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International Law Commission
Report on ILC's 64th Session

- Chapter VI – Immunity of State Officials from foreign criminal jurisdiction
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Speech delivered on behalf of Mr. Ion Gâlea
Director General for Legal Affairs
Ministry of Foreign Affairs

New York, November 2012

Mr. Chairman,

I would like to refer now to **Chapter VI of the Report - The immunity of State officials from foreign criminal jurisdiction**- a complex and sensitive topic that is relevant not only for international law as such, but for the international relations as a whole. In this context, please allow me to express our gratitude for the preliminary work embodied in the three reports carried out by Mr. Roman Kolodkin that constituted a good starting point. I would also like to congratulate Ms. Concepción Escobar Hernández for her appointment as Special Rapporteur and for the valuable work she has done so far as evidenced by the “transitional” report that she has already presented.

Although the topic is classical for international law, it has indeed many facets and contains several sensitive issues that should be further addressed in the light of the new developments and taking into consideration the relevant values and principles of contemporary international law. It requires a systemic approach from a fresh perspective that we do hope that it will be ensured by the Special Rapporteur, in particular as to the points where differences exist. In our view, it is of outstanding relevance to treat the topic of immunity of state officials in close relationship with the state immunity because, although they are not identical, they are based on the same premise, the state sovereignty, and there are many cases in which they are claimed together. The topic should be also considered having in view the already achieved codification, in particular in respect of aspects of immunity of the diplomatic and consular relations, special missions, jurisdictional immunity of States and their property. The topic should be also dealt with while taking into account the protection of human rights and the avoidance of impunity. We commend the intention of the Special Rapporteur to take it up in a concrete and practical way by establishing four blocks of questions, namely the general issues of a methodological and conceptual nature, immunity *ratione personae*, immunity *ratione materiae* and procedural aspects of immunity. Since the product of the work of the Commission is intended to form part of the international legal system, we are looking forward to examine the draft articles that are to be presented in the next report.

As regards the **Chapter VII - Provisional application of treaties**, we consider it as a topic of great importance and relevance, mainly for the impact it may have on the future conduct of the States in concluding treaties containing this clause and on the interpretation of the legal regime they create. Therefore, the relevant practice of the States up to now

and the circumstances in which the States resorted to provisional application of treaties would be useful for the future work of the Commission on this topic.

We share the view of the Special Rapporteur - and we take this opportunity to congratulate Mr. Juan Manuel Gómez - Robledo for his appointment - that the first basis for the consideration of the topic should be the work undertaken on the law of treaties and the analysis of the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties. We also think that the final outcome of the Commission's work - draft articles or guidelines or model clauses- may be decided at a later stage after the preparation of the first report.

I would like now to refer briefly to **Chapter VIII - The Formation and evidence of customary international law** and to underline the practical significance and usefulness of the Commission's future work on this topic, especially in the context of the constitutional order and the internal law of many States where guidance is needed not only to international lawyers who deal and suggest legal solutions in international relations, but also to judges of domestic courts that are called upon to solve cases involving aspects of international law. We congratulate Mr. Michel Wood for his appointment as Special Rapporteur and express our hope that we shall have in front of us an outstanding outcome in spite of the difficulty, complexity and challenging character of the endeavors to elaborate a set of conclusions with commentaries on the topic. In our view, they should be elaborated with a practical purpose in mind and consequently, the identification and clarification of the rules on formation and evidence of customary international law should be at the core of these conclusions. In this respect, the future research should focus on the practice of States in this field, the elements of the previous work of the Commission and certainly, on the judgments and advisory opinions of the International Court of Justice.

Regarding "**The obligation to extradite or prosecute**", we would like to welcome the discussions held within the five meetings of the working group and the presentation of the possible future options for the progress on this topic. The obligation *aut dedere aut judicare* has a close relationship with the universal jurisdiction and although the finalization of the work of the Sixth Committee on universal jurisdiction is important, this should not, in our view, preclude the analysis of this relationship within the work of the Commission as well, having in view the role played by this obligation as an inter-linkage of the national and international systems as regards international criminal justice.

With respect to “**Treaties over time**”, we welcome the extensive debates that took place within the Study Group on the second and third report of its Chairman, as well as the decision of the Commission on a new format of the work as suggested by the Study Group, entitled “**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**”. We congratulate Mr. Georg Nolte for his appointment as Special Rapporteur and would like to underline that we share the view that the main focus of the first report he intends to submit for the next session of the Commission should be on the legal significance of subsequent agreements and subsequent practice for interpretation of treaties in conformity with article 31 of the Vienna Convention on the Law of Treaties. Also, as to the question whether the future work should have a level of determinacy, we think that while preserving a flexible approach on the topic, further efforts should be made to come up with conclusions and guidelines that have a certain normative content. We are looking forward to the first report which will be elaborated on this topic by the Special Rapporteur.

With respect to the “**Most-Favored-Nation clause**”, we would like to thank the Study Group and its chair Mr. Donald M. McRae for the efforts made so far in identifying several issues and cases related to this topic and seeking to formulate proposals to safeguard in the future against the fragmentation of international law in this field. We appreciate the ample debates held within the Study Group during its six meetings and the two working papers presented by Mr. Donald M. McRae and Mr. M. Forteau highlighting different interpretative approaches, mainly in the arbitral decisions. We hope that building upon the results already obtained, further progress will be made towards an outcome during the next two-three sessions of the Commission, designed to ensure a more stable and certain investment law. Also, in our view, the recommendations and possible model clauses drafted in this respect should be put forward within the broader normative framework of general international law. The previous work of the Commission on the topic as well as the developments within international organizations, such as WTO, OECD, UNCTAD should be also taken into account for this purpose.

As regards “**Other decisions and conclusions of the Commission**”, we welcome the decision to establish a Working Group on the Long Term Programme of Work for the present quinquennium. Thank you, Mr. Chairman.