

Annex 1: United Nations Environment Programme comments on Draft Guidelines

Draft Guideline and paragraph	Text	Comments and suggestions
Draft Guideline 5, paragraph 2	Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere	UNEP suggests mentioning also "social development" in this paragraph, as it is one of the pillars of sustainable development
Draft Guideline 8, paragraph 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	UNEP suggests referring to scientific and technical knowledge and referring to causes, impacts and ways to prevent
General commentary, paragraph 2	the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained there	In our view, there is a need to identify the gaps that exist under the current treaty regimes. Once identified, there would be more clarity on what gaps the Draft Guidelines seek to fill.
Preamble, paragraph 2	Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere	The definitions section notes that "atmospheric pollution" requires a substance, but there is no mention of substances as a cause of "atmospheric degradation", particularly given the definition of "atmospheric degradation". Furthermore, we note that there is no further mention of "degrading substances" in the Draft Guidelines apart from this one preambular paragraph. As a result, in our view it is not clear whether there is a distinction between a "polluting substance" and a "degrading substance"
Preamble, paragraph 3	Noting the close interaction between the atmosphere and the oceans,	From our perspective, the third preambular paragraph is closely related to the eighth. We thus suggest to have them next to each other.
Preamble, paragraph 6	Aware also, in particular, of the special situation of low-lying coastal areas and	1. From our perspective, the Draft Guidelines should reflect the logical

	small island developing States due to sea-level rise,	<p>continuum that exists between pollution, degradation of the atmosphere, climate change, sea level rise and its effect on the low-lying coastal areas and small island developing States</p> <p>2. Given the focus on air quality rather than sea-level rise, we suggest to mention developing States that are inordinately affected by poor air quality. From our perspective, the link between "atmosphere degradation" and sea-level rise is not apparent in the language of the Draft Guidelines. Thus, in our view the purpose of singling-out States susceptible to sea-level rise is unclear.</p>
Preamble, paragraph 8	<i>Recalling</i> that the present 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,	If the Guidelines do not address what is already in treaty regimes, and they do not address what is not accounted for in treaty regimes (by filling gaps), from our perspective the scope of the Draft Guidelines is unclear.
Commentary to the Preamble, paragraph (2)	The atmosphere provides renewable "flow resources" essential for human, plant and animal survival on the planet, and it serves as a medium for transportation and communication. As a natural resource, the atmosphere was long considered to be non exhaustible and non-exclusive, since it was assumed that everyone could benefit from it without depriving others. That view is no longer held. ⁸⁰⁹ It must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity	In our view it is unclear whether we can argue that the atmosphere is an exhaustible natural resource. The only reference made in the Draft Guidelines is a 1996 WTO AB report. We are also unsure whether we can easily compare water with air/atmosphere.
Commentary to Draft Guideline 1, paragraph (11)	Since "atmospheric pollution" is defined narrowly in paragraph (b), it is necessary, for the purposes of the draft guidelines, to address issues other than atmospheric pollution by means of a different definition. For this purpose, paragraph (c) provides the definition of "atmospheric degradation". This definition is intended to	It is unclear to us to what extent can the definition apply to ozone depletion and climate change. This, considering that the definition of "atmospheric degradation" is meant to include "ozone depletion and climate change", but the preamble states that "the present draft

	include problems of ozone depletion and climate change.	guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion and transboundary air pollution...", and also not fill gaps in treaty regimes
Draft Guideline 2	<p>Scope of the guidelines</p> <p>1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.</p> <p>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.</p> <p>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</p>	Despite, the commentary provided by the Commission, the scope of the guidelines remains unclear. Moreover, we note that most of it is defined in the negative but remains unclear what is the gap that needs regulation
Commentary to Draft Guideline 2, paragraph (2)	The draft guidelines are concerned only with anthropogenic causes and not with those of natural origins such as volcanic eruptions and meteorite collisions. The focus on transboundary pollution and global atmospheric degradation caused by human activity reflects the current realities, which are supported by the science	It is our view that this paragraph elaborating on the distinction (anthropogenic vs natural origins) is more appropriate in the commentary section for Draft Guideline 1 (Use of terms) paras. (b) and (c)
Draft Guideline 3	<p>Guideline 3</p> <p>Obligation to protect the atmosphere</p> <p>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.</p>	It is unclear to us how the obligation imposed on States to undertake "due diligence in taking appropriate measures" ensures compliance
Commentary to Draft Guideline 3, paragraph (2)	Draft guideline 3 delimits the obligation to protect the atmosphere to preventing,	For consistency purposes with the rest of the text, we suggest

	reducing and controlling atmospheric pollution and atmospheric degradation, thus differentiating the kinds of obligations pertaining to each	changing the word "and" in bold by "or".
Commentary to Draft Guideline 4, paragraph (5)	By having a threshold of "likely to cause significant adverse impact", the draft guideline excludes an environmental impact assessment for an activity whose impact is likely to be minor. The impact of the potential harm must be "significant" for both "atmospheric pollution" and "atmospheric degradation". What constitutes "significant" requires a factual not a legal determination.	It is rightly mentioned that the determination of the "significance" criterion is based on consideration of the facts. But it is not clear to us what are the facts. We suggest specifying what is the threshold. Otherwise, in our view there are two factors (likelihood and significance) and the assessment is subjective. A situation may be significant as a fact for one person and not-so significant for another. We further note that this is why the Espoo Convention includes an Annex with activities which de facto are likely to have a significant environmental impact and thus require a transboundary environmental impact assessment procedure.
Commentary to Draft Guideline 4, paragraph (7)	it was considered that the parts dealing with procedural aspects of an environmental impact assessment should not be dealt with in the draft guideline itself	Even though the procedural aspects of an environmental impact assessment are tackled in other international instruments it is our view that the Draft Guidelines should still deal with them. We note that there are many issues tackled in these Draft Guidelines that are already dealt with in other instruments (for instance, international cooperation, indigenous rights) but they have been still considered in the Draft Guidelines. We consider procedural rights a key issue and we suggest including them in the Draft Guidelines.
Commentary to Draft Guideline 5, paragraph (1)	Some members expressed doubts whether the atmosphere could be treated analogously as transboundary watercourses or aquifers	We also express doubts whether the atmosphere could be treated analogously as transboundary watercourses or aquifers.
Commentary to Draft Guideline 5, paragraph (3)	The atmosphere has been utilized in several ways	We suggest providing examples of how the atmosphere has been utilized.

Draft Guideline 6	<p>Guideline 6</p> <p>Equitable and reasonable utilization of the atmosphere</p> <p>The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.</p>	<p>From our perspective the text of this Draft Guideline is vague, and we suggest to develop the commentary further to support the content of the Draft Guidelines.</p>
Commentary to Draft Guideline 6, paragraph (1)	<p>Although equitable and reasonable utilization of the atmosphere is an important element of sustainability, as reflected in draft guideline 5, it is considered important to state it as an autonomous principle. Like draft guideline 5, the present guideline is formulated at a broad level of abstraction and generality</p>	<p>In our view, this paragraph is missing an explanation on why it is important to state "equitable and reasonable utilization of the atmosphere" as an autonomous principle</p>
Commentary to Draft Guideline 6, paragraph (3)	<p>(...) the Commission elected to use the phrase "taking into account the interests of future" (...)</p>	<p>We note that this sentence should read "the Commission elected to use the phrase "taking into account the interests of present and future""</p>
Draft Guideline 12	<p>Guideline 12</p> <p>Dispute Settlement</p> <p>1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.</p> <p>2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.</p>	<p>We consider that referring to dispute settlement in the Draft Guidelines is not necessary as there are many other international venues to deal with disputes between States.</p>