

Written comments of Portugal on the draft guidelines on the protection of the atmosphere as adopted on first reading by the International Law Commission at its 70th Session

1. Portugal underlines the scientific evidence showing that atmospheric degradation bears a profound and long-term negative impact on the sustainability of ecosystems, with prejudice to the full enjoyment of human rights and to the environment as a common good of Humankind.
2. The prevention, mitigation and reversal of such atmospheric degradation calls for the ability of human communities to change behaviours at the political, technological, economic and lifestyle levels. It is therefore of paramount importance that the legal analysis by the International Law Commission on the protection of the atmosphere addresses the problematic of the protection of the atmosphere from a “cause and effect” perspective.
3. The reference in the Preamble to atmosphere as being essential to life on Earth is welcome. Nevertheless, Portugal advocates that Preambular Paragraph 1 should be clearer about acknowledging the atmosphere as a finite and natural resource (as read in Commentary (2) to the draft guidelines). In this sense, we put forward the following proposal for the text of Preambular Paragraph 1 (underlined text in bold):

“Acknowledging that the atmosphere is a limited natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,”
4. In the Preambular Paragraph 4, Portugal argues that the protection of the atmosphere should be referred to as “a common concern of Humankind”, in line with international legally binding instruments such as the 1992 United Nations Framework Convention on Climate Change. Portugal advocates that, for a progressive development of international law in this subject, a normative statement is preferable over a simply factual one (“a pressing concern of the international community”). Consequently, Portugal proposes the following text for Preambular Paragraph 4 (stricken-down text and underlined text in bold):

“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 a common concern of Humankind,”

5. Portugal welcomes the clear statement on a State obligation to protect the atmosphere as read in Draft Guideline 3, having argued at the Sixth Committee in favour of such a statement. Portugal supports the doctrine recognising that a human right to environment is becoming a staple in International Human Rights Law. A human right to environment as encompassing a sustainable atmosphere must correspond to clear and enforceable State obligations of preventing, reducing and controlling atmospheric degradation.
6. As such, Portugal firmly supports the idea behind Draft Guidelines 3, 4, 5 and 6 of addressing the transboundary nature of the harm caused by atmospheric degradation. Recalling the work of the International Law Commission on the draft articles on the prevention of transboundary harm from hazardous activities, Portugal praises the coherence shown in the comments in paragraph 7 of the Commentary to Draft Guideline 3 and the acknowledgement of a customary international norm establishing a State obligation to prevent significant adverse effects derived from atmospheric pollution.
7. One of the greatest endeavours of the International Law Commission on this topic should be to clarify the interrelationship between rules of different areas of international law. Therefore, Portugal welcomes the emphasis on the need for interpreting international law in accordance with the relevant principles of international law concerning interpretation and application, as read in Draft Guideline 9.
8. Moreover, Portugal praises the very clear reference made in Paragraph 3 of Draft Guideline 9 – in line with the text in Preambular Paragraphs 5 and 6 – to persons and groups particularly vulnerable to atmospheric pollution.
9. Portuguese delegations to the Sixth Committee of the General Assembly of the United Nations have argued that the interrelationship between the rules of international law relating the atmosphere and human rights raises many problems like the interpretation of jurisdiction, the identification and the implementation.

10. It is the hope of Portugal that the finished work of the International Law Commission will provide guidance for solving some of those problems. Portugal believes the draft guidelines as they were adopted on first reading are on a good path to do so, by clarifying existing international norms and principles applicable to the protection of the atmosphere and thus encouraging States to consider adopting common norms, standards and recommended practices in connection with trade and investment law, law of the sea and human rights law.

11. Portugal wishes the International Law Commission and Special Rapporteur, Mr. Shinya Murase, a fruitful continuation of their work on this very important topic and will follow further developments carefully.