Having considered the first cluster of principles, the Committee could seek the views and suggestions of Member-States on the second and third clusters of principles respectively. After having considered all these clusters of principles, the governments could then pronounce themselves on the further action or actions to be taken with respect to the prepared study.

Subsequent reports could have the following structures :

1. A short introduction;
2. A short summary of the consideration of the item at the plenary of the previous session of the Committee and the decisions or recommendations adopted thereat;
3. Views and comments of States;
4. Draft principles and their elements;
5. Short commentary on each principle and its content;
6. Conclusions and recommendations of the Rapporteur;
7. List of relevant reference materials (if necessary);
8. Annexes (if necessary).

The Rapporteur believes that the size of each report should not exceed 30 pages.

Annex I
MEMORANDUM OF THE GOVERNMENT OF THE MONGOLIAN PEOPLE'S REPUBLIC

Three decades have elapsed since the adoption by the historic Bandung Conference of a set of principles aimed at ensuring peace and developing cooperation among the peoples of Asia and Africa. Those principles had a positive impact on international relations, contributing to a certain extent, the creation of a non-aligned movement as well as of the Organisation of African Unity. They also played a positive role in the Asian and the Pacific region. Since then many peoples on the Asian continent have made progress in their socio-economic development, while most of the peoples of the Pacific region have gained their independence.

However, the over-all situation in the region continues to be of serious concern to the peoples of the region and of the entire World. Since the end of the World War II, war and conflicts have plagued and continue to flare up in various parts of the region, for example the Middle East. Hot-beds of conflict and tension persist and could explode at any time. Recently certain parts of the region have been rapidly becoming arenas of disturbing military build-up, including nuclear build-up with all its potential dangers. The extension of the arms race to the various parts of the region is forcing many countries to squander for military purposes the colossal financial and human resources that are so crucial for the solution of the acute socio-economic problems facing them, problems such as poverty, malnutrition and disease, problems of refugees, problems connected with overcoming the legacies of the colonial past, and arising out of ethnic and religious differences, the solution of which requires both increased attention and enormous economic, financial and intellectual resources. Furthermore, new political, socio-economic, environmental and other problems are arising that need to be addressed individually or jointly.

In these circumstances, and in order to further strengthen, *inter alia*, the legal basis of Inter-State relations of the States of the region aimed at eliminating the sources of conflict and mutual suspicion, and enhancing the security and developing cooperation of States, the Government of the Mongolian People's Republic considers that the principles and norms regulating these relations in the region should be carefully examined, developed and concretized, taking due account of the process of codification and progressive development of general international law as well as the rich practical experience of the past decades of international relations especially in this vast region.

The Government of the Mongolian People's Republic further believes that given the thirty years of fruitful work of the Asian-African Legal Consultative Committee, its well-known competence in the legal field, the Committee could consider the legal aspects of strengthening friendly and good-neighbourly relations of the States of Asia and the Pacific. To this end, the Government of the Mongolian People's Republic proposes that an item entitled "Elements of a legal instrument on friendly and good-neighbourly relations of States of Asia and the Pacific" be inscribed in the agenda of the twenty-sixth session of the committee under Article 3(b) of its Statutes.

Annex II
WORKING PAPER PRESENTED BY THE MONGOLIAN DELEGATION

In connection with the item entitled "Elements of a Legal Instrument on Friendly and Good-Neighbourly Relations between

States of Asia and the Pacific" the Mongolian delegation is proposing that the following principles be considered and progressively developed by the Asian-African Legal Consultative Committee :

1. Non-use or threat of force;
2. Peaceful settlement of disputes;
3. Respect for the sovereignty, territorial integrity and inviolability of frontiers of States;
4. Non-interference in the internal affairs of States;
5. Sovereign equality of States and right of peoples to self-determination;
6. Duty to cooperate, development of regional cooperation;
7. Duty to fulfil in good faith obligations under international law (pacta sunt servanda);
8. Promotion of international security (including confidence building measures);
9. Responsibility of States;
10. Non-discrimination and respect for economic security interests of others;
11. Permanent sovereignty of States over their national resources;
12. Respect for fundamental human rights;
13. Development of economic, cultural and scientific-technical cooperation;
14. Refraining from activities that can have harmful effect on neighbouring and other states.

When considering these principles, the elements that should form part of each one of them would be clearly identified, so as to allow uniform interpretation. and thus strict observance of the principles in the future.

These principles could be considered either separately, in groups or all of them simultaneously. Given the limited possibilities of the committee, it is being proposed that the principles be considered in small but organically linked groups. Thus for example, the principles of non-use of force, peaceful settlement of disputes and promotion of international security could be clustered together and considered in a group.

VII. Jurisdictional Immunities of States and their Property

(i) Introduction

At the Twenty-third Session of the Committee held in Tokyo in May 1983 some delegations expressed concern over the interpretation and application of the U.S. Foreign Sovereign Immunities Act, 1976 by the Courts in the United States and especially the exercise of *'long arm jurisdiction'* by the Courts. Legislation on the same subject had also been enacted in Canada, United Kingdom and Australia. At the Tokyo Session in May 1983 it was decided to refer the matter to the meeting of the Legal Advisers of the AALCC.

Accordingly, the topic was taken up at the meeting of the Legal Advisers of member countries held at the United Nations Headquarters in New York in November 1987. The discussions at the Legal Advisers Meeting centred around the concern expressed by some of the member governments concerning the application and interpretation of the U.S. Foreign Sovereign Immunities Act by the Courts in that country. There were three basic issues on which attention was focussed viz :

(i) The assumption of the long arm jurisdiction against foreign governments in respect of acts performed outside the United States on the basis of even the remotest *nexus* which was endorsed by the US Supreme Court in *Verlinden vs. Central Bank of Nigeria* on 23 May 1983;

(ii) The extended definition of the term "*commercial activity*" in the U.S. legislation for the purpose of exercise of jurisdiction by the local courts against foreign governments which brought within

its ambit transactions undertaken even in the exercise of sovereign functions;

(iii) The provisions in the act for attachment and execution of the property of foreign governments intended for use for 'commercial' purposes as understood within the extended definition.

The other related issue that came up at the Legal Advisers' meeting was the growing trend towards an indiscriminate resort to litigation against foreign States under the 1976 legislation consequent upon the decision in the *Verlinden Case* whereby the governments found themselves with no option but to defend even for the purpose of claiming immunity to prevent a default judgment. The enormous costs that developing countries had to meet as litigation expenses even where the claim to immunity was upheld was pointed out.

At the Meeting of the Legal Advisers, views were expressed that in the light of the divergence of State practice, and the growing trend towards enactment of national legislations in certain countries restricting State immunity, it was desirable that the law on the subject should be authoritatively settled through the work of the International Law Commission in order to achieve a uniform approach towards application of sovereign immunity.

The meeting was of the view that the AALCC would be in a better position to examine and comment upon that legislation as also to advise on possible reciprocal legislation in Member States after the International Law Commission had made some further progress on its work on jurisdictional immunities. It was accordingly agreed that the matter be placed before the Committee at one of its regular sessions with a view to making of appropriate recommendations soon after the Commission had adopted provisionally the draft articles on the subject.

At its Twenty-fourth Session held in Kathmandu in 1985 the Committee whilst taking note of the recommendations of the Legal Advisers, held a general debate on the topic of Sovereign Immunity and the work of the International Law Commision, with the participation of ILC's Special Rapporteur Mr. Sucharitkul Sompong, on the subject. The Committee also discussed the scope and effect of the United States legislation of 1976 and the United Kingdom State Immunity Act, 1978 which had many similar provisions as in the United States legislation. At the conclusion of the debate it was decided that the topic should be taken up as a substantive item for consideration of the Committee at its next session.

The Secretariat, thereafter, accordingly prepared a comprehensive study setting forth the law and practice in respect to immunity of States in various regions of the world. That study was considered at the Twenty-fifth Session of the Committee held in Arusha in 1986.

The matter was generally discussed at the Arusha (1986) and Bangkok (1987) sessions but no indepth consideration was possible due to lack of time. However, at the Twenty-sixth Session held in Bangkok in 1987 a decision was taken to convene a meeting of the Legal Advisers of the Member Governments for an exchange of views on the jurisdictional immunities of States and their property.

In pursuance of that decision, a meeting of the Legal Advisers of member States of the Asian-African Legal Consultative Committee was convened in New York during the Forty-Second regular Session of the General Assembly. The Legal Advisers of member States of the Committee and those of its permanent observers held three sessions at the United Nations Office in New York in November 1987. The study on the Jurisdictional Immunities of States and Their Property, prepared by the Secretariat for the Bangkok Session was the basic document for the Legal Advisers meeting on the said matter. In the course of three sessions the Legal Advisers considered and discussed at some length the following issues viz: Commercial and Trading Activities of States; Transactions by State Agencies having separate Entities; Attachment and Execution in Regard to the Property of Foreign States; Basis for Exercise of Jurisdiction by Local Courts; Appropriate Modalities for Settlement of the Law at National Level; Other Exceptions to State Immunity; and Question of Reciprocity.

The Report of the Meeting of the Legal Advisers of the member States of the Committee was considered at the Twenty-seventh Session of the Committee held in Singapore in 1988. The matter, however, could not be discussed at length and it was decided, *inter alia,* that the Committee should continue to monitor the progress of work in the International Law Commission.

Thereafter at the Twenty-eighth Session of the Committee held at Nairobi in 1989 the view was expressed that the subject Jurisdictional Immunities of States and Their Property having been discussed at previous Session and taking into account that the ILC has commenced the second reading of the draft articles at its Fortieth Session held in 1988 it was timely to consider the subject again. The deliberation might be channelised in some concrete areas so that the Committee might be in a position to adopt its recommendations and to

communicate its view-point to the International Law Commission. It was therefore decided that the Secretariat shall continue to monitor the progress of work in the ILC and shall convene, in collaboration with that latter body, a meeting of the Legal Advisers of member governments. In pursuance of that decision of the Nairobi Session of the Committee, a meeting of Legal Advisers of the member States of the AALCC was convened at the United Nations Offices in New York in October 1989 on the item '*The Jurisdictional Immunities of States and Their Property*'. The meeting was organised in joint collaboration with the International Law Commission. The purpose of the meeting was to have an exchange of views on certain urgent matters of common interest to member governments. Ambassador Motoo Ogiso (Japan), member of the International Law Commission and Special Rapporteur on the topic of Jurisdictional Immunities of States and Their Property on the agenda of the ILC, participated in that meeting.

The discussions on the subject were broadly centred around the working paper prepared by the Secretariat. The Working Paper prepared by the Secretariat focussed on the draft articles, on the subject, as adopted by the ILC on first reading at its Thirty-eighth Session (1986) and the amendments proposed thereto by the Special Rapporteur, Ambassador Motoo Ogiso in his preliminary (1988) and second (1989) reports in the light of the observations and comments made by member States of the United Nations.

A report of the Meeting of Legal Advisers of the member States held in New York in October 1989 was considered at the Twenty-ninth Session of the Committee held in Beijing in March 1990. Owing to lack of time the matter could not be debated in detail. It was decided, however, that owing to the significance attached to the item by a large number of the member States of the AALCC, the Secretariat should continue to monitor and comment upon the progress of work on the subject on the ILC. At the Cairo Session of the Committee held in 1991 the item "*Jurisdictional Immunities of States and Their Property*" was considered in conjunction with the item Progress of Work of the International Law Commission at its Forty-second Session. At that Session the AALCC further took note of the Note of the Secretariat on this subject. It directed the Secretariat to prepare detailed analysis of the draft articles on Jurisdictional Immunities of States and their Property whose second reading might be successfully concluded during the forty-third session of the ILC.

(ii) Secretariat Study : Jurisdictional Immunities of States and Their Property

The International Law Commission took up the topic "*Jurisdictional Immunities of States and Their Property*" pursuant to General Assembly Resolution 32/151 adopted on December 19, 1977 and decided to include the topic in the work programme of its Thirtieth Session in 1978.[1] At its Thirtieth Session in 1978, the Commission set up a working Group[2] to consider the question. In the course of that Session the Commission considered the report of the Working Group[3] and on the basis of the recommendations contained therein decided, *inter alia*, to :

(i) appoint a Special Rapporteur for the topic;

(ii) invite the Special Rapporteur to prepare a preliminary report;

(iii) request the Secretary-General to request Governments to submit relevant materials on the topic, including national legislations, decisions of national tribunals and diplomatic and official correspondence;[4] and

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1. An item entitled "Jurisdictional Immunities of States and Their Property" was included in the provisional list of 14 topics selected for codification by the ILC at its first session in 1949. For details see *Yearbook of ILC* (1979), Vol.II, Part 2, pp. 185 et. seq.
2. The Working Group comprised of Mr. Sompong Sucharitkul (Chairman), Mr. Abdullah El-Erian, Mr Laurel B. Francis, and Mr. William Riphagen.
3. A/CN.4/L.279/Rev.1., reproduced in the *Yearbook of the ILC* (1978), Vol. II, Part 2 at pp. 353-355. For the details of the consideration of the report of the Working Group see the *Yearbook of the ILC* (1978).
4. These materials were published in Materials on *Jurisdictional Immunities of States and Their Property* (UN Publications, Sales No. E/F.81 V. 10).

(iv) request the Secretariat to prepare working papers and materials on the topic.

At that Session the Commission also appointed Mr. Sompong Sucharitkul as Special Rapporteur on the topic "Juridictional Immunities of States and Their Property".

At its Thirty-first Session in 1979, the Commission considered the preliminary report submitted by the then Special Rapporteur, Mr. Sompong Sucharitkul.[5] At its thirty-second to thirty-seventh Sessions (1980-85), it considered six further reports submitted by the Special Rapporteur, Mr. Sompong Sucharitkul.[6]

At its Thirty-eighth Session, the Commission had before it the Eighth Report of the Special Rapporteur[7] which, *inter alia*, set out or proposed changes in the draft articles which were still under consideration in the Commission and which had not as yet been referred to the Drafting Committee.[8] Also included in the Report were proposals for draft articles on two more parts viz. Part VI (Settlement of Disputes) and a final Part VII (Final Provisions) for the consideration by the Commission in finalizing the draft articles. The Commission after due deliberations adopted the text of 28 draft articles on the topic as a whole and in the process renumbered draft articles 12 to 20 adopted at its Thirty-seventh Session in 1985 as Draft Articles 11 to 19. The Commission decided in accordance with Articles 16 and 22 of its Statute that the text of draft articles adopted at that session be transmitted, through the Secretary-General to Governments for comments and observations.

At its thirty-ninth Session the Commission apointed Mr. Motoo Ogiso as Special Rappporteur for the topic in place of Mr. Sompong Sucharitkul who had ceased to be a member of the Commission.

5. See A/CN. 4/323 reproduced in the *Yearbook of the ILC*, 1979, Vol. II, Part One.
6. See A/CN. 4/331 and Add. 1 Second Report: A/CN.4/340 and Corr.1 and A/CN. 4/340 Add. 1 and Corr.1 Thid Report; A./CN. 4/357 and Corr.1 Fourth Report; A/CN. 4/363 Corr. 1 and Add.1 and Corr. 1 Fifth Report; A/CN. 4/376 Add.1 and 2 Sixth Report; and A/CN. 4/388 Seventh Report.
7. A/CN. 4/396 and Corr.1.
8. These included draft article 2 paragraph2; draft article 3 paragraph1 draft article 4 (Jurisdictional Immunities not within the Scope of the Present Articles); Draft Article 5 (Non-Retroactivity of the present Articles); Draft Article 25 (Immunities of Personal Sovereigns and other Heads of State); Draft Article 26 (Service of Process and Judgment in Default of Appearance); Draft Article 27 (Procedural Privileges); and Draft Article 28 (Restrictions and Extension of Immunities and Privileges).

At its Fortieth Session the Commission had before it the preliminary report of the present Special Rapporteur, Mr. Motoo Ogiso,[9] wherein he had recommended some amendments in light of the written comments received from member States and the various opinions and views expressed in the sixth committee.

At its Forty-first Session the Commission had before it the Second Report of the present Special Rapporteur.[10] The Second Report of the Special Rapporteur was additional to the First Report and the two Reports required to be read together. In this Second Report which was divided into three parts, the Special Rapporteur advanced some comments on Part II, Part III and Part IV of the Draft Articles as adopted on first reading. In 1986. The Special Rapporteur had in his second report, *inter alia*, proposed the addition of new draft articles 6 *bis* and 18 *bis* and other amendments to the draft articles. Owing to the lack of time the Commission could not consider all the Draft Articles and referred Draft Articles 1 to Article 11 *bis* to the Drafting Committee.

At its Forty-second Session the International Law Commission considered the Third Report of the Special Rapporteur, Mr. Motoo Ogiso, on the Jurisdictional Immunities of States and Their Property.[11] In this Third Report which was divided into five parts the Special Rapporteur had accommodated most of the specific comments on the Draft Articles taking into account the views expressed both in the Commission and in the Sixth Committee at the Forty-fourth Session of the General Assembly.

General Observations

The topic has been among the most important under consideration of the Commission in recent years. The Doctrine of Sovereign Immunity, that is immunity of States from the Jurisdiction of other States, is well established as a principle of public international law, whereas a body of rules has gradually surfaced in the practice of a certain number of States which had sought to draw a distinction between various types of activities undertaken by States. This categorization whilst admitting of and allowing immunity in respect

9. See the Preliminary Report on Jurisdictional Immunities of States and Their Property (A/CN. 4/418).
10. See Doc. A/CN. 4/422 and Add.1.
11. See A/CN. 4/431.

of public acts of the State (*acta jure imperii*) concerned have tended to restrict such immunity in certain other types of cases described, *inter alia*, as *acta jure gestionis*, commercial activities or "*acts of a private law nature*". This distinction had been manifest in numerous decisions of municipal courts and judicial tribunals; in municipal legislations as well as in the provisions of various treaties or conventions.

From the materials placed before the Commission on the current State practice[12] it would appear that, by and large, most of the developing countries and those in Eastern Europe have not embraced the new distinction and have not sought to place any restrictions on the application of the doctrine of sovereign immunity in its traditional form. On the other hand there is an increasing trend in countries like the United States,[13] United Kingdom,[14] Canada, Australia,[15] Egypt, Singapore, Pakistan and those in Western Europe[16] towards restricting immunity from the jurisdiction of the courts in regard to what they consider as non-sovereign transactions of governments.

It was in this context that the need was felt for codification of this topic by the International Law Commission. The general approach of the former special Repporteur in the formulation of the draft articles reveal a trend towards restictive application of the doctrine of sovereignty basically on the lines of the recent State practice in a certain number of countries.

The Secretariat of the Asian-African Legal Consultative Committee in a paper presented at the meeting of Legal Advisers of the member States of the Committee held in New York in November 1983 had observed :

> "Even though the judicial or legislative pracice of States which are expressly pronounced relate to comparatively a few countries there cannot be any denying the fact that upon principle and authority a restrictive doctrine on sovereign immunity may well be justified in the modern context. This is particularly so having regard to the manifold activities of States in the commercial or trading sector and it would not be reasonable to expect immunity to be allowed in regard to activities which are purely of a commercial nature in the true sense. Indeed the AALCC itself as early as in 1960 had expressed itself in favour of drawing a distinction between different classes of State activities in the context of sovereign immunity. Nevertheless it is felt that even the restrictive doctrine should have some limitations and no State has the right or competence in the garb of applying a restrictive doctrine to encroach upon the jurisdiction of other States."

12 Jurisdictional Immunities of States and Their Property, *op cit.*, supra note 4.
13. See the U.S. Foreign Sovereign Immunties Act, 1976.
14. See the U.K. State Immunity Act, 1978.
15. See the Australian Foreign State Immunities Act, 1985.
16. See the European Convention on State Immunity, 1972 in *ILM*, Vol. 11 (1972), 470.

The Legal Advisers at that meeting had expressed the view that, having regard to divergence of State practice and the growing trend towards enactment of national legislations in certain countries restricting immunity, it was desirable that the law on the subject should be authoritatively settled through the work of the International Law Commission in order to achieve a uniform approach towards application of sovereign immunity. The general consensus that emerged out of the discussions included, *inter alia*, the following observations :

> "The principle of reciprocity might appropriately be the governing factor in the matter of application of jurisdictional immunity and the International Law Commission might be requested to consider incorporating a provision to that effect in the draft articles...."

Notes and Comments on the Draft Articles

The draft articles adopted on second reading by the Commission at its Forty-third Session comprise of five parts viz. Introduction (Part I, draft articles 1-4); General Principles (Part II, draft articles 5-9); Proceedings in which State Immunity Cannot be Invoked (Part III, draft articles 10-18); State Immunity from Measures of Constraint in connection with Proceedings Before a Court (Part IV, draft articles 19-20); and Miscellaneous Provisions (Part V, draft articles 21-23). The Commission did not however adopt the draft articles relating to the Settlement of Disputes and Final Provisions as set out in the Special Rapporteur, Mr. Sucharitkul Sompong's report to the Thirty-eighth Session of the Commission. Nevertheless the Draft Articles, as adopted on Second Reading by the Commission, are virtually comprehensive with the exception of provisions relating to settlement of disputes and the final clauses.

PART I : INTRODUCTION

The Introductory Part of the Draft Articles on the Jurisdictional Immunities of States and Their Property comprises four articles. *Draft Article 1*, as adopted on Second Reading, sets out the material scope of the Draft Articles as being limited to the question of immunity from jurisdiction of the Courts and is in accordance with the decision of the Commission taken at its Thirty-fourth Session in 1982. The current Special Rapporteur, Mr. Motoo Ogiso, proposed no changes in the text of the provisions of the said draft article.

The Special Rapporteur, Mr. Motoo Ogiso, had in his preliminary report proposed that the texts of Draft Article 2 (Use of Terms) and Draft Article 3 (Interpretative Provisions) as adopted on first reading be joined in a single text i.e *Draft Article 2 entitled "Use of Terms."* The text as adopted defines three terms, viz. (i) Court; (ii) State; and (iii) Commercial Transaction. Sub-paragraph (a) of paragraph 1 of the proposed text of Draft Article 2 stipulates that the term "Court" means any organ of a State entitled to exercise judicial functions. It is noteworthy in this regard that "*judicial functions*" vary under different constitutional and legal systems and that they may be exercised (in connection with a legal proceeding) at different stages. Article 2 paragraph 1(a) therefore clarifies that *any organ of a State*, howsoever, designated is empowered to excerise judicial functions in a Court.

Clause 1(b) of the Draft Article 2 enumerates sub-divisions of a State that are entitled to immunity when performing acts in the exercise of sovereign authority. These include : (i) the State itself and its various organs; (ii) the constitutent units of a federal State—the immunity here is restricted to such political sub-divisions as are endowed with international legal personality or capacity to perform sovereign functions; (iii) political sub-divisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State; (iv) agencies and instrumentalities of the State that are entitled to perform acts in the exercise of the sovereign authority of the State; and (v) all natural persons authorised to represent the State in all its manifestations.

Clause 1(c) of the draft text defines the term "*Commercial Transaction*" and retains the meaning accorded to that term in the 1986 text.[17] The definition of the term "*Commercial Contract*" was

17. Article 2(1)(b) of the 1986 text.

introduced as part of a package, covering the exception of "*Commercial Contracts*" in draft article 11 and was adopted together with the interpretative provision of article 3. The use of the term "*Commercial Contracts*" is intrinsically broadened by the enumeration of three categories of contracts viz., those for the sale or purchase of goods or the supply of services; those for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction; and any other contract whether of a commercial, industrial, trading or professional nature but excluding a contract of employment of persons.

Paragraph 3 of the text of draft article 2 clarifies that the use of terms "*Court*", "*State*" and "*Commercial Contract*" is in the context of jurisdictional immunities of States and Their Property whereas these terms may have different connotations in other international instruments or in the internal law of a State in respect of other legal relationships. The provisions of this paragraph would help assure States that they may ratify the future convention on the subject without having to amend their internal laws regarding other matters. Since the two terms have been accorded a specific connotation in the present context they are without prejudice to other meanings already given or to be given to these terms in the internal law of States or in other international instruments.

Paragraph 2 of the proposed text of article 2 seeks to delineate contracts which may be commercial contracts. It lays down the criteria to be taken into consideration in determining the nature of the contract. Succinctly stated para 2 recognises the use of the "*nature test*" as well as the "*purpose test*" for determining the commercial character of a contract or transaction. However it would appear that the "*purpose test*" is to be applied only "*if an international agreement between States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose*". This is a marked improvement over the previous text.

Draft Article 3 entitled "*Privileges and Immunities Not Affected by the Present Articles*" and Draft Article 4 *(Non-retroactivity)* embody a rule which is generally acceptable while the text of the provisions relating to privileges and immunities not affected by the present articles had generally been supported, the Special Rapporteur, Mr. Motoo Ogiso, had, following the Australian suggestion recommended the addition of the words "*under international law*" after the word "*State*" in paragraph 1 of Draft Article 4. The text of draft articles as adopted by the Commission should be acceptable.

PART II : GENERAL PRINCIPLES

Part II which embodies the General Principles of State Immunity comprises of five draft articles viz. Article 5-9.

Draft Article 5 (State Immunity). This Article is designed to state the general rule on sovereign immunity and the obligation of States to give effect to the rule. There is general agreement that immunity is a fundamental principle of international law supported by the practice of States. It is also accepted that a State is immune from the jurisdiction of the courts of another State. The question hitherto was how should the principle of sovereign immunity be stated so as to indicate within the general rule the existence of certain restrictions on that doctrine as may be elaborated in the draft articles. The formulation in the 1986 draft article had read :

> "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles (and the relevant rules of general international law)".

It would be recalled that in the course of consideration of the provisions of draft aarticle 6 the Commission, at its Thirty-eighth Session, had placed the phrase "*the relevant rules of general international law*" within square brackets in view of the differences of opinion among the members of the Commission. The main purpose of placing the phrase in square brackets was to draw the attention of the issue to the Governments with a view to eliciting their comments thereon. Observations were made by several States that limitations/ exceptions to the principle of State Immunity would be prejudiced since the term "*the relevant rules of general international law*" could be interpreted unilaterally. The Special Rapporteur therefore proposed the deletion of the aforementioned bracketed words to prevent their unilateral interpretation. Nine governments favoured the deletion of the above mentioned phrase. This constitutes a constructive improvement since it would serve to restrict further erosion of the principle of State Immunity through unilateral State practice.

Draft Article 6 (Modalities for giving effect to State Immunity) stipulates that a State shall give effect to State Immunity by refraining from exercising jurisdiction in a proceeding before the courts of the Forum State against another State and "*to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under Article 5 is respected*". Paragraph 2 of the Draft

Article then elaborates the circumstances in which the expression proceedings before the courts of a forum State are to be understood.

Draft article 7 covers a wider ground than mere modalities for the fulfilment of the obligations to give effect to State Immunity. It sets out the circumstances when a State is said to be impleaded, whether directly or indirectly, and the different situations in which a proceeding, not instituted against a State as such, is still regarded as being against a State in the sense there that even though the State itself is *not* named as a party to the proceeding the proceeding in effect seeks to affect the property, rights, interests or activities of the State.

In the Commission the view was expressed that the commentary should make it clear that the provision of paragraph 1 was not to be construed as an encouragement of the right of State concerned not to appear before the Court. One Member pointed out that the matter was one of great importance for developing countries and it should *not* be necessary for a State to appear before a foreign court when the State immunity was obvious. The practice of dragging foreign States before the Courts involved heavy expense for the States concerned and raised very serious problems for the developing countries. He therefore urged that the commentary should carefully reflect the real position, namely that States were free to choose whether to appear before the court or not.

Draft Article 7 (Express Consent to Exercise of Jurisdiction) sets out the general rule that a State cannot invoke immunity from jurisdiction when it has expressly consented to the exercise of jurisdiction by the Court. The Special Rapporteur Mr. Ogiso had proposed an amendment to subparagraph (c) as adopted on first reading. The propesed text infused a specific and temporal element and states thus "(c) by a written declaration submitted to the Court after a dispute between the parties has arisen". In the Drafting Committee this proposal of the Special Rapporteur was reformulated to include a declaration before the court or by a written communication in a specific proceeding. In addition a new paragraph has been added which stipulates:

> "Agreement by a State for the application of the Law of another State shall not be interpreted as consent to the exercise or jurisdiction by the courts of that other State".

This strengthens the voluntary nature of submission of the dispute to local jurisdiction. The principle contained in this draft article ought to be acceptable.

Draft Article 8 (Effect of Participation in a Proceeding before a Court) is based on the doctrine of implied consent to the exercise of jurisdiction and sets out the instances where consent would be implied by reason of participation by a State in a proceeding before a Court. The Special Rapporteur, Mr. Motoo Ogiso, had recommended that paragraph 1(b) be qualified to provide for cases where a State in question took a step relating to the merits of a preceeding before it had knowledge of facts on which a claim to immunity might be based. Accordingly, the Rapporteur recommended the addition in paragraph 1(b) of a second sentence based on article 3, paragraph 1 of the European Convention on State Immunity. The proposed formulation reads in part:

> "However, if the State satisfies the Court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on these facts provided it does so at the earliest possible moment."

He had also suggested that a new paragraph 3 be added to draft article and that paragraph 3 of draft articles adopted on first reading be renumbered as paragraph 4. The proposed paragraph had provided that the appearance of a representative of a State before a court of another State as witness does not affect the immunity of that State in that proceeding before a Court of another State. The Drafting Committee has reformulated this provision as follows :

> "The appearance of a representative of a State before a Court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the Court".

In our view the principles embodied in the draft article in question ought to be generally acceptable.

Draft Article 9 (Counter Claims)—This is also based on the doctrine of implied consent and stipulates that if a State files a counter claim in a proceeding before a court it cannot subsequently invoke immunity from jurisdiction. In his preliminary report the Special Rapporteur Mr. Ogiso had proposed the addition of a new paragraph 4 which was a provison to the effect that a State cannot invoke immunity from jurisdiction only to the extent that the claim or counter claim against it does not seek relief exceeding in amount or different in kind from that sought by that State itself. The proposed provision was not generally acceptable and barring a few minor drafting changes the draft article stands as adopted on first reading.

PART III : PROCEEDINGS IN WHICH STATE IMMUNITY CANNOT BE INVOKED

The Special Rapporteur, Mr. Ogiso, was of the view that although the title of this part as adopted on first reading had been controversial in the Commission, as indicated by the brackets, the importance given to it had been disproportionate. In his opinion the members of the Commission may have had apprehensions that the choice of a specific title would give a doctrinal orientation to further discussion of other aspects. A choice could be more easily made either way, in his considered opinon, after all the issues relating to the rest of the draft have been settled.

At the Forty-first Session of the Intrnational Law Commission one member suggested that a descriptive title such as "cases in which State Immunity may not be invoked before a Court of another State" might facilitate the reaching of a consensus. The present title has its roots in that suggestion.[18]

Part III of the draft articles is intended to set out cases of exceptions or limitations to the doctrine of sovereign immunity, that is to say, the tansactions in respect of which a State cannot claim immunity from the jurisdiction of Courts in other States. Whilst it may still be a matter of some controversy as to whether certain exceptions should be built in within the general principles of sovereign immunity as a part of progressive development of international law, there can be little doubt that in the modern context of international relations and having regard to the manifold activities undertaken by a State in present times some exceptions should be justified.

The questions which require to be seriously considered are basically two, namely, (i) the types of cases where exceptions to the general rule of sovereign immunity would be called for; and (ii) the method that should be employed to determine whether a case falls within the excepted categories. However in municipal courts, which are the

18. The title of Part III of the draft articles as adopted on frst reading had read "Limitations on/Exceptions to State Immunity".