The Pew Charitable Trusts Intervention on Environmental Compensation Fund

Environmental Compensation Fund

Thank you Madam Facilitator for your briefing note and for the excellent questions you have provided to guide our discussion today.

Before we answer the specific question, we had a general comment we wished to make briefly.

While we support the inclusion of the Environmental Compensation Fund (ECF) in the regulations, we want to clarify our opinion that these regulations about the ECF are not enough on their own to establish a clear and comprehensive liability system, whereby contractors are held accountable for harm caused.

Creation of a fund held by the ISA is one element. But it is still unclear to us how a person harmed by activities in the Area should proceed. Do they apply to the ISA in the first instance? If so, who is deciding on their case, and on what basis? Do they have to seek redress in a national court first? If so, how does the ISA and the ECF relate to those proceedings? What if they are unable to access such national courts? The ISA's previous legal liability working group found that most sponsoring state laws at that time failed to establish appropriate compensation mechanisms at the national level, and called for leadership from the ISA to set rules at an international level, which has not been done.

We are also surprised to see that the role of insurance is not referenced in the ECF provisions. Surely a Contractor's insurance (as required under regulation 36) should cover claims as a first port of call, before damage can be recoverable from the ECF?

Overall, we are confused about how the ECF sits within a wider picture of a liability regime for deep seabed mining. How does the ECF relate to the compensation that the ISA may order contractors to pay to coastal states, under DR4? Does the ISA see itself claiming against the ECF as a guardian of the environment and resources of the Area? What judge or decision-maker is making a finding of liability, causation, loss and quantification of damage in order for the ECF to be accessible; and on the basis of what rules and procedures; and how does this fit in with national proceedings and insurance? We think the Regulations need more work to present a comprehensive regime for liability, before one specific element, the ECF can be meaningfully developed.

(a) What kind of damage is to be compensated?

Regarding the first question (a), Pew's first comment is that the Environmental Compensation Fund, or ECF, may be misnamed. We do not consider that its scope should be limited to environmental damage only. We believe member States are largely agreed that the purpose of the ECF is to cover the gap raised by the ITLOS Seabed Disputes Chamber in its 2011 Advisory Opinion. This is the situation in which a contractor is not able to meet its liability in full (for example due to insolvency), but the sponsoring State is also not liable, due to satisfactory discharge of its own obligations. This leaves an actor having suffered harm but with no recourse to compensation - and this is where the ECF steps in. Annex III to the Convention is clear that a contractor's liability is for '<u>any damage</u>' arising out of the conduct of a contractor's operations. This is not limited to environmental damage. The ECF should have the same scope. If the contractor causes harm to persons, property or livelihoods of third parties, these should also be types of damage that are claimable from the ECF, as well as environmental harm. In this regard, any legal person should be able to make a claim upon the fund, not only the ISA or member States.

For the avoidance of doubt, we believe it is important also that the ECF is worded to cover damages wherever they occur, and should not be limited solely to the seabed, or to international waters. We believe this is both consistent with UNCLOS as well as the ITLOS 2011 advisory opinion which does not constrain the scope of damage caused to others, nor of harm to the marine environment, to the Area.

We are also of the opinion that the ECF should not be limited to only cover damages caused by unlawful or negligent actions but should cover any damage arising from a Contractor's activities in the Area, other than environmental impacts that were foreseen and permitted in the contract, however it is caused. This reflects many of the interventions we heard yesterday with regard to DR 18bis underlining the need for strict liability of contractors consistent with the polluters pays principle.

(b) How will the funds and any interest generated be managed and by whom?

Regarding the second question (b), it also remains unclear to us how and by whom the funds will be managed.

We wonder if a helpful way forward would be for the Council to request the Finance committee to provide recommendations. Or to seek appropriate independent external advice via a study, on this question? Along these lines we believe it is important to note that there are separate functions required, which may need separate bodies.

One function is the day-to-day fund management, and this will include decisions about how to invest the fund. We presume an external fund manager could be hired by the ISA to do this. Though the ISA would need to determine first its investment strategy.

We are not sure whether a fund manager or someone else would be responsible for another function of determining how much funding is a minimum requirement for the fund, and how payments into the fund are calculated and collected?

A third function is managing claims to the fund and decision-making about claims and payment out of the fund, including whether a claim and claimant are eligible, and how much compensation should be paid. This is likely to be a complex process, and requires considerable thought about the capacity, expertise and impartiality required.

We recognise the importance to apply an evolutionary approach within the ISA, but would caution against allocating different functions of fund management to the same entity, or allocating functions of fund management to organs of the ISA that do not have the required expertise or capacity for such functions. Again, we think a study that could present different fund management and administration options to the Council for consideration would be helpful here.

(c) Whom is to be compensated?

Regarding the third question (c), as we have stated, we are of the firm view that the ECF should provide prompt and adequate compensation to any injured party, this includes the Authority, States and/or private entities who suffer any time of claimable damage.

We consider however that the ECF must be clear that it only covers compensation for damages that have not already been covered, either by an award of a national court that has been met, or by the contractor's

insurance. We consider the ECF regulations should clarify that the ECF covers only damage which is excluded or not sufficiently covered by the contractor's insurance.

(d) The standard of proof that will be required to access the fund

We are grateful for the fourth question (d). We have already noted that the regulations in general do not elaborate on the process, criteria, decision-maker or forum for determining liability, loss and quantification of damages; and we consider these points all need more consideration.

In terms of this specific question, as indicated previously, and in line with the polluter pays principle, we are of the view that the ECF should operate on a 'strict liability' approach to award damages.

It is relevant in this regard to note that all existing international liability funds of which we are aware operate on a 'strict liability' approach to damage award.

(e) What happens if there is damage to the environment before the money is paid?

On the fifth question

One scenario in which a shortfall may occur, is a timing one. And we agree with the delegations who covered this issue with the proposal to require ECF payments from a contractor before any activities commence under the contract.

We are also concerned with a second scenario in which a shortfall may occur, the quantity one raised by Australia & Netherlands, whereby claims could be made against the ECF which exceed the amount of the fund. It is unclear to us what quantities are expected to be held in the ECF. We are certainly concerned that a shortfall may be likely, and that the ECF may be small in size at the commencement of the first mining operations when risks are likely to be the highest. To address this issue, we recommend that the Council request the Finance Committee to provide recommendation on what it considers the requisite amount of funds for the ECF prior to commencement of commercial production, taking into consideration Contractor insurance requirements and any insurance caps. The Finance Committee could also then examine whether the proposed sources of money to the ECF set out in DR 56 will be sufficient. However we note this question may include some degree of prediction as to claims that may be made and the size of such claims, and it may be that some external expertise is required to assist with such prediction and quantification.

(f) What elements should be addressed in the Regulations and what parts should be covered in the Standard and Guidelines, or in rules and procedures of the fund?

Lastly, regarding question (f), we agree with Nauru's comment.

Drawing on the modalities developed by the intersessional WG on EIA, we are generally of the view that the regulations are the place for items which:

- implement the Convention in binding and enforceable terms
- express high-level obligations, without too much prescriptive detail,
- establish powers, rights and responsibilities of relevant actors, including setting a mandate for the making of subsidiary instruments; and

- For which amendment is expected only infrequently / exceptionally.

With this in mind, and with regards to the ECF, we think that the list just stated by Bangladesh sounded good. Though we also take Germany's point that such allocation between instruments may be premature at this stage.