems to have overcome the tendency to combine the acceptance of a restrictive thesis on jurisdictional immunity and an absolute thesis on immunity from enforcement. Nevertheless, the fact that several subsequent decisions handed down by lower courts admitted enforcement against the property owned by embassies and consular posts and even against private property belonging to diplomatic agents and consular officers, thereby infringing the provisions of the CDR and the CCR,

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out diplomatic and consular activities cannot, under any circumstances, be attached. Therefore, a differentiation must be made between the regulation of immunity from enforcement of foreign State property and the system of immunities that the Vienna Conventions grant to property owned by the diplomatic missions or consular posts of these States, whose non-execution is always safeguarded by the CDR and the CCR.

25. The application of reciprocity was perhaps inspired by the statements made by L.E. De La Villa, *loc. cit.*, p. 19.

shows that prior to judgment 107/1992, there was a great deal of confusion on this topic[26].

B) Constitutional Court Judgment 107/1992 dated 1 July (Diana Gayle Abbott v. the Republic of South Africa)

Even though the *recurso de amparo* (appeal for due process of law) resolved by this TC judgment generally has to do with immunity from enforcement[27], it is also of great interest in relation to jurisdictional immunity for two reasons. First, it includes certain references to jurisdictional immunity. Second, considering that the allusion to the possible application of immunity from enforcement assumes that jurisdictional immunity will not be recognized given that immunity from enforcement implies exercising coercive measures against State property if that foreign State is convicted, many of the statements made about immunity from enforcement are equally applicable to jurisdictional immunity. Two aspects are of particular importance: the resolute support the TC grants to the distinction between *iure imperii* acts and *iure gestionis* acts and the necessary harmonization of immunity from enforcement and, for the aforementioned reasons, of jurisdictional immunity with art. 24.1 of the *CE*. Furthermore, it is absolutely essential to make reference to the TC's reflections on immunity from enforcement of foreign State property in Spain.

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26. These judgments can be found in A.G. Chueca Sancho and J. Díez-Hochleitner, *loc. cit.*, pp. 46—50.

27. The issues involved in this case were addressed in relation to the ruling made by the *Sala de lo Social* of the TS on 1 December 1986, in which a resolution was made to return the case to the *Magistratura de Trabajo* where it originated for a decision on the merits of the case. After several judgments and writs by the *Magistratura de Trabajo*, the Republic of South Africa filed an appeal against a writ issued by *Magistratura de Trabajo* number 11 in Madrid on 21 March 1988, and the case was remitted to the *Sala de lo Social* of the TSJ in Madrid. This court ruled in favour of the appeal on 8 February 1990 and revoked the writ handed down on 21 March 1988. Diana Gayle Abbott then filed an appeal for due process of law against this ruling which was decided by STC 107/1992. The *Sala Segunda* of the TC recognized the appellant's right to due process on the issue of her right to have a final judgment enforced and returned the proceedings to the *Juzgado de lo Social* n. 11 in Madrid in order for enforcement of the judgment to be carried out against any other South African State property not protected by immunity from enforcement in the terms indicated in the sixth legal ground of the judgment.

a) Questions related to both jurisdictional immunity and the immunity from enforcement of foreign States

a') The limited scope of the rules of Public International Law in force with respect to State immunities

a") Absolute or restrictive immunity?

The TC is very optimistic in its evaluation of the legal *status* of the restrictive version of State immunity. It points out that "from the time of the traditional absolute rule of jurisdictional immunity (...), international law has evolved throughout this century towards the cristalization of a relative rule of immunity"[28]. As regards the limits of immunity from enforcement, the TC establishes that "currently, public international law does not require absolute immunity from enforcement, but rather allows national courts to order forced enforcement against a foreign State"[29].

In my opinion, the fact that national practices remain divided in their interpretation of the current scope of the rule of State jurisdictional immunity makes it possible to conclude that at the present time, even though the restrictive formula of this immunity seems to be invoked quite broadly nowadays in State practice, it is not a customary rule in force in all of the spheres in which exceptions to jurisdictional immunity can be pleaded[30].

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28. In its judgment of 10 February 1986, the TS pointed out that the maintenance of the rule "according to which a sovereign State cannot be subjected to the courts of another sovereign State (...) is currently being questioned by authors with the help of international developments". Therefore, the TS went too far in its abandonment of the absolute thesis, and even questioned the very existence of the rule of State jurisdictional immunity that continues to be in effect internationally even if there is no consensus about its current scope. On the other hand, the *Sala Sexta* of the TS presented a more precise evaluation in its judgment dated 1 December 1986 as it initially admitted that State jurisdictional immunity is a general rule and subsequently recognized the relative, and not the absolute, character of this rule "which finds in favour of the jurisdiction of the forum State in cases having to do with *acta iure gestionis* in which the State acts as an individual or in accordance with the rules of private law".

29. *BJC*, n. 135 (1992), p. 165.

30. Emanuelli believes that given that State practices apply different versions of restrictive jurisdictional immunity which implies that the meaning of the rule has not yet been clearly determined, each State may define this meaning according to its own notion of the matter ("L'immunité souveraine et la coutume internationale: de l'immunité absolue à l'immunité relative?", *CYIL*, vol. XXII (1984), 26—97, p. 96). Brownlie also does not believe that any rule exists and in his opinion, in spite of the new tendency to favor the restrictive theory of jurisdictional immunity, it has been difficult up to now to find a new principle that meets the criteria of

However, this rule can be considered in force in a more restricted sphere such as in the commercial activities of foreign States, because the denial of jurisdictional immunity for these types of activities is firmly established and there is no proof that the practice is any different in domestic judicial decisions[31]. In any case, due to the progressive decline of the absolute thesis, the rules of PIL as regards jurisdictional immunity no longer require that this immunity be granted to foreign States in an important part of their activities.

As regards immunity from enforcement, there is unanimous acceptance of the absolute immunity of specific categories of State property by virtue of customary PIL. This is also found in several international conventions. This is the case of foreign State property that is earmarked for use in the exercise of diplomatic activities[32], ships owned or operated by a State and used in non-commercial government service[33] or State aircraft[34]. However, on the other hand, there is a great deal of legal uncertainty about the immunity from enforcement of the rest of State property. Given the very great disparity that

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uniformity and coherence that are required for the emergence of a rule of customary international law (*Principles of Public International Law*, 3rd ed., Oxford 1983, p. 333).

31. A. Soria Jiménez, *La excepción por actividades comerciales a las inmunidades estatales*, Madrid 1995, especially p. 83 *et seq.*

32. Article 22.3 of the Vienna Convention on Diplomatic Relations establishes that "the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution".

33. This immunity is found both in conventions whose object is to closely regulate the immunities of State-owned ships such as the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State Owned Vessels which Spain is not a party to, and in specific provisions found in treaties that regulate rather broad areas of the Law of the sea such as the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone and on the High Seas, both ratified by Spain, and the 1982 Montego Bay Convention, signed but not ratified by Spain.

34. In addition to the 1933 Rome Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft to which Spain is a party, the international treaties on air navigation, taking into account that they are drawn up within the International Civil Aviation Organization, regulate the condition of civil aircraft but they make no reference to the immunities of State aircraft. The only mention of these immunities appears in several conventions on environmental protection ratified by Spain such as art. 7.4 of the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters or art. 11.2 of the 1976 Barcelona Protocol on the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft. Likewise, we must not forget the mention that was made of aircraft and ships in art. 236 of the 1982 United Nations Convention on the Law of the Sea relating to the protection and preservation of the sea.

In Spanish practice there is a case of maritime salvage related to immunity from attachment for State aircraft. A Harrier fighter plane belonging to the British Navy made a forced

exists in different national practices, many of which continue to firmly accept the absolute version, States are not bound by any rule regarding this property. As the absence of an absolute rule on immunity from enforcement is not compensated for by the emergence of a restrictive rule on that immunity, there seems to be a legal vacuum as regards the question of immunity from enforcement in current PIL.

In short, even though current international custom currently in force on questions of State immunity is not as well defined as one would like, it does seem clear that State jurisdictional immunity does not have to be recognized in at least one area of activity, and immunity from enforcement is not applicable to all State property. There is also a progressive trend in international practice to reduce not only State property but also, and especially, State activities that are protected by immunity.

b") The distinction between *iure imperii* acts and *iure gestionis* acts

Precision in defining exactly what these acts are creates certain types of problems in Spain as there is really no legal orientation on this subject or case law that has ruled on the scope of these acts. Nonetheless, in spite of the difficulties that are involved in its application[35], the *TC* seems determined to support this dichotomy:

> "The distinction between *iure imperii* acts and *iure gestionis* acts is gradually becoming a general international rule in spite of the complexity of defining it in specific cases and of the fact that it appears in many different versions in State practices and in international codifications"[36].

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landing on 6 June 1983, on board the "Alraigo", a Spanish merchant ship which was sailing in international waters. The Spanish ship subsequently docked in Santa Cruz de Tenerife. The incident brought about a great deal of activity in both Spanish and British diplomatic circles given the fact that at the outset, both the crew and the owner of the Spanish ship refused to return the Harrier to the British Government unless they were guaranteed some sort of compensation. The aircraft was eventually returned to British authorities and the case was submitted to independent arbitration in London. The owner, captain and crew of the Spanish ship were awarded 412,000 pounds. The return of the aircraft complied with the requirements that derive from the rules of PIL. These rules leave no doubt that State aircraft, including those assigned to military service, cannot be attached.

35. The *Consejo de Estado* has pointed out its imprecise nature (Opinion n. 55786, 20 June 1991, pp. 8—9). Also see the critical comments made by M. Medina Ortega against its use, *loc. cit.*, p. 254.

36. *BJC*, n. 135 (1992), p. 164.

In this way, the Spanish TC offers some guidelines that it will most likely follow in future cases even though it does not give an exact definition of both types of acts. However, there is no universal rule that sets the scope of this distinction, its methods of application, or even its international legal status. Certain States still apply absolute immunity, and not all States that accept restrictive immunity support the *iure imperii* and *iure gestionis* criteria. Furthermore, when they do, they do not always apply them in a consistent manner. As a matter of fact, it seems that this dichotomy is only well-established in Western countries that have a Civil Law legal tradition. In short, this distinction cannot currently be considered a general international rule in spite of the statements made by the TC, but rather a tendency of current practice in Civil Law countries.

In spite of the above, some Spanish jurisdictional organs have been applying this dichotomy for some time, and it has been accepted in an important percentage of the few cases on State immunity that have come before Spanish courts. This criterion of distinguishing between immune and non-immune acts was invoked in at least four different judgments issued by lower Spanish courts during the sixties and was later reconfirmed in two TS rulings in 1986. It culminated with the TC pronouncement which can be considered the consecration of the restrictive theory in matters of jurisdictional immunity and immunity from enforcement in Spain. Consequently, the application of the distinction between *iure imperii* and *iure gestionis* acts really means that Spanish courts have definitely abandoned the absolute theory and this is an important step towards the acceptance of the restrictive version in Spain as regards both jurisdictional immunity and immunity from enforcement. Therefore it seems that support must be given to the invocation of the dichotomy in Spanish case law both in relation to the activities of a foreign State and the use or intended use that that foreign State has for its property.

b') The harmonization of State immunities with the right to due process

a") Constitutional grounds

As regards State immunity from enforcement, the TC has stated that "whatever this immunity may be, it is not contrary to the right to due process of law which is guaranteed by art. 24.1 of the CE", as there is no "incompatibility between absolute or relative immunity from enforcement of foreign States before our courts and art. 24.1 of the CE"[37]. In order to support its statements

37. *Ibid.*, pp. 162—163. In this way the TC resolves any doubts that might have been created by

on the compatibility of immunity from enforcement and due process of law, the TC points out that the lawmaker, using reasonable and objective grounds, can decree the non-attachability of certain State property. This is specifically found in art. 132.1 of the CE which states that the law will regulate the legal status of public domain considering *inter alia* the principle of non-attachability. From this reasoning based on Spanish law, the TC goes on to identify international grounds and concludes that the sovereignty and equality of all States makes it possible to legitimately exclude property located in Spanish territory and owned by a foreign State from forced enforcement. Foreign State immunity, given that this concept is based on State sovereignty, is clearly expressed in the principle *par in parem non habet imperium*, which basically states that legal persons of equal standing cannot have their disputes settled in the courts of one of them. In this way, the legal equality and reciprocal independence of nations means that the forum cannot exercise jurisdiction over a foreign State without that State's consent. These statements are valid for both jurisdictional immunity and immunity from enforcement, but they acquire a special value as regards measures of forced enforcement that imply intervention against foreign State property through coercive measures which would definitely be considered use of force.

The TC also argued that the right to enforcement is not violated if the immunity from enforcement was absolute and the Spanish jurisdictional organs could not enforce foreign State property. Additionally, in the TC's opinion, compliance with this right to enforcement, which is "understood *lato sensu* as a right to the effectiveness of a judicial ruling" might be grounded on mechanisms other than forced enforcement such as diplomatic protection, or, as a last resort, on an assumption by the forum State of its duty to meet judicially mandated obligations when the lack of enforcement of these might imply undue sacrifice for the individual contrary to the principle of equality before public burdens[38]. In fact, we should wonder if Spanish government is willing to compensate private litigants each time Spanish courts convict a foreign State and that State does not own any property subject to enforcement in Spain, thereby converting the Spanish government into the guarantor of foreign States. Furthermore, given that the adoption of this possibility would

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the TS in its 1 December 1986 judgment about the alleged unconstitutionality of State immunities. In this ruling, the *Sala de lo Social* had pointed out that art. 24.1 of the CE has "a very broad nature which makes it difficult if not almost impossible for any jurisdictional organ to accept a request for jurisdictional immunity made by a foreign State based on the legal texts now in force". This argument was taken by the TS from L.E. De La Villa, *loc. cit.*, p. 18.

38. *BJC*, n. 135 (1992), p. 163.

make Spain pioneer on this issue[39], it would be necessary to attempt to avoid attracting enforcement proceedings to Spain that are not connected to this country[40]. Therefore it seems wise for the Spanish State to legislate or to make use of another type of procedure contemplated in the Spanish legal system in order to prevent an individual from having to suffer undue sacrifice which is contrary to the principle of equality before public burdens, in cases in which there is an absence of enforcement, if the application of State immunity from enforcement brings about these consequences.

Recourse to diplomatic protection seems rather complicated given that one of the requirements for its exercise is that a foreign State violate an international rule that affects a foreign citizen. As a matter of fact, in the majority of cases on State immunities it is quite difficult to imagine that a foreign State could be charged with the violation of an international rule[41]. This does not mean that some of these cases do not meet the requirements needed

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39. A bill that was proposed in 1988 on enforcement against foreign State property in Italy [see *RDI*, vol. LXXXIV (1989), pp. 500—504] tried to guarantee the payment of compensation by the Italian Government in cases in which the *Ministero di Grazia e Giustizia* did not concede the authorization required to enforce the measures dictated by Italian courts against foreign State property. This authorization is required by Law n° 1263 of 1926 in order to avoid judicial resolutions whicb could give rise to international liability for the Italian Government. The proposed bill maintained the compulsory nature of authorization. Nevertheless, that law was declared unconstitutional in a ruling of the Italian Constitutional Court on July 15, 1992, in the Condor and Filvem v. Ministry of Justice case [see *ILM*, vol. 33 (1994), pp. 596--604, with an introductory note by M. Ragazzi, *ibid.*, pp. 593—594. Also see the comments made by L.G. Radicati di Brozolo, "La coercizione sui beni statali stranieri: l'Italia volta finalmente pagina", *RDI*, vol. LXXXVII (1992), pp. 356—368].

In any case, the bill only attempted to compensate an individual for an amount that could not exceed the total value of the property owned by a foreign State in Italy and subject to enforcement when enforcement was not carried out because the Italian Government did not issue the required authorization [V. Starace, "Immunità degli Stati stranieri dall'esecuzione e diritto all'indennizo verso lo Stato italiano: chiaroscuri del progetto governativo", *RDI*, vol. LXXXIV (1989), pp. 320—323]. This is why the Italian system could not inspire any future Spanish legislation.

40. It would therefore seem reasonable to accept the forced enforcement of the rulings made in Spain and of those issued in proceedings held in third countries but in relation to those over which the courts of the forum could also have exercised jurisdiction in addition to those that subjects residing in the fornm would require to be enforced. See G. Gaja, "L'esecuzione su heni di Stati esteri: l'Italia paga per tutti?", *RDI*, vol. LXXX (1985), p. 345 *et seq.*, in which this author points out the negative consequences that the system proposed in tbe first version of tbe bill to modify the 1926 Italian law would produce for the Italian Treasury (*ibid.*, p. 491 *et seq.*).

41. "It must be proven that the foreign State that has been sued and tried before Spanish courts has violated, in each specific case, a rule of *international law* related to the rights of the

to allow the exercise of diplomatic protection. But there do seem to be very few of these as cases on State immunity usually have to do with commercial activities subject to national regulation and a State's failure to live up to the terms of a contract subject to domestic law and does not, in principle, imply in and of itself, the violation of international rule unless there is a violation of an international obligation that falls outside the terms of the contract itself[42].

Given these conditions, the exercise of diplomatic protection, even though theoretically possible, is actually quite difficult to imagine. Additionally, it would only contribute to solving a very specific type of problem and therefore it does not seem to be a very adequate alternative for guaranteeing the right to due process of law as regards the right to the enforcement of final judgments issued against foreign States. The restriction of State immunities has emerged during this century precisely because diplomatic protection has been found to be an ineffective means of solving the problems of companies in modern international trade in which State participation is steadily growing in importance.

b") The violation of the right to due process in cases in which the scope of State immunities is improperly extended

In spite of the previous considerations, the TC warns Spanish judicial organs that they must be careful not to extend the scope of immunities beyond the requirements of PIL, thereby linking "the compatibility of art. 24.1 of the Constitution with absolute or relative immunity from enforcement to the correct jurisdictional application of the *international* rules governing this institution"[43]. The refusal by Spanish courts to enforce a judgment issued against a foreign State must therefore be reasonably grounded on the rules of PIL to which art. 21.2 of the *LOPJ* remits:

"An incorrect extension by courts of the scope of State immunity from enforcement in our current international legal system constitutes a violation of the executant's right to due process of law because it creates an

individual or individuals who have brought tbe suit. This possibility is quite low except in cases of the infringement of precise rules found in international treaties that directly create rigbts for individuals or when declared human rights are not recognized" [L.I. Sánchez Rodríguez, "Estatuto internacional del Estado" in "Jurisprudencia de Derecho internacional público", *REDI*, vol. XLIV (1992—2), 565—582, p. 577].

42. Ch. Leben, "Les fondements de la conception restrictive de l'immunité d'exécution des Etats", in M.F. Labouz, *L'immunité d'exécution de l'Etat étranger*, Paris, 1990, 7—39, pp. 26—27.

43. L.I. Sánchez Rodríguez, "Estatuto...", *loc. cit.*, p. 577.

> ungrounded restriction on his/her possibilities of obtaining the effectiveness of the ruling and this without there being any rule that stipulates an exception to that effectiveness. (...) Article 24.1 *CE*, even though (...) it does not so stipulate, does contribute to a limited acceptance of immunity from enforcement (...). That is why, in general terms, when the sovereignty of a foreign State is not involved in a specific activity or in the use of certain property, neither international law nor, by remission, domestic law can authorize a judgment not to be enforced, and therefore, a decision not to enforce a judgment constitutes a violation of article 24.1 *CE*"[44].

The TC's reasoning on this issue gives rise to two different considerations. In the first place, as has been pointed out previously, PIL in force does not impose either the absolute version or the restrictive version of immunity from enforcement. Therefore, it should be clearly and emphatically stated that, in response to the position taken by the TC, the current rules of PIL do not disallow the absence of enforcement of a judgment issued against a foreign State as no universal rule considers an asset of a State subject to enforcement. Nowadays, the only thing that seems to be clearly and generally accepted as a rule of PIL is the respect for the absolute immunity from enforcement of certain State property, while no rule prohibits or authorizes enforcement against the rest of that property, given the legal vacuum that exists in matters of immunity from enforcement in current PIL. In the second place, in the "no man's land" regarding the rest of State property, the TC favors a restrictive interpretation of immunity from enforcement and this conflicts with the requirements of the TC, as will be seen later in this article, which states that State property subject to enforcement is unequivocally used or intended for use in commercial activities, and this unequivocal use is not stipulated by PIL. In spite of this incongruency, it still seems legitimate and in my opinion, plausible for the TC, within the range of possible interpretations offered by PIL, to manifest its intention to rule in favour of the greatest effectiveness of the fundamental right to due process of law from the outset.

In short, the TC feels that an extension of immunity from enforcement of foreign State property beyond the limits established by PIL violates the right to due process of law because it restricts the right to the enforcement of a ruling without any legal support. Given that at the present time PIL does not prohibit enforcement against certain foreign State property, and that, in keeping with the TC, a different interpretation of the remission found in art. 21.2 of the *LOPJ* would violate art. 24.1 of the *CE* by restricting the right to enforcement

44. *BJC*, n. 135 (1992), pp. 163 and 165.

without basing that restriction on any specific rule, it remains to be seen what scope or limits a Spanish court must respect in enforcing a judgment against foreign State property situated in Spain.

b) Immunity from enforcement for foreign States as regards their properties in Spain

a') Non-attachability of the bank accounts used for the functioning of diplomatic missions

a") Spanish practice prior to the Constitutional Court decision

The Ministry of Foreign Affairs (MAE) maintains that embassy bank accounts are implicitly included in art. 22.3 of the CDR[45], even though they are not expressly mentioned among the property owned by the diplomatic mission which is explicitly granted absolute immunity from enforcement by that precept: tbe premises, their furnishings and other property thereon and the means of transport of the mission. The MAE offers several legal grounds for

45. The MAE argues that if the funds deposited in the accounts are needed for the functioning of the mission, it must be understood that, in accordance with the *functional* grounds of diplomatic privileges and immunities declared in the Preamble to the CDR, these accounts cannot be attached, as is stipulated in art. 22.3, and therefore a coercive measure against these accounts would constitute a violation of the principle of *ne impediatur legatio*. The MAE points out that a restrictive interpretation of said article would oblige diplomatic missions that wish to protect the non-attachability of their funds to keep all of their funds on the premises of the mission itself, and this is not a very reasonable alternative nowadays given that the majority of payments are made through a bank (*Consejo de Estado* Opinion n. 55786, 20 June 1991, p. 3). Spanish authors are also unanimously in favour of this implicit inclusion. See J.A. Pastor Ridruejo, *op. cit.*, p. 528 or A.G. Chueca Sancho and J. Díez Hochleitner, *loc. cit.*, pp. 47—48.

The MAE also emphasizes the fact that to the extent that bank accounts are property that is needed for the functioning of the diplomatic mission, their immunity from attachment derives from the obligation of the receiving State to accord full facilities for the performance of these functions. This is stipulated in art. 25 of the CDR. This precept includes a *positive* obligation on the receiving State's part which constitutes a complement to the principle of *ne impediatur legatio* which implies a *negative* obligation not to hinder the exercise of diplomatic functions in any way. The MAE also alleges that these accounts *are official documents of the mission*, no matter where they are located, and therefore any freezing or interruption of their use would constitute a violation of the inviolability of the mission's documents granted by art. 24 of the CDR. Finally, the MAE emphasizes that the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property establishes the non-attachability of any bank account which is used or intended for use for the purposes of the diplomatic mission.

the absolute non-attachability of embassy bank accounts when faced with the relatively frequent attachment and enforcement measures that various Spanish courts have taken or tried to take, at least prior to the TC ruling, against diplomatic and consular bank accounts in Spain. The references in this section to embassies and diplomatic activities should be applied to consular posts and consular activities as well[46].

The position defended by the MAE has been reflected not only in the reports issued by the AJI in relation to several cases that have come before Spanish courts on this subject and in Circular n. 6/7 dated 1 February 1990, directed by the MAE to diplomatic missions accredited in Spain, but alos in *Consejo de Estado* (Council of State) Opinion n. 55786, 20 June 1991, in which the highest consultative organ of the Spanish government adopted a similar position as regards this issue[47]. The MAE justifies its position by pointing out that the trend to attach the bank accounts belonging to diplomatic missions and consular posts *"has created very delicate problems for this Ministry that exercises a negative impact on our bilateral relations with sending States.* These States contend, and rightly so in the opinion of this Ministry, that these attachments constitute a violation of international law *and they insinuate that they might apply retorsion measures on Spanish bank accounts and embassies in their respective capitals"*[48] (emphasis is ours).

The AJI has continually expressed its opposition to the exercise of any coercive measure against the bank accounts belonging to a diplomatic mission or a consular post. Given this very clear position of the MAE which was also adopted by the Council of State, and taking into account the statements made

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46. The MAE believes that the bank accounts owned by a consular post enjoy absolute immunity from enforcement. The *Consejo de Estado*, while sharing this opinion, unlike the MAE, feels that art. 33 of the CCR is not applicable to said bank accounts but rather that the immunity of these accounts derives exclusively from the general rules of PIL (*Consejo de Estado* Opinion n. 55786, 20 June 1991, p. 3).

47. The MAE requested an opinion from the *Consejo de Estado* on the applicability of the provisions of arts. 22.3 of the CDR and 33 of the CCR respectively to bank accounts owned by diplomatic missions and consular posts. This opinion was subsequently distributed to embassies and consular posts accredited in Spain so that they could allege in proceedings before Spanish courts.

48. This passage of Document n. 6.332 JPR/SG, 4 December 1990, drawn up by the AJI and entitled "Borrador de escrito a dirigir por el Sr. Ministro al Consejo de Estado sobre inmunidad de ejecución de cuentas corrientes de misiones diplomáticas y oficinas consulares en España" can be seen in J. Quel, *Los privilegios e inmunidades de los agentes diplomáticos en el Derecho internacional y en la práctica española*, Madrid 1993, pp. 166—167. See the AJI Reports mentioned by this author on page 169, footnote 276.

by the TC, which will be included later in this article, it seems quite likely that in the future, Spanish courts will prohibit any coercive measures against these accounts.

b") The reasoning put forward by the *Sala Segunda* (Second Division)

The immunity of the bank accounts belonging to diplomatic missions and consular posts has been unconditionally supported by the TC which has been very transparent in its position on the issue by stating that the CDR and the CCR "serve as grounds for the prohibition of a forced enforcement against the property owned by diplomatic missions and consular posts" and that "contemporary international practice clearly exempts embassy bank accounts from all types of enforcement measures. Art. 23 of the draft articles on State jurisdictional immunities can be cited as an indication, although it cannot be considered a rule yet. This is also the opinion accepted in recent resolutions issued by several national high courts"[49].

Keeping in mind the very clear trend of foreign and international practice in favour of recognizing the absolute immunity from enforcement of embassy bank accounts, the TC concludes that "the attachment of an embassy checking account is prohibited by art. 21.2 *LOPJ*",[50] even though it recognizes that this declaration would make the enforcement of judgments issued against a foreign State extremely difficult, especially if this State does not own any other property that is subject to forced enforcement in the forum. The TC presumes *juris et de jure* that bank accounts and other property held by an embassy, consular post or foreign State enjoys absolute immunity from enforcement when "they are effectively or presumptively earmarked for the exercise of the functions of the diplomatic missions or consular posts"[51].

Therefore, the TC is openly in favour of the automatic recognition of absolute immunity from enforcement, both for the bank accounts that belong to an embassy or a consular post and for those that are held by a foreign State and are earmarked for the functioning of the diplomatic mission or consular post of that State independent of the fact, in both cases, that those accounts can also be used for commercial activities. Thus, the TC categorically rejects the

49. *BJC*, n. 135 (1992), pp. 165—166.

50. L.I. Sánchez Rodríguez had made similar statements prior to the TC judgment. He wrote "that the indiscriminate attachment of the bank accounts owned by the diplomatic missions of foreign States by the courts of the forum" constituted "judicial practice which is expressly prohibited by article 21.2 of the *LOPJ*" (*Las inmunidades...*, *op. cit.*, p. 148).

51. *BJC*, n. 135 (1992), p. 166.

possibility that enforcement can be exercised at the present time in Spain against property owned by an embassy and intended for mixed purposes. Mixed property, especially bank accounts that are held in the name of a diplomatic mission or consular post but are used both to pay for goods and services and for financing the expenses related to the functioning of the mission or post and to offset the cost of commercial activities undertaken by a State, give rise to the most serious problems and to the most frequent type of case in practice related to this topic.

The TC is of the opinion that there are two reasons that justify the absolute non-attachability of a bank account earmarked for the functioning of an embassy. These are the indivisible and integral nature of the balance of a bank account and the impossibility of investigating the uses of the funds deposited in a bank account earmarked for the exercise of the functions of a diplomatic mission. It is quite logical to support the principles of integrity and indivisibility of a bank account given the technical difficulties that exist in carrying out a partial attachment of an account. As money is a fungible article, regardless of its origin or intended use, the sums of money in an account are taken as a whole. They are not budgeted and controlled separately, and in a material sense, they make up one whole; therefore, it is quite difficult to distinguish between official and commercial funds. As regards burden of proof, the TC's reasoning states that in order to obtain recognition of immunity before Spanish courts, it is not even necessary for the competent authorities of the foreign State to attest to the fact that the funds kept in an account are earmarked for the functioning of an embassy such as the one required by the German Constitutional Court in 1977 in the Philippine Embassy Bank Account Case[52].

c") Comments on the partlly dissenting opinion delivered by Magistrate Díaz Eimil

In his partlly dissenting opinion, Díaz Eimil defends the position that in order to avoid the exercise of coercive measures, the burden of proof as to the intended use of property should fall on the foreign State, and that this State should furnish proof beyond a simple statement to the effect that would convince the judicial organ that the bank accounts and other property against which enforcement is sought are indeed integrally earmarked for official non-commercial activities. In the Magistrate's opinion, doing otherwise really im-

52. *ILR*, vol. 65 (1984), pp. 146—192. Consequently, "no document indicating that mission funds were to be used for other purposes would be acceptable as proof to the contrary" (L.I. Sánchez Rodríguez, "Estatuto...", *loc. cit.*, p. 581).

plies the acceptance of absolute immunity by means of a presumption of *juris et de jure* lacking any legal support. Nevertheless, Díaz Eimil's reasoning cannot prevail over the reasoning of the rest of the members of the *Sala Segunda* (Second Division) who supported the position on this issue found in all of the rulings made by European Constitutional and High Courts which reject partial attachment of embassy accounts given that any attempt by a court to verify whether these accounts are indeed used totally or partially for diplomatic purposes, or to identify the portion of the account not used for these purposes, would constitute interference in mission activity contrary to the rules of PIL.

Díaz Eimil suggests that the solution adopted by the TC be inverted given the contradiction that in his opinion exists between the right to due process of law and the scope that the TC grants to immunity from enforcement. As regards the Second Division's defense of the non-attachability of embassy bank accounts, Díaz Eimil believes that if no legal rule in force justifies that these accounts, regardless of their use, be considered an exception to the PIL principle according to which foreign State property not earmarked for official activities is subject to forced enforcement, the limitations imposed in the case judged on the right to enforce final judgments, protected by art. 24.1 of the *CE,* is incompatible with the constitutional principle that stipulates the application of the solution that is most favorable to the effective enjoyment of fundamental rights.

Díaz Eimil's desire to emphasize the exercise of the fundamental right to due process of law is quite admirable, but he does not mention the specific international rule that would allow him to justify attachment in the way that he proposes and the requirements derived from PIL are therefore unknown. This gives rise to technical deficiencies which invalidate the points made in his dissenting vote. Díaz Eimil does not offer grounds that there is a PIL rule in force that proclaims the attachability of foreign State property not earmarked for official activities, nor does he show that bank accounts used for the daily functioning of embassies are not protected by the CDR. He also fails to justify the non-legal nature of the prohibition of attachment of embassy bank accounts.

In response to this, the TC has established that based on an analysis of foreign and international practice, it is exactly this prohibition, in other words, it is exactly the opposite rule, which forms part of PIL as foreign and international codifications, legislation, case law and practice are almost totally in agreement with the position taken by the *Sala Segunda*[53]. Therefore, the statements made by the aforementioned Magistrate cannot be accepted when

53. See my monograph *La excepción..., op. cit.*, p. 169 *et seq.*, and especially pp. 200—202.

he claims that the defense of the non-attachability of embassy bank accounts is a changing, practice which is not universal and uniform and which is accepted in some countries against the prevailing trends in PIL. In short, Díaz Eimil does not take into account that the scope of State immunity from enforcement as regards banks accounts and other property owned by embassies has been extraordinarily broadened by the influence of diplomatic immunities, and thus the scope of State immunity from enforcement in relation to those accounts is much broader than it is in relation to most other types of State property.

Therefore, it must be pointed out that given that according to current PIL, enforcement against property belonging to an embassy or earmarked for the running of an embassy seems to be absolutely prohibited, a State can easily elude a coercive measure against its property in a foreign country by assigning ownership of this property to its embassies. However, there does not seem to be any solution to this problem given the absolute immunity from enforcement enjoyed by embassy property resulting from the requirements of Diplomatic Law which are unanimously accepted in foreign and international practice[54].

Consequently, in a case in which it is impossible to enforce a judgment against foreign State property because it is entirely earmarked for the running of an embassy, the only possible solutions left according to the reasoning of the TC which was referred to earlier, is to resort either to diplomatic protection, which could not be claimed in a case such as this one in which PIL is not infringed, or to the aforementioned assumption by the forum State of its duty to meet judicially mandated obligations in order to prevent an individual from having to suffer undue sacrifices contrary to the principle of equality before public burdens that would result from the absence of enforcement, a possibility that cannot be discarded in cases of this nature.

The very broad limitations that have been outlined here virtually nullify the possibility that future Spanish judicial rulings will authorize the attachment

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54. In a circular sent on March 25, 1987, by the Department of State to the heads of foreign missions in Washington, it was indicated that "the utilization of bank accounts held by diplomatic missions or consular posts and used for commercial transactions not related to the maintenance or exercise of diplomatic or consular functions, is incompatible with the status of diplomatic missions and consular posts" (*Consejo de Estado* Opinion n. 55786, 20 June 1991, pp. 12—13). The American Government thus expressed its opinion that the sending State should not use the funds from an embassy or consular account for commercial activities. The circular warned that if an agency or instrumentality of a foreign State did not own a bank account to meet its engagements, the entitlement to immunity granted by the Vienna Conventions and general international law to embassies and consular accounts could be endangered. This happened in the case of Birch Shipping Corporation v. Embassy of the United Republic of Tanzania which was resolved by the District Court for the District of Columbia in 1980 [see *ILR*, vol. 63 (1982), pp. 525—527].

or enforcement of the bank accounts belonging to dimplomatic missions, consular posts or foreign States earmarked for the running of these missions or posts. It seems then that the only alternative that remains is to consider all foreign State property that is not covered by the absolute immunity granted by the CDR and the CCR to be subject to enforcement.

b') State property subject to enforcement

For the reasons explained above, coercive measures can only be exercised against accounts opened by a foreign State in banks located in Spain or against other State property located in Spain when the owner of this property or of these accounts is not the head of the diplomatic mission or of the consular post of the foreign State in Spain. The solution proposed by the TC as regards the forced enforcement against the property of a foreign State in Spain requires Spanish courts to be particularly diligent in matters of enforcement so that without diminishing the sovereignty of a foreign State in any way, it also does not violate an individual's right to due process of law. The heart of the problem lies in determining which State property is subject to forced enforcement according to the requirements set out by the TC because the High Court does not pay much attention to the resolution of this problem. The TC only points out the possibility of enforcement against property that is unequivocally earmarked by a foreign State for commercial activities:

> "In order to guarantee the right to enforcement of judgments, courts are authorized to order forced enforcement against *property that is unequivocally earmarked by the foreign State for industrial or commercial activities* in which that State engages and that are not part of the exercise of sovereign authority, thereby acting in accordance with the rules of private law. In each case it is the executor judge who must determine, according to our legal system, which properties that are specifically owned by the foreign State in our territory, are unequivocally earmarked for economic activities in which that State, without making use of its sovereign authority, acts in a way equivalent to that of an individual. *This requirement being met, it is not necessary for the property against which enforcement is sought to be earmarked for the same commercial activity upon which the litigation is based,* because if this were not so, enforcement in cases like this would be almost impossible as we are dealing with the dismissal of an embassy employee, and if we accept that this type of litigation falls outside of State jurisdictional immunity, all of the property would be covered by immunity from enforcement since only embassy property would be connected with the activity that brought about the litigation"[55] (emphasis is ours).

55. *BJC*, n. 135 (1992), p. 166.

This passage basically gives rise to two interpretative questions both centered on the way State property is linked to commercial activity. The first is the requirement that there be a connection between the State commercial activity which is the object of the litigation and the State property that is subject to the forced enforcement, and second, the exegesis of the adverb unequivocally, used by the TC in its statement "property (...) unequivocally earmarked for economic activities".

As regards the first question, the TC points out that it is not necessary for the property against which enforcement is sought to be earmarked for the same commercial activity that gave rise to the litigation. This rule seems essential given that "if the TC has specifically declared the non-attachability of embassy bank accounts, all of the conflicts in which these were involved would be affected by immunity from enforcement. In this way, labour disputes, and more specifically those deriving from the dismissal of employees, would be clearly connected to the activity that gave rise to the *litis*, and consequently, the payment of compensation required by our labour law would always be impossible to comply with"[56]. For these reasons, it seems wise to support the TC's position that State property against which enforcement is sought may be used for any type of commercial activity, without requiring that there be a connection between that property and the commercial activity that gave rise to the suit. Therefore state property against which enforcement is sought would not have to be earmarked for the same commercial activity that is the object of the litigation.

The position adopted by the Spanish TC is quite advanced and progressive and is similar to the position accepted in Australian and English codifications. This attitude conflicts to a great extent with the requirement that the property against which enforcement is sought be unequivocally earmarked by the foreign State for commercial activities. The solution offered by the *TC* as regards this question demands that Spanish judicial organs be unequivocally certain, that is, that they have absolutely no doubts, that the property that is to be attached or enforced is earmarked for commercial activities. Consequently, the idea that bank accounts and other foreign State property that is not earmarked is subject to forced enforcement must be discarded when this property is owned by an embassy, consular post or other State organ, as *the TC recognizes immunity from enforcement* of this property given the requirement

56. M.I. Ramos Quintana, "La imposible ejecución de una sentencia de condena por despido ante la inmunidad de un Estado extranjero (Comentario a la Sentencia del Tribunal Constitucional 107/1992, de 1 de julio)", *Revista Española de Derecho del Trabajo*, n. 59 (1993), 447—461, p. 460.

that in order to deny this immunity, this property must be *unequivocally* earmarked for commercial activities.

A critical look at the postulates defended by the TC shows that together with the positive aspects of these postulates that aligns Spain with the more progressive theories on the issue of immunity from enforcement, there also exist questions that merit a new approach if we want to prevent the possibilities of forced enforcement against foreign property in Spain from being excessively diminished. The most positive aspect is undoubtedly the fact that the Spanish TC *does not require the existence of a connection between the State property and the commercial activity that is the object of the suit.* The TC understands that by requiring this link, it would virtually impede any possible enforcement of a judgment issued in relation to any activity carried out by an embassy or a consular post.

Nevertheless, there are aspects of the TC reasoning that merit criticism. We can begin with the fact that its ruling does little to clarify what type of State property is subject to forced enforcement. On the other hand, even though the approach that states that it is only possible to enforce a judgment against foreign State property that is earmarked for commercial activities is found in the most progressive domestic codifications, adding the word unequivocally as a requirement seems excessive and unnecessary. Given that no rule of PIL requires the commercial use of State property to be unequivocal, it would have been wise, in my opinion, for the TC to have required that State property against which enforcement is sought should be merely intended for use in commercial activities without requiring Spanish courts to determine beyond a doubt exactly what the final use of the State property is. The use of the word unequivocally can require Spanish judges and courts to reduce the already limited range of State property subject to forced enforcement in Spain to a minimum.

In short, in keeping with the TC, *forced enforcement should only be exercised against bank accounts and other property owned by an organ of a foreign State other than an embassy or consular post which were found to be unequivocally intended for use in commercial activities.* Thus the most important question in determining if forced enforcement against State property is possible is if it is unequivocally used for commercial activities.

c') Recap: classification of foreign State property in Spain for purposes of immunity from enforcement

It is necessary, then, to establish a classification of foreign State property located in Spain for purposes of immunity from enforcement which is in keeping with the declarations made by the TC. Quel has pointed out that in the

TC's opinion, not only all the property owned by a diplomatic mission and the hank accounts held by a foreign State and used for the everyday running of tbe mission should be unattachable, but also any State account whose funds are earmarked for non-commercial official activities. In Quel's opinion, therefore, there is *juris et de jure* presumption as regards the property that is earmarked for activities in which the foreign State is invested with *imperium*[57].However, Sánchez Rodríguez defends a *juris tantum* presumption which favors the position that bank accounts held in the name of a State organ other than an embassy is property not used for commercial activity unless this use is clearly recorded at the bank by bank officials.

It seems more appropriate to accept the posture proposed by Sánchez Rodríguez than the one proposed by Quel, firstly, because both the solution, adopted in the TC judgment and the very wording of the judgment itself directly reflect the pronouncements made by Sánchez Rodríguez on this issue prior to the judgment[58], and secondly, because if we accept the statements made hy Quel we would be virtually eliminating any possibility whatsoever of an enforcement against foreign State property, including the remote possibility of enforcement against bank accounts that are unequivocally earmarked for use by a foreign State in their commercial activities.

In my opinion, the TC establishes two broad categories within State property. The first includes property belonging to embassies and other State organs that are earmarked for diplomatic activities. A *juris et de jure* presumption as regards immunity from enforcement would be applied to this property. The second covers all other State property and there would be a *juris tantum* presumption as regards immunity from enforcement of this property. In this way, the TC is not distinguishing between bank accounts and other State property, but rather between *State property earmarked for diplomatic activities and all other State property.* As a matter of fact, the TC partially annuls the writ issued by the *Magistratura de Trabajo* n. 11 in Madrid on February 19, 1988, because it orders the case to be shelved, thereby elimimating any possibility of "continuing enforcement against other State property or funds that are located in our territory and do not enjoy immunity from enforcement"[59]. Spanish TC

57. J. Quel, *op. cit.*, p. 178.

58. "It is only possible to make an argument for one exception to immunity from enforcement and that is when the plaintiff can prove *beyond a doubt* that those funds are exclusively earmarked for the foreign State's commercial activities and there is no connection of any kind with the State's official functions" (emphasis ours) (*Las inmunidades..., op. cit.*, p. 147).

59. *BJC*, n. 135 (1992), p. 166.

therefore admits that a bank account used for commercial activities is subject to forced enforcement.

In short, there is property owned by embassies that enjoys absolute immunity from enforcement, and there is also property owned by State organs other than embassies. This second group of property owned by a foreign State can be divided into property earmarked for the running of the diplomatic missions — which also enjoys absolute immunity from enforcement — and property not earmarked for these activities. This last group can, in turn, be subdivided into property not unequivocally earmarked for commercial activities which would also enjoy immunity from enforcement, and property unequivocally earmarked for commercial activities. This would be the only State property subject to forced enforcement.

IV. THE OPTIONS AVAILABLE IN SPAIN

Several of Spain's neighbouring nations have already adopted solutions to the problems relating to State immunity before foreign courts. Some countries have passed specific statutes, and others have ratified the 1972 European Convention on State Immunity either as the only measure or as a complementary measure to the legislation they have passed on this issue. Still other countries have a good deal of domestic case law that has produced solid criteria on this matter. Spain does not really fit into any of these categories. Art. 21.2 of the *LOPJ* has not been fully developed, the European Convention has not been ratified, and only very recently has Spanish case law begun to support positions that are in line with the restrictive tendencies that prevail in Spain's neighbouring countries. This situation, in addition to producing legal uncertainty, can generate international liability for the Spanish State if Spanish courts rule at some point against the provisions of the rules of PIL in issues of State immunities. For this reason, it seems quite essential to take some action to try to illuminate the confusing panorama that currently exists in Spain as regards foreign State immunities. There are three solutions that could be adopted.

1. Maintaining the *status quo*

In spite of the fact that, according to the TC, this solution cannot be attacked in strict constitutional terms, the proposal to regulate foreign State immunities before Spanish courts exclusively by the provisions of art. 21.2 of the *LOPJ* has

been shown to have the disadvantage that, in practice, the application of this precept has not prevented case law that postdates 1985, when the *LOPJ* came into force, from making contrary and technically incorrect rulings. On the other hand, Spanish judges and courts are faced with the difficulty of determining to which rules of PIL art. 21.2 remits . This is an especially serious problem given that the majority of cases that must be resolved by Spanish courts have to do with an area — labour disputes — in which case law is not only contradictory and incoherent, but also very scarce, and therefore, at the present time, it could be claimed that as regards this area, there is no firmly established international custom[60]. Therefore it seems quite clear that maintaining art. 21.2 of the *LOPJ* as the only solution is not adequate[61] given the current absence of a universal convention on this issue and the fact that Spain is not a party to the European Convention on State Immunity. As the aforementioned precept would require Spanish judges and courts to apply the rules of PIL, we cannot be sure that they will be able to find the correct solution for a State immunity problem by studying these rules given the difficulty that exists in determining just what they are.

2. The Ratification of the 1972 European Convention on State Immunity

Even though Spain is not yet a party to this convention nor to its Additional Protocol, the possibility of ratifying both instruments has been studied by the Spanish government for several years. The *Dirección General del Servicio Jurídico del Estado,* in an opinion issued 14 February 1989 at the request of the *Subdirección General de Política Convencional Consular* of the MAE, pointed out that there are no technical reasons why accession to both instruments should be opposed given that the content of these instruments is not incompatible with current PIL or with any of the Spanish legal system's domestic rules[62].

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60. I. Brownlie, "Contemporary Problems Concerning the Jurisdictional Immunity of States" *Definitive Report, AIDI,* vol. 62 (1987--1) 45—97, p. 50. Also see S. Sucharitkul, "Quinto informe sobre las inmunidades jurisdiccionales de los Estados y de sus bienes", *ACDI* (Spanish version of the ILC Yearbook) 1983, vol. II, 1st part, 27—61, pp. 36—41.

61. This opinion is shared by A. Rodríguez Carrión who believes that if art. 21.2 of the *LOPJ* is maintained as the exclusive criterion, "it is doubtful that the oscillating trends in Spanish case law that up to now has lacked any precise rules could be avoided" (*Lecciones de Derecho internacional público,* 2nd ed., Madrid 1990, p. 122).

62. The opinion can be seen in *Selección de Dictámenes de la Dirección General del Servicio Jurídico del Estado 1989,* Madrid 1990, pp. 608—618.

The main disadvantages of this accession are related to quantitative issues — such as the fact that since only a few countries have ratified the convention, it could only be applied in cases related to those countries — and qualitative issues if we consider the relative importance, with a few exceptions, of the countries that are parties to the convention. As a result of these two circumstances, the convention would probably be applied very rarely[63] and in any event, even in the unlikely case that in the next few years many member States of the Council of Europe were to ratify the convention, this would only bring about an operative solution exclusively as regards Spain's neighbouring countries when this problem is a universal, not a regional one. This can be seen by the fact that almost all of the proceedings recently instituted in Spain have had to do with employment disputes between embassies or consular posts and their employees.

For these reasons, we oppose the resolution of this problem exclusively by ratifying the convention because, in practice, it is scarcely operative. Its adoption as a complement to a legislative solution does not seem to be technically incorrect or politically reckless — as can be seen in the United Kingdom — but the territorial limitations of application of the convention would always have to be kept in mind.

3. The Enactment of a Foreign States Immunities Act

Efforts to enact a statute that would develop art. 21.2 of the *LOPJ* have already been made in Spain. Sánchez Rodríguez has drawn up a draft bill which has been studied by the MAE[64]. The *Dirección General del Servicio Jurídico del*

63. As a matter of fact, at least up to 1988, the European Convention on State Immunity had not been applied at all (Ch. H. Schreuer, *State Immunity: Some Recent Developments*, Cambridge 1988, p. 168).

64. In spite of the attempts made to obtain this document from both the author and the AJI of the MAE, this was not possible given its classification as an internal document. The contents of this draft bill can be guessed at by looking at the legislative proposal put forward by Sánchez Rodríguez in his 1990 monograph on foreign State immunities before Spanish courts (*Las inmunidades..., op. cit.*, pp. 157—162). The structure that is outlined in that monograpb is very similar to the one found in the majority of codifications that exist at the present time. The draft bill probably comprises four parts: the first includes preliminary questions such as scope of the articles, use of terms, etc. together with the harmonization that would have to be imposed if Spain were to ratify the European Convention; the second refers to jurisdictional immunity for foreign States and exceptions to this immunity; tbe third contains the special procedural privileges that must be accorded when a foreign State is sued; and finally, the last part establishes immunity from

Estado advised the non-enactment of a Spanish law on foreign State immunities in the same opinion in which it stated that there were no disadvantages to ratifying the European Convention. In this opinion it states that immunities are questions of PIL and therefore they should be governed by international rules and not by domestic rules. This posture does not seem very well founded because domestic codification of international rules cannot be considered technically incorrect no matter how much the opinion insists this is so. As a matter of fact, this has been the method that has been adopted by Anglo-Saxon countries in order to find a way to get off of the dead-end street that their own case law had put them on.

This also seems to be the general feeling of Spanish authors because, of the three options available, that is, the maintenance of art. 21.2 of the *LOPJ* as the only regulation on this subject, the accession to the European Convention, or the enactment of a Spanish statute on State immunities, authors are clearly and overwhelmingly in favour of the enactment of a statute[65]. This posture, which has also been supported in an opinion issued by the Council of State[66] is likewise backed by the TC which feels that legislative action on this issue would benefit legal certainty[67].

It is true that there might also be a disadvantage — albeit a solvable one — to the enactment of a Spanish statute and that is that a very rigorous study would have to be done on the current state of the international rule on State immunity in order to avoid any possible violation of current PIL and this could give rise to international liability for Spain. Nevertheless, if codification were done correctly, an act on foreign State immunities would be the best solution. Thus the enactment of a Spanish statute that defmed the criteria to be applied in matters of State immunities would increase legal certainty in this area as there would be greater predictability as regards judicial decisions issued in relation to these immunities. Acceding to the European Convention on State Immunity would also be advantageous and a possible future statute would not suffer from the limitations of the text of the convention.

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enforcement for foreign States and exceptions to this immunity as well as an enumeration of specific categories of state property that would enjoy special status.

65. See J.A. Pastor Ridruejo, *op. cit.*, p. 566 and A.G. Chueca Sancho and J. Díez-Hochleitner, *loc. cit.*, p. 53.

66. Opinion n. 55786, 20 June 1991, p. 16.

67. *BJC*, n. 135 (1992), p. 163.

V. CONCLUSIONS

Current Spanish rules on State immunities do little to clarify the position Spanish jurisdictional organs should adopt when a foreign State claims immunity. Royal Decree 1654/1980 on *Servicio de lo Contencioso del Estado en el extranjero* only regulates the position of the Spanish State before foreign courts. Spain has not ratified the 1972 European Convention on State Immunity. There is no specific statute on this issue as art. 21.2 of the *LOPJ* is limited to remitting to the provisions of the rules of PIL on foreign State immunities, whose current scope is quite difficult to define. Under these circumstances, it is not surprising that Spanish case law, until very recently, seemed to vacillate a great deal on this issue. There is not a consolidated body of Spanish case law that has defined the scope of immune and non-immune acts. As Spanish courts, on the several occasions on which they have applied the restrictive thesis on immunity, have not really set the limits of this thesis for any situations beyond the one strictly at hand in the case they were dealing with.

Given this panorama, STC 107/1992 has had a decisive impact as it has fully confirmed the acceptance of the relative thesis on foreign State immunities in Spain. The Constitutional Court also repudiated the analogous application of the provisions of Royal Decree 1654/80 by Spanish jurisdictional and administrative organs in cases that were just the opposite of the kinds of cases the Royal Decree was promulgated for. On the other hand, the TC has cleared up any possible doubts about the alleged unconstitutionality of State immunities and it has discarded any possible contradiction that these immunities might have with art. 24.1 of the *CE*. The TC has also directly linked the right to due process of law to the correct jurisdictional application of the international rules to which art. 21.2 of the LOPJ remits. The TC feels that the extension of immunity from enforcement to foreign State property beyond the stipulations of PIL violates the right to due process of law because it restricts the right to enforcement of a ruling without any legal support. On the other hand, the TC points out that when the rules of PIL impose absolute immunity from enforcement, this right is not violated. In these cases, the compliance with this right might be grounded on diplomatic protection, or as a last resort, on an assumption by the forum State of its duty to satisfy judicially mandated obligations when the absence of enforcement of these might imply undue sacrifice for the individual contrary to the principle of equality before public burdens. Therefore it seems wise for the Spanish State to legislate or to make use of another type of procedure contemplated by the Spanish legal system in order to prevent the application of State immunity from enforcement from

generating this type of consequence for individuals.

On the other hand, the Constitutional Court recognizes absolute immunity from enforcement for bank accounts belonging to an embassy or consular post as well as for those that are owned by a foreign State but are earmarked for use in the operation of its diplomatic missions and consular posts regardless of whether all these accounts can also be used for commercial activities. As a result, property owned by an embassy or consular post and earmarked for mixed purposes is also immune from enforcement. In short, the Constitutional Court, just like the Council of State and the AJI, has had to accept the absolute non-attachability of the bank accounts owned by embassies and consular posts that is required by the rules of Public International Law.

In keeping with the TC, *the forced enforcement of judgment should only be exercised against bank accounts and other property owned by an organ of a foreign State other than an embassy or a consular post which were found to be unequivocally earmarked by that State for commercial activities.* The essential question as regards the forced enforcement of a judgment against State property is its unequivocal use for commercial activities. The Spanish Constitutional Court *does not therefore require the existence of a connection between State property and the commercial activity that is the object of the suit.* This would virtually block the enforcement of a judgment having to do with any activity carried out by a diplomatic mission or consular post. In my opinion, it would have been wise for the TC to require that State property against which forced enforcement is sought, merely be earmarked for commercial activities without also requiring that Spanish judges and courts determine beyond a doubt exactly what the final use of this property is, as this reduces the already limited range of State property subject to forced enforcement in Spain to a bare minimum.

In short, there is property owned by embassies and consular posts that enjoys absolute immunity from enforcement and there is also property owned by State organs other than embassies and consular posts. This second group of foreign State property can be divided into property used for the running of diplomatic missions and consular posts — which also enjoys absolute immunity from enforcement — and property not earmarked for these activities. This last group can, in turn, be subdivided into property not unequivocally earmarked for commercial activities, which would also enjoy absolute immunity from enforcement, and property unequivocally earmarked for commercial activities, which would be the only State property subject to forced enforcement.

Finally, the very clear support that the Constitutional Court has granted to the distinction between *iure imperii* acts and *iure gestionis* acts means that Spanish courts have definitely abandoned the absolute conception of State

immunity. This is an important step towards the acceptance of the restrictive version of immunity in Spain as regards both jurisdictional immunity and immunity from enforcement. If we consider all of the limitations that we have pointed out in this article and the fact that Spanish courts need to resort to some way in which to include restrictive immunity in its judgments, it seems that the only option available to them is to apply the aforementioned distinction, given the absence of other criteria that are more well-known than the one mentioned in the Spanish legal system. Nonetheless, distinguishing between both types of acts does not seem to be the best method for restricting State immunity in all cases. As a matter of fact, at the present time, more precise criteria are being applied in other countries. It would be highly recommendable for Spain to "import" some of these through legislative channels as soon as possible. Specifically, we are referring to the formulation of a list of exceptions to immunity, which would allow Spanish courts not to apply the same procedure to every situation. The Constitutional Court itself recognizes the advantages of enacting a statute on foreign State immunity. It is the executive branch, therefore, that should resolve this situation, by presenting a bill on this issue and perhaps, as a complementary measure, ratifying the European Convention on State Immunity.

SUMMARY

Judgment 107/1992 of the Spanish Constitutional Court has not only cleared up any possible doubts about the alleged unconstitutionality of State immunities and it has discarded any possible contradictions that these immunities might have with art. 24.1 of the Spanish Constitution.. Judgment 107/1992 has also directly linked the right to due process of law with the correct jurisdictional application of the international rules to which art. 21.2 of the *LOPJ* remits. The Constitutional Court feels that extending immunity from enforcement to foreign State property beyond the provisions of Public International Law violates the right to due process because it limits the right to enforcement of judgments without any legal support. On the other hand, the Constitutional Court points out that when the rules of Public International Law impose absolute immunity from enforcement, the aforementioned right is not violated. That in these cases, this right might be guaranteed by diplomatic protection or, as a last resort, by an assumption by the forum State of its duty to satisfy judicially mandated obligations when the absence of enforcement of these might imply undue sacrifice for an individual contrary to the principle of equality before public burdens. Therefore it seems wise for the Spanish State to establish some procedure which would prevent the recognition of immunity

would also be highly recommendable for Spain to enact a statute containing a list of exceptions to State immunity as soon as possible. It is the executive branch, therefore, that should resolve this situation by proposing a bill on this issue and perhaps, as a complementary measure, by ratifying the European Convention on State Immunity.