



MALAYSIA

PERMANENT MISSION TO THE UNITED NATIONS

(Please check against delivery)

**STATEMENT BY
WAN MOHD ASNUR WAN JANTAN, REPRESENTATIVE OF
MALAYSIA**

**ON AGENDA ITEM 78: REPORT OF THE INTERNATIONAL
LAW COMMISSION ON THE WORK OF ITS SIXTY-SIXTH
SESSION AT THE 6TH COMMITTEE OF THE 69TH SESSION
OF THE UNITED NATIONS GENERAL ASSEMBLY**

NEW YORK, 31 OCTOBER 2014

**CHAPTER VII: SUBSEQUENT AGREEMENTS AND
SUBSEQUENT PRACTICE IN RELATION TO THE
INTERPRETATION OF TREATIES**

Mr. Chairman,

Malaysia would like to record her appreciation to the Special Rapporteur, Mr. Georg Nolte, for his work on the draft Conclusions together with commentaries which were provisionally adopted by the ILC at its 66th Session.

2. At the previous session, Malaysia has submitted her preliminary views on draft Conclusions 1 to 5 which still stand at the moment and will continue to submit her preliminary views on the subsequent draft Conclusions 6 to 10.

Mr. Chairman,

3. In relation to draft Conclusion 6 (Identification of subsequent agreements and subsequent practice), Malaysia notes the prevailing position that there is a need to carefully identify and interpret subsequent agreements and subsequent practice, in particular to ask whether the parties assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations. In this regard, Malaysia agrees that subsequent agreement and subsequent practice by a State should be a basis for the interpretation of a treaty only if the said subsequent agreement and subsequent practice are motivated by the treaty and not by other external considerations.

4. As regards draft Conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), Malaysia notes the opposing views of the WTO

Appellate Body and the European Court of Human Rights. While Malaysia agrees that whether a subsequent practice has a modifying effect should revolve around the treaty provisions, Malaysia is concerned with the position that subsequent practice of the parties “cannot be wholly precluded as a possibility in law”. It is Malaysia’s view that the modification or amendment of a treaty should only be done in line with Articles 39-41 of the 1969 Vienna Convention on the Law of Treaties (VCLT). In light of this draft Conclusion, Malaysia is also concerned that certain “general comments” or “general recommendations” published by some human rights treaty bodies have the possible effects of altering the provisions of the treaty or providing too broad interpretation of treaty provisions. Therefore, Malaysia proposes these possible effects ought to be explored by the Special Rapporteur in his future reports.

Mr. Chairman,

5. Malaysia notes that draft Conclusion 8 (Weight of subsequent agreements and subsequent practice as a means of interpretation) identifies some criteria that may be useful to determine the interpretative value, or weight, which a particular subsequent agreement or subsequent practice should play in the

process of interpretation. While Malaysia appreciates the importance of the criteria specified in the draft Conclusion, Malaysia is of the view that the criteria should be subjected to other rules on treaty interpretation contained in the VCLT, in particular Article 31(1).

6. Moving on to draft Conclusion 9 (Agreement of the parties regarding the interpretation of a treaty), Malaysia is particularly concerned with the position taken in the second sentence of paragraph 2 which stipulates that silence can constitute acceptance when the circumstances call for some reaction. It is Malaysia's view for extreme caution to be exercised in dealing with the question of silence as acceptance. Malaysia therefore proposes for the sentence to be further heavily scrutinised by considering more views from various adjudicatory bodies.

Mr. Chairman,

7. Turning to draft Conclusion 10, Malaysia notes the explanation by the Special Rapporteur that the phrase "including by consensus" was introduced "at the end of paragraph 3 to dispel the notion that a decision by consensus would necessarily be equated with agreement in substance". While Malaysia agrees

that the adoption of a decision by consensus cannot represent a subsequent agreement under Article 31(3)(a) of VCLT when there exists an objection by a State, Malaysia is of the view that the intention of the Special Rapporteur has not been clearly translated into paragraph 3.

CHAPTER VIII: PROTECTION OF THE ATMOSPHERE

Mr. Chairman,

8. Malaysia would like to thank the Special Rapporteur, Dr. Shinya Murase, on his successful presentation on the topic “Protection of the Atmosphere”. Malaysia notes that during the Sixty-sixth Session of the International Law Commission (ILC), Dr. Shinya Murase, had submitted his report entitled “First Report on the Protection of the Atmosphere” (“First Report”). Malaysia further notes that the expected outcome of the work of Dr. Shinya Murase will be a set of draft guidelines which will not seek to impose legal rules and legal principles on current treaty regimes.

9. Malaysia observes that the First Report lays down three draft guidelines, firstly, on “Definition of the Atmosphere” (draft Article

1), secondly, on “Scope of the Guidelines” (draft Article 2) and thirdly, on “Legal Status of the Atmosphere” (draft Article 3). In relation to the “Definition of Atmosphere”, Malaysia is conducting our internal consultations particularly with our scientific experts to ensure the acceptability of the definition.

10. On the “Scope of the Guidelines”, Malaysia notes the Special Rapporteur’s proposal for the draft guidelines to address “human activities” that directly and indirectly introduce deleterious substances and energy into the atmosphere. In this regard, Malaysia is hopeful that the Special Rapporteur would elucidate the specific type of “human activities” intended to be covered under the draft guidelines. This is to ensure that the activities propose will not overlap with “human activities” covers under the existing international regime on environmental protection. Further, Malaysia is not familiar with the term “deleterious substances” as proposed in the First Report. Hence, Malaysia is hopeful that the Special Rapporteur would provide clarifications on the usage of the terms “deleterious substances” as well as the term “energy”, particularly, on the differences of these terms with the common terms such as “hazardous substances” “pollutants” and “waste”.

11. Further, on the “Legal Status of the Atmosphere”, Malaysia is analysing the five concepts highlighted in the First Report namely the airspace, shared or common natural resources, common property, common heritage and common concern. We are of the view that detailed understanding of these five (5) concepts could lead to the determination of the legal status of the atmosphere which we are not in the position to comment at this juncture.

CHAPTER IX: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Mr. Chairman,

12. Malaysia notes that the Third Report of the Special Rapporteur for the topic was considered at the Commission’s Sixty Sixth session. Malaysia is particularly interested in the matter as the Special Rapporteur has proposed two (2) draft articles which capture the key issues pertaining to the immunity of State officials from foreign criminal jurisdiction.

13. Malaysia has been studying and closely following the development of the subject since the inclusion of the topic at the Commission's Fifty Eighth Session in 2006. At the Sixth Committee of the Sixty-Third Session of the United Nations General Assembly, New York in 2008, Malaysia made intervention as regards its stand on the Preliminary Report prepared by the previous Special Rapporteur, Mr. Roman Kolodkin. In this regard, Malaysia would like to reiterate its position at the Sixth Committee in 2008 that the topic should focus on the immunities accorded under international law, in particular customary international law and not under domestic law. There is also no necessity to re-examine previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of States to international organizations, these categories of persons should be excluded from any definition of "State officials" for the purpose of this study.

14. Malaysia welcomes the proposed draft Articles and will continue to conduct an in-depth study of the draft Articles. Meanwhile, Malaysia notes that draft Article 2 (e) deals with definition of the State officials to be immune from the criminal jurisdiction. It was drafted to set clear the individuals who are

considered to perform official acts in the context of the immunity from foreign criminal jurisdiction. Malaysia fully supports the establishment of such parameters as it would set clear the individuals who enjoy the immunity.

15. Malaysia has previously raised an issue as to who are the “State officials” that enjoy immunity as provided under draft Article 2 (e). Malaysia notes that the current definition of “State officials” covers any individual who represents the State or who exercises the State’s function, including those who are employed on contract basis. In this regard, Malaysia finds ambiguity of language in the second limb of draft Article 2 (e), namely “who represents the State or who exercises State functions” and such language needs clarification. Malaysia takes note that this matter will be dealt with in the Special Rapporteur’s next report. As such, Malaysia is of the view that the acceptability of draft Article 2 (e) as adopted by the Drafting Committee is subject to further clarification by the Special Rapporteur.

16. Malaysia is also of the view that since the Commission will exclude previously codified areas such as the immunities of diplomatic agents, consular officials, members of special missions and representatives of states to international organizations, these

categories of persons should be excluded from the definition of “State officials”.

Mr Chairman,

17. Malaysia further notes the adoption of draft Article 5 by the Drafting Committee which provides the State officials with “Immunity *ratione materiae*”. However, we note that the definition of “Immunity *ratione materiae*” which was defined in the previous draft article has been deleted to which no reason assigned for such deletion. Malaysia is of the view that the definition of the terms “Immunity *ratione materiae*” is imperative to determine in which circumstances would State officials be granted immunity from foreign criminal jurisdiction.

18. In this regard, Malaysia agrees with the view by the Special Rapporteur in its report that the basic characteristic of “Immunity *ratione materiae*” can be identified as being granted to all State officials for acts performed in an official capacity and is not time limited. This is due to the fact that “Immunity *ratione materiae*” might continue even after the person who enjoys such immunity is no longer State official. Malaysia further takes note that the concept of an act performed in an official capacity, the temporal

scope of the immunity and the exception to immunity from foreign criminal jurisdiction will be addressed in the next report.

I thank you, Mr. Chairman.