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STATEMENT BY
MS. FARHANI AHMAD TAJUDDIN, REPRESENTATIVE OF MALAYSIA

ON AGENDA ITEM 81 ENTITLED

**“REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS
SIXTY-THIRD AND SIXTY-FIFTH SESSION”
(PART II)**

**AT THE SIXTH COMMITTEE OF THE SIXTY-EIGHTH SESSION
OF THE UNITED NATIONS GENERAL ASSEMBLY
NEW YORK, 1 NOVEMBER 2013**

Mr. Chairman,

Malaysia congratulates the Commission on the adoption of the entire set of Guide to Practice on Reservations to Treaties and its commentaries. We would like to express our sincere appreciation to the Special Rapporteur for the topic Reservations to Treaties, Professor Alain Pellet for his efforts and outstanding contributions to the work.

Mr. Chairman,

2. With regard to the topic of Reservations to Treaties, Malaysia recalls that by virtue of Resolution 65/26 passed by the General Assembly during its 65th Session, States were given the opportunity to submit their observations on the text of the provisionally adopted Guide to Practice. Further, by virtue of Resolution 67/92 adopted by the General Assembly during its 67th Session, Malaysia takes note that consideration of this topic shall be continued at this Session. Malaysia further notes that, the text has undergone a process of finalization which includes the introduction and deletion of some guidelines. In this regard, Malaysia would like to record its appreciation to the ILC for taking into consideration the comments raised by States including those of Malaysia in respect of draft guidelines 1.4.2, 2.1.8, 2.9.9, 3.4.1, 3.6, 3.6.1 and 3.6.2. In addition to these earlier comments and after having further perused the report of the ILC's 63rd Session, other reports as well as their Addendums, Malaysia wishes to take this opportunity to present its views on the finalized text of the Guide to Practice.

Mr. Chairman,

3. Malaysia notes paragraph 63 of the report of the ILC's 63rd Session on the ILC's submission of the Guide to Practice together with the recommendations to the General

Assembly. In this regard, Malaysia supports the recommendation for the General Assembly to take note of the Guide to Practice and ensure its widest possible dissemination, as stated in section C and paragraph 72 of the said Report. Malaysia further notes paragraph 64 of the report of the ILC's 63rd Session on the ILC's submission to the General Assembly on the recommendations on mechanisms of assistance in relation to reservations, as set out in section D of the said report. In this regard, Malaysia seeks further understanding on the reservations assistance mechanism and the accompanying Annex, particularly on the purpose, role, function and the extent of the effect of the mechanism.

Mr. Chairman,

4. On the Guide to Practice, Malaysia wishes to make some observations which are outlined in the following paragraphs.

5. With respect to guidelines 1.1.1, 1.1.2 and 1.1.6., Malaysia is of the view that the definitions contained in these guidelines should not in any way prejudice the nature of the unilateral statements in question at the outset as reference must be made to the effects that these unilateral statements might intend to produce in order to determine their status. Further, in order to determine the status of such unilateral statements, Malaysia is of the opinion that States could possibly fall back on guidelines 1.3, 1.3.1 and 1.3.2 which deal with the "Method of implementation of the distinction between reservations and interpretative declarations", "Phrasing and name" and "Formulation of a unilateral statement when a reservation is prohibited". Thus, these definitions may be inappropriate as they tend to, from the very initial stage, restrict States by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of those States.

6. Malaysia also notes that guideline 1.7.1 is restricted to two procedures which are not mentioned elsewhere and are at times characterized as "reservations", although they do not by any means meet the definition contained in guideline 1.1. Malaysia's concern is that confusion may arise in differentiating these alternative procedures from reservations. Malaysia is therefore of the view that the mechanism on the formulation of such alternatives and the means to differentiate them from reservations needed to be clearly specified to avoid confusion.

7. With regard to guideline 2.3.3, Malaysia finds that the language employed in paragraph (a) is vague and can cause confusion to readers. Guideline 2.3.3 can be construed both as an interpretation made by the reserving State, as well as an interpretation made by other contracting States. Although the commentary to this guideline states that the interpretation referred to in paragraph (a) refers to the interpretation of the author State, Malaysia is concerned that paragraph (a) could be misconstrued from a mere reading of the text.

8. On guideline 2.3.4, Malaysia is of the view that any modification which would widen the scope of a reservation but does not touch upon the substance of the commitments of the State to a treaty should not be defeated merely upon a single objection. As such, Malaysia is of the view that there is a need to have a proper mechanism to assess a “widened reservation” as it should not be determined solely by an objection received. Therefore, Malaysia recommends that the permissibility test should be applied in determining such a reservation.

Mr. Chairman,

9. With regard to guideline 2.6.2, Malaysia would like to record its understanding that although the right being vested on the objecting States to formulate an objection to a reservation is irrespective of the permissibility of the reservation, that right is not arbitrary. In this regard, Malaysia acknowledges that this guideline is to be read together with Part 3 of the Guide to Practice so as to serve as a check and balance with respect to the permissibility of the objections.

10. On guideline 3.2, Malaysia is of the view that a treaty monitoring body (TMB) should comprise independent experts and not representatives of governments or countries. These experts should only make legal findings. The rationale behind this is to enable the TMB to execute its powers without being politically influenced by the representatives of Governments or countries.

11. With regard to guideline 3.2.1, Malaysia is of the view that the spirit of this guideline does not allow for the decision of TMBs to deprive reserving States from making reservations, but rather to assist reserving States to craft their reservations to render them valid for permissibility. As such, Malaysia is of the view that the legal effects of the assessment made by TMBs and the extent of such legal effects required further clarity in the guideline. Malaysia is also of the view that such assessments should not be binding on the State party.

12. Malaysia also has concerns on guideline 3.2.5 with regard to the competence of Dispute Settlement Bodies (DSBs). It is noted that this guideline gives the power to DSBs to make an assessment of the permissibility of reservations where the determination of the validity of such reservations is necessary in order to settle disputes. In Malaysia’s view however, this guideline would redefine the role of DSBs. Malaysia would have preferred that guideline 3.2.5 on DSBs be taken out from the Guide to Practice.

13. With regard to guideline 4.2.2, Malaysia would like to raise concern on the practicality of this guideline as Malaysia is of the view that it would be unfair for the author of a particular reservation to be prevented from becoming one of the contracting States to a particular treaty, merely because another contracting State opposes the earlier becoming a party. In this regard, Malaysia would like to highlight that in ratifying a regional-based treaty, at times it would be inevitable for States to make reservations which are intended to safeguard their interests against other States facing

developmental gaps to implement their obligations under the treaty. However, if a State making a reservation is faced with opposition from inclusion as a contracting party due to the reservation it makes, this would frustrate the concept of regional cooperation among States in the region.

Mr. Chairman,

14. With regard to guideline 4.2.3 and 4.2.5, Malaysia would like to reiterate its position as submitted to the ILC, that these guidelines needed to be reformulated and simplified for better clarity.

15. On paragraph 1 and 2 of guideline 4.5.3, Malaysia is unclear about the status of the author State of an invalid reservation which has expressed intention not to be bound by a treaty without the benefit of the reservation. Thus, Malaysia had sought further clarification on this point.

16. On paragraph 4 of guideline 4.5.3, Malaysia would like to reiterate its position that the findings made by TMBs should not be binding on States but should merely act as a recommendation. As such, Malaysia is concerned with the terms stated under paragraph 4 which imposes a specific time period for State to clarify its intention. Further, Malaysia is also of the view that this paragraph defeats the rule stated in paragraph 3 of this guideline. In this regard, Malaysia would have preferred for this paragraph to be removed.

17. On guideline 5.2.4, Malaysia would like to reiterate its previous comments on the meaning of “radically changes” in paragraph (b). It is not clear by whom the scope of such radical changes would be determined for the situation to qualify as an exception to the rule laid down in guideline 5.2.4. Malaysia would have welcomed further consideration of this guideline.

Mr. Chairman,

18. In relation to guideline 2.4.7, Malaysia is concerned as to the legal effects that guideline 2.4.7 would have on a treaty. Based on Malaysia’s understanding, guideline 2.4.7 may have the effect of overriding a treaty provision concerning time limits required for the formulation of interpretative declarations. Malaysia had sought further clarification on this provision.

19. Malaysia notes that as it stands, guideline 2.4.8 is the only provision concerning the procedure for modification of interpretative declarations. Malaysia is not clear on whether the procedures applicable at the stage of formulation of an interpretative declaration, would also be applicable at the stage of its modification. Since the express wordings of the guidelines and the commentaries thereof do not indicate application of such procedures to the modification of an interpretative declaration, Malaysia is concerned that States parties might not be aware of actions taken by States who decide to modify their position through conduct without communicating the same to others.

20. Malaysia would like to reiterate its comments as regards paragraph 2 of guideline 2.9.8. Malaysia is of the view that the phrases “exceptional cases” and “relevant circumstances” are ambiguous and require further elaboration. In particular, given the wide range of possibilities of the extent of such “relevant circumstances”, it was only apt that more details were provided for States’ understanding.

21. In relation to the condition for permissibility laid down in guideline 3.5 namely that a State may formulate an interpretative declaration unless it is prohibited by a treaty, Malaysia is of the view that since prohibitions are often made in general terms and would preclude States from construing the treaty in a certain manner, such conditions should only be imposed against prohibitions that are specifically expressed in a treaty provision.

22. On guideline 3.5.1, Malaysia would like to stress that this provision should not be applicable to unilateral statements made under a treaty which prohibits the formulation of a reservation. Hence, it is Malaysia’s view that, unless a conclusive determination is made to the effect that the unilateral statement is actually a reservation, conditions for permissibility under guideline 3.5.1 should not be imposed. In addition, it is not clear as to who would determine whether the interpretative declaration in question is in fact a reservation.

23. With regard to guideline 4.7.1, Malaysia is of the view that approval of and opposition to an interpretative declaration should not determine the weight to be given to the interpretation proposed. Rather, an interpretative declaration should constitute an element to be considered in a treaty interpretation based only on its own merits. Thus, an approval or an opposition should merely act as an interpretative aid without prejudicing the weight of the interpretative declaration itself.

24. On guideline 4.7.2, Malaysia understands that this provision is based on the principle that a State cannot declare that it can interpret a particular provision in a certain way, and then take a different position later. Malaysia believes that there had been a necessity for the ILC to explain in the commentary as to what extent another State could rely on a declarant State’s original interpretative declaration so as to deny the declarant State from claiming that its modified interpretative declaration could take effect under guideline 4.7.1.

Mr. Chairman,

25. Malaysia in its previous interventions had expressed its views that a separate legal regime for international organizations should be developed as opposed to being made part of the Guide to Practice. Malaysia premised its position on its understanding that the power to conclude treaties by international organizations largely depends on the terms of the constituent instrument of the international organization itself and oftentimes, the mandate granted to the international organization by the States comprising such an international organization. Thus, Malaysia is of the view that a separate legal regime for international organizations should be developed and should

not be made part of the guidelines at this juncture. As such, Malaysia is of the view that the placement of guidelines 2.8.7, 2.8.8, 2.8.9, 2.8.10, 2.8.11 and 4.1.3 as well as all other references made to international organizations found in the Guide to Practice is inappropriate. Malaysia remains open to discuss with the ILC to develop a separate regime for international organisations and welcomes the views of other States on the possibility of other approaches.

26. With regard to the question of reservations dialogue, Malaysia notes from the Seventeenth Report of Special Rapporteur that it was never intended to produce a legal effect since the ILC should not venture into establishing a specific legal regime for it. Thus, in order to develop practice, the Conclusions on the reservations dialogue are intended not to impair the flexibility of the modalities of a reservations dialogue by subjecting it to specified rules and procedures. Malaysia therefore views the said Conclusions to be acceptable in so far as they serve as a guideline or recommendations in the practice of reservations dialogue.

Mr. Chairman,

27. Malaysia wishes to draw the attention of the ILC to the fact that States only had the benefit of studying the finalized guidelines within the context of what has now been approved by the ILC. Malaysia agrees that these finalized guidelines together with their commentaries should be read together as a whole to ensure that all concerns are addressed. For this reason, Malaysia would like to reserve the right to provide further comments on all guidelines and commentaries in future discussions.

Thank you, Mr. Chairman.