

The Environmental Compensation Fund

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Outline

1. 2011 advisory opinion of the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS) and liability gap identified by it.
2. Rationale of the proposed Environmental Compensation Fund (ECF).
3. Existing international practice which may be relevant to the establishment of the ECF.
4. Key issues to be taken into account and decided upon in order to ensure the effective and smooth functioning of the ECF, once it is established.

Liability for damages arising out of activities in the Area

- Meaning of «activities in the Area» according to article 1 UNCLOS («all activities of exploration for and exploitation of» the resources of the Area).
- Contribution of the advisory opinion of the SDC.
- Liability of the sponsoring State (due diligence).
- Liability of the contractor and of the International Seabed Authority (ISA) (fault-based, link of causation).

The SDC advisory opinion and the liability gap identified by it

- 11 May 2010: request of the Council of the ISA to the SDC to render an advisory opinion on the subject of responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.
- 1 February 2011: advisory opinion rendered.
- Gap identified in relation to the situation where a contractor sponsored by a State party to UNCLOS incurs liability and is therefore under a duty to provide compensation, but is unable to meet its liability in full, while the sponsoring State is not liable under article 139, paragraph 2, of UNCLOS.
- Suggestion of the SCD: under such circumstances, the ISA should consider the establishment of a “fund” to compensate for the damage not covered.

The proposed ECF: its rationale

- Residual nature of the ECF: such a fund, once in existence, will be only called into question as an instance of last resort, in situations where compensation is not available from either the contractor (including through its insurer) or the relevant sponsoring State.
- Polluter pays principle (Principle 16 of the 1992 Rio Declaration on the Environment and Development) and internalization of environmental costs: any cost caused by pollution should be borne by the person responsible for causing the pollution itself.

The proposed ECF: existing international practice

- Existing practice provides several examples of international funds, e.g., in the areas of carriage of oil and hazardous and noxious substances by sea, transboundary movements of hazardous wastes and their disposal, nuclear accidents.
- National funds also exist, namely in the fields of seabed mining, land-based mining and offshore oil and gas exploitation.
- No full replicability as far the situation in the Area is concerned (uniqueness of the applicable legal regime, no ad hoc international treaty, peculiar nature of the contractors engaged in activities in the Area, ...).

The proposed ECF: key issues and policy options

- Notion of «compensable damage».
 - According to the SDC.
- Who should be compensated and for what.
 - Damage to the Area, to the high seas, to areas under national jurisdiction.
 - Actions brought by individuals?
 - A compensation cap?
- Operational matters.
 - Access to the ECF (and passive role of the Council and other ISA organs).
 - Financing of the ECF.
 - Administration of the the ECF.

Take-away points

- ECF intended to fill a liability gap and function as a last resort.
- Liability will continue to rest primarily with the contractor and the sponsoring State.
- Several considerations (of legal, economic and practical nature) remain to be dealt with in order to ensure the proper functioning of the ECF.
- Existing models of international and national funds not fully replicable.
- **Questions?**