

## **Comments of the Czech Republic on the International Law Commission's draft guidelines on the topic „Protection of the atmosphere“**

With reference to paragraph 76 of the Report on the work of the seventieth session of the International Law Commission (doc. A/73/10), the Czech Republic welcomes the opportunity to present written comments on the set of draft guidelines, together with commentaries thereto, on the „Protection of the atmosphere“, adopted by the International Law Commission on first reading (2018).

The Czech Republic appreciates outstanding contribution of the Special Rapporteur, Mr. Shinya Murase, to the preparation of the draft guidelines on the protection of the atmosphere and his tireless efforts which enabled the Commission to complete the first reading of the draft guidelines.

During the debates of the Sixth Committee of the General Assembly, we provided comments on individual draft guidelines in the course of annual consideration of the topic. With the benefit of the full picture of the draft guidelines adopted on first reading and willing to contribute to an outcome which could serve practical needs of States in their joint efforts aimed at combatting atmospheric degradation and preserving Earth's environment for future generations, we wish to make the following observations:

In view of the understanding reflected in 2013 decision concerning the overall approach to the topic, we concur with Commission's conclusion that the outcome of the work should be a set of guidelines.

Despite being classified as “guidelines”, several draft provisions are missing the element of “guidance”. Some consist of a simple statement of a factual situation or a restatement of a well-established principle of international law; other draft guidelines do contain interesting elements, some of which could be further developed. In order to provide a valuable tool to the States, in view of the Czech Republic, it is necessary that the Commission formulate more precisely the purpose of individual draft guidelines.

Should their goal be, for example, to provide guidance to the negotiators of future treaty instruments dealing with issues of the protection of the atmosphere, several existing draft guidelines, with some modifications, could indeed assist States in such processes. The Commentaries accompanying individual draft guidelines could be in particular helpful in the course of such negotiations, by informing negotiators and directing them towards specific instruments in which they would find examples of methods and formulations “tailoring” the general text of the guideline to the more specific (technical) content of the particular instrument. This would also enable the Commission to be more specific in the text of individual guidelines.

Those guidelines, which are supposed to provide the guidance to the States in the process of implementation of legal instruments to which they are Parties, should be clearly formulated “without prejudice” to legal obligations that States have under such instruments. Accordingly, their main function would be a complementary one.

Concerning some guidelines, we would like to observe the following:

Draft guideline 9 – Interrelationship among relevant rules. It is not clear, whether the reference to “rules of international law” in paragraph 1 is supposed to cover only rules of customary international law or also the obligations under treaties. Possible conflicts between treaty obligations relating to the protection of the atmosphere and other treaty obligations could hardly be resolved in a manner suggested in the first sentence of paragraph 1. The rules of the Vienna Convention on the Law of Treaties concerning the interpretation apply to treaties individually. They do not aim at reconciling, by means of interpretation, conflicting obligations deriving from various treaty instruments which may also be binding on different groups of treaty parties. If the legal instruments are substantively contradictory, the problem cannot be resolved by means of their “conciliatory” interpretation.

The problem is primarily a problem of harmonization, in phase of “treaty-making”, of the substantive obligations under various international legal instruments to which a State is a party. Such harmonization should, first of all, be preceded by identification of appropriate material and technical solutions for inter-connected problems, which may subsequently require the adoption of new legal obligations or modification of existing ones. Paragraph 2 addresses the problem of harmonization of legal instruments in a more realistic manner.

Draft guideline 10 – Implementation. The fact, that national implementation of an international obligation may take the form of legislative, administrative, judicial or other action, is a simple statement of a well-known fact. This guideline would be more practical, if formulated as a guideline for negotiation of future instruments – e.g., it could include an opening sentence advising that future instruments should also envisage provisions concerning appropriate means of national implementation.

Paragraph 2 aims at implementation of “recommendations” contained in the present draft guidelines. The effective implementation of some guidelines, such as draft guideline 5 on sustainable utilization or draft guideline 6 on equitable and reasonable utilization of the atmosphere requires a concerted action of the international community. The most effective way in which States “should endeavor to give effect” to these recommendations is through a collective effort based on multilateral treaty arrangements. This aspect should be included.

Draft guideline 11 – Compliance. Paragraph 1 of guideline 11, which recalls the duty of States to “abide with their obligations under international law relating to the protection of the atmosphere ... in good faith” does not add to what is already universally accepted for all international legal obligations. This provision would therefore better serve as a paragraph of the preamble. There is also no reason for mentioning explicitly “rules and procedures in the relevant instruments” as there are no different standards for compliance in *good faith* with international obligations depending on their content.

Paragraph 2 of this guideline concerns facilitative and enforcement procedures. It could be formulated as an encouragement to States to include this type of provisions in future agreements, while seeking, at the same time, their coherence with procedures already available under existing agreements to which they are parties. The element of periodic review and improvement of these procedures, keeping with scientific and technological progress, could also be included in such guideline.

Draft guideline 12 – Dispute settlement. The need for the involvement of scientists or technical experts should be recognized and underscored in all stages of policy and decision making, as well as in the process of elaboration of international legal instruments aimed at

protection of atmosphere, *i.e.* not only in connection with dispute settlement. Whether technical or scientific experts have a role to play in settlement of legal disputes depends on the content of the 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. In contrast, the involvement of experts in solution of emerging scientific and technical problems in the process of implementation of existing treaty instruments should be envisaged as an important means of dispute prevention. This aspect should be underscored either in this guideline or in the guideline concerning the compliance.