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Swiss Statement

presented by
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Permanent Mission of Switzerland
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Mr. Chairman,

May I again thank the Chairman of the International Law Commission, Mr Maurice Kamto, for presenting the third and final part of the Report covering chapters VII, X, XI, XII and XIII. My delegation would also like to thank the rapporteurs and other members of the Commission who have worked on the matters concerned.

My delegation will today express its views on the chapters relating to the immunity of State officials from foreign criminal jurisdiction, the obligation to extradite or prosecute, the most-favoured-nation clause, and other decisions and conclusions of the International Law Commission. I will read out only the most important parts of my declaration. For details, please refer to the written version.

[Chapter VII – Immunity of State officials from foreign criminal jurisdiction]

Mr. Chairman,

I shall first tackle the issue of the immunity of State officials from foreign criminal jurisdiction. My delegation considers this issue to be very important, not least in the light of current discussions on the issue of the universal competence of national courts. Switzerland intends to actively support the Commission's efforts and we would like to share some thoughts on this matter with you.

The scope of the immunity of State officials from criminal jurisdiction needs to be examined in different ways, depending on whether the proceedings concerned are taken by a national court or whether the alleged offences fall within the competence of an international court. Where the International Criminal Court is concerned, its Statute explicitly sets limits on the possibility of invoking immunities deriving from other sources of international law. Switzerland welcomes this legal development. However, as the Special Rapporteur has pointed out, this limitation on immunities does not apply when the competence of a national court is concerned. Indeed, the principle of equality between States must be guaranteed, as must the stability of international relations.

Allow me, Mr President, to refer back to the 2008 Preliminary Report on the immunity of State officials from foreign criminal jurisdiction (A/CN/601). This sets out, in particular, the international rules adopted to date concerning the privileges and immunities of State officials, taking into account different aspects. In particular, it mentions the situation of members of diplomatic and consular representations, members of special missions and State representatives to international organisations.

This analysis is very valuable, especially for States which, like Switzerland, have a long tradition of acting as host countries. We would like to point out that, in addition to multilateral treaties and the rulings of national courts, an examination of the regulations covering the privileges and immunities of State officials also needs to take into account the many headquarters agreements (*accords de siège*) concluded between host countries and the organisations established on their territory. These headquarters agreements in fact provide a useful picture of the generally permitted framework

of privileges and immunities, and in particular of the personal and material extent of the privileges and immunities accorded to State officials.

The Preliminary Report rightly points out that these international treaties do not deal with the issue of the immunity of State officials from criminal jurisdiction in general, nor with many specific situations. We would like to emphasise how important it is that the Commission focus its attention on issues which have not yet been regulated by international treaties.

It would not be appropriate if the consequence of formulating general rules concerning the immunity of all State officials from criminal jurisdiction were to limit the scope of existing agreements or make them more difficult to interpret. Indeed, setting out general rules which also affect specific areas that have already been codified could result in the existing special rules being considered differently. In our view, therefore, the Commission should focus its attention on filling the gaps which currently exist in this area of international law. On this basis, the Commission could determine which rules of customary international law are still in need of codification, and then go on to consider the need to create new rules of international law in areas which have not yet been regulated.

In this context, the Preliminary Report of 2008 emphasises the need to study in greater depth the question of whether there are already rules of international customary law which regulate the status of members of special missions (paragraph 98, note 199), given that to date few States have signed up to the 1969 New York Convention on special missions. For our part, we are of the view that certain principles of the said Convention constitute a codification of international customary law, and we would encourage the Commission to pursue its analysis of this question.

Mr. Chairman,

My delegation thinks it essential that the Commission identify criteria – in the light of international regulations which deal, in one way or another, with the legal status of State officials – to define more precisely the notion of "State officials" as envisaged in the current work of the Commission.

As regards actions which a State exercising its competence in criminal matters might take without violating the immunity of a State official, Switzerland supports the special Rapporteur in subscribing to the conclusions of the International Court of Justice. Switzerland is also of the opinion that a State may – without violating the immunity of a State official – take measures of criminal procedure which are not restrictive in character and not likely to prevent the foreign official form performing his functions, in particular in the context of preliminary investigations to establish the facts and decide whether or not proceedings are appropriate.

Finally, my delegation would like to draw attention to a question of terminology, with reference to a ruling of the International Court of Justice of 14 February 2002 in a case relating to an arrest warrant issued on 11 April 2000 (Democratic Republic of Congo v. Belgium). Whereas the Report of the International Law Commission submitted for our attention today makes a distinction between official and non-official ac-

tions, the above-mentioned ruling is founded on the notions of official actions and actions performed “on a private basis”. The terminology used by the International Court of Justice in this case seems to us better suited to express the different notions we are dealing with.

[Chapter X – The obligation to extradite or prosecute]

Mr. Chairman,

In the second part of this statement, I shall attend to the issue of the obligation to extradite or prosecute dealt with in Chapter X of the Report. My delegation is of the opinion that any analysis of this obligation which does not take into account the question of universal jurisdiction cannot lead to a full and consistent understanding of the issues involved. Given the close relationship between the obligation to extradite or prosecute and the matter of universal jurisdiction, these two issues would have been better dealt with together by the Commission. This would have made the Commission’s work more relevant from the point of view of combating impunity. In any case, the Sixth Committee’s working group concerned with universal jurisdiction needs to take into account the questions tackled by the International Law Commission regarding the obligation to extradite or prosecute.

[Chapter XII – The most-favoured-nation clause]

Mr. Chairman,

Thirdly, I shall be commenting on Chapter XII of the report regarding the most-favoured-nation (MFN) clause. I shall introduce my comments with a general observation of the work of the International Law Commission as regards investment law.

Generally speaking, my delegation welcomes the fact that the work of the Commission relating to the most-favoured-nation clause and the fair and equitable treatment (FET) standard helps to prevent the risk of fragmentation. In this spirit, it seems best that the Commission focus on bringing added value to the efforts undertaken by other actors in the area. I refer notably to the work of UNCTAD, which has very recently published an extensive publication on MFN, and of the OECD, which has a long record of publications in investment law.

Mr. Chairman,

This brings me to the central point of Chapter XII of the Report, the most-favoured-nation clause.

Switzerland sees the function of the MFN clause in the context of investment to be the same as in trade, that is to ensure equality in competitive conditions between foreign investors of different nationalities. The clause aims at enabling the contracting states and/or its investors to challenge the actual level of material treatment with respect to the making or the management of an investment. However, the scope of the MFN clause in foreign investment is much broader than in the context of trading certain goods or services, so the implications should be carefully addressed. On that

note, we have doubts that the use of MFN made by some arbitral tribunals for importing allegedly more favourable substantive or procedural provisions from other investment agreements concluded by the treaty partner country really corresponds to the intention of many contracting states of bilateral investment treaties. Switzerland has followed the trend detected in the Commission's working paper of clarifying in its post-Maffezini investment treaty practice that the dispute settlement clauses are not covered by the MFN obligation.

My delegation supports the drafting of a report presenting a widely shared understanding of key aspects of the Most-Favoured Nation clause, and not necessarily entailing recommendations and model clauses.

In particular, we favour further work on the relationship between the Most-Favoured Nation, National Treatment and Fair and Equitable Treatment standards. In addition, we would find worth identifying the reasons why arbitral tribunals lack a systematic approach when interpreting and applying Most-Favoured Nation clauses. In that regard, we would find it interesting to assess how the rules of interpretation of the Vienna Convention on the Law of Treaties are applied by tribunals and how this impacts on the coherence of their approach.

[Chapter XIII – Other decisions and conclusions of the Commission]

Mr. Chairman,

In the final part of this statement, my delegation will refer to the decision of the International Law Commission to add to its long-term working programme the five subjects covered in paragraphs 365 to 367 of the Report. In response to the Commission's declared interest in hearing States' opinions on these new subjects, I shall give our views on three of them: the fair and equitable treatment standard in international investment law, the formation and evidence of international customary law, and the protection of the environment in relation to armed conflict.

[The fair and equitable treatment standard in international investment law]

Mr. Chairman,

Following on from what we have just said about the most-favoured-nation clause, allow me to speak first of all on the issue of the fair and equitable treatment standard in international investment law.

My delegation is of the view that the questions raised on Fair and Equitable Treatment in Part II of Annex D of the report are valid ones. Fair and Equitable Treatment is the most frequently invoked standard in practice and deserves further study. We wonder however about the feasibility of achieving an understanding shared by a majority of states, particularly regarding the meaning of Fair and Equitable Treatment. *The lack of multilateral consensus on investment issues is manifest indeed, as evidenced by the failure of the OECD Multilateral Agreement on Investment or the early exclusion of investment from WTO's Doha agenda.*

The quest for greater coherence in case law also entails inherent limits. On the one hand, we face a multiplicity of investment agreements (nearly 3000 worldwide) with different wordings on Fair and Equitable Treatment. And on the other, arbitral tribunals constituted on the basis of investment treaties are under no obligation to ensure coherence of their decisions with earlier decisions in investment treaty-based disputes, let alone if these have been made under a different treaty.

In my delegation's opinion, achieving a clear and common view about the intended final product of the International Law Commission's work is essential before entering into a more substantive debate. Producing guidelines that would indicate whether Fair and Equitable Treatment reflects customary international law does not seem most appropriate, bearing in mind that a considerable number of states, albeit not Switzerland, reject the existence of customary international law with respect to foreign investment. As to the idea of drafting a statement on the meaning of the standard, it does not seem to have much chance of success for the same reason.

My delegation acknowledges that "a clear statement of the law [on this point], from an authoritative source" would theoretically be useful. However, given the many open questions and the divergent views - and interests - of states, multilateral treaty negotiation seem to be the most appropriate forum to come to agreements on the law in relation to Fair and Equitable Treatment.

Beyond Fair and Equitable Treatment, my delegation wishes to suggest another subject of studies to the International Law Commission. It has been asked whether investment treaty case law has *de facto* taken the place of customary international law as a source of obligation regarding foreign investment. The response to this question and its implications for the development of international law could be a subject of further in-depth studies by the Commission.

[Formation and evidence of international customary law]

Mr. Chairman,

I am now turning to the Commission's decision to add to its Long-term Programme of work the issue of formation and evidence of international customary law. My delegation could not agree more with the statement made at paragraph 4 of Annex A of the report, according to which flexibility remains an essential feature of the formation of customary international law. Thus, it would be difficult to systematise the process through which customary rules are formed without sapping the very essence of custom. Indeed, custom has constituted a main source of international law, which is in constant evolution. Therefore, my delegation wishes that it continue to play its full role on the side of other sources of law.

[Protection of the environment in relation to armed conflict]

Mr. Chairman,

To conclude, my delegation takes note with interest of the fact that the International Law Commission will tackle the question of the protection of the environment in rela-

tion to armed conflict and we underscore the importance of a close cooperation with the International Committee of the Red Cross. The President of this Committee stated, on 12 May 2011, that he wished to continue working for a better knowledge and understanding of the rules concerning the protection of environment, if necessary through organizing expert meeting.

Thank you, Mr. Chairman.