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Item 4 of the provisional agenda\*

**Emerging policy issues: environment in the multilateral system**

**Environmental law**

**Report by the Executive Director**

**Addendum**

**Draft guidelines for the development of domestic legislation on  
liability, response action and compensation for damage caused by  
activities dangerous to the environment**

*Summary*

The present report is submitted to the Governing Council/Global Ministerial Environment Forum at its eleventh special session in accordance with section III of Governing Council decision 25/11 of 20 February 2009, on draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, by which the Governing Council took note of the draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment and 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 national legislation on access to information, public participation and access to justice in environmental matters are discussed in document UNEP/GCSS.XI/8. That the present guidelines are discussed in an addendum to the report on the draft guidelines on access and participation 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 13 of the Rio Declaration on Environment and Development,<sup>1</sup> which stipulates that “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage”,

*Recognizing* that the existence of national legislation on liability and compensation for environmental damages resulting from human activities has been largely recognized as a significant element for the protection of the environment,

*Recalling* section III of its decision 25/11 of 20 February 2009, entitled “Draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment”, in which it took note of the draft guidelines and requested the secretariat to carry out further work on the guidelines with a view to their adoption at its next special session,

*Noting with appreciation* the outcome 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, held in Nairobi from 9 to 11 November 2009,

1. [*Decides* to adopt] the guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, as set out in the annex to the present decision;
2. *Also decides* that the secretariat should disseminate the guidelines, with the commentary and annexes attached thereto, to all countries and invites countries to provide further comments on the commentary to enhance its quality;
3. *Encourages* countries, in particular developing countries and countries with economies in transition, to apply the guidelines in the development or amendment of their national legislation related to liability, response action and compensation for activities dangerous to the environment;
4. *Requests* the Executive Director to assist countries, upon their request, [subject to the availability of resources] with the development or amendment of national legislation, policies and strategies on liability, response action and compensation for damage caused by activities dangerous to the environment;
5. *Also requests* the Executive Director to report on progress through regular reporting on the implementation of the programme of work and budget.

## II. Background and rationale

2. Principle 13 of the Rio Declaration on Environment and Development, which was adopted at the United Nations Conference on Environment and Development in June 1992, states:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

3. The United Nations Environment Programme (UNEP) was requested to assist in this process by the third and fourth Montevideo Programmes for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-First Century, adopted by the Governing Council in 2001 and 2009, respectively. The most recent Montevideo Programme represents a broad

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<sup>1</sup> *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.

strategy for UNEP for the decade beginning in 2010 and incorporates programme area 3 on prevention, mitigation and compensation of environmental damage.

4. In 2007, at two meetings of the UNEP high-level advisory expert group on liability and compensation for environmental damage participants developed a set of recommendations offering guidance to, in particular, developing countries and countries with economies in transition, in drafting domestic legislation in the field. In June 2008, at a UNEP consultative meeting government officials and experts reviewed and further developed the draft guidelines.<sup>2</sup>

5. In February 2009, the Governing Council adopted decision 25/11 on environmental law. Its part III, on the draft liability guidelines, recalled the UNEP mandate to work in the area of environmental liability and noted with appreciation the work that UNEP had undertaken to date. It further recalled Principle 13 of the Rio Declaration on Environment and Development and noted that the existence of national legislation on liability and compensation for environmental damage had been recognized as a significant element for the protection of the environment. The Governing Council subsequently took note of the draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment. It also 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.<sup>3</sup>

6. To this 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. Follow-up letters to remind Governments of this opportunity to comment were sent on 26 June and 2 July 2009.

7. In response to the invitation the secretariat received comments from 16 countries (Algeria, Argentina, Australia, Bhutan, Canada, Croatia, India, Japan, Mauritius, Netherlands, Norway, Switzerland, Thailand, Togo, United States of America and Zambia) and from the European Union. Comments were also received from the secretariats of the United Nations Framework Convention on Climate Change and of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and from the Ad-Hoc Industry Natural Resource Damage Group, European Chemical Industry Council, Environmental Law Institute, Instituto de Derecho y Economía Ambiental, International Council of Environmental Law and Women in Europe for a Common Future. Focal points were nominated by 25 countries.

8. An expert meeting was held in Geneva in September 2009, attended by 12 experts from around the world. Participants made additional suggestions on how to incorporate the comments received and on how to maintain internal consistency. The secretariat prepared a revised version of the guidelines using the inputs from the meeting.

9. The revised version served as the basis for discussion at an intergovernmental meeting convened in Nairobi from 9 to 11 November 2009 to review and further develop the draft 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.

10. The meeting was attended by experts representing a number of Governments, the Food and Agriculture Organization of the United Nations and non-governmental organizations. Participants reviewed and further developed the draft guidelines and, while some issues remained to be resolved, largely agreed on their text, as contained in the report of the meeting (reproduced as document UNEP/GCSS.XI/INF/6/Add.1). That document also contains a revised version of the commentary to the guidelines developed by the secretariat following the meeting, in addition to annexes elaborating on draft guideline 14.

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2 See the report of the meeting, document UNEP/Env.Law/CM/1/2.

3 For further details see documents UNEP/GC.25/11/Add.2 and UNEP/GC/25/INF/15/Add.3.

11. In subsequent meetings with the Committee of Permanent Representatives Governments resolved the outstanding issues referred to in the previous paragraph. The outcome may be found in the annex to the present report, which contains the text of the draft revised guidelines. The meetings also resulted in further revisions to the commentary to the guidelines, which may be found in document UNEP/GCSS.XI/INF/6/Add.2.

## Annex

### **Draft revised guidelines for the development of domestic legislation on liability, response action and compensation for damage caused by activities dangerous to the environment<sup>4</sup>**

The purpose of the present guidelines is to highlight core issues that States will have to resolve should they choose to draft domestic laws and regulations on liability, response action and compensation for damage caused by activities dangerous to the environment. The guidelines discuss key elements for possible inclusion in any such domestic legislation and offer specific textual formulations for possible adoption by legislative drafters. It is envisaged that they will be of assistance to, in particular, developing countries and countries with economies in transition, in devising, as they deem appropriate, domestic legislation or policy on liability, response action and compensation.

#### **Guideline 1: Objective**

The objective of the present guidelines is to provide guidance to States regarding domestic rules on liability, response action and compensation for damage caused by activities dangerous to the environment, taking into account the polluter pays principle.

#### **Guideline 2: Scope of application**

1. The present guidelines apply to liability, response action and compensation for damage caused by activities dangerous to the environment.
2. They are not intended to apply to damage caused by activities dangerous to the environment that are covered by other domestic laws establishing special liability regimes or that principally relate to national defence, international security or natural disaster management.

#### **Guideline 3: Definitions**

1. The term “activity dangerous to the environment” means an activity or installation specifically defined under domestic law.
2. The term “damage” means:
  - (a) Loss of life or personal injury arising from environmental damage;
  - (b) Loss of or damage to property arising from environmental damage;
  - (c) Pure economic loss;
  - (d) Costs of reinstatement measures, limited to the costs of measures actually taken or to be undertaken;
  - (e) Costs of preventive measures, including any loss or damage caused by such measures;
  - (f) Environmental damage.
3. The term “environmental damage” means an adverse or negative effect on the environment that:
  - (a) Is measurable taking into account scientifically established baselines recognized by a public authority that take into account any other human-induced variation and natural variation;
  - (b) Is significant, which is to be determined on the basis of factors such as:
    - (i) Long-term or permanent change, to be understood as change that may not be redressed through natural recovery within a reasonable period of time;

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<sup>4</sup> The present guidelines have been amended and revised on the basis of the discussions at 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, held in Nairobi from 9 to 11 November 2009.

- (ii) Extent of the qualitative or quantitative changes that adversely or negatively affect the environment;
- (iii) Reduction or loss of the ability of the environment to provide goods and services, either of a permanent nature or on a temporary basis;
- (iv) Extent of any adverse or negative effect or impact on human health;
- (v) Aesthetic, scientific and recreational value of parks, wilderness areas and other lands.

4. The term “operator” means any person or persons, entity or entities in command or control of the activity, or any part thereof at the time of the incident.

5. The term “incident” means any occurrence or series of occurrences having the same origin that cause damage or create a grave and imminent threat of damage.

6. The term “preventive measures” means any reasonable measures taken by any person in response to an incident, to prevent, minimize or mitigate loss or damage, or to undertake environmental clean-up.

7. The term “pure economic loss” means loss of income, unaccompanied by personal injury or damage to property, directly deriving from an economic interest in any use of the environment and incurred as a result of environmental damage.

8. The term “reinstatement measures” means any reasonable measures aiming to assess, reinstate, remediate or restore damaged or destroyed components of the environment.

9. The term “response action” means preventive measures and reinstatement measures.

#### **Guideline 4: Response action**

1. Should an incident arise during an activity dangerous to the environment, the operator should take prompt and effective response action.

2. The operator should promptly notify the competent public authority of the incident and the response action planned or taken and its effectiveness or expected effectiveness.

3. The competent public authority should be entitled to obtain from the operator all relevant information related to the incident. It may also order the operator to take specific response action that it deems necessary.

4. If the operator fails to take response action or such action is unlikely to be effective or timely, the competent public authority may take such action itself or authorize a third party to take such action and recover the costs from the operator.

#### **Guideline 5: Liability**

1. The operator should be strictly liable for damage caused by activities dangerous to the environment.

2. Without prejudice to paragraph 1, any person should be liable for damage caused or contributed to by not complying with applicable statutory or regulatory requirements or through wrongful, intentional, reckless or negligent acts or omissions. A violation of a specific statutory obligation should be considered fault per se.

#### **Guideline 6: Exoneration from liability**

1. Without prejudice to additional exonérations provided for in domestic law, the operator should not be liable, or in the case of (c) below not liable to the degree not apportioned to him or her, if the operator proves that the damage was caused:

- (a) By an act of God/force majeure (caused by natural phenomena of an exceptional, inevitable and uncontrollable nature);
- (b) By armed conflict, hostilities, civil war, insurrections or terrorist attacks;

(c) Wholly or in part by an act or omission by a third party, notwithstanding safety measures appropriate to the type of activity concerned but in the case of claims for compensation, only if the damage caused was wholly the result of wrongful intentional conduct of a third party, including the person who suffered the damage;

(d) As a result of compliance with compulsory measures imposed by a competent public authority.

2. In relation to paragraph 4 of guideline 4, exonerations additional to those referenced in subparagraphs 1 (a)–(d) above or mitigating factors may include:

(a) That the activity was expressly authorized and fully in conformity with an authorization given under domestic law, that allows the effect on the environment;

(b) That the damage was caused by an activity which was not likely to cause damage according to the state of scientific and technical knowledge at the time that the activity was carried out.

3. The operator may be exonerated wholly or in part towards a claimant if the operator proves that the damage resulted from the claimant's act or omission done with intent to cause damage, or that the damage resulted wholly or in part from the claimant's negligence.

### **Guideline 7: Joint and several liability**

In the event of multiple operators their liability should be joint and several, or apportioned, as appropriate.

### **Guideline 8: Claims for compensation**

1. Any person or group of persons, including public authorities, should be entitled to claim compensation for loss of life or personal injury, loss of or damage to property and pure economic loss in consequence of the occurrence of damage caused by activities dangerous to the environment in addition to, where appropriate, the reimbursement of the costs of preventive measures and reinstatement measures.

2. Domestic law may allow claims for compensation for environmental damage.

### **Guideline 9: Other claims**

1. Any person or group of persons should be entitled to seek response action by competent public authorities if neither the operator nor the competent public authorities concerned are taking prompt and effective measures to redress environmental damage, provided that the person or group of persons has a sufficient interest or suffers the impairment of a right if so required by domestic law.

2. Any person or group of persons within the meaning of paragraph 1 above should have the right to challenge in administrative or judicial proceedings the legality of any act or omission by private persons or public authorities that contravenes domestic laws or regulations relating to damage caused by activities dangerous to the environment.

3. Any person or group of persons sustaining damage should be entitled to any information directly relevant to the presentation of a claim for compensation from the operator or the competent public authority in possession of such information, unless such disclosure is specifically prohibited by law or violates the legally protected interests of third parties.

### **Guideline 10: Financial limits**

1. Liability pursuant to guideline 5, paragraph 1, may be limited in accordance with criteria established under any applicable domestic classification scheme for activities dangerous to the environment.

2. Given that the operator might be unable to meet his or her liability or that actual damages might exceed the operator's limit of liability, domestic law may provide for closure of potential compensation gaps by way of special funding or collective compensation mechanisms.

3. There should be no financial limit on liability arising under guideline 5, paragraph 2.

### **Guideline 11: Financial guarantees**

1. The operator should, taking into account the availability of financial guarantees, be encouraged or required to cover liability under guideline 5, paragraph 1, for amounts not less than the minimum specified by law for the type of activity dangerous to the environment concerned and should continue to cover such liability, during the period of the time limit of liability, by way of insurance, bonds or other financial guarantees.

2. The competent public authority should periodically review the availability of and the minimum limits for financial guarantees, taking into account the views of relevant stakeholders, including the specialized and general insurance industry.

### **Guideline 12: Time limits for presentation of claims**

1. Domestic law should establish that claims for compensation are inadmissible unless they are brought within a certain period of time from the date the claimant knew or ought to have known of the damage and the identity of the operator. In addition, claims should be inadmissible unless they are brought within a certain period of time following the occurrence of the damage.

2. Where the damage-causing incident is a series of occurrences having the same origin, the time limits established under the present guideline should run from the last of such occurrences. Where the damage-causing incident consists of a continuous occurrence, such time limits should run from the end of that continuous occurrence.

### **Guideline 13: Claims with foreign elements: applicable law**

1. Subject to domestic laws on jurisdiction and in the absence of special rules established by contract or international agreement, any claim for compensation that raises a choice-of-law issue should be decided in accordance with the law of the place in which the damage occurred, unless the claimant chooses to base the claim on the law of the country in which the event giving rise to the damage occurred.

2. The timing of the claimant's choice pursuant to paragraph 1 should be determined by the law of the forum.

### **Guideline 14: Classification of hazardous substances and activities or installations**

1. Domestic law should provide for lists of hazardous substances and their threshold quantities, activities or installations dangerous to the environment, to make apparent the nature and scope of operators' risk of environmental liability and thereby strengthen the insurability of the risk of damage.

2. To enhance their effectiveness, such lists should be exhaustive rather than indicative and give due recognition to domestic priorities, in particular social and economic needs, environmental and public health sensitivities or other special circumstances.

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