



Permanent Mission of
Malaysia
to the United Nations

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STATEMENT BY MR. UMAR SAIFUDDIN JAAFAR, REPRESENTATIVE OF MALAYSIA, ON AGENDA 82: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS 59TH SESSION AT THE SIXTH COMMITTEE OF THE 62ND SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 1ST NOVEMBER 2007

Mr. Chairman,

My delegation would like to thank Mr Ian Brownlie, Chairman of the Commission for his excellent presentation of the report of the Commission on the Chapters under this cluster. My delegation wishes to comment on the following chapters in this cluster under consideration in this debate.

Chapter IV: Reservations to treaties

2. Malaysia welcomes the report of the Special Rapporteur, Mr. Alain Pellet and extends its appreciation for the work of the Special Rapporteur on the topic of reservations to treaties as contained in document A/CN.4/574 and A/CN.4/584 entitled the "Eleventh Report on Reservation of Treaties" and the "Twelfth Report on Reservation of Treaties" respectively. Malaysia would also wish to commend the Chairman and the members of the International Law Commission for the excellent work carried out on this topic thus far.

Mr. Chairman,

3. Malaysia's comments and proposals on the draft guidelines contain in document A/CN.4/574 and A/CN.4/584 are as follows:

(a) Malaysia notes that guideline 2.6.3 was drafted based on the position that a State or an international organization may object both to a reservation that does not meet the criteria for validity in accordance with Article 19 of the Vienna Conventions and to a reservation that it deems to be unacceptable "in accordance with its own interest" even though the reservation is valid. Malaysia understands that this position is based on the principle of consent, whereby a State should not be bound by a modified treaty obligations which is not within its interest. Malaysia welcomes the position taken that objections can also be made to reservations which although valid is contrary to the interest of the State. It would be to the State's advantage that it could object to a treaty obligation which is not in its interest.

(b) On this matter Malaysia observes from the Special Rapporteur's Eighth Report (document A/CN.4/535/Add.1 footnote 144) and Eleventh Report (document A/CN.4/574 paragraph 63-65) that the issue on whether or not a State or an international organisation can object to a reservation which is expressly authorised by a treaty is still undetermined. In this respect Malaysia looks forward to further study on

the expansion of the scope to object to reservations which are expressly authorised by the Vienna Conventions.

(c) Malaysia has also made several reservations to human rights treaties which are perceived by some State Parties as incompatible to the object and purpose of the treaty. Accordingly, Malaysia looks forward to the conclusion of the work of the Special Rapporteur on the impact of invalid reservations and objections and acceptances to the reservation before a conclusion can be made to guideline 2.6.3.

(d) Regarding guideline 2.6.5 Malaysia understands the phrase "Any state and any international organization that is entitled to become a party to the treaty" to mean signatory States and international organisations to the treaty. Malaysia is of the view that a State or an international organization that has no intention of becoming a party to a treaty should not be given the right to object to a reservation made to a treaty by a State Party. In view of guideline 2.6.5, Malaysia proposes amendment to guideline 2.6.12 to require signatory State or international organisation to confirm objections they have made prior to the expression of consent to be bound by the treaty when the State or international organisation expresses its consent to be bound to the treaty. The confirmation provides certainty to the treaty obligations between the author of the reservation and the objecting party. This is especially important taking into consideration that a long time may lapse between the date the objection is made by the signatory State or international organisation and the date the signatory State or international organisation expresses its consent to be bound by the treaty.

(e) Malaysia is of the view that the drafting of guideline 2.6.13 on "Time to formulate an objection" does not reflect accurately article 20(5) of the Vienna Conventions as the words "by the end" used in guideline 2.6.13 seem to only allow objections to be made at the end of a period of 12 months after notification of the reservation to the States or international organisation. In this regard Malaysia proposes that the word "by the end of a" be substituted with "within the" for the consideration of the Drafting Committee.

(f) Malaysia finds guideline 2.6.14 on pre-emptive objections unacceptable. Malaysia is of the view that States or international organization should react to reservations that have been made rather than speculate a reservation. This is to enable a State or international organisation to determine the extent of the reservation before a decision to object to the reservation is being made.

(g) Malaysia notes that the effect of objection and acceptance to reservations will be covered in the subsequent work of the Special Rapporteur. In view of this Malaysia proposed that the legal effects of late objections in guideline 2.6.15, legal effects of partial withdrawal of an objection in guideline 2.7.7 and 2.7.8 to be considered together with future deliberations on effects of objection and acceptance to reservations.

(h) On tacit acceptance of reservations Malaysia is of the view that guideline 2.8.1 bis provides clear language on what is tacit acceptance of reservations. Malaysia observes that guideline 2.8.2 as it is currently drafted can be understood to restrict the acceptance of the reservation to the 12 month period following notification of the reservation, whereas article 20(5) Vienna Conventions provide that objection to the reservation can also be made when the State or international organisation expresses its consent to be bound to the treaty. It is proposed that guideline 2.8.2 be redrafted taking into consideration the above concern.

(i) Malaysia supports the requirement that the organ of the organization must clearly express the acceptance of the reservation made by a State or international organisation as contained in guideline 2.8.8. However, Malaysia is of the view that the acceptability of guideline 2.8.9 which seeks to provide guidance on which organ of the organisation is competent to decide on a reservation to a constituent instrument is dependent on the internal framework of the organisation. This guideline should be seen as all encompassing.

4. Malaysia acknowledges that the adoption of the draft guidelines would assist in the practice of States and international organizations in respect of reservations to treaties. Nevertheless, further discussions and comments from member States and in depth analysis from the Commission are necessary before the guidelines can be adopted.

Mr. Chairman,

5. Malaysia notes that the Special Rapporteur on reservations to treaties proposes to complete his presentation of problems posed by the invalidity of reservations next year. The Commission has raised several questions for the response of States. In this respect Malaysia will be providing its comments on the questions raised by the Commission in due course after in depth study and consideration has been made to the questions.

Chapter V: Shared Natural Resources

Mr. Chairman,

6. Malaysia applauds the work of the International Law Commission on Shared Natural Resources and appreciates the report presented by the Special Rapporteur, Mr. Chusei Yamada on transboundary groundwaters, and especially on the topic "Relationship between the Work on Groundwaters and that on Oil and Gas". Mr. Chusei Yamada had given sufficient grounds for the separation of the work on transboundary groundwaters and issues concerning oil and gas.

7. Malaysia takes note that Mr. Chusei Yamada had recommended that the Commission proceed with and complete the second reading of the law of transboundary groundwaters independently of any future work on oil and natural gas. A linkage between the work on groundwaters and the work on oil and natural gas would result in undue delay to the completion of the work on groundwaters. In this respect, Malaysia supports the recommendation of Mr. Chusei Yamada that it is prudent for the present work to be solely concentrated on the law of transboundary groundwaters, and that the Commission take up the issue on oil and natural gas only after the work on transboundary groundwaters is finished, given the fact that an extensive study on the issue of oil and gas would be required.

8. Malaysia recognizes that oil and natural gas are important resources for a country's economic and social development, but they are not essential for life as there are various alternative resources. Oil and natural gas could not categorically be called a vital human need, although they are of strategic importance and necessity to States. We agree with Mr. Chusei Yamada that the consideration of environmental problems of oil and natural gas requires an entirely different approach from that of groundwaters. Principles or guidelines drafted for one natural resource may not be appropriate to be extended to other types of natural resources.

9. Pursuant to this, Malaysia supports the suggestion made in the recent report of the ILC that some additional preliminary research work should be carried out regarding State practice,

including treaty practice, relating to oil and natural gas, before a decision is made as to whether the development of an international law in the area would be beneficial to States.

Mr. Chairman,

10. Regarding the final form of the draft articles, Malaysia is of the view that this question should be approached with caution in light of the differing views expressed by States. Malaysia suggests that the question of the final form be deferred until after the second reading of the draft articles has been accomplished. Malaysia also notes that the present draft articles do not include provisions of dispute settlement, final clauses and any article which might prejudice the issue of final form.

11. Malaysia appreciates that this is a difficult and complex topic and the task of accommodating the needs of all countries in the articles is a daunting one. In view of this, Malaysia would like to once again thank the Commission, and in particular the Special Rapporteur, for their work on this topic.

Chapter IX: States obligations to extradite or prosecute

Mr. Chairman,

12. Malaysia welcomes the report of the Special Rapporteur, Mr. Zdzislaw Galicki and extends its appreciation to his for the work on this topic. Malaysia notes the current work of the International Law Commission ("ILC") particularly on the initiative to formulate draft articles on this topic. In assisting this work, States were requested to provide information on its laws and practices. Malaysia's inputs are categorized as follows:

- (a) international treaties in which Malaysia is party to, which imposes obligations to extradite or prosecute;
- (b) position under the domestic laws concerning this obligation;
- (c) Malaysia's practice reflecting the application of this obligation; and
- (d) crimes or offences to which this obligation is applied in the laws of Malaysia.

13. Malaysia is party to the following multilateral treaties which contains the obligation to extradite or prosecute – the 4 Geneva Conventions of 1949; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973; the International Convention against the Taking of Hostages 1979; the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances 1988; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention 1988; the International Convention for the Suppression of Terrorist Bombings 1997; the International Convention for the Suppression of the Financing of Terrorism 1999; the United Nations Convention against Transnational Organized Crime 2000; and the United Nations Convention against Corruption 2003.

14. Malaysia has also concluded bilateral extradition treaties with Thailand, Indonesia, Hong Kong Special Administrative Region, the United States of America and Australia. The provisions on the obligation to extradite or prosecute are provided for in the said treaties except for the treaty with Thailand which was concluded on 4 March 1911. Thus, when the obligation is not provided for in the treaty or the treaty only provides for limited obligation, the application of

the obligation is governed by the domestic laws of the contracting parties. In the treaties where this obligation exists, its scope of application is limited to the request involving nationals of the parties only and not applicable to non-national. For non-nationals, there is no obligation for Malaysia and its treaty partners to prosecute in the event the extradition request is denied.

15. At the domestic level, Malaysia has incorporated the obligation to extradite or prosecute in section 49 of the Extradition Act 1992 [Act 479]. Section 49 of Act 479 provides that the determination of whether to grant the extradition request or to refer it to the relevant authority for prosecution lies with the relevant Minister. In doing so, the Minister would take into consideration the nationality of the fugitive offender and whether Malaysia has jurisdiction to try the offence committed. In this regard, Malaysian laws are generally territorial in nature with the exception of several laws, to name a few, the Sedition Act 1948, the Official Secrets Act 1972, the Aviation Offences Act 1984, the Computer Crimes Act 1997, Chapter VI and VIA of the Penal Code, the Communications and Multimedia Act 1998, the Anti-Money Laundering and Anti Terrorism Financing Act 2001 and the Chemical Weapons Convention Act 2005.

16. In the event that no treaty is available, extradition is still possible and implemented through the issuance of a Special Direction under section 3 of Act 479. For the multilateral instruments in which Malaysia is party to, Malaysia does not recognize the Convention regime as the legal basis for acceding to an extradition request. Rather, it must be subjected to Act 479. This means that a Special Direction will have to be issued beforehand. In practice, when all the requirements under Act 479 are met, a Special Direction will normally be issued to enable Malaysia to grant a request for extradition from a non-treaty State.

17. The exception to the general rule is only as regards to the Hague Convention 1970, the Montreal Convention 1971 and its' Protocol wherein, section 16 of the Aviation Offences Act 1984 enables the application of the instruments as the legal basis for extradition under the domestic laws of Malaysia.¹

18. With regard to the practice in carrying out this obligation, Malaysia has consistently maintained its commitment to provide the widest possible assistance in combating crimes and to suppress impunity. Apart from the requirements of the law (*vis-à-vis*, the nationality of the fugitive offender and the issue of whether the Malaysian courts have the jurisdiction to try the offence), various considerations are taken into account, including international cooperation, the comity of nations, the seriousness of the crimes, the likelihood of obtaining the conviction and the interest of the States and the victims concerned. Malaysia had allowed extradition of its nationals before for offences relating to international drug trafficking and this was done in order to ensure that justice is upheld. In practice, Malaysia normally seeks certain assurances from the requesting State, such as an undertaking of reciprocity that the requesting State would also extradite its nationals for a similar offence if such request is made by Malaysia in the future.

19. With regard to the crimes to which this obligation is applied under the Malaysian law, Act 479 provides that it is only applicable to "extraditable offences". Under the said Act, an extraditable offence is an offence however described, including fiscal offences, which is punishable under the laws of Malaysia with imprisonment for not less than one year or with

¹ Section 16 provides that where there is no arrangement relating to extradition in force between Malaysia and a State Party to the Convention, the Convention may be regarded as to have effect as if there were an arrangement relating to extradition for the purposes of application of the Extradition Act 1992 to such State.

death. As long as the crimes fulfil this threshold, Malaysia will regard it as an extraditable offence.

21. As a general observation, Malaysia is of the view that the obligation to extradite or prosecute arises from treaties and not a general obligation under customary international law. From Malaysia's reading of the ILC's Report including the study on other States' practices, there appears to be insufficient basis under customary international law as well as State practices to support the contention that this obligation has attained the required level of acceptance. The study suggests that there is no such obligation exists outside the treaties. Thus, in the absence of a treaty, States are not required to carry out this obligation. Malaysia however notes that the study is ongoing and not conclusive. As such, Malaysia hopes that more States can come forward and contribute on this matter to enable the ILC to determine the extent of States practices on the obligation to extradite or prosecute.

22. On the feedback concerning the obligation to extradite or prosecute and its relation to the principle of universal jurisdiction, Malaysia would like to stress that it does not apply the principle of universal jurisdiction in its domestic laws or in its practices. Malaysia has not criminalized the offences which has universal jurisdiction as its domestic laws are sufficient to deal with these offences. Thus, any extradition request to Malaysia may be considered when the dual criminality and minimum punishment threshold requirements are met.

23. Lastly, Malaysia welcomes the initiative of the ILC in conducting this study and look forward to contribute substantively in the future.

Thank you.