



THE ENVIRONMENTAL COMPENSATION FUND

Introduction

1. This policy brief summarizes the key findings of ISA Technical Study No. 27 titled “Study on an Environmental Compensation Fund for Activities in the Area”.

2. Technical Study No. 27 provides background information on the possible establishment of an Environmental Compensation Fund (ECF) in connection with activities in the international seabed area (the Area).

3. The study presents the relevant legal framework with particular regard to the provisions contained in the United Nations Convention on the Law of the Sea (UNCLOS), Part XI and Annex III, as well as in the 1994 Agreement relating to the implementation of Part XI of UNCLOS (1994 Agreement).

4. The study also examines existing international environmental compensation funds, including those that are currently operating in the maritime industry and others which could operate in the future, as well as other mechanisms that have been created in the fields of liability for nuclear damage and liability for damage caused in connection with the transboundary movement of hazardous waste.

5. In addition, the study takes stock of the experience of the United Nations Compensation Commission and the United Nations Compensation Fund, as well as of national funds dealing with land-based mining and offshore activities.

6. Given the very different contexts in which such funds operate, the study also sheds light on the peculiarities of the Area from a legal, geographical and operational standpoint, with a view to verifying whether and to what

extent the features of existing funds could be transposed into the prospective ECF.

7. The study makes several suggestions relating to the creation of the proposed ECF, focusing on key issues such as the notion of compensable damage, the evaluation of damage and the existence of a cap on compensation, the modalities of access to the funds, the liability standard and any applicable exclusion, the standard of proof required, the identification of the contributing entities, the parameters for contribution, the size of the fund, the modalities of administration of the fund, insurance aspects and dispute settlement.

Background to the establishment of an Environmental Compensation Fund

8. On 1 February 2011, the Seabed Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS) rendered an advisory opinion on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.¹

9. The advisory opinion identified a potential gap in the legal regime governing liability for environmental damage in the context of activities in the Area. The gap occurs 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 at the same time the sponsoring State is not liable under Article 139, paragraph 2, of UNCLOS.

10. Under UNCLOS, liability for contractors and the Authority is fault-based. This means that liability can only arise for actual damage resulting from activities carried out in the Area.

¹ International Tribunal for the Law of the Sea, 2011. Reports of judgments, advisory opinions and orders: *Responsibilities and obligations of States with respect to activities in the Area*. Advisory Opinion, 1 February 2011.

In addition, such damage must be causally linked to a wrongful act of the contractor.

11. In view of this, the SDC in its advisory opinion suggested that ISA consider the establishment of a “fund” to compensate damage not covered. The purpose of the fund as envisaged by the SDC is considered to be of a residual nature in the sense that such a fund, once in existence, will be available as a last resort when compensation is not available from the contractor, either directly or through its insurer or the sponsoring State.

12. It is against this background that the establishment of an ECF for activities in the Area is currently under discussion in the context of the development of the ISA draft Regulations on the exploitation of mineral resources in the Area (draft exploitation regulations). Section 5 of Part IV of the draft exploitation regulations provides for the establishment of the ECF, outlines the possible purposes and how it could be funded.

Key issues

Compensable damage

13. The prospective establishment of an ECF raises several issues that relate to various aspects of its functioning. The first of these is the identification of the type of damage that may be compensated by the ECF.

14. In its advisory opinion, the SDC noted that, whilst neither UNCLOS nor the regulations adopted by ISA specified what may constitute compensable damage, it could be envisaged that this would include damage to the Area and its resources, constituting the common heritage of humankind, and damage to the marine environment.²

Whom or what is to be compensated?

15. A second string of issues relates to the identification of the eligible claimant entity with

regard to different types of damage that may occur.

16. As far as the geographic scope of application of the proposed ECF is concerned, the draft exploitation regulations limit the operation of the ECF to damages to the Area. As detailed in the technical study, it is possible that damage originating in the Area could spread to the high seas and to areas under the national jurisdiction or sovereignty of coastal States. Thus, the eligible entities will be determined by the type of compensable damage on a case-by-case basis.³

17. One option is to qualify ISA as the only entity eligible to receive compensation on behalf of all States parties. The status of the Area and its resources as the common heritage of humankind suggests that obligations relating to the preservation of the marine environment of the high seas and the Area are to be considered as being towards the community of States as a whole rather than one or more individual States.⁴

18. With regard to damage originating in the Area but suffered in maritime zones falling under the jurisdiction or sovereignty of coastal States, such States could be eligible to seek compensation from the ECF for the damage suffered in areas within their national jurisdiction or sovereignty, in cases where they are unable to receive full compensation from the contractor, and the relevant sponsoring State is not liable in accordance with the provisions of UNCLOS.⁵ The study also examines the question of whether to allow private entities to claim compensation for damage suffered by them.

19. The establishment of a cap on the liability of the ECF (which is not inconsistent with the content of Annex III of UNCLOS) would, in addition, secure the financial viability of the fund itself and has significant precedents in international practice.⁶

² ISA Technical Study No. 27, pp. 35-36.

³ ISA Technical Study No. 27, pp. 39-40.

⁴ ISA Technical Study No. 27, p. 40; Advisory Opinion, par. 180.

⁵ ISA Technical Study No. 27, p. 40.

⁶ ISA Technical Study No. 27, pp. 40-42.

20. International practice relating to existing compensation funds also provides for useful benchmarks in respect of requirements that could potentially form part of the rules governing the ECF. Reference can be made, for example, to the possibility of limiting recoverability of damage to the actual cost incurred for prevention, limitation or remediation of the damage caused, as well as, if practicable, for the restoration or rehabilitation of the impaired marine environment and to costs that are reasonable, justified and based on best available scientific evidence.⁷

Other operational issues to be addressed

21. The study identifies additional issues of a more operational nature that require further consideration by ISA.

- **Institutional nature of the ECF:** the possibility of the administration of the fund by ISA, instead of the establishment of another international organization.
- **Procedure to access the fund:** whilst it would seem appropriate to develop rules governing the modalities of access to the ECF in detail, consideration is needed on whether specific requirements should be developed in the context of the draft regulations or in the context of rules and procedures to be prepared by the Finance Committee as suggested in the text of the draft exploitation regulations.⁸
- **Financing of the ECF:** existing international practice shows that several alternatives may be considered, ranging from fixed annual payments or a levy based on the value of extracted minerals.⁹ In the case of contractors, a timing issue will also have to be considered, as they could, in principle, be required to contribute either from

the initial stages of exploitation or only from the moment in which commercial production starts. Furthermore, there is the question of whether the resources that have been collected in connection with activities that have been discontinued should remain available for future use by the ECF.

- **Administration of monies pertaining to the ECF:** a decision will have to be made at the outset regarding the currency for general purposes of the fund. The options available are either to choose a national currency or an international standard such as the Special Drawing Rights (SDRs) as used by the International Monetary Fund.

Clarification will be needed on which financial rules apply to the administration of the assets of the ECF, taking into account the ISA Financial Regulations and Rules.

Other relevant issues to address range from disbursements (with particular regard to the need to ensure transparency) and publication and dissemination requirements that may apply to reports on the operation of the ECF with regard to the collection of monies, the administration of assets and the payment of compensation.

- **Dispute resolution:** the refusal to provide compensation, in whole or in part, in relation to a specific instance of damage, may give rise to a dispute. Such a dispute could, for example, relate to the compensable nature of the damage claimed, the existence of a causal link between exploitation and the damage or loss, or the quantification of such damage or loss. Determination of the international or national forum that may exercise jurisdiction over such disputes will be required.

⁷ ISA Technical Study No. 27, p. 48.

⁸ See Regulation 54(2) of ISBA/25/C/WP.1.

⁹ ISA Technical Study No. 27, pp. 44-45.

Way Forward

22. The development of the ECF should be seen as an important contribution to the implementation of the suggestions formulated by the SDC to address the liability gap identified by the SDC. The establishment of the ECF is also a way to implement Article 235 of UNCLOS, setting out the principles of States' responsibility for the protection and preservation of the marine environment and their liability in accordance with international law.

23. In the negotiations of the draft exploitation regulations, the following will have to be taken into consideration with respect to the nature of the proposed ECF in accordance with the liability provisions in Part XI of UNCLOS:

- The first recourse for compensation will always remain the contractor or sponsoring State, supported by mandatory insurance requirements on the contractor.
- Given its residual nature, the ECF is intended to fill the liability gap identified by the SDC in order to ensure a last resort for compensation for environmental damage.
- The provisions relating to the ECF will not replace the liability rules set out in UNCLOS and explained in the advisory opinion.
- The ECF implements Article 235 of UNCLOS.

References

International Tribunal for the Law of the Sea, 2011. *Reports of judgments, advisory opinions and orders: Responsibilities and obligations of States with respect to activities in the Area*. Advisory Opinion, 1 February 2011., p. 10. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf

ISA Technical Study No. 27, *Study on an Environmental Compensation Fund for Activities in the Area*, 2021, 71 p. https://isa.org.jm/files/files/documents/ISA_Technical_Study-27.pdf



ABOUT THE INTERNATIONAL SEABED AUTHORITY

Made up of 167 Member States, and the European Union, ISA is mandated under the UN Convention on the Law of the Sea to organize, regulate and control all mineral-related activities in the international seabed area for the benefit of humankind as a whole. In so doing, ISA has the duty to ensure the effective protection of the marine environment from harmful effects that may arise from deep seabed related activities.