



Malaysia

Permanent Mission to the United Nations

(FULL TEXT VERSION)

STATEMENT BY ZURSHIDA MURNI ABDUL HAMID, REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 81: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION.: CHAPTER IV: RESERVATIONS TO TREATIES AND CHAPTER V: RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS AT THE 6TH COMMITTEE OF THE 66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 24 OCTOBER 2011

Mr. Chairman,

Malaysia congratulates the Commission on the adoption of the entire set of Guide to Practice on Reservations to Treaties and draft articles on the Responsibility of International Organizations. We would like to express our sincere appreciation to the Special Rapporteur for the topic of Reservation to Treaties, Mr. Alain Pellet and the Special Rapporteur for the topic of Responsibility of International Organizations, Mr. Giorgio Gaja for their contributions and outstanding work in the preparation of the Guide to Practice and the draft articles on the Responsibility of International Organizations respectively.

RESERVATIONS TO TREATIES

Mr. Chairman,

2. With regard to the topic of Reservations to Treaties, Malaysia recalls that by virtue of Resolution 65/26 passed by the General Assembly during its 65th Session, States were given the opportunity to submit their observations on the text of the provisionally adopted Guide to Practice. Malaysia further notes that, the text has undergone a process of finalization which includes the introduction and deletion of some guidelines. In this regard, Malaysia would like to record its appreciation to the ILC for taking into consideration the comments raised by States including those of Malaysia in respect of draft guidelines 1.4.2, 2.1.8, 2.9.9, 3.4.1, 3.6, 3.6.1 and 3.6.2. In addition to these earlier comments and after having further perused the report of the ILC's 63rd Session, other reports as well as their Addendums, Malaysia wishes to take this opportunity to present its views on the finalized text of the Guide to Practice in the light of the latest developments made to this document.

Mr. Chairman,

3. With respect to guidelines 1.1.1, 1.1.2 and 1.1.6., Malaysia is of the view that the definitions contained in these guidelines should not in any way prejudice the nature of the unilateral statements in question at the outset as reference must be made to the effects that these unilateral statements might intend to produce in order to determine their status. Further, in order to determine the status of such unilateral statements, Malaysia is of the opinion that States could possibly fall back on guidelines 1.3, 1.3.1 and 1.3.2 which deal with the "Method of implementation of the distinction between reservations and interpretative declarations", "Phrasing and name" and "Formulation of a unilateral statement when a reservation is prohibited". Thus, these definitions may be inappropriate as they tend to, from the very initial stage, restrict States by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of those States.

4. Malaysia also notes that guideline 1.7.1 is restricted to two procedures which are not mentioned elsewhere and are at times characterized as “reservations”, although they do not by any means meet the definition contained in guideline 1.1. Malaysia’s concern is that confusion may arise in differentiating these alternative procedures from reservations. Malaysia is therefore of the view that the mechanism on the formulation of such alternatives and the means to differentiate them from reservations will need to be clearly specified to avoid confusion.

5. With regard to guideline 2.3.3, Malaysia finds that the language employed in paragraph (a) is vague and can cause confusion to readers. Guideline 2.3.3 can be construed both as an interpretation made by the reserving State, as well as an interpretation made by other contracting States. Although the commentary to this guideline states that the interpretation referred to in paragraph (a) refers to the interpretation of the author State, Malaysia is concerned that paragraph (a) could be misconstrued from a mere reading of the text.

6. On guideline 2.3.4, Malaysia is of the view that any modification which would widen the scope of a reservation but does not touch upon the substance of the commitments of the State to a treaty, should not be defeated merely upon a single objection. As such, Malaysia is of the view that there is a need to have a proper mechanism to assess a “widened reservation” as it should not be determined solely by an objection received. Therefore, Malaysia recommends that the permissibility test should be applied in determining such a reservation.

Mr. Chairman,

7. With regard to guideline 2.6.2, Malaysia would like to record its understanding that although the right being vested on the objecting States to formulate an objection to a reservation is irrespective of the permissibility of the reservation, that right is not arbitrary. In this regard, Malaysia acknowledges that this guideline is to be read together with Part 3 of the Guide to Practice so as to serve as a check and balance with respect to the permissibility of the objections.

8. On guideline 3.2, Malaysia is of the view that a treaty monitoring body (TMB) should comprise independent experts and not representatives of governments or countries. These experts should only make legal findings. The rationale behind this is to enable the TMB to execute its powers without being politically influenced by the representatives of Governments or countries.

9. With regard to guideline 3.2.1, Malaysia is of the view that the spirit of this guideline does not allow for the decision of TMBs to deprive reserving States from making reservations, but rather to assist reserving States to craft their reservations to render them valid for permissibility. As such, Malaysia is of the view that the legal effects of the assessment made by TMBs and the extent of such legal effects should be made clear in the guideline. Malaysia is also of the view that such assessments should not be binding on the State party.

10. Malaysia also has concerns on guideline 3.2.5 with regard to the competence of Dispute Settlement Bodies (DSBs). It is noted that this guideline gives the power to DSBs to make an assessment of the permissibility of reservations where the determination of the validity of such reservations is necessary in order to settle disputes. In Malaysia’s view however, this guideline would redefine the role of DSBs. It is therefore proposed that guideline 3.2.5 on DSBs be taken out from the Guide to Practice.

11. With regard to guideline 4.2.2, Malaysia would like to raise concern on the practicality of this guideline as Malaysia is of the view that it would be unfair for the author of a particular reservation to be prevented from becoming one of the contracting States to a particular treaty, merely because another contracting State opposes the earlier becoming a party. In this regard, Malaysia would like to highlight that in ratifying a regional-based treaty, at times it would be inevitable for States to make reservations

which are intended to safeguard their interests against other States facing developmental gaps to implement their obligations under the treaty. However, if a State making a reservation is faced with opposition from inclusion as a contracting party due to the reservation it makes, this would frustrate the concept of regional cooperation among States in the region.

Mr. Chairman,

12. With regard to guideline 4.2.3 and 4.2.5, Malaysia would like to reiterate its proposal as submitted to the ILC for these guidelines to be reformulated and simplified for better clarity.

13. On paragraph 1 and 2 of guideline 4.5.3, Malaysia is unclear about the status of the author State of an invalid reservation which has expressed intention not to be bound by a treaty without the benefit of the reservation. Thus, Malaysia would like to seek further clarification on this point.

14. On paragraph 4 of guideline 4.5.3, Malaysia would like to reiterate its position that the findings made by TMBs should not be binding on States but should merely act as a recommendation. As such, Malaysia is concerned with the terms stated under paragraph 4 which imposes a specific time period for State to clarify its intention. Further, Malaysia is also of the view that this paragraph defeats the rule stated in paragraph 3 of this guideline. For that reason, Malaysia would like to propose for this paragraph to be removed.

15. On guideline 5.2.4, Malaysia would like to reiterate its previous comments on the meaning of “radically changes” in paragraph (b). It is not clear by whom the scope of such radical changes would be determined for the situation to qualify as an exception to the rule laid down in guideline 5.2.4. Malaysia is therefore of the view that this guideline should be reconsidered by the ILC.

Mr. Chairman,

16. In relation to guideline 2.4.7, Malaysia is concerned as to the legal effects that guideline 2.4.7 would have on a treaty. Based on Malaysia’s understanding, guideline 2.4.7 may have the effect of overriding a treaty provision concerning time limits required for the formulation of interpretative declarations. Malaysia seeks further clarification on this provision.

17. Malaysia notes that as it stands, guideline 2.4.8 is the only provision concerning the procedure for modification of interpretative declarations. Malaysia is not clear on whether the procedures applicable at the stage of formulation of an interpretative declaration, would also be applicable at the stage of its modification. Since the express wordings of the guidelines and the commentaries thereof do not indicate application of such procedures to the modification of an interpretative declaration, Malaysia is concerned that States parties might not be aware of actions taken by States who decide to modify their position through conduct without communicating the same to others.

18. Malaysia would like to reiterate its comments as was previously raised as regards paragraph 2 of guideline 2.9.8. Malaysia is of the view that the phrases “exceptional cases” and “relevant circumstances” are ambiguous and require further elaboration. In particular, given the wide range of possibilities of the extent of such “relevant circumstances”, it is only apt for the ILC to provide more details for States’ understanding.

19. In relation to the condition for permissibility laid down in guideline 3.5 namely that a State may formulate an interpretative declaration unless it is prohibited by a treaty, Malaysia is of the view that since prohibitions are often made in general terms and would preclude States from construing the treaty in a certain manner, such conditions should only be imposed against prohibitions that are specifically expressed in a treaty provision.

20. On guideline 3.5.1, Malaysia would like to stress that this provision should not be applicable to unilateral statements made under a treaty which prohibits the formulation of a reservation. Hence, it is Malaysia's view that, unless a conclusive determination is made to the effect that the unilateral statement is actually a reservation, conditions for permissibility under guideline 3.5.1 should not be imposed. In addition, it is not clear as to who would determine whether the interpretative declaration in question is in fact a reservation.

21. With regard to guideline 4.7.1, Malaysia is of the view that approval of and opposition to an interpretative declaration should not determine the weight to be given to the interpretation proposed. Rather, an interpretative declaration should constitute an element to be considered in a treaty interpretation based only on its own merits. Thus, an approval or an opposition should merely act as an interpretative aid without prejudicing the weight of the interpretative declaration itself.

22. On guideline 4.7.2, Malaysia understands that this provision is based on the principle that a State cannot declare that it can interpret a particular provision in certain way, and then take a different position later. Malaysia is of the view that it may be necessary for the ILC to explain in the commentary as to what extent another State can rely on a declarant State's original interpretative declaration so as to deny the declarant State from claiming that its modified interpretative declaration can take effect under guideline 4.7.1.

Mr. Chairman,

23. Malaysia wishes to reiterate its views in relation to the application of this Guide to international organizations. Malaysia recognizes that an international organization does not have similar treaty-making powers as States. On the contrary, the power to conclude treaties by international organizations largely depends on the terms of the constituent instrument of the international organization itself and oftentimes, the mandate granted to the international organization by the States comprising such an international organization. Thus, Malaysia is of the view that a separate legal regime for international organizations should be developed separately and should not be made part of the guidelines at this juncture. As such, Malaysia is of the view that the placement of guidelines 2.8.7, 2.8.8, 2.8.9, 2.8.10, 2.8.11 and 4.1.3 as well as all other references made to international organizations found in the Guide to Practice is inappropriate.

Mr. Chairman,

24. From Malaysia's point of view, the technical assistance as referred to in Recommendation 2 and Annex (iv) and (v) of the Recommendation on Mechanisms of Assistance should only be available at the request of States.

25. Malaysia wishes to draw the attention of the ILC to the fact that States only have the benefit of studying the finalized guidelines within the context of what has now been provided by the ILC. It is in Malaysia's view that these finalized guidelines together with their commentaries should be read together as a whole to ensure that all concerns have been addressed. For this reason, Malaysia would like to reserve the right to provide further comments on all guidelines and commentaries pending their finalization.

RESPONSIBILITY OF THE INTERNATIONAL ORGANIZATIONS

Mr. Chairman,

26. We would like to now comment on the topic of “Responsibility of the International Organizations”. In relation to the proposed recommendation by the Commission to the General Assembly to take note of the draft articles in a resolution, it is Malaysia’s view that at the present stage, States and international organizations should be given more time to evaluate and review the said draft articles based on their own practices and bilateral and regional arrangements, if any. Malaysia therefore proposes that the recommendation for the General Assembly to take note of the draft articles should be made at a later stage after sufficient practice has developed.

27. With regard to the recommendation for the General Assembly to consider, at a later stage, the elaboration of a convention on the basis of the draft Articles, Malaysia is of the view that at this juncture, it would be premature to discuss the possibility of elaborating an international convention on this topic especially when at present, there is still an absence of a consensus in relation to the elaboration of a convention on the Responsibility of States for Internationally Wrongful Acts.

28. As was aptly pointed out in the Report of the Commission, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility as these draft articles are more in the nature of progressive development. Malaysia is of the view that a legally binding instrument should only be drafted when broad support from the international community can be expected and when practices of international organizations are clearly delineated. It is observed that practice concerning the responsibility of international organizations appears to be limited. As was also the case with the articles on State responsibility, the authority of these articles will depend upon their reception by those to whom they are addressed.

Thank you, Mr. Chairman.

(This page was left blank intentionally)

(AS DELIVERED DUE TO TIME CONSTRAINT)

STATEMENT BY ZURSHIDA MURNI ABDUL HAMID, REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 81: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION.: CHAPTER IV: RESERVATIONS TO TREATIES AND CHAPTER V: RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS AT THE 6TH COMMITTEE OF THE 66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 24 OCTOBER 2011

Mr. Chairman,

Malaysia congratulates the Commission on the adoption of the entire set of Guide to Practice on Reservations to Treaties and draft articles on the Responsibility of International Organizations. We would like to express our sincere appreciation to the Special Rapporteur for the topic of Reservation to Treaties, Mr. Alain Pellet and the Special Rapporteur for the topic of Responsibility of International Organizations, Mr. Giorgio Gaja for their contributions and outstanding work in the preparation of the Guide to Practice and the draft articles on the Responsibility of International Organizations respectively.

RESERVATIONS TO TREATIES

Mr. Chairman,

2. On the topic of Reservations to Treaties, Malaysia had provided its views with regard to the other provisions. Having perused the report of the ILC's 63rd Session, we noted that those views were not included in the finalized text of the Guide to Practice. As such, we wish to take this opportunity to share with the Special Rapporteur our observations and analysis on those provisions. However, in the interest of time, we would only highlight our concerns and observations with regard to guidelines 1.1.1, 1.1.2, 1.1.6, 1.7.1, 3.2, 3.2.1, 2.4.7, 2.4.8, 3.5 and 3.5.1. We had provided the full text of our Statement to the Secretariat which contains all the provisions to which we had made detailed observations and analysis with the view of requesting the Special Rapporteur to take into consideration those observations and analysis.

Mr. Chairman,

3. With respect to guidelines 1.1.1, 1.1.2 and 1.1.6., Malaysia is of the view that the definitions contained in these guidelines should not in any way prejudice the nature of the unilateral statements in question at the outset as reference must be made to the effects that these unilateral statements might intend to produce in order to determine their status. Further, in order to determine the status of such unilateral statements, Malaysia is of the opinion that States could possibly fall back on guidelines 1.3, 1.3.1 and 1.3.2 which deal with the "Method of implementation of the distinction between reservations and interpretative declarations", "Phrasing and name" and "Formulation of a unilateral statement when a reservation is prohibited". Thus, these definitions may be inappropriate as they tend to, from the very initial

stage, restrict States by imposing that such unilateral statements are tantamount to reservations even though that may not have been the intention of those States.

4. Malaysia also notes that guideline 1.7.1 is restricted to two procedures which are not mentioned elsewhere and are at times characterized as “reservations”, although they do not by any means meet the definition contained in guideline 1.1. Malaysia’s concern is that confusion may arise in differentiating these alternative procedures from reservations. Malaysia is therefore of the view that the mechanism on the formulation of such alternatives and the means to differentiate them from reservations will need to be clearly specified to avoid confusion.

5. On guideline 3.2, Malaysia is of the view that a treaty monitoring body (TMB) should comprise independent experts and not representatives of governments or countries. These experts should only make legal findings. The rationale behind this is to enable the TMB to execute its powers without being politically influenced by the representatives of Governments or countries.

6. With regard to guideline 3.2.1, Malaysia is of the view that the spirit of this guideline does not allow for the decision of TMBs to deprive reserving States from making reservations, but rather to assist reserving States to craft their reservations to render them valid for permissibility. As such, Malaysia is of the view that the legal effects of the assessment made by TMBs and the extent of such legal effects should be made clear in the guideline. Malaysia is also of the view that such assessments should not be binding on the State party.

Mr. Chairman,

7. In relation to guideline 2.4.7, Malaysia is concerned as to the legal effects that guideline 2.4.7 would have on a treaty. Based on Malaysia’s understanding, guideline 2.4.7 may have the effect of overriding a treaty provision concerning time limits required for the formulation of interpretative declarations. Malaysia seeks further clarification on this provision.

8. Malaysia notes that as it stands, guideline 2.4.8 is the only provision concerning the procedure for modification of interpretative declarations. Malaysia is not clear on whether the procedures applicable at the stage of formulation of an interpretative declaration, would also be applicable at the stage of its modification. Since the express wordings of the guidelines and the commentaries thereof do not indicate application of such procedures to the modification of an interpretative declaration, Malaysia is concerned that States parties might not be aware of actions taken by States who decide to modify their position through conduct without communicating the same to others.

9. In relation to the condition for permissibility laid down in guideline 3.5 namely that a State may formulate an interpretative declaration unless it is prohibited by a treaty, Malaysia is of the view that since prohibitions are often made in general terms and would preclude States from construing the treaty in a certain manner, such conditions should only be imposed against prohibitions that are specifically expressed in a treaty provision.

10. On guideline 3.5.1, Malaysia would like to stress that this provision should not be applicable to unilateral statements made under a treaty which prohibits the formulation of a reservation. Hence, it is Malaysia’s view that, unless a conclusive determination is made to the effect that the unilateral statement is actually a reservation, conditions for permissibility under guideline 3.5.1 should not be imposed. In addition, it is not clear as to who would determine whether the interpretative declaration in question is in fact a reservation.

Mr. Chairman,

11. Malaysia wishes to reiterate its views in relation to the application of this Guide to international organizations. Malaysia recognizes that an international organization does not have similar treaty-making powers as States. On the contrary, the power to conclude treaties by international organizations largely depends on the terms of the constituent instrument of the international organization itself and oftentimes, the mandate granted to the international organization by the States comprising such an international organization. Thus, Malaysia is of the view that a separate legal regime for international organizations should be developed separately and should not be made part of the guidelines at this juncture. As such, Malaysia is of the view that the placement of guidelines 2.8.7, 2.8.8, 2.8.9, 2.8.10, 2.8.11 and 4.1.3 as well as all other references made to international organizations found in the Guide to Practice is inappropriate.

Mr. Chairman,

12. From Malaysia's point of view, the technical assistance as referred to in Recommendation 2 and Annex (iv) and (v) of the Recommendation on Mechanisms of Assistance should only be available at the request of States.

13. Malaysia wishes to draw the attention of the ILC to the fact that States only have the benefit of studying the finalized guidelines within the context of what has now been provided by the ILC. It is in Malaysia's view that these finalized guidelines together with their commentaries should be read together as a whole to ensure that all concerns have been addressed. For this reason, Malaysia would like to reserve the right to provide further comments on all guidelines and commentaries pending their finalization.

RESPONSIBILITY OF THE INTERNATIONAL ORGANIZATIONS

Mr. Chairman,

14. We would like to now comment on the topic of "Responsibility of the International Organizations". In relation to the proposed recommendation by the Commission to the General Assembly to take note of the draft articles in a resolution, it is Malaysia's view that at the present stage, States and international organizations should be given more time to evaluate and review the said draft articles based on their own practices and bilateral and regional arrangements, if any. Malaysia therefore proposes that the recommendation for the General Assembly to take note of the draft articles should be made at a later stage after sufficient practice has developed.

15. With regard to the recommendation for the General Assembly to consider, at a later stage, the elaboration of a convention on the basis of the draft Articles, Malaysia is of the view that at this juncture, it would be premature to discuss the possibility of elaborating an international convention on this topic especially when at present, there is still an absence of a consensus in relation to the elaboration of a convention on the Responsibility of States for Internationally Wrongful Acts.

16. As was aptly pointed out in the Report of the Commission, the provisions of the present draft articles do not necessarily yet have the same authority as the corresponding provisions on State responsibility as these draft articles are more in the nature of progressive development. Malaysia is of the view that a legally binding instrument should only be drafted when broad support from the

international community can be expected and when practices of international organizations are clearly delineated. It is observed that practice concerning the responsibility of international organizations appears to be limited. As was also the case with the articles on State responsibility, the authority of these articles will depend upon their reception by those to whom they are addressed.

Thank you, Mr. Chairman.