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Item 4 of the provisional agenda*

Emerging policy issues: environment in the multilateral system

Environmental law

Note by the Executive Director

**Report of the intergovernmental meeting to review and further
develop draft guidelines for the development of national legislation on
access to information, public participation and access to justice in
environmental matters**

Summary

By section II of its decision 25/11 of 20 February 2009, on the draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, the Governing Council took note of the draft guidelines and requested the secretariat to carry out further work on them with a view to their adoption by the Governing Council/Global Ministerial Environment Forum at its next special session.

The annex to the present note contains the report of the intergovernmental meeting organized in follow-up to section II of Governing Council decision 25/11 to review and further develop the draft guidelines, held on 12 and 13 November 2009 at the headquarters of the United Nations Environment Programme in Nairobi, as set out in document UNEP/Env.Law/IGM.Acc/1/3, which is available also in French and Spanish.

The report of the intergovernmental meeting to review and further develop draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment is made available in document UNEP/GCSS.XI/INF/6/Add.1. That that report is made available in an addendum to the present note does not imply that the two reports and their associated sets of guidelines are substantially linked or that there is a difference in status between them. Both sets of guidelines are part of the UNEP environmental law programme under the environmental governance priority area.

* UNEP/GCSS.XI/1.

Annex

Report of the intergovernmental meeting to review and further develop draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

Introduction

1. The intergovernmental meeting to review and further develop draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters was held at the headquarters of the United Nations Environment Programme (UNEP) in Nairobi on 12 and 13 November 2009. It followed a consultative meeting of government officials and experts on an earlier version of the guidelines convened by UNEP at its headquarters in Nairobi on 20 and 21 June 2008 and subsequent discussions at the twenty-fifth session of the Governing Council, in February 2009. The outcomes of the first meeting can be found in document UNEP/Env.Law/CM.Acc/1/2, while the Governing Council concluded its deliberations on the matter at its twenty-fifth session with the adoption of decision 25/11.

I. Opening of the meeting

2. The meeting was opened at 10.20 a.m. on Thursday, 12 November 2009, by Mr. Bakary Kante, Director, Division of Environmental Law and Conventions, UNEP. He said that the current meeting enabled UNEP to assist member States to develop their national legislation on access to information, public participation and access to justice in environmental matters. The matter had been discussed intensively since the 1992 United Nations Conference on Environment and Development as a means of facilitating the sound management of the environment; while some progress had been made since that time, much remained to be achieved.

II. Organization of work

A. Election of officers

3. Mr. Jan Dusík (Czech Republic) was elected as chair of the meeting.

B. Adoption of the agenda

4. The following agenda was adopted on the basis of document UNEP/Env.Law/IGM.Acc/1/1:
1. Opening of the meeting.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Briefing by the secretariat on the process of developing the draft guidelines.
 5. Review and further development of the draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters.
 6. Discussion of action on the draft guidelines for the consideration of the Governing Council.
 7. Other matters.
 8. Closure of the meeting.

C. Attendance

5. The meeting was attended by experts representing the following Governments: Algeria, Angola, Argentina, Bangladesh, Benin, Botswana, Brazil, Burundi, Cameroon, China, Cuba, Czech Republic, Democratic Republic of the Congo, Egypt, France, Finland, Germany, Ghana, Guatemala, Indonesia, Italy, Japan, Kuwait, Madagascar, Malawi, Malaysia, Mali, Mauritius, Mexico, Morocco, Mozambique, Nepal, Netherlands, Pakistan, Peru, Romania, Saint Lucia, Samoa, Senegal, Serbia, Sierra Leone, Spain, Swaziland, Sweden, Togo, Trinidad and Tobago, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uzbekistan.
6. The representative of the Occupied Palestine Territory also attended the meeting.
7. The representatives of the following United Nations entities and organizations were present: Food and Agriculture Organization of the United Nations, United Nations Economic Commission for Europe, United Nations Environment Programme, United Nations Institute for Training and Research.
8. The following non-governmental organizations were present: Institute of Law and Environmental Governance, World Resources Institute.

III. Briefing by the secretariat on the process of developing the draft guidelines

9. The representative of the secretariat provided an overview of the two-year history of the guidelines' development; the twenty-fifth session of the Governing Council, in February 2009 had, he said, provided an important juncture in that history. He recalled that, by its decision 25/11, the Governing Council had taken note of the guidelines and requested the secretariat to carry out further work with a view to their adoption by the Governing Council at its next special session, to be held in February 2010. He described the development of the latest version of the guidelines, which had, to a large extent, been produced based on written comments received in response to the Executive Director's invitation to Governments and other stakeholders to send such comments with a view to further enhancing the guidelines' relevance and level of perfection. Responses had been received from 11 countries and the European Union. He noted that the Executive Director had also requested Governments to nominate focal points for the further development of the guidelines; to date, 23 countries had done so.

IV. Review and further development of the draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

10. Introducing the item, the representative of the secretariat drew attention to the note by the secretariat on the draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters (UNEP/Env.Law/IGM.Acc/1/2). She stressed that the main objective of the voluntary guidelines was to provide general guidance to States on promoting the effective implementation of Principle 10 of the Rio Declaration on Environment and Development. Describing the draft guidelines' structure and contents, she noted that the current meeting was not intended to provide a forum to negotiate the text of the commentary on the guidelines, although the secretariat welcomed suggestions to strengthen that component. She suggested that representatives should review the document in two stages; first, providing general comments on the document, second, making specific comments during a guideline-by-guideline review. Guidelines 6–10, 13, 18, 22 and 23 had remained unchanged since the twenty-fifth session of the Governing Council. Representatives of the Government of Australia and the International Fund for Agricultural Development had conveyed their regrets at being unable to attend the present meeting; they had, however, submitted written comments that were made available to the meeting in an information document (UNEP/Env.Law/IGM.Acc/1/INF/1).

11. In the ensuing discussion, many representatives welcomed the revised draft guidelines and commended UNEP on its work in developing them; one representative noted, however, that the document had not been made available in a sufficiently timely manner. Several representatives said that the draft guidelines would help countries to develop domestic legislation and improve their commitment to Principle 10. One representative expressed his Government's particular appreciation that the

document under discussion had made full use of the comparative advantage of UNEP in conserving and improving the global environment through the application of rules related to environmental management. A number of representatives stressed the importance of finalizing discussions on the guidelines to facilitate their adoption by the Governing Council at its eleventh special session. Some representatives described national measures pertaining to the issues under discussion. Others drew attention to lacunae in the implementation of national legislation; they expressed the hope that the draft guidelines would facilitate better enforcement.

12. Two representatives described pilot projects being undertaken in their countries in partnership with the United Nations Institute for Training and Research to develop national profiles and action plans with a view to strengthening capacities to implement Principle 10.

13. One representative congratulated UNEP on having taken the initiative to develop the draft guidelines when many countries were building their capacities to strengthen public participation and access to information and justice. Pointing to the interest generated by the pilot projects mentioned, he noted that a number of countries had expressed interest in working collectively on the implementation of Principle 10. Drawing attention to the particular importance of capacity development, he suggested that the draft guidelines might include a section dedicated to that subject.

14. The representative of the secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters provided a brief introduction to the Convention. Noting that some 42 States, including four from Central Asia, had become Parties to the legally binding instrument, he stressed that it was open to any State member of the United Nations. He expressed the secretariat's willingness to support UNEP in its work on matters related to Principle 10.

V. Discussion on the draft guidelines

15. The draft guidelines were reviewed, elaborated on and developed further in the course of the meeting. The text and content of some guidelines were revised and developed further. The final version of the guidelines and the commentaries thereto are set out in annex I to the present report.

VI. Discussion of action on the draft guidelines for the consideration of the Governing Council

16. The representative of the secretariat introduced a conference room paper that contained a draft decision on suggested action for consideration by the Governing Council. She stressed that the draft decision would be submitted to the Committee of Permanent Representatives to UNEP for its consideration prior to its submission to the Governing Council at its eleventh special session. In the ensuing discussion, some representatives proposed editorial and substantive changes to the draft decision. The final version of the decision, as agreed by the participants, is set out in annex II to the present report.

VII. Other matters

17. No other matters were discussed.

VIII. Closure of the meeting

18. Following the customary exchange of courtesies, the meeting was declared closed at 3.40 p.m. on Friday, 13 November 2009.

Annex I

Draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters

The purpose of these voluntary guidelines is to provide general guidance, if so requested, to States, primarily developing countries, on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. In doing so, the guidelines seek to assist such countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters.

The guidelines should not be perceived as recommendations to amend national legislation or practice in cases where existing legislation or practice provides for broader access to information, more extensive public participation or wider access to justice in environmental matters than follows from these guidelines.

I. Access to information

Guideline 1

Any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request (subject to guideline 3), without having to prove a legal or other interest.

Guideline 2

Environmental information in the public domain should include, among other things, information about environmental quality, environmental impacts on health and factors that influence them, in addition to information about legislation and policy, and advice about how to obtain information.

Guideline 3

States should clearly define in their law the specific grounds on which a request for environmental information can be refused. The grounds for refusal are to be interpreted narrowly, taking into account the public interest served by disclosure.

Guideline 4

States should ensure that their competent public authorities regularly collect and update relevant environmental information, including information on environmental performance and compliance by operators of activities potentially affecting the environment. To that end, States should establish relevant systems to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment.

Guideline 5

States should periodically prepare and disseminate at reasonable intervals up-to-date information on the state of the environment, including information on its quality and on pressures on the environment.

Guideline 6

In the event of an imminent threat of harm to human health or the environment, States should ensure that all information that would enable the public¹ to take measures to prevent such harm is disseminated immediately.

Guideline 7

States should provide means for and encourage effective capacity-building, both among public authorities and the public, to facilitate effective access to environmental information.

II. Public participation**Guideline 8**

States should ensure opportunities for early and effective public participation in decision-making related to the environment. To that end, members of the public concerned² should be informed of their opportunities to participate at an early stage in the decision-making process.

Guideline 9

States should, as far as possible, make efforts to seek proactively public participation in a transparent and consultative manner, including efforts to ensure that members of the public concerned are given an adequate opportunity to express their views.

Guideline 10

States should ensure that all information relevant for decision-making related to the environment is made available, in an objective, understandable, timely and effective manner, to the members of the public concerned.

Guideline 11

States should ensure that due account is taken of the comments of the public in the decision-making process and that the decisions are made public.

Guideline 12

States should ensure that when a review process is carried out where previously unconsidered environmentally significant issues or circumstances have arisen, the public should be able to participate in any such review process to the extent that circumstances permit.

Guideline 13

States should consider appropriate ways of ensuring, at an appropriate stage, public input into the preparation of legally binding rules that might have a significant effect on the environment and into the preparation of policies, plans and programmes relating to the environment.

Guideline 14

States should provide means for capacity-building, including environmental education and awareness-raising, to promote public participation in decision-making related to the environment.

1 “The public” may be defined as one or more natural or legal persons and their associations, organizations or groups.

2 “The public concerned” may be defined as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law should be deemed to have an interest.

III. Access to justice

Guideline 15

States should ensure that any natural or legal person who considers that his or her request for environmental information has been unreasonably refused, in part or in full, inadequately answered or ignored, or in any other way not handled in accordance with applicable law, has access to a review procedure before a court of law or other independent and impartial body to challenge such a decision, act or omission by the public authority in question.

Guideline 16

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters.

Guideline 17

States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.

Guideline 18

States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.

Guideline 19

States should provide effective procedures for timely review by courts of law or other independent and impartial bodies, or administrative procedures, of issues relating to the implementation and enforcement of laws and decisions pertaining to the environment. States should ensure that proceedings are fair, open, transparent and equitable.

Guideline 20

States should ensure that the access of members of the public concerned to review procedures relating to the environment is not prohibitively expensive and should consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Guideline 21

States should provide a framework for prompt, adequate and effective remedies in cases relating to the environment, such as interim and final injunctive relief. States should also consider the use of compensation and restitution and other appropriate measures.

Guideline 22

States should ensure the timely and effective enforcement of decisions in environmental matters taken by courts of law, and by administrative and other relevant bodies.

Guideline 23

States should provide adequate information to the public about the procedures operated by courts of law and other relevant bodies in relation to environmental issues.

Guideline 24

States should ensure that decisions relating to the environment taken by a court of law, other independent and impartial or administrative body, are publicly available, as appropriate and in accordance with national law.

Guideline 25

States should promote appropriate capacity-building programmes, on a regular basis, in environmental law for judicial officers, other legal professionals and other relevant stakeholders.

Guideline 26

States should encourage the development and use of alternative dispute resolution mechanisms where these are appropriate.

Commentary to the guidelines*

Commentary to the introductory paragraphs

It is underscored in the first paragraph that these voluntary guidelines are intended to provide general guidance to States, primarily developing countries, who so request, on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development. The term “developing countries” is an umbrella term including groupings such as the least developed countries, landlocked developing countries and small island developing States and any other such group of countries.

Furthermore, it is pointed out that the guidelines seek to assist the above-mentioned countries in filling possible gaps in their respective legal norms and regulations as relevant and appropriate to facilitate broad access to information, public participation and access to justice in environmental matters. Relevant legal norms and regulations can be found at various administrative levels in a country depending on the constitutional and administrative arrangements. This means that the present guidelines can be relevant at various levels, ranging from the national or central level to the local or district level. For example, in federal States, which are characterized by a union of partially self-governing states or regions united by a central (federal) Government, the states or regions may have considerable legal autonomy in the field of the environment. This could imply that there may be a need for an adequate legal framework on access to information, public participation and access to justice in environmental matters at this level.

Commentary to guideline 1

Environmental information, such as that contained in public registers, should be available to the public for inspection free of charge or at a reasonable cost. Any person requesting information should be provided with adequate facilities for obtaining copies of such information, on payment of the costs of reproduction and dissemination, if appropriate and reasonable.

A response should be provided by public authorities to a person requesting information within a reasonable period of time. Such period should be defined under national law.

Where information is held in various forms, including written, visual, aural or electronic forms, it should be provided in the form specified by the requestor unless it is reasonable for the public authority to make it available in another form or if the information is already publicly available in another form.

There may be situations in which specific measures to facilitate access to information should be considered, for example when illiteracy is widespread or when minorities do not adequately understand the (official) language(s) used by the public authorities or where the person seeking access to the information has a disability that requires information to be provided in a particular form.

The definition of natural and legal person is a matter for national legislation.

Commentary to guideline 2

To ensure the transparency of environmental information systems, the type and scope of the environmental information available and the basic terms and conditions under which it can be obtained should be specified. Registers should be established and maintained and information officers should be designated within relevant public authorities.

* The present commentary has been prepared by the secretariat in consultation with the UNEP Senior Advisors Group and is annexed to the guidelines as indicative reference material. The text of the commentary has not been negotiated by Governments.

Commentary to guideline 3

The grounds expressed in law for refusing an information request should be clearly specified and could be limited to, but need not include, situations where disclosure of the information would adversely affect:

- (a) The confidentiality of the proceedings of public authorities;
- (b) International relations, national defence or public security;
- (c) The course of justice;
- (d) Commercial and industrial confidentiality, unless the information is about emissions;
- (e) Intellectual property rights;
- (f) The confidentiality of personal data or files;
- (g) Interests of a third party that has supplied information without that party being under, or being capable of being put under, a legal obligation to do so, and where that party has not consented to the release of the material;
- (h) The environment to which the information relates.

Reasons for a refusal to comply with a request for information should be stated in writing. Where only part of the information requested falls within one of the exempt categories, the remainder of the information should be separated out and supplied to the requestor. While a request for information may be refused at the time the request is made, it should be noted that the same information could be made available in the future.

An information request may also be refused if the relevant public authority does not hold the environmental information in question, the request is manifestly unreasonable or formulated in too general a manner.

Commentary to guideline 4

A relevant system to ensure an adequate flow of information about proposed and existing activities that may significantly affect the environment could, among other things, involve requiring the regular reporting of such information to the competent public authorities by such entities. In addition, such entities should be encouraged to report regularly on the environmental impact of their activities directly to the public.

Commentary to guideline 6

It is stated in the footnote to the guideline that “the public” may be defined as one or more natural or legal persons and their associations, organizations or groups. The precise definition of the term is a matter for national legislation.

Commentary to guideline 8

Public participation in decision-making processes having significant environmental implications should be facilitated by ensuring that members of the public concerned are informed in a timely and effective manner about the relevant decision-making process and the opportunities, procedures and criteria for their participation. The earlier in the decision-making process the public becomes involved, the more effective its participation can be. Public participation should therefore begin at an early stage when options are open and effective public influence can be exerted.

Public participation procedures should include reasonable time frames for the various phases, permitting sufficient time for informing the public and for the members of the public concerned to prepare and participate effectively during the decision-making process. The timing of the opportunities to participate should be compatible with those pertaining to public access to the relevant information, so as to facilitate informed public participation.

The members of the public concerned should be given the opportunity to consult the information necessary to participate effectively in the process. Such information could be provided through websites and, if possible, directly to members of the public concerned having requested to be so notified or

having otherwise been identified as in need of direct communication. Where appropriate, the relevant authorities should give the public additional assistance and explanations.

Public participation in environmental administrative decision-making processes should be ensured, preferably by means of explicit rules governing certain procedures such as, if applicable, environmental impact assessment and the issuing of permits or licences, particularly where these may affect the environment significantly. Such rules could include the right to be heard, procedures that include the right to submit comments and propose alternatives, a reasonable time frame to comment, the right to a reasoned decision and the right of recourse to administrative or judicial proceedings to challenge failures to act and to appeal decisions. The provision of financial assistance to members of the public to enable effective participation in policy and other decisions related to the environment should also be considered.

Special efforts should be made to promote public participation in environmental policymaking and on decisions related to plans and programmes (see also guideline 12) that are of particular interest to subnational, regional and local communities.

Irrespective of the characteristics of the decision-making process in question, it should be noted that special efforts may have to be made to facilitate the effective participation of some groups and members of the public concerned. This could, for example, be the case when illiteracy is widespread or when minorities lack adequate understanding of the (official) language(s) being used in the decision-making process. It is also important to ensure involvement and participation by both men and women. Specific measures should be considered to ensure equal participation in this regard since participation could be affected by power imbalances within communities, household family relations and different time use by men and women, which could hamper effective participation.

Commentary to guideline 9

Ensuring an adequate opportunity for members of the public to express their views could, where appropriate, include taking account of literacy levels and minority languages and holding oral hearings. It could also, where relevant, include holding meetings and proceedings in a location close to the site that will be affected or the activity whose environmental impacts are under consideration or in close proximity to where the majority of the members of the public concerned reside.

Commentary to guideline 11

To take due account of the comments of the public, including opinions expressed and proposals put forward, should be understood to mean, as a minimum, that the competent authority needs to respond to the main substantive arguments put forward in the comments. The public should be promptly informed when the decision has been taken, in accordance with appropriate procedures. The text of the decision, along with the reasons and considerations on which the decision is based, should be made public.

Commentary to guideline 14

Given the general importance of environmental impact assessment procedures, specific capacity-building measures with a view to strengthening the public's effective participation in such procedures should be actively promoted.

Commentary to guideline 15

Guideline 1 states that any natural or legal person should have affordable, effective and timely access to environmental information held by public authorities upon request. Consequently, any person whose right to access to environmental information has been denied should also have access to a review procedure to enforce the right. As was mentioned in the commentary to guideline 1, the definition of natural and legal person is a matter for national legislation.

Commentary to guidelines 16 and 17

The wording of guidelines 16 and 17 is without prejudice to the right of States to require additional qualifications for the members of the public concerned to have access to justice in the cases covered by these guidelines. For example, members of the public concerned may be required to have a sufficient interest or maintain the impairment of a right in a specific case, for example, article 9, paragraph 2, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Commentary to guideline 18

Providing a broad interpretation of standing in proceedings concerned with environmental matters should include according standing to appropriate public interest and community groups. This should include non-governmental organizations promoting environmental protection and meeting any criteria that may exist in national law. Proceedings concerned with environmental matters should be understood to include any proceedings, including civil proceedings, before a court of law or any other independent and impartial body or administrative proceedings concerned with such matters.

Commentary to guideline 19

It should be ensured that the obligations of courts of law and other bodies charged with resolving environmental issues are properly defined and that they are adequately resourced and staffed to perform the obligations required of them.

Commentary to guideline 20

Costs associated with review procedures include court fees, attorney's fees, expert fees and other litigation costs. To ensure that access to review procedures relating to the environment is not prohibitively expensive, there is a need to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. These could for example include the timely provision of financial and legal aid to poor litigants or waivers and cost-recovery mechanisms as may be appropriate.

Other barriers to access to justice include for example limitations on standing, difficulties in obtaining able legal counsel, unclear review procedures, corruption, a lack of awareness within review bodies of environmental issues and environmental law and weak enforcement of judgements and decisions. The effective implementation in countries' legal norms and regulations of the present guidelines can make a significant contribution to remove or reduce these barriers. To facilitate access to competent legal counsel the establishment and support of legal assistance offices that provide free or low-cost legal advice on matters relating to the environment should be considered.

The risk of the losing party being compelled to cover the (litigation) costs of the winning party in the review procedure may be an example of a situation where there is a considerable risk for the review procedure to become prohibitively expensive. It may be argued that the members of the public concerned in such cases are exposed to an unreasonably high financial risk that may be a strong disincentive to seeking justice. Nevertheless, an award of (reasonable) costs against a losing party may also be regarded as a normal risk of litigation and may serve as a check on unmeritorious matters being brought forward.

Commentary to guideline 21

The ultimate objective of any review by courts of law or other independent or impartial bodies is to obtain a remedy for a transgression of law. It should be ensured that remedies are adequate and effective. Adequacy requires the remedy to compensate fully past damage, prevent future damage and may require it to provide for restoration. The requirement that the remedies should be effective means that they should be capable of efficient enforcement.

In environmental cases, remedies such as compensation and restitution are often insufficient to reverse the situation to ex ante given the irreversible impacts of many environmentally hazardous acts and activities. Provisional measures, such as injunctive relief, are therefore important remedies to avoid irreversible damage. When initial or additional damage may still happen and the violation is continuing,

or where prior damage can be reversed or mitigated, courts and other review bodies may issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is thus injunctive relief. An injunction can be final (permanent) or interim (temporary). An interim injunction is granted to restrain activity, or to require a person to undertake some act temporarily until a final decision can be made.

Restitution is a remedy by which a defendant can be ordered to give up his or her gains from an unlawful activity to the claimant. Restitution should be contrasted with compensation, which is an order to the defendant to compensate the claimant for his or her loss. It could thus be in the interests of the claimant to seek restitution if the profit that the defendant has made as a result of unlawful behaviour, i.e., by transgression of laws relating to the environment, is greater than the loss suffered by the claimant.

Other appropriate measures could include civil penalties.

Commentary to guideline 22

It should be ensured that the laws relating to enforcement of decisions in environmental matters provide the appropriate mechanisms for the successful party to seek timely and effective enforcement. The laws should be adequate and sufficiently effective to remedy any harm caused to the environment, to provide full compensation for such harm and to protect the environment from suffering similar harm in the future.

In cases in which the State is a litigant, either on the winning or losing side, it should be expected, through its actions, among other things, under the laws referred to in the paragraph above, to ensure timely and effective enforcement of the decision in the particular case.

Commentary to guideline 24

It is an essential component of access to justice that the decisions taken by the reviewing court or other independent or impartial or administrative body are publicly available. The guideline recognizes a need for national flexibility on this matter and states that such decisions should be publicly available as appropriate and in accordance with national law.

Commentary to guideline 25

The guideline draws attention to the importance of capacity-building in environmental law for a wide group of judicial officers (such as justices, judges, magistrates, legal assistants and clerks) and other legal professionals (for example prosecutors, attorneys, barristers, counsels and solicitors) and other stakeholders. Naturally, within these groups of professionals, the guideline targets those individuals who deal with environmental matters. The classification (title) of various judicial and legal professions and functions varies from jurisdiction to jurisdiction.

Education on participation in environmental decision-making and on the environmental rights of individuals and public interest groups should be actively promoted. Such education should, among other things, explain to the members of the public concerned how they can use the legal system to protect their rights to access to information and public participation.

Commentary to guideline 26

Alternative dispute resolution refers to any means of settling disputes outside the judicial or administrative process. It includes, among other things, negotiations, arbitration, conciliation and mediation. Its use should be encouraged as a potentially swift and relatively inexpensive means of resolving disputes. In the sphere of environment one potential benefit associated with the use of such mechanisms is the possibility to arrive at broadly accepted and thereby potentially long-lasting solutions to disputes. It is primarily mediation, but also arbitration, that has been used in the environmental field. In mediation, there is a third party, a mediator, who facilitates the resolution process (but may also in some cases, as in a conciliation procedure, provide advice on the content or possible resolution of the dispute) but does not impose a resolution on the parties. In arbitration, participation is typically voluntary, and there is a third party, such as a private judge, who imposes a resolution. A prerequisite for mediation to be successful is that national law must allow sufficient margin for negotiations to develop a win-win solution for all involved. The potential role of alternative dispute resolution can thus

vary according to the nature of the decision-making process, the issues at stake and the margin for alternative dispute resolution that national law permits, among other things.

Where appropriate, the relevance and use of traditional, community-level alternative dispute resolution mechanisms and processes should be considered.

Annex II

Suggested action for consideration by the Governing Council through the Committee of Permanent Representatives

The Governing Council,

Recalling Principle 10 of the Rio Declaration on Environment and Development,¹ the Malmö Ministerial Declaration² and its decisions 20/4 of 4 February 1999, 20/6 of 5 February 1999, 21/24 of 9 February 2001, 22/17 of 7 February 2003 and 25/11 of 20 February 2009,

Recalling also that, as recognized by the Governing Council in its above-mentioned decision 25/11, access to environmental information enhances the transparency of environmental governance and that it is a prerequisite for effective public participation in environmental decision-making, that public participation in environmental decision-making generally improves decision-making and enhances its legitimacy and that access to justice in environmental matters provides a means for affected parties to gain redress and to assist in the implementation and enforcement of legislation related to the environment,

Recognizing that national legislation on access to environmental information, public participation and access to justice in environmental matters contributes to the achievement of environmental sustainability and to the legal empowerment of citizens, including the poor and marginalized,

Noting with appreciation the further work carried out by the secretariat on the guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters,

Noting also with appreciation the outcome of the intergovernmental meeting to review and further develop draft guidelines for national legislation on access to information, public participation and access to justice in environmental matters, held in Nairobi on 12 and 13 November 2009,

1. *Decides* to adopt the guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, as set out in the annex to the present decision;

2. *Also decides* that the secretariat should disseminate the guidelines to all countries, and that the commentary on the guidelines³ should also be distributed to all countries for further comments to enhance its quality;

3. *Encourages* countries, in particular developing countries, to apply the guidelines in the development or amendment of their national legislation related to the subject matters covered by the guidelines;

4. *Requests* the Executive Director to assist countries, upon their request, subject to the availability of resources and through the programme of work and budget, and, if appropriate, in collaboration with other relevant international and regional organizations, with the development or amendment of national legislation, policies and strategies on access to information, public participation and access to justice in environmental matters;

5. *Also requests* the Executive Director to provide updates on progress through regular reporting on the implementation of the programme of work and budget.

1 *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I.

2 Governing Council decision SS.VII, annex.

3 The commentary has been prepared by the secretariat in consultation with the Senior Advisors Group of the United Nations Environment Programme and has been annexed to the guidelines as indicative reference material. The text of the commentary has not been negotiated by Governments.