STATEMENT BY MR. PREM CHAND GUPTA, MEMBER OF PARLIAMENT, ON AGENDA ITEM 81 – REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION – CHAPTERS VII, X, XI, XII AND XIII – AT THE SIXTH COMMITTEE OF THE 66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY ON NOVEMBER 01, 2011

Mr. Chairman,

I thank Prof. Maurice Kamto, Chairman of the International Law Commission (ILC) for introducing the third cluster of topics of the Report of the sixty-third session of the Commission.

Mr. Chairman

We commend the Special Rapporteur Mr. Roman A. Kolodkin, for his second and third reports on the topic of "Immunity of State officials from foreign criminal jurisdiction", which were considered by the Commission during its sixty-third session. The reports have addressed both the substantial and procedural aspects of the subject matter of the topic. The questions concerning the timing of consideration of immunity, its invocation and waiver deserve appreciation in particular.

We agree, in principle, with the Special Rapporteur that the immunity of a State official from foreign criminal jurisdiction was a generally accepted norm and that any exceptions to that needed to be proved or established.

We also concur with the proposal of the Special Rapporteur that the timing for raising immunity in criminal proceedings should be considered either at the initial stage

or at the pre-trial stage of the court proceedings. In this regard, it is thought appropriate that the Commission may study in detail, the implications of not considering the immunity at the early stages of criminal proceedings.

Mr. Chairman,

Concerning the applicability of immunity *ratione personae* beyond troika*,* we are in favour of identifying a clear criterion in establishing such practice. Further, we stress the need of enhanced cooperation between the States concerned in matters relating to immunity of state officials. With regard to the waiver of immunity, we agree that the right to waive immunity of an official vests in the State and not in the official himself.

Mr. Chairman,

On the topic of "Most-Favoured-Nation clause", we commend the Study Group constituted under the co-chairmanship of Mr. Donald McRae and Mr. A. Rohan Perera. Given the wide experience, the Study Group would be able to thoroughly examine the topic and the issues related thereto.

Mr. Chairman,

The MFN clause got its way first in the international trade law matters and subsequently in investment treaties, in order to prevent discrimination and to ensure free and fair treatment. There is an improbability due to the various arbitral decisions on the topic, especially after the *Maffezine case*. This paved the way for divergence interpretation on the scope of application of MFN treatment in the investment regime. We welcome the Working Paper prepared by Mr. Donald Mc Rae on the 'interpretation and application of MFN clauses in investment agreements'. This paper has thrown some light on the prevailing divergences concerning this topic.

We feel that it is important to study the different formulations of MFN clauses that can be included in the investment treaties and precise implications of their inclusion. This would bring some clarity on the meaning and application of the MFN principle to the benefit of countries willing to conclude investment treaties. In this regard, we fully subscribe to the view of the Study Group that the topic needs to be looked at, in relation to trade in services and investment agreements. The non-discriminatory application of MFN clause, fair and equitable treatment of States, and the national treatment standards deserve special attention.

Mr. Chairman,

Turning to the topic of "The Obligation to extradite or prosecute" we are committed to the spirit of the topic that no offender should go scot free and should be

brought before the justice. We appreciate the presentation by the Special Rapporteur Mr. Zdzislaw Galicki of his fourth report before the Commission in its last session. We fully subscribe to the view that States have the duty to cooperation in the fight against impunity and agree with the proposition of draft article 2 in that regard.

Mr. Chairman,

We agree with the observation of Special Rapporteur that this topic required an in-depth analysis of international norms both conventional and customary as well as national regulations.

Regarding the position under Indian law, the Indian extradition law has clearly incorporated the principle of either extradite or prosecute. All bilateral extradition treaties of India have also included this principle. Given the practical value of the topic, we are in favour of its continued consideration by the Commission.

Mr. Chairman,

The establishment of a Working Group by the Planning Group of the Commission on methods of its work is a welcome initiative. These efforts will result in more efficient working methods of the Commission. We also welcome the reconstitution of the Working Group on the Long-term Programme of Work. Regarding the selection of topics for consideration by the Commission, we are of the view that the topics should be of practical value for the whole international community, the translation of which in international legal instruments is necessarily needed to govern the relationship of States.

Thank you, Mr. Chairman.

BACK TO TABLE OF CONTENTS