



Malaysia

Permanent Mission to the United Nations

STATEMENT BY MS. SARAH KHALILAH ABDUL RAHMAN, REPRESENTATIVE OF MALAYSIA ON AGENDA ITEM 81: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD SESSION AT THE 6TH COMMITTEE OF THE 66TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY, NEW YORK, 1 NOVEMBER 2011

**CHAPTER VII: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION;
CHAPTER X: THE OBLIGATION TO EXTRADITE OR PROSECUTE;
CHAPTER XI: TREATIES OVER TIME; CHAPTER XII: THE MOST-FAVOURLED-NATION CLAUSE**

CHAPTER VII: IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION

Mr. Chairman,

On the topic of Immunity of State Officials from Foreign Criminal Jurisdiction, Malaysia commends the Special Rapporteur, Mr. Roman Anatolevich Kolodkin for his detailed Reports on this topic. Malaysia also notes the detailed debates on the Reports at the 63rd Session of the Commission and the issues that are expected to be addressed in a Working Group at the Commission's 64th Session. Further thereto, Malaysia notes the specific issues on which comments are invited as specified in Chapter III, paragraphs 36 to 39 of the Commission's Report and will provide its response in writing to the Commission.

2. By way of preliminary comments, Malaysia notes the Special Rapporteur's clarification that the various conclusions in his reports merely represented summaries of his findings as the formulation of draft articles at this stage, before resolving the basic issues, would be premature.

3. In this regard, Malaysia notes that the Commission needs to determine the general orientation of the topic before proceeding further. In Malaysia's view, since even the current status of the law in this area is unclear, the Commission should work at determining the existing basis for such immunity, scope and approach to immunity of State Officials before embarking on progressive development of the law.

Mr. Chairman,

4. Malaysia agrees that the Commission should clarify the premise for the application of the immunities in question in the first instance and notes the view of certain Commission members that in the interest of emphasizing accountability, a distinction could be drawn between ordinary crimes and grave international crimes where special considerations, not least the need to prevent impunity, apply. Indeed, Malaysia looks forward to further discussions on this topic.

CHAPTER X: THE OBLIGATION TO EXTRADITE OR PROSECUTE

Mr. Chairman,

5. Turning now to the topic of the Obligation to Extradite or Prosecute, Malaysia records its appreciation to the Special Rapporteur, Mr. Zdzislaw Galicki for the efforts to make headway on this complex topic. Malaysia also appreciates the constraints that have been placed on the Commission's consideration of this topic as the Sixth Committee continues its consideration of the agenda item "Scope and Application of the Principle of Universal Jurisdiction". Malaysia reiterates its view that given the complexity of the subject matter and its inter-relationship with the *aut dedere aut judicare* obligation, it would be appropriate for the Commission to include consideration of the universal jurisdiction issue, either in conjunction with this topic or separately.

6. Malaysia notes from the debates in the Commission that the fundamental issue, namely the basis in international law of the *aut dedere aut judicare* obligation remains undetermined. In Malaysia's view this should be the focus of more study and it would be premature to attempt the drafting of any draft articles until these parameters are identified. For this purpose, Malaysia reiterates its view that the Commission must ascertain the status of existing law before embarking on progressive development of this area of international criminal law. In this regard, Malaysia looks forward to the judgment of the International Court of Justice in the Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*).

7. Further thereto, the existence of any obligation or duty to extradite or prosecute and the context and limits of the obligation may be ascertained. In this regard, the distinction of its application to "core crimes", however that term may be defined, and ordinary crimes should also be determined.

8. With reference to the specific issues raised in the Commission's Report for the attention of States, Malaysia wishes to highlight that its obligation to extradite or prosecute is based on its domestic law, namely the Extradition Act 1992 [Act 479] and also the bilateral and multilateral treaties to which Malaysia is a party. In this regard, such cooperation is premised on the need to cooperate with other States to prevent and suppress crimes, which today are increasingly of a transnational nature. Malaysia also grants international cooperation in extradition on the basis of reciprocity.

9. With regard to cooperation with international courts and tribunals, the competence and jurisdiction of such courts and tribunals in relation to the requested States also needs to be considered.

CHAPTER XI: TREATIES OVER TIME

Mr. Chairman,

10. As regards the topic of Treaties Over Time, Malaysia welcomes and records its appreciation for the work of the Study Group on the topic thus far. 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.

11. 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 courts and tribunals on the relevance of subsequent agreement and subsequent practice to international treaties.

12. Malaysia also takes note of the nine preliminary conclusions of the Study Group, and looks forward to the completion of the Study Group's discussion on the jurisprudence of international courts and tribunals on general and ad hoc jurisdiction in their study on 'the role of subsequent agreement and practice in treaty interpretation'.

CHAPTER XII: THE MOST-FAVOURED-NATION CLAUSE

Mr. Chairman,

13. Malaysia records its appreciation to the Commission for its efforts to revitalise discussions on the "Most Favoured Nation" ("MFN") Clause and embark on its study on the usage and implications of the MFN Clause under various fora and arenas. The developments thereof constitute the wealth of jurisprudence which necessitates the Commission's Study Group on the MFN Clause to constantly keep abreast with the contemporary issues in order to develop a comprehensive repertoire on MFN. While the study is carried out, Malaysia is of the view that the resumed discussion on the "MFN Clause" should be undertaken with the objective of elaborating a non-legally binding set of guidelines for States.

14. Malaysia echoes the general sense of the Study Group that it is unnecessary at this stage to consider the option of preparing draft articles or a revision of the 1978 Draft Articles. Based on the Commission's Report on its 63rd Session, it appears that the Study Group is still examining the probable final outcome of the study undertaken on the MFN Clause. Nonetheless, Malaysia notes that the Study Group has already embarked on a more concrete project and more focused deliberations on areas of study and research that have been identified. Further examination of the decisions of investment tribunals, individual arbitrators, papers and the application of the MFN Clause in other areas of international law may shed light on the outcome the Study Group hopes to achieve. Malaysia would like to stress that while the study is being conducted and guidelines developed, they should in no way limit the inherent right of States to determine the contexts of which it would be appropriate for them to interpret and apply the MFN Clause. Malaysia reiterates the position that the Vienna Convention on the Law of Treaties should remain as the authoritative guide in interpreting treaties while the outcome of work of Commission on the MFN Clause may act as a useful guide to accord certainty and stability in the field of investment law.

Thank you, Mr. Chairman.