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**Fourth Programme for the Development and Periodic Review of
Environmental Law**

Note by the Executive Director

Addendum

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

Summary

Annex I to the present note contains the draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment, incorporating the comments from the three countries that submitted written comments following the Executive Director's invitation in September 2008 to the members of the Committee of Permanent Representatives to do so.

Annex II contains the report of the consultative meeting of government officials and experts to review and further develop draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment, held in Nairobi on 18 and 19 June 2008 (originally produced as document UNEP/Env.Law/CM./1/2), at which participants agreed upon the draft guidelines as annexed to the report.

* UNEP/GC.25/1.

Annex I

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

The purpose of the present Draft Guidelines is to highlight core issues that states will have to face when drafting domestic laws and regulations on liability and compensation for environmental damage. The Draft Guidelines discuss key elements for possible inclusion in any national/domestic legislation on the topic of environmental liability and compensation and offers specific textual formulations for possible adoption by legislative drafters. It is envisaged that the Draft Guidelines will be of assistance to, in particular, developing countries and countries with economies in transition, to create, as they deem appropriate, the necessary frameworks on which they might base national/domestic legislation or policy on liability and compensation for environmental damage.

Guideline 1: Objective

The objective of these Guidelines is to provide guidance to States regarding rules on liability, response action and compensation for damage caused by activities dangerous to the environment.

Guideline 2: Scope of application

1. These Guidelines relate to liability, response action and compensation for damage caused by activities dangerous to the environment.
2. These Guidelines are not intended to cover damage caused by activities dangerous to the environment which:
 - (a) Are covered by other national and/or domestic laws establishing special liability regimes; or
 - (b) Principally relate to national defense, international security, or natural disaster management.

Guideline 3: Definitions

1. "Activity dangerous to the environment" means an activity involving any of the hazardous substances referred to in Annex I or any activity listed in Annex II of these Guidelines.
2. "Damage" includes:
 - (a) Loss of life or personal injury;
 - (b) Loss of or damage to property;
 - (c) Pure economic loss;
 - (d) The costs of reinstatement measures of the impaired environment, limited to the costs of measures actually taken or to be undertaken;
 - (e) The costs of preventive measures, including any loss or damage caused by such measures; and
 - (f) Environmental damage.
3. "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 takes into account any other human – induced variation and natural variation; and
 - (b) Is significant which is to be determined on the basis of factors, such as:

- (i) The long-term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;
 - (ii) The extent of the qualitative or quantitative changes that adversely or negatively affect the environment;
 - (iii) The 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) The extent of any adverse or negative effect/impact on human health;
 - (v) The aesthetic, scientific, and recreational value of parks, wilderness areas, and other lands.
4. "Operator" means the person or persons/entity or entities in operational control of the activity, or any part thereof at the time when the damage occurred;
5. "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 effect environmental cleanup;
6. "Pure economic loss" means economic loss unaccompanied by personal injury or damage to property;
7. "Reinstatement measures" means any reasonable measures aiming to assess, reinstate, remediate or restore damaged or destroyed components of the environment;
8. "Response action" means preventive measures and reinstatement measures.

Guideline 4: Response action in the case of environmental damage

1. In the event of environmental damage or imminent risk of environmental damage resulting from an incident arising 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 damage or imminent risk of damage and the response action planned or taken and its effectiveness or expected effectiveness.
3. The 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. Unless otherwise provided for in these Guidelines, the operator should be strictly liable for damage caused by activities dangerous to the environment.
2. Without prejudice to paragraph 1 of this Guideline, 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. Any violation of a specific statutory obligation constitutes fault per se.

Guideline 6: Exoneration from Liability

1. Without prejudice to additional exonérations provided for in national and/or domestic law, the operator should not be liable, or in the case of (c) below liable to the degree apportioned to him considering an act or omission by a third party, 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, despite safety measures appropriate to the type of activity concerned;
- (d) Compliance with compulsory measures imposed by a public authority; or
- (e) An activity expressly authorized by and fully in conformity with an authorization given under domestic law that allows the effect on the environment.

2. 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

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

Guideline 9: Claims for other Response Action

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 has a sufficient interest or suffers the impairment of a right as may be required by national and/or domestic law.

2. Any person or group of persons within the meaning of paragraph 1 should have the right to challenge in administrative or judicial proceedings the legality of any act or omission by private persons or public authorities which contravene national and/ or domestic laws or regulations relating to the environment.

3. Any person or group of persons sustaining environmental damage should be entitled to any information directly relevant to the presentation of a claim for compensation from the operator and/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 national classification scheme for activities dangerous to the environment.

2. 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 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. Claims for compensation should not be admissible unless they are brought within (five) years from the date the claimant knew or ought to have known of the damage and the identity of the operator. Claims for compensation should, in any case, not be admissible unless they are brought within (10 to 30) years of 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 this 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 national laws on jurisdiction and in the absence of special rules established by contract and/or international agreement, any claim for compensation which raises a choice-of-law issue should be decided in accordance with the law of the place where 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.

Annex I

List of Hazardous Substances

For possible model formulations, see examples in other legal instruments.

Annex II

List of Activities and Installations Dangerous to the Environment

For possible model formulations, see examples in other legal instruments.

Commentary¹ to the draft guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment

Commentary to Guideline 2

National and/or domestic law should incorporate some or all of these exclusions.

Commentary to Guideline 3

National and/or domestic legislation should ensure that “pure economic loss” linked to environmental damage, and the costs of restoring/reinstating the environment as well as of preventive measures, are made eligible for compensation. As a basic rule, measures of restoration/reinstatement should aim for on-site replacement of the loss of natural resources damaged, unless their cost would be disproportionate to the damage sustained. In this regard, states could adopt flexible standards, based on contextually determined notions of reasonableness, by defining who is entitled to take measures, of what kind, and up to what level of environmental wholesomeness. In the event that restoration/reinstatement is physically impossible or its costs would be unreasonable, the law should require offsetting measures such as the introduction of equivalent components into the environment, or the taking of off-site measures.

Additionally, as regards environmental damage, national and/or domestic legislation might acknowledge such loss as being an intrinsic part of any approach to comprehensive legislation on liability, redress and compensation for environmental damage. In the event that national and/or domestic legislation incorporates such a comprehensive focus, national law might also put in place an appropriate mechanism for the assessment or valuation of compensation due to the loss of the use of the natural resources concerned.

In defining “operator” the law should assure that the primarily responsible party is also the one in the best position to act towards minimizing the costs of environmental damage, i.e. the costs of prevention as well as of redress.

National and/or domestic legislation should list activities deemed “dangerous to the environment” based on a combination of classification criteria.

Commentary to Guideline 4

National and/or domestic law should specify the operator’s and the competent public authority’s obligations and, conversely, rights to take action in response to environmental damages resulting from incidents arising during an activity dangerous to the environment. Specifically, the operator should be required to act as a “first responder” and whenever unsuccessful or unable to avert or minimize damage, to promptly notify the authorities. Conversely, the competent public authority should be entitled to obtain relevant information from the operator, require the operator to take action, or take such action itself or through third parties, if the requisite response action is likely not to be otherwise forthcoming, effective or timely.

Commentary to Guideline 5

National and/or domestic legislation should channel liability to the “operator”, i.e. the person or persons/entity or entities in control of the activity. Strict liability should be the standard applicable to environmental damage due to hazardous activities. Other environmental damage should be subject to liability based on fault.

¹ *This Commentary has been prepared by UNEP Consultants and Secretariat, as advised by the Advisory Expert Group on Liability and Compensation for Environmental Damage and by the Consultative Meeting of Government Officials and Experts to Review and Further Develop Draft Guidelines for the Development of National Legislation on Liability and Compensation for Environmental Damage; it is annexed to the Guidelines as indicative reference material.*

Commentary to Guideline 6

National and/or domestic law should include a generic “act of God/force majeure” basis for exoneration. In general, that basis will be understood to include natural phenomena of an exceptional, inevitable and uncontrollable nature. Another basis for exemption could be armed conflict, hostilities, civil war, insurrections, or terrorist attacks. Additionally, national law should retain a traditional, complete exemption from liability, namely for damage due to third parties’ conduct. It should further recognize the degree of a claimant’s contributory fault in causing the damage as a basis for a corresponding reduction of the operator’s liability vis-à-vis that person. Exemptions from liability should also consider compliance with compulsory measures imposed by public authorities and if the activity has been expressly authorized under domestic law.

Commentary to Guideline 7

To facilitate claimants’ recovery, multiple operators ought to be jointly and severally liable. States might wish to provide for the allocation of liability among multiple defendants on the basis of individual contributions to the damage sustained, with or without prejudice to the position of the claimant.

Commentary to Guideline 8

While recognizing the primary importance of legal claims for personal injury and loss of property, national law should recognize the compensability of environmental damage as well. Only public authorities, including their trustees should be entitled claim compensation for pure environmental loss.

Commentary to Guideline 9

Beyond enabling competent public authorities or trustees to take appropriate measures to redress environmental damage, national mechanisms for compensating damage to the environment must strike a balance between the respective role of individuals and of community institutions in protecting, preserving and restoring the environment. To this end, national law:

- Should permit civil society organizations and NGOs access to justice for the purpose of correcting any public authorities’ failure to redress environmental damage.
- Might grant any person the right to institute judicial proceedings against another person acting in contravention of provisions of environmental law without having to meet applicable standing requirements.
- Should enable a claimant to obtain relevant information directly bearing on his/her claim for compensation from the operator and/or the public authority in possession of such information unless disclosure of such information is specifically prohibited by law or violates the legally protected interests of third parties. Conversely, national law should enable the operator to obtain correspondingly relevant information from the competent public authority.

Commentary to Guidelines 10 and 11

An effective system of environmental liability, redress and compensation depends on adequate financial arrangements, such as insurance, letters of credit, bonds, etc. being in place to cover compensable claims for damage. Accordingly national law should require the operator to enter into and maintain appropriate financial arrangements commensurate with the operator’s potential liabilities.

When setting up any such financial arrangements states should pay special attention to their feasibility and effectiveness by cooperating closely with and taking into account the interests of all relevant stakeholders. In particular, it is recommended to consult the insurance sector on the availability and/or development of financial guarantees to cover liability under the Guidelines.

Commentary to Guideline 12

National and/or domestic legislation should incorporate two tier-based time limits into their environmental liability, redress and compensation legislation. Indicative limits are included in the Guidelines in brackets.

Commentary to Guideline 13

National and/or domestic legislation should incorporate the principle of *lex damni*, i.e., the law of the state where the environmental damage occurs or may occur, as the default rule applicable to environmental damage. Additionally, national law might give favourable consideration to permitting the claimant to choose the law where the event giving rise to the damage occurred as an alternative. National and/or domestic legislation that provides for this alternative should leave the timing of the claimant's choice of law to be determined by the law of the forum.

Annex I List of Hazardous Substances

Annex II List of Activities and Installations Dangerous to the Environment

National and/or domestic environmental liability legislation should provide for a special classification scheme for hazardous activities because it makes apparent the nature and scope of the risk of environmental liability and thereby strengthens insurability of risk.

As noted before, any national environmental liability, redress and compensation regime will require the identification of activities as dangerous to the environment. International as well as emerging national practice, suggest that the listing of specific activities in the relevant liability instrument is the most appropriate method of classification, because it makes apparent the nature and scope of the risk of environmental liability and thereby strengthens insurability of risk. It also may contribute to deterring environmental damage-causing activities. Activities could be listed either by category, property of substances involved, or a combination thereof.

Any list of hazardous substances may be subject to possibly applicable thresholds regarding their hazard potential, such as the quantity of the substances involved. Any classifications lists should be viewed as providing either indicative or exhaustive enumerations of activities dangerous to the environment, depending on national practice and/or policy preferences.

Examples of such lists – either separate or combined -- can be found in:

- 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (“Lugano Convention”), Annex I (dangerous substances) and Annex II (installations or sites for the incineration, treatment, handling or recycling of waste);
- OECD, Decision of the Council on the Exchange of Information concerning Accidents Capable of Causing Transfrontier Damage, 8 July 1988 - C(88)84/Final, Appendix III (threshold quantities of dangerous substances);
- 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, Annex I (hazardous substances and their threshold quantities for the purpose of defining hazardous activities);
- EU Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, Annex III.

Annex II

Report of the consultative meeting of government officials and experts to review and further develop draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment

I. Introduction

1. The United Nations Environment Programme (UNEP) convened a consultative meeting of government officials and experts to review and further develop draft guidelines for the development of national legislation on liability and compensation for environmental damage at its headquarters in Nairobi on 18 and 19 June 2008.

II. Opening of the meeting

2. The meeting was opened at 10 a.m. on 18 June by Mr. Bakary Kante, Director, Division of Environmental Law and Conventions, UNEP. In his remarks, he referred to the discussion on the issue of environmental liability, which had begun at the 1972 United Nations Conference on the Human Environment in Stockholm, had been considered further at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, and remained under discussion in the present day. He gave an overview of UNEP involvement in the subject, including its mandate as set forth in the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century (Montevideo Programme III). He noted that UNEP had received several requests from developing countries to devise guidelines that could assist them in developing legislation and procedures related to liability and compensation for environmental damages. He pointed out that there was a disparity between countries, given that, while most developed countries had appropriate regulations in place, developing countries lacked significant national regulations of that type. Accordingly, they either had no legislation applicable to cases of environmental damages or, where they did have such legislation, it was very limited in scope.

III. Organization of work

3. Discussions were facilitated by Ms. Iwona Rummel-Bulska, representative of the UNEP secretariat. The meeting adopted the following agenda:

1. Opening of the meeting and adoption of the agenda.
2. Review and further development of the draft guidelines for the development of national legislation on liability and compensation for environmental damage.
3. Other matters.
4. Closure of the meeting.

IV. Attendance

4. The meeting was attended by experts representing the following Governments: Argentina, Bangladesh, Bhutan, Burundi, Canada, Central African Republic, Chile, China, Colombia, Comoros, Côte d'Ivoire, Djibouti, France, Finland, Germany, Ghana, India, Indonesia, Kenya, Kuwait, Lesotho, Mali, Mauritius, Mexico, Mozambique, Nepal, Netherlands, Romania, Russian Federation, Samoa, Saudi Arabia, Serbia, Senegal, Seychelles, Sudan, Somalia, Sri Lanka, Syrian Arab Republic, Togo, Tonga, Uganda, United Republic of Tanzania, Yemen and Zambia.

6. Representatives of the following United Nations bodies and other intergovernmental organizations were present: African Centre for Technology Studies (ACTS), United Nations Industrial Development Organization (UNIDO), United Nations Framework Convention on Climate Change and World Bank.

7. Representatives of the following non-governmental organizations were present: Central Organization of Trade Unions (COTU), Cohort for Research on Environment, Urban Management and Human Settlements (CREUMHS), Emirates Environmental Group, Indigenous Information Network, International Centre for Environment, Social and Policy Studies, Kuwait Oil Company, Nile Basin Federation, Sahel Institute and Soroptimist International.

V. Summary of main points of discussions

7. The representative of the UNEP secretariat presented the document entitled “Draft guidelines for the development of national legislation on liability and compensation for environmental damage” and gave details on its genesis. UNEP had convened a legal expert group meeting in 2002, which had identified and recommended priority issues and gaps on which UNEP should focus its future work in the environmental liability and compensation fields. Some years later, as part of the implementation of Montevideo Programme III, UNEP had embarked on work on that topic and the first meeting of the UNEP Advisory Expert Group on Liability and Compensation for Environmental Damage had been convened. It had produced a set of recommendations containing elements of guidelines on liability and compensation for environmental damage for the use of States in developing relevant domestic legislation. During the second meeting of the Expert Group, held from 31 October to 2 November 2007, participants had reviewed and refined the draft guidelines.

8. The draft guidelines, which would be voluntary and were intended for application at the national level, were to be regarded as minimum guidelines on which national legislation could be based and which would require tailoring to specific national circumstances.

A. Discussion of the draft guidelines

9. The draft guidelines were renamed “draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment”. They were discussed during the meeting and their content and text was revised. It was agreed that the draft guidelines should be recognizable as guidelines rather than as model legislation, which was reflected accordingly in the document.

10. In the ensuing discussion, several experts expressed their support for the work of UNEP in that field and commended the organization on having taken the initiative to develop the draft guidelines.

11. Experts from Argentina and the Netherlands stated that, while they appreciated the efforts of UNEP to develop the draft guidelines, owing to the significant number of meetings in the environmental field and to the late arrival of the invitation to the meeting, there had not been sufficient time to review and consult on the draft guidelines, meaning that they reserved their right to submit comments at a later stage.

B. Outcome of the meeting

12. Participants agreed on the following recommendations:

(a) Participants revised and further developed the draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment, as annexed to the present report, and recommended to the Executive Director to submit them to the twenty-fifth session of the UNEP Governing Council in February 2009, for consideration with a view to their adoption;

(b) Participants requested that, following the adoption of the guidelines by the Governing Council, they should be disseminated to all countries, in particular developing countries and countries with economies in transition, with a view to assisting them to develop and update their national legislation in this field;

(c) Participants requested that the commentaries to the guidelines should be finalized, taking into account the revision of the draft guidelines and their further development at the meeting, and that those updated commentaries should be attached to the draft guidelines;

(d) Participants further requested that the draft guidelines and the commentaries thereon, together with the report of the meeting, be sent to all countries for information;

(e) Lastly, participants requested expeditious translation of the draft guidelines and the commentaries thereon into the six official United Nations languages, with particular emphasis on the correct translation of legal terms employed therein.

VI. Adoption of the report

13. The report of the meeting was adopted on Thursday, 19 June 2008, at 4 p.m.

VII. Closure of the meeting

14. The representative of the UNEP secretariat thanked participants for their constructive dialogue, which had made it possible to agree on the revised draft guidelines. She also said that she would endeavour to ensure that the wish expressed by participants to have expeditious translation and dissemination of the draft guidelines was fulfilled.

15. The meeting was closed on Thursday, 19 June 2008 at 4 p.m.

Annex

Draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment

The purpose of the present Draft Guidelines is to highlight core issues that states will have to face when drafting domestic laws and regulations on liability and compensation for environmental damage. The Draft Guidelines discuss key elements for possible inclusion in any national/domestic legislation on the topic of environmental liability and compensation and offers specific textual formulations for possible adoption by legislative drafters. It is envisaged that the Draft Guidelines will be of assistance to, in particular, developing countries and countries with economies in transition, to create, as they deem appropriate, the necessary frameworks on which they might base national/domestic legislation or policy on liability and compensation for environmental damage.

Guideline 1: Objective

The objective of these Guidelines is to provide an effective regime on liability, redress and compensation for damage caused by activities dangerous to the environment, taking into account, particularly, the polluter pays principle.

Guideline 2: Scope of application

3. These Guidelines apply to liability, redress and compensation for damage caused by activities dangerous to the environment.
4. These Guidelines do not apply to damage caused by activities dangerous to the environment:
 - (c) Covered by other national and/or domestic laws establishing special liability regimes; or
 - (d) Caused by activities dangerous to the environment which principally relate to national defense, international security, or natural disaster management.

Guideline 3: Definitions

9. "Activity dangerous to the environment" means any activity involving any of the hazardous substances referred to in Annex I or any activity listed in Annex II of these Guidelines.
10. "Damage" includes:
 - (a) Loss of life or personal injury;
 - (b) Loss of or damage to property;
 - (c) Pure economic loss;
 - (d) The costs of reinstatement measures of the impaired environment, limited to the costs of measures actually taken or to be undertaken;
 - (e) The costs of preventive measures, including any loss or damage caused by such measures; and
 - (f) Environmental damage.
11. "Environmental damage" means an adverse or negative effect on the environment that :
 - (a) Is measurable or otherwise observable taking into account, wherever available, scientifically established baselines recognized by a public authority that takes into account any other human – induced variation and natural variation; and
 - (b) Is significant which is to be determined on the basis of factors, such as:

- (vi) The long-term or permanent change, to be understood as change that will not be redressed through natural recovery within a reasonable period of time;
- (vii) The extent of the qualitative or quantitative changes that adversely or negatively affect the environment;
- (viii) The reduction or loss of the ability of the environment to
- (ix) Provide goods and services either of a permanent nature or on a temporary basis;
- (x) The extent of any adverse or negative effect/impact on human
- (xi) Health.

12. "Operator" means the person or persons/entity or entities in operational control of the activity, or any part thereof;

13. "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 effect environmental cleanup;

14. "Pure economic loss" means economic loss unaccompanied by personal injury or damage to property;

15. "Reinstatement measures" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment;

16. "Response action" means preventive measures and reinstatement measures.

Guideline 4: Response action in the case of environmental damage

5. In the event of environmental damage or imminent risk of environmental damage, the operator should take prompt and effective response action.

6. The operator should promptly notify the competent public authority of the response action taken and its effectiveness.

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

8. 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. Unless otherwise provided for in these Guidelines, the operator should be strictly liable for damage caused by activities dangerous to the environment.

2. Without prejudice to paragraph 1 of this Guideline, 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. Any violation of a specific statutory obligation constitutes fault *per se*.

Guideline 6: Exoneration from Liability

3. Without prejudice to additional exonérations provided for in national and/or domestic law, the operator should not be liable if the operator proves that the damage was caused:

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

(c) Wholly or in part by an act or omission by a third party done with intent to cause damage, despite safety measures appropriate to the type of activity concerned.

4. 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.

Guideline 8: Claims for Compensation

When redress is not possible, any person, including public authorities, should be entitled to compensation for loss of life or personal injury, loss or damage to property, and pure economic loss in consequence of the occurrence of caused by activities dangerous to environment damage as well as, where appropriate, the reimbursement of the costs of preventive measures and reinstatement measures.

Guideline 9: Claims for other Redress

4. 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 has a sufficient interest or suffers the impairment of a right as may be required by national and/or domestic law.

5. Any person or group of persons within the meaning of paragraph 1 should have the right to challenge in administrative or judicial proceedings the legality of any act or omission by private persons or public authorities which contravene national and/ or domestic laws or regulations relating to the environment.

6. Any person or group of persons sustaining environmental damage should be entitled to any information directly relevant to the presentation of a claim for compensation from the operator as well as 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 national classification scheme for activities dangerous to the environment.

2. 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 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. Claims for compensation should not be admissible unless they are brought within (five) years from the date the claimant knew or ought to have known of the damage and the identity of the operator. Claims for compensation should, in any case, not be admissible unless they are brought within (10 to 30) years of 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 this 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. In the absence of special rules established by international agreement, any claim for compensation which raises a choice-of-law issue should be decided in accordance with the law of the place where 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.

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List of Hazardous Substances

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List of Activities and Installations Dangerous to the Environment

For possible model formulations, see examples in other legal instruments.

Commentary² to the draft guidelines for the development of national legislation on liability, redress and compensation for damage caused by activities dangerous to the environment

Commentary to Guideline 1

As part of its introductory provisions, a national and/or domestic law should make explicit reference to the polluter pays principle as a basic organizational concept for environmental liability, redress and compensation.

Commentary to Guideline 2

National and/or domestic law should incorporate some or all of these exclusions.

Commentary to Guideline 3

National and/or domestic legislation should ensure that “pure economic loss” linked to environmental damage, and the costs of restoring/reinstating the environment as well as of preventive measures, are made eligible for compensation. As a basic rule, measures of restoration/reinstatement should aim for on-site replacement of the loss of natural resources damaged, unless their cost would be disproportionate to the damage sustained. In this regard, states could adopt flexible standards, based on contextually determined notions of reasonableness, by defining who is entitled to take measures, of what kind, and up to what level of environmental wholesomeness. In the event that restoration/reinstatement is physically impossible or its costs would be unreasonable, the law should require offsetting measures such as the introduction of equivalent components into the environment, or the taking of off-site measures.

Additionally, as regards environmental damage, national and/or domestic legislation might acknowledge such loss as being an intrinsic part of any approach to comprehensive legislation on liability, redress and compensation for environmental damage. In the event that national and/or domestic legislation incorporates such a comprehensive focus, national law might also put in place an appropriate mechanism for the assessment or valuation of compensation due to the loss of the use of the natural resources concerned.

In defining “operator” the law should assure that the primarily responsible party is also the one in the best position to act towards minimizing the costs of environmental damage, i.e. the costs of prevention as well as of redress.

National and/or domestic legislation should list activities deemed “dangerous to the environment” based on a combination of classification criteria.

Commentary to Guideline 4

National and/or domestic law should specify the operator’s and the competent public authority’s obligations and, conversely, rights to take action in response to environmental emergencies. Specifically, the operator should be required to act as a “first responder” and whenever unsuccessful or unable to avert or minimize damage, to promptly notify the authorities. Conversely, the competent public authority should be entitled to obtain relevant information from the operator, require the operator to take action, or take such action itself or through third parties, if the requisite emergency response is likely not to be otherwise forthcoming, effective or timely.

² *This Commentary has been prepared by UNEP Consultants and Secretariat, as advised by the Advisory Expert Group on Liability and Compensation for Environmental Damage and by the Consultative Meeting of Government Officials and Experts to Review and Further Develop Draft Guidelines for the Development of National Legislation on Liability and Compensation for Environmental Damage; it is annexed to the Guidelines as indicative reference material.*

Commentary to Guideline 5

National and/or legislation should channel liability to the “operator”, i.e. the person or persons/entity or entities in control of the activity. Strict liability should be the standard applicable to environmental damage due to hazardous activities. Other environmental damage should be subject to liability based on fault.

Commentary to Guideline 6

National and/or domestic law should include a generic “act of God/force majeure” basis for exoneration. In general, that basis will be understood to include natural phenomena of an extraordinary, inevitable and uncontrollable nature. Another basis for exemption could be armed conflict, hostilities, civil war, insurrections, or terrorist attacks. Additionally, national law should retain a traditional, complete exemption from liability, namely for damage due to third parties’ conduct intended to cause such damage. It should further recognize the degree of a claimant’s contributory fault in causing the damage as a basis for a corresponding reduction of the operator’s liability vis-à-vis that person.

Commentary to Guideline 7

To facilitate claimants’ recovery, multiple operators ought to be jointly and severally liable. States might wish to provide for the allocation of liability among multiple defendants on the basis of individual contributions to the damage sustained, with or without prejudice to the position of the claimant.

Commentary to Guideline 8

While recognizing the primary importance of legal claims for personal injury and loss of property, national law should recognize the compensability of environmental damage as well. Only public authorities, including their trustees should be entitled claim compensation for pure environmental loss.

Commentary to Guideline 9

Beyond enabling competent public authorities or trustees to take appropriate measures to redress environmental damage, national mechanisms for compensating damage to the environment must strike a balance between the respective role of individuals and of community institutions in protecting, preserving and restoring the environment. To this end, national law:

- Should permit civil society organizations and NGOs access to justice for the purpose of correcting any public authorities’ failure to redress environmental damage.
- Might grant any person the right to institute judicial proceedings against another person acting in contravention of provisions of environmental law without having to meet applicable standing requirements.
- Should enable a claimant to obtain relevant information directly bearing on his/her claim for compensation from the operator or the public authority in possession of such information unless disclosure of such information is specifically prohibited by law or violates the legally protected interests of third parties. Conversely, national law should enable the operator to obtain correspondingly relevant information from the competent public authority.

Commentary to Guidelines 10 and 11

An effective system of environmental liability, redress and compensation depends on adequate financial arrangements, such as insurance, letters of credit, bonds, etc. being in place to cover compensable claims for damage. Accordingly national law should require the operator to enter into and maintain appropriate financial arrangements commensurate with the operator’s potential liabilities.

When setting up any such financial arrangements states should pay special attention to their feasibility and effectiveness by cooperating closely with and taking into account the interests of all relevant stakeholders. In particular, it is recommended to consult the insurance sector on the availability and/or development of financial guarantees to cover liability under the Guidelines.

Commentary to Guideline 12

National and/or domestic legislation should incorporate two tier-based time limits into their environmental liability, redress and compensation legislation. Indicative limits are included in the Guidelines in brackets.

Commentary to Guideline 13

National and/or domestic legislation should incorporate the principle of *lex damni*, i.e., the law of the state where the environmental damage occurs or may occur, as the default rule applicable to environmental damage. Additionally, national law might give favourable consideration to permitting the claimant to choose the law where the event giving rise to the damage occurred as an alternative. National and/or domestic legislation that provides for this alternative should leave the timing of the claimant's choice of law to be determined by the law of the forum.

Annex I List of Hazardous Substances

Annex II List of Activities and Installations Dangerous to the Environment

National and/or domestic environmental liability legislation should provide for a special classification scheme for hazardous activities because it makes apparent the nature and scope of the risk of environmental liability and thereby strengthens insurability of risk.

As noted before, any national environmental liability, redress and compensation regime will require the identification of activities as dangerous to the environment. International as well as emerging national practice, suggest that the listing of specific activities in the relevant liability instrument is the most appropriate method of classification, because it makes apparent the nature and scope of the risk of environmental liability and thereby strengthens insurability of risk. It also may contribute to deterring environmental damage-causing activities. Activities could be listed either by category, property of substances involved, or a combination thereof.

Any list of hazardous substances may be subject to possibly applicable thresholds regarding their hazard potential, such as the quantity of the substances involved. Any classifications lists should be viewed as providing either indicative or exhaustive enumerations of activities dangerous to the environment, depending on national practice and/or policy preferences.

Examples of such lists – either separate or combined -- can be found in:

- 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (“Lugano Convention”), Annex I (dangerous substances) and Annex II (installations or sites for the incineration, treatment, handling or recycling of waste);
- OECD, Decision of the Council on the Exchange of Information concerning Accidents Capable of Causing Transfrontier Damage, 8 July 1988 - C(88)84/Final, Appendix III (threshold quantities of dangerous substances);
- 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, Annex I (hazardous substances and their threshold quantities for the purpose of defining hazardous activities);
- EU Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage, Annex III.