Comments of the United States
on the International Law Commission's Draft Guidelines on Protection of the Atmosphere
as Adopted by the Commission on First Reading in 2018

December 15, 2019

Introduction

The United States appreciates the opportunity to provide written comments on the International Law Commission's Draft Guidelines on Protection of the Atmosphere ("draft guidelines"), and accompanying commentaries, which were adopted on first reading in 2018.[1] The United States recognizes the efforts of the Commission and its Special Rapporteur, Professor Shinya Murase, on this important topic.

General Observations

The United States has repeatedly expressed its concerns, through statements in the Sixth Committee, that the Commission's work on this topic would complicate rather than facilitate negotiations regarding environmental issues related to the atmosphere and thus could inhibit progress in this area. The draft guidelines that have been adopted on first reading essentially confirm this broad concern, but also raise specific issues with regard to their form and substance. In accordance with the comments below, it is the view of the United States that the Commission's time could more profitably be spent on other topics and the draft guidelines should not be adopted at second reading, but instead reconsidered in a working group to determine whether completion of this project is viable, in light of the comments received.

The draft guidelines are likely to give rise to confusion by virtue of the incongruence among their title, substance, and form. As we explained in general comments in the Sixth Committee regarding ILC work products, "[a]s the ILC has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles."[2] In general international practice, documents entitled "guidelines" are not understood as setting forth international legal obligations. Draft guidelines 3, 4, and 8, however, all assert categorically that "States have the obligation" to undertake certain actions. While the Commission's Guide to Practice on Reservations to Treaties[3] ("Guide to Practice on Reservations") provides some precedent for considering the scope of a State's obligations in the context of "guidelines," that

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[1] *See* Report of the International Law Commission on the Work of Its Seventieth Session, UN GAOR, 73rd Sess., Supp. No. 10, UN Doc. A/73/10, at 158-200 (Sept. 3, 2018).

[2] *See* Agenda Item 79: Report of the International Law Commission on the Work of its 71st Session, Cluster I, Comments of the United States, U.N. GAOR, 74th Session, 24th mtg. of the Sixth Committee, U.N. Doc. A/C.6/74.SR.24 (Oct. 29, 2019).

[3] Guide to Practice on Reservations to Treaties, Report of the International Law Commission on the Work of its Sixty-Third Session, U.N. Doc. A/66/10/Add.1 (2011).

topic necessarily concerned the ability to make reservations to binding treaty obligations. Moreover, the form of the Guide to Practice on Reservations was chosen to make it clear that the document was providing guidance as opposed to setting forth obligations. The draft guidelines, in contrast, are presented in a format that more closely resembles draft articles for a treaty or multilateral convention, with a preamble and apparent operative clauses that include provisions addressing "compliance" and "dispute settlement" that appear out of place in a non-binding set of guidelines.

Comments on Specific Provisions of the Draft Guidelines, accompanying commentary or both.

The actual content of the draft guidelines does nothing to clarify the confusion introduced by the choice of format. The core of the draft guidelines appears to be draft guideline 3, yet this draft guideline is confusing at best. This draft guideline states that the purported "obligation to protect the atmosphere" is to be fulfilled 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." The best reading of draft guideline 3 is that it constitutes a simple assertion that States should comply with existing "applicable rules of international law" concerning atmospheric pollution and atmospheric degradation, and thus adds nothing to existing law. Even so, however, draft guideline 3 introduces needless confusion.

According to draft guideline 3, other "applicable rules of international law" require States to "prevent, reduce or control atmospheric pollution and atmospheric degradation." It is unclear, though, whether the Commission believes that international law at present requires States to do all the elements indicated in this draft guideline, specifically to: (1) prevent atmospheric pollution; (2) prevent atmospheric degradation; (3) reduce atmospheric pollution; (4) reduce atmospheric degradation; (5) control atmospheric pollution; and/or (6) control atmospheric degradation. There are, therefore, at least six potentially independent legal obligations, that the Commission is asserting require distinct actions on the part of States. Yet there appears to be little basis for making that assertion. The commentary notes that the "prevent, reduce, or control" framework is borrowed from the Law of the Sea Convention (LOSC). The LOSC, however, is not addressing atmospheric pollution and degradation. Moreover, even in the context of protecting the marine environment, the LOSC includes specific provisions addressing what is meant by "prevent, reduce, or control" at Part XII Section 5. The absence of detailed provisions in the draft guidelines that would correspond to LOSC Part XII Section 5 in the context of atmospheric pollution and atmospheric degradation only contributes to the confusion introduced by draft guideline 3.

Draft guideline 8 similarly suffers from a lack of clarity concerning its legal underpinnings. In particular, draft guideline 8(1) provides that "States have an 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." Unlike draft guideline 3, however, draft guideline 8 (1) does not appear to incorporate existing applicable rules of international law to inform the purported obligation identified therein. In fact, none of the sources referenced in the corresponding commentary to this draft guideline establish the general obligation to cooperate set forth in draft guideline 8(1). Specifically, the

commentary notes two political declarations,[4] the preambles to two multilateral conventions,[5] and three sets of draft articles produced by the Commission,[6] none of which establish any legal obligation in respect of cooperation. The single example of a binding obligation to cooperate comes from the Convention on the Law of the Non-navigational Uses of International Watercourses, a treaty with only thirty-six parties addressing a wholly separate area of international law. The purported obligation in draft guideline 8(1) is therefore best understood as a recommendation that States cooperate and not as encompassing a legal obligation.

The essentially recommendatory or hortatory nature of draft guideline 8(1) is shared by draft guidelines 5, 6, and 7. Each of these draft guidelines contain assertions about what States "should be" doing with regard to distinct activities concerning the atmosphere. While the commentary to draft guidelines 5 and 7 acknowledge that their formulations are "simple and not overly legalistic" and "hortatory" respectively, it bears observing that these draft guidelines are policy prescriptions based on value judgments. Inclusion of such policy preferences in Commission products is inconsistent with the Commission's Statute, Article 1(1), which unambiguously states that the Commission "shall have for its object the promotion of the progressive development of international law and its codification." Policy prescriptions for diplomatic cooperation, however well-intentioned, are not part of the Commission's mandate and therefore should not be a part of the Commission's work.

The final four draft guidelines each address topics of general applicability within public international law that do not warrant special or specific consideration in the context of protection of the atmosphere. Specifically, draft guidelines 9, 10, 11, and 12 address "interrelationship among relevant rules," "implementation," "compliance," and "dispute settlement" respectively. Any one of these topics could be, and at least two have been, considered as topics by the Commission in their own right, but by addressing these general areas of law in the draft guidelines the Commission introduces needless confusion.

In particular, the United States sees no need for draft guideline 12(1)'s call to settle disputes relating to the protection of the atmosphere by peaceful means. Article 2(3) of the United Nations Charter, which is not mentioned in the commentary, requires that international disputes be settled by peaceful means, and this applies as well in the context of disputes relating to protection of the atmosphere. Nevertheless, the reference to peaceful settlement of disputes in draft guideline 12(1) gives the appearance that disputes concerning protection of the atmosphere

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[4] United Nations Conference on the Human Environment, Stockholm, June 5-16, 1972, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1, at 3-5 (June 16, 1972); United Nations Conference on the Human Environment, Rio de Janeiro, June 3-14, 1992, *Rio Declaration*, U.N. Doc. A/CONF.151/26/Rev.1(Vol. I), at 3-8 (June 14, 1992).

[5] Vienna Convention for the Protection of the Ozone Layer (with annexes and Final Act), Mar. 22, 1985, 1513 U.N.T.S. 324; United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

[6] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. Doc. A/56/10(Supp), at 370-377 (2001); Draft Articles on the Law of Transboundary Aquifers, Report of the International Law Commission on the Work of its Sixtieth Session, U.N. Doc. A/63/10(Supp), at 19-27 (2008); Draft Articles on the Protection of Persons in the Event of Disasters, Report of the International Law Commission on the Work of its Sixty-Eighth Session, U.N. Doc. A/73/10, at 13-17 (2016).

enjoy a special status as compared with other types of disputes; in so doing, it weakens the general rule set forth in Article 2(3) of the United Nations Charter.

Similarly, draft guideline 9 concerning "interrelationship among relevant rules," gives the appearance that issues concerning fragmentation of international law are to be treated in a special way in the context of protection of the atmosphere. The Commission released in 2006 a lengthy report by a Study Group addressing exactly this topic, including in particular the relationship between trade and environmental regimes referenced in draft guideline 9(1).[7] The report included extended considerations of international environmental law, but reached no definitive normative conclusion about the interaction between international environmental law and other international legal regimes. Notably, the Study Group's report cast doubt about the viability of harmonizing interpretation in precisely this context.[8] The report did not directly address protection of the atmosphere. However, despite the topic of fragmentation having been the subject of exhaustive study by the Commission's Study Group, draft guideline 9 purports to identify specific norms of harmonization and systemic integration that should apply in the context of protection of the atmosphere. The United States sees no basis for establishing specific norms in this context and cautions the Commission against establishing a practice whereby previous Commission products and efforts intended to address broad topics are undermined by new projects with a narrow focus.

Finally, draft guidelines 10 and 11 address "implementation" and "compliance" respectively. As a general matter the means by which a State chooses to "implement" domestically and/or States may agree to achieve "compliance" with international legal obligations is left for States to decide and are not prescribed in advance by general public international law. While such issues could be addressed in a treaty, the United States does not see the utility in addressing these topics in the abstract in non-binding draft guidelines.

Conclusion

The United States' concerns previously expressed about this project remain for all of the above reasons. It is the view of the United States that the Commission's time could more profitably be spent on other topics and the draft guidelines should not be adopted at second reading, but instead reconsidered in a working group to determine whether completion of this project is viable, in light of the comments received.

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[7] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

[8] *Id.* at para. 277.