



Report of the International Law Commission

Agenda item 82

“Report of the International Law Commission on the work of its seventy-second session, Cluster 1”

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Chair,

The Kingdom of the Netherlands would like to express its continuing appreciation for the work of the International Law Commission and its contribution to the codification as well as the progressive development of international law. The Netherlands wishes to thank all the members of the Commission for their contribution to the work of the Commission this year, all the more given the challenges caused by the pandemic. The Netherlands also congratulates the Commission and its Chair for the report to the Sixth Committee this year, which provides an excellent basis for the deliberations of this Committee.

My Government attaches great importance to the work of the Commission and takes seriously its duty to contribute to this work, by providing its comments and observations, its State practice, and its views as requested. With a view to enhancing the impact of the work of the Commission on international law, my Government would like to make the following suggestions regarding the methods of work of the Commission.

In order to enable all UN Member States to provide their comments and observations, and examples of their State practice and *opinio juris*, the Commission might consider limiting the number of topics on its programme of work. This would allow the UN Member States to consider those topics on the list more in depth. Second, to ensure meaningful input from the UN Member States, the Commission may wish to attach greater significance to the reservations of Member States on the desirability of taking up certain topics, even if such reservations have only been voiced by a few States. My Government would also welcome more transparency with respect to the treatment by the Commission of comments and observations of governments in general. In particular, my Government would recommend that the Commission, when rejecting certain comments and observations, explain more clearly its reasons for such rejection.

Finally, [mister/madam] Chair, my Government notes that it would be helpful for the Commission to identify relevant State practice and *opinio juris* more rigorously. Should States not provide the Commission with sufficient examples of State practice and *opinio juris*, or should such simply not exist, the Commission should be more reluctant to conclude that a particular rule has obtained the status of customary international law. When there is insufficient evidence for the existence of State practice and *opinio juris*, the Commission may, and indeed should, still develop international law, in the exercise of the progressive development. However, it should then state more explicitly that the proposed rules are an exercise in progressive development. Doing so will contribute to the transparency of the work of the Commission, which is something my Government would value greatly.

Chapters I, II, III, IV – Protection of the Atmosphere

Chair,

With respect to the topic of **the Protection of the atmosphere**, the Netherlands would like to express its appreciation for the work of the ILC and, in particular its Special Rapporteur, on the protection of the atmosphere. The draft guidelines incorporate key principles of international environmental law, including customary international law, and provide useful guidance to the international community for addressing critical issues related to the transboundary and global protection of the atmosphere. We note with appreciation that the focus of these draft guidelines is on the protection of a natural resource, in this case the atmosphere, rather than on one or more types of pollution. This is an innovative approach which is, in our view, not less than a paradigm shift to preserve our global environment.

The Netherlands also welcomes in this respect the adjustment of the 3rd preambular paragraph of the guidelines, indicating that atmospheric pollution and atmospheric degradation are *a common concern*

of humankind. We share the view of the Commission that this concern can only be adequately addressed through cooperation of the international community as a whole.

The Netherlands supports the recommendation of the Commission to consider the adoption, by the General Assembly, of a resolution of the draft guidelines and to ensure their widest possible dissemination. The Netherlands recommends therefore to include the topic on the agenda of the Sixth Committee of next year.

Lastly, I must draw your attention to the reference in the ILC's report to the comments and observations received from Governments and international organizations (A/CN.4/735). The comments of the Netherlands, transmitted through a diplomatic note of 9th December 2019, are not correctly referred to in the report. Through our diplomatic note, we invited the Secretary-General to take note of an advice of the (*independent*) Dutch Advisory Committee on Issues of Public International Law and understand that it has been brought to the attention of the ILC. The advice is now cited in the document on Comments and observations from Governments and international organizations. However, the reference fails to make clear that it concerns an advice of the Dutch Advisory Committee on Issues of Public International Law to the Government of the Netherlands. It does not, as such, reflect the position of the Government of the Netherlands.

Chapter V – Provisional Application of Treaties

Chair,

Nine years ago, at its sixty-fourth session (2012) the Commission commenced its work on the topic of "Provisional application of treaties". This year the Commission concluded its work on this topic and adopted the Guide to Provisional Application of Treaties, consisting of draft guidelines and a draft annex, and the commentaries thereto. We extend our sincere appreciation to the Special Rapporteur for his efforts.

My Government expects that the Guide to Provisional Application of Treaties, including the commentaries, will be a useful tool for states and international organizations. It will contribute to the development and understanding of relevant practice in accordance with Article 25 of the Vienna Convention on the Law of Treaties.

We note and appreciate that our comments on this topic as submitted throughout the years have been taken into account. We would like to point in particular to our comment not to blur conceptual distinction between the rules applicable to treaties that have entered into force and those that are applied on a provisional basis, the need to uphold the flexible nature of the instrument and, finally, recognition of the potential consequences of termination of provisional application.

Chapter X - Other decisions

As regards Chapter X of the report, the Netherlands has taken note of the proposal to put the topic "subsidiary means for the determination of rules of international law" on the long-term programme of work. While the Netherlands understand the thought to pursue further work on the sources of international law mentioned in the ICJ's Statute, the Netherlands would rather see that the ILC focus on issues that are more pertinent for international practice, such as the use of non-binding instruments in the identification and application of international law.

With respect to the ILC programme of work, the Netherlands would like to invite the ILC to consider moving the topic "the settlement of international disputes to which international organizations are parties" from the long-term to the short-term programme of work. International organizations as well as host States of international organizations are increasingly confronted with legal actions brought against them by natural and legal persons. Such disputes with a private law character are fraught with legal complexities impeding the sound administration of justice. The Netherlands would

therefore support priority to be given to this topic and would welcome a further study by the ILC into this topic.

Thank you