forum in which a preliminary issue as to whether the case falls within the excepted category is decided, various complications are likely to arise as is evident from a number of cases in the past few years.

Draft Article 10 (Commercial Transactions). This comprises of three paragraphs, the first of which represents a compromise formulation. It is intended to accommodate the differing doctrinal view-points of those who are prepared to admit exceptions to the general rule on State Immunity in the field of commercial activities based on the theory of implied consent and those who take the position that a plea of State Immunity cannot be invoked to oust the jurisdiction of the local courts where a foreign State engages in a commercial transaction with a foreign natural or juridical persons. The aforementioned paragraph reads :

> "If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial tansaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction."

Paragraph 2 of the same draft article provides that the rule in paragraph 1 would not, however, apply (i) in the case of a commercial transaction between States; and (ii) if the parties to the commercial transaction have expressly agreed otherwise.

The Governments of Denmark, Finland, Iceland, Norway and Sweden and of the German Democratic Republic had favoured the inclusion of a rule pertaining to the jurisdictional link between the commercial transaction and the State of the forum. The United Kingdom on the other hand considered the reference of the applicable rules of private international law as effective and sufficient to determine whether differences relating to a commercial contract fall within the jurisdiction of a Court of another State.

The Special Rapporteur, Mr. Motoo Ogiso, had in his provisional report proposed the inclusion of a draft article stipulating that where a State enterprise enters into a commercial contract on behalf of a State with a foreign or natural person, differences relating to that commercial contract, should be subject to the jurisdiction of a Court the forum State as far as segregated property placed under its possession is concerned.

The text of the proposed Article 11 *bis* read :

> "If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person, and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a preceeding arising out of that commercial contract unless a State enterprise, being a party to the contract on behalf of the State, with a right of possessing and disposing of a segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person".

At the meeting of the Legal Advisers of the Asian-African Legal Consultative Committee held at New York in November 1987, a number of legal advisers were of the view that no immunity should be sought in respect of State agencies having separate legal personality. It was stated that neither the Absolute Theory nor the Restrictive Doctrine accord immunity to such State enterprises and therefore State owned firms as separate juridical persons are not to enjoy immunity from jurisdiction. It was pointed out that the State Trading Agencies of communist countries neither seek nor are they granted any immunity. The view was also expressed that State enterprises as legal persons can sue and be sued in a Court of Law. However, in such circumstances the State should not be dragged to the court of the forum State to defend disputes relating to activities of such State enterprises.

The view was also expressed that in the developing countries State agencies were the vehicles of development and that the transactions of such entities which are in the fulfilent of a governmental function ought to be accorded immunity. A view was also expressed that the Restrictive Doctrine poses a danger to the State Trading Corporation as promoters of development in the developing countries.

The Secretariat of the AALCC had held the view that the concept of "*segregated State Property*" and the formulation in the proposed draft article 11 *bis* would require some clarification in as much as the question of immunity is, perhaps, being confused with the question of against whom to direct court action. The courts of the forum State should have the right to bring a claim against a State enterprise and not against the State itself.

It is well recognised that in the economic system of some States, certain transactions which were characterized as commercial under the present articles are conducted by Governments. For that purpose Governments have established enterprises and entities, and given them legal personality independent from the State, to conduct those transactions. Therefore, in the event of a dispute, the independent legal personality of those entities should be recognized and State immunity from jurisdiction should remain intact. The claimant should bring as such against only the enterprise or entity concerned and collect from its assets and not from the State.

The Drafting Committee considered that it was appropiate place for a provision on the commercial function of those entities, in the article dealing with "*commercial transactions*" consequently paragraph 3 has been added in order to deal with the commercial transactions of such State enterprises or entities. Under paragraph 3, the State enterprises concened are required to have certain qualifications.

In the first place, they must have been established by a State *exclusively* to carry out commercial tansactions, "*exclusively*" being the key word. If an enterprise or entity established by a State had a dual function, i.e. it is engaged in commercial tansactions as well as in acts of the sovereign authority of the State, it is not a State enterprise or entity within the meaning of paragraph 3. In the second place, the enterprise or entity must have an independent legal personality, personality that must include the capacity to (a) sue or be sued; and (b) acquire, own, possess and dispose of property including property which the State had authorized the enterprise or entity to operate or manage.

Thus the requirements of sub-paragraphs (a) and (b) are cumulative and that the presence of both is necessary. In addition to the capacity to sue or be sued, the enterprise or entity must also satisfy certain financial requirements as stipulated in sub paragraph (b). The Drafting Committee was of the view that the entities concerned must not be permitted to conceal their property behind the State and thus avoid claims from creditors. Usually, the State puts at the disposal of the entity some State property to be operated or managed by it. In addition, those entities could themselves acquire property through their commercial transactions. Under sub-paragaph (b), the enterprises or entities must be capable of acquiring, owning or possessing and/or disposing of their property, namely the property that the State enterprises had themselves gained as a result of their operations. The term "*disposing*" is significant since it makes the property of the entities potentially subject to attachment for satisfaction of creditors.

Draft Article 11 (Contracts of Employment) is concerned with contract of employment being an exception to the doctrine of State Immunity.

The Special Rapporteur Mr. Ogiso had, in his preliminary report, recommended that the criterion of "Social Security" be omitted from paragraph 1 of the text of the draft article as adopted on first reading. The deletion of the phrase "*and is covered by the social security provisions which may be in force in that other State*" had been proposed in the light of the comment that the criterion of social security is neither an effective reference nor necessary limitation on the exception to State Immunity. The AALCC Secretariat had considered this suggestion of the Special Rapporteur, to be constituting a distinct improvement.

The Rapporteur had also proposed the deletion of sub-paragraph (a) and (b) of paragraph 2 of the draft article as in his opinion the two sub-paragraphs could "give rise to unduly wide interpretations which could lead to confusion in the implementation of the future Convention. However, as the Secretariat of the AALCC had pointed out these are well established situations of immunity of State which should not be compromised as suggested by the Special Rapporteur.

Draft Article 13 (Personal Injuries and Damage to Property) deals, in effect, with the question of tortuous liability in regard to personal injuries and damages to property as being an exception to the doctrine of State immunity. The former Special Rapporteur, Mr. Sucharitkul Sompong, had supported this provision on the ground that they covered insurable risks and as such the actions would be virtually against insurance companies which would in no way affect the dignity of a State.

It is doubtful whether actions in tort in other areas contemplated in this draft article should be acceptable in principle. There is a puacity of judicial decisions, which make an exception to the doctrine of sovereign immunity in regard to actions in tort for personal injury or damage to property and it is questionable whether such an exception ought to be introduced as a part of progressive development of international law. It has been argued at times that it would be unfair to a person who has suffered personal injury or suffered damage to his property to deny him relief on the ground of sovereign immunity. At the same time, however, it is inappropriate to conceive of such

wide inroads into the doctrine of sovereign immunity by recognising exceptions in regard to actions in tort. It becomes even more unacceptable when diplomatic agents of States enjoy immunity against such torts and to submit a sovereign state to jurisdiction of the forum state. Even if the provisions of this were clearly limited to insurable risks the articles would still present serious difficulties.

The present Special Rapporteur, Mr. Ogiso, had in his provisional report expressed the opinion that when the responsibility for death, injury or damage caused in the territory of the State by an official of a foreign State performing his duties is attributable to that foreign State in accordance with the municipal laws of the forum State, its courts should be permitted to exercise jurisdiction over the foreign State, on the ground that no State should be under an obligation to acquiesce in any wrongful acts under its internal law committed on its territory by a foreign official acting in the exercise of his function. In his view, relief for death, injury or damage caused by a foreign official performing his duties should be brought not only through international proceedings according to the applicable rules of international law, but also through the tribunal of the State in the territory of which the death, injury or damage occurred.

Mr. Ogiso doubted whether the presence of the author of the act or omission in the teritory at the time of the act or omission can legitimately be viewed as a necessary criterion for exclusion of State Immunity, and therefore proposed that it be eliminated from the draft article. He had accordingly recommended the omission of the phrase "and that the author of the act or omission was present in that territory at the time of the act or omission" appearing towards the end of the draft article on first reading.

Such an act or omission may constitute an internationally wrongful act and the solution of any possible dispute between the State to which the act or omission is attributable and the forum State. The extent of liability or compensation, should be governed by other international instruments. The Special Rapporteur recommended the addition of a new paragraph 2 which reads :

> "Paragraph 1 does not affect any rules concerning State Responsibility under International Law."

While the first of the recommendations of the Special Raporteur has found favour his latter suggestion has been rejected. The draft article as adopted on first reading has been reformulated accordingly.

Several members expressed reservation to the draft Article as formulated by the Drafting Committee. At the Forty-third Session of the Commission it was *inter alia* said that :

> "the question of the attribution of an act or omission to a State came within the scope of the international responsibility of States and a court which held a foreign State responsible for an act would be violating the principle of State sovereignty. It was further stated that under customary international law, the State in whose territory the wrongful act had been committed could not exercise its jurisdiction if the act in question was attributable to a foreign State; and that the fact that a State could not invoke immunity from jurisdiction in a proceeding relating to compensation for damage to or loss of tangible property might create friction between States. It was suggested that situations referred to in draft article 11 should preferably be settled through diplomatic channels."

A view was also expressed that draft article 11 was incompatible with the principle of diplomatic immunity.

Draft Article 13 (Ownership, Possession and Use of Property) was designed to provide for an exception in respect of actions concerning ownership, possession and use of property. The exception was generally supported in the Commission on the basis of sovereign authority of the forum State to regulate the legal relations on its territory concerning land, ships and certain types of moveable property. The principal issue which required consideration in relation to this draft article as adopted on first reading was the desirability of making an exception to the rule of sovereign immunity in regard to matters specified in clause (a) of paragraph 1 of this draft article in such broad terms as had been done.

It would appear that the scope of this provision would include within its purview and ambit several types of disputes which may affect the functioning of offices maintained by foreign governments including such disputes as may arise out of landlord-tenant relationship. Whether an exception in regard to such matters should be contemplated is a matter requiring careful consideration. On the whole draft article 13 must be construed in the light of the provisions of draft article 3. It will be recalled that the latter draft article provides that the articles relating to jurisdictional immunities would not affect the privileges and immunities enjoyed by States under conventions on *diplomatic* and *consular* relations etc.

The present Special Rapporteur, however, had expressed doubts as to whether sub-paragraphs (c), (d) and (e) of paragraph 1 reflected universal practice and had called upon the Commission to decide whether it wishes to let the common law practice to prevail in which event the sub-paragraphs would be amended to better reflect the actual practice. The Special Rapporteur had taken note of the Soviet comment that sub-paragaphs (b), (c), (d) and (e) could open the door to foreign jurisdiction even in the absence of any nexus between the property and the forum State.[19] He had proposed that these four sub-paragraphs should be deleted since, in his opinion, it is only in relation to sub-paragraph (a)—which concerns immovable property—that there is a sufficient jurisdictional link.

The Commission having duly reflected on the merits of the two formulations decided to delete sub-paragraphs (d) and (e) of paragraph 1 of the draft article as adopted on first reading. The Draft Article 13, in substance, lists the various types of proceedings relating to the determination of any right or interest of a State in, or its possession or use of, movable or immovable property or any obligation arising out of its interest in or its possession or use of, immovable property.

Paragraph (a) deals with immovable poperty and is qualified by the phrase "*situated in the State of the forum*". This sub-paragraph as a whole does not give rise to any controversy owing to the generally accepted predominance of the applicability of the *lex situs* and the exclusive competence of the *forum rei sites.*

Paragraph (b) concerns any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia.*

Paragraph (c) need not concern to the determination of a right or interest of the State in property, but is included to cover the situation in many countries, especially in the common-law systems, where the court exercises some supervisory jurisdiction or other functions with regard to the administration of trust property or property otherwise held on a fiduciary basis including the estate of a deceased person, a person of unsound mind or a bankrupt or of a company in the event of its winding-up.

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19. Even the United States Foreign Sovereign Immunities Act, 1976 contains no provisions similar to sub-paragraphs (c) to (e).

Draft Article 14 (Intellectual and Industrial Property) purports to exclude the application of State Immunity in the area involving patents, trade marks and intellectual or industrial property.

The area specified in article 14 bears close relation to "*commercial transaction*" under draft article 10 and "*ownership, possession and use of property*" under draft article 13. Draft article 14 could be considered as an extension of the exception of commercial transactions, recognised under article 10, the difference being that the purpose of the protection in the latter is to prevent "*unfair competition*" in trade and to regulate the imposition of restaint on trade or trade restrictions. Since various new categories, have been and, are emerging in the area of intellectual property and it may be difficult to enumerate all types of intellectual property exhaustively the special Rapporteur proposed to explain in the commentary that new categories of intellectual property such as "*plant breeders rights*" are encompassed by the phrase "*any other similar form of intellectual or industrial property*" employed in sub-paragraph (a) of the draft article and adopted on first reading. This provision seems quite satisfactory.

"*Intellectual and industry property*" in their collective nomenclature constitute a highly specialized form of property rights which are intangible or incorporeal, but which are capable of ownership, possession or use as recognised under various legal systems.

The generic terms employed in this article are therefore intended to include the whole range of forms of intellectual or industrial property which may be identified under the groups of intellectual or industrial property rights, including for example, a plant breeder's right and a right in computer-generated works.

The voluntary entrance by a State into the legal system of the State of the forum, by submitting an application for registation of, or registering a copyright, as well as the legal protection offered by the State of the forum, provides a strong legal basis for the assumption and exercise of jurisdiction.

Sub-paragraph (a) of draft article 14 deals specifically with the determination of any rights of the State in a legally protected intellectual or industrial property.

Sub paragraph (b) of draft article 14 deals with an alleged infringement by a State in the territory of the State of the forum of any such right which belongs to a third person and is protected in the State of the forum. The infringement under this article does not necessarily have to result from commercial activities conducted by a

State as stipulated under article 10 of the present draft articles; it could also take the forum of activities for non-commercial purposes.

It should be observed that the application of the exception to State immunity in sub-paragraph (b) of this article is confined to infringements occurring in the State of the forum. Every State, including any developing State, is free to pursue its own policy within its own territory.

Even though the Special Rapporteur had not proposed any amendment of a substantial or drafting nature to the adopted text, the present text reflects some drafting changes which add elegance to the text.

Draft Article 15 (Participation in Companies or Other Collective Bodies) provides that if a State bought or held shares in a company, constituted or registered under the company law of another Sate, or acquired equities in or became a member of an association or partnership formed, organised or chartered under the law of another State, it could be said to have entered into a legal relationship in that State. Such action by a State, it was stated, would indicate its willingness to recognise the validity of the legal relationship it had entered into under the law of the other State. It was therefore bound to respect the local laws of the State of incorporation or registration. The collective body in which the State may thus participate with private partners or members from the private sector may be motivated by profit-making, such as a trading company, business enterprise or any other similar commercial entity or corporate body.

Draft Article 15 had been first introduced to provide for the exception to State Immunity in that regard. It now represents an instance of "*Preceedings in which State Immunity cannot be invoked*". The expressions used in the draft article such as the phrase "Company or other collective body, whether incorporated or unincorporated" have been deliberately selected to cover a wide variety of legal entities as well as other bodies without legal personality. The formulation is designed to include different types or categories of bodies, and groupings known under different nomenclatures denoting bodies such as corporations, associations, partnerships and other similar forms of collectivities which may exist under various legal systems with varying degrees of legal capacity and status.

The rule of non-immunity or the exception to State Immunity as enunciated in paragraph 1 of this article depends in its application upon the concurrence or coexistence of two important conditions. First, the body must have participants other than States or international organisations. In other words, it must be a body with participation from the private sector. Thus, international organisations and other forms of collectivity which are composed exclusively of States and/or international organisations without participation from the private sectors are excluded from the scope of Draft Article 15.

Secondly, the body in question must be either incorporated or constituted under the law of the State of the forum. The second condition is fulfilled if the body is controlled from, or has its seat or place of business in the State of the forum. The place of control may be determined by reference to a factual or a legal criterion.

In the practice of States that matters arising out of the relationship between the State as participant in a collective body and that body or other participants therein fall within the areas covered by this exception to the rule of State Immunity. To sustain the rule of State Immunity in matters of such a relationship would inevitably result in a jurisdictional vacuum. One of the three links based on substantial territorial connection with the State of the forum must be established to warrant the assumption and exercise of jurisdiction by its courts. These links are: the place of incorporation indicating the system of incorporation, charter or other type of constitution or the seat or the principal place of business.

The exception regarding the State's participation in companies or other collective bodies as provided in paragraph 1 is subject to a different or contrary agreement between the States concened, namely the State of the forum, which in this case is also the State of incorporation or of the seat or principal place of business, on the one hand, and the State against which a proceeding is instituted on the other. This particular reservation had orginally been placed in paragraph 1, but was moved to paragraph 2 on second reading, with a view to setting out clearly the general rules of non-immunity in paragraph 1 and consolidating all the reservation clauses in paragraph 2. Paragraph 2 also recognizes the freedom of the parties to the dispute to agree contrary to the rule of non-immunity as enunciated in paragraph 1.

Draft Article 16 (Ships Owned or Operated by a State) is concerned with a very important area of Maritime Law as it relates to the conduct of external trade. It was initially entitled "*State-owned or State-operated ships engaged in commercial service*". The expression "*ship*" in this context should be interpreted as covering all types of

sea-going vessels, whatever their nomenclature and even if they are engaged only partially in sea-going traffic. It is formulated as a residual rule, since States can always conclude agreements or arrangements allowing, on a reciprocal basis or otherwise, for the application of jurisdictional immunities in respect of ships in commercial service owned or operated by States or their agencies.

Paragraphs 1 to 3 are exclusively concerned with ships engaged in commercial service, paragraph 2 mainly with warships and naval auxiliaries, paragraphs 4 and 5 are concerned with the status of cargo. A noteworthy feature of this draft article is the rule relating to non-immunity of States in a proceeding which relates to the operation of that ship which, *inter alia,* refers to pollution of the marine environment. This provision would further the cause of protection and preservation of marine expenses. Paragraph 4 enunciates the rule of non-immunity in proceedings relating to the carriage of cargo on board a ship owned or operated by State and engaged in commercial non-governmental service. Paragraph 5 maintains State Immunity in respest of any cargo carried on board the ships referred to in paragraph 2 as well as any cargo belonging to a State and used or intended for use in government non-commercial service.

It may be recalled that in the text of paragraphs 1 and 4 of the Draft Article 16 as adopted on first reading the term "*non-governmental*" had been placed in square brackets. The present Special Rapporteur was of the view that the inclusion of the word "*non-governmental*" makes the meaning of paragraph 1 ambiguous and could be, in time to come, an unnecessary source of controversy. He had therefore recommended the omission of the term "*non-governmental*" from paragraphs 1 and 4 of the draft article. The term "*governmental and non-commercial*" is used in the 1926 Brussels Convention, and the term "*government non-commecial*" in conventions of a universal character such as the Convention on the High Seas (Geneva, 1958) and the 1982 United Nations Convention on the Law of the Sea in which ships are classified according to their use, i.e. government and non-commercial service as opposed to a commercial service.

The present draft article employs the same terminology.

On the substantive scope of Draft Article 16 on '*Ships Owned or Operated by a State*', it may be recalled that one government had proposed that the Committee consider the question of State-owned or State operated aircraft engaged in commercial service. During the debate on the issue divergent views were expressed as to the need for an inclusive jurisdiction on this subject in the proposed text.

During the discussions in the Drafting Committee also divergent views were expressed. One member of the Commission convinced that aircrafts and/or objects launched into outer space—particularly aircrafts—were already subject to a comprehensive and self-contained regime sought the opinion of the International Civil Aviation Organization (ICAO) in the matter. The office of the ICAO was of the opinion that the proposed draft articles on the Jurisdictional Immunities of States and Their Property "*should NOT include matters relating to civil aviation*" since "*it could mean complications to existing ICAO text on definition of State Aircraft*". ICAO Secretariat pointed out that nothing would seem to be gained by the inclusion of reference to civil aircraft in the poposed draft articles.

It may be recalled that in the Convention on International Civil Aviation, Chicago, 1944, is applicable to civil aircraft only and does not apply to State aircraft.[20] While the Convention defines neither '*civil aircraft*' nor '*State aircraft*', Article 3 paragraph (b) of the Convention, however, provides that "*aircraft used in military, customs and police services shall be deemed to be State aircraft*". From the foregoing provisions, which are deemed to be exhaustive, all aircraft owned and operated by the governments *other* than military, customs and police services are "*civil aircraft*" for the purposes of the Chicago Convention.

Article 3 paragraph (e) further stipulates that overflight or landing of State aircraft is subject to prior authorization. The commentary on this article further provides :

> "State aircraft, which include military, customs and police aircraft, are excluded from the right of overflight, without special authorization or agreement; consequently, the Chicago Convention only applies to civil aircraft.
>
> Nevertheless, intrusions in the air medium of one State, by the military aircraft of another State, can be caused by conditions independent of the pilot's will (bad weather or technical defects) and these circumstances must be taken into

20. See Article 3 of the Convention *inter alia* stipulates that:
"(a) This convention should be applicable to Civil aircraft and shall not be applicable to Sta aircraft".
(b) Aircraft used in military, customs and police services shall be deemed to be State aircraft

account when considering possible reprisals. Moreover, the last paragraph of article 3 of the Convention commits Contracting States to take into consideration the safety of navigation of civil aircraft, when they establish rules for their State aircraft.

It is interesting to underline the idea of the abuse that a State could make of civil aviation by using it for purposes which are incompatible with the Convention's aims (Article 4). Although no special sanction is provided for, except that generally stipulated by the Convention for States that have committed infractions as the reciprocal undertaking made to this effect represents a step forward along the path towards control of aerial activity (46) . . . ."

The text of the provisions of Article 3 must be read together with the provisions of Article 79 of the Chicago Convention which stipulates :

"*Participation in operating organizations*—A state may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be State-owned or partly State-owned or privately owned."

This and similar provisions of the rules of civil aviation are applicable to all aircraft. It may be inferred therefrom that aircraft would not enjoy State immunity on the ground of ownership or operation by a State. The only category of aircraft which are excluded from the application of the civil aviation rules under those treaties are aircraft used in the military, customs or police services. That category of aircraft would then presumably enjoy jurisdictional immunity of the State. Neither international instrument nor bilateral treaties however deal expressly with the questions of jurisdictional immunity of State aircraft, and the case law in this field is very scanty.

The Drafting Committee considered the matter and despite divergent views decided that the aircraft or objects launched into outer space should be excluded from the ambit and scope of the proposed Convention. The draft articles, as adopted on second reading, therefore do not deal with or provide for the issue of aircraft and/or objects launched into outer space.

In view of the foregoing the Secretariat of the AALCC therefore strongly recommends that the draft articles as adopted which exclude

from its ambit and scope any reference to aircrafts, including State-owned or state operated aircraft in view of the definition to the term "*aircraft*" in the Chicago Convention.

Draft Article 17 (Effect of an Arbitration Agreement) was designed to provide for instances where there was an agreement to submit (a dispute) to arbitration and where, if there was also a link between the procedure for arbitration and the territory of a State, an implied consent to the exercise of the jurisdiction was to be presumed. The draft article deals with the rule of non-immunity relating to the supervisory jurisdiction of a Court of another State which is otherwise competent to determine questions connected with the arbitration agreement. The objective of draft article 17 is to deny immunity in the case of an agreement to submit to arbitration, but the article nonetheless gave rise to a difficult problem. The parties to a dispute sometimes prefer arbitration to judicial proceedings because it saves time and costs, apart from enabling the parties to choose freely the panel of arbitrators, the arbitration procedure and the law to be applied.

Among the issues on which the opinion of the members of the Commission was divided was the use of terms in the text. While some members favoured the inclusion of the term "*Commercial contract*" others had argued for employment of the term "*Civil or Commercial Matters*". The current Special Rapporteur had indicated that he preferred the latter expression i.e. "*civil and commercial matters*" in view of the increased importance of arbitration as a means of settlement of disputes arising from civil or commercial matters between a State and a natural or juridical person. These expressions have been replaced by the term "*commercial transaction*" in line with the provision of Draft Article 2 paragraph 1(c).

It should be pointed out in this connection that it is the growing practice of States to create conditions more attractive and favourable for parties to choose to have their differences arbitrated in their territory. The exercise of supervisory jurisdiction may have been excluded, at least in some jurisdiction, by the option of the parties to adpot an autonomous type of arbitration, such as the arbitration of the International Centre for Setttlement of Investment Disputes (ICSID) or to regard arbitral awards as final, thereby precluding judicial intervention at any stage. The proviso "*Unless the arbitration agreement otherwise provides*" is designed to cover the option freely expressed by the parties concerned which may serve to take the arbitration procedure out of domestic judicial control. Submission to

commercial arbitration under this article constitutes an expression of consent to all the consequences of acceptance of the obligation to settle differences by the type of arbitration clearly specified in the arbitration agreement.

It is important to note that the draft article refers to "*arbitration agreement*" between a State and a foreign natural or juridical person, and not States themselves or between States and international organizations. Also excluded from this article are the types of arbitration provided by treaties between States or those that bind States to settle differences between themselves and nationals of other States, such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington, 1965) which is self-contained and autonomous, and contains provisions for execution of the awards.

PART IV

STATE IMMUNITY FROM MEASURES OF CONSTRAINT IN CONNECTION WITH PROCEEDINGS BEFORE A COURT

The first three parts—"*Introduction*", "*General Principles*" and "*Proceedings in which State Immunity cannot be invoked*"—having been completed, the draft also contains a fourth part concerning State Immunity from measures of constraint in connection with proceedings. Immunity in respect of property owned, possessed or used by States in this context is all the more meaningful for states in view of the recent growing practice for private litigants, including multinational corporations, to seek relief through attachment of property owned, possessed or used by developing countries, such as embassy bank accounts or funds of the central bank or other monetary authority, in proceedings before the courts of industrially advanced countries.

Part IV of the draft is concerned with State Immunity from Measures of Constraint upon the use of property, such as attachment, arrest and execution, in connection with a proceeding before a court of another State. The expression "*Measures of Constraint*" has been chosen as a generic term, not technical one in use in any particular internal law. Since measures of contraint vary considerably in the practice of States, it would be difficult, if not impossible, to find a term which covers each and every possible method or measure of constraint in all legal systems.

Part IV is of special significance in that it relates to a second phase of the proceedings in cases of measures of execution, as well as covering interlocutory measures or pre-trial or pre-judgment measures of attachment, or seizure of property *ad fundandam jurisdictionem.*

The two Articles in Part IV deal with the question of Immunity of State property or property in the possession or control of a State from attachment, arrest and execution in connection with a proceeding before a Court of another State. This is a topic which is in some respects independent of the question of State Immunity from the jurisdiction of the Courts even though both are inter-related.

Draft Article 18 (State Immunity from Measures of Constraint), inter alia, reflects the accepted general rule in International law that State property enjoys immunity and is protected from attachment and execution both as an interim or pre-judgment measure and also in the execution of a final judgment of a Court in satisfaction of a decree or order. The measures of constraint mentioned in this article are not confined to execution but cover also attachment and arrest, as well as other forms of "*saisie*", "*saisie-arret*" and "*saisie-execution*", including enforcement of arbitral award, sequestration and interim, interlocutory and all other prejudgment conservatory measures, intended sometimes merely to freeze assets in the hands of the defendant.

The property protected by immunity under this Article is State property, including, in particular, property defined in draft Article 19. The principle of immunity here is subject to three conditions, the satisfaction of any of which would result in non-immunity : (a) if consent to the taking of measures of constraint is given by international agreement, in an arbitration agreement or in a written contract, or by a declaration before the Court or by a written communication after a dispute between the parties has arisen; or (b) if the property has been allocated or earmarked by the State for the satisfaction of the claim; or (c) if the property is specifically in use or intended for use by the State for other than government non-commercial purposes. Subparagraph (c) further provides that, for there to be no immunity, the property must have a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed. Thus express consent can be given generally with regard to measures of constraint or property, or be given for particular measures or particular property, or, indeed, be given for both meaures and property. Once consent has been given under paragraph 1(a),

any withdrawal of that consent may only be made under the terms of the international agreement (subparagraph (i)) or of the arbitration agreement or the contract (subparagraph (ii)). However, once a declaration of consent or a written communication to that effect (subparagraph (iii)) has been made before a court, it cannot be withdrawn. In general, once a proceeding before a court has begun, consent cannot be withdrawn.

Under paragraph 1(b), the property can be subject to measures of constraint if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. Paragraph 2 makes more explicit the requirement of separate consent for the taking of measures of constraint under Part IV. Consent under draft Article 7 of Part II does not cover any measures of constraint but is confined exclusively to immunity from the jurisdiction of a court of a State in a proceeding against another State.

Theoretically, immunity from measures of constraint is separate from jurisidictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Draft Article 18 clearly defines the rule of State Immunity in its second phase, concerning property, particulary measures of execution as a separate procedure from the original proceeding.

The new provision is in fact an amalgamation of the provisions of Draft Articles 21 and 22 as adopted on first reading.

Draft Article 19 (Specific Categories of Property) lists the types of property which may not be attached, arrested or taken in execution notwithstanding any consent or waiver of immunity. The categories of such property are :

(a) property, including any bank account, which is used for or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; and

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

Paragraph 2 of the Draft Article stipulates that paragraph 1 is without prejudice to paragraph 1(a) and (b) of Draft Article on State Immunity from Measures of Constraint.

The former Speical Rapporteur, Mr. Sucharitkul Sompong, had been of the opinion that the Draft Article (then numbered 23) was designed to impose limitations on the effectiveness of consent and to protect a State that may unknowingly have been led to giving its consent in advance to allow available assets including bank accounts of their embassies or diplomatic premises to be seized without being fully aware of the extent of the resultant disruption of diplomatic relations whilst the seizure of certain types of properties might cause in the case of an outbreak of hostilities. To this end he had identified five categories of property that were to be immune from attachment and execution.

The present Special Rapporteur, Mr. Motoo Ogiso, in his preliminary report, had proposed certain amendments to the text of the draft article as adopted on first reading. In subparagraph 1 he had proposed the omission of the word "*non-governmental*" placed in square brackets.

PART V

MISCELLANEOUS PROVISIONS

The three Draft Articles in part V stipulate the miscellaneous provisions including those relating to service of process; default judgment; and privileges and immunities during court proceedings.

Draft Article 20 (Service of Process) relates to domestic rules of procedure and paragraph 1 enumerates a hierarchy of means by which service of process may be effected when a proceeding is instituted against a State. The current Special Rapporteur, Mr. Ogiso, had in his preliminary report expressed the view that it would not be proper to refer to a special arrangement between the claimant and the State since such practice does not seem to be acceptable in many legal systems. He had deemed it appropriate to refer to an international agreement and, failing that, to transmission through diplomatic channels. Mr. Ogiso had accordingly recommended that subpara