

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

The draft text as contained in Annex I of the note by the Executive Director on the report of the intergovernmental meeting to review and further develop draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters (UNEP/GCSS.XI/INF/6)

Commentary to the guidelines*

Commentary to the introductory paragraphs

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

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

Commentary to guideline 1

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

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

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

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

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

Commentary to guideline 2

To ensure the transparency of environmental information systems, the type and scope of the environmental information available and the basic terms and conditions under

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

which it can be obtained should be specified. Registers should be established and maintained and information officers should be designated within relevant public authorities.

Commentary to guideline 3

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

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

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

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

Commentary to guideline 4

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

Commentary to guideline 6

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

Commentary to guideline 8

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

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

The members of the public concerned should be given the opportunity to consult the information necessary to participate effectively in the process. Such information could be provided through websites and, if possible, directly to members of the public concerned having requested to be so notified or having otherwise been identified as in need of direct communication. Where appropriate, the relevant authorities should give the public additional assistance and explanations.

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

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

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

Commentary to guideline 9

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

Commentary to guideline 11

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

Commentary to guideline 14

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

Commentary to guideline 15

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

Commentary to guidelines 16 and 17

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

Commentary to guideline 18

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

Commentary to guideline 19

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

Commentary to guideline 20

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

Other barriers to access to justice include for example limitations on standing, difficulties in obtaining able legal counsel, unclear review procedures, corruption, a lack of awareness within review bodies of environmental issues and environmental law and weak enforcement of judgements and decisions. The effective implementation in countries' legal norms and regulations of the present guidelines can make a significant contribution to remove or reduce these barriers. To facilitate access to competent legal counsel the

establishment and support of legal assistance offices that provide free or low-cost legal advice on matters relating to the environment should be considered.

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

Commentary to guideline 21

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

In environmental cases, remedies such as compensation and restitution are often insufficient to reverse the situation to ex ante given the irreversible impacts of many environmentally hazardous acts and activities. Provisional measures, such as injunctive relief, are therefore important remedies to avoid irreversible damage. When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and other review bodies may issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is thus injunctive relief. An injunction can be final (permanent) or interim (temporary). An interim injunction is granted to restrain activity, or to require a person to undertake some act temporarily until a final decision can be made.

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

Other appropriate measures could include civil penalties.

Commentary to guideline 22

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

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

Commentary to guideline 24

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

Commentary to guideline 25

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

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

Commentary to guideline 26

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

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