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## Report of the International Law Commission

**Protection of Atmosphere**
**Provisional application of treaties**
**Peremptory norms of general international law (jus cogens)**

**Statement by**

**Mr. Petr Válek**
Director of the International Law Department
Ministry of Foreign Affairs

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1109 – 1111 Madison Avenue, New York, NY 10028
tel.: 1-(646)-981-4000, fax: 1-(646)-981-4099, www.mfa.cz/un.newyork

Mr. Chairman,

The Czech Republic commends the Commission on the completion of the first reading of the topic "**Protection of Atmosphere**" and appreciates the contribution of the Special Rapporteur, Professor Shinya Murase, to this outcome.

*The Czech Republic commented extensively on individual draft guidelines adopted on first reading during past years. Today we will limit our comments to draft articles adopted during the 70th session of the Commission. We will avail ourselves of an opportunity to submit written comments on the draft guidelines adopted on first reading as a whole, assuming that the General Assembly resolution will invite Member States to do so.*

Before we comment separately on three new draft guidelines, we want to make a more general observation in relation to all of them. It concerns usefulness of an exercise consisting in generalization of provisions frequently found in various treaty instruments.

Our first question is, what is the purpose and value of such generalization. The mere fact that this type of provisions is frequent in various treaties dealing with protection of environment does not grant them any normative value on their own, independently of such instruments. They do not have an autonomous life in international law. They are a corollary of substantive provisions of various instruments and cannot operate in the absence of such substantive provisions.

As we now can see, there is lack of substantive provisions concerning "protection of the atmosphere" in the draft guidelines before us. Similarly as new draft guidelines 10, 11 and 12, the preceding draft guidelines too are a sort of generalization of certain type of provisions of various treaty instruments. However, the treaty instruments, which served as inspiration for the present exercise, do have specific, substantive content. They are addressing well-defined problems and their causes, they establish international standards and goals, or they require some sort of action by treaty parties. In the context of such substantive provisions, the type of provisions we can see in the present draft guidelines has a real meaning.

The present exercise does not aim at addressing substantive problems of atmospheric deterioration, and rightly so, since the Commission does not possess necessary technical or scientific expertise in this regard. The limits of Commission's exercise are reflected in draft guideline 2, paragraphs 2 and 3.

I now turn to draft guideline 10 on implementation. The fact that national implementation of an international obligation may take a form of legislative, administrative, judicial or other action is a simple statement of a known fact. Therefore, in our opinion, paragraph 1 does not have to be included in the draft.

As regards draft guideline 11 on compliance, we note that some other draft guidelines indeed refer to obligations that States have under international law. However, paragraph 1 of guideline 11, which advises States to "abide with their obligations under international law relating to the protection of the atmosphere ... in good faith", only repeats what is already universally accepted for all international legal obligations.

Similarly, paragraph 2 of this guideline is referring, in a descriptive manner, to facilitative and enforcement procedures available under relevant agreements. Stating the obvious fact - namely that these procedures may be used in accordance with these agreements.

Concerning draft guideline 12, we doubt whether it is appropriate to include in the draft guidelines of this kind a guideline on dispute settlement. We understand, that the primary focus here is on the use of technical or scientific experts in certain situations. They have a role to play in settlement of legal disputes depending on the content of such dispute. If the dispute concerns questions such as the validity of a treaty, effects of a reservation etc., there is no need for such experts.

*Due to the nature of the subject matter before us we are of the view that the need for experts' involvement should be recognized and highlighted in all stages of policy and decision making, as well as in the process of preparation of international legal instruments aimed at protection of atmosphere, not only in connection with dispute settlement.*

*The completion of the first reading on this topic provides us with an opportunity to make an evaluation of the results achieved so far and give a direction to Commission's future work, so that the final outcome could serve States in their joint efforts aimed at combatting atmospheric degradation and preserving Earth's environment for future generations. Whether we are able to do so is a challenge both for the Commission and this Committee.*

Mr. Chairman,

I will now turn to the topic **„Provisional application of treaties"**. The Czech Republic welcomes the adoption, on first reading, of draft Guide to Provisional Application of Treaties and appreciates the contribution of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, to this outcome. His five reports, as well as three Memoranda prepared by the Secretariat, were instrumental for the work on this topic.

*We intend to submit our written comments on the entire draft Guide in due course.*

In our today's remarks we will focus on those draft guidelines, which have been adopted or substantively amended by the Commission at its 70th session.

Concerning draft guideline 7 on formulation of reservations, we are not convinced of the need for its inclusion. We worry that it may cause confusion as far as the integrity of the legal regime of reservations is concerned. As it was rightly underlined in connection with the elaboration of the Guide to Practice on Reservations, the regime of reservations is a single and uniform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation is formulated, and – in our view – also irrespective of whether such provision will or will not be provisionally applied. This fact is, in our view, blurred by inclusion of words *"mutatis mutandis"* in paragraph 1 of the draft guideline 7. These words imply that relevant provisions of the 1969 Convention are not directly applicable to reservations to treaty provisions, which may be provisionally applied. We cannot agree with such assumption.

A reservation may be formulated before the action triggering provisional application is taken. Accordingly, the standard provisions concerning reservations apply directly, not *"mutatis mutandis"*, to such reservation. Both paragraph 1 and 2 put inappropriate accent on the moment of the formulation of the reservation. However, the real issue here seems to be that of the time span of the reservation, namely limitation of reservation's duration to the duration of the provisional application of the treaty. In other words, it is about the exclusion of some treaty provisions from provisional application, or modification of their content during their provisional application. By focusing on the moment of formulation of reservation to a provision to be provisionally applied draft guideline 7 does not seem to properly capture this issue.

*We noted the debate, which took place in the Drafting Committee on this matter. In fact, the arguments that the Drafting Committee viewed as potentially favoring inclusion of a provision on reservations rather strengthened our misgivings concerning draft guideline 7 as currently drafted. We appreciate that the Drafting Committee acknowledged that it moved towards adoption of draft guideline 7 with considerable degree of hesitation. We will further reflect on this matter and revert to it in our written comments.*

As regards draft guideline 9, we welcome the adoption of its new paragraph 1 by the Commission. The inclusion of this paragraph responds to requests by several delegations, including Czech delegation, made last year. We agree with its content, as well as with its prominent place, in view of the fact that it addresses the most common scenario of termination of the provisional application.

*We have some hesitation concerning current drafting of paragraph 3 addressing the issue of termination and suspension of provisional application as such. In principle we are in favor of a provision addressing these issues. However, as far as the phrase "other relevant rules of international law concerning the termination and suspension" is concerned, we want to stress that in our view the rules on suspension or termination of a treaty, as a whole or in part, can be found solely in the law of treaties and not in other branches of international law (as the existing formulation would allow to argue). We believe that, if the provisional application of a treaty or its part produces the same legal effect as if that treaty were in force (see draft guideline 6), the rules governing the termination and suspension of such provisional application cannot be different from the rules governing the termination and suspension of the treaty which is in force. This should be crystal clear from the draft guideline itself and also unambiguously explained in the commentary.*

Mr. Chairman,

With regard to the topic „**Peremptory norms of general international law (jus cogens)**", the Czech delegation wishes to commend Special Rapporteur, Mr. Dire Tladi, for his extensive third report on this topic. Since the Drafting Committee managed to discuss only a few proposed conclusions and the draft conclusions have yet to be sent to the Commission in plenary session, we will limit our intervention only to several more general remarks. We will provide detailed comments on the draft as a whole upon its completion on first reading.

However, we note that the Special Rapporteur's approach to the topic is primarily based on references to doctrine rather than international practice. In this regard, the Czech Republic would appreciate a deeper analysis of international and national case law and state practice relevant to this topic, in particular as far as the methodology used for the identification of peremptory norms is concerned.

Ius cogens is a dynamically developing concept. Accordingly, the focus should not be on which norms have already acquired peremptory character but rather on how – namely, through which processes – peremptory character of a specific rule of international law could be ascertain.

Lastly, we would like to point to the fact that some of the draft conclusions presented by the Special Rapporteur overlap with issues discussed by the Commission – at present or in the past – under other topics. In this regard, it is necessary that the Commission ensure coherent approach and consistency in its work on all related topics.