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30 October 2013

Sixth Committee of the General Assembly

Report of the International Law Commission on the work of its 65th session Cluster I

**Statement by Ms Julia O'Brien
First Secretary (Legal)
Australian Permanent Mission to the United Nations**

(Check against delivery)

Mr Chair and distinguished members of the International Law Commission,

Australia acknowledges the work of the Commission over the past year on a range of important topics, including on some issues of fundamental importance in international law.

We would like to comment briefly on some of these topics, namely subsequent agreements and subsequent practice in relation to the interpretation of treaties and the immunity of state officials from foreign criminal jurisdiction.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Mr Chair

Australia welcomes the first report of the Special Rapporteur, Mr. Georg Nolte, on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and notes the provisional adoption of five draft conclusions and their associated commentaries.

Australia considers the work of the Commission on this topic to be of great utility and guidance to States and international organisations. Australia encourages the Commission, in its future work on this topic, to give consideration to issues raised by the adoption of subsequent agreements as well as subsequent state practice relating to multilateral conventions. In particular, consideration of the procedural requirements for the adoption of ‘interpretative resolutions’ would be of great utility, given the range of divergent views which still exist regarding this issue.

Immunity of state officials from foreign criminal jurisdiction

Mr Chair

Australia welcomes the discussion of the Commission and the second report of the Special Rapporteur, Ms Escobar Hernandez, on the immunity of State officials from foreign criminal jurisdiction. The report continues the admirable work of the Commission in this complex and politically sensitive area of law.

Australia emphasises the procedural nature of immunity and underscores the need for immunity to not be equated with impunity. For this reason, Australia is encouraged by the ILC’s effort to achieve the right balance in limiting the temporal and material scope of personal immunity. Such balance should be a key factor in the future development of draft articles on both personal immunity and functional immunity (immunity *rationemateriae*).

Australia notes the divergent views of States on the categories of State officials entitled to immunity from foreign criminal jurisdiction and the scope of this immunity. For this reason, Australia welcomes the Commission's commitment to further consider specific terms, including 'officials' and the meaning of 'acts performed in an official capacity'. Such consideration will help ensure greater clarity and remove confusion. With this in mind, Australia is of the view that the Commission should explore the possibility of defining the term 'officials' within the draft articles.

Given the political sensitivities that this topic raises, new principles should be developed in a conscious and considered fashion. In Australia's view, particular issues that should be considered in the future work of the Commission on this topic include:

- the continuing need to balance the protections afforded by immunity with the prevention of impunity from the most serious crimes and human rights abuses,
- the link between State responsibility and immunity, and
- express or implicit waiver of immunity, noting the arguments occasionally advanced for interpreting provisions of human rights treaties as implied waivers of immunity. Australia considers that the legal basis of such arguments should be examined carefully as a question of treaty interpretation.

Australia looks forward to considering the continued work of the Commission on this topic in its subsequent sessions.