

ILC DRAFT GUIDELINES ON THE PROTECTION OF THE ATMOSPHERE

WRITTEN COMMENTS SUBMITTED ON BEHALF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. Following the invitation made by the International Law Commission (the **Commission**) at its seventieth session (2018) to Governments to provide comments on its draft guidelines on the protection of the atmosphere (the **draft Guidelines**),¹ the United Kingdom of Great Britain and Northern Ireland (the **UK**) presents the following comments.
2. Generally, the UK continues to emphasise the significance of various treaties concerning protection of the atmosphere. The UK notes the way in which these treaties continually evolve in response to new challenges or new understandings.
3. Given this general position in relation to the draft Guidelines, the UK has the following concerns about specific guidelines.

Draft Guideline 2, scope of the draft Guidelines

4. The UK is concerned that the scope of the draft Guidelines goes beyond the limitations agreed to by the Commission when it included this topic in its programme of work in 2013, and in particular the understanding that “work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution” (A/68/10, para. 168(a)). The UK recognises that this aspect of the understanding upon which the Commission adopted this topic is referenced in the final paragraph of the preamble to the draft Guidelines. The UK suggests, however, that this preambular reference is not, of itself, sufficient to avoid the risk that the draft Guidelines (as described in draft Guideline 2) interfere with political negotiations relating to protection of the atmosphere.
5. A possible solution may be to add a new paragraph to draft Guideline 2 clarifying that the draft Guidelines do not extend to matters that are the subject of political negotiation, in particular political negotiations relating to climate change, ozone depletion, or long-range transboundary air pollution. The concept of ‘political negotiation’ could be clarified to make clear that it is not confined to the negotiation of new treaties, but extends to the review of existing treaties, political negotiations regarding the implementation of those treaties and other work taking place within the framework of those treaties.

Draft Guidelines 3 to 6, obligation to protect the atmosphere, environmental impact assessment, sustainable use of the atmosphere, equitable and reasonable use of the atmosphere

6. The commentary to draft Guideline 3 recognises that draft Guidelines 3, 4, 5 and 6 are interrelated. Together this group of guidelines ‘seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere’ (quotation from the commentary).

¹ *Report of the International Law Commission, seventieth session, A/73/10, paragraph 76.*

7. The UK recognises that each guideline relates to principles that are being developed in the context of transboundary pollution. However, as recognised in the commentary to draft Guideline 3, these principles are unsettled for atmospheric pollution and atmospheric degradation. The UK suggests that this is because of the particular nature of atmospheric pollution and atmospheric degradation. Atmospheric pollution and atmospheric degradation (as defined by draft Guideline 1) have multiple causes and sources, the cause/effect relationship is often complex, and any single State can be both a source and a victim while all States may contribute to a particular problem. These principles, and their application to particular aspects of protection of the atmosphere, are in fact being addressed in the course of political (treaty) negotiations – and in particular those negotiations relating to climate change, ozone depletion, or long-range transboundary air pollution. Political (treaty) negotiations on particular subject matter relevant to protection of the atmosphere are the better vehicle for developing principles that account effectively for the complexities of that subject matter.

Draft Guideline 9, interrelationship among relevant rules

8. The UK supports the concept of international cooperation set out in draft Guideline 8. International cooperation is an effective means of ensuring harmony and integration as between separate instruments and bodies concerned with protection of the atmosphere, and the UK recognises that such harmony and integration is important. Draft Guideline 9 is also aimed at achieving such harmony and integration – but does so by constraining interpretation, and development, of rules of international law. Draft Guideline 9 seems to be an excessive and unnecessary means for ensuring harmony and integration as between separate instruments and bodies concerned with protection of the atmosphere. Draft Guideline 8 is a sufficient and effective means of attaining this end.

Draft Guideline 11, compliance

9. Draft Guideline 11 relates to ‘compliance with the rules and procedures [of] relevant agreements’. Yet such ‘relevant agreements’ are the subject of ongoing political negotiation (since concluded agreements are reviewed and evolve in response to new challenges and understandings). As mentioned above, the Commission adopted this topic on the understanding that: “work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long range transboundary air pollution.” A guideline on ‘compliance with the rules and procedures [of] relevant agreements’ goes beyond this limitation.

Concluding comments

10. Despite reservations about the draft Guidelines, the UK stresses its support for the need to protect the atmosphere and environment, and to tackle climate change. But it continues to have reservations about whether the Commission is the best or most effective forum to seek to pursue these objectives.