



PHILIPPINES

STATEMENT

Permanent Mission of the Republic of the Philippines to the United Nations
Agenda Item - 82: Report of the International Law Commission
on the work of its seventy-second session

Cluster I - Protection of the Atmosphere, Provisional Application of Treaties, and Other Decisions

Sixth Committee

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Madam Chair,

The Philippines thanks the International Law Commission (ILC) through its Chair, Mr. Mahmoud D. Hmoud (Jordan), for introducing its comprehensive report on its seventy-second session, which took place in hybrid format at the United Nations Office at Geneva from April to August 2021. We laud the Commission's continued efforts to promote, encourage and advance the rule of law despite the constraints posed by the pandemic.

From its inception, the ILC has worked towards the progressive development of its international law and its codification to contribute to securing a world order firmly based on the rule of law in international relations.

It is in recognition of the ILC's unique role in the firmament of international law that the Philippines has fielded a candidate to the ILC for the term 2023-2027 who can represent Philippines' hybrid legal tradition of civil and common law and who is well-poised to share the state practice of Southeast Asia's oldest democracy, contribute to closer relations between States (through the General Assembly - Sixth Committee) and the ILC, and prioritize the agenda of developing states committed to the rule of law as the basis of the global order. We count on the support of States for the Philippine candidate to the ILC for the coming term.

Madam Chair,

The Philippines commends Special Rapporteurs Mr. Murase Shinya and Mr. Juan Manuel Gomez Robledo for their outstanding contribution to the work of the ILC, respectively, on "Protection of the Atmosphere" and "Provisional application of treaties."

On “Protection of the Atmosphere”

We note that the Commission has adopted the entire set of draft guidelines on the protection of the atmosphere as well as the commentaries thereto, on second reading, and that it has commended these documents to the attention of states and international organizations.

From the outset, the Philippines has supported the work on this topic, and especially the Special Rapporteur, recognizing that the atmosphere is our single biggest and one of our most important natural resources. It is a shared, common, and finite resource, therefore, our common concern. Before this Committee, we emphasized that we have the general obligation to protect the atmosphere from human activity and a corresponding obligation to cooperate, in this regard.

While noting its adoption, we wish to make the following observations:

We are pleased that the preambular provisions, as adopted, emphasize that atmospheric pollution and atmospheric degradation are a common concern of mankind; highlight the special situation and needs of developing countries; note the close interaction between the atmosphere and the oceans as well as the special situation of low-lying coastal areas and small island developing states due to sea-level rise; and recognizes the interests of future generations.

On the last preambular recognition, recognition of interests of future generations is consistent with Philippine practice. This principle is part of Philippine law and jurisprudence for almost thirty years now. In *Oposa v. Factoran*, minors filed a case against the Secretary of the Department of Environment and Natural Resources to mandate him to cancel all existing timber license agreements and to stop their further issuance. On the question of whether or not these minors have legal standing to sue by representing their generation and the generation yet unborn, the Supreme Court said yes because this is based on the concept of intergenerational responsibility in environmental law.

Moving on to Guideline 1 on the use of terms, we note that under Guideline 1(b), pollution refers only to pollution with effect beyond state of origin. Given that the atmosphere is a continuum of gas, it is difficult to identify what level of pollution is without effect. Limiting the scope to pollution with transborder effect, while consistent with the *Train-Smelter Arbitration* case ruling on inter-state liability, is silent on the state’s obligation to protect its own residents from pollution.

The Guidelines indicate several positive obligations for states which seem to be inconsistent with its nature as a non-legally binding document. Nevertheless, we welcome the articulation of these obligations. Guideline 3 sets out the obligation to protect the atmosphere as a core provision and prescribes the manner by which States can discharge the obligation to protect: by taking appropriate measures to prevent, reduce, or control atmospheric pollution and atmospheric degradation. Guideline 4 requires States to ensure that environmental impact assessment is undertaken on activities with significant adverse impact on the atmosphere within their jurisdiction and control. Guideline 8 imposes States’ obligation to cooperate with each other and with international organizations. Finally, Guideline 11, under the broad heading compliance, requires states to abide by their obligations under relevant international law in good faith.

This delegation is cognizant of the parameters within which work on this topic was undertaken. Nevertheless, we wish to express our deep appreciation to the Special Rapporteur, Mr. Shinya, for shepherding this work, and for this succinct outcome, which reflects, to an extent, the aspirations of many states, and signals, as well, progressive development of international law in this field.

On “Provisional application of treaties”

The Philippines welcomes the adoption by the ILC of the entire Guide to Provisional Application of Treaties, including the commentaries thereto.

As a general observation, in relation to the Guide, we considered the possibility of a rule of construction that a treaty shall not be deemed subject to provisional application unless the text of the treaty or other instrument expressly and categorically provides it. This would be consistent with our practice and takes into account realities of republican states where the executive negotiates treaties but shares foreign policy powers with other bodies, so provisional application which derogates from the sharing should not be presumed.

In terms of its own state practice, consistent with Article 25 of the Vienna Convention on the Law of Treaties, the Philippines observes the concept of “provisional application” of treaties and international agreements under its national guidelines.

Specifically, Executive Order No. 459 (Providing for the Guidelines in the Negotiation of International Agreements and its Ratification), under Section 6, states that:

b. No treaty or executive agreement shall be given provisional effect unless it is shown that a pressing national interest will be upheld thereby. The Department of Foreign Affairs, in consultation with the concerned agencies, shall determine whether a treaty or an executive agreement, or any amendment thereto, shall be given provisional effect.

Under Section 2 of the same executive issuance, the term “Provisional Effect” is defined as the “recognition by one or both sides of the negotiation process that an agreement be considered *in force* pending compliance with domestic requirements for the effectivity of the agreement” (emphasis supplied). Due to this definition, there has been marked hesitation in making a positive determination that a treaty or an international agreement shall be given provisional effect. This stems from the perception that this might lead to non-compliance with internal rules governing procedures of a state to consent to be bound to a treaty.

The robust discussions on the legal effects of provisional application are therefore welcome. We appreciate the efforts of the Commission in ascertaining more precisely the legal effects of provisional application to draw more clearly the fine distinction between provisional application and the regime of entry into force.

We support the request of the Commission for 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 along with other relevant materials. This

would help assist states in assessing and reviewing their current internal guidelines, also as against the Guidelines adopted by the Commission, and the practice of other States.

On other decisions

With respect to the other decisions of the Commission, the Philippines wishes to state the following:

- We support the recommendation of the ILC on the inclusion of the topic “Subsidiary means for the determination of rules of international law” in the long-term programme of work of the Commission.
- We also welcome the establishment of the Working Group on methods of work of the Commission and hope that discussions will include strengthening relations with the Sixth Committee.
- We commend the Commission’s commitment to the rule of law and its continued contribution, despite the postponements caused by the Covid19 pandemic, and progress in its current program of work. We take note of the challenges of working under a hybrid format, with ILC members being in different time zones, and the attendant impact in terms of reduced hours of operation for decision making and negotiations as well as on collegiality, which is a hallmark of ILC engagement.
- For the second year, the International Law Seminar was not convened. We hope that the new year would usher the re-convening of the Seminar, to allow for interaction between ILC and jurists, professors, and government officials.
- We are committed to supporting the ILC and note with concern that budgetary constraints in recent years have reduced budgeted amounts which impact on ensuring the attendance of all members in the annual session and of the full substantive Secretariat. Necessary budgetary resources should be allocated for the functioning of ILC and its Secretariat, as well as for the Special Rapporteurs, including their honoraria. We support the recommendation for the establishment of a trust fund.
- Sufficient, adequate, and predictable funding for the ILC is important to ensure that all members can participate and the main forms of civilization and the main legal systems of the world are represented in the Commission.

Finally, the Philippines wishes to recognize the invaluable role of the United Nations Office of Legal Affairs, particularly its Codification Division, for the support to the ILC in its pursuit of its mandate, and for facilitating engagement between the ILC and this Committee. END.