UNITED STATES MISSION TO THE UNITED NATIONS
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The United States Mission to the United Nations presents its compliments to the United Nations and has the honor to refer to Resolution 69/118 of 10 December 2014, in which the General Assembly drew the attention of states to the importance of having their views on a number of topics on the agenda of the International Law Commission, in particular those in Chapter III of its report, among which is protection of the atmosphere. The ILC specifically requested states to provide relevant information "on domestic legislation and the judicial decisions of the domestic courts." The United States hereby presents its response to the Commission and requests the Secretariat's assistance in transmitting this response to the International Law Commission.

The United States Mission avails itself of this opportunity to renew to the United Nations the assurances of its highest consideration.

Enclosure: As stated.

United States' Response to the International Law Commission's Request for Information on Domestic Legislation and Judicial Decisions Regarding Protection of the Atmosphere

The United States is pleased to respond to the International Law Commission's request to provide relevant information regarding domestic legislation and judicial decisions of domestic courts on protection of the atmosphere. This response provides examples of U.S. legislation and judicial decisions that relate to this topic. The United States has sought to provide examples that fall within the scope of the International Law Commission's work on this topic.[1] The examples below do not constitute an exhaustive list of relevant U.S. legislation or judicial decisions. Further, in most instances such U.S. legislation is not adopted and such judicial decisions are not issued based on a belief that they are required by U.S. obligations under international law. Rather, such U.S. legislation is typically the product of political choices made within the United States as to how best to address environmental problems affecting the United States and such judicial decisions are in implementation of that legislation. In some instances, however, U.S. treaty obligations may be one of the reasons why U.S. legislation on a specific issue (such as ozone depletion) is adopted and U.S. courts may be guided by aspects of that treaty regime when deciding a case arising under such legislation.

I. EXAMPLES OF DOMESTIC LEGISLATION

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 168. The Commission included the topic in its programme on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding."

Since potential harms relating to the atmosphere arise in a broad range of very different contexts, the U.S. has a variety of laws and regulations, at the federal, state, and local levels that address in different ways a multitude of issues relating to air pollution and other potential harm to the atmosphere. Such laws and regulations can take very different forms: e.g. emissions standards; cap-and-trade regimes; loan guarantees to promote new technologies; tax regimes; and other regulatory mechanisms.

At the federal level, the U.S. has sophisticated and detailed statutory and regulatory regimes in a variety of areas of atmospheric protection. As the following examples demonstrate, these regimes are designed to address their unique problems in unique ways, and are not subject to general rules that span or seek to harmonize them. The U.S. experience has been that a "one size fits all" approach to this topic is not effective, efficient, or practical.

A. FEDERAL LEGISLATION

1. **Clean Air Act (CAA), 42 U.S.C. § 7401–7626.** The CAA limits the emission of pollutants into the atmosphere from stationary and mobile sources in order to protect human health and the environment from the effects of airborne pollution. The CAA includes, *inter alia*, provisions that address acid rain, emissions that deplete the ozone layer, and toxic pollutants such as the accumulation of heavy metals. The U.S. Environmental Protection Agency (EPA) has adopted extensive regulations implementing this Act. See 40 CFR Subchapter C.

2. **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund"), 42 U.S.C. § 9601-9675, and § 311 of the Clean Water Act (CWA), 33 U.S.C. 1321**. CERCLA and CWA section 311 authorize the Federal government to clean up environmental contamination wherever it is found, usually in or on earth or water. This legislation has an impact on curbing air pollution because much oil and chemical contamination will evaporate into the air if not cleaned up. The National Contingency Plan, 40 CFR Part 300, governs cleanups under CERCLA and CWA section 311.

3. **Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 3004(n).** This legislation directs EPA to promulgate standards for organic air emissions from hazardous waste management at RCRA treatment, storage, and disposal facilities. EPA regulates leaks from process vents, such as open-ended pipes or stacks, and equipment used to treat hazardous waste, including valves, pumps, compressors, flanges, and pressure relief devices. [40 C.F.R sections 264 and 265 subparts AA and BB.] EPA also regulates leaks from hazardous waste tanks, containers, and surface impoundments. [40 C.F.R sections 264 and 265 subpart CC.] The subpart CC regulations also apply to tanks and containers used to accumulate hazardous waste at facilities that are "large quantity generators" of hazardous waste. These RCRA regulations generally require use of equipment that actively controls air emissions, and include specific operation, design, inspection, repair, and reporting requirements.

4. **The Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1901 – 1915:** This Act implements a number of treaty requirements, including Annex VI of the MARPOL Convention relating to air emissions from ships.

5. **Uranium Mill Tailings Radiation Control Act (UMTRCA), 42 USC § 2022 et seq.** UMTRCA amended the Atomic Energy Act by directing EPA to set generally applicable health and environmental standards to govern the stabilization, restoration, disposal, and control of effluents and emissions at both active and inactive mill tailings sites. Title I of the Act covers inactive uranium mill tailing sites, depository sites, and vicinity properties. It directs EPA, the Department of Energy, and the Nuclear Regulatory Commission to undertake standards of protection and compliance.

6. **Nuclear Waste Policy Act (NWPA), 42 USC § 10101 et seq.** The NWPA supports the use of deep geologic repositories for the safe storage and/or disposal of radioactive waste in order to protect air, land, and water from contamination. The Act establishes procedures to evaluate and select sites for geologic repositories and for the interaction of state and federal governments. It also provides a timetable of key milestones the federal agencies must meet in carrying out the program.

7. **Energy Policy Act (EnPA), 42 USC 13201 et seq. (2005).** The Act addresses energy production in the United States, including: (1) energy efficiency; (2) renewable energy; (3) oil and gas; (4) coal; (5) Tribal energy; (6) nuclear matters and security; (7) vehicles and motor fuels, including ethanol; (8) hydrogen; (9) electricity; (10) energy tax incentives; (11) hydropower and geothermal energy; and (12) climate change technology. For example, the Act provides loan guarantees for entities that develop or use innovative technologies that avoid the by-production of greenhouse gases. Another provision of the Act increases the amount of biofuel that must be mixed with gasoline sold in the United States.

8. **Public Health Service Act (PHSA), 42 USC 201 et seq.** This act, which consolidates laws related to the public health service, *inter alia* provides EPA the authority to monitor environmental radiation levels and provide technical assistance to states and other federal agencies in planning for and responding to radiological emergencies.

B. STATE LEGISLATION

Environmental law in the United States does not fall exclusively within the federal domain. Rather, various aspects of environmental law are regulated at the state level in recognition that different problems arising in different locations may require different types of legal measures that are tailored to the particular context in which they are applied. As such, all U.S. states have laws and regulations addressing air pollution. The cooperative federalism approach adopted by the federal Clean Air Act sets out distinct roles and obligations for the federal government and for state and local governments. State laws enacted to satisfy federal Clean Air Act obligations generally must be approved by EPA. See, e.g., 40 CFR Part 52 (approved state implementation plans designed to attain national ambient air quality standards). In certain circumstances, states are allowed to enact legal requirements that are more stringent than the federal requirements. 42 U.S.C. §7416.

The following are examples of state statutes that address air pollution and other relevant topic areas.

1. **New Jersey: Air Pollution Control Act (1954), N.J. Stat. Ann. § 26:2C-1 (West):** This act regulates motor vehicles exhaust emission standards and test methods.

2. **Rhode Island: R.I. Admin. Code 25-4-10:10.2:** This act establishes Emission Reduction Plans in case of air pollution alert, warning or emergency.

3. **Colorado: "Colorado Air Pollution Prevention and Control Act," Colo. Rev. Stat. Ann. § 25-7-101-25-7-139 (West):** This Act contains a list of substances that are declared to be hazardous air pollutants and are subject to regulation under this act.

4. **California: Protect California Air Act of 2003, Cal. Health & Safety Code § 42500-42507 (West):** This Act focuses on implementing the requirement that all new and modified sources, unless specifically exempted, must apply control technology and offset emissions increases as a condition of receiving a permit. It establishes non-vehicular emissions regulations.

5. **Florida: Florida Radiation Protection Act, FL ST T. XXIX, Ch. 404:** This Act relates to low-level radioactive waste management.

6. **Illinois: Illinois Radon Awareness Act, 420 Ill. Comp. Stat. Ann. 46/1-46/99**: This Act regulates radon testing and disclosure.

II. DOMESTIC JUDICIAL DECISIONS

U.S. federal and state court decisions relating to the atmosphere generally address the specific provisions of the particular statute or regulation that have been challenged. There have been thousands of court cases that address air pollution and related atmospheric harm in some manner. In relation to air pollution, the two most significant types of cases are: (1) cases interpreting the Clean Air Act and determining whether an EPA rule is consistent with the Act; and (2) enforcement cases brought against polluters for violating the Act. The following are examples of some recent, notable federal court decisions relating to air pollution.

CTS Corporation v. Waldburger, 134 S. Ct. 2175 (2014): This decision affects the ability of litigants to recover personal injury or property damages resulting from the release of a hazardous substance, pollutant or contaminant subject to the provisions of CERCLA. CERCLA Section 9658 preempts the application of state statutes of limitations to state tort claims in certain circumstances. The Court held that Section 9658 does not preempt state "statutes of repose," which automatically terminate a cause of action after a specified number of years regardless of when the harm is first discovered, because the statutory language does not refer to "statutes of repose." Noting that Congress could have preempted statutes of repose, but failed to do so, the Court observed that the states are independent sovereigns in the federal system and, accordingly, their powers are not preempted absent clear and manifest Congressional purpose.

Sierra Club v. U.S. E.P.A., 762 F.3d 971 (9th Cir. 2014): Environmental organizations filed petition pursuant to the Clean Air Act (CAA) for review of an EPA order granting a permit for new natural gas-fired power plant to be built and operated under old air quality standards. The Court held, *inter alia*, that the CAA unambiguously required that the project comply with regulations in effect at the time the permit was issued.

Alaska v. Kerry, 972 F. Supp. 2d 1111 (D. Alaska 2013): The U.S. District Court for the District of Alaska dismissed the case brought by the state of Alaska and joined by the Resource Development Council ("RDC") challenging the procedure by which an emissions control area ("ECA") off the coast of Alaska was established pursuant to the International Convention for the Prevention of Pollution from Ships ("MARPOL"), including Annex VI, and domestic implementing legislation (the Act to Prevent Pollution from Ships, "APPS," 33 U.S.C. §§ 1901 to 1915). The court considered the applicability of the political question doctrine to the first cause of action in the complaint, which alleged violations of the APPS and the Administrative Procedure Act ("APA") in the establishment of the ECA. The court agreed with the United States that the first cause of action raises a nonjusticiable political question and was therefore not subject to judicial review. The court also rejected claims under the Treaty Clause of the U.S. Constitution

and the separation of powers doctrine, specifically, claims that the executive branch did not have the domestic authority to implement the amendment to MARPOL.