**STATEMENT BY DR. VISHNU DUTT SHARMA, COUNSELLOR, ON AGENDA ITEM 79: "REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-FOURTH SESSION (PART-TWO)" AT THE SIXTH COMMITTEE OF THE 67TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON NOVEMBER 06, 2012**

**Mr. Chairman,**

I thank the Chairman of the International Law Commission for the presentation of his report concerning the second cluster of topics.

Concerning the topic of "Immunity of State officials from foreign criminal jurisdiction", we commend the Special Rapporteur Ms. Concepcion Escobar Hernandez for her preliminary report on this topic. We generally support the work plan devised by the Special Rapporteur. We also recognize the significance of the work done by the previous Special Rapporteur Mr. Roman A. Kolodkin on this topic.

**Mr. Chairman,**

This topic holds great significance as it is directly related to the performance abroad of the officials of a State. The topic is complex and politically sensitive. We agree with the Special Rapporteur that the substantive issues relating to this topic were cross-cutting and interrelated, but at the same time each and every issue needed to be looked into carefully and in a through manner. Consideration of this topic requires a balanced approach taking into account the existing law and practice on the related issues. In this regard, the in-depth examination of the judgement of the International Court of Justice of 3 February 2012 in the *Jurisdictional immunities of the States'* case would be desirable which inter-alia identified state practice in respect of immunities before national jurisdictions.

**Mr. Chairman,**

The issue of relationship between the *immunity ratione materiae* and *immunity rationae personae* would also need to be examined by taking into account the State practice and the ICJ judgement in the case, *certain questions of mutual assistance in criminal matters*. Concerning the applicability of immunity *ratione personae* beyond troika, we are in favour of identifying a clear criterion in establishing such practice by taking into consideration the judgement of the ICJ in the *Arrest Warrant case*.

We consider that the established legal order and certain aspects of immunity dealt under the existing international instruments should not be disturbed.

**Mr. Chairman,**

We congratulate Mr. Juan Manuel Gomez-Robledo for his appointment as the Special Rapporteur for the new topic of 'Provisional application of treaties' and commend him for informal consultations on the topic and presenting thereupon an oral report at the Commission's session.

We support the view that aspects relating to the formation and identification of customary international law do not form part of the scope of this topic.

We are in favour of preserving the regime established under article 25 of the 1969 Vienna Convention on Law of Treaties and not to create new conditions and circumstances for the provisional application of treaties. On the question of the final outcome of the Commission's work, we agree with those members of the Commission who thought it pre-mature to take any decision as to the form of the outcome and that the topic did not necessitate the elaboration of draft articles.

**Mr. Chairman,**

We commend Special Rapporteur Sir Michael Wood for his detailed Note on the topic 'Formation and evidence of customary international law'.

Custom has been recognized as a source of international law and this is also reflected in the Statute of the International Court of Justice annexed to the UN Charter. Customary principles of international law develop out of behaviour of the States in their international relations through a unique process and are not always easily defined. It may be therefore difficult to advance new rules on the formation and evidence of customary international law. We are of the view that the work of the Commission should be mainly focused on ways and methods concerning the identification of the rules of customary international law and that how the evidence of those rules could be established.

We agree with the Special Rapporteur that elaboration of conclusions with commentaries or guidelines on this topic would be of high practical value for the judges, scholars and practitioners facing the questions of customary international law both at the international and national levels.

**Mr. Chairman,**

In our view, the work on the codification and clarification of issues concerning the topic of "the obligation to extradite or prosecute" is of great importance given the fact that the obligation is based on the rule that a criminal should not go scot free and should be brought before the justice. The progress on the topic is slow for which the reason in the report appears to be the absence of basic research on whether or not the obligation has obtained the customary law status. In this regard, we would agree with those members of the Commission who are of the view that the absence of the customary nature of the obligation should not pose insurmountable difficulties in the further consideration of the topic.

We consider that the obligation to extradite or prosecute and the concept of universal jurisdiction are not interrelated in the sense that one is dependent on the other and so agree with those members of the Commission who have opined to delink the topic from the universal jurisdiction.

We agree with the observation of the Working Group on this topic that the in-depth analysis would be required of the ICJ judgement of 20 July 2012 in the case *Questions relating to the obligation to prosecute or extradite* in order to assess its implication for this topic.

**Mr. Chairman,**

Turning to the topic of Most-Favoured-Nation clause, we commend the work of the ILC Study Group on this topic ably chaired by Mr. Donald McRae.

We appreciate the efforts of the ILC in reviving its work on this topic since 2007 particularly by revisiting the temporal relevance of draft articles on the MFN clause by the ILC in 1978. Since then, the state practice in relation to MFN provision has been, to a large extent, superseded by specific multilateral, bilateral and regional arrangements. The GATT, and resort to the dispute settlement under the investment agreements has resulted in the interpretation of MFN provision in the investment context.

We agree with the Commission's observation that the reason of the peculiarities of the application of MFN clause in the mixed arbitral decisions is the different nature of the parties to the proceedings, the claimant being a private person and the respondent being a State and that the tribunal acts as a functional substitute for an otherwise competent domestic court of the home State.

We appreciate Commission's efforts toward providing authoritative guidance on the interpretation of MFN clause. The Commission may in this process consider the studies

that have been undertaken by other trade related bodies such as the WTO, UNCITRAL and OECD.

**Thank you, Mr. Chairman.**

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