



CZECH REPUBLIC

Permanent Mission of the Czech Republic to the United Nations

76th Session of the General Assembly

Report of the International Law Commission on the work of its 72nd session:
Protection of the Atmosphere
Provisional Application of Treaties
Other decisions |

Statement by

Mr. Martin Smolek

**Deputy Minister and Legal Adviser
at the Ministry of Foreign Affairs of the Czech Republic |**

New York, 25th October, 2021 |

Check against Delivery

One Dag Hammarskjöld Plaza, 48th floor
885 Second Avenue, New York, NY 10017
tel.: +1 (646) 981 4001, fax: +1 (646) 981 4099
www.mzv.cz/un.newyork

Madam / Mr. Chair,

During its 72nd session, the Commission adopted, on second reading, **Guidelines on Protection of the Atmosphere**. The Czech Republic appreciates the tireless efforts of the Special Rapporteur and his contribution to this outcome.

The Czech Republic considers the protection of the atmosphere to be one of the most urgent challenges that the humankind is facing. The response to the process of atmosphere's degradation cannot be successful unless it engages the entire international community, as well as other relevant components of global society. Building a framework of legally binding instruments addressing various aspects of atmospheric degradation and creating a basis for a concerted action against such degradation represents an important element of the complex effort to protect the atmosphere.

According to the General commentary to the Draft Guidelines on Protection of the Atmosphere “ [t]he Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere”. At the same time, the Commission adds that “it ... does not desire to interfere with relevant political negotiations or to impose on current treaty regimes rules or principles not already contained therein”. This does not disperse our doubts about the purpose of such exercise.

As far as the text of guidelines as such is concerned, we note that the changes made during second reading contributed to the improvement of the preamble and several guidelines. However, we equally note that the Guidelines are not sufficiently specific to provide States with any guidance other than that they can find in already existing instruments dealing with problems of air pollution, climate change, degradation of various components of the atmosphere, or with the protection of the environment in general. Most of the approaches and principles laid down in the Guidelines are already applied in States' negotiations. The real challenge, however, is not to rediscover or reconfirm these principles and approaches, but to find a political compromise, based on science, concerning substantive issues of economic, social and political nature on which national priorities often diverge.

As regards individual guidelines, we will address at least some of them:

We agree with the content of Guidelines 3 to 8, while noting, once again, that principles referred to in these guidelines are of broader application, going far beyond the issues related to the protection of atmosphere. We also welcome improvements in the text of these guidelines made on second reading.

Concerning Guideline 9, we remain of the view that paragraph 1 of this guideline is inaccurate, for reasons explained in our written comments. We also agree with the comments by some states (USA) that the guideline gives a wrong impression that in the context of atmosphere, there is a different regime for solution of problems of

fragmentation of international law. Further, we note the criticisms expressed by other states (UK) that this provision “seem[s] to be an excessive and unnecessary means for ensuring harmony and integration as between separate instruments and bodies concerned with protection of the atmosphere.” In fact, Guideline 9 touches upon several substantively different issues, while proposing an oversimplified solution to them. It seems to confuse in particular the problems of “identification” and “interpretation” of the rules of international law. Moreover, in doing so, the guideline does not distinguish between rules of customary international law and treaty obligations. The guideline suggests that the identification of norms of customary international law should be done “in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts”. This premise seems to be fictitious and inconsistent with the Conclusions on identification of customary international law adopted by the Commission in 2018. Similarly, concerning the problem of interpretation, it suffices to compare the Commentary of the Commission on [what became] articles 30 and 31 (3)(c) of the Vienna Convention on the law of treaties with the text of this guideline to see a discrepancy between them.

Finally, Guidelines 10, 11 and 12 (Implementation, Compliance and Dispute settlement) are dealing, in a rather rudimentary manner, with issues that may arise also in any context other than that concerning the protection of the atmosphere and do not contain anything which would be specific to the protection of atmosphere. We therefore doubt the usefulness and added value of these guidelines.

Madam / Mr. Chair,

Let me now focus on the topic “**Provisional Application of Treaties**”. The Czech delegation congratulates the Commission on the adoption of the Guide on this topic and expresses its gratitude to the Special Rapporteur Mr. Juan Manuel Gomez Robledo, for his outstanding contribution to this outcome. We also acknowledge, with great appreciation, contribution of the Secretariat, which prepared three Memoranda on various aspects of this topic.

We agree that in order to ascertain more precisely the legal effects of provisional application, the attention has to be paid both to the practice of States and international organizations, but also to the relationship between provisions of article 25 and other provisions of the Vienna Convention on the Law of Treaties. In this respect, and having regard to the divergence of State practice in this field, we note with appreciation Special Rapporteur’s effort to take on board the comments of governments and identify their common elements.

The Czech delegation considers that the outcome of the work on this topic is properly reflecting the flexible nature of the provisional application of treaties as “a voluntary

mechanism for giving immediate effect to all or some of the provisions of a treaty, prior to the fulfillment of the conditions and formalities required for the treaty's entry into force.”

While the Guide consist of only 12 guidelines, these guidelines and commentaries thereto address in concise manner the most pertinent issues of provisional application of treaties. We will mention at least some of them.

Guideline 4 (Form of agreement) clarifies that in addition to the case where the treaty so provides, the provisional application of a treaty or its part may be agreed through four different forms listed therein. It also reveals that the basis for provisional application of a treaty is an agreement between the States or international organizations concerned.

Hence, as further provided in Guideline 6 (Legal effect), unless the treaty provides otherwise or it is otherwise agreed, provisional application produces legally binding obligation to apply the treaty or a part thereof. This aspect is convincingly explained in paragraph 2 of the commentary to this guideline. Such treaty or a part thereof must be performed in good faith. We agree both with the principle announced in this guideline, and the element of flexibility reflected in the formulation of the guideline.

As a logical consequence, Guideline 8 (Responsibility for breach) provides that the breach of an obligation arising under the treaty which is provisionally applied entails international responsibility – a conclusion we fully support.

We appreciate that Guideline 7 on reservations is formulated as a saving clause, in view of insufficient practice in this field.

Finally, we welcome that Guideline 9 on termination of provisional application includes further clarifications in addition to restating elements of article 25 of the 1969 Convention. Paragraph 3, analogically with rules governing the termination of the treaty, envisages possibility of additional grounds for termination of provisional application, while paragraph 4 clarifies another important element of the termination of provisional application, namely that such termination does not affect rights, obligations or legal situations created through provisional application prior to its termination. This provision contributes significantly to strengthening of legal certainty and stability of legal relations.

The Czech delegation is confident that the Guide to Provisional Application of Treaties will provide useful guidance to the States and international organizations and contribute to further consolidation and unification of the practice in this field. We therefore support the recommendation of the Commission to the General Assembly to take note of the Guide, to commend it to the attention of States and international organizations, and to request the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of States and international organizations in the provisional application of treaties.

Madam / Mr. Chair,

In conclusion, I would like to comment briefly on the programme of work of the Commission.

Firstly, the Czech Republic notes with interest the inclusion of the topic “Subsidiary means for determination of rules of international law” in the long-term programme of work of the Commission. In this connection, we would like to underline that moving any of the topics from already existing long-term programme list on the active programme of the Commission should be done only after careful consideration and proper explanation why the Commission gives preference to a particular topic over other topics on the long-term programme list. The Commission should also take duly into account the overall volume of the work and speed of progress on topics currently before it, with a view to their timely completion.

In this regard, we would like to note that, in the discussions in the Sixth Committee, the Czech Republic repeatedly proposed to refer the topic “Universal criminal jurisdiction” to the International Law Commission. A few years ago, the Commission itself included the topic in its long-term programme of work. Universal criminal jurisdiction is subject of intense discussions, is relevant for State practice and meets the criteria for the selection of topics of the Commission. Therefore, we would like to support the inclusion of this topic on the active programme of the Commission.

Thank you, Madam / Mr. Chair.