

Draft guidelines on the protection of the atmosphere

Comments by the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)

11 December 2019

The Nordic countries welcome the request for comments and observations on the draft guidelines on the protection of the atmosphere, adopted, on first reading, by the International Law Commission at its seventieth session, transmitted by the Secretary General of the United Nations to Member States and to the Permanent Observers of Non-Member States of the United Nations.

The Nordic countries welcome the work of the International Law Commission and the Special Rapporteur on the protection of the atmosphere and are, overall, supportive of the draft guidelines.

The Nordic countries commend the skill with which the Special Rapporteur has conducted his work on this weighty and complex subject, acknowledging the difficulty of the task given the restricted mandate of the topic at hand. It should be recalled that the original plan, according to the Syllabus attached to the Commission's 2011 report, was to prepare draft articles on the protection of the atmosphere as a basis for a framework Convention comparable to the UN Convention on the Law of the Sea.¹ The Nordic countries have, from the outset, recognized the importance of the protection of the atmosphere as a topic for the work of the Commission² and only regret that the draft guidelines inevitably reflect the tight constraints of the Special Rapporteur's mandate.

In light of the foregoing, the Nordic countries respectfully submit the following observations:

First, in our previous comments, we have noted with regret that the expression 'pressing concern of the international community as a whole' was used in paragraph 4 of the preamble to the guidelines in lieu of 'common concern of humankind', the latter being a more established choice of expression in international environmental law.³ Opting for a criterion that has been

¹ Report of the International Law Commission, Sixty-third session (2011 ILC Report), A/66/10, Annex II, para. 5, p. 191.

² A/C.6/66/SR.18, at para. 30.

³ See the preamble to the UN Framework Convention on Climate Change (New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107), as well as instruments such as those listed in footnote 821 in the Report of the International Law Commission (2018 ILC Report), Seventieth session; A/73/10, at p. 165.

used in another, and completely different, context – that of selection of topics for the Commission’s own long-term programme of work – has not been an obvious choice.

While acknowledging the Commission’s explanation for this choice of terminology in the relevant commentary,⁴ the Nordic countries nevertheless find it disappointing that a reference to the protection of the atmosphere as a ‘common concern of humankind’ was omitted from the draft guidelines and propose its introduction to the preamble. We wish to stress that inclusion of the term ‘common concern of humankind’ would be well-founded in light of the subject matter of the guidelines and the close connection between the protection of the atmosphere and climate change. Insofar as the omission of a reference to the protection of the atmosphere as ‘a common concern of humankind’ was related to a lack of clarity as to the precise legal implications of the concept, the Nordic countries would consider the draft commentaries a worthy opportunity for the Commission to contribute to its clarification.

Second, and not unlike the first observation above, the Nordic countries note the use of less established terminology in draft guideline 7 on intentional large-scale modification of the atmosphere. Specifically, while supporting the objective of draft guideline 7, we question the choice to employ the expression ‘prudence and caution’ rather than ‘precautionary approach’ in the text. Although the Commission has explained the choice of terminology with reference to a number of cases of the International Tribunal for the Law of the Sea in which the expression ‘prudence and caution’ was used,⁵ the Nordic countries suggest that an alternative, and perhaps more relevant, point of reference would be found in the Commission’s Draft Articles on the Law of Transboundary Aquifers, in which the expression ‘precautionary approach’ is included in draft Article 12.⁶

In closing, the Nordic countries wish to reaffirm their appreciation for the work of the Special Rapporteur as well as their support for the draft guidelines on the protection of the atmosphere. We value the opportunity to comment on the draft guidelines and hope that the observations submitted herewith are of use to the Commission in view of the forthcoming second reading at the Commission’s seventy-second session in 2020.

⁴ 2018 ILC Report, A/73/10, at para. 9 of the commentary to the preamble, at pp. 164-165.

⁵ See 2018 ILC Report, A/73/10, para. 9 of the commentary to draft guideline 7, at p. 183

⁶ ILC Draft articles on the Law of Transboundary Aquifers (2008), Article 12, (A/63/10).

For reference at drafting stage

1. [2011 ILC Report, Annex II](#), at para. 5, p. 191.
2. [A/C.6/66/SR.18](#), at para. 30.
3. [2018 ILC Report](#), footnote 821. ([UNFCC](#)).
4. [2018 ILC Report](#), at para. 9 of the commentary to the preamble, at pp. 164-165.
5. [2018 ILC Report](#), para. 9 of the commentary to draft guideline 7, at p. 183.
6. [ILC Draft articles on the Law of Transboundary Aquifers](#)