



Permanent Mission of
Malaysia
to the United Nations

STATEMENT BY THE REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 81: REPORT OF THE INTERNATIONAL LAW COMMISSION IN THE WORK OF ITS SIXTY-FIRST SESSION "TREATIES OVER TIME" AT THE SIXTH COMMITTEE OF THE SIXTY FOURTH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 2 NOVEMBER 2009

Mr. Chairman,

Malaysia notes that during its Sixtieth Session, the ILC endorsed the recommendation for the inclusion of a new topic for consideration in the long term working programme of the ILC: Treaty over time on the basis of a working paper prepared by Mr. G. Nolte, the German ILC member. This was subsequently endorsed by the General Assembly under the Resolution A/RES/63/123.

2. The Malaysian delegation records its appreciation to the ILC for establishing a Study Group on Treaties Over Time, chaired by Mr. George Nolte during the Sixty-First Session of the ILC and to maintain the proposal on the agenda so that the matter could be further pursued when the Study Group comes forth with the necessary reports and materials. In this regard, Malaysia welcomes the Conclusions of the Study Group that the point of departure should be based on reports to be prepared by the Chairman.

3. Over time, treaties which are designed to preserve the agreement between parties in a legally binding form would have to contend with evolving circumstances and subsequent developments which may affect the existence, content or meaning of the said treaties. This is especially true involving law-making treaties.

4. In ensuring such treaties would continue to fulfill their objectives and purpose, finding a flexible approach to treaty interpretation which is rational in the form of subsequent agreement and subsequent practice of States would have to be attained.

5. Malaysia notes that while the evolutive interpretation method has long been codified within articles 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, the jurisprudence of the International Court of Justice shows that those provisions have hardly been analysed with depth, due to the difficulty in identifying subsequent agreement and practice in mere studies and reports. In this regard, Malaysia notes that the International Court of Justice pointed out in the *Gabcikovo-Nagymaros Case*¹ that newly developed norms of law that are relevant for the implementation of a Treaty could, by agreement of parties be incorporated into the Treaty.

¹ *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, I.C.J. Reports, p. 7, at p. 67, paragraph 112.

6. Malaysia however notes with concern that while an evolutive interpretation ensures the continued effectiveness of treaties, it may also lead to reinterpretation beyond the actual consent of the parties. Malaysia nonetheless continues to believe that it is important in any legal system to determine how subsequent acts, events and developments affect the obligations of a State Party to a treaty. Therefore, it is imperative that the Study Group produce illustrative guidelines which will steer international community courts and tribunals on the relevance of subsequent agreement and subsequent practice to international treaties.

7. With regard to the working methods of the Study Group, views from the member states of the United Nations should also be welcomed and should not be confined solely to the interested members of the Study Group. Malaysia on its part acknowledges the importance of subsequent agreement and subsequent practice to treaty interpretation and is actively pursuing the matter so as to enable Malaysia to evaluate the impact of this method of treaty interpretation in light of its obligations in the regional and international forum.

8. Malaysia further observes that a caveat has been made by the Chairman that the practice of the main bodies of the UN could be excluded from the inquiry if there are concerns about possible limitations to the UN system as a whole, while other UN organs do not raise similar concerns and should be reviewed.² Malaysia would like to place on record our concerns that there may exist confusion as to how such a caveat should be applied since the main bodies of the UN are also often referred to as “UN organs”.

9. It is hoped that the work of the Study Group would further assist member states of the United Nations in approaching this delicate subject matter upon being parties to international treaties.

Thank you.

² The Informal Paper presented by the Chairman of the Study Group on Treaties over Time, Mr. Georg Nolte, contained in Annex A of the ILC’s Report on its 2008 session (A/63/10), at p. 373, paragraph 18.