

Financial Security: The Example of the Philippine Environmental Guarantee Fund

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Introduction

Negotiations under the Cartagena Protocol on Biosafety have made some progress on the text of a Supplementary Protocol on liability and redress for damage resulting from transboundary movements of living modified organisms (LMOs). However, some outstanding and contested issues remain to be resolved, among them Article 12 of the Supplementary Protocol, on financial security.

Article 12 currently provides that:¹

1. [Parties may, consistent with international [law][obligations,] require the operator to establish and maintain, during the period of any applicable time limit, financial security, including through self-insurance.]
2. [Parties are urged to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under domestic law implementing this Supplementary Protocol.]

The same text is included as Guideline 8 in the Proposal by the Co-Chairs on the Draft Guidelines on Civil Liability and Redress in the Field of Damage Resulting from Transboundary Movements

of Living Modified Organisms (23 April 2010).

The need for financial security

Insurance and/or other financial guarantees are critical to a liability regime for several reasons, among them where the liable party is declared bankrupt or insolvent or for some other reason cannot or does not pay for response measures or compensation. This is in order to ensure that response actions are taken in the event of damage or imminent threat of damage, and that no damage is left uncompensated or unremedied.

Financial security would also cover major disasters or accidents or situations where no party is found liable for any reason. There might also be situations where the cause and the liable persons are not immediately known, yet clean-up and redress is an immediate need.

If the liability of the operator is not secured by insurance or other financial guarantees, then the potentially liable party can simply avoid exposure through undercapitalization, limited liability companies, etc. Therefore, to adequately provide for redress in such situations, financial security and a supplementary compensation scheme should be ensured in both the Supplementary Protocol and the Guidelines on Civil Liability.

The Philippine Environmental Guarantee Fund

The Philippine Environmental Guarantee Fund (EGF) is an example of a model that could be used to establish a financial security mechanism and which would also address several issues such as the reluctance and/or refusal of insurance companies to provide cover, and the issue of burden on the operator to establish self-insurance and/or development of financial security instruments.

As part of the implementation of the Environmental Impact Statement System (EISS) in the Philippines, the EGF was created. Department Administrative Order No. 21 s. of 1992 known as 'Amending the Revised Rules and Regulations Implementing P. D. 1586 (EISS)' paved the way for its creation.²

The Philippine EGF is a negotiated amount, on a per project basis, to be set up by a project proponent which shall be readily accessible and disbursable for the immediate clean-up or rehabilitation of areas affected by damages to the environment and the resulting deterioration of environmental quality as a direct consequence of a project's construction, operation or abandonment. It shall likewise be used to compensate parties and communities affected by the negative impacts of the project, and to fund community-based environment related projects including, but not limited to, information and education and emergency preparedness programmes.³ The EGF is also an insurance scheme; it is self-insurance.

The EGF is a regulatory attachment to an environmental project such that if an environmental project is to be undertaken, part of the obligation of the proponent of the project under the law is to set up an EGF.

Thus, all environmentally critical projects, as determined by the Department, shall be required to set up an EGF, which shall comprise of three parts:

1. A multisectoral fund allocated expressly for environmental monitoring by a multiparty monitoring team;
2. A trust fund set aside for damage compensation to aggrieved parties, and to finance environmental restoration and the rehabilitation of environmental quality caused by project operations; and
3. A cash fund to be used by companies in implementing environmental enhancement measures.

The fund shall be managed by a multisectoral group

made up of community and local government representatives, the Department of Environment and Natural Resources (DENR) regional office staff, and industry representatives.⁴

Concretely, the EGF will provide for the following:

1. The immediate rehabilitation of areas affected by damage to the environment and the resulting deterioration of environmental quality as a direct consequence of project construction, operation, and abandonment;
2. The just compensation of parties and communities affected by the negative impacts of the project;
3. The conduct of scientific or research studies that will aid in the prevention or rehabilitation of accidents and/or environmental damages; and/or
4. For contingency clean-up activities, environmental enhancement measures, damage prevention programmes, including the necessary information education campaigns (IEC) and capability building activities.

Scope and coverage of the EGF include damages to life, property, and the environment caused by such risk, or requiring rehabilitation or restoration measures. In addition, it will also cover expenses for damage prevention measures, environmental education, scientific or research studies, IEC and training.

Under the EGF, the financial guarantee mechanism is in the form of a Trust Fund and Environment Guarantee Cash Fund. The Trust Fund can be in the form of environmental insurance, letters of credit, other financial instruments and other similar guarantee instruments without the need for any performance bonds. On the other hand, the Environment Guarantee Cash Fund will be for immediate use, such as for clean-up and redress, hence, it provides ready cash and it is unlimited since it needs to be replenished.⁵

In terms of payment of claims, the EGF provides a simpler process, wherein the EGF that is being managed by an EGF Committee will be paid directly to approved claimants. Claims are classified into emergency, compensatory or operating costs, and all claims are validated by the DENR regional office and approved by the EGF Committee.⁶

As stated earlier, the EGF is a regulatory attachment to an environmental project; hence, implementation of the EGF is done by the EGF Committee and by the Multipartite Monitoring Team (MMT)⁷. The

EGF Committee is formed through a Memorandum of Agreement (MOA) between the proponent and the DENR in consultation with Local Government Units (LGUs) and Non-Governmental Organizations/Peoples' Organizations (NGOs/POs). Meanwhile, the MMT is comprised of the core of the EGF Committee. The internal procedures or manual of operations of the EGF are agreed upon in the MOA. Thus, EGF Guidelines will vary among projects.

The amount of the EGF also varies among projects, as it is determined by the DENR based on the environmental risk assessment whereby the amount of the EGF is totally dependent on the risk that is posed by a particular activity or processes that are associated with a particular industry.⁸

An important point was raised by Dr. Ben Malayang III, *President, Society for the Conservation of Philippine Wetlands*, in the forum entitled "Replacing the Environmental Guarantee Fund with an Insurance Scheme: A Look into Advantages and Disadvantages", held on November 15, 2005 on risk assessment of environmental matters. To quote:

“In conducting risk assessment over environmental matters, it should consider risks that are human-induced as well as nature induced. Environmental risks involve risks not only to material in nature or directly measurable by physical entities but there also non-measurable, non-monetizable such as the eradication of a scared mountain, the threat to a cultural entity, and historical sites. These would pose a tremendous challenge to risk assessment that in fact in the science of environment to date, the whole notion of risk assessment is still a very, very questionable topic. There are no agreed principles or much less, protocols and technologies to precisely pin down environmental risks. There are attempts to determine environmental vulnerabilities but pinning down the monetizable aspect of potential, unlikely threats, and including the likely threats to both human and non-human entities as well as properties is technical challenge to the scheme that needs to be undertaken.”

Under the Administrative Order issued by the DENR, violation of the EGF will be penalized by Revocation of the Environmental Compliance Certificate (ECC)⁹ when claims are not paid and

late payment of claims by the operator will bear interest.¹⁰

Conclusion

The provision of financial security is essential to the functioning of a liability regime so that no damage is unredressed. The Philippine EGF is one example of a good mechanism that can protect the environment even in cases of insolvency, with the aim of enabling operators to cover their responsibilities. It is also a good mechanism to prevent possible damage to the environment and biodiversity. The EGF provides a venue for both the proponents or the project or the operator and the public concerned for reconciling interests and needs.

¹ Annex I of Appendix I [Supplementary Protocol] UNEP/CBD/BS/GF-L&R/2/3, page 12.

² ESCAP Virtual Conference, Integrating Environment Considerations into Economic Policy Making Processes, http://www.unescap.org/drpad/vc/conference/ex_ph_4_peg.htm

³ Republic of the Philippines, Department of Environment and Natural Resources Administrative Order No. 2003-30, issued by Department Secretary Elisea G. Gozun.

⁴ Republic of the Philippines, House of Representatives, House Bill No. 0263, Introduced by: Representative Belma A. Cabilao.

⁵ Presentations given by Dr. Marlito L. Cardenas in the forum entitled "Replacing the Environmental Guarantee Fund with an Insurance Scheme: A Look into Advantages and Disadvantages", held November 15, 2005.

⁶ Ibid.

⁷ Multipartite Monitoring Team (MMT) - community-based multi-sectoral team organized for the purpose of monitoring the proponent's compliance with the Environmental Compliance Certificate (ECC) conditions, Environmental Management Plan/Program (EMP) and applicable laws, rules and regulations as defined in the Department of Environment and Natural Resources Administrative Order No. 2003-30.

⁸ Reactions given by Mr. Rene Morente, Environmental Manager, Mirant Philippines, based on the Proceedings of the forum entitled "Replacing the Environmental Guarantee Fund with an Insurance Scheme: A Look into Advantages and Disadvantages", held November 15, 2005.

⁹ The Environmental Compliance Certificate (ECC) is a document issued by the Department of Environment and Natural Resources (DENR) after a positive review of an ECC application, certifying that based on the representations of the proponent, the proposed project or undertaking will not cause significant negative environmental impact. The ECC also certifies that the proponent has complied with all the requirements of the EIS System and has committed to implement its approved Environmental Management Plan. The ECC contains specific measures and conditions that the project proponent has to undertake before and during the operation of a project, and in some cases, during the project's abandonment phase to mitigate identified environmental impacts as defined in the Department of Environment and Natural Resources Administrative Order No. 2003-30.

¹⁰ See footnote 6.