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Sixth Committee

Agenda item 79 – Part 3
Report of the International Law Commission on the work of its sixty-third session: Chapters VI (immunity of State officials from foreign criminal jurisdiction); VII (provisional application of treaties); IX (the obligation to extradite or prosecute); XI (the Most-Favoured-Nation clause)

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Mr Chair

Since this is the first time my delegation takes the floor during this debate on the International Law Commission, allow me to thank the chairman of the Commission, Mr Lucius Caflisch, for presenting the Commission's report and to congratulate the members of the Commission for their achievements over the past year.

I will speak today on four topics – the Most-Favoured-Nation clause, the obligation to extradite or prosecute, the Immunity of State Officials from Foreign Criminal Jurisdiction, and the Provisional Application of Treaties.

Mr Chair

New Zealandappreciates the excellent work of the Study Group on the **Most-Favoured-Nation Clause** and its chairProfessor Donald McRae and former co-chair Ambassador RohanPerera. We consider the two working papers before the Study Group, including the revised paper on the "Interpretation and Application of MFN Clauses by Investment Tribunals", prepared by Professor McRae,provide a valuable resource on the factors and considerations taken into account by tribunals in interpreting and applying MFN clauses.

New Zealandwelcomes further consideration of the question of MFN in relation to trade in services and investment agreements, including its relationship to the core investment disciplines, as well as the relationship between MFN, fair and equitable treatment, and national treatment standards. We also support the Study Group's view that its work should be located against the background of general international law and the Commission's prior work, including the 1978 draft articles on the MFN clause.

We support the Study Group's general understanding on MFN including its methodologies in reaching this understanding. In particular, we support the Study Group's approach that no further interpretation is necessary where an MFN clause expressly includesor excludes dispute settlement procedures.New Zealandhas taken this approach in our modern Free Trade and investment agreements, following the case of*Maffezini*.

New Zealand looks forward to the draft report and considersthat it will be of great assistance to States to include an overview of the general background, an analysis of the case law, and appropriate recommendations,as proposed. We welcomethe Study Group's intention to completeits work next year. Given the constantly evolving nature of international investment jurisprudence, we would consider the Commission's work a timely and valuable contribution.

Mr Chair

New Zealand acknowledges the efforts of Ambassador Kriangsak Kittichaisaree, chairman of the Working Group on the **Obligation to Extradite or Prosecute**(*aut dedere aut judicare*), in charting a productive way forward on this topic.

We consider there is merit in exploring the question of whether an obligation to extradite or prosecute exists under customary international law, noting that the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind contains such an obligation for the core crimes in international law. We look forward to the working paper to be prepared on this topic for the Commission's sixty-fifth session, and encourage further consideration of the relationship of this topic with universal jurisdiction.

Mr Chair

New Zealand considers the topic **Immunity of State Officials from Foreign Criminal Jurisdiction**to be an important and timely topic for consideration by the Commission. We thank Special Rapporteur Ms Concepción Escobar Hernández for herpreliminary report analysing the work thus far on this topic, including a proposed work plan which provides a sound foundation for further discussion of the issues.

New Zealand views the law of immunity of state officials from foreign criminal jurisdiction as requiring a careful balancing between fundamental principlesof sovereign equality, non-interference in internal affairs and independent performance of state activitieson the one hand;and individual criminal accountability and the need to protect human rights and combat impunity for serious international crimes on the other.While it remains vital that officials not be subjected to politically-motivated actions in the courts of foreign countries, equally, in the "age of accountability" the public expects officials to be held accountable for serious crimes.

New Zealand looks forward to further consideration on the question of possible exceptions to immunity, and notesthe Commission's intention to consider both*lex lata*and*lex ferenda*. New Zealand continues to prefer the approach of the Commission in the 1996 draft Code of Crimes against the Peace and Security of Mankind, which provides for an exception to immunity when a state official is accused of international crimes, particularly when prohibition of an international crime has reached the status of a *jus cogens* norm. We welcome the suggestion thatterms such as "international crimes", "grave crimes" or "crimes under international law"be clarified for the purpose of this topic, noting that these terms may overlap with other topics of the Commission.

We are pleased to see the scope of immunity being given careful consideration and look forward to further analysis in this area, particularly around whether immunity *ratione personae* should be absolute and apply prior to and while in

office, both in an official and personal capacity. We continue to consider that any extension of immunity beyond the troika of Heads of State, Heads of Government and Foreign Ministers must be clearly justified and include a careful analysis of customary international law. We would also be interested in further study on whether immunity*ratione materiae* should apply to unlawful acts or acts *ultra vires*.

We support the Special Rapporteur's intention to prepare draft articles addressing the core issues of the topic for a first reading during the present quinquennium.

Mr Chair

New Zealand takes note of the inclusion of the topic **Provisional Application of Treaties** in the Commission's work programme, and welcomes the appointment of Ambassador Juan Manuel Gómez-Robledo as Special Rapporteur for this topic.

We agree that it would be useful to clarify issues relating to provisional application, in particular the relationship between Articles 18 and 25 of the Vienna Convention on the Law of Treaties and their differing legal regimes. There is merit in having a clear identification of the differing forms of provisional application, the procedural steps that are pre-conditions for provisional application, and the legal effect of provisional application. The memorandum to be prepared by the Secretariat on the previous work undertaken by the Commission on this subject in thecontext of its work on the law of treaties, and on the travaux préparatoires of the relevant provisions of the 1969 Convention on the Law of Treaties, should provide useful material for this purpose.

However, New Zealand also believes that the Commission's work on this topic would greatly benefit from consideration of the differing practice of States regarding provisional application. The legal regime of provisional application cannot be divorced from a State's constitutional and procedural requirements. The Commission's work would therefore benefit from a good understanding of the internal position of States towards provisional application.

Mr Chair

To conclude, my delegation expresses its appreciation for the work of the Commission. New Zealand continues to be a strong supporter of the important work of the Commission and wishes the members of the Commission every success in the comingquinquennium.