

Estonian written comments on the Draft Guidelines on the Protection of the Atmosphere (ILC)

In reply to the request of the Secretary-General of the United Nations and following the comments submitted in 2018, Estonia has the honour to submit in writing its comments and observations on the draft guidelines on the protection of the atmosphere as adopted by the International Law Commission (ILC).

Estonia would like to express its appreciation for the work done by the ILC and the Special Rapporteur Mr Shinya Murase and welcomes the draft guidelines as the first international synthesis document consolidating the main principles and concerns regarding the protection of the atmosphere at the global level. Besides the relevant multilateral agreements, which are listed in the commentaries to the guidelines, Estonia stresses the high value of the in-depth analysis of relevant international judicial and arbitral practice as well as exhaustive overview of the legal theory presented in the commentaries.

Regarding the second preambular paragraph, Estonia would propose to refer to the *role of the atmosphere in the transport and dispersion of polluting and degrading substances* rather than limiting the transport and dispersion to the atmosphere alone (excluding other media like water), as may be understood from the present wording.

Estonia notes that the preambular paragraphs of the guidelines follow certain logic - moving from more general considerations to more specific. Therefore, Estonia would like to propose the reference to interests of future generations of humankind as related to the quality of the atmosphere to appear before mentioning the recognition of the pressing concern of the international community as a whole. According to our understanding, the interest of future generations is the general aim, causing the pressing concern of the international community today and therefore the order of these two paragraphs should be rearranged.

Regarding the last preambular paragraph, Estonia would support, in addition to listing all the aspects that the guidelines are not to interfere with, the inclusion of a list of relevant international treaty regimes serving as an existing context for the guidelines. This could be done together with encouragement for the states to consider joining and implementing these existing multilateral environmental agreements.

Paragraph (b) of draft guideline 1 defines “atmospheric pollution”. It is not clear, however, why *energy* is excluded from the definition and is understood to be included *per se* in the term *substance* (as explained in paragraph 9 of the commentaries to guideline 1), despite the fact that the clear distinction between the two is made in two relevant international instruments referred to in paragraph 8 of the commentaries to guideline 1. Estonia does not see merit in such generalization and prefers to see the terminology to be coherent to the extent possible, in line with existing treaty practice, the principle also referred to in paragraph 7 of the commentaries to guideline 1. Energy, as heat, light, noise and radioactivity, does not associate with a substance in the common understanding of the word. Hence, the term *substance* would need additional, and to the extent artificial, explanation each time referred to, in order to avoid confusion or misinterpretation.

In the context of guideline 3, Estonia would propose to add a second paragraph to the guideline encouraging the states to consider joining, ratifying or acceding to the relevant international treaties referred to in the existing text of the guideline (*applicable rules of international law*). Such an encouragement in this context would be relevant as guideline 3 is seen as central of the draft guidelines (as per paragraph 1 of the commentaries to guideline 3) and international multilateral agreements are the only platform at the global level to tackle the challenges of the protection of the atmosphere.

Draft guideline 4 states the obligation to assess environmental impacts of proposed activities. Estonia would like to see the guideline make an *expressis verbis* reference also to the possible transboundary effects of such activities (in addition to the elaboration of transboundary harm in paragraph 1 of the commentaries to guideline 4). We find it of utmost importance to involve the neighbouring states and the public in the environmental impact assessment process with the purpose to ensure the widest possible discussion on the impacts of a planned activity.

Regarding paragraph 1 of draft guideline 5, Estonia is of the opinion that the wording should be coherent with that of the draft guideline 3 which declares that the “States *have the obligation* to protect the atmosphere...”. In Estonia’s view also the utilization of the atmosphere should be implicitly connected to the protection of the atmosphere. Thus, we propose that paragraph 1 of draft guideline 5 be worded in imperative (“*Given that the atmosphere is a natural resource with a limited assimilation capacity, it is the obligation of the states to ensure that its utilization is undertaken in a sustainable manner.*”). Estonia welcomes the notion of the need to reconcile economic development with protection of the atmosphere as an unavoidable path to be followed in the years to come.

Estonia sympathizes with paragraph 1 of the commentaries to draft guideline 6 regarding the importance of the need to utilize the atmosphere in an equitable and reasonable manner, taking into account the interests of present and future generations. However, in line with our comment regarding draft guideline 5, Estonia would prefer imperative also in the wording of this guideline (“*It is the obligation of the states to ensure that the atmosphere is utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.*”).

Concerning paragraph 2 of draft guideline 10, which notes that states should make an effort to give effect to the recommendations contained in the draft guidelines, Estonia would like to reiterate its comments presented in 2018 that we consider the cooperation of all states of utmost importance in this matter and support the idea that states could endeavour the recommendations, for example through political declarations.

We would also like to re-express our strong support for the inclusion of subparagraph 2 (a) to draft guideline 11, which concerns the compliance with international obligations and missing capabilities of some states. We welcome the assistance to the states in case of non-compliance and recognition of specific challenges the states could have. In the view of our common responsibility to protect the atmosphere and different capabilities of the states, assistance to the States concerned is therefore an essential tool to improve the compliance with international obligations.

Estonia supports the reaffirmation of the peaceful settlement of disputes as expressed in draft guideline 12.

Finally, Estonia welcomes that the importance of scientific knowledge has been emphasized throughout the commentaries of the draft guidelines and considered the key by the ILC when it comes to the protecting of the atmosphere (scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation in paragraph 13 of the commentaries to guideline 8; the need to use technical and scientific experts in paragraph 2 of the commentaries to guideline 12). Estonia would therefore request the ILC to consider adding an autonomous guideline stating *expressis verbis* the importance of underlying scientific knowledge for actions relating to the protection of the atmosphere.

Estonia once again thanks the International Law Commission for the valuable work done so far and we hope that these comments contribute to the second drafting of the guidelines on the protection of the atmosphere.