



MALAYSIA

Permanent Mission to the United Nations, New York

STATEMENT BY

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**REPRESENTATIVE OF MALAYSIA TO THE SIXTH COMMITTEE OF THE
79TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY**

**ON AGENDA ITEM 79:
REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SEVENTY-FIFTH SESSION**

**CLUSTER II - CHAPTER IV (SETTLEMENT OF DISPUTES TO WHICH
INTERNATIONAL ORGANIZATIONS ARE
PARTIES) AND
CHAPTER V (SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF
INTERNATIONAL LAW)**

**AT THE SIXTH COMMITTEE OF
THE 79TH SESSION OF THE GENERAL ASSEMBLY**

NEW YORK, 25 OCTOBER 2024

Mr. Chair,

**CHAPTERS IV: SETTLEMENT OF DISPUTES TO WHICH INTERNATIONAL
ORGANIZATIONS ARE PARTIES**

1. My delegation appreciates a comprehensive analysis presented in the second report of the Special Rapporteur on the renamed topic "Settlement of disputes to which international organizations are parties". In this regard, Malaysia notes that the revised title more accurately reflects the topic's scope, encompassing both disputes of public and private law involving international organizations.

2. Malaysia supports the recommendation to employ a variety of dispute resolution mechanisms i.e. negotiation, mediation, conciliation, arbitration, judicial settlement, and other peaceful means as the means to resolve the dispute. In this regard, Malaysia alludes that the choice of method should be tailored to the specific circumstances of each dispute to ensure effective resolution of disputes. This also aligns with our commitment of ensuring justice for all parties.

3. Be that as it may, Malaysia is also of the view that immunity poses significant challenges in disputes involving international organizations. The need to balance immunity with accountability is a complex issue that requires careful consideration of the Member States. While immunity is crucial for the effective functioning of these organization, Malaysia believes that it should not obstruct access to justice. Hence, any mechanisms to address these challenges, including potential amendments to the Statute of the International Court of Justice, should be carefully explored to address these challenges and consequently ensure fair and effective dispute resolution for all parties involved.

4. In light of the above, Malaysia believes that an in-depth analysis of these issues is necessary in refining the guidelines and ensuring that all relevant parties, including Member States, have equitable access to justice.

Mr. Chair,

CHAPTER V: SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF INTERNATIONAL LAW

8. Turning to Chapter V of the report, my delegation wishes to record its appreciation to the Special Rapporteur Mr. Charles C. Jalloh for preparing the Second Report on “Subsidiary means for the determination of rules of international law” (A/CN.4/769) as well as to the Secretariat for preparing the second Memorandum on “Examples of judicial decisions and other materials found in the case law of international courts, tribunals and other bodies” (A/CN.4/765).

9. Malaysia also commends the efforts undertaken by the International Law Commission (“ILC”) for the continuous determination and effort in the work done so far. In this regard, Malaysia notes the ILC had provisionally adopted draft conclusions 6, 7 and 8 and their commentaries as well as provisionally adopted draft conclusion 4 (Decisions of courts and tribunals) and draft conclusion 5 (Teachings), as orally revised, which had only been taken note of during the seventy-fourth session and also adopted commentaries. Malaysia would like to express its views and concerns on the draft conclusions 6 to 8.

Mr. Chair,

Draft conclusion 6: Nature and function of subsidiary means

10. Malaysia notes that the earlier text of draft conclusion 6 which was proposed by the Special Rapporteur in his Second Report was drafted differently, which had attempted to distinguish the scope of subsidiary means from the sources of international law, i.e. those referred to under subparagraphs 1(a) to (c) of Article 38 of the Statute of the International Court of Justice (“ICJ Statute”). In that regard, Malaysia is of the view that the said earlier draft text included certain ambiguity on the nature and role of such

subsidiary means, that may have been addressed by the revised text of draft conclusion 6 which has now been provisionally adopted by the ILC.

11. With regard to Article 38(1)(d) of the ICJ Statute of which this topic has its origins from, there are only two subsidiary sources for the determination of rules of law, whereby the first is judicial decisions and the second subsidiary source is the teachings of highly qualified publicists of the various nations. Based on this origin, Malaysia is of the view that draft conclusion 6 provides better clarity and certainty on the nature and function of subsidiary means. In essence, Malaysia is of the view that paragraph 1 effectively carves out subsidiary means (as categorised under conclusion 2) from being a source of international law. Nevertheless, the said paragraph also expressly reflects the important role and function of subsidiary means in assisting the determination of the existence and content of rules of international law.

12. However, Malaysia is of the view that the usage of the term “materials” in paragraph 2 of draft conclusion 6 may cause uncertainty and ambiguity on the scope or category of such subsidiary means. In particular, it is noted that although the term is used in the commentary of draft conclusion 5 on teachings, the fact that such term was not reflected in any of the preceding draft conclusions may result in another category of subsidiary means, other than that already provided under draft conclusion 2. Nevertheless, Malaysia supports the inclusion of draft conclusion 6, as provisionally adopted by the ILC.

Draft conclusion 7: Absence of legally binding precedent in international law

13. Malaysia notes draft conclusion 7 deals with the question of precedent in international law, which confirms and establishes that, as a general rule, there is no system of legally binding precedent, or *stare decisis*, in international courts or tribunals under international law. Although the decisions of international courts or tribunals do not create binding precedents, they play a crucial role in shaping and interpreting international law. Be that as it may, it is accepted that as a matter of practice, courts or tribunals routinely take into account the legal reasoning contained in the decisions of other courts and tribunals, although they are not obligated to apply them. The general rule in international adjudication involving States is that the decisions of courts are binding only on the parties to the case pursuant to Article 59 of the ICJ Statute.

14. With regard to the formulation of the key elements of the first sentence of draft conclusion 7, the ILC selected the term “may”. The idea is that the possibility exists for an international court or tribunal to follow other decisions on points of law, but also clarifies that doing so is not mandatory. Second, the term “points of law”, which is a reference to the legal reasoning and legal conclusions, was used to describe what could potentially be followed. The formulation “points of law” explains that the object is not the decision, as such, but the reasons in support thereof.

15. Based on the above, Malaysia concludes that the general proposition contained in draft conclusion 7, that there is no system of legally binding precedent in international law

remains valid. However, in some circumstances, the obligation to follow prior decisions is established in either a specific instrument or a specific rule of international law.

Draft conclusion 8: Weight of decisions of courts and tribunals

16. Draft conclusion 8 outlines additional criteria for assessing the weight of decisions of courts and tribunals in the determination of the existence and content of rules of international law. The scope of application of the term “decisions of courts or tribunals” is intended to apply to decisions of all types whether of international courts and tribunals or those of national courts.

17. It is also worth noting that the three specific factors that follow in this conclusion are meant to serve as a form of guideline instead of being mandatory elements. Moreover, these listed criteria are merely illustrative of the most likely scenarios to arise. Most importantly, these factors set out in draft conclusion 8 are to be read together with those in draft conclusion 3.

18. Subparagraph (a) of draft conclusion 8 emphasizes the importance of considering a court or tribunal’s specific competence when assessing the weight of its decisions in relation to a particular international law rule. The ILC viewed that the decisions issued by bodies with specific competencies, however they may be characterized, deserve to be considered when interpreting instruments concerned, even if such decisions or interpretations need not be followed by other tribunals.

19. Subparagraph (b) focuses on the weight of a decision based on its place within a body of concurring decisions. The ILC noted that, while a single decision can be authoritative, a series of consistent rulings on the same issue can strengthen the precedent.

20. Meanwhile, subparagraph (c) focuses on the importance of assessing whether the reasoning behind a judicial decision remains relevant in light of subsequent developments. It recognises that legal principles and circumstances can change over time, affecting the weight given to previous decisions. “Subsequent developments” such as new treaties, changes in state practice, or decisions from other courts that may challenge the reasoning of an earlier decision should be considered.

21. Based on the foregoing, Malaysia is of the view that draft conclusion 8 offers a helpful guidance in evaluating the weight to accord to the decisions of courts and tribunals as subsidiary means for the determination of rules of international law. While the listed criteria may require careful consideration based on the specific context of each case, they provide a good starting point. We also believe that, as international law continues to evolve, it will be important to monitor the application of these criteria and assess whether they remain effective in addressing the challenges of contemporary legal practice.

Mr. Chair,

22. Malaysia wishes to draw the attention of the Sixth Committee to the fact that States only have the benefit of studying the present draft conclusion within the context of what has now been provided by the ILC. It is Malaysia's view that the entire draft conclusion should be read in its entirety to ensure that all concerns have been addressed as a whole since they are interrelated to one another. For this reason, Malaysia would like to reserve the right to make further statements on all the draft conclusions once the entire draft is completed.

23. In conclusion, Malaysia acknowledges the importance of this area of study and Malaysia remains committed to further engaging in the development of this topic in a supportive and constructive manner.

Thank you.