MALAYSIA
PERMANENT MISSION TO THE UNITED NATIONS

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STATEMENT BY
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DELEGATE OF MALAYSIA TO THE UNGA 73RD SESSION

AGENDA ITEM 82:
REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS OF ITS SEVENTIETH SESSION

CHAPTER VI:
PROTECTION OF THE ATMOSPHERE

CHAPTER VII:
PROVISIONAL APPLICATION OF TREATIES

CHAPTER VIII:
PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW *(JUS COGENS)*

24-25 OCTOBER 2018

Mr. Chairman,

CHAPTER VI: PROTECTION OF THE ATMOSPHERE

1. Malaysia expresses its gratitude to the Special Rapporteur, Mr. Shinya Murase and acknowledges his determination in producing the report titled “Protection of the Atmosphere” with such details and precision.

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2. Malaysia notes the insertion of three new draft guidelines to address matters relating to the implementation of and compliance with obligations under international law as well as issues concerning the resolution and settlement of disputes relating to the protection of the atmosphere.

3. Malaysia acknowledges that draft guideline 10 deals with national implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. In this regard, it is observed that the term “implementation” is used in the present draft guideline to refer to measures that States may take to make treaty provisions effective at the national level, including implementation in their respective national laws. National implementation may take many forms, which includes, but is not limited to legislative, administrative, judicial and other actions. Malaysia is of the view that the draft guideline 10 can be given due consideration.

4. Further, Malaysia observes that compliance under draft guideline 11 reflects the principle *pacta sun servanda.* This guideline also refers to the mechanics and procedures to assist States in adhering to their obligations under the relevant international law. In lieu of this, Malaysia would like to stress on the importance to recognize the challenges that faced by developing and least developed countries in the discharge of their international environmental protection obligations. In this regard, Malaysia would like to highlight that capacity building in this area is important. In light of the above, Malaysia is of the view that the facilitative and enforcement procedures can be deployed to foster compliance and should be given due consideration.

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5. On draft guideline 12, Malaysia acknowledges its purpose to refer any disputes related to the protection of atmosphere to peaceful means of dispute settlement. The draft guideline also emphasizes on the increasingly important role of scientific and factual evidence in international dispute resolution. In line with the current trend in States bringing atmosphere protection related disputes to international courts and tribunals, Malaysia opines that draft guideline 12 should be given due consideration.

6. In general, Malaysia has no objection to the insertion of the three new draft guidelines for our consideration. In this regard, Malaysia looks forward to receiving the draft guidelines on the protection of the atmosphere and will endeavour to submit our comments on the same within the timeline as prescribed.

CHAPTER VII: PROVISIONAL APPLICATION OF TREATIES

7. Malaysia commends the efforts of the Special Rapporteur in preparing the Fifth Report on the provisional application of treaties. In this regard, Malaysia wishes to reflect its preliminary view on the topic as the foregoing:

a) Malaysia notes that the Commission has provisionally adopted all draft guidelines and the commentaries to the draft guidelines. Malaysia is of the view that due consideration must be given as there are issue of doubts on some parts of the draft guidelines. The draft guidelines must provide a clear understanding and interpretation as well as take into account the practice of internal laws of states. In this regard, Malaysia reiterates its comments to the draft guidelines as submitted in the previous sessions particularly during the 72nd session of the United Nations General Assembly;

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b) Malaysia would like to raise its concerns on several issues, among others, on the internal law and Malaysia's practice in signing and ratifying treaties. Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. In this regard, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once ratified. Malaysia would ensure domestic legal framework to be in place before a treaty is binding upon Malaysia;

c) For this present session, Malaysia would like to focus on the two other draft guidelines in the present report as proposed by the Special Rapporteur. The two issues are *(a)* the termination or suspension of the provisional application of a treaty as a consequence of its breach; and *(b)* the formulation of reservations. In relation to the newly proposed draft guideline 8 *bis*, Malaysia notes that this proposal entitles the States or international organizations concerned to invoke a "material breach of a treaty or a part of a treaty that is being provisionally applied" as a ground for terminating or suspending such provisional application in whole or in part, in accordance with Article 60 of the VCLT. With regard to the term "termination" and "suspension" under this new draft guideline 8 *bis*, Malaysia is mainly guided by Article 60 whereby the termination and suspension should be applicable to a treaty that is being provisionally applied by a State as a consequence of a breach by another State.

d) Malaysia is also of the view that careful consideration shall be given by the affected State in determining the "material breach" whereby it should be a violation of an essential provision of the treaty. In addition to this, it is also important to note that Article 60 of the VCLT refers only to breaches of treaties that are actually in force between the parties.

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Nevertheless, Malaysia notes that previous study of this topic has confirmed that provisional application of a treaty produces legal effects as if the treaty were actually in force and that obligations arise therefrom must be performed under the *pacta sunt servanda* principle. Therefore, the formulation of this draft guideline 8 *bis* should refer to the States or international organizations that had negotiated the treaty and agreed to provisionally apply it.

e) In the context of Malaysia's experience and practice, we wish to reiterate that the signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. However, it is to be pointed out that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law. If a State is to adhere to a basic criterion of a legal certainty, such determination would be made beforehand, and not at a later stage. Be that as it may, prior to signing or becoming a Party to a treaty, Malaysia will ensure that its domestic legal framework is in place and ready in order to implement the treaty;

f) As for draft guideline 5 *bis*, Malaysia notes that this draft guideline was drafted to allow a State or an international organization to formulate reservations from the time of its agreement to apply a treaty provisionally. This draft was based on the fact that the provisional application of treaties produces legal effects and the purpose of reservations is precisely to exclude or modify the legal effects of certain provisions of the treaty on that State. On this point, Malaysia stands guided by Article 19 of the VCLT which clearly indicates that a State may formulate a reservation unless the reservation is prohibited by all or part of the treaty, and in cases where it is not prohibited by the treaty,

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the reservation in question must not be incompatible with the object and purpose of the treaty.

g) It is interesting to note that Article 19 of the VCLT is silent about the possibility of formulating reservations in the context of the provisional application of a treaty. This is because, Article 19 provides that a State may formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. In other words, a State can formulate a reservation at many different forms and stages in which the State places on record its consent to be bound by a treaty. For purposes of consistency and clarity, it may be a good practice if a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits; and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time.

h) In this regard, Malaysia is of the view that the proposed draft guideline 5 *bis* which allows a State to formulate reservations with regard to the provisional application of a treaty may be given due consideration as the effect of provisional application is to give immediate effect to some of the provisions of the treaty. On the other hand, the effect of reservation is to exclude the legal effects of certain provisions of the treaty. Nonetheless, in as no treaty or practice has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally, Malaysia proposes that draft guideline 5 *bis* should be further deliberated.

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8. Last but not least, Malaysia reiterates its view that it is crucial to discern the provisional application of the treaties from the source of obligations as provided by the treaty provision itself. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by the result of an unequivocal indication by the State that it accepts provisional application of treaty, as expressed via a clear mode of consent. Thus, for a further comprehensive analysis of the topic, Malaysia would like to suggest that the topic be further elaborated having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices so far have responded to such variations.

CHAPTER VIII: PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW *(JUS COGENS)*

Mr. Chairman,

9. Malaysia welcomes the inclusion of the topic *"jus cogens"* into the ILC's programme of work. We are of the view that the study of *"jus cogens"* spearheaded by Special Rapporteur, Mr. Tladi will bring much needed clarity to this principle which is integral to the progressive development of international law.

10. Malaysia appreciates the work done so far by the Special Rapporteur and observes that the discussions on *jus cogens* have progressed from considering the criteria of *jus cogens* to the validity of international instruments being in conflict with *jus cogens*.

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11. Malaysia notes the issue on whether non-State Parties to a treaty could invalidate such treaty on the basis that it is in conflict with a particular *jus cogens* norm. Malaysia is of the view that considering the relevant international laws relating to treaties, parties should be allowed to self-determine the content of the treaty bearing in mind that it should be in line with peremptory norms of general international law. Hence, Malaysia is of the view that any question on the validity of a treaty on this reason should be done by the international community as a whole since it relates to peremptory norms of general international law.

12. Malaysia also would like to request the Special Rapporteur to further provide clarity on the issue of the sources of *jus cogens* and a thorough analysis on the element of modification under article 53 of the VCLT.

13. Further, with regard to Draft Conclusion 9, Malaysia would like to stress that the work of expert bodies and scholarly writings as secondary means of identifying a norm of general international law as a norm of *jus cogens*, must be subjected to the recognition of the whole international community of States.

14. Malaysia looks forward to further discussion on application of regional *jus cogens*. We note that such application may not be consistent with *jus cogens* in terms of its acceptance and recognition by the community of States as a whole. Regional *jus cogens* may create confusion in terms of application and therefore should be avoided. We also would like to request the Special Rapporteur to undertake study on state practices on how States deal with *jus cogens* vis-à-vis a treaty.

I, thank you Mr. Chairman.