

**Guidelines for the Development of
Domestic Legislation on Liability,
Response Action and Compensation for
Damage Caused by Activities Dangerous
to the Environment**

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

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;

(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 subparagraph (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, exonérations additional to those referred to 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.