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Emerging policy issues: environment in the multilateral system

Environmental law

Report of the Executive Director

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

Summary

The present report is submitted to the Governing Council/Global Ministerial Environment Forum at its eleventh special session in accordance with section II of Governing Council decision 25/11 of 20 February 2009, on draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, by which the Governing Council, among other things, requested the secretariat to carry out further work on the guidelines with a view to their adoption by the Council/Forum at its next special session.

The draft guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment are discussed in document UNEP/GCSS.XI/8/Add.1. That those draft guidelines are discussed in an addendum to the present report does not imply that the two 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.

I. Suggested action by the Council

1. The Governing Council may wish to consider the adoption of a decision along the following lines:

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.

II. Background and rationale

2. Principle 10 of the Rio Declaration on Environment and Development, which was adopted at the United Nations Conference on Environment and Development in June 1992, states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

3. Since the Principle's adoption, its elements (access to information, public participation and access to justice) have progressively gained momentum and have increasingly been implemented globally. Consequently, the public is becoming an important stakeholder in environmental decision-making, law-making and policymaking and in compliance and enforcement actions, both at the national and international levels. Many countries, including in Africa, Asia and Latin America and the Caribbean, have enacted legislation on the matter, although in many cases not adequately covering all three elements of Principle 10.⁴ At the regional level, Principle 10 has been codified and elaborated in the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). There is, however, no comparable instrument at the global level or in other regions. Principle 10 elements can also be found in global multilateral environmental agreements.

4. The issue of access to information, public participation and access to justice has been on the agenda of the United Nations Environment Programme (UNEP) on a number of occasions, including at the twenty-fifth session of the Governing Council, in February 2009.⁵

5. By section II of its decision 25/11 the Governing Council noted with appreciation the work that UNEP had undertaken thus far in this area. The Council went on to recognize that access to environmental information enhanced the transparency of environmental governance and that it was a prerequisite for effective public participation in environmental decision-making; that public participation generally improved decision-making and enhanced its legitimacy; and that access to justice in environmental matters provided a means to permit affected parties to gain redress and to assist in the implementation and enforcement of legislation related to the environment. Lastly, the Council took note of the draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters 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.

6. To that end, the Executive Director wrote on 21 May 2009 to the Committee of Permanent Representatives (with a copy to the Permanent Missions to the United Nations in New York and Geneva) inviting all Governments and members of the Committee to comment on the guidelines and the commentaries thereto, with a view to further enhancing their relevance and level of perfection. The Executive Director also wrote to other relevant stakeholders extending the same invitation. He also requested all Governments to nominate a focal point for consultation purposes on the guidelines' further development. Invitations to comment on the guidelines were also sent to United Nations organizations and other relevant stakeholders.

7. In response to the invitation, the secretariat received comments from 11 countries (Argentina, Australia, Bhutan, Japan, Mauritius, Mexico, Norway, Switzerland, Togo, United States of America and Zambia) and from the European Union. Comments were also received from the secretariat of the United Nations Framework Convention on Climate Change and from the Environmental Law Institute, the International Council of Environmental Law and the Instituto de Derecho y Economía Ambiental. Focal points were nominated by 23 countries.

4 *A Report on Models of National Legislation, Policy and Guidelines in the Africa Region, Asia and Pacific Region, and the Latin America and Caribbean Region*, UNEP, 2002.

5 For further details see the document UNEP/GC.25/11/Add.1.

8. Based on the comments received, the secretariat prepared a revised version of the guidelines, which served as the basis for discussion at an intergovernmental meeting convened in Nairobi on 12 and 13 November 2009 to review and further develop the guidelines. The Executive Director sent invitations to the intergovernmental meeting to ministers responsible for the environment of all Governments. Invitations were also sent to United Nations organizations and other relevant stakeholders.

9. The meeting was attended by experts representing a number of Governments, United Nations entities and organizations and non-governmental organizations. Participants reviewed and further developed the draft guidelines and agreed on their text, as contained in the report of the meeting (reproduced as document UNEP/GCSS.XI/INF/6). That document also contains a revised version of the commentary to the guidelines developed by the secretariat following the meeting. The text of the agreed guidelines is also found in the annex to the present report.

Annex

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.
