

THE PEW CHARITABLE TRUST'S COMMENTARY

***ON THE REVISED CONSOLIDATED TEXT: DRAFT REGULATIONS ON
EXPLOITATION OF MINERAL RESOURCES IN THE AREA,
DATED 29 NOVEMBER 2024 (ISBA/30/C/CRP.1)***

Key

Black font, red font, and grey text-boxes are replicated from the Draft Regulations text.

Blue font represents commentary or edits proposed by The Pew Charitable Trusts.

~~{Regulation 55 Alt.~~

~~Purpose of the Environmental Compensation Fund~~

~~The [purpose of the] Environmental Compensation Fund [is to function as a “last resort” compensation fund only in the event that there is [unlawful] environmental damage caused by contractor activities that were not [foreseen in the Plan of Work or that arise form a breach of any condition of approval], then in accordance with the polluter pays principle the Contractor shall bear liability for the financing of any measure to mitigate that [unlawful] environmental damage and shall also be liable for compensation to any person affected by that [unlawful] environmental damage. [] If the Contractor is unable to meet that liability in full, [and the Sponsoring State is not liable under Article 139 (2) of the Convention] then, as a last resort, the environmental compensation fund may be called upon.~~

Regulation 55 ~~Alt.2~~

Purpose of the Environmental Compensation Fund

[13. The purpose of the Fund is to finance the implementation of any necessary measures designed to mitigate or compensate for any loss or damage to the Marine Environment, coastal states, [or damage caused to third parties] arising from activities conducted under an Exploitation Contract [that was not foreseen in the Plan of Work or that arise form a breach of any condition of approval]. The Fund shall cover at least 2 situations:

(a) Where there is damage caused by contractor activities that were not ~~consented~~authorized; or

(b) Where there is unforeseen damage caused by contractor activities that were ~~consented~~authorized activities or where the Contractor acted negligently.

24. Based on the polluter pays principle and as reflected in these Regulations, it is the responsibility of the Contractor to pay for any necessary measure to limit, mitigate, remedy and compensate any damage arising from the activities conducted under an Exploitation Contract.

32. In cases where situations may arise, where a Contractor does not meet its liability in full while the Sponsoring State is not liable under Article 139 (2) of the Convention, the compensation fund may be used as a last resort after exhausting all other possibilities.

4. Compensation to [any][a] person affected by damage pursuant to paragraph 3 shall include the costs ~~for~~of implementation of any necessary measures designed to mitigate any damage to the marine environment and its resources.

5. The Fund shall be subject to periodic review, including the consideration of whether Restoration has become technically and economically feasible and could be carried out in accordance with Good Industry Practice, Best Environmental Practices and Best

Available Techniques when the costs of such measures and efforts cannot be recovered from a Contractor or Sponsoring State, as the case may be.]

Comments

- Several delegations supported the inclusion of the new alternative hybrid version of draft regulation 55. It has thus been retained.
- It was suggested to change the order of paragraphs 1-3, so that the purpose is clearly set out in the first para.

It is our impression that **lack of consensus persists with regards the purpose of the ECF**. Questions that we think could be clarified amongst Council include:

- Should the ECF cover only environmental damage, or also other types of claims (e.g. personal and property damage, and economic loss)? (We believe the latter).
- Should the ECF only be accessible to the ISA, or also to States and private entities who suffer damage? (We believe the latter).
- Should the ECF cover damage caused only to and in the Area, or should it also cover damage beyond this, wherever it is located (e.g. in the high seas or the jurisdiction of a coastal state)? (We believe the latter).
- Should the ECF cover damage that was caused by only unlawful or negligent actions, or also those caused by permitted and lawful actions (with unanticipated consequences), accidents and ‘no-fault’ situations? (We believe the latter, noting that all existing international liability funds operate on a ‘strict liability’).
- Who can claim for pure ecological loss? Would it be the ISA on behalf of humankind? If so, what procedures would be in place to ensure conflict-management, and representative and inclusive decision-making about use of funds?

Without some consensus on these points, it will be very difficult to finalise these regulations, or develop a sensible scheme for this important compensation fund. Though we do agree that this version of DR55 is moving in the right direction.

We are unsure that the **‘last resort’ wording** is quite correct, nor the reference to sponsoring State liability. The purpose of the fund should be to provide prompt and adequate compensation to persons suffering harm. The structure we envision would be that a claim is made, to be covered by insurance, with any excess or type of claim not covered by insurance being covered by the ECF. Sponsoring States may have parallel liability, but the liability is not joint and several.

The current draft of DR55 is silent as to **how the ECF will relate to the Contractor’s insurance**. We think it would be helpful for the link to be made. E.g. DR55 could specify that recourse to the ECF is to be provided in cases “*where the damages exceed the amounts recoverable, or are exempt from liability, under the Contractor’s insurance required under regulation 36.*”

Useful resources to support further discussion on the ECF include the ISA Technical Study 27 on an Environmental Compensation Fund for activities in the Area,¹ and a paper of the ISA’s former Liability Working Group drawing from experience of other international compensation funds to consider application in the ISA’s context.²

¹ <https://www.isa.org.jm/publications/technical-study-27-study-on-an-environmental-compensation-fund-for-activities-in-the-area/>

² <https://www.cigionline.org/publications/use-compensation-funds-insurance-and-other-financial-security-environmental-0/>