

Comments of the Republic of Belarus on the text of the draft guidelines on the protection of the atmosphere, together with preamble, adopted by the International Law Commission on first reading

To ensure the uniform interpretation of the text of the draft guidelines on the protection of the atmosphere, it is proposed to specify, in the second preambular paragraph, what is being polluted. If it is the atmosphere, the possessive adjective “*ee*” should be inserted after the word “*vyzyvayushchikh*”. If it is other elements of the environment that are being polluted, the text should specify which ones are meant (water, air, the ecosystem).*

The link between the protection of the atmosphere, atmospheric pollution and atmospheric degradation and the special needs of developing countries is not clear. A high concentration of a given polluting substance will have the same effects on human beings and the ecosystem in any country. Accordingly, there appears to be no justification for retaining the fifth preambular paragraph.

The provisions on the need to take into account the interests of future generations should, however, be included in the preamble, given that the legal interpretation of the concept of mutual responsibility of generations is one of the main areas for the further progressive development of international law.

In interpreting the definition of the term “atmospheric pollution”, it is worth noting that the main sources of such pollution are natural and human-caused (transport, industry, everyday activities). The latter pollutants are transboundary in nature; in other words, substances emitted in the territory of one State are deposited both in its own territory and in the territory of neighbouring States and continents. Taking into account these specific aspects, we believe it is necessary to review the wording of the definition proposed in draft guideline 1 and to state that atmospheric pollution is, for example, “the introduction or release by humans, directly or indirectly, into the atmosphere of substances or energy resulting in harmful effects of such a nature as to endanger human life and health and harm living resources and the Earth’s natural environment, both in the territory of the State of origin and in territory under the jurisdiction of another State”.

* Translator’s note: in the English text, the phrase “polluting and degrading substances” would have to be replaced with “substances that pollute and degrade”, plus a direct object or objects (either the atmosphere or other elements of the environment (water, air, the ecosystem), depending on what is being polluted).

Today, there is controversy as to which substances are dual-impact substances; this controversy concerns black carbon in particular.¹ We therefore think it necessary, in draft guideline 2, paragraph 3, to list all the main dual-impact substances or not to refer to any of them, leaving the question to the discretion of States.

Environmental protection occupies an important place in the national policies of many countries, and States are taking appropriate measures in that area, not only at international but also - first and foremost - at national level. The rules of international law on preventing, reducing or controlling atmospheric pollution and atmospheric degradation must therefore be regarded as minimum standards and not as targets to which States must aspire. In draft guideline 3, it should perhaps be left up to States to apply their national laws in cases where they contain higher standards than those set by international law.

In addition, consideration should be given to the appropriateness of separating out the concepts of prevention and reduction, on the one hand, and control, on the other. These concepts seem to be different aspects of one and the same obligation, namely that of "due diligence".

It is proposed that draft guideline 4 should read as follows: "States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause a transboundary impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation, including in the territory of foreign States."

It is not possible to reconcile protection of the atmosphere with economic development or to find a balance between them. All countries are seeking to develop. Draft guideline 5, paragraph 2, should therefore read as follows: "Sustainable utilization of the atmosphere while increasing economic development includes the need to protect the atmosphere and reduce atmospheric pollution."

Regarding the commentary to draft guideline 9, the statement to the effect that any human activities governed by international law have a bearing on the atmosphere seems somewhat excessive. We are also not convinced that international atmospheric law has become a separate branch of international law, the presumption on which this draft guideline is based. Overall, the issues highlighted in the draft guideline appear to be sufficiently regulated by the applicable provisions of the Vienna Convention on the Law of Treaties of 1969 and the conclusions contained in the Commission's report on the fragmentation of international law. At the same time, the

¹ The current wording refers to black carbon, a substance that is claimed to have an impact on the climate. There have been attempts to include black carbon in lists of restricted or prohibited substances under international treaties, including the Convention on Long-range Transboundary Air Pollution. However, no one has a methodology for calculating/measuring/assessing it.

formulation of rules for interpreting international treaties goes somewhat beyond the scope of the draft guidelines. It would perhaps be more appropriate in this context to emphasize the mutually reinforcing effect of compliance with the rules of different branches of international law, a phenomenon identified by the Special Rapporteur. In the same vein, we believe that it would be preferable — in terms of interrelationships and mutual reinforcement — to consider the interrelationship between protection of the atmosphere and protection of fundamental human rights.

Regarding paragraphs 13 and 15 of the commentary to the draft guideline, extreme caution should be exercised in formulating conclusions as to the existence of rules and principles of customary international law in order not to raise false expectations among the persons and groups concerned.

At the same time, we support the provision requiring considerations relating to the protection of the atmosphere (and, presumably, other elements of the environment) to be taken into account when developing rules of international law.
