

Saltsjöbaden VI

Protection of the Atmosphere: The Work of the UN International Law Commission (ILC)

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It is recalled with deep appreciation that the Saltsjöbaden V, held at Gothenburg, Sweden, in June 2013,¹ stated in its report that CLRTAP should invite the International Law Commission “to continue exploring the scope for a ‘Law of the Atmosphere’, which would facilitate integrated action on climate change and tropospheric air pollution”.² It is with such strong encouragement and support from the international community that the ILC has been able to proceed with the work on the work of the “Protection of the Atmosphere”.³

The ILC has so far provisionally adopted nine draft guidelines and preambular paragraphs (see the Annex). The guidelines include: Use of terms (Guideline 1); Scope of the guidelines (Guideline 2); Obligation to protect the atmosphere (Guideline 3); Environmental impact assessment (Guideline 4); Sustainable utilization of the atmosphere (Guideline 5); Equitable and reasonable utilization of the atmosphere (Guideline 6); Intentional large-scale modification of the atmosphere (Guideline 7); International cooperation (Guideline 8); Interrelationship among relevant rules (Guideline 9). Draft guidelines to be proposed by the Special Rapporteur in his Fifth Report in 2018 will include draft guidelines on Implementation, Compliance and Dispute Settlement, and this will complete the first

¹ This workshop was organized by the Swedish Environmental Protection Agency and the Swedish Environmental Research Institute in close cooperation with the Convention on Long-range Transboundary Air Pollution and the UN European Economic Commission.

² Peringe Grennfelt, Anna Engleryd, John Munthe & Ulrika Håård, eds., “Saltjöbaden V –Taking international air pollution policies into the future”, Gothenburg 24-26 June 2013, (Copenhagen, Nordic Council of Ministers, 2013), p. 14. At its 32nd session held on 9-13 December 2013, the Executive Body for the CLRTAP “took note” of the recommendation of the Saltjöbaden V workshop (ECE/EB.AIR/121, Agenda 14). The 16th session of the IUAPPA held in Cape Town, South Africa, on 29 September-4 October 2013 made a similar recommendation to the ILC, Cape Town Declaration, Global Atmospheric Governance, para. 4. <http://www.iuappa.com/newsletters/CapeTownDeclaration.pdf>. See, Shinya Murase, “First report on the protection of the atmosphere” (A/CN.4/667), para. 28, and footnote 47.

³ The ILC adopted topic on the protection of the atmosphere in August 2013 and appointed Shinya Murase as Special Rapporteur, who has so far submitted four reports (First Report, A/CN.4/667, 2014; Second Report, A/CN.4/681, 2015; Third Report, A/CN.4/692, 2016; Fourth Report, A/CN.4/705, 2017). The Fifth Report (which is the final substantive report) will be issued in April 2018.

reading of the topic in 2018. We wait for the comments from governments in 2019, and it is expected the second reading and the whole work on the topic will be concluded in 2020.

It should be noted that in the course of the work on this topic, the ILC recognized the importance of having scientific knowledge on the atmosphere in the process of codification and progressive development of international law, and held three Dialogue sessions with atmospheric scientists between 2015 and 2017. The scientific experts who spoke at these sessions included: Professor Peringe Grennfelt (Chair of the Working Group on Effects, CLRTAP, UNECE), Professor Øystein Hov (President of the Commission of Atmospheric Sciences, WMO) and Dr. Jacqueline McGlade (Chief Scientist of UNEP). The members of the ILC found these Dialogue session extremely useful.⁴

It is hoped that the Saltsjöbaden VI to be held in March 2018 will give a strong endorsement to the ILC work on the topic, Protection of the Atmosphere and that States will actively make concerted efforts for future international lawmaking for a comprehensive and integrated framework for the protection of the atmosphere from transboundary atmospheric pollution and global atmospheric degradation.

⁴ Shinya Murase, “Scientific knowledge and the progressive development of international law; with Reference to the ILC topic on the protection of the atmosphere” in Said Mahmoudi (ed.), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Leiden: Brill/ Nijhoff, 2017, pp. 41-52).

Annex

Protection of the Atmosphere

Draft guidelines and preamble on the Protection of the atmosphere so far provisionally adopted by the International Law Commission (and Draft guidelines to be proposed in 2018)

Preamble

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Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

Aware of the special situation and needs of developing countries,

Also aware, in particular, of the special situation of low-lying coastal areas and small-island developing States due to sea-level rise,

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to “fill” gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

[Some other paragraphs may be added and the order of paragraphs may be coordinated at a later stage.]

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Guideline 1: Use of terms

For the purposes of the present draft guidelines,

- (a) “Atmosphere” means the envelope of gases surrounding the Earth;
- (b) “Atmospheric pollution” means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth’s natural environment;
- (c) “Atmospheric degradation” means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth’s natural environment.

Guideline 2: Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.
3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject

of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

[The alternative formulations in brackets will be subject to further consideration.]

Guideline 3: Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

Guideline 4: Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5: Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.
2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6: Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7: Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8: International cooperation

- 1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.
- 2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9: Interrelationship among relevant rules

- 1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied 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 should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31(3)(c), and the principles and rules of customary international law.
- 2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.
- 3. When applying paragraphs 1 and 2 above, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying areas and small-island developing States affected by sea-level rise.

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Draft guidelines proposed by the Special Rapporteur in his Fifth Report in 2018

Draft Guideline 10: Implementation

1. States are required to implement in their domestic law the obligations affirmed by the present draft guidelines relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation. Domestic implementation takes the forms of legislative, administrative and judicial actions.
2. Failure to implement the obligations amounting to breach thereof entails the responsibility of States under international law, if the actions or omissions are attributable to the States and the damage or risk is proven by clear and convincing evidence.
3. States should also implement in good faith the recommendations contained in the present draft guidelines.
4. The extraterritorial application of domestic law by a State is permissible when there is a well-founded grounding in international law. It should be exercised with care, taking into account comity among the States concerned. The extraterritorial enforcement of domestic law by a State should not be exercised in any circumstance.

Draft Guideline 11: Compliance

1. States are required to effectively comply with the international law relating to the protection of atmosphere in accordance with the rules and procedures of the relevant multilateral environmental agreements.
2. For non-compliance, facilitative and/or enforcement approaches may be adopted, as appropriate.
3. Facilitative measures include providing assistance to non-complying States in a transparent, non-adversarial and non-punitive manner to ensure those States to comply with their international obligations by taking into account their capabilities and special conditions.
4. Enforcement approaches include issuing caution of non-compliance, termination of rights and privileges under the relevant multilateral environmental agreements as well as other forms of sanctions. These measures should be adopted only for the purpose of leading non-compliant States to return to compliance with prescribed obligations.

Draft guideline 12: Dispute Settlement

1. Disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means as established in Article 33, paragraph 1 of the Charter of the United Nations, i.e., through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, or resorting to regional agencies or arrangements.
2. Given that such disputes may be of fact-intensive and science-dependent character, due considerations should be given to the rules and procedures concerning, *inter alia*, the use of experts in order to ensure proper assessment of scientific evidence, if such disputes are to be settled by arbitration or judicial procedures. Such experts may be appointed by the parties who are to be cross-examined by the other party, or by the court or tribunal itself to which the dispute is submitted.
3. It may be taken into consideration, as appropriate, in the settlement of disputes relating to the protection of the atmosphere, that the principle of *jura novit curia* (the court knows the law) applies not only to law but also to facts, thereby requiring necessary assessment of scientific evidence, on the condition of not exceeding the scope of the dispute under the rule of *non ultra petita* (not beyond the request).