Statement by Ms. Nguyen Thi Minh Nguyet

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At the Meeting of the Sixth Committee

On Agenda Item 78: Report of the International Law Commission on the Work of its Sixty- sixth Session (Part II - Chapters VI-IX, Part III – Chapter XVIII)

Mr. Chairman,

I would like to take this opportunity to thank the International Law Commission for its comprehensive report on the work of its 66th Session and members of the International Law Commission for their wonderful work and contribution to the codification and progressive development of international law over the past years.

My delegation will, in this intervention, make general comments and observations on chapters VI-IX and XIII of the Report.

The obligation to extradite or prosecute (Chapters VI)

With respect to Chapter VI on the obligation to extradite or prosecute, we would like to congratulate the International Law Commission for its conclusion of consideration of the topic and the adoption of the final report by the Special Rapporteur on 7 August 2014.

The obligation to extradite or prosecute plays a crucial role in combating crimes of serious concern to the international community, ensuring perpetrators of such crimes not go unpunished. We would like to reiterate that the Judgment made by the ICJ on *Questions relating to the Obligation to Prosecute or Extradite* in the case between Belgium and Senegal on 20 July 2012 has shed the light on the

obligation to extradite or prosecute as a duty of states to cooperate in fighting against impunity bring perpetrators of any crimes to justice. This obligation applies to a wide range of crimes and has been incorporated in many multilateral treaties, including a series of conventions against international terrorism concluded since 1970.

In this regard, the final report of the International Law Commission on obligation to extradite or prosecute is of practical value to States. It provides a useful guidance for States in interpreting and implementing existing treaties relating to the subject. We highly appreciate that the report of the ILC covers all related issues raised in the Sixth Committee during the previous sessions of the General Assembly, including the gaps in the existing conventional regime, the transfer of a suspect to an international or special court or tribunal as a third alternative for punishment of the offenders, the relationship between the obligation to extradite or prosecute and *erga omnes* obligation or *jus cogens* norms, the customary international law status of the obligation to extradite or prosecute, and the implementation of this obligation in light of the Judgement of the ICJ in the Belgium v Senegal case and other substantial matters.

In this connection, we would like to confirm our commitment to fight against impunity. We are willing to cooperate with other States to combat crimes, bringing alleged perpetrators to justice in accordance with our national law and obligations under international law.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (Chapter VII)

With respect to the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", Viet Nam would like to congratulate the Special Rapporteur, Mr. Georg Nolte for his successful work in producing the first report on the topic. We note that the draft conclusions prepared by him were referred to the Drafting Committee and adopted provisionally by the Commission, together with commentaries. We also note with satisfaction that the Special

Rapporteur, in his commentaries, took stock of the enriched jurisprudence of, *inter alia*, the International Court of Justice, the World Trade Organisation dispute settlement bodies, the European Court of Human Rights and arbitral tribunals of *ad hoc* jurisdiction as well as extensive writings by academia in this field. My delegation contends that these draft conclusions will serve as a useful sources for governments and interpreters of treaties, including judges, arbitrators and other practitioners.

With regard to the legal effect of subsequent practice in amending or modifying treaties, my delegation fully support the second paragraph of draft conclusion 7. We are of the view that subsequent practice has no effect of modifying or amending a treaty. This position was supported by a majority voting in favour of deleting a draft article 38 to that effect at the Vienna Conference on the negotiation of the Convention on the Law on Treaties. We hold that State practice and jurisprudence has not developed to such a stage that the possibility of modifying a treaty by subsequent practice can be generally recognised. Such scenario would be in discrepancy with our domestic law governing the conclusion of treaties, which stipulates that amendments to treaties shall be agreed upon by the concerned parties.

Protection of the atmosphere (Chapter VIII)

On the topic "Protection of the atmosphere", we would like to express our appreciation for the devoted work of the Special Rapporteur, Mr. Shinya Murase. We note that at the 66th session, the Commission engaged in a very fruitful discussion on the first report of the Special Rapporteur.

Mr. Chairman,

We share the view that the current project presents several difficulties should it proceed in strict compliance with the Commission's 2013 understanding. In view of the extreme importance of the atmosphere to the humankind and the need for urgent and concrete action by the international community, we expect the current project make a meaningful contribution to the global comprehensive endeavours to

protect the environment. To realise that goal, it is desirable that the Special Rapporteur be accorded certain degree of flexibility in his methodology, while at the same time, maintain compliance with the 2013 understanding of the Commisison.

Along that line, we welcome the Special Rapporteur's indication that the major objectives of the project consisted of identifying legal rules regarding the topic and any gaps in the existing treaty regimes. My delegation also value that the project would focus on exploring possible international cooperation mechanisms, which are essential to any effort to protect the atmosphere as a single unit. Such an approach may ensure non-interference with relevant political negotiations on the topic of climate change, ozone depletion and long-range transboundary air pollution. As a follow-up to identifying the legal gaps, recommendations on ways to fill the gaps may be put forward in order to make the present project inclusive and more useful to governments.

On one particular point, we note some concern at the lack of meaning ascribed to the term "a common concern of humankind" as used in draft guideline 3, an ambiguous and no less controversial concept which seems to find no basis in State practice or in any case-law. We welcome the Special Rapporteur's plan to consult with the scientific community for a technical perspectives on the topic and to reformulate the draft guidelines for consideration by the Commission in 2015. With interest, we look forward to reading the second report of the Special Rapporteur on this complex project.

Immunity of State Officials from foreign criminal jurisdiction (Chapter IX)

Finally, on the topic "Immunity of State Official from foreign criminal jurisdiction" in Chapter IX, our delegation welcomes the provisional adoption of 5 first articles with commentaries by the Commission, which, in our view, presents a significant progress in the work of the Commission on the topic. These five draft articles help identify the subjective and the objective elements of immunity.

Draft article 2(e) introduces the definition of "State official" who may enjoy immunity *ratione materiae* from foreign criminal jurisdiction. The inclusion of this definition is necessary for the purpose of the present draft articles. However, the definition of "State official" is so general that may lead to confusion. Therefore, it needs more clarification. We think it desirable to add definitions for several terms used in draft article 5, namely "acting as such", "represent" and "exercise state functions".

Concerning draft article 5, even though this article is intended to define the subjective scope of immunity *ratione materiae,* the wording of this article is no more than a statement of the person enjoying immunity of foreign criminal jurisdiction. Since part 3 concerns with immunity *ratione materiae,* it is necessary to add articles on the nature of acts that can enjoy immunity *ratione materiae.*

It is necessary, in our view, for the Commission, to take a systemic approach which could ensure the balance between the need to respect criminal jurisdiction immunity of State officials and that to fight impunity. Given the complexity of the topic and its political sensitivities, it is essential that those aspects be considered thoroughly and comprehensively.

Most-Favored-Nation clause

As my delegation will deliver only one speech in this agenda item, Mr. Chairman, with your permission, I would like to briefly touch upon the most-favored-nation clause topic. Viet Nam expresses its appreciation for the extensive research and analysis undertaken by the Study Group and its coming up with a draft final report on its overall work. We note with appreciation that the International Law Commission adopted five draft conclusions on the most-favored-nation clause.

We contend that the Study Group is moving in a right direction in setting forth the target of making the final report of practical use. Such can be attained in part by identifying trends in the interpretation of MFN provisions in investment arbitration cases and State treaty pratices with regards to the MFN provision. On

the one hand, MFN provision is of treaty nature and their interpretation is a product of specific treaty dependent on other provisions of the relevant treaty; thus, MFN provision resists a uniform approach. On the other hand, in the background of proliferation of investment agreement, the ongoing negotiation of several major free trade agreements and increasing number of arbitration cases, the outcome of the Study Group is expected to serve as a useful source for treaty negotiators, policy makers and practitioners involved in the investment booming area. With this, we look forward to reading the final report of the Study Group.

I thank you, Mr. Chairman.