CHAPTER II

SOVEREIGN IMMUNITY AND TRANSNATIONAL ARBITRATION :
AN INTERNATIONAL PERSPECTIVE

1. Introduction

In the contemporary world-trade participation of governments through their departments, agencies or instrumentalities in international transactions with foreign nationals, an individual, a partnership firm or a private corporation, is not uncommon. State trading through public corporations and other instrumentalities could be linked with the ending of a laissez faire economic system and changed 'role' and 'philosophy' of a contemporary state.\(^1\) The increase in the international trade has obviously increased possibility of a variety of disputes arising out of such transactions. Absence of an institutionalized dispute resolution mechanism at international level, uncertainty of law applicable to such disputes coupled with diverse systems of law involved conferring different rights and obligations on the parties - a State or its instrumentalities and private individuals of an international dealings - for quite a long time, led to strong suspicion in minds of the private individuals and thereby arrested growth of the international trade
and commerce. However, faith in private resolution of disputes and its inherent positive qualities conducive to the development of such transactions led to widespread adoption of arbitration clauses in international commercial transactions between public entities and foreign private parties.²

The presence of a State or its instrumentality, as a party to arbitral proceedings raises a set of vital issues and pertinent difficulties. A few threshold issues without having uniform approach are: legal authority of the agency representing the state to create binding contractual obligations on the state and to negotiate, draft the arbitration clause and to submit to arbitration; choice of law applicable to the dispute; the circumstances/situations justifying non-fulfillment of the contractual obligation; impact of subsequent legislative or administrative actions of the state or its officials on the agreed contractual obligations; applicability of rules of public international law (such as the exhaustion of local remedies) before recourse to arbitration; international responsibility of the state for breach of contract; impact of the plea of sovereign immunity on arbitral proceedings and enforcement of the arbitration agreement and/or of the resultant award.

Rules of the exhaustion of alternate local remedies, unless otherwise stated, are inapplicable
where a valid contract between a State and a foreign private individual contains an arbitration clause. Such agreement to arbitrate does not warrant exhaustion of other alternate remedies by the alien before he resorts to the agreed arbitration.\(^3\) Response to the question as to the international responsibility of a State for breach of contract owing to legislative or executive measures without compensating the foreign private party depends upon the proper law of the contract and character of the act. A contractual obligation, unlike international one, is subjected to domestic law of a State and therefore, legislative or executive justification for non-performance of a contract does not amount to 'international wrong'. However, the state's default in organisation of the agreed arbitral tribunal and its failure to co-operate to arbitrate the claim, in the absence of remedial measures provided in the procedural rules applicable thereto, constitute an 'international wrong, particularly denial of justice.\(^4\) To avoid such a risk and to protect an alien from such legislative encroachments denying him his legitimate contractual rights, it was suggested that an alien must insist upon submission of the contract to a legal system other than that of the contracting foreign state.\(^5\)

Finally, a contracting State or its instrumentality engaged in international commercial
transaction may be reluctant to comply with the arbitration clause and/or enforcement of the resultant arbitral award by pleading sovereign immunity.

The notion of sovereign immunity, which is derived from the maxim *par in pares non habet imperium*, and is grounded in the principles of the independence, the sovereign equality and the dignity of states, connotes that a State, unless it chooses to waive its immunity, is not amenable to the jurisdiction of a foreign court.

II. General Theories of Sovereign Immunity

Among the writers of various countries, there is no general agreement concerning the concept of sovereign immunity, its justification and application. A study of the law of sovereign immunity, however, reveals two conflicting theories, the theory of absolute immunity and the theory of restricted immunity, each of which has been widely held and firmly established at one period of time or another. According to the classical or absolute theory of immunity, sovereign of a foreign State is to be accorded jurisdictional immunity for all the activities attributable to the State, virtually regardless of the nature of the activities involved and irrespective of the capacity in which a state organ has done those activities. The modern restrictive theory of immunity, on the other hand, rejects the absolute immunity to a State or its instrumentality and argues
that it goes against the principle of equality and offends the ideal of justice. Considerations derived from the ideal of justice, rule of law and the principle of equality, it asserts, impose extensive limitations upon the state immunity.\(^6\) It, accordingly, maintains that a sovereign is immune from jurisdiction of a Court only with regard to a 'public' act, (acta jure imperii) and not with respect to its 'private' act (acta jure gestionis).

Main arguments forwarded in favour of the unqualified immunity are: that jurisdictional immunity of a foreign sovereign is premised on the principles of the independence, the equality and the dignity of states, crystallising the maxim par in parem non habet imperium, and that the assumption of jurisdiction over a foreign State amounts to an exercise of imperium over it in disregard of the fundamental canons of international law;\(^7\) that the doctrine has been accepted as a customary rule of international law; that the exercise of jurisdiction based on the distinction between acts jure gestionis and acts jure imperii is impossible of definition and therefore of application;\(^8\) that an executive branch of a Government cannot satisfactorily conduct its foreign relations if courts of a State are allowed to assume jurisdiction over foreign sovereign,\(^9\) and a State, as an institution, has to defend the 'public interests' and therefore all its acts are jure
imperii and none of them is acts jure gestionis and any distinction between 'private' transactions and 'public' acts of sovereignty is fallacious. Recently, the memorandum submitted to the International Law Commission (ILC) by Mr. Nikolai A. Ushakov⁠¹⁰ objecting the restrictive immunity of a State proposed by Sompong Sucharitkul, Special Rapporteur of the working group constituted by the ILC to study 'Jurisdictional Immunities of States and their property,'¹¹ not only resurfaces a few of these arguments but also adds to it a few more vigorous arguments. Mr. Nikolai A. Ushakov, perceiving the restrictive theory of immunity as manifestly unsound and contrary to the principle of sovereignty and sovereign equality, sees no sound grounds for restricting the state immunity by making a distinction between acta jure imperii and acta jure gestionis. He argues that in its foreign relations a State, itself or through its organs and representatives, always acts as imperium or in public power. It engages in economic activities not as does a private individual but precisely as a sovereign State invested with public power. It is, he therefore argues, altogether inadmissible that a court should examine the activities of a foreign state and should qualify them in one or the other way or matter contrary to the view of that state itself. He further believes that a State is a single entity and it cannot have either dual personality or capacity enabling it to perform activities in its
official or governmental capacity or personality and in unofficial or non-governmental capacity or personality. Whatever it does, it does under its public power, he asserts.

Critics of the classical absolute immunity, in the context of the immense expansion of states’ economic enterprises and commercial activities, and of the quest of justice and preservation of the rule of law, on the other hand, doubt the raison d'être of the unqualified state immunity. And it, they argue, has lost its significance and ratione cessante in the contemporary international law. And they accordingly refuse to recognize it as a customary rule of international law. A State, according to them, has two separate persona grata when it carries public functions and undertakes commercial activities entailing extra-territorial effects. And a distinction between acta jure imperii and acta jure gestionis is necessary to accord state immunity to the former and not to the latter. 12 The mere fact that a State is involved in an activity in the light of its extended functions and extra-territorial effects does not justify the classical absolute immunity based on the principles of independence, equality and dignity of the State. H. Lauterpacht, reacting to the argument that the absolute state immunity is based on the principles of independence, equality and dignity of states, rightly observes:
"The principle of independence logically requires that the courts of a state should recognise as valid the legislative acts of another recognised state in so far as these are not contrary to international law and to fundamental principles of justice, so long as they do not require other states to enforce foreign public or fiscal law, and so long as they are not intended to have extraterritorial effect —. Beyond this it does not go. Thus, no legitimate claim of sovereignty is violated if the courts of a state assume jurisdiction over a foreign state with regard to contracts concluded or torts committed in the territory of the state assuming jurisdiction. On the contrary, the sovereignty, the independence, and the equality of the latter are denied if the foreign state claims as a matter of right — as a matter of international law — to be above the law of the state within the territory of which it has engaged in legal transactions or committed acts entailing legal consequences according to the law of that state.13 A state does not derogate from the dignity of another state by subjecting it to the normal operation of the law under proper municipal and international safeguards and on a footing of equality with the state within which it concludes a contract or commits a tort. The dignity of foreign states is no more impaired by their being subjected to the law, impartially applied, of a foreign country than it is by submission to their own law".14

Elsewhere he has to say that:

"The old notion that the dignity, equality and independence of foreign sovereigns required that they be not impeded in domestic courts had not only vanished with the days of monarchs wielding absolute power but are "an archaic survival and — they cannot continue as a rational basis of immunity".15
Sompong Sucharitkul, in his 'Preliminary Report on Jurisdictional Immunities of States and their Property' also takes a similar view. He believes that state immunity is restricted or limited in the sense that it is not 'absolute' or to be accorded in all circumstances for all acts of a State. A State is entitled to jurisdictional immunity only in respect of acts which are official or sovereign in character, public in purpose or governmental in nature. He argues that if the exercise of imperium by a State is the basis for immunity, then the absence of connection with the imperium or activity not pertaining to the sovereignty of the state does afford the raison d'être for cases of 'non-immunity'.

States' extensive involvement in economic and commercial activities in the contemporary world dominated by the idea of welfare state, 'rule of law' and 'justice', generated a feeling among critics of the absolute theory of immunity that extension of the unqualified immunity to states involved in commercial activities needs reconsideration. When a State, it was argued, engages in business competition with a foreign private party or corporation, this competition would be unfair, unjust and violative of rule of law to the private person if the competing state is not made answerable in the courts of the state where the business is transacted. Commenting on the
jurisdictional immunity and the rule of law.

H. Lauterpacht says:

"Its abandonment is required not only by the expansion of the activities of states and the injustice and inconvenience resulting from the disregard of these developments in relation to claims of individuals. At a period in which in enlightened communities the securing of the rights of the individual, in all their aspects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise whenever the state - our own state or a foreign state - screens itself behind the shield of immunity in order to defeat a legitimate claim." 17

In the contemporary international trade and commerce, wherein modern governments, unlike in the past, extensively engage in commercial activities, it cannot be expected that private parties will be content to permit their rights to be determined by the goodwill of the states with whom they deal. If governments or their instrumentalities are to engage in commercial activities, it is argued, some restriction or mechanism making them accountable for their actions in the commercial sphere in the same way that private entities are held accountable becomes imperative. Such a restriction is required to ensure rule of law and to render justice to both the parties, states or their instruments and individuals. The famous 'Tate Letter' insisted for such a restriction, when it reads:
"... [T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts". 18

A review of literature supporting the absolute and restricted theories of immunity and of arguments advanced in favour and against these two theories exhibits two conflicting perceptions and ideologies pertaining to persona grata, functions and capacities of a State and the extent of the immunity warranting distinction between acta jure imperii and acta jure gestionis. According to the believers in the absolute state immunity theory, a State cannot have two different personalities and capacities. It cannot act otherwise than as a sovereign entity and all functions undertaken by the state, therefore, are governmental in nature and official in character. While the supporters of the restrictive theory of immunity, on the other hand, believe that a State does have a dual personality and capacity. It has capacity to perform activities in the exercise of its governmental or sovereign powers and capacity, like other individuals, to perform private or non-governmental activities in which it may act as a sovereign authority or as a private person. And it does have two separate personalities, political and civil or corporate, when it carries public functions and undertakes commercial activities entailing extra-territorial effects.
It is, however, important to note that eight reports on jurisdictional immunities of states and their property, submitted to the International Law Commission (ILC) by Sompong Sucharitkul, which ultimately culminated in the 'Draft Articles on Jurisdictional Immunities of States and their Property' (hereinafter referred to as the ILC Draft Articles) are premised on the idea that there are two kinds of acts of a State, namely, acta jure imperii, and acta jure gestionis. However, members of the International Law Commission had agreed during the first reading of the Draft Articles not to plunge too deeply into theoretical and abstract debate on the respective merits of the two theories of immunity from jurisdiction and to concentrate rather on identification of activities to which immunity from jurisdiction should and should not apply.19

National legislations on sovereign immunity; states' practice;20 juristic opinions21 and codification drive, official and unofficial, at regional as well as international level22 unequivocally reveal decline in the doctrine of absolute immunity and indicate an increasing acceptance of the restrictive theory within the international community. The legislative approach and the codification drive of the restrictive theory of sovereign immunity, it seems, is developed out of the
ideas that a State in the contemporary world-order has two separate persona grata when it carries a "governmental" or "public" function and undertakes a "non-governmental" or commercial or "private" activity entailing extra-territorial effects. And such a dual personality of a State makes it imperative to restrict the doctrine of absolute sovereign immunity when a State engages, itself or through another, in "commercial" or "private" or jure gestionis acts and not in the "public" or jure imperii acts.

III. The Restrictive Theory of Immunity:

Two Central Problems

It is important to recall that the restrictive theory of immunity is premised basically on the fact that a contemporary welfare State, which itself or through its departments, corporations or other instrumentalities, distinct from the State or otherwise, has to undertake numerous multidimensional and multifarious activities - governmental as well as non-governmental - in the public interest, is not entitled to immunity for all of its acts but only for a few ones. The modern theory of restrictive immunity, therefore, depends upon the assessment of what constitutes a "State" for the purpose of immunity and when it should be immune. The central problem thus basically pertains to the identification of a State party and characterisation and categorization of activities of a
State into 'immune' (governmental or public or jure imperii) and 'non-immune' (non-governmental or private or jure gestionis). In the pertinent and crucial questions emerging from these mentioned dual central problems are: What constitutes a State for immunity purposes?; how can the subjects of immunity be identified?; are all constituting parts of a State qualify for immunity?; if not, which authorities or entities of a State can legitimately claim immunity and why?; and, what types of activities of a State do constitute acta jure imperii and acta jure gestionis and what criteria are to be employed for distinguishing such immune and non-immune transactions of a State?

Against the background of the predominant welfare philosophy of a State and consequential extensive participation of a State in the international trade and commerce these question lie at the heart of any discussion on sovereign immunity and transnational state trade activities.

3.01 Identification of a state party

Recalling the raison d'être of the restrictive theory of immunity, arguments justifying such limited immunity and the prevailing judicial and legislative trends away from the absolute doctrine of sovereign immunity, and the extended activities of a State, the question as to what authority or entity of a State is a
proper subject of immunity becomes imperative. The question as to who enjoys sovereign status for the purposes of immunity is very crucial for:

(i) The restrictive theory of immunity in vogue on its operational plane does not necessarily guarantee immunity to an entity of a State even though sovereign status is granted to it. Conversely, denial of sovereign status to it guarantees non-immunity to it.

(ii) Sovereign status brings to its recipient a additional procedural as well as substantive privileges (e.g. disclosure of documents, proof of foreign law, serving of notices etc.) and

(iii) Sovereign status results in certain disadvantages and responsibilities that a defendant may wish to avoid (e.g. defendant may loose certain affirmative defences such as governmental force majeure, sovereign compulsion, act of state, problem of authority for waiver of immunity and liability of a state etc.)

Further, it is significant to recall that even though sovereign immunity is an international law concept, its specific contents and application have generally been left to the municipal law and domestic courts of individual nations. Definition of a "State", by individual nation is shaped largely by its internal political ideology and paradigm. And this ideology and paradigm is guided by its social and economic
development. Naturally, these ideological, political, economic differences and types of state enterprises established for their economic development act as potential sources of conflict and obstacles in defining and identifying subjects of a State for immunity purposes and thereby make it difficult to have an uniform and generally acceptable definition and identification of a state subject entitled to immunity. Similarly, respective national interests in ensuring equity among the individuals and the foreign states involved in commercial matters; comity and respect for national sovereignty of a foreign State; promotion of economic development; and faith in, and development of the rule of law guide a State in determining and identifying an entity for purposes of immunity. These differences, interests and perceptions of individual states lead to different approaches to the identification and assessment of a State, its constituent elements and instrumentalities for the purpose of immunity. Th8074

These differences necessarily lead to several pertinent questions. A few of them are: How does sovereign immunity law of a State deal with these differences and tackle the problems arising therefrom?; How does it treat national law of immunity of the state seeking immunity?; Does it accept its definitions of a 'state' and of its constituting
elements without referring to the forum’s (lex fori) conception and perception of ‘state’ and its constituting elements? In case of conflicting approaches in the law of the forum and that of the state seeking immunity, does it give primacy to the definition of the forum or that of the state seeking immunity?; What alternative does it offer? If it offers an alternative, is that alternative based on function (what an entity does) or on its structural connection to the state (what an entity is)?; Does the determination of sovereign status of a state enterprise, acting as a state device for economic development of the state depend upon its juridical identification—functional or structural—with private corporations or other non-governmental entities or extent of ‘control’ over, or ‘share’ in, the state enterprise or nature of the activity undertaken by it?

These questions, for the sake of convenience and analysis, may further be crystallised into two broad formulations, namely, what forms are generally recognized as ‘subjects’ of sovereign immunity law? and, which entities and organs of a State should be treated as ‘part’ of a State for purposes of immunity? An immunity law of a nation by way of definition of ‘state’ may specify and enumerate acceptable structures of a State for the immunity purposes. For example,
section 14 (1) of the Sovereign Immunity Act 1979 (SIA) of the United Kingdom (hereinafter referred to as the SIA) reads:

"(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom, and references to a State include references to:

(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government, but not to any entity (hereafter referred to as `separate entity`) which is distinct from the executive organs of the government of the State and capable of suing or being sued."

Clause (2) of section 14 SIA, further accords jurisdictional immunity to such a separate entity only for `anything done by it in the exercise of sovereign authority`. The ILA Draft Convention, revealing similar approach, offers comparatively an elaborate definition of a `foreign state` for purposes of immunity. It defines the term `foreign state` to include: "(1) the government of the State; (2) any other State organs; (3) agencies and instrumentalities of the State not possessing legal personality distinct from the State, and (4) the constituent units of a federal State". And it, further, makes it clear that any agency or instrumentality of a foreign State possessing distinct legal personality be treated as a
foreign State only for acts or omissions performed in the exercise of sovereign authority. Recently, the International Law Commission in its Draft Articles has also specified the forms of a state entitled to immunity. It accords jurisdictional immunity to a state; various organs of its government; its political subdivisions and agencies or instrumentalities entitled to perform acts in the exercise of sovereign authority and representatives of the state acting in the sovereign capacity. An extreme, an immunity instrument, on the other hand, may, with or without enumerating subjects of state immunity; employ words of wide amplitude to define a 'State' to accommodate 'any national, regional or local official body organised under the laws of the state or any of its subdivisions', or 'any political subdivision' or 'any other State recognised by the forum for purposes of immunity. For example, the Inter-American Draft Convention in addition to the government of a foreign State; its departments; decentralised agencies; self-governing or self-sustaining entities, agencies, with or without a separate legal personality; any entity of legal national interest irrespective of its technical and legal form, includes all 'national, regional or local political or administrative institutions' in the definition of a State. It is significant to note that the Convention explicitly states that this list of entities qualifying
as a ‘state’ for immunity purposes is ‘not all-inclusive’ and it accords immunity to any national, regional or local political or administrative institution only for acts performed by it in exercise of its governmental powers. Further, the phrase ‘any other entity of legal national interest, whatever its technical and legal form’ used in the definition, which allows any entity to claim a state status, is a catch-all term. Similarly, the Foreign Sovereign Immunity Act, 1976 of the United States, (hereinafter referred to as FSIA), which represents the first effort of codification of the law governing litigation with foreign states and their instrumentalities in the USA, defines a foreign state to include ‘its political subdivisions; agencies and instrumentalities’. An agency or instrumentality of a foreign state, as defined in the FSIA, is an entity having separate legal personality, corporate or otherwise, or an organ of a foreign state or political subdivision or whose majority of shares is held by that state or political subdivision. The European Convention on State Immunity, on the other hand, has also given a very wide meaning to the expression (contracting) state. Article 27 of the Convention says: "For the purpose of the present Convention, the expression ‘contracting state’ shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has
been entrusted with public function. While the Indian Code of Civil Procedure of 1908\textsuperscript{34} which, owing to the absence of an Immunity Act in India, regulates suits in India against a foreign state, goes a step forward by simply stating that, a "foreign state" means any state outside India which has been recognized by the Central Government".\textsuperscript{35}

Similarly, in the given different conceptions of ‘state’ guided by varied political, economic and social ideologies, the second crucial formulation mentioned above, namely, which entities and organs of a State be treated as part of a ‘State’ for the immunity purposes? has been perceived in two extreme possible approaches. A definition of a State adapting a broad approach would include any entity which performs any function which the state of origin considers to be ‘public’ or ‘state function’. A narrow definition, on the other hand, would confer state status only on those entities which correspond to the official state structure of the forum or which perform only those acts which the state of forum itself performs i.e. \textit{acta jure imperii}. These two approaches, in essence, respectively reveal emphasis on formal structure and functional approach of the entity in identification of a state party for immunity purposes.

The American FSIA, more or less, emphasizes on
form of an entity or instrumentality rather than on its
functions for immunity purposes. Section 1803 of the
Act confers a state status on, and thereby accords state
immunity to, any political subdivision and any agency or
instrumentality having separate legal personality and
major ‘ownership interest’ of the state or its political
subdivision. Thus, under the FSIA the immunity rules
applicable to a foreign state are also applicable to its
political subdivisions, agencies and instrumentalities.
Similarly, The ILA Draft Convention exhibits
structural approach to the identification of state party
for immunity purposes. It respects for the immunity
purposes the form of an entity recognized by the state
of origin and accords immunity to any agency or
instrumentality having separate legal personality to
that of the state for acts performed in the exercise of
sovereign authority.36

The functional approach of an entity, on the other
hand, insists upon granting of state status only when an
entity, authority or instrumentality of a State
possesses a distinct legal personality and acts within
the jure imperii. For example, the British SIA states
that an entity, distinct from the executive organ of a
Government, is immune from jurisdiction only in
proceedings relating to acts done in the exercise of
sovereign authority.37 Similarly, the European
Convention does not accord immunity to a legal entity
simply because it is distinct from the state and it has been entrusted with public function and thereby is capable of suing or being sued. But it accords immunity to such a legal entity only for the acts performed by it in the exercise of sovereign authority. The Inter-American Draft Convention also exhibits a functionalist tendency in granting immunity. Article 2 of the Draft Convention, which defines 'State' for the purpose of immunity, accords immunity to a self-governing or self-sustaining entity; an agency, with or without separate legal personality; an entity of legal national interest irrespective of its technical or legal form and, a national, regional and a local political or administrative institution of a State, only for acts performed by virtue of governmental powers. The recent ILC Draft Articles similarly evince emphasis on functional tendency in granting immunity to an organ other than a state when article 3, defining state for the purpose of immunity, accords immunity to a political subdivision and agencies or instrumentalities of a state for their acts performed in the exercise of the sovereign authority of the state and not otherwise.

The structural definition of a State certainly obviates the need to choose between competing views of what is a private (jure gestionis) and what is public (jure imperii) act for determining state status and thereby in granting immunity. It is, however, important
to note that the status of a particular body under the law of the state of origin may not always be clear as evidenced by the extensive litigation in the United States surrounding the questions of what makes an entity a state actor. Further, the structural approach to identification and definition of a State, as reflected in the ILA Draft Convention, it seems, becomes functional one when it largely disregards form of a juridically distinct 'agency or instrumentality', (such as a state trading organisation) and insists upon its functions in determining its eligibility for state status. 39

The definition of a 'State' conferring a state status on Government, which represents the state and acts in its behalf, and its 'other organs or departments', which traditionally cover integral arms of the state such as cabinets and ministers, does not generally create any difficulty in identification of a state party for immunity purposes. But expressions such as any other 'authority', 'agency' or 'instrumentality of a state' employed in definitional clauses of immunity Acts and instruments generally create difficulty in determination of their status distinguishable from governmental or non-governmental entities and thereby their identification as state party for purposes of immunity.
It is important to note that a contemporary State, which extensively participates in international trade and commerce, may either allow one of its political organisations to carry on its economic and trade responsibilities or alternatively may create special economic entities for the purpose. Such entities may either constitute a part of the political organisation or fit into the hierarchy of political organisations of the state.

It is needless to mention that entities created within the basic political organisation of a State qualify as a part of the state for immunity purposes. Such entities may be constituted through a variety of devices. A State, for example, may assign the task of exploitation and export of natural gas and oil products, to one of its ministries, say the Ministry of Oil and Natural Gas or the Ministry of Industry and Commerce, or create a new Department of Oil and Natural Gas, a body under the control of the Ministry of Oil and Natural Gas and with no separate legal status. Both the entities, which openly operate in the name of the state, unquestionably would be eligible for state immunity as they legally constitute part of the state itself. And accordingly the principles developed in court decisions and legal doctrines regarding the immunity of states before courts would be applicable to such an entity. However, the state may, for reasons of economic efficiency or administrative convenience or political
exigencies, design a more independent body for developing the oil and natural gas industry. If it desires so, it has two major options. It may create an entity, say, the Oil and Natural Gas Commission, endowed with considerable administrative independence or a private law company, say, the Oil and Natural Gas Company, or a corporation, say, the Oil and Natural Gas Corporation, an entity which is not only administratively independent but also legally separate from the state. The former, though it could develop its own policies and operate its day-to-day affairs without constant government supervision, would, so long as its legal status is linked with government of the state, qualify for state status for immunity purposes. The latter, which not only enjoys considerable freedom to formulate and pursue its own policies with comparatively lesser governmental interference but also to manage its own assets and can sue or be sued independently of the state, however, creates a difficulty in determination of its legal status for immunity purposes because shares of such a private law entity may be owned by other state economic organisations or non-private bodies or private investors or it may be manned by ministers or other state officials through its Board of Directors. While other entities may be allowed to manage their general operations except major policy decisions which generally have to be cleared by the government.
Further, growing participation in international trade and commerce of these entities, whose formal and functional structure is dominated by individual state’s diverse economic and legal system, creates a problem of identification of their status for immunity purposes. The expressions, such as, ‘government’, ‘state organ’ or ‘state agency’ and instrumentality figure in the existing national immunity Acts and instruments, regional as well as international, are obviously inadequate to encompass such diverse entities devised by states for their economic functions and other activities which cannot, in stricto sensu, be labeled as acta jure imperii.

Against this background a question as to when an entity, which is administratively distant and legally distinct from the government, is entitled for state immunity becomes significant in any discussion on transnational state trade activities and its immunity.

A separate legal status does not necessarily disqualify an entity from being considered a state ‘agency or instrumentality’. A national immunity Act or an instrument, regional and international, may, for immunity purposes, require some additional criteria to confer the state status on an entity or instrumentality. For example, the American FSIA attaches importance not only to legal status of an entity but also takes into consideration its ownership and place of incorporation.
to qualify it for state immunity. Section 1603(b) of the Act, *inter alia*, confers status on any agency or instrumentality having a separate legal personality, corporate or otherwise and any organ whose majority shares or other ownership interest is owned by a (foreign) State or its political sub-division. This criterion unequivocally makes it clear that an entity entirely owned by a foreign State would be a state agency or instrumentality. And where ownership is divided between foreign states and private interests the entity would be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) are owned by a foreign state or by a foreign state’s political subdivision. The FSIA, unlike other instruments, adds an additional criterion that an entity to qualify as a state agency or instrumentality must be incorporated under the laws of the nation in whose name it seeks immunity. 41 The ILA Draft Convention, like the FSIA, attaches importance to separate legal status of an entity to designate it as a state agency or instrumentality. It proposes to confer state status on agencies or instrumentalities of a State not possessing legal personality distinct from the state and on agencies and instrumentalities of a state possessing a separate legal personality from the state, for *acta iure imperii*. 42 A careful reading of these clauses of the
two instruments reveals that the FSIA definition sets out a general rule giving state status only to agencies and instrumentalities which have separate legal personality from the state, while the ILA definition does not look at the distinct personality of an agency or instrumentality as the sole criterion for status determination, it, instead, emphasizes the nature of the act as being jure imperii.

The British SIA and the European Convention on Sovereign Immunity, on the other hand, exhibit a different approach to designate an entity as a state agency or instrumentality. The SIA grants sovereign status to 'any department of the government but not to any entity which is distinct from the executive organs of the government of the state and is capable of suing or being sued.' It, however, allows an entity distinct from the government to receive immunity in proceedings relating to acts done by it in the exercise of sovereign authority and in the circumstances in which a state would have been so immune. A separate entity claiming immunity in the UK has to show that it was acting as the state's agent in the performance of acta jure imperii and not acta jure gestionis. However, the European Convention does not accord immunity to a legal entity which is distinct from the state and is capable of suing or being sued, even if that entity has been entrusted with public functions. It further specifies
that a state, subject to a contrary agreement, cannot claim jurisdictional immunity if it has on the territory of the state of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity and the proceedings relate to that activity of the office, agency or establishment. These two instruments, thus, employ a distinct separate legal personality, its capability of suing or being sued and (private) nature of the commercial, industrial or financial activities of an entity in determining state status of an agency or instrumentality.

The ILC Draft Articles, also without specifying any criteria for determination of state status of an entity, agency or instrumentality, simply confers state status, *inter alia*, on any political sub-divisions and agencies or instrumentalities of the state, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the state and on representatives of the state acting in that capacity. The International Law Commission (ILC) takes the position that an entity or instrumentality of a State, regardless of its constitution, separate legal personality clothed by virtue either of a statute or a process of incorporation or otherwise, should be given benefit of state immunity for acts performed in the
exercise of the sovereign authority of the state and when it acted as a state organ or agent. Immunity, thus, is based on the attribution of activities to the state and on the fact that the act was done in the exercise of the sovereign authority of the state. The test for entitlement of state immunity suggested by the ILC is based on nature of the activities involved rather than on its separate juristic personality and legal status.\textsuperscript{47} The ILC Draft Articles also point out that a State having an interest in the shares or stock of a foreign corporation or commercial enterprise, corporate or uncorporate, is not entitled for jurisdictional immunity.\textsuperscript{48}

A survey\textsuperscript{49} on national and international state of Law and Practice on arbitration and state enterprises, soliciting, \textit{inter alia}, information from different countries on indirect participation in international business of a State through its enterprises, treats an entity as state enterprise which is a commercial enterprise predominantly owned or controlled by the state or by state institutions, with or without legal personality.\textsuperscript{50} The survey, pondering upon the circumstances under which a state enterprise can claim state immunity, identifies the two generally relied upon criteria viz., separate legal personality of an entity and nature of the activity undertaken by it for identification of a state party. If an agency does not
have a separate legal personality it gets immunity only for *acta jure imperii*; while entities having separate legal personality are disentitled for immunity. The survey also approves the view point that the criterion for determination of immunity of an entity should be not be based on separation of its personality from that of the state but on its functional operation and governmental control.\(^{51}\)

The foregoing discussion of selective national immunity Acts and regional as well as international instruments on sovereign immunity not only reveals disagreement on identification of entities as state agencies and instrumentalities but also exhibits variance in criterion to be employed for such identification. Further, it also eloquently shows that national approaches which are far from uniform, are conducive to international conflict and undesirable forum shopping for questions arising out of international trade. The discussion also reveals two broad tendencies in dealing with such entities. The American FSIA and the Inter-American Draft Convention propose that the economic organisation of a State does not affect the determination of state status of such an entity. The British SIA, the European Convention and the ILC Draft Articles on the other hand, reject the proposition that the economic organisation of a country is inconsequential to the determination of state status for immunity purposes.
The restrictive doctrine of sovereign immunity, although accepted in principle by a number of states, in the absence of international guidance encounters major difficulties in identification of a state party for enjoyment of benefits of state immunity.

3.02. Distinction between acta jure imperii and acta jure gestionis

The theory of restrictive immunity, which has provided the means for extensive breach of the bulwark of sovereign immunity, however, lacks objective criteria for categorization of activities of a State into acta jure imperii and acta jure gestionis. National courts, which in regard to foreign sovereign immunity have been operating in virtual isolation of international processes, have developed the restrictive doctrine of immunity according to their respective perception and the identified criteria to do so. Application of the restrictive theory of immunity in practice, therefore, depends upon some external criteria such as commercial and non-commercial, or public and private, or governmental and non-governmental for distinguishing immune ("governmental" or "public" or jure imperii) from non-immune ("commercial" or "private" or jure gestionis) transactions of a foreign State. In this connection it is important to note that the working group
constituted by the International Law Commission to study jurisdictional immunities of states and their property, during its attempt to specify areas of activity qualifying a State for immunity, has noticed several distinctions evinced from state practices, national legislations and decisions of domestic courts to distinguish immune acts from non-immune. Its study reveals that the distinction has been drawn on the basis of consideration of the following factors: dual personality or dual capacity of the state and acta jure imperii and acta jure gestionis (which are related to the public or governmental and private or non-governmental activities). The dual personality test, obviously, is premised on the idea that a State, sometimes, is endowed with a double personality, empowering it to act as an ente politico or political entity, and a private individual or juristic person like a corporate entity vested with legal or juridical personality. While the dual capacity test makes a distinction between acts done in pursuance of a State’s political power, potere politico and as persona civile or juristic person. The acta jure imperii and acta jure gestionis test, on the other hand, makes distinction between public or actes de puissance publique or atti d’impero or ‘public law authority’ and non governmental or non official transactions based on ‘private law’ or actes de pouvoir or atti de gestione to accord immunity
or non-immunity. Such a distinction based on 'public' or 'private' activity of a State, evidently, relates to the nature of the activities performed by the state or its agencies or otherwise attributable to the governmental authorities. This type of distinction is not necessarily dissimilar from the distinction between acta jure imperii and acta jure gestionis and it, therefore, may be viewed as a different expression of the same kind of distinction with emphasis on the nature of the activities, public or private, and authority or capacity of a state in which it has acted. Similarly, the commercial/non-commercial activities test, which makes distinction between acts of a State of a 'commercial' or 'governmental' nature, in ultimate analysis, refers to the acts done in the exercise of the governmental authority of the state or otherwise. These decisive factors, in isolation or in combination, undoubtedly serve as a basis for denying a claim of state immunity but fail to crystalise uniformly acceptable criteria for making distinction between the immune and no-immune activities of a State. The criteria, due to their varied and unascertainable premises, which are far from generalisation, make the problem more complicated and acute. The absence of a set of universally accepted criteria to draw a distinction between such immune and non-immune state activities has also led the critics of the restrictive theory to doubt its soundness and propriety. 53
Even if it is assumed that such a distinction is possible in all cases, a question as to whether the distinction should be drawn according to the notions of the forum, or of the foreign state concerned or according to internationally accepted standards, if any, remains unresolved. Approach to the question is not as simple as it looks. If it is left to the discretion of a municipal court to distinguish immune ('public') from non-immune ('private') acts of a foreign State inconsistent results in the various jurisdictions, guided by their respective economic and political ideologies, cannot be ruled out. In fact, leaving a municipal Court of a forum State to draw such a line of distinction results in disappearance of the immunity rule. And leaving it to a municipal Court of a foreign State, on the other hand, results in denial of the exception contemplated by the restrictive theory of immunity. Absence of universally accepted criteria distinguishing *acta jure imperii* from *acta jure gestionis* not only leaves room for 'value judgments' resting on political assumptions as to the proper sphere of state activity and of priorities in state policies, but also gives a considerable latitude to a recalcitrant government to manipulate its acts to give them the appearance of 'public' or 'governmental' acts.\textsuperscript{54} Similarly, not all state activities can be described either as 'governmental' or 'commercial'. There may be
some 'undistinguished' activities which could be classified as 'neutral' or 'colourless' (unless in a particular case one could say that they acquired a 'colour' or 'classification' from their context). In such a situation possibility of immunity being accorded to a foreign state activity even though there may be good reasons for asserting local jurisdiction cannot be ruled out. Moreover, there are some cases which can hardly be susceptible to categorisation as 'public' or 'private' but which may well justify the assertion of local jurisdiction.

However, inspite of these weaknesses and pertinent problems, practice of nations accompanied by the clear opinio juris of almost all but the Socialist states demonstrate adoption of the restrictive theory of immunity.

IV. Some Attempted Criteria for Distinguishing acta jure imperii and acta jure gestionis: A Survey

The recently enacted domestic statutes, judicial and juristic opinions, and international instruments on foreign sovereign immunity reveal the following broad objective criteria for distinguishing the so-called acts jure imperii from acts jure gestionis and thereby determining the extent of immunity of a foreign State, its agencies and instrumentalities. The prominent objective tests, which have so far emerged, may be
captioned as 'positive and negative list theory'; 'assimilation of foreign and home immunity theory'; 'purpose theory'; 'nature not purpose theory'; and 'nature and purpose theory'.

4.01 Positive and negative list theory

The difficulty in finding a totally satisfactory test to distinguish *acta jure imperii* from *acta jure gestionis* coupled with the absence of any foundation in the principles of international law for both, the doctrine of absolute and restrictive immunity of foreign States, and of workable basis for regulation of the problem of jurisdictional immunities by reference to rules capable of general application led Sir Hersch Lauterpacht to propose base rule of no jurisdictional immunity, absolute or restrictive, to a foreign State or its instrumentalities. He argues for abolition of the doctrine of jurisdictional immunity of a foreign State, either in its absolute or limited form, subject to a few 'principal safeguards and exceptions'. The principal safeguards and exceptions entitling immunity to a foreign State, according to him, belong to the following categories: (i) legislative acts of foreign State and measures taken in pursuance thereof (such as nationalisation of property of alien); (ii) executive and administrative acts of a foreign State within its territory (such as expulsion of an alien or exaction of
dues or wrongful imprisonment); (iii) governmental contracts governed by the conflict of laws rules of the forum, and (iv) matters of diplomatic immunities. It is also significant to note that the United States Court of Appeal for the Second Circuit in Victory Transport Inc. v. Comisaría General de Abastecimientos Transportes, after extensive review of the pertinent authorities on the distinction between *jure gestionis* and *jure imperii*, concluded that there are the following five categories of activities about which sovereigns have traditionally been quite sensitive and which therefore justify invocation of the doctrine of sovereign immunity. They are: (i) international administrative acts (such as expulsion of an alien), (ii) legislative acts such as nationalisation, (iii) acts concerning the armed forces, (iv) acts concerning diplomatic activity and (v) public loans. J.F. Lalive, with a view to providing the authoritative guidance for the courts to delineate its degree of uniformity internationally in the application of the law of sovereign immunity, subsequently developed and reformulated in more precise terms the theory proposed by H. Lauterpacht. In his view, a foreign State enjoys jurisdictional immunity only for *certain acts dits de puissance publique* which according to him encompass: (i) internal administration (such as expulsion of an alien); (ii) legislative acts (such as nationalisation);
(iii) acts concerning the armed forces of the state; (iv) acts concerning diplomatic activities, and (v) questions concerning public loans contracted abroad by the foreign state. 62

The positive and negative list theory undoubtedly enables a court to accord immunity to a State in the situations enumerated in the positive list or conversely to deny it in the situations not expressly covered by the list. However, the list, which eloquently allows state immunity only to certain puissance publique and not to the acts not covered by it, in ultimate analysis, does not go beyond generating self-fulfilling declarations in the area of sovereign immunity for in many cases the accomplishment of purely governmental acts and their underlying public purpose require the performance of commercial acts as an ancillary to, or in preparation for, the public act. Similarly, the enumeration of acts, which merely gives a new version of distinction between acta jure imperii and acta jure gestionis, as admitted by H. Lauterpacht himself, is unworkable. 63

4.02 Assimilation of foreign and home immunity theory

H. Lauterpacht doubting the feasibility of both the types of state immunity theories absolute and restrictive, puts forward the principle of “assimilation of jurisdictional immunities of foreign states to those
of the domestic state.\textsuperscript{64} According to this view a foreign State should be placed in the same position as the home sovereign with regard to subjection to the adjudicatory jurisdiction of the forum and the legislative provisions and judicial precedent prevailing in the forum state be carried over \textit{en masse} from the domestic to the foreign arena. In other words, a foreign State shall be held accountable before otherwise competent courts in respect of claims put forward against it in the same way in which the domestic state is subject to the law administered by the courts.

The theory of assimilation which enables a court to apply its domestic law rather than to engage itself in the dubious venture of interpreting a variety of foreign precedents to decide upon a claim of sovereign immunity, obviously increases the likelihood of consistent and predictable criteria to adjudicate upon claims of sovereign immunity. It naturally draws some sort of borderline between those situations which do not justify immunity and the rest. The theory, in due course of time, would crystallise a relatively well developed body of domestic jurisprudence emboldening a set of consistent and predictable criteria to make a distinction between \textit{acta jure imperii} and \textit{acta jure gestionis}. Furthermore, the theory, it seems, would enable the municipal courts, which are endowed with jurisdiction to adjudicate over their home governments
in matters regarded by the later as jure gestionis, to precisely settle the immunity claims of foreign states.

Against these ostensible advantages, however, the assimilation theory is, at least, subjected to three important objections. First, the result will be inconsistent among the various nations for sovereign prerogative is not identical in all the nations, it changes from state to state. The restrictive theory of immunity as a principle of international law, therefore, would be devoid of uniform content and of application. Such an approach, would, accordingly, make application of the restrictive theory as a principle of international law more difficult. Secondly, a State may have good substantive reasons for taking different views of the public/private distinction in the domestic and foreign arenas.  

Thirdly, if the internal sovereign subjects himself to the jurisdiction only in acta jure gestionis the problem of distinguishing these from acta jure imperii cannot be avoided but can only be transposed, and assimilation is likely to increase immunity to some fields and decrease it in another.  

Taking clue from the assimilation theory, with a view to minimising effects of these shortcomings, one may venture to propose that immunity to a foreign State be granted when the law of the forum is in full harmony with international law on the particular issue raised.
4.03 Purpose Theory

It is proposed that ‘object’ or ‘purpose’ of the transaction in question should be a decisive criterion for determining whether a particular activity is ‘governmental’ or ‘non-governmental’.67 This test, obviously, probes into motive of the act, i.e. whether it serves a ‘private’ or ‘public’ purpose. It is needless to mention that in the present day politico-social conditions and changed role of a State and its extended powers the ‘purpose’ test would be more protective to a foreign State as majority of the state activities could legitimately be argued and linked with ‘public’ purpose.68 A test based on the purpose of the act, however, will not serve as a decisive criterion for distinguishing acta jure gestionis from acta jure imperii as a State, in principle, always acts as a ‘public’ person for benefit of the community as a whole. In ultimate analysis and in a real sense, therefore, almost every acta jure gestionis are acta jure imperii.69 This test has been rightly criticised as being ‘unsatisfactory’ as it often involves subjective determination of ‘subtle and dangerous’ questions leading to un-uniform results70 and ‘notions of a by-gone century’.71 A critic, commenting upon the test and adopting a pragmatic approach, has rightly said that the reference to purpose not only restates the problem but
also involves classification of acts according to variable criteria of social and economic policy.\textsuperscript{72}

4.04 ‘Nature’, not ‘purpose’ theory

The decisive criterion according to the nature test theory is the juridical nature of the transaction and not its object. It asks whether the act to be characterized is of the kind that an individual could perform, or whether it could be performed only by a State. An act would be ‘private’ and sovereign immunity would be denied if such act could be done by an individual and if an act, on the other hand, could be performed only by a public authority then the act is ‘public’ and immunity, accordingly, be granted.\textsuperscript{73}

It is significant to note that the theory finds its expression in regional instruments; national laws and decisions of municipal courts.

Representatives of Burma, Sri Lanka, India, Indonesia, Iran, Japan, Pakistan, Sudan, Syria and the United Arab Republic, constituting the Asian-African Legal Consultative Committee (AALCC) deliberating upon the question as to whether a foreign State or a state trading organisation be jurisdictional immune for commercial and other activities which do not strictly fall within the ambit of ‘governmental activities’ as traditionally understood, as early as in 1960, with the
exception of Indonesia, were of the opinion that no immunity to a foreign State be granted in respect of its activities which may be called commercial or of a private law nature. The Indonesian delegate, however, maintained that immunity should be granted to all the activities carried by the government of a foreign State irrespective of their nature. The AALCC having taken the view of all the delegates into consideration recommended that a State which enters into transactions of a commercial or private character should not raise a plea of jurisdictional immunity in respect of such transactions and if such a plea is raised it should not deprive the jurisdiction of the domestic courts.74

A review of regional instruments in the American hemisphere and European countries also exhibits preference to nature of an activity and not its purpose in determination of state immunity.

The American Law Institute Draft Restatement of Foreign Relations Law75 has stated as 'the basic rule' of sovereign immunity that:

"Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of a foreign state, but not with respect to claims arising out of activities in the foreign state of the kind that may be carried on by private persons."

The International Law Association (ILA) in 1982 in its Draft Convention on State Immunity76 disentitles a
foreign State from immunity for its commercial activities and mandates a Court to determine commercial character of a transaction by referring to the nature of the act rather than its purpose. Article 1(c), which in the first paragraph defines commercial activity for the purpose of the convention, in its second paragraph, directs a court that: in applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by its purpose." The Inter-American Draft Convention on Jurisdictional Immunity prepared by the Organization of American States and approved by the Inter-American Juridical Committee in 1983, also impliedly prefers the nature test rather than the purpose test for determining commercial activity. Article 3 declares that "a State is granted immunity from jurisdiction for acts performed by virtue of governmental powers". And second part of article 5 insists that: "trade or commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations".

The European Convention on State Immunity whereby the member states of the Council of Europe, taking into account the then prevailing international law tendency restricting the state immunity, desired to establish common rules relating to the scope of immunity
of one member State from the jurisdiction of the courts of another one, functionally gives iminence to the nature test over the purpose test. Article 7, inter alia, declares:

"A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment."

The American FSIA, which reaffirms the restrictive theory of state immunity formulated in the 'Tate Letter' and endeavours to make the application of immunity law more uniform and predictable by relieving the Department of State of the responsibility of determination of such claims and remitting them exclusively to judicial determination, in unmistakable terms mandates a Court to determine commercial character of a state activity by reference to its nature and not by purpose. Section 1603(d) of the Act states as under:

"--- The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose."80

The Committee on the Judiciary, to whom the 1975 Bill (H.R.11315) was referred for recommending necessary
amendments, sketching legislative history of the FSIA, has aptly explained the relevance of the nature test in determination of commercial characteristic of a state activity. It dilates:

"...[T]he fact that goods or services to be procured through a contract are to be used for public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to contract a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function."81

The British SIA also exhibits a functionally similar approach when it does not attach immunity to any transaction or activity into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.82 Further, it is significant to note that one of the categories of the exceptions83 recognised under the SIA is primarily based on the nature of the state activities rather than purpose and the Act makes it clear that the immunities and privileges are, inter alia, applicable to states’ activities done in their public capacity.84

However, after the SIA the 'nature' theory versus 'purpose' theory dichotomy is reflected in I Congresso
del Partido and in an appeal therefrom to the House of Lords. The Court of Appeal while determining whether an act of a foreign State is *jure imperii* entitling it to immunity from jurisdiction or merely *jure gestionis* disentitling it from such immunity relied heavily upon the nature of the act rather than its purpose. Reacting to the argument advanced by the Republic of Cuba, which had interfered with the performance of a contract when the Government in Chile was overthrown and replaced by a new one which the Cuban government found to be politically repugnant in the changed political circumstances, that its decision to prevent the cargoes of sugar being delivered to their Chilean consignees, was a ‘sovereign governmental act’ (*jure imperii*) resulting from a political decision in pursuance of its foreign policy with no commercial interests and it thereby entitled to sovereign immunity, Lord Denning, justifying his observation in *Rahimtula v. Nizam of Hyderabad* that sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly but rather than on the nature of the dispute, reiterated that sovereign immunity depends on the nature of that action and not on the purpose or intent or motive with which it is done. In no unclear terms his Lordship has further categorically observed that when the government of a country enter into an ordinary trading transaction it cannot afterwards be permitted to repudiate it and get
out of its liabilities by saying that it did it out of governmental policy or foreign policy or any other policy. He, after careful review of many authorities from different countries, has said:

"As a means for determining the distinction between acts jure imperii and jure gestionis one should refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity".90

However, Walter L.J. of the Court of Appeal, on the other hand, dissented from Lord Denning to take the view that decision of the Republic of Cuba to prevent the cargoes to deliver to the Chilean consignors was a political act devoid of any commercial interests and thereby it (the Republic of Cuba) was entitled to sovereign immunity. His Lordship, on the basis of quoted and applied dicta from the Rahimtoola and the Victory Transport Inc., cases, emphasized that whether an act of a sovereign State is jure imperii or jure gestionis depends upon whether a foreign State has acted in exercise of its sovereign authority (that is in public law), or like a private person (that is in private law).91

As Lord Denning and Waller L.J. of the Court of Appeal disagreed on the question as to when and on what basis distinction between acta jure gestionis and acta jure imperii be made an appeal, by special leave, was
preferred to the House of Lords. Lord Wilberforce in *Playa Larga v. 1. Congresso del Portido*\(^{92}\) after an instructive review of judicial pronouncements from home and abroad, dealing, in general, with the difficulty in differentiating ‘private’ (*jure gestionis*) acts from ‘public’ (*jure imperii*) by applying the ‘nature’ or ‘purpose’ theory and highlighting particularly the problems viz., “(i) whether it could be said that the relevant contract was concluded for governmental purposes, and (ii) whether it was relevant that governmental motives were advanced for breaching the contract”,\(^{93}\) has approved Lord Denning’s view in the *Trendtex* that a commercial act done for governmental or political reasons does not attract sovereign immunity, and observed:

“I accept that there is support --- for proposition that existence of a governmental purpose or motive will not convert what would otherwise be an act *jure gestionis*, or an act of private law, into one done *jure imperii* ---”\(^{94}\)

Lord Wilberforce, addressing himself to the crucial issue involved in the case as to whether the decision of the Republic of Cuba not to complete unloading of its cargo was ‘governmental’ or ‘public’ or non-governmental or private and referring to the conflicting opinions of Robert Goff J. (of the Queen’s Bench Division who tried the case) and Waller L.J. (of the Court of Appeal, who along with Lord Denning heard the appeal from the

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decision of Robert Goff J. that the act was ‘governmental’ and of Lord Denning that it was not, held that though it was a political decision based on political and non-commercial reasons was not an act jure imperii.95 His Lordship, appreciating Lord Denning’s line of reasoning and taking the view that breach of a private law obligation for political or sovereign reason does not either change its character or immunity from jurisdiction, observed:

"If immunity were to be granted the moment that any decision taken by the trading state were shown to be not commercially, but politically inspired, the restrictive theory would almost cease to have any content --. It is precisely to protect private traders against politically inspired breaches, or wrongs, that the restrictive theory allows states to be brought before a municipal court ---. It is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform".96

Similarly, the Supreme Court of Austria as early as 1961, has observed:

"We must always look at the act itself which is performed by State organs, and not its motive or purpose. --- Whether the act is of a private or sovereign nature must always be deduced from the nature of the legal transaction, viz., the inherent nature of the action taken or of legal relationship which arises".97
The Federal Constitutional Court of the Federal Republic of Germany, in 1963 in a case concerning a claim against Iran, had stated that the distinction between acts *jure imperii* and acts *jure gestionis* could only be based on the nature of the act of the state or of the resulting legal relationship, and not on the motive or purpose of the state activity. The Court in no unclear terms asserted that "the distinction between sovereign and non-sovereign state activities cannot be based on the purpose of the activity of the State, or on a connection of the activity with sovereign functions of the State, since ultimately all or most of activities of a State serve sovereign purposes and functions. Professor Schreuer of the University of Salzburg in his recent lecture series had also said that the state practice of different states evince that the wider context or purpose of the transaction in question had been discarded in favour of type of transaction or the nature of the activity.99

It is also important to note that Sompong Sucharitkul, who was asked by the International Law Commission to work on jurisdictional immunities of states, in his Second Report favouring the 'nature' not 'purpose' test has argued:

The activity or course of conduct or particular act attributable to a foreign State should not be determined by reference to its motivation or purpose.
An act performed for a State is inevitably designed to accomplish a purpose which is in a domain closely associated with the State itself or the public at large. In the ultimate analysis, reference to the purpose or motive of an activity of a foreign Government is therefore not helpful in distinguishing the types of activity which could be regarded as commercial from those which are non-commercial. If it is commercial in nature, the activity can be regarded as a trading or commercial activity. Further reference to the purpose which motivated the activity could serve to obscure its true character. The purpose could best be overlooked in determining whether an activity is commercial or not, especially for the purpose of deciding upon the availability or applicability of State immunity. The objective criterion i.e. the commercial nature of the transaction or the activity, as opposed to the subjective test of purpose, which breeds uncertainties.

Accordingly, initially he, inter alia, proposed that:

“In determining the commercial character of a trading or commercial activity, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than its purpose.”

However, a few critics expressed doubts as to feasibility of the nature theory. According to Hersch Lauterpacht the nature test, which appears to be simple, on analysis, merely postpones the difficulty of making distinction between acts jure imperii and jure gestionis and shifts the focus of difficulty from one conceptual point to another without in any sense resolving the difficulty. To support his viewpoint and
to indirectly demonstrate that the 'nature not purpose' test, indeed, is of little help when a transaction is ultimately and inextricably linked with the performance of a public function, Lauterpacht, argues:

"To what extent is it true to say that contracts made by the state for the purchase of shoes for the army, or of a warship, or of munitions, or of foodstuffs necessary for the maintenance of the national economy are not immune from the jurisdiction for the reason that they are contracts and that an individual can make a contract? For can it not be said that these particular contracts can be made by a state only, and not by individuals? Individuals do not purchase shoes for their armies, they do not buy warships for the use of the state; they are not, as such, responsible for the management of the national economy." 103

The view that the 'nature' of the act rather than its 'purpose', it is submitted, seems more decisive and practicable in determination of sovereign immunity, for the following reasons:

(i) It seems very unconvincing to allow a State which has entered into contract with a foreign private person or a corporation to sue the foreign person or the corporation in its courts for the acts connected with the contract but itself is immuned from suit with respect to the same or similar acts.

(ii) If the purpose of the act were to be decisive, the state involved would always continue the contractual relationship, irrespective of its nature, till it is advantageous to it and would refuse to continue it in

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adverse conditions without attracting any liability. This approach, in ultimate analysis, would come closer to the doctrine of absolute immunity.

(iii) The nature of the act as a criterion can be applied by the courts without insurmountable difficulties and thereby would lead to precise uniformity in application of the restrictive theory of immunity as a principle of international law.

4.05 Nature and Purpose Test

The initial proposal of Sompong Sucharitkul that the commercial character of an activity has to be determined by reference to its nature rather than its purpose was extensively deliberated upon both in the International Law Commission and the Sixth Committee of the General Assembly. During the thirty fourth session a number of members of the Commission had commented upon the question as to the precise meaning of the 'nature of the transaction' and had argued that in the absence of an objective criteria for determining the nature of commercial activity, it would not only cause difficulty in determination of the nature of the activity but also would lead to an arbitrary distinction between commercial and non-commercial activity of a State. And accordingly particularly with a view to protecting interests of the developing countries, it was suggested that trading or commercial activity be
determined by a combination of various criteria. The members, admitting that the nature of the act is a major factor in determining commercial character of a state activity, however, suggested that it should not be the sole yardstick and the purpose of the act should not be totally excluded in formulating a criterion to be employed for distinguishing *acta jure imperii* from *acta jure gestionis*.

Subsequently, the Drafting Committee, with a view to accommodating the interests and views of all the countries with different systems and practice, introduced the following improved interpretative provision for determination of commercial character of an act. The clause, making relevant the purpose test in determination of non-commercial character of the contract, runs as under:

"In determining whether a contract --- reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that state, that purpose is relevant to determining the non-commercial character of the contract."

A plain reading of the draft article, which intends to provide guidance for determining the commercial character of a contract or transaction and to reduce unnecessary controversies or to avoid one sided application of a single test such as the nature of the contract, suggests two tests - nature as well as purpose.
- which are to be applied successively in determination of commercial character of an activity or transaction. It in no ambiguous terms indicates that primarily reference should be made to the nature of the contract or transaction. If it is according to the ‘nature’ test, it is established that a state transaction is non-commercial or governmental in nature, then the contract is non-commercial and there would be no necessity to enquire further as to its purpose. However, if after the application of the nature test the contract appears to be commercial in nature, then it is open to the state to argue that purpose of the transaction should also be taken into account if, in the practice of the state in question, purpose is relevant to determining the non-commercial character of the contract. On the other hand, if, in the practice of the state party to the contract, the purpose of the transaction is not relevant, it should not be permitted to invoke the purpose test to override the commercial nature of the transaction. Many Governments had criticised the draft clause incorporating the purpose test and, after reviewing the prevailing tests in recent national legislations and state practice, felt that the only test to determine commercial character of an activity should be the nature test and not the purpose test. 106
It is significant to note that Maotoo Ogiso, who has succeeded Sompong Sucharitkul as a Special Rapporteur for the topic on jurisdictional immunities of states, recalling the extensive discussion both in the ILC and in the Sixth Committee; preference given to the purpose test by a number of developing countries and phraseology of draft article 3(2) as a result of compromise proposed by Sompong Sucharitkul, fails to see any fundamental difficulty in setting aside the purpose test and leaving only the test of the nature of the contract. However, he apprehends that complete elimination of the purpose test, although theoretically justifiable, might give rise to further difficult discussions on the commercial activity of a states and tests to be employed for its determination. According to him the hybrid criteria referring primarily to the nature of the conduct and also to its purpose by reference to the relevant practice of the state party to the contract, for determining the commercial character of a contract suggested by Sompong Sucharitkul, would ultimately favour the doctrine of absolute immunity. He, with a view to limiting the application of the 'purpose' test only to those cases where the public and non-commercial character of a contract is stipulated in an international agreement or in a written contract itself, has reformulated the relevant original draft article as under:

83
"In determining whether a contract --- is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the states concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account, in determining the non-commercial character of the contract." 108

The draft article as well as the reformulated one opting a distinct hybrid test of nature and purpose, it is submitted, not only dilutes the efficacy of the criterion based on the 'nature' of the act, but also fails to assist a Court called in determining the character of the act in question. Obviously, the hybrid test leads to unpredictable approach and undesirable results when a State, with a view to thwart the legitimate claims of the private party, asserts that the purpose of the contract was public and its system of law relies upon purpose of a contract for determination of commercial character of a contract. As stated earlier in a welfare state almost every contract entered into by a State may ultimately be traced to the so-called 'public purpose' to characterise it as a 'public act' warranting immunity. Such a task, undoubtedly, needs probing into the purpose of the contract, public or private, and the system of law of the state involved in the commercial activity. The International Law Commission, it is submitted, in its endeavour to make a compromise between the nature and purpose theories and
to satisfy the adherents of both the theories, proposes an unpredictable approach. It has failed to formulate a pragmatic and generally acceptable precise criterion for distinguishing *acta jure gestionis* from *acta jure imperii* as it, in ultimate analysis, restates the problem and involves consideration of social and economic policies of a State.

Each of the above discussed theories attempting a distinction between *acta jure imperii* and *acta jure gestionis* on the basis of purpose, nature, nature and purpose of the state activities or enumeration of state activities warranting immunity and no-immunity suffers from some inherent limitations. Absence of precise formulations or standards in these theories (except the positive and negative list) to make such a distinction compelled a commentator to feel that such distinction in modern conditions 'cannot be placed on a sound logical basis' and is 'unworkable'.

V. Foreign Sovereign Immunity and Commercial Activity: Legislative Approach

Emergence of the restrictive theory of sovereign immunity, as indicated in the preceding pages, has resulted, in substantial part, from the fact that modern governments engage in commercial activities on a wider scale and undertake economic activities. If governments or their instrumentalities are to engage in such
activities it is imperative to make them accountable for their actions in the commercial sphere in the same way that private entities are held accountable. It cannot be, obviously, desirable and expected that private parties would depend upon the goodwill of the states or their instrumentalities for redress in case of non-fulfillment of the contractual obligations. This would not only lead to uncertainty, but also deter private parties to deal with states. The restrictive theory of immunity intends to do away with these anomalies and to hold the state accountable for its non-governmental actions. The contemporary state practice reflected in the domestic immunity statutes and national courts' decisions, unmistakably demonstrates acceptance of the restrictive sovereign immunity. Foreign states, their agents or instrumentalities, therefore, are subjected to the jurisdiction of local courts with regard to acts jure gestionis, and, accordingly, actions relating to any conduct of commercial activities exercised by them in another state do not provide them immunity from jurisdiction. The rationale and raison d'être of the restrictive theory of immunity rests on the proposition that a State cannot exploit its position of privilege when it engages itself in act jure gestionis devoid of sovereign power.

Against this background, it is worth noting that recent legislations, international and regional
instruments dealing with jurisdictional immunities of foreign states invariably contain a provision with regard to the exception of trading or commercial transactions. Thus, the FSIA of the U.S., the first enactment attempting codification of sovereign immunity, provides:

"(a) A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

(1) ---

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign states or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States ---." 110

Definition of a commercial activity is set forth as:

"--- either a regular course of commercial conduct or a particular commercial transaction of act ---." 111

The definition of the phrase 'commercial activity carried on in the United States by a foreign State' not only includes commercial activity performed and executed in its entirety in the United States but also a commercial transaction or act having a substantial contact with the United States.112 A careful reading of the provision makes it clear that a foreign State would not be entitled to immunity with respect to a claim based upon a commercial activity if:
(i) the commercial activity is carried on in the United States by the foreign state; or
(ii) an act performed in the United States relates foreign state elsewhere or to a particular commercial transaction conducted or carried out in part elsewhere, and
(iii) an act done outside the territory of the United States in connection with commercial conduct abroad having direct effects within the United States, subject to the legislative jurisdiction of the US under 'effects' principles embodied in the Second Restatement of the Foreign Relations Law of the United States.

The SIA of the United Kingdom, in which, like the FSIA, definition of a commercial activity exception occupies a central place, also does not accord jurisdictional immunity to a foreign State in proceedings relating to its commercial activities. It declares that immunity does not attach to 'a commercial transaction entered into by the state', or in 'an obligation of the state by virtue of a contract (whether commercial transaction or not) falls to be performed wholly or partly in the United Kingdom'. Commercial transaction is defined in section 3 (3) to mean:

"(a) any contract for the supply of goods or services;"
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligations; and

(c) any other transaction or activity, (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

It is of interest to note that all but one of the state immunity Acts\textsuperscript{114} passed subsequent to the British SIA, not only disallow jurisdictional immunity to a foreign State in matters relating to commercial activity but also adopt \textit{verbatim et literatim} the English definition of commercial transaction.\textsuperscript{115}

Regional instruments prevailing in Europe, American hemisphere and Asian-African countries, as well as, international instruments in the area of sovereign immunity also exhibit similar approach to commercial activity \textit{vis-à-vis} sovereign immunity. A mention may be made of a few of such leading instruments. The European Convention on Sovereign Immunity\textsuperscript{116} disentitles a Contracting State from jurisdictional immunity in another Contracting State if that state, itself or through its agency or instrumentality, engages, in the same manner as a private person, in industrial, commercial or financial activity.\textsuperscript{117} The Inter American Draft Convention,\textsuperscript{118} in terms of wide amplitude, also directs a State not to invoke immunity
in claims relating to its commercial activities undertaken in the foreign state. And commercial activities of a State, according to the Draft Convention, are to be construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.\textsuperscript{119} However, the ILA Draft Convention on State Immunity proposed by the International Law Association\textsuperscript{120} during the same year, exhibits a different approach to the commercial activity exception to jurisdictional immunity and its definition. It, like the Inter-American Draft Convention \textit{inter alia}, does not accord jurisdictional immunity to a foreign State in cases arising out of a commercial activity carried on by it or in an obligation arising out of a contract, commercial or non-commercial, other than a contract of employment,\textsuperscript{121} but while defining the term "commercial activity" for the immunity purposes it attempts to take a combined approach reflected in the British SIA and the American FSIA. It, like the FSIA, defines the term "commercial activity" as meaning of commercial conduct or a particular commercial transaction or act including (like the SIA) "any activity" or transaction into which a foreign State enters or in which it engages otherwise than the exercise of sovereign authority, particularly, (a) arrangements for the supply of goods or services and (b) any financial transaction involving lending or borrowing or guaranteeing financial obligations.\textsuperscript{122}
Similarly, the Asian-African Legal Consultative Committee (AALCC), composed of representatives of Burma, Sri Lanka, India, Indonesia, Iraq, Japan, Pakistan, Sudan, Syria and the United Arab Republic, which, in its third session, considered the question as to jurisdictional immunity of a foreign State in respect of liabilities arising out of commercial transactions other than the ‘governmental activities’, recommended that a State which enters into transactions of a commercial or private character should not raise the plea of sovereign immunity if sued in courts of a foreign State in respect of such transactions and even if raised it should not be allowed.\textsuperscript{123}

The International Law Commission (ILC) in its recently adopted Draft Articles on Jurisdictional Immunities of States and their Property,\textsuperscript{124} in somewhat different way but in essence, recognizes the commercial activity as an instance of non-immunity. Draft article 11, which stipulates the commercial activity exception to the state immunity, \textit{inter alia}, reads as under:

“If a State enters into a commercial contract with a foreign natural or judicial person --- the state is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.”
And article 2 of the ILC Draft Articles defines 'commercial contract' as meaning:

"(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."

It also makes clear that in determining commercial contract for the purpose of no-immunity primarily nature of the contract be looked into and purpose of the contract be also considered if practice of the state requires it as a relevant factor in such a determination.125

A careful reading of the immunity exception based on commercial activity of a foreign State in the FSIA, SIA and other statutes modeled on the SIA and, regional arrangements and international instruments which deny a claim of sovereign immunity to a foreign State engaged in commercial activity, reveal a set of significant differences in, and diverse approaches to, the treatment of the problem of sovereign immunity vis-a-vis a transnational commercial activity carried by itself or through its agency or instrumentality.
A simple reading of the definitions of commercial activity and the commercial activity as an instance of non-immunity embodied in the FSIA and the SIA reveals significant differences. First, scope of these provisions is not the same. The FSIA only mentions that immunity does not extend to commercial activities of a State, and it does not incorporate a provision dealing with the immunity of a state in proceedings arising out of contractual obligations. The SIA, on the other hand, extends its provisions to the proceedings arising from contractual disputes involving commercial activities. Secondly, the American Act, which intends to apply to activities of foreign states taking place or having direct effect in the United States, requires jurisdictional connecting factors. The British Immunity Act, on the other hand, does not require such territorial connection relating to commercial activities or contractual obligations. Similarly, it contains no ‘direct effects’ limitation, but extends to ‘any commercial transaction entered into by the state’. As a result states might be subject to jurisdiction before U.K. courts concerning activities carried on wholly outside the United Kingdom and possibly not affecting property in the United Kingdom. Thirdly, the FSIA definition amounts to no more than a general guideline to the courts to look to the nature of the course of conduct or particular transaction or act.
rather than to its purpose, in determining whether it amounts to a commercial activity. While the SIA, in
categoric terms solves the issue of characterization in
respect of two of the most frequent transnational
commercial activities of foreign states, namely, those
arising out of contracts for the supply of goods and
services and those relating to loans or similar
financial transactions. Even the 'catch all' provision
embracing other activities - commercial, industrial,
financial, professional or other similar characters -
engaged in by a State 'otherwise than in the exercise of
its sovereign authority' which requires determination by
courts, affords them some guidance by listing the type
of activities most likely to fall within the commercial
category.

Further, a comparative analysis of the provisions
dealing with the commercial activity exception to
sovereign immunity of national legislations, and
regional and international instruments, which exhibit a
basic agreement that trade activity of state does not
entitle jurisdictional immunity in the forum state,
broadly indicates two approaches regarding definition
and scope of commercial transactions as an exception to
state immunity which occupies a central place in the
doctrine of restrictive sovereign immunity. The FSIA
and the State Immunity Act of Canada accord some
flexibility in definition of a commercial transaction of
a foreign State. While the SIA and the statutes modeled on it, the European Convention on State Immunity, the Inter-American and the ILA Draft Conventions inject greater predictability and certainty in definitional clauses of commercial transaction by stipulating broad categories/classes of commercial activities of a foreign State. But whichever approach is adopted in the absence of direct legislative criteria, judicial inquiry into determination of commerciality of a state activity has to base on one or the other decisive criterion. The FSIA and the SIA of Canada, expressly, and the British SIA, State Immunity Ordinance of Pakistan; the Inter-American Draft Convention and, the ILA Draft Convention, which incorporate activities of non-governmental nature (other than the sovereign authority) and ordinary trade operations in its definitional clause, impliedly, propose determination of commerciality by looking into 'nature' and 'not purpose' of the activity. While the ILC Draft on Jurisdictional Immunity suggests a criterion combining nature as well as purpose of a state activity for determination of its commercial character. The European Convention on State Immunity and the American Law Institute's Restatement, on the other hand, suggest that the manner in which, a private or otherwise, any industrial, commercial or financial activity is performed, be taken into account for determination of commerciality of an act. The key phrases such as, nature and purpose, acts done like a
private person and ordinary trade activities, do vest a
court with judicial discretion not only in determination
of commerciality of an act but also in opting for
decisive criteria to adjudicate upon the characteristic
of a state activity. Influence of individual ideology
and subjectivity of a judge in such a judicial inquiry
cannot be ruled out. Most significantly the American
Congress recognising the drawbacks of such judicial
discretion and explicitly showing reluctance to attempt
an excessively precise definition of the term
‘commercial activity’ even though it was practicable,
left ‘the courts to have a good deal of latitude in
determining what is a commercial activity’.129 Monroe
Leigh, the then Legal Adviser to the Department of
State, in no uncertain terms, testified that ‘we
probably could not draft legislation which would
satisfactorily delineate that line of demarcation
between commercial and governmental. We therefore
thought it was the better part of valor to recognize our
inability to do that definitively and to have it to the
courts with very modest guidance.’130

Though the FSIA, in comparison to the British SIA
and the Acts modeled on it, provides greater flexibility
and wider judicial discretion in determination of
commercial activity, the House Report makes mention of a
few other general criteria, other than the nature and
not purpose of the activity relating to commerciality.
The House Report, discussing the scope and contents of the term commercial activity as defined in sec. 1603 (c), assumes commerciality of an act if that activity could customarily be carried on for profit. It also treats a conduct as commercial if it could be undertaken by a private person.

The preceding discussion, in ultimate analysis, exhibits two distinct patterns of commercial behaviour so far adopted in the domestic statutes, regional and international instruments. They are: (1) activities customarily carried on for profit, and (2) conduct in which a private person might engage (including non-governmental activities and activities done in other than the sovereign authority).

However, it can be argued that neither profit motive nor the private conduct criterion should be a sole determinative factor because the doctrine of restrictive theory of sovereign immunity rests on the central premise that those activities of a foreign State which can ordinarily be 'performed by a private individual' are private in character and they do not enjoy jurisdictional immunity. An activity customarily carried on for profit 'would be of a kind normally engaged in by private persons and would accordingly be considered commercial.'
With a view to avoiding uncertainty and ununiformity in application of these criteria and question begging decisions by national courts, a choice-of-custom approach is suggested. The proposed approach is recommended to be made applicable, only to non-contractual claims between a State and a private party particularly when international consensus with respect to the commerciality of a given activity or mutual agreement between the parties as to commerciality of the act is not clear. The approach pleads that a court while determining commerciality should select the norms of the state bearing 'the most significant relationship' to the issue of commercial character. And if the defendant state's activity has taken place in a third state, a court should first apply the choice-of-custom analysis by reference to the defendant state's own socio-economic standards in order to determine whether they conflict with those of the forum. If this preliminary step results in a strong finding of commerciality, the inquiry need not proceed further. But if the standards of the forum and the defendant states conflict, the approach suggests, the relative interests of the forum state, defendant state and private plaintiff, as well as the policies underlying the doctrine of restrictive sovereign immunity, indicate the choice of appropriate custom. The suggested approach also recommends a court to consider other
objective criteria in determination of commerciality of an act. They are: profitability of the act; enjoyment or no enjoyment of sovereign immunity to similar act in the state with which the act has most significant relationship; the forum of business chosen by the foreign state; percentage of total governmental revenue that the defendant state derives from the activity; role of the state as a market regulator or as a market participant and degree of international consensus not earlier determined to be conclusive on commerciality.\textsuperscript{134}

The suggested choice-of-custom approach, would not only help courts in determining commerciality of a given act but would also contribute to predictability of the decisions and to the progressive evolution of foreign sovereign immunity law. Further, the choice of law custom approach, unlike the FSIA,\textsuperscript{135} the British SIA and other regional and international instruments on sovereign immunity which do not offer any guidance on the question as to whether which standards, internal law - of the forum or of the defendant state - or international, be applied in determination of commerciality of a given act, partially eliminates the problem of application of the standards in judicial inquiry of commerciality of an act. It is important to note that the recently adopted ILC Draft Articles on Jurisdictional Immunity of States, more or less, indicate similar approach to the standards or norms to
be applied in deciding commercial characteristic of an act for the immunity purposes. Draft article 3 (2) directs a court to take into consideration purpose of the contract if practice of the defendant state treats it as relevant factor in determination of non-commercial character of a state activity.

VI. Sovereign Immunity and Transnational Arbitration

6.01 Two aspects of sovereign immunity: immunity from jurisdiction and immunity from execution:

The customary rules of international law, international instruments, national laws and judicial pronouncements of domestic courts recognise two aspects of sovereign immunity, namely, immunity from jurisdiction and immunity from execution. Immunity of a foreign State from jurisdiction as indicated earlier, which is applicable only with respect to acts jure imperii, in ultimate analysis, implies that upon proper motion on behalf of the state concerned, a court of a territorial state declares itself incompetent to pass upon the merits of action brought against a former state, its agency or instrumentally. Immunity from execution, on the other hand, indicates that no action, judicial or executive, can be levied against the properties of that state as a conservatory or executory measure. It renders a court unable to pass an order for attachment or seizure of goods or property belonging to
a foreign State in satisfaction of a decree or as a measure of attachment before judgment. The problem of execution, obviously, arises only when the foreign state possesses property within the jurisdiction of a territorial state.

One may convincingly argue that immunity from execution can be equated with, and is correlative of, immunity from jurisdiction. Jurisdiction of a State for immunity purposes, it may be argued, is precisely a judicial power to determine mutual rights and obligations according to the relevant law. Presumably, therefore, adjudicatory jurisdiction carries with it the power to enforce any resulting judgment. 136

Similarly, one may, with equal force and consistency argue that jurisdictional immunity differs from immunity from execution and, therefore, grant of immunity from jurisdiction does not ipso facto entitle the foreign state to the immunity from execution. A scholar has rightly highlighted a couple of dangers in simply equating jurisdiction and execution immunities. Prominent among them are: special rules immunizing from seizure certain classes of foreign state property—especially certain diplomatic and consular property, and State warships and public ships assimilated to warships—are not available in the context of jurisdictional immunity. Similarly, many of the techniques available in classifying State transactions into acta jure
acta jure imperii for jurisdictional purposes are not available in the context of execution. In execution proceedings more emphasis is generally given on the fact whether the property in question was "in use" or "intended for use" for commercial purposes. An execution upon a judgment is a much more serious measure than the pronouncement of a judgment, because it might prove serious diplomatic complications and thus may endanger international relations. And there may be certain contingencies in which seizure of property or the assets of the foreign state might cause friction, or raise issues likely to disturb in a serious way the friendly relations with the state concerned.

However, national statutes, trade agreements and treaties and international instruments in vogue, do take the position that waiver of immunity from jurisdiction does not necessarily imply waiver of immunity from execution. They do not accord absolute immunity in execution against property of a foreign State. These instruments, accordingly, inter alia, do not allow a State immunity in execution of judgment or an arbitral award against property of a foreign State "used" or "intended to be used" for commercial purposes. For example, the American FSIA, which provides extensive exceptions to the immunity from attachment and execution of property of a foreign State, proclaims
that states are not immune from jurisdiction of foreign states insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.\textsuperscript{142} It also does not exempt state property actually used for commercial activity from execution upon which the claim is based\textsuperscript{143} and any property of a foreign state agency or instrumentality engaged in commercial activity.\textsuperscript{144} It may be noted that the FSIA distinguishes between execution against property of a foreign State and execution against property of an agency or instrumentality of a foreign State. Unlike execution against property of a foreign State, execution against property of a foreign agency does not require that the property be used for commercial purposes that relate to the claim. If the agency or instrumentality is engaged in a commercial activity in the United States, the plaintiff may obtain an attachment in aid of execution or execution against any property, commercial and non-commercial, of the agency or instrumentality.\textsuperscript{145} Similarly, the British SIA provides that a State is not immune in respect of proceedings relating to commercial transactions entered by it\textsuperscript{146} and also in respect of proceedings relating to property "used" or "intended to be used" for commercial purposes. It also states that a State should not be given relief by way of injunction or
order for specific performance or for the recovery of land or other property. It is interesting to note that originally the SIA Bill, in tune with the European Convention on Sovereign Immunities, provided for a general immunity from execution except in actions in rem in respect of commercial ships and their cargoes. But in response to severe criticisms by Lord Denning and Wilberforce against the approach favouring absolute immunity from execution a set of amendments were introduced to substantially restrict jurisdictional immunity and immunity from execution. And accordingly, the SIA allows execution against state commercial property to satisfy any final judgment in respect of which the state was not immune. Unlike the FSIA of the U.S., there is no requirement that the claims must arise out of the use of that property. It is worth noting that similar provisions are incorporated in legislations following the British model. The position is not different even in the countries where there is no legislation specifically defining the status of property of a foreign State in relation to execution. Similarly, prevailing international instruments also do not, inter alia, allow state immunity in execution of judgment or an arbitral award against property of a foreign State ‘used or intended to be used for commercial purposes’.  

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6.02 Waiver of Immunity

It is a well accepted proposition that immunity of a State, either from jurisdiction or from execution, is a privilege accorded to it and one state cannot exercise jurisdiction over another except with the latter’s consent. A State may, expressly or implicitly, waive these privileges and voluntarily submit itself to jurisdiction of a court in another state and may also allow execution of consequential judgments against its property. Not only international law but also all the national immunity statutes and regional as well as international instruments on sovereign immunity in vogue, recognise that state immunity, like any other immunity, can be waived by the beneficiary and if a State has waived its immunity it places itself, its agents and other instrumentalities, into a situation equal to that of nationals of the other state as far as legal responsibility is concerned.

Such consent of a State may be either express or implied authorising another state to exercise jurisdiction over it. Such a view finds its expression in the doctrine of international law, national immunity statutes and practice of states. However, all the instruments do not reveal uniform pattern of express and implied waiver. Some of them merely recognise the principle of waiver of immunity, while others
comparatively, elaborately enumerate the situations amounting to express and implied waiver of immunity. For example, the American FSIA simply reiterates the well accepted principle of waiver of immunity that a foreign State is not immune from jurisdiction of the courts in US in a case in which it either explicitly or implicitly has waived its immunity.\textsuperscript{155} The SIA of the United Kingdom, which also disentitles a State for immunity when it has submitted to the jurisdiction of courts in the UK, on the other hand, though in a restricted manner, gives elaborate enumeration of the situations of express and implied waiver of immunity. A State, according to it, can be said to have waived its immunity if it has submitted to the jurisdiction of a court. And a State can submit either by a prior written agreement or after the dispute giving rise to the proceedings has arisen. And the term ‘written agreement’ is defined to include ‘a treaty, convention or other international agreement’.\textsuperscript{156} A State is also deemed to have submitted to the courts in England when it institutes proceedings or intervenes or takes steps in the proceedings in England.\textsuperscript{157}

The European Convention on State Immunity, though comparatively in more elaborate manner declares that a State cannot claim immunity from the jurisdiction of a court of another state if it has submitted to the jurisdiction of that court either by international
agreement, by an express term contained in writing or by an express consent given after a dispute between the parties has arisen.\textsuperscript{158}

The ILA Draft Convention on State Immunity, which like other instruments recognise express and implied waiver of immunity, enumerates the situations of express and implied waiver of immunity. An express waiver of jurisdictional immunity, according to it, be made, inter alia, either by : unilateral declaration; or international agreement, or a provision in a contract or an explicit agreement. An implied waiver, on the other hand, can be made by participating in a tribunal of the forum state, subject to a few exceptions, or in agreement to arbitrate current or future dispute.\textsuperscript{159}

Recently, provisionally adopted the ILC Draft Articles on Jurisdictional Immunities of States also reveal identical approach to express and implied waiver of immunity. Draft article 8, which is designed to prevent a State from pleading immunity with respect to matters "expressly consented to the exercise of jurisdiction by the forum State, reads:

"A state cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter :
(a) by international agreement,
(b) in a written contract, or
(c) by a declaration before the court in a specified case".
While draft article 9, which asserts the generally recognised principle that a State cannot invoke immunity in an action which it has itself initiated or in which it has intervened in order to obtain a decision on the merits, presumes that a State waives its immunity when it institutes that proceedings, or intervenes in that proceedings or takes any other step relating to the merits thereof.

Thus, to summarise, express consent for jurisdiction, generally, may be given either by unilateral declaration, or international agreement or a written contract, or an explicit agreement to that effect, or declaration before the court. And a court may also read such a consent when it participates in or intervenes in proceedings before it. It is, therefore, not difficult for a court to read express consent reflected in the above mentioned devices through which it is expressed. However, a court may sometimes find it difficult to read an implied consent for its jurisdiction when it is not clear as to whether a State has or has not submitted to the jurisdiction of a court.

However, a few statutes do also provide additional instances of implied immunity. One of the provisions having bearing on the present discussion is implied waiver by agreement to arbitrate. Against the
background of increasing role of a State or its agency or instrumentality in contemporary international trade and commerce and frequent resort to commercial arbitration as a means of dispute resolution it becomes imperative to give due consideration to the subject of implied waiver of immunity through arbitration clause and to its scope.

6.03 Waiver of Sovereign Immunity by Agreement to Arbitrate

6.03.1 Arbitral tribunal and sovereign immunity: Some reflections

Arbitration proceedings, unlike judicial proceedings, depend totally on consent of the parties. A party can never be brought before an arbitration tribunal without its consent. Without an arbitration agreement or a clause in an agreement agreeing to submit, present or future disputes to arbitration, the arbitrator has no jurisdiction, no power and the consequential award has no binding effect. The institution of arbitration, then, derives its force from the agreement of the parties. The undertaking to arbitrate involves three major commitments: (a) an immediate irrevocable obligation to refer the dispute to arbitration, (b) an obligation to settle the dispute by means of arbitration in preference and prior to resort to any other type of legal proceedings, and (c) an
obligation to honour the resultant award. Such an undertaking to arbitrate, current and future differences and disputes through arbitral settlement between more than two private parties or between a private party and a State or its entity, in ultimate analysis, emerges as an exception to the general compulsory jurisdiction, *ratione personae* as well as *ratione materiae*, of a local competent court which is otherwise entitled to exercise. In other words, arbitration provides an effective alternate method of pacific settlement of legal disputes and differences, which is distinguishable from judicial settlement as a separate and different method of dispute settlement.

However, a closer examination of procedures available in domestic laws of states reveals the closest connection between arbitration and judicial settlement. In certain areas the operation of one is inextricably linked with the other. Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement an arbitral proceedings is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order. It is further significant to note that municipal laws and domestic courts not only provide procedures of varying effectiveness to enforce the obligations arising out of undertaking to arbitrate, but also play a supportive role in resolution of differences or disputes through
arbitration. A court generally directs back to the arbitration a party to a valid arbitration agreement who is not willing to arbitrate. It also gives effect to the arbitration agreement by staying local judicial proceedings. Similar remedy may generally be made available to compel a party who, with a view to frustrating obligation of arbitration in disregard of the arbitration agreement, seeks to commence legal proceedings in relation to the arbitrable issues to carry out the agreed arbitration to settle the dispute by means of arbitration in preference and prior to resort to any other type of legal proceedings. Finally, when the award is made a court converts the arbitral award into a judgment to enable the winning party to obtain its recognition and enforcement.

However, the above mentioned connotations of undertaking to arbitrate between two private parties and the judicial help in complying with the resulting obligations have different ramifications for a State when it engages in commercial activities and undertakes to arbitrate with a private individual. Presence of a State in arbitral process and its special position conforming on it, unlike a private party, a set of peculiar rights as a litigant certainly have important implications not only on the arbitral process but also on its consequences. One of such pertinent privileges is the plea of sovereign immunity. It is not only a
source of dilatory tactics but also influences the
decision to have recourse to arbitration. It directly
concerns whenever a local court's aid is required to
back up the arbitration, whether by provisional remedies
before or during arbitration, or by review or
enforcement of the award after the arbitration is
completed. Thus, a State may raise immunity from suit
as a bar to the enforcement of the arbitration agreement
or to the proceedings instituted for the recognition or
confirmation of an award. Similarly, the state involved
may plead immunity from execution to object to measures
of execution against its property either in the form of
provisional measures before the award is rendered or in
the form of procedures intended to secure enforcement of
the award after it is rendered. Nevertheless, the
contemporary world trade and transnational commerce
reveals numerous agreements providing for arbitral
settlement of disputes arising out of contracts between
foreign sovereigns and private parties.

Therefore, when a State agrees to submit a
dispute or difference to arbitration, either in advance
in a written agreement or on ad hoc basis, it becomes
interesting to examine the extent to which that
consent or agreement to submit to arbitration, in the
absence of express waiver of immunity, constitute an
exception to the application of state immunity and its
eventual consequences on the arbitral process.
Before delving into these questions it is pertinent to deal with a few threshold conceptual questions. The immediate effect of the rule of immunity is that courts and authorities of one state cannot, even within their own territory, take action against organs or representatives of another state or its property, at least as long as the activities of that other state are confined to *acta jure imperii*. The doctrine of sovereign immunity, therefore, applies only in the relations between courts and other authorities on one side and another state, its representatives or property on the other side. It, in the absence of its waiver, may operate as a bar to the exercise of jurisdiction of competent courts or prevent enforcement measures. At this juncture it is important to recall the bases and status of courts and international arbitral tribunals. A municipal court is constituted by a State and is always backed by the state authority. Its jurisdiction, procedure, powers and authority rest in its national law. It also has certain coercive measures to implement its decisions and orders. An international arbitral tribunal, on the other hand, is constituted by consent of the parties to a valid arbitration agreement. It derives its jurisdiction, procedure, powers and authority from the agreement. It also does not have coercive measures to implement its awards or determinations. Therefore, arbitral tribunals
do not engage in any exercise of sovereign power and do not represent any state.

A set of preliminary conceptual questions arising out of the foregoing paragraph cannot be easily overlooked. They are: can a State successfully invoke the plea of sovereign immunity to bar jurisdiction of an agreed arbitral tribunal despite the existence of a valid arbitration agreement?; if such a plea is raised, is the arbitral tribunal bound to apply the prevailing immunity rules, international or national, in deciding the immunity claim? and does refusal on part of the arbitral tribunal to accept the plea of immunity make the consequential award either void or challengeable because of such refusal?

During the recent past a few eminent international arbitral tribunals constituted under the International Chambers of Commerce (ICC) rules were confronted with the question as to whether a State or its representative, which is a party to an arbitration agreement, can rely upon the plea of sovereign immunity to bar jurisdiction of an arbitral tribunal to enable them to adjudicate upon the subject matter of the disputes brought before them. These arbitral tribunals have unequivocally, though for different reasons, given an unqualified answer that such a defence is not available to a State or its representative in an international arbitration in which it is a party by
virtue of having entered into a valid and effective arbitration agreement. These arbitral awards support the view that a sovereign state cannot successfully claim immunity from the jurisdiction of arbitrators to whose jurisdiction it is otherwise subject to pursuant to a valid arbitration agreement. For example, the sole arbitrator in Solel Boneh International Ltd (Israel) and Water Resources Development International (Israel) v. The Republic of Uganda and National Housing and Construction Corporation of Uganda,160 before whom, inter alia, the plea of sovereign immunity to bar the jurisdiction of the arbitral tribunal was raised, held that his authority rested upon an agreement between the parties to the dispute and stressed that his position was wholly independent in relation to the courts and authorities of the state (Sweden). Rejecting the plea of sovereign immunity made by the Republic of Uganda, he rightly observed:

"Sovereign immunity may operate as a bar to the exercise of jurisdiction or prevent enforcement measures but does not per se interfere with the legal relationship between the parties as defined in a contract or otherwise. --- As arbitrator I am myself no representative or organ of any state. My authority as arbitrator rests upon an agreement between the parties to the dispute and by my activities I do not, as state judges or other state representatives do, engage the responsibility of the state (of Sweden). Furthermore, the courts and other authorities (of Sweden) can in no way interfere with my activities as
Arbitrator, neither direct me to do anything which I think I should not do or to direct me to abstain from doing anything which I think I should do. --- I do not consider the doctrine of immunity to have any application whatsoever in arbitration proceedings which are conducted independently from the local courts ---"

Similarly, an arbitral tribunal composed of Professor Georgio Bernini, Mr. Mark Littman Q.C. and Mr. Aly H. Elghalit in *SPP (Middle East) and Southern Pacific Properties Ltd v. Hong Kong v. Arab Republic of Egypt* and *EGOTH*, has stressed the view point that in the absence of an express waiver of immunity, a submission by a State to arbitration amounts to an implicit waiver of immunity and that a State party to an arbitration agreement is precluded from asserting its immunity to frustrate the purpose of the agreement. The tribunal negating the plea of sovereign immunity of the Arab Republic of Egypt to justify its course of action, which would otherwise have amounted to a breach of the contract, and reacting the plea that the general principles of international law are the ultimate yardstick for the adjudication of the claims of sovereign immunity, has argued:

"The issue is whether submission to international arbitration by states and public entities should be regarded as an implicit waiver of immunity thus preventing concurrent application of other international or municipal rules granting sovereign immunity. --- It would be indeed frustrating to recognise full force and effect of general principles
of international law aimed at protecting foreign investors and then admit that a state may, before an arbitral tribunal, rely upon domestic or international principles granting sovereign immunity as an excuse to contractual breaches.\textsuperscript{162}

The view that an arbitration agreement constitutes an implicit waiver of sovereign immunity was not only accepted but also relied upon by another imminent tribunal in \textit{Westland Helicopter Ltd. v. Arab Organisation for Industrialization, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Co.}\textsuperscript{163} by rejecting the plea of sovereign immunity before the arbitral tribunal. The tribunal relied upon the view accepted in Switzerland, as elsewhere, that the signing of an arbitration clause implies the waiver of immunity. The viewpoint pertaining to state immunity in the context of arbitration proceedings has also received strong support in Sweden. The Stockholm Chamber of Commerce, dilating upon the query ‘may sovereign immunity be pleaded before the arbitral tribunals?’, eloquently and convincingly argues that state immunity is based on the concept of sovereignty enabling a sovereign not to subject without its approval to the jurisdiction and exercise of power of the courts and authorities of another sovereign. Arbitrators (in Sweden) who derive their authority from the arbitration agreement are not considered to be engaged in any exercise of sovereign power, and they therefore do not
represent the (Swedish) state. Emphasizing the generally accepted view in Sweden that a sovereign state may not claim immunity from the jurisdiction of arbitrators sitting in Sweden, it advises the arbitrators to reject the plea of sovereign immunity if a sovereign party, after having entered into an agreement providing for arbitration, pleads immunity before a Swedish arbitral tribunal. It also feels that such an award will not be either void or challengeable because of such refusal. 164

A similar line of argument is also pursued in the 1978 Course of the Hague Academy of International Law by Mr. Riccardo Luzzatto. He, pointing out that the doctrine of sovereign immunity has been frequently invoked by state with a view to getting rid either of the obligation to arbitrate or of the duty to execute the award, felt that an agreement to arbitrate constitutes an implicit waiver and that therefore international or municipal rules operating sovereign immunity cannot be made applicable. 165 Recently, one of the renowned scholars in the area of international commercial arbitration has also rightly argued that if consent to arbitration is not concerned with the removal of any bar of state immunity before the arbitration tribunal it is difficult to extend it by implication to waiver of that bar before local courts. 166
Above mentioned approach of the arbitrators constituting international arbitral tribunals and opinions of renowned scholars disallowing the plea of sovereign immunity to bar jurisdiction of agreed international arbitral tribunals goes well with the rationale and raison detre of the peaceful resolution of disputes through arbitration and with the fundamental notions of the international arbitral process. It is needless to mention that the basic object of an arbitration clause is to create a binding legal contractual obligation among the parties to resort to arbitration for peaceful settlement of disputes. Therefore, recognition by an arbitral tribunal of the plea of sovereign immunity of a State or its entity would result in avoidance of its arbitral obligations with a private individual or a corporation according to its discretionary approval. It would not only enable the state (or its entity) to avoid arbitration as a method of resolution mechanism when it apprehends that it would be detrimental to its interests but also make the availability of arbitration uncertain and ununiform. Such a result would certainly lead to violation of elementary principles of justice by making the parties procedurally unequal. Approach of the arbitrators and scholars, therefore, is proper and appreciative.

The foregoing discussion unequivocally negating the first two formulated preliminary questions by
asserting that a foreign State which has entered into a valid arbitration agreement with a private party, cannot invoke the plea of sovereign immunity before an agreed international arbitral tribunal to bar its jurisdiction and the arbitral tribunal is not bound to rely upon the prevailing international as well as national rules pertaining to state immunity to adjudicate the claim of sovereign immunity and such a refusal does not furnish any additional ground to assail the award in a court of law, in ultimate analysis, also answers the last question as to whether submission of a state to an arbitration goes against the spirit of the principles of independence, equality and dignity of states following indirectly from the maxim *par in parem non habet imperium*, in the negative.

8.03.2 Waiver of sovereign immunity by agreement to arbitrate:

Against the background of the analysis of a set of preliminary threshold conceptual questions, let us now ponder upon the basic question as to when and to what extent an arbitration agreement can be construed as a waiver of sovereign immunity. The question, to put it in the proper perspective, involves consideration of three pertinent questions: does the inclusion of an arbitration clause in an agreement to which a sovereign state is a party constitute implied waiver of immunity
though nothing is expressly mentioned about it?; does the implied waiver of immunity through an arbitration clause extend to auxiliary court proceedings and to recognition and enforcement of the eventual arbitral award? and, does an arbitration clause irrevocably waive immunity enabling a state to resile from its contractual commitment?

National legislations, international as well as regional conventions and international opinions, generally, assert that once a State agrees in a written instrument to submit to arbitration disputes which have arisen or may arise between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral processes from its initiation to judicial confirmation and enforcement of the arbitral awards. The assertion, it seems, is based on the viewpoint that consent to a commercial arbitration implies consent to all the natural and logical consequences of the commercial arbitration contemplated. And it may, therefore, be said that consent to arbitration by a State entails consent to the exercise of supervisory jurisdiction by a court of another state and implementation of the arbitral agreement. Submission to a commercial arbitration, therefore, 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 merely incidental to the obligation to arbitration undertaken by a State that a court of another state, which is otherwise competent, can exercise its supervisory jurisdiction in connection with the arbitration agreement.

6.03.2 **Does an arbitration clause constitute an implied waiver of sovereign immunity?**

Decisions of international arbitral tribunals raise treaty and statutory provisions embodied in the European Convention, the ILC Draft Articles, the British SIA, the American FSIA and other State Immunity Statutes prevailing in Europe and the Commonwealth countries, and pronouncements of domestic courts unmistakably, concur with the view that a State party to an arbitration agreement is precluded from asserting its immunity in order to frustrate (or at least to resort to dilatory tactics if not altogether frustrate) the purpose of the arbitration agreement and the arbitral processes.

Treaties and national legislations in the field of jurisdictional immunities or having bearing on it also treat submission of current or future disputes to arbitration, through either a separate arbitration
agreement or an arbitration clause incorporated in a contract, as implicit waiver of state immunity.

As early as in 1923 the Protocol on Arbitration Clauses (hereinafter referred to as the Geneva Protocol)\(^{168}\), prepared under the aegis of the League of Nations, impliedly equating an arbitration clause to implicit waiver of immunity, declares:

"Each of the Contracting States recognises the validity of an agreement relating to existing or future differences between parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matter or to any matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."\(^{169}\)

The same viewpoint is more eloquently pursued in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration (hereinafter the New York Convention)\(^{170}\). Article II runs as under:

"(1) Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration."
(2) The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."

Clause (3) of the article, which mandates a Court not to seize of an action in a matter agreed between the parties and to refer the matter to the parties to arbitration, makes the waiver provision more effective and compels a State to resolve the dispute through the agreed arbitration. These clauses, in ultimate analysis, mandate a state party to comply with the obligations arising out of the arbitral agreement without resorting to any dilatory tactics and pleas including the plea of sovereign immunity.

Article 20, captioned 'effects of an arbitration agreement', of the ILC Draft Articles on Jurisdictional Immunities of States, adopted in 1986 by the International Law Commission (ILC), is more eloquently premised on the conception that submission of a foreign State to commercial arbitration implies consent to all the natural and logical consequences of the contemplated arbitral process. It, accordingly, regards consent of a State to arbitration as its implied consent to the supervisory jurisdiction of a Court of another state which is otherwise competent to determine questions connected with the arbitration agreement, such as the validity of obligation to arbitrate, the interpretation
and validity of the arbitration clause or agreement, the arbitration procedure and the setting aside of the arbitral award. An explanatory note appended to the draft article by Sompong Sucharitkul further makes clear these consequences of an arbitration agreement when it says:

"The exception set out in article 20 --- relates to the 'effect of an arbitration agreement' and is, as such, confined to the direct consequences of an expression of consent to submit to arbitration differences relating to commercial contracts or to civil or commercial matters." 171

The draft article unmistakably tells that a foreign State disqualifies itself to raise the plea of sovereign immunity before a competent court of another state, which otherwise is competent to exercise supervisory jurisdiction in proceedings relating to arbitration agreement under rules of international law of the lex fori including its rules of private international law, when it agrees with a private party to submit, present and/or future disputes, to arbitration. A court may be competent to exercise such supervisory jurisdiction in regard to a commercial arbitration for one or more other reasons. It may be competent in normal circumstances because the seat of the arbitration is located in the territory of the state of the forum, or because the parties to arbitration agreement have chosen the internal law of the forum as the applicable law of the
arbitration. It may also be competent because the property seized is situated in the territory of the forum. However, it is important to note that the ILC Draft Articles on Jurisdictional Immunities recognise a State’s right, through the same arbitration agreement or arbitration clause, to curtail scope and extent of even an implied waiver of its immunity. A distinguished scholar in the area of international commercial arbitration rightly opines that the extent of consent to submit to arbitration, being regarded also as consent to the exercise of jurisdiction in appropriate circumstances, is a matter for states to decide and agree upon. And it is an implication to be drawn from the exception of consent to submit current and future disputes to arbitral settlement in regard to possible exercise of existing jurisdiction in relation to arbitration.\textsuperscript{172}

Regional arrangements or conventions on state immunity, existing and proposed, among the European, American and Asian and African countries also view an agreement to arbitrate as implicit waiver of sovereign immunity.

As early as in 1972 the European Convention on State Immunity.\textsuperscript{173} in one of its articles provided that:

"Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from
the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

(a) the validity or interpretation of the arbitration agreement,

(b) the arbitration procedure,

(c) the setting aside of the award, unless the arbitration agreement otherwise provides."174

The ILA Draft Convention on State Immunity, 175 like the European Convention on State Immunity but comparatively in more mandatory words and in the wider perception, treats agreement to arbitrate as implicit waiver of immunity. Article III dealing with exceptions to immunity from jurisdiction, inter alia, states:

"An implied waiver may be made inter alia:

(a) ---

(b) by agreeing in writing to submit a dispute which has arisen, or may arise, to arbitration in the forum State or in a number of States which may include the forum state. In such an instance a foreign State shall not be immune with respect to proceedings in a tribunal of the forum State which relate to:

(i) the constitution or appointment of the arbitral tribunal; or

(ii) the validity, or interpretation of the arbitration agreement or the award; or

(iii) the arbitration procedure, or

(iv) the setting aside of the award ---". 127
The Asian-African Legal Consultative Committee (AALCC) comprised of Burma, India, Indonesia, Iraq, Japan, Pakistan, Sri Lanka, Sudan, Syria and the United Arab Republic, which was called upon to consider the question of immunity constituted a Standing Sub-Committee on International Trade Matters. The Sub-Committee, taking the position that a State when it enters into an arbitration agreement should not be allowed to invoke the plea of sovereign immunity in respect of that agreement to thwart the arbitral process and the eventual award, urged the UNCITRAL to append to the New York Convention a protocol, inter alia, enabling a State or its agency to invoke sovereign immunity in the proceeding initiated in pursuance of the arbitration agreement. 176

A closer examination of National Laws in the field of jurisdictional immunities of the European, American and Commonwealth countries also reveals that submission of a foreign State to an agreed arbitral tribunal through an arbitration agreement between it and a private party amounts to an implicit waiver of state immunity and therefore that state cannot invoke the plea of sovereign immunity before an otherwise competent judicial tribunal.

Section 9(1) of the British SIA unmistakably tells that when a State, through an arbitration agreement, agrees for arbitration, subject to contrary provisions
in the arbitration agreement, cannot invoke the plea of jurisdictional immunity. It says:

"Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration." 177

It is important to note that comparative assessment of effect of provisions of article 12 of the European Convention 178 and of section 9 of the SIA reveal different effects of a States' agreement to arbitrate on immunity. First, under section 9 of the SIA, unlike article 12 of the European Convention, agreement to arbitrate theoretically removes state immunity from proceedings in respect not only of commercial but of non-commercial matters, in respect of domestic as well as foreign awards. 179 Secondly, section 9 of the SIA, again unlike article 12 of the European Convention, does not expressly limit the local court proceedings to those relating to the validity or interpretation of the arbitration agreement, arbitration procedure and the setting aside of the award. It disentitles a State, which submits a current or future dispute to arbitration, for immunity in respect of proceedings in the courts of UK relating to the arbitration. If the statutory wording is read at its widest connotation, consent of a State to an arbitration would confer supervisory jurisdiction on
English courts to all the questions relating to arbitration. However, one may be tempted to offer an interpretation derived from the phraseology of article 12 of the European Convention to section 9 of the SIA to limit implied consent to the supervisory jurisdiction of the court to questions relating to the validity of interpretation of the arbitration procedure and the setting aside of the award.

Despite these deviations of the provisions of the SIA from that of the European Convention a question as to whether every written agreement of a foreign State, to submit a present or future dispute to arbitration governed by any system of law constitute waiver of immunity in England needs consideration. To put it in the proper perspective the issue is: does an undertaking by a State to arbitrate a dispute in England only and not outside the United Kingdom, within the provisions of section 9, constitute implicit waiver of immunity in English courts? In other words, does the implied waiver provided under section 9 of the SIA require territorial nexus or jurisdictional connection between the court itself and the arbitration agreement to disentitle a State for immunity. Provision of section 9 do not expressly insist for such an additional requirement. However, legislative history of the SIA and pre-SIA judicial pronouncements clearly indicate that courts in England do not normally entertain
proceedings if a dispute has nothing to do with the UK and the question of claiming immunity, therefore, does not arise. A distinguished commentator has also expressed the view that 'before immunity or its absence falls to be considered an English court must have territorial jurisdiction'. Similarly, Lord Denning in the Thai-Europe case has opined that an arbitration clause in a contract signifies voluntary submission of the state to the jurisdiction of the arbitrators and the supervision of them by the courts. It is very significant to note that the recently enacted immunity laws of Singapore, South Africa, Pakistan and Australia and similar statutes in other countries, have incorporated a provision similar to that of the British SIA. However, the Australian SIA is more comprehensive and unambiguous. Section 17(1) of the Act, unlike section 9 of the SIA, provides:

"(1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration including a proceeding:

(a) by way of a case stated for the opinion of the court;

(b) to determine a question as to the validity and operation of the agreement or as to the arbitration procedure; or

(c) to set aside the award ---.

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The FSIA of the United States, allowing a foreign State to renounce its immunity, simply provides that a foreign State is not immune from jurisdiction of US courts in any case:

"[I]n which the foreign state has waived its immunity, either explicitly or implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."188

However, the Act unlike the British SIA, contains no explicit provision dealing with the question of implicit waiver of immunity by agreement to arbitrate, or gives any definite indication that an agreement to arbitrate constitutes a waiver of sovereign immunity. However, the House Report189 outlining the legislative history of the FSIA and offering section-by-section analysis of its provisions, not only indicates that the draftsmen of the Act were aware of judicial precedents holding that an agreement to arbitrate constitutes an implied waiver of state immunity but also exhibits the Congress' intent to read such implied waivers in the provisions of article 1605(a)(1) of the Act. The House Report notes that, "the courts have found such waivers (implied) in cases where a foreign state has agreed to arbitration in another country or where the foreign state has agreed that the law of a particular country should govern a contract."190 A
plain reading of the passage from the House Report reveals that if a foreign State agrees to arbitrate in "another country" or to be governed by the laws of any "particular country" with respect to a transaction occurring anywhere in the world, it waives its immunity from suit in the United States under section 1605(a)(1) of the FSIA.

Further, the Congressional statement, exhibiting its intention to regard agreement to arbitrate as implied waiver of state immunity, as stated in the quoted para, is based on the cases decided prior to the FSIA. However, a careful review of the judicial pronouncements prior to the FSIA, presumably referred to in the House Report, does not unanimously lend support to the Congressional proposition and thereby leaves scope for substantive doubt regarding its correctness. It, therefore, seems that the proposition is an overstatement of the then existing law on implied waiver of immunity vis-a-vis agreement to arbitrate. For example, in Petrol Shipping Corporation v. Kingdom of Greece\(^1\) immunity was granted, notwithstanding the fact that the contract between the plaintiff and the defendant contained an arbitration clause.\(^2\) A year later, the Second Circuit in Victory Transport Inc. v. Comisaria General de Abastecimientos Y. Transportes\(^3\) expressly declined to rule on whether the presence of an arbitration clause amounted to a waiver of sovereign
immunity. Similarly, in Frazier v. Hanover Bank, a New York court held that a choice of law clause did not waive sovereign immunity. There is, however, authority in earlier case law supporting the view that an arbitration clause amounts to waiver of immunity if such agreements identify American law as the proper law and American court as the forum. There is no authority in the earlier cases for the wider proposition stated in the House Report that the existence of an arbitration clause ipso facto amounts to a waiver on the basis of which US courts could assume jurisdiction.

However, courts in the US in interpreting the waiver provision in decisions immediately after the FSIA have not only placed a great reliance on the Congressional statement in the House Report treating the presence of an arbitration clause as implied waiver of immunity but also accepted the wider proposition stated in it. In Ipitrade International S.A. v. Federal Republic of Nigeria, (hereinafter Ipitrade) wherein an action was brought in a US court to enforce an arbitral award against Nigeria made in Switzerland, represents the first important decision dealing with arbitration and choice of law clause under section 1605(a)(1) of the FSIA. The District Court of Columbia relying upon the legislative history of the FSIA held that Nigeria's agreement to arbitrate in Paris in
accordance with the Swiss law constituted under the FSIA a waiver of immunity.

Iupiterde was not only followed in Libyan American Oil Company v. Socialist People's Libyan Arab Jamahirya197 (hereinafter LIAMCO) and in Maritime International Nomines Establishment v. Republic of Guinea198 (hereinafter MINE) but also used to give wider connotation to the Congressional intent.

In LIAMCO the District Court of Columbia in an enforcement in the US of an arbitral award199 between Libyan American Oil Company and the Government of the Libyan Arab Republic was confronted with the question as to whether arbitration clause without specifying the place of arbitration but authorising the arbitrator to choose the place constituted on part of the Libya a waiver of immunity in US courts. LIAMCO, relying upon Iupiterde and the House Report language, asserted that Libya had in fact implicitly waived its immunity in the United States by agreeing to arbitrate anywhere the arbitrator might select even without specifying the arbitral forum. The District Court, relying heavily upon the Iupiterde and the legislative history, has accepted the argument when it sustained the jurisdiction on the theory that Libya had consented to arbitrate in the US Its reasoning was that although the United States was not named, consent to have a dispute arbitrated where the arbitrators might determine was
certainly consent to have it arbitrated in the United States." It is interesting to note that the United States, in its brief as amicus curiae submitted before the United States Court of Appeals for the District Court of Columbia Circuit, has endorsed similar argument. The US argued that:

"In enacting section 1605(a)(1) of the FSIA, Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity —— To date, only one other court has had occasion to interpret and apply the waiver provision of section 1605(a)(1) with respect to the enforcement of foreign judgment, and it reached the --- result --- that an agreement to arbitrate in a third country constitutes a waiver of foreign sovereign immunity. And section 1605(a)(1) must be applied by the Courts not only where the arbitration agreement explicitly stipulates the United States as the situs of the arbitration, but also where, as here, the arbitration properly takes place in any state(which is a party to the New York Convention)." 201

In MINIRE, wherein a contract between MINIRE, a Lichtenstein Corporation and Guinea, incorporating an arbitration clause agreeing to arbitrate before a tribunal of three arbitrators to be selected by the President of the International Centre for Settlement of Investment Disputes (ICSID), — an international organization established by ‘the Convention on the Settlement of Investment Disputes between States and Nationals of other States’, having its seat in the US — Judge Gesell of the District Court of Columbia, who was,
inter alia, called upon to determine the scope of an implied waiver by arbitration agreement under section 1605(a)(1) of the FSIA, primarily in the context of agreement to arbitrate through the international nature of ICSID arbitration, relying heavily upon *Ispirade*, LIAMCO and the House Report, held that Guinea had impliedly waived its jurisdictional immunity in US courts by virtue of its agreement to arbitrate even though the contract did not specify a place of arbitration.  

Judge Gesell, noting that ICSID’s Rules of Procedure call for ICSID tribunals to meet at the seat of ICSID – Washington, D.C. unless another site is agreed upon by the parties and approved by ICSID, reasoned that the parties must have contemplated that arbitration would take place in the United States. He accordingly assumed that Guinea by way of an agreement to arbitrate before the arbitrators approved by the President of the ICSID, consented for an arbitration in the US merely because ICSID is headquartered in Washington D.C.

However, justification of the assumption that submission to ICSID arbitration process includes submission to the jurisdiction of the American courts merely because ICSID has its headquarters in Washington D.C. may be questioned. The legislative history to which Judge Gesell refers notes the tendency of some courts to infer an acceptance by one sovereign or
another's jurisdiction because of its willingness to submit to arbitration there. Presumably, such an acceptance indicates a willingness to be subject to the second country's arbitration laws and its process of judicial review of them. Judge Gesell's assumption, therefore, does not seem justified with respect to arbitration before ICSID, an international organisation (not a national body), constituted and governed by an international convention, simply because ICSID is situated in the U.S. It is worth noting that the United States as an intervener - appllee in MINISTER - before the Court of Appeals for the District Court of Columbia Circuit in its brief has unequivocally asserted that an arbitration agreement contemplating ICSID proceedings cannot fairly be interpreted as a waiver of immunity except for purposes of enforcing the resulting award and an ICSID clause does not amount to waiver of immunity even if the ICSID arbitration is to be held in the U.S. The brief also cautions U.S. courts that implicit waiver of immunity on the basis of ICSID would damage the ICSID institution and would also be contrary to the national interest. 204 It is needless to mention that the established arbitral jurisprudence warrants that if jurisdiction by consent is conferred by an agreement defining the scope of the consent, it would seem logical that consent should not be extended by
judicial decree beyond the limits established by the parties.

In the recent past the US courts, however, have shown a reluctance to infer waiver from the existence of an arbitration clause in a contract. Decisions involving arbitration and choice of law clauses, such as Verlinden B.V. v. Central Bank of Nigeria;\textsuperscript{205} Texas Trading & Milling Corporation v. Federal Republic of Nigeria\textsuperscript{206}; Chicago Bridgie & Iron Co. v. Islamic Republic of Iran\textsuperscript{207} and Ohntrup v. Firearms Center Incorporated\textsuperscript{208} represent restrictive interpretation to, and a retreat from, the reasoning of Ipirtrade.

In Verlinden which involved a dispute between Verlinden, a Dutch corporation and the Republic of Nigeria, arising out of an agreement providing for ICC arbitration in Paris and Dutch choice of law, an argument was advanced on the basis of Ipirtrade and the House Report that Nigeria had implicitly waived its jurisdictional immunity by virtue of arbitration clause and therefore was amenable to jurisdiction in the United States. In a careful opinion dissecting both Ipirtrade and the part of the House Report on which it was based, Judge Weinfeld rejected the notion that the presence of third-party nation choice of law and forum clauses do constitute implicit waiver of immunity and, in turn, implicit consent to United States jurisdiction under provisions of section 1605(a)(1). The judge, doubting
propriety of the dictum that a sovereign state which agrees to be governed by the laws of a third-party country disentitles for immunity in an American court, has observed:

"The Congressional history cited by plaintiff is not dispositive of this issue, indeed, it is at most ambiguous. The comment in the congressional report --- that the courts had found an implicit waiver 'where a foreign state has agreed to arbitration in another country or --- agreed that the law of a particular country would apply, does not necessarily constitute an endorsement of that result. More importantly, it is by no means clear that congress intended in referring to 'another country' or a 'particular country', to include a third party country the adoption of whose law or forum by a foreign state as one of the contracting parties would operate as a waiver thereby subjecting the foreign state to jurisdiction in this country. It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of United States - which is both 'another country', and 'a particular country' - has implicitly waived its ability to assert the defense of sovereign immunity, when sued in an American court. But it is quite another matter to suggest, as did the court in Ipirade, that a sovereign state which agrees to be governed by the laws of a third party country - such as the Netherlands - is hereby precluded from asserting its immunity in an American court."209

The court emphasizing the dangers inherent in Ipirade and a liberal application of the House Report language had to say:
"Plaintiffs view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of United States. Verlinden and Nigeria could scarcely have foreseen this untoward result when they signed the contract and it is unlikely that Congress could have intended it."

In *Texas Trading* Judge John M. Cannella of the United States District Court for the Southern District of New York, citing the House Report and *Ipitrade*, not only rejected the similar argument advanced in *Verlinden*, but also expressly declined to adopt the reasoning of *Ipitrade*. He stated that an agreement that the contract would be governed by the law of another country or submitted to arbitration in another country does not reflect an intention to waive governmental immunity to actions brought against the foreign state in the courts of the United States.

Immediately following the *Texas Trading* was *Chicago Bridge* which, *inter alia*, focused on the implied waiver of immunity by arbitration clause. Judge Grady of the District Court for the Northern District of Illinois Eastern Division, quoting with approval the language of *Verlinden* highlighting the dangers inherent in a sweeping approach to the waiver provision.
'categorically' rejected the argument that the arbitration clause amounted an implicit consent to jurisdiction in the US courts. He observed:

"None of the arbitration clauses in these contracts contain US choice of law or choice of forum provisions. In fact, these contracts which address the question stipulate that **Iranian law** or the **Iranian courts** shall resolve disputes in the event of the breakdown of informal arbitration. We agree with Judge Weinfeld's precise holding in *Verlinden B.V. v. Central Bank of Nigeria* (supra), that preference of third party nation choice of law and forum clauses does not in any sense implicitly consent to United States jurisdiction ---"214

Similarly, in *Omntrup*,215 involving an action against seller of a gun for its malfunctioning, who in turn impleaded manufacturer of the gun, a Turkish public corporation owned by the Turkish government, argued that the arbitration clause in the agreement between it and the seller, providing for dispute resolution by ICC, Paris, amounted to an implicit waiver of immunity. Judge Pollack rejected the argument and held that a waiver of immunity by a State to one jurisdiction cannot be interpreted as a waiver to all jurisdictions.216

*MINER*, though does not neatly fit into the pattern of the above mentioned cases, also manifests the trend in favour of requiring designation of a US forum as a pre-requisite to any finding of implicit waiver by agreeing to arbitrate. As stated above, in *MINER* the court has treated the arbitration clause authorising the
President of ICSID to constitute the arbitral tribunal, as implied waiver of immunity for parties reference to the ICSID's settlement and its seat in the US. It reasoned that parties by agreeing to arbitrate before arbitrators selected by the ICSID President contemplated arbitration in the US.

Although it is clear that a submission of a State to an arbitration amounts implicit waiver of immunity under section 1605(a)(1) of the FSIA judicial decisions rendered by US courts in the context of the FSIA, as discussed in the preceding pages, exhibit some divergence of opinion. The question which has caused divergence of opinion is whether by referring to another country the authors of the FSIA had in mind only the United States, or any country other than the state party to the arbitration. The question has received both the restrictive and wider responses in the US courts. The restrictive interpretation found favour in Verlinden and in the subsequent cases relied upon the Verlinden reasoning. While the second interpretation prevailed in Ipirtrade and LIAMCO.

Scholars have also attributed divergent meaning to the Congressional intent when it used the term 'another country' and its true nature in determination of implicit waiver through submission to arbitral process. A view has been expressed in writings that an arbitration clause should not be treated as a waiver of
jurisdictional immunity under section 1605(a)(1) when it
does not, directly or indirectly, provide for
arbitration in the United States or when the plaintiff's
action is not related to arbitration. They argue that
territorial nexus is always required to treat an
arbitration clause as implicit waiver of immunity. 217
While others, who view that the restricted
interpretation is unwarranted, feel that the broader
interpretation should get preference over the
restrictive one. They argue that if submission to
arbitration is to be treated as waiver of immunity it
should be so regarded irrespective of the location of
the seat of arbitration. 218

It is important to note that Senator Mathias, with
a view to enhancing the usefulness of the FSIA for
parties pursuing claims and counterclaims in US courts
against foreign governments and their agencies,
introduced a legislation to amend the FSIA. 219 It,
inter alia, deals with the effect of arbitration
agreements on sovereign immunity. One of the proposed
amendments not only endeavours to give statutory
confirmation that agreements to arbitrate remove
sovereign immunity but also explicitly removes immunity
whenever an arbitration agreement falls within the
criteria specified in the Bill. One of the proposed
amendments provides for no immunity from the
jurisdiction of courts of the US in any case:

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"(6) which is brought to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not concerning a subject matter capable of settlement by arbitration under the laws of the United States, or which is brought to confirm, recognize or enforce an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, or (C) for the underlying claim save for the agreement to arbitrate could have been brought in a United States court under this section or section 1607."

The Mathias proposal, which is modelled on a draft bill prepared by the American Bar Association, expressly states that immunity would be waived in United States courts if the arbitration was held in the United States or an action on the underlying claim could have been brought in the United States or the arbitration agreement was governed by an international agreement. The proposal, if enacted, would evidently bring US law on the effect of arbitration agreements on sovereign immunity closer to the practice of the United Kingdom and other states. It is needless to mention that in the prevailing conflicting judicial opinions regarding the effect of an agreement to arbitrate on sovereign immunity and uncertainty in requirement of territorial
nexus, enactment of the Mathias proposal would increase the usefulness of arbitration agreement with foreign states and state agencies.

It is submitted that the first interpretation requiring territorial connection with the forum nation of an arbitration agreement to constitute waiver of immunity seems more convincing and logical. If territorial link is not required US courts would in ultimate analysis be entitled to adjudicate upon any dispute between a private party and a State and thereby turn itself into an international court. The FSIA is not designed to encourage national courts to compete with or undermine the agreed arbitration but rather to ensure compliance with the agreement. It is interesting to note that Monroe Leigh, the then legal adviser to the US State Department, has testified during the congressional hearing that approach of the FSIA was consistent with that of the the European Convention on Sovereign Immunity. The European Convention unequivocally asserts for territorial link with the forum nation for implicit waiver of immunity by arbitration agreement. The inclusion of the European Convention in the legislative history of the FSIA reveals Congress' understanding of the existing international law on arbitration clause waivers. Similarly, during the congressional hearing an official from the Justice Department stated:
"It should also be stressed that the long-arm feature of the bill will ensure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small international courts of claims. The bill is not designed to open up our courts to all corners to litigate any dispute that any private party may have with a foreign state anywhere in the world."223

In this context one also cannot lose sight of article 20 of the ILC Draft Convention on Jurisdictional Immunity.224 It contains the three limitations initially set out in article 12 of the European Convention; immunity is removed only in respect of civil or commercial matters and only in respect of proceedings in local courts which have a sufficient jurisdictional nexus with the arbitration (the arbitration either being held on the territory within the local courts jurisdiction or subject to its law).

Further, the view expressed by a commentator that if submission to arbitration is to be treated as a waiver of immunity, it should be so regarded, irrespective of the location of the seat of arbitration, cannot be accepted for two significant conceptual objections. First, international arbitration by definition is consensual, therefore, to use the arbitration clause as a world-wide jurisdictional immunity which goes beyond the contemplation of the parties, offends the fundamental consensual basis of the
agreement. Secondly, if the waiver is not restricted to judicial process directly affecting the arbitration and territorial nexus it would certainly encourage forum shopping by the parties. Without this restriction a party which preferred to litigate a case in a court rather than to arbitrate would be in the enviable position of sending the foreign state before the courts of any state it (private party) wished. There, therefore, must be some territorial connection and this connection must be within the contemplation of the parties. Waiver of sovereign immunity by an agreement to arbitrate, as emphasized after 1976 by American courts and intended by the Mathias proposed amendment, be presumed only for those matters which were intended to be submitted to arbitration by agreement and such a waiver be confined to the courts of the place which is directly or indirectly connected with arbitration.

However, a set of significant but complex questions worth mentioning may emerge out of early stages of an arbitration agreement between a state party and a private individual vis-a-vis implicit waiver of state immunity by an agreement to arbitrate. They are: Has the appropriate representative of the foreign state executed the waiver?; Had the person consenting to the arbitration capacity and authority to bind the state?; Can a foreign State be held to have waived its immunity, even when an incompetent and unauthorised
person has consented for the arbitration? Can a foreign State be allowed to invoke its constitutional and internal law to repudiate its consent to arbitration and can it be held to have waived its immunity even when its constitutional law prohibits such a waiver? and finally, which law - lex fori or international-governs the appropriateness, competence and authorisation of the person to bind the state party?²²⁷

Answers to these questions basically revolve around and conceptually depend upon the responses to the question as to whether the agreement to arbitrate is intra vires or ultra vires respectively binding the state to honour its consensual commitment and, disentitling it for immunity or vitiating the contractual obligation and disallowing the presumption of implicit waiver of immunity.

A view has been expressed that mere presence of an arbitration clause may not be conclusive proof to assume waiver of immunity. It could be that the officials who entered into the agreement lacked authority under the constitution or the laws of the state to submit disputes to arbitration. And in such a situation the existence of an arbitration clause might be considered by the state to be an ultra vires act of the organ or individual who had agreed the clause. If
so, the act would be treated *ultra vires* and the court should not assume waiver of jurisdictional immunity.\(^{228}\)

The suggestion, however, is neither in consonance with the *rule of law* and accepted rules of international commercial arbitration nor does it fit into the objectives and schemes of recently enacted national immunity Acts. In the contemporary international trade and international commercial arbitration it is widely recognised that a State which has entered into an agreement with a private party is neither allowed to invoke its internal law to repudiate its consent to international commercial arbitration nor to give effect to its domestic prohibitions to retreat from its contractual obligations. Such a state, in good faith and with a view to ensuring confidence of the private parties, should not be allowed to rely upon provisions of its internal law to escape from an arbitration that it has already willingly accepted.\(^{229}\)

The prevailing view is that it should be contrary to uphold and support the fundamental principles of good faith if a state party to an international contract, having freely accepted an arbitration clause, is lateron allowed to invoke its own legislation to contest the validity of its agreement to arbitrate and thereby to avoid its contractual obligations. Distinguished international arbitral tribunals have viewed the
principle of good faith as an imperative norm in international commercial arbitration and have opined that international *ordre public* vigorously rejects the proposition that a State organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause can thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its promise. They also do clearly emphasize as the substantive rule of the ‘common law of arbitration’, that international arbitrators should reject a State’s plea invoking its own law to contest validity of its consent to an arbitration agreement.\(^{230}\) One of the distinguished arbitrators also advances a similar line of argument that where a State or one of its public entities accepted an arbitration clause, it is considered as part of international public policy that they cannot later claim that they could not submit to arbitration due to their own national laws.\(^{231}\) Obvious effects of the view that prohibition of agreements to arbitrate to be contrary to international public order are: First, a State which has concluded an arbitration agreement would be held contrary to international *ordre public* if it tried to affirm that its internal law was incompatible with the undertaking to arbitrate. Secondly, the acknowledged distinction between internal *ordre public* and international *ordre public* coupled with the prohibition of national bare to international arbitration leads to the result that a
state or State entity’s agreement to arbitrate is applicable only in domestic matters because violation of an arbitration clause amounts to an international wrong and involves international responsibility, particularly denial of justice. Further, it is very objectionable to allow a state to invoke its internal legal or constitutional prohibitions/limitations to deprive the private party of its legitimate contractual obligations when an official of the state entered into agreement with the private party. The problem becomes more serious when the official had the apparent authority to enter into agreement or when the private party does not either have facility or opportunity to examine the officials affirmed authorisation and competence to bind the state. If such a concession is given to a State in international commercial arbitration, it would, undoubtedly, be violation of the principle of estoppel – actual or apparent – and would also violate the notion of international ordre public, as outlined in the preceding paras. Unilaterally allowing a State to adjudicate upon the claims arising out of the contractual relations between it and a private party would also infringe the spirit and contents of the rule of law doctrine. In this context it is important to note that the British SIA contains an evidentiary rule that a person who has entered into a contract on behalf of, and with the authority of, a State
does have also an authority to submit on its behalf in proceedings arising out of the contract.\textsuperscript{234} It is also relevant to recall that the American FSIA and the British SIA are essentially designed to help to ensure that individuals who have claims against foreign states may obtain redress in circumstances where previously they would have had no redress.\textsuperscript{235} Against this background refusal to accept national law as a jurisdictional bar to international commercial arbitration involving a State may be seen as a necessary complement to the well received rule of restrictive sovereign immunity incorporated in domestic laws. It is also now well established with respect to arbitral jurisdiction that the waiver of immunity implicit in a state’s agreement to arbitrate is almost irrevocable.\textsuperscript{236}

The rule is premised on the idea that a foreign State which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally. If a State cannot invoke its immunity from suit in international arbitration, irrespective of its privilege defined or limitations imposed in its national law, one fails to understand the propriety of another provision in its national law putting limitations on the state’s capacity and thereby allowing neutralisation of the international arbitral processes.
Finally, if a State is allowed to unilaterally invoke the plea of sovereign immunity, either to thwart the arbitral process or to deprive a private party of his legitimate claims, it is submitted that, it would amount to denial of justice. It is significant to make mention that there is some authority for the proposition that where a State denies to an alien the exclusive remedy of arbitration which a contract between the state and the alien prescribes for settlement of disputes arising under the contract, it connotes a denial of justice. F.A. Mann, a distinguished and acclaimed international law scholar in 1967 observed:

"...[D]enial of justice in the strict and narrow sense of the term implies the failure to afford access to the tribunals of the respondent State itself. But there is no reason of logic or justice why the doctrine of denial of justice should not be interpreted so as to comprise the relatively modern case of the repudiation of an arbitration clause." 237

The American Law Institute in its commentary to the Revised Foreign Relations Law of the United States, in more assertive language, pursues similar argument. It commented that:

"A State may be responsible for denial of justice under international law --- if, having committed itself of a special forum for dispute settlement, such as arbitration, it fails to honour such commitment ---." 238
Similarly, there is an international support in the ICJ decisions for the proposition that repudiation by a State of the arbitral remedy to which it had committed itself constitutes a denial of justice. For example, one of the judges of the court in his dissenting opinion in the Anglo-Iranian Oil case, in which the United Kingdom maintained that Iran, in purporting to annul the company’s concession contract and in denying the company the exclusive legal remedy expressly provided for, was guilty of denial of justice, opined that the refusal on part of the Iranian government to set up the arbitral tribunal provided for in the contract constituted a denial of justice and held that this was ‘a grave violation of international law’. Recently, a case summarised in the Yearbook of Commercial Arbitration, though by way of obiter dictum also supports the proposition. Similarly, during the recent past, contemporary arbitral tribunals while resolving disputes between a State and an alien, after examining many cases and other authorities, have decisively held that a State’s refusal to carry out an obligation to arbitrate contained in a contract with an alien constitutes a denial of justice, even in circumstances where that state maintains that the contract is void ab initio.
6.03.2 (B) *Does the implied waiver of immunity by arbitration clause extend to recognition and enforcement of the resultant award?*

The foregoing analysis undoubtedly demonstrates that when a State consents for arbitration it is not only bound by the arbitration agreement but also waives its immunity from jurisdiction of the arbitrators as well as of the local courts in proceedings relating to the arbitration. An equally important question as to whether such an implied waiver of immunity can legitimately be extended to the proceedings relating to recognition and enforcement of the resulting award deserves consideration. To be precise the questions to be delved into are: *does implied waiver of immunity from jurisdiction through an arbitration clause automatically result in implied waiver of immunity from execution?*, if not, under what circumstances is waiver of immunity from execution to be presumed? Consideration of these questions becomes pertinent in the context of the fact that most legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution, and they do not imply the latter in the former. Accordingly they do refuse to accept that the former does flow automatically from the latter. The rule that waiver of immunity from jurisdiction does not *per se* entail waiver of immunity from execution of any resulting judgment and
for that a separate waiver is required, it seems, is established at Common Law\textsuperscript{243} and is adopted by the FSIA of the United States\textsuperscript{244}; the British\textsuperscript{245} and the European Convention on State Immunity.\textsuperscript{246} The point is expressly accepted in the second Report on jurisdictional immunities of States and their property.\textsuperscript{247} Sompong Sucharitkul stated that though jurisdiction covers execution, the immunities of states from one are entirely distinguishable and separate from the other. Waiver from jurisdiction, therefore, does not imply consent or submission to measures of execution. And the court of the territorial state may be in a given situation decide to exercise jurisdiction in a suit against a foreign state on different grounds, such as nature of the activities involved, the consent of the foreign state, voluntary submission, or waiver but will have to reconsider and re-examine the question of its own competence when it comes to execute the judgment so rendered. The immunities attributable to state property at the time of execution vary with the types of state property which may or may not be susceptible to measures of execution.\textsuperscript{248} A number of legal systems, on the other hand, do exhibit equal approach to the issues of immunity from jurisdiction and immunity from execution.

Against this background one has to look more deeply at the problem of implied waiver of immunity in
execution of an arbitral award rendered by a tribunal before which the state concerned had waived its immunity by agreeing for the arbitration.\textsuperscript{249}

Conceptually as well as pragmatically the latter view, as far as implied waiver by arbitration agreement is concerned, seems convincing and in consonance with the \textit{raison d'être} and the underlying philosophy of the well established restrictive theory of sovereign immunity. Such a distinction between immunity from jurisdiction and immunity from execution, as far as arbitration is concerned, is irrelevant and illogical. This view finds support in writings of distinguished scholars, judicial pronouncements and legislative enactments. For example, a commentator has disapproved such a distinction between jurisdictional immunity and immunity from execution and has labelled it as ‘inappropriate’ and ‘illogical’.\textsuperscript{250} If a State agreed for arbitration and later on it does not itself produce a settlement, there is little sense in engaging in an expensive arbitration if at the end the status of the defendant State prevents recovery of the sum awarded by the arbitrator. . Sompong Sucharitkul, commenting upon the draft article dealing with effects of arbitration, has also opined that once a State agrees in writing to submit future disputes with a private party to arbitration there is an irresistible implication, if not an irrebuttable presumption that it has waived its
jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation, judicial confirmation and enforcement of the arbitral awards.252

When the plea of sovereign immunity was invoked in execution of arbitral awards the courts have also responded to the effect that implied waiver of immunity by submitting to arbitration extends to proceedings for confirmation or recognition of the resulting award. For example, Swiss courts, in the absence of a statute dealing with the issue, have consistently refused to distinguish between jurisdiction and enforcement from the point of view of immunity. The Federal Swiss Supreme Court has rightly argued that since powers of execution directly derive from powers of jurisdiction, there is no reason that Swiss courts should treat immunity from execution differently from immunity from jurisdiction. And once the jurisdictional issue has been decided and an award has been rendered the state cannot be allowed to create a new obstacle for the private party by claiming to be immune from execution of the award.253 It is significant to note that pleas of immunity from execution of arbitral awards rendered by arbitral tribunals agreed by them, as a rule, have been unsuccessful. When such an issue of immunity from execution arose the courts in the Netherlands, the United States, France and Sweden have held that when a
State has waived its immunity by submitting to arbitration, the implied waiver extends to proceedings for the confirmation or recognition of the resulting award. 254

Finally, reference should be made to statutory provisions of recent national laws extending implied waiver of immunity by agreeing to submit disputes, present or future, to arbitration to execution too. Section 17(2)(b) of the Australian Foreign State Immunity Act of 1985 provides that a State which is party to an arbitration agreement is not immune from the recognition and enforcement of an award made pursuant to the arbitration, wherever the award was made. 255 A view has also been taken that section 9 of the British SIA, which provides that a State agreed for submission to arbitration is not immune in proceedings relating to arbitration from jurisdiction of the courts in the UK in its historical antecedents and broader perspectives, can be interpreted to the effect that a State's entry into an arbitration clause constitutes implied waiver from execution unless express resolution to the contrary is made. 256

However, the American FSIA257 and other domestic immunity Acts, unfortunately, do not exhibit similar extension of the implied waiver of immunity to the proceedings relating to execution of the resultant
award. It is interesting to note that one government, reacting provisionally adopted the ILC Draft Articles on Jurisdictional Immunity, had proposed addition of 'recognition and enforcement' as clause (d) to article 19, dealing with effect of an arbitration agreement, to read it as under:

"If a State enters into an agreement in writing with a foreign --- to submit to arbitration --- that State cannot invoke immunity from jurisdiction before a court of another state which is otherwise competent in a proceeding relating to
(a) ---
(b) ---
(c) ---
(d) recognition and enforcement of award."

The proposal was opposed by a number of members of the ILC on the ground that recognition of the award could be deemed to constitute a first step towards execution of the award, which requires the express consent of the state concerned. Motoo Ogiso, Special Rapporteur, in his third report, reviewing the entire set of Draft Articles and considering views of members of the ILC expressed in its forty-first session and of the governments expressed in the forty-fourth session of the General Assembly, approved addition of the proposed clause only on the understanding that the term 'recognition' should be interpreted as the act which entailed turning the award into a judgment or equivalent to a judgment by providing it with an
exequatur or some similar judicial certificate but not as waiver of immunity from execution. And accordingly he recommended reconsideration of the proposal if recognition is to be viewed as a first step towards execution. However, interestingly Motoo Ogiso, keeping in view the recent developments in immunity from jurisdiction and in execution of arbitral awards, conflicting ideological viewpoints of states regarding inter-relationship between immunity from jurisdiction and execution and written comments received from different governments, suggests two alternative proposals to the provisionally accepted provision dealing inter alia with State immunity from execution measures, to restrict state immunity in execution of arbitral awards. One of the alternatives unlike earlier one, suggests that a State should not be allowed to rely upon state immunity to thwart execution of an arbitral award when it has consented through an arbitration agreement. The text of the alternative submitted by the Special Rapporteur reads as under:

"Article 21 : State Immunity From measures of constraint

1. No measures of constraint including measures of attachment, arrest and execution, against the property of foreign State may be taken in the territory of a forum State unless and to the extent that:

(a) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated:
(i) by arbitration agreement;

(ii) by international agreement or in a written contract;

(iii) by a written consent given after a dispute between the parties has arisen; or ---“262

It is important to note that majority of the members of the ILC indicated their support to this suggested alternative.263 It is also significant to note that a commentator feels that even text and travaux preparatoires of the New York Convention lead to the conclusion that a State which has agreed to submit to arbitration a dispute having the nature of private law should comply with the resulting arbitral award and it cannot plead immunity.264

It is needless to mention that if a foreign State is allowed to invoke successfully immunity from execution of an arbitral award to which it had consented, the private party will undoubtedly be deprived of the benefits of the agreement to arbitrate and the underlying acclaimed objectives of the institution of arbitration, viz., peaceful, impartial and effective resolution of disputes, will certainly be defeated. Arbitration is particularly appropriate for state contract because it provides a neutral forum and avoids the issue of jurisdictional immunity before the arbitral tribunal as well as the supervisory jurisdiction of courts. Therefore, once a State has consented for
arbitration it, like any other private party, be bound by the arbitral obligation and it must be considered that it has waived its immunity not only from jurisdiction of a court but also in all those judicial actions which necessarily and forceably relate to the support of the arbitral proceedings. A State which consents to arbitration, like any other party, thereby expresses its commitment to carry out the resulting award. Therefore, the consent to arbitration implies a waiver of immunity in the enforcement proceedings also. The arbitral process, otherwise, would result in uncertainty and shake the mutual confidence between a State and a private individual or firm, which is necessary for international economic transactions. Further, this would inevitably lead to more bruising international disputes, including the litigation of contract disputes with sovereign parties in national courts. Therefore, immunity statutes and judicial decisions of national courts should go a step further to recognise that state by agreeing to arbitrate waives its right to claim immunity from jurisdiction as well as from the proceedings relating to recognition and enforcement of the arbitral award rendered by the agreed arbitral tribunal. The recent approach taken by the working group constituted by the International Law Commission, particularly by Motoo Ogiso, the Special Rapporteur, and a few domestic statutes and national
courts, against this background, is appropriate and indicates uniform future response to the issue of extension of implied waiver of immunity to the proceedings relating to execution of arbitral awards.

6.03.2 (c) Does an arbitration clause irrevocably waive state immunity enabling a State to resile from its contra commitment?

A survey of international instruments and national statutes reveal different approaches to irrevocability of waiver of jurisdictional immunity by agreement to arbitrate enabling a State to resile from its agreement to submit to the jurisdiction of the courts of the forum.

The European Convention, the British SIA and the ILC Draft Articles on Jurisdictional Immunity do not incorporate a provision dealing with withdrawal of waiver of jurisdictional immunity accorded by arbitration agreement. In contrast, the American FSIA the ILA Draft Convention and the Australian Foreign States Immunities Act make it clear that withdrawal of consent to jurisdiction can occur only if that right is retained by the agreement to arbitrate and is exercised in accordance with those terms. By section 1605 (a), FSIA, a foreign State shall not be immune in any case:

"(1) in which the foreign State has waived its immunity either explicitly or by implication, notwithstanding any
withdrawal of the waiver which the foreign State may purport to effect except in accordance with the terms of the waiver."

Article III.A of the ILA Draft Convention which disentitles a State for jurisdictional immunity when it has waived it expressly or by necessary implication, inter alia, stipulates that:

"A waiver may not be withdrawn except in accordance with its terms."

A similar provision finds place in the Australian Foreign States Immunity Act. Section 10 (5) of the Act states:

"An agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement."

Thus, one may categorise the international instruments and national legislations into two categories: those which do not make mention of irrevocability of waiver of jurisdictional immunity effected by an agreement to arbitrate and those which do expressly disallow a State from withdrawing its waiver of jurisdictional immunity except in accordance with the terms of the agreement.

Recalling advantages of arbitration over litigation in the field of international trade and commerce there cannot be two opinions that some
restrictions be placed when power of the state consenting to arbitration and thereby waiving its jurisdictional immunity to limit its unilateral withdrawal of its waiver of jurisdictional immunity. Absence of such limitation, obviously, would not only frustrate the raison d'etre of arbitration as a conflict resolution mechanism in international trade transactions but would also put the private party to disadvantageous position. Further, keeping in view the bargaining power of a State with a private individual in commercial activities and with a view to strengthening international commercial arbitration, the power of the consenting state to withdraw its jurisdictional immunity waiver in accordance with the terms of the waiver, it is submitted, should also be subjected to a few significant restrictions. The need for such restrictions may be illustrated as: A foreign state, for example, agrees to arbitrate a dispute, present or future, between itself and a private party and accepts the jurisdiction of a competent court of the forum but reserves the right to withdraw that consent with regard to any appeal or any other similar judicial proceedings that might arise in respect of the arbitral proceedings. Does it not frustrate the ultimate outcome of the arbitral process? Does it, in ultimate analysis, not allow the state to take shelter under the umbrella of 'state immunity' to avoid its contractual
obligations and thereby to deprive the private party from its legitimate rights? Does it not contrary to the public policy of the forum or trade ethics to allow a State to resile from its agreement when it is not beneficial to it? and lastly, is the consent to submit to arbitration and thereby effected waiver of jurisdictional immunity effective and only the right to withdrawal a nullity or vice-versa? A search for answers to these questions undoubtedly leads to the conclusion that the power of a State to withdraw its implied consent to submit to jurisdiction of a court of the forum even in accordance with the terms of the agreement should not be unrestricted.

The Australian Foreign States Immunities Act, which restricts power of a State to withdraw its consent, can be used as a guiding pointer in limiting, by way of a statute, the power of a State to resile from submission to a court in the forum while updating international instruments (including the ILC Convention) and national legislations. Section 10 (3) provides that a submission to the jurisdiction 'may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise)' and clause (4) of section 10 indicates judicial sanction against an unreasonable limitation on the courts jurisdiction. Section 10 (4) which authorises an Australian court to 'dismiss, stay or otherwise decline to hear and
determine a proceedings in respect of a 'limitation, condition or exclusion' attached to a submission, which is not in respect of remedies, reads as under:

"Without limiting any power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it has satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in respect of remedies), it is appropriate to do so."

Quite apart from the question of waiver of jurisdictional immunity by arbitration agreement and its irrevocability it could well be argued that the presence of an arbitration clause indicates the commercial nature of the transaction and that therefore the court should assume jurisdiction under the 'commercial activity' exception incorporated in almost every regional and international instruments on state immunity and national laws recognizing the restrictive theory of state immunity. Under the commercial activity exception a contracting state cannot invoke state immunity and therefore question of withdrawal of its jurisdictional immunity does not at all arise. But, such an approach has to be adopted and pursued by the domestic courts of different states to make it a 'state practice' and thereby a part of international law.
To avoid conflicting judicial pronouncements and to remove ambiguity in revocability of waiver of jurisdictional immunity it is suggested that suitable statutory restrictions, like the Australian Immunity Act, should be imposed on the power of a State to withdraw from agreed jurisdiction. Such a step would certainly enhance credibility of the international commercial arbitration.

6.03 3 Waiver of sovereign immunity by state/public enterprises in transnational commercial arbitration.

Contemporary international trade and commerce exhibits growing participation in international trade of state or public enterprises and submission to international arbitration of, present or future, disputes between itself and a foreign private party for settling international disputes. Most of the national immunity Acts and international instruments in the area of sovereign immunity, as stated above, refer to such state enterprises or public entities in identification of a 'foreign state' for the purposes of state immunity. Such an entity may or may not have separate juridical status and personality. It may merely be an agency or instrumentality of a State or may be totally distinct from the state. If it is extension of a state, the preceding analysis of sovereign immunity in international arbitration mutatis mutandis holds true.
But if an entity is distinct from a State, in the context of the present discussion of sovereign immunity and transnational arbitration, two significant questions arise for due consideration. They are: when and in what circumstances a state enterprise or public undertaking can submit to arbitration? and what are the legal consequences of such a submission on international arbitral process and the eventual enforcement of arbitral awards. The latter question to be precise, poses two queries: Does such an agreement to arbitrate constitute implied waiver of immunity and if yes, can such an implied waiver be legally equated to implied waiver of immunity in enforcement proceedings against the state enterprise or public undertaking?

Examination of the first issue leads to examination of individual system of law, which is neither feasible nor appropriate for the present discussion. However, it suffices to mention that a survey of national laws, state practice and judicial pronouncements of domestic courts reveals non-existence or existence of a variety of restrictions upon state enterprises to submit to arbitration, respectively enabling or inabling them to agree to international arbitration. State enterprises, in spite of the legal restrictions, of course, keeping themselves in these limitations, submit to arbitration. The second question pertaining to legal consequences of agreement
to arbitrate with a foreign private party on arbitration and enforcement of the resulting award, on the other hand, cannot be answered unless one takes into account its legal personality, similar or distinct from that of the state, and nature of the activity, private or public, carried on by it. If a state enterprise does not have a separate legal personality, prevailing rules of state immunity applicable to the state before courts as well as arbitral tribunals would be applicable to the state enterprise. This statement, in ultimate analysis, connotes that the public enterprise, being identified with the state for immunity purposes, can, like a state, waive its immunity, expressly or impliedly by arbitration clause. In other words, when a public enterprise, which is not distinct from a state, submits disputes to arbitration, can be said that it has implicitly waived its immunity by agreement to arbitrate. If a state enterprise, on the other hand, does have a separate and distinct personality from that of a State, being juridically unconnected with the state, does not entitle any state immunity because it does not fit into the concept of 'state' as viewed by national immunity Acts and international instruments. Similarly, if a state enterprise carries a commercial activity does not attract any immunity by virtue of restricted theory of sovereign immunity. A net effect of these propositions is that an agreement to arbitrate
between a state enterprise, which is not distinct from the state, and a foreign private individual constitutes implied waiver of immunity, and it cannot claim immunity in the arbitration proceedings and consequential judicial proceedings pertaining to arbitration. Conceptually one visualises no convincing reasoning to extend such an implicit waiver of immunity to enforcement proceedings of the resultant award.

VII Conclusion

In the contemporary international trade and commerce states’ commercial activities have extensively increased. States, questioning and doubting propriety of the maxim *par in parem non habet imperium* in the contemporary enhanced state commercial activities, have adopted the restrictive theory of immunity. Such a restrictive view of sovereign immunity unequivocally finds its place in international and regional instruments and national legislations dealing with immunity and also in judicial pronouncements. The restrictive immunity theory is ostensibly premised on the dual personality and capacity of a State i.e. when it undertakes governmental functions and carries commercial activities having transnational effects, on the *rule of law* doctrine and on the principle that justice be done to private parties involved in transnational commercial activities.
However, the restrictive theory of immunity on its operational plane suffers from two major central problems, namely, identification of a state party and precise distinguishing criteria to differentiate *acta jure gestionis* from *acta jure imperii* for immunity purposes. A survey of regional as well as national instruments and judicial opinions in the area of sovereign immunity exhibit different approaches to these problems.

Nevertheless, it is well recognised that a State is not immune for its commercial activities though states, depending upon their respective politico-economic philosophy, have employed varied criteria for determination of commercial characteristic of a state activity. Although, there is no uniform practice of states with regard to sovereign immunity, there is an unmistakable trend towards restricting state immunity to sovereign acts only and denying immunity to it for activities beyond the scope of sovereign acts such as commercial transactions with extra-territorial effects. It is a general rule that immunity accorded to a foreign state is a privilege and it can be waived. Such a waiver may be either express or implied, sufficiently indicating a state's desire to waive the privilege and to submit itself to the jurisdiction of a competent court in the forum state. Though the plea of sovereign immunity in strict sense is applicable to judicial
proceedings, the prevailing efforts at codification of sovereign immunity rules at international level, legislative intention and opinio jure of states unmistakably extend such a plea to international commercial arbitral processes also. Accordingly, these instruments and judicial pronouncements of national courts rightly view that a State impliedly waives its immunity when it agrees to resolve a dispute, present or future, through an arbitration and such a waiver, submit to contrary provision in the arbitration agreement is not only irrevocable but also extends to the recognition and enforcement of the resultant award. It is needless to mention that where a State unambiguously gives its consent to arbitration it, like any other party, is bound to abstain from any action which prevents courts of the proceedings. Consequently, it must be considered as having waived its jurisdictional immunity in all those judicial actions which necessarily and foreseeably relate to the support of the arbitration proceedings. A State which consents to arbitration expresses its commitment to carry out the resulting award. Consent to arbitration, thus, implies a waiver of immunity both in the enforcement proceedings and with respect to the enforcement process. This view if perceived against the background of the raison d'etre, the underlying philosophy of the restrictive theory of immunity and the fundamental principles relating to consensual contractual commitment.
international ordre public denial of justice and rule of law doctrine, seems appropriate and logical.

However, in the absence to uniformity in the international, regional as well as national instruments dealing with state immunity for acta jure gestionis or commercial activities, approaches of different states to the problem of immunity are generally bound to be far from uniform and consist. Harmonization of national laws, regional arrangements and international conventions is required. It would not only promote and strengthen international commercial arbitration but also do away with the problem of invoking of sovereign immunity to thwart international commercial arbitration. Unceasing endeavour of the International Law Commission in this direction, it is believed in the present submission could really do a long way in improving participation of private parties in international trade and commerce as also encouraging international commercial arbitration.

Footnotes


3. See generally, Schwebel & Wetter, Arbitration and
the Exhaustion of Local Remedies, 60 A.J.L.L. 484
(1966); Mann, State Contracts and International
Luzzatto, International Commercial Arbitration and
the Municipal Law of States, Recueil Des Cours de l'Académie de Droit International de la Hague.
(Collected Courses of the Hague Academy of
International Law), (hereinafter referred to as
Collected Courses of the Hague Academy)(hereinafter referred to as Collected Courses of the Hague Academy) (Sijthoff, 1978)
1977 IV p. 17 (93); Bockstiegel, Arbitration of
Disputes between States and private Enterprises in
the International Chamber of Commerce, 59 A.J.L.L.
579 (1965).

4. Riccardo Luzzatto, ibid, at p. 94.

5. Mann, State Contracts and State Responsibility, 54
A.J.L.L. 572 (588) (1960). Such "delocalization" is
now accepted. Generally see, Fatouros, InternationaL
Law and International Contract, 74
A.J.L.L. 134 (1980); Lal i ve, Contracts between a
State or a State Agency and a Foreign Company. 33
I.C.L.Q. 987 (1984); Geizer, The Unilateral Change
of Economic Development Agreements, 23 I.C.L.Q. 73
(1974); Hans Smit & et al (ed.), International
Contracts (Matthew, Bender New York, 1981).

6. Vernon G. Setser, The Immunities of the State and
Government Economic Activities, 24 Law &

7. H. Lauterpacht, The Problem of Jurisdictional
Immunities of Foreign States, 28 B.Y.B.I.L. 220
(226-232) (1951); Franciszek Przetacznik, The
Sovereign Immunity of Foreign State and
International Commercial Arbitration, 57 Revue De
Droit International (International Law Review) 188
(1979).

8. H. Lauterpacht, ibid, pp. 221-22.

9. Franciszek Przetacznik, supra, n.7 p. 193;
Dramler, Republic of Czechoslovakia 41 I.L.R. 61
(1950).

10. Doc A/CN.4/371 reproduced in Yearbook of the
International Law Commission (hereinafter referred

11. See Preliminary Report on Jurisdictional
Immunities of States and their Property by Sompong


13. H. Lauterpacht, supra n. 7 at p. 229.

14. Ibid. at p. 231.


16. supra n.11.

17. H. Lauterpacht, supra n. 7 at p. 235.


23. For text see 17 *I.L.M.* 1123 (1978). For comments see Mann, the State Immunity Act, 1978, supra n. 20, Bowett, the State Immunity Act, 1978, supra n. 20 and Delaume, the State Immunity Act of the United Kingdom, supra n. 20.

24. *Supra* n. 22.

25. Art.I (B).

26. *Supra* n. 22.
27. Art. 3 (1).

28. Supra n. 22.


30. Art. 3.


32. Sec. 1603 (a) and (b).

33. Supra, n. 22.


35. Sec. 87A. For details see State Commercial Transactions and Sovereign Immunity: Law and Practice in India, Chapt. III, infra.

36. Art. 1(B). For text see the text accompanying n. 25, supra.

37. Sec. 14 (1)(c) and 2 (a). The Pakistan, Singapore and South African state immunity Acts have employed almost identical language to that of the SIA and thereby exhibit similar functionalist tendency. See UN Materials on Jurisdictional Immunities, supra n 20, pp. 20-26; 28-33.

38. Art. 27 (a) and (2).

39. For details see, infra.

40. However, the Asian-African Legal Consultative Committee (AALCC) in 1960, has recommended that a State Trading Organisation which has a separate juristic entity under the Municipal Law of the country where it is incorporated should not be entitled to the immunity in respect of any of its activities in a foreign state. Such organisation and its representative be sued in the Municipal courts of a foreign State in respect of its transactions or activities in its state. See, supra n. 22, pp. 573-574.

181
41. Sec. 1603 (b) (3) of the Act states that an agency or instrumentality be 'neither a citizen of a state of --- the United States --- nor created under the laws of any third country'. This provision, it seems, is justifiable on the ground that a state should not be allowed to extend its sovereignty to entities not created under its own laws, otherwise the device could be used to expand sovereignty all over the globe. The explanation given in the House Report for this provision it's also worth noting. It says that the rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature. "House Report No.94-1487 (hereinafter House Report) reprinted in UN, Materials on Jurisdictional Immunities supra, n.20, p.106.

42. Art. 1B (3) and (4).

43. Sec. 14 (1)(c) and 2(a) & (b). The Pakistan, Singapore, Canada and South Africa immunity Acts also deny state status to legally separate entities in almost identical language. See, UN Materials on Jurisdictional Immunities, supra, n.20.

44. Art. 27.

45. Art. 7.

46. Art. 3.


51. Ibid. pp. 41-43.


54. See Brownlie, supra n. 53, pp. 330-331 and references cited therein; S.K. Agrawala, supra n. 20, p. 1, and references cited in n.13 thereof.


56. Ibid at 90. For critique of the distinction in English law, see Harlow, Public and Private Law: Definition without distinction 43 M.L.R. 241 (1980).


58. See generally, 10 Neth. Y.B. Int'l. L. (1979) and UN Materials on Jurisdictional Immunities, supra n. 20; G. Delaune, Transnational Contracts (1980) chs. XI and XII. Treaty developments such as the European Convention on State Immunity as well as statutory enactments such as the FSIA of the USA;
the SIA of the UK and identical statutes in Canada (State Immunity Act, 1981); Pakistan (State Immunity Ordinance, 1981); Singapore (State Immunity Act, 1979); South Africa (Foreign Sovereign Immunity Act, 1981); Australia (Foreign States Immunities Act, 1985) unequivocally reveal increasing support to the restrictive theory of immunity in major legal systems.


60. 336 F.2d 354 (2nd Gr.1964).

61. Ibid at 361.

62. J.F.Lalive, L immuniti de juridiction des Etates, et des Organisations Internationales, Collected Courses of the Hague Academy (Sijthoff, 1954) 285 (1953). The list was adopted by the U.S. Court of Appeal in Victory Transport v. Comisaria General, supra n. 60. It should be noted that the categories specified by H.Lauterpacht and J.F.Lalive are not identical. A difference lies not only in the number of categories of acts to which immunity applies but also in the nature of the acts specified in (iii) of both the instances.

63. H. Lauterpacht, supra n. 7 p. 224.

64. Ibid p. 236 et seq.


66. S.K.Agrawala, supra, n. 20 p. 5.


68. For illustrations and convincing arguments see Nawaz, supra, n. 20 pp. 179-184 : C.G.Raghavan, supra, n. 20 pp. 170-171.

69. H. Lauterpacht, supra n. 7 p. 224.

70. Weiss, Competence ou lincompentence des tribunaux a legard des Etats etrangers, Collected Courses of the Hague Academy, (Sijthoff, 1924), 546 (1923).

72. Ian Brownlie, supra, n.53 p.324.

73. H. Lauterpacht, supra, n.7 p.224.


75. Restatement (Revised) of Foreign Relations (Tent.Draft No.2) supra, n. 22. For comments, see 75 A.J.I.L. 369 (1981).


77. Supra n.22.

78. Supra n.22.

79. Supra n. 31.

80. Prior to the FSIA it seems that, the US courts were divided as to whether the nature or purpose of the transaction should be looked at in determining commercial or governmental character of a transaction. For example, see Et ve Blik Kurumu v. B.N.S.International Sales Corporation, (196) 31 I.L.R. 247; Kingdom of Roumania v. Guorenny Trust Co., 250 F.2d 341 1058.

81. Congressional Committee Report on the Jurisdiction of United States Courts in Suits Against Foreign States, 15 L.L.M. 1398 at 1406 (1976). However, the House Committee Report does not indicate as to why the drafters of the FSIA adopted the nature test.

82. See sec. 3(3). supra, n. 23.

83. The exceptions can conveniently be grouped into three major groups, viz., situations in which a state is considered as having submitted to the jurisdiction of the courts in the UK (ss.2-3); exceptions based on the nature of the activities (ss.4-8) and activities based on taxes and other operations of state-owned ships (sec.10).
84. Sec. 14 (1).


87. (1957) 3 All E.R. 441 (463).

88. Supra n.85 at p.1102.

89. Ibid. p. 1104.

90. Ibid. p. 1102.

91. See Ibid. pp. 1104-1109.

92. Supra, n.86.

93. Ibid. p. 338.

94. Ibid. at p. 340.


96. Ibid. at p. 342. This view pertaining to restrictive theory of immunity seems to have been shared by Lord Edmund-Davies, Lord Diplock, Lord Bridge and Lord Keith.


100. Doc. A/CN.4/331 and Add.1, supra, n. 47.

101. Ibid. at 211.

102. Ibid. 211-212.

103. Supra n. 7, p. 225.


108. See the Second Report on Jurisdictional Immunities of States and their Property by Mooto Ogiso, Doc.A/CN.4/422 and Corr.1 and A/CN.4/422/Add.1 and Corr.1 para 3. Also see, his Preliminary Report, supra n. 19 p. 266. However, he conceding the opposition from the few members of the Commission to his proposed reformulation on the ground that it is too rigid to apply and does not adequately provide for unforeseen situations which could not be stipulated in advance in an international agreement or in a written contract, has agreed to add the following lines to the reformulated paragraph:

"In determining ---- contract,] it being understood that a court of the forum state, may, in the case of unforeseen situations decide that the contract has a public purpose." See, *ibid* pp. 272-73.


110. Sec. 1605.

111. Sec. 1603 (d).

112. Sec. 1603 (e).

113. Sec. 3 (1) (a) and (b).

114. Sec. 5 of the State Immunity Act of 1982 of Canada declares that "a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state", while sec. 2 of the Act defines "commercial activity" as "any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character".

115. For example, see section 5(1) of the the Pakistan State Immunity Ordinance of 1981, and section 5(1) (b) of the Singapore State Immunity Act of 1979.
116. Supra n. 22.

117. Art. 7. The states which have ratified the Convention, such as Austria, Belgium, Cyprus and the U.K. have adopted internal legislation or made necessary declarations to give effect to the provisions of the Convention, see Y.B.I.L.C. 1982 vol. II (Part I) p. 210 et seq.

118. Supra n. 22.

119. Art. 5.

120. Supra n. 22.

121. Art. III (B) (1) and (2).

122. Art. I (C).

123. Supra n. 22, pp. 572-574.

124. Supra n. 22.

125. Art. 3 (2).

126. For further comments see Brower, Bisline and Loomis, The Foreign Sovereign Immunities Act of 1976 in Practice, 73 A.J.I.L. 200 (1979). However, the European Convention contains a stricter territorial restrictions on the extension of jurisdiction in the context of commercial transactions (see art. 7).

127. For criticism see Delaume, supra n. 20. Sinclair, The Law of Sovereign Immunities: Recent Developments, supra n. 20.

128. For details see supra.

129. See the House Report No. 94-1487, supra n. 41 p. 107.

130. Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the sub-committee on Administrative Land and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2nd Seession, 31 at 53.

131. Supra n. 41 p. 107.

133. Ibid pp. 1487-1501.
134. Ibid pp. 1502-1504.

135. However, comment (a) to the commercial activity provision of the Restatement (Second) of the Foreign Relations Law of the United States (1965) states that "in considering what is commercial activity, the standard to be applied is that of the State exercising jurisdiction".

136. See generally, Osakwe, supra n. 57, pp. 13-52; Boguslavskii, supra n. 57 pp. 167-77; Crawford Execution of Judgments and Foreign Sovereign Immunity, 75 A.J.I.L. 820 (858-86) (1981) and Alcom v. Republic of Columbia, (1983) 3 W.L.R. 906 wherein John Donaldson M.R. has said that : If a State is amenable to the jurisdiction of the English courts in accordance with (section 3(1)), there seems no logical reason why its money should not be attachable in satisfaction of a judgment (at p. 912).

137. Crawford, supra n. 55, pp. 116-119.

140. Generally see State reports compiled in 10 Neth.Y.B.I.L. (1979); UN Materials on Jurisdictional Immunity, supra n. 20; H. Lauterpacht, supra n. 7; Crawford, supra n. 136; Hazel Fox, Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity 34 I.C.L.Q. 115 (1985);

141. See ss. 1609-1611.
142. Sec. 1602.
143. Sec. 1610 (a).
144. Sec. 1610 (b).
145. See House Report, supra n. 41.
146. Sec. 3 (1).
147. The SIA, unlike the FSIA, does not make distinction between execution of property of a state and execution of property of a separate entity.
148. Sec. 13 (2) (b).

150. See ibid. cols. 1501-11, 1520-30.

151. See the Singapore State Immunity Act, 1979, (sec. 15); the Pakistan State Immunity Ordinance, 1981 (sec.14); the South Africa Foreign States Immunities Act, 1981 (sec. 14); the State Immunity Act of Canada of 1982 (Sec. 11 (1) (b)); the Australian Foreign States Immunities Act, 1985 (sec.32).


153. Article 23 of the European Convention on State Immunity recognises absolute immunity from execution. However, article 26 provides that execution of a judgment can be carried out against property of a foreign state if such a property has been solely used for commercial or industrial activity.


155. Sec. 1605 (a) (1).

156. Sec. 17 (2).

157. See sec. 2 (3). However, the provision is inapplicable when a state intervenes or takes any step to claim immunity or to assert an interest in property in the circumstances entitling the state immunity vide sec. 2 (4)]. A similar approach is adopted in the State immunity Acts of Singapore, Pakistan, South Africa and Australia, which are modeled on the British SIA.
158. Art. 2.

159. Art. III A(a) and (b). Drawing from the European Convention and the SIA, the ILA Draft Convention refuses to recognise a waiver of immunity if a State participates only to assert immunity, or intervenes as an interested third party under circumstances in which it would have been immune had the suit originally been instituted against the state.


162. Ibid. at 772.


A Swedish scholar has made a claim that a plea of sovereign immunity as bar to the exercise of jurisdiction of arbitrators has never been admitted by an international arbitral tribunal, see J.Gills Wetter, Pleas of Sovereign Immunity and Act of Sovereignty before International Arbital Tribunals, 2 Jr.Int'1.Arb. 7 (14) (1985).

165. Riccardo Luzzatto, supra n. 3. Also see G.Bernini and Albert Jan Van den Berg, The Enforcement of Arbitral Awards Against a State : the Problem of Immunity from Execution, in Julian D.M.Lew (ed), supra n. 152, p. 359 (360).


168. For text see Indian Society of International Law, *International Commercial Arbitration* (Delhi, 1964) p. 17 et seq.

169. Art. 1.

170. For text see *supra* n. 168 p. 22.


173. *Supra* n. 22.

174. Article 12 (1).

175. *Supra* n. 22.


177. In a pre-SIA case Lord Denning, commenting upon the question as to whether an accepted arbitration clause implies a waiver of immunity, pointed out that if contract contains an arbitration clause there would be a voluntary submission to the jurisdiction of the arbitration and their supervision by courts (See, *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan* (1975) 3 All E.R. 961 (1966). Also see, *President of India v. Metcalfe Shipping Co.Ltd.* (1970) I.Q.B. 289. But see *Kahan v. Pakistan Federation*, (1951) 2 K.B. 1063 (CA) and *Duff Development Co.Ltd. v. Government of Kelantan*, (1924) A.C. 797 (PC).

178. For text see text accompanying n. 174 *supra*.

179. For states the distinction has great significance as many disputes with private parties arise not only out of commercial activities but also out of governmental power or mixed issues of commercial law and public law. Traditionally immunity is available in the latter areas. Such an automatic imputation of immunity by reason of the consent to government to arbitrate makes significant inroads in the area of state immunity. The statutory wording of section 9(1), in this sense, gives supervisory jurisdiction to the local English courts over any English arbitration to which the state has consented to be a party.

181. Mann, _supra_, n. 23.

182. _Supra_ n. 177.

183. The Singapore State Immunity Act, 1979 (sec. 11).


187. Other nation’s laws such as Switzerland’s clearly provide that the signing of an arbitration clause implies the waiver of sovereign immunity. See Interim Award Westland Helicopters Ltd., 23 _I.L.M._ 1071 (1989) (1984). Also see, J.F. Lalive, Swiss law and Practice on Relation to Measures of Execution against the Property of a Foreign State, 10 _Neth. Y.B.I.L._ 153 (162) (1979). Even in countries like France, where there is no comprehensive statute on sovereign immunity, the British model of waiver of immunity from jurisdiction by virtue of arbitration clause is incorporated in the arbitral jurisprudence through judicial pronouncements. See Crawford & Wesley, Arbitration with Foreign States and their Instrumentalities, _International Financial Law Review_, April 1986, p. 11 (14).

However, the State Immunity Act, 1982 of Canada, though enacted subsequently to the British SIA and the American FSIA, surprisingly, does not reveal any indication to the effect that submission to arbitration regards implied waiver of immunity. For text of the Canadian Act see 21 _I.L.M._ 798 (1982).

188. Sec. 1605 (a) (1).

189. _Supra_ n. 41.


191. (1964) 326 F. 2d 117 (2nd Cir.).

192. However, Clark J., who dissented, said: "the circumstances of consent to arbitration of what appears clearly to be a commercial transaction suggest a good possibility, that the State
Department --- will not support the defence of immunity". A view has also been expressed that the court could find little authority for the proposition that a sovereign state waives its claim to immunity by agreeing to arbitrate. See Comment, Waiver of Sovereign Immunity, 6 Har. Int’l L.J. 203 (214) (1965).

193. Supra n. 60.


200. Supra n.197 at p. 1178.


202. The Draft Restatement of Foreign Relations of the United States (Revised) (Tent.Draft No.4, 1983, citing LLAMCO and Ipitrade, treats an agreement to arbitrate as a waiver of immunity in an action to enforce both the agreement to arbitrate and any resultant award. See 497 Reporters Note 8.

203. The United States Appeals for the District of Columbia Circuit, on appeal by Guinea initially reversed the District Court’s decision. It, analysing the objectives and nature of the ICSID Arbitration, and disadvancing the significance attached by the District Court of Colombia to the ICSID rules and thereby assuming anticipation of the parties that the arbitration would occur in the U.S., held that Guinea’s agreement was not an agreement to arbitrate in
another country' within the meaning of section 1605 (a)(1) of the FSIA and therefore, it cannot be constituted an implicit waiver of immunity. [see, 21 L.L.M. 1355 (1982)]. However, the same court, sua sponte, amended its judgment to, held, inter alia, concur with the District Court's waiver holding. [see 22 L.L.M. 86 (90) (1983)].


209. Supra n.205 at p. 1301 (emphasis is original).

210. Ibid at p.1302. However, Judge Weinfeld conservatively limited the scope of his verdict in Verlinden by holding that a foreign state when it agrees to submit to disputes with another non-American private party, to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its jurisdictional immunity in U.S. courts.

211. Supra n.206.
212. Ibid p. 320.
213. Supra n. 207.
214. Ibid. at p. 987 (at p. 1444, L.L.M.)
215. Supra n.208.
216. Ibid at p. 1285.

endorsed that most courts have refused to find an implicit waiver of immunity to sue in American courts from a contract clause providing for arbitration in a country other than the United States.

217. For example see George Kahale, supra, n.195, Richard J.Oparil, Waiver of Sovereign Immunity in the United States and Great Britain by an Arbitration Agreement, 3 Jr.Int’l.Arb. 61 (1986) and Hans Smit (ed.) supra n. 5. H.Smit has not only opposed the view that submission to arbitration amounts to a waiver of jurisdictional immunity but also doubted constitutionality of such absolute waiver of immunity. He has a feeling that the implied waiver should reasonably not be construed to be consent to the competence of a court other than that sitting in the state whose law has been chosen. He argues that after all a person who agrees to an arbitration clause does not contemplate proceedings in a place other than that in which the arbitration is to take place and perhaps the place in which he resides. And construing a waiver of immunity clause waiving objection to suit in a place with which the defendant has no reasonable connection would appear not only unfair but may also be unconstitutional (see pp. 259-60).


221 Supra n. 130 at 37.

222. Art. 12. The British SIA enacted subsequent to the American FSIA, also limits the effect of waiver to proceedings in the courts of the United Kingdom which relate to arbitration, vide sec. 9(1). For details see text accompanying notes 178-181, supra.

224. See supra n.22. Also see, article III(g) of the Draft Resolution on Jurisdictional Immunities of the Institute of International Law prepared by Professor I. Brownlee printed in 62 Inst. Int. L. Ann. 98 (101) (1987); article III of the I.L.A. Draft Convention on Immunity, supra n.22.

225. Hans Smit (ed), supra n.5.

226. Gary B. Sullivan, supra n. 204; Richard J. Oparil, supra n. 217.

227. See generally, Kahale and Vega, supra n. 20. 


231. K.H. Bockstiegel, supra n. 49 p. 25.

232. Franaszek Przetacznik, supra n. 7.

233. Riccardo Luzzatto, supra n.3 p. 94.

234. Sec. 2 (7).

236. See infra.

237. Mann, supra n.3.


240. Ibid. at p. 165.

241. See 8 Y.C.A. 108 (1983). For other cases supporting the point under discussion and further comments see Schwebel, Some Aspects of International Law in Arbitration between States and Aliens, in Janice R.Moss (ed), Private Investors Abroad = Problems and Solutions in International Business in 1986 (Matthew Bender, 1986) ch. 12 $ 12.06; Schwebel, International Arbitration : Three Salient Problems ( )


243. For example in Duff Development Co. v. Government of Kelantan (supra n. 177) consent to arbitrate was held not to constitute waiver of immunity from the jurisdiction of the courts to enforce the resulting award.

244. Sec 1610 (a) (1) and (b) (1) Nevertheless, in Birch Shipping Corp. v. Embassy of Tanzania (D.D.C.Nov. 18, 1980) it was held that submission to arbitration in the U.S. entailed waiver of immunity from execution of the resulting award.

245. Sec. 13 (3).

246. Art. 23.

247. UN Doc. A/CN.4/331 and Add 1, supra n. 47.

248. Ibid. at 15.


254. See G. Delaume, supra n. 58 ch. XIV para 4.08; G. Delaume, Foreign Sovereign Immunity: Impact on Arbitration, supra n. 218; Stockholm Chamber of Commerce, supra n. 164 pp. 18-20.

255. 17 (2) "Where ---
(a) ---
(b) the foreign State is a party to an agreement to submit to arbitration about the transaction or event then subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose or for the enforcement of an award made pursuant to the arbitration, wherever it was made."

256. Per Lord Wilberforce, see 389 Hansard H.L. Comm., col. 1524. Also see, Hazel Fox, Sovereign Immunity and Arbitration in Julian D.M. Lew (ed), supra n. 152 p. 325. However, Mann, argues that English courts may recognise arbitral awards and enforce them only in respect of property of the state in commercial use. See, State Immunity Act, 1978, supra n. 20 at p. 58.

257. It is, however, worth noting that section 456 (2) (b) of the Restatement (Revised) of Foreign Relations Law of the United States (Tentative Draft No.2, March 27, 1981) expressly provides that: "an agreement to arbitrate is a waiver of immunity from jurisdiction in --- (i) an action to enforce an arbitral award rendered in pursuant to the agreement."


263. See supra n. 154 p. 103.
