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### ENVIRONMENTAL INSURANCE FUNCTIONS: LEGAL ASPECT

**Abstract.** The state of regulatory support of the compensatory and preventive functions of environmental insurance has been studied. As a research method, a systematic approach has been chosen, which explores environmental insurance not only as a separate type of profit-seeking activity, but first of all as the component of economic and legal mechanism in the field of environmental relations, an element of the legal mechanism for providing environmental safety and a means to prevent and compensate for environmental abuses.

The system of environmental funding sources financing has been analysed. It is determined that, unlike other funds for financing environmental protection measures, environmental insurance funds are used exclusively to protect the policyholders' proprietary interests. Despite the fact that in case of an insured event occurrence a natural object may be destroyed or damaged, the obligation to use the funds received as insurance payments for environmental protection measures is not provided for in the legislation of Ukraine.

It has been established that the possibility of using the insurance funds in environmental insurance for financial support of preventive measures related to the reduction of environmental insurance risk, provided for by the environmental legislation of Ukraine, contradicts the provisions of the insurance legislation of Ukraine as it pertains to insurance reserves placement.

The conclusion has been drawn on the suitability of legal support of the ecological function of environmental insurance, which is to ensure the quality of the environment.

In order to reflect the ecological function of environmental insurance at the regulatory level, it has been proposed: to capture in the legislation of Ukraine the obligation of the insured to use the insurance payment associated with causing harm to natural objects, to restore the wholesomeness of such objects and to eliminate the negative changes in the environment that led to the occurrence of the relevant insured event; to create a guarantee fund for financing activities related to the environmental insurance risks mitigation.

**Keywords:** legal regulation, environmental insurance, environmental insurance functions, economic and legal mechanism in the field of environmental relations, environmental safety legal mechanism.

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## ФУНКЦІЇ ЕКОЛОГІЧНОГО СТРАХУВАННЯ: ПРАВОВИЙ АСПЕКТ

**Анотація.** Досліджено стан нормативно-правового забезпечення компенсаційної та превентивної функцій екологічного страхування. За метод дослідження обрано системний підхід, відповідно до якого екологічне страхування розглядається не лише як окремий вид господарської діяльності, що здійснюється з метою отримання прибутку, а передусім як складова економіко-правового механізму в галузі екологічних відносин, елемент правового механізму забезпечення екологічної безпеки і спосіб компенсації та попередження екологічної шкоди.

Проаналізовано систему джерел екологічного фінансування. Визначено, що, на відміну від інших фондів фінансування природоохоронних заходів, страхові фонди в екологічному страхуванні використовуються виключно для захисту майнових інтересів страхувальників. Попри те, що в результаті страхового випадку може бути знищено або пошкоджено природний об'єкт, обов'язок використовувати кошти, отримані як страхові виплати, на природоохоронні заходи, у законодавстві України не передбачений.

Установлено, що можливість використовувати кошти страхових фондів в екологічному страхуванні для фінансового забезпечення запобіжних (превентивних) заходів, пов'язаних із зниженням страхового екологічного ризику, яка передбачена екологічним законодавством України, суперечить положенням страхового законодавства України в частині правових засад розміщення коштів страхових резервів.

Зроблено висновок про доцільність правового забезпечення екологічної функції екологічного страхування, яка полягає в забезпеченні якості навколишнього природного середовища.

Для відображення екологічної функції екологічного страхування на нормативному рівні запропоновано: 1) закріпити в законодавстві України обов'язок страхувальника використовувати страхову виплату, пов'язану із заподіянням шкоди природним об'єктам, на відновлення якісного стану таких об'єктів і на ліквідацію негативних змін у навколишньому природному середовищі, які призвели до настання відповідного страхового випадку; 2) створити гарантійний фонд фінансування заходів, пов'язаних із зниженням рівня страхових екологічних ризиків.

**Ключові слова:** правове регулювання, екологічне страхування, функції екологічного страхування, економіко-правовий механізм у галузі екологічних відносин, правовий механізм забезпечення екологічної безпеки.

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**Introduction.** Environmental insurance as a complex legal institution combines regulations of many areas of law: financial, civil, economic, administrative, environmental, and others. If that is the case, the integrated nature of environmental insurance should also affect the combination of its general social and special legal functions.

However, the environmental function as a general social function of environmental law, which involves the quality of the environment, is not actually translated into the legal regulation of environmental insurance. With this in mind, the authors of the article seek to draw attention to the problems of improving the legal regulation of environmental insurance in this area.

**Research analysis and problem statement.** General issues of insurance functions were the subject of research by representatives of legal and economic science M. Brahynskiy, V. Vitrianskyi, V. Musin, I. Pokrovskiy, V. Serebrovskiy, V. Bazylevych, A. Zaliyev, P. Bilenchuk and others. Peculiarities of ecological insurance functions were studied in the works of H. O. Motkin, M. Semenov, V. S. Denha, N. Yu. Kotelnikov, A. V. Polutorny.

The purpose of the article is to substantiate a possibility and relevance of expanding the functional purpose of environmental insurance as a way to compensate for environmental damage and prevent negative changes in the environment on the basis of general provisions of the theory of law, systemic analysis of applicable environmental laws, as well as study of foreign experience.

**Methodology and research methods.** The methodological basis of the research consists of general scientific and special legal methods of cognition. Definition of the legal nature of environmental insurance and its functional purpose, taking into account the interdependence between the actual state of the relevant social relations and the need for their regulation, determined the use of the dialectical method of cognition. With the help of system analysis, environmental insurance is being studied as an element of the system of economic and legal mechanism in the field of environmental relations, and a component of the mechanism of environmental safety. The use of the formal-logical method allowed us to identify the weaknesses of the current legislation and to make proposals for its improvement.

**Results of the research.** From the legal point of view, the notion *function* is defined as the main areas of influence of legal norms on the relevant social relations. This is the general legal approach. Along with this, from the viewpoint of the comprehensive approach, the notion *function* is interpreted more broadly and is considered through the correlation between «a part and the whole, where existence or any manifestation of the part provides existence or any form of manifestation of the whole» [1, p. 31].

In this regard, examining the functions of environmental insurance from the viewpoint of the comprehensive approach, it should be borne in mind that environmental insurance is an integral part of two complex legal institutions: 1) economic and legal mechanism in the field of environmental relations; 2) legal mechanism for providing environmental safety.

As part of the economic and legal mechanism in the field of ecological relations, environmental insurance is an additional source of financing environmental measures [2, p. 50]. According to the applicable laws of Ukraine, the main sources of environmental financing are: 1) the State Budget of Ukraine; 2) the republican budget of the Autonomous Republic of Crimea; 3) local budgets; 4) funds of enterprises, institutions and organizations, funds for environmental protection; 5) voluntary contributions; 6) other financial resources (clause b of Article 41, Article 42 of the Law of Ukraine *On Environmental Protection* [3]). For the purposes of ongoing funding as part of the above budgets, the State fund, the republican fund of the Autonomous Republic of Crimea and local funds of environmental protection are established (Article 47). A reserve fund is set for extraordinary expenses (Article 24 of the Fiscal Code of Ukraine [4]).

The most significant feature of the above funds are the purposes and areas of their use. According to Article 47 of the Law of Ukraine *On Environmental Protection*, using financial resources of such funds is possible only within the designated purpose — to finance environmental measures, with the list approved by the resolution of the Cabinet of Ministers of Ukraine [5].

In contrast, environmental insurance funds, established at the expense of insurance contributions, are spent on insurance payments to protect the property interests of the insured

without a mandatory requirement (principle) for the designated use of the funds received as insurance payments for environmental measures. Inter alia, this rule applies to those insurance cases which resulted in destroying and damaging natural sites.

The only legal reference, to be considered by convention as a reference, which is aimed at providing insurance payments for environmental purposes, is clause 9 of the Procedure and Rules for mandatory liability insurance of an exporter and a person responsible for disposal (removal) of hazardous wastes, on compensation for damage which may be inflicted to the health of a person, property and the environment during transboundary movement and disposal (removal) of hazardous wastes [6]. This is the provision according to which the funds received as the insurance indemnification, in case of damage to the environment, are allocated to state and local environmental funds, which, in turn, are used to finance environmental measures.

This provision of the law is definitely worth attention and attests to the possibility, relevance and necessity to allocate the funds received as insurance payments under environmental insurance contracts to make payments for works related to eliminating adverse effects of natural or technogenic accidents (disasters), recovery of natural sites quality.

However, for its effective implementation, it is necessary, firstly, to clearly divide «any damage inflicted to the environment», depending on the entity, into the damage caused to the state and damage inflicted to natural sites (resources) owned or used by individuals and legal entities. In the latter case, beneficiaries will be the owners or users of such natural sites (resources), but not the funds mentioned above. Secondly, it is necessary to amend clause b of Part 2, clause b of Part 2 of Article 47 of the Law of Ukraine *On Environmental Protection* in terms of expanding the sources of state and local funds for environmental protection through appropriate insurance payments, and to provide for similar rules for other types of environmental insurance.

In addition, while analysing environmental insurance as a means to compensate for environmental damage, it should be noted that such indemnification is characterized by other limitations. According to Article 9 of the Law of Ukraine *On Insurance* [7], insurance indemnity shall not exceed the amount of direct damage suffered by the insured, with indirect losses considered insured, if provided for by the insurance contract. Provided no standard contract of mandatory environmental insurance contains provisions for recovery of indirect damages, losses of profit and expenses, necessary to restore the quality of natural resources, remain beyond the scope of the damage which can be indemnified by environmental insurance funds.

At the same time, analysing foreign experience in the legal regulation of environmental insurance, it should be noted that the possibilities of environmental insurance enable to balance compliance with the principle of full indemnification for environmental damage with the financial stability of insurers.

In most countries of the world legal regulation of environmental insurance is derived from the requirements of the laws on liability for environmental damage. Thus, in the 1980s, in accordance with the US Comprehensive Environmental Response Compensation and Liability Act — CERCLA and the Superfund Amendment and Reauthorization Act — SARA [8] provided for that liability for environmental pollution «is not only strict or no fault, but also has retroactive effect». Such liability was established for both actual and prospective pollution and was not dependent on preventive measures, taken by a contaminator to avert pollution. At first, these requirements had an adverse impact on the US insurance market, demonstrating an imperfective character of the existing environmental insurance system [9], but over time, the country has developed mechanisms which enable to balance compliance with the principle of full reimbursement for environmental damage and financial stability of insurers. The most important advantage and prerequisite for the effective development of environmental insurance in the United States was the fact that the conditions of Environmental Impairment Liability or EIL took into account the peculiar features of certain activities of policy holders, and such conditions were rectified according to provisional environmental challenges in the light of the necessity to properly assess environmental insurance risks.

Environmental insurance was developing in the same manner in Great Britain. In this country, stricter environmental liability requirements, associated with the adoption of the Environmental Protection Act [10] of 1990 and the Water Resources Act [11] of 1991, also affected insurance. However, development of Environmental Impairment Liability (EIL), which specifies the list of risks to be insured in each case, enabled to provide indemnification for environmental damage with regard to expenses for restoring the quality of natural sites [12; 13].

Analysing environmental insurance as a component of the mechanism of legal provision of environmental safety, it should be noted that in this case insurance is part of a wide range of heterogeneous, in their nature, but interrelated political, economic, organizational, legal and other measures (Part 2 of Article 50 of the Law of Ukraine *On Environmental Protection*). In their entirety, these measures are also characterized by a general functional focus. Taking into account the peculiarities of establishment and operation of insurance funds, it is possible to specify such an impact by placing a special emphasis on the preventive function of environmental insurance.

The preventive function of environmental insurance was defined in the literature of the subject as creating economic incentives to avoid environmental damage in the future [14]. In addition, given the general interpretation of the term *preventive* [15] (French *preventif*, Latin *praeventus* — «preventive, anticipatory»), as well «as on the basis of certain provisions of environmental laws, the preventive function of environmental insurance can be defined as one which manifests itself in two directions: 1) in the preventive nature of establishing environmental insurance funds (with regard to the time of environmental damage); 2) in the use of these funds to finance preventive measures related to the reduced level of environmental insurance risks» [16, p. 87].

Relevant provisions of the laws of Ukraine are contained, for example, in the Concept of Protection of Population and Territories in the Event of Threats and Emergencies [16], which refers implementation of targeted types of insurance to the daily functions and advanced readiness (clause V) and mentions the possibility to use financial resources of insurance funds for financing measures to prevent emergencies (clauses VI, VII).

Similar provisions are also provided for in the National Program for Water Management Development, as well as in the National Program for Environmental Protection and Reproduction of the Azov and Black Seas [17], which state that environmental risk insurance funds may, in some cases, be used to finance specific national environmental programs.

However, the laws do not define any legal mechanism for financing such measures at the expense of insurance funds. The financial activities of insurers are strictly regulated by applicable laws, which do not provide for such an opportunity.

According to Part 8 of Article 2 of the Law of Ukraine *On Insurance*, the subject of direct activities of an insurer may be insurance, re-insurance and financial activities related to establishment, allocation of insurance reserves and their management. Given that insurance reserves are established to ensure future payments of insurance premiums and insurance indemnity (Part 1 of Article 31 of the Law of Ukraine *On Insurance*), the laws impose restrictions on the forms and conditions of allocation of these reserves. These funds shall be placed taking into account security, efficiency, liquidity, diversification and shall be represented by assets, with the exclusive list of categories provided for by clause 20 of Article 31 of the Law of Ukraine *On Insurance*, namely: funds on the current account; bank deposits; foreign currency investments; real estate; shares, bonds, mortgage certificates, securities issued by the state; right of subrogation against re-insurers; investments in the economy of Ukraine in the areas specified by the Cabinet of Ministers; bank metals; cash in banks.

The exclusive list of investment areas of the Ukrainian economy, approved by the Resolution of the Cabinet of Ministers of Ukraine *On Approval of Investment Areas of the Economy at the Expense of Insurance Reserves* [18], includes: 1) development and implementation of high-tech equipment, other innovative products, resource and energy saving technologies; 2) development of tourism infrastructure; 3) extraction of minerals; 4) recycling of mining and metallurgical wastes; 5) housing development; 6) development of transport infrastructure, including

construction and reconstruction of highways; 6) development of the communications and telecommunications sector; 7) development of the mortgage market through purchasing securities issued by the National Mortgage Agency.

In accordance with the Regulations on Mandatory Criteria and Standards of Sufficiency, Diversification and Quality of Assets, which represent insurance reserves for types of insurance other than life insurance [19], investment in the economy in these areas (except for investment in mortgage market development) shall not exceed a total of 10 percent of insurance reserves, with 5 percent of investment in a separate investment facility.

Therefore, allocation of insurance reserves for preventive measures is limited and possible only: a) in the areas whose exclusive list is provided for by the Resolution of the Cabinet of Ministers № 1211 dated August 17, 2002; b) within the framework of the above amounts of funds; c) on the terms of investment.

In contrast, for some other types of compulsory insurance, the law explicitly provides for establishment of funds of preventive measures. In particular, according to Article 43-1 of the Law of Ukraine *On Mandatory Insurance of Legal Liability of Owners of Surface Vehicles* [20], the fund of preventive measures is established by the Motor (Transport) Insurance Bureau (MTIB) to take preventive measures aimed at higher road safety and reduced number of insurance cases for the relevant type of insurance. The sources of this fund are deduction of insurance premiums for this type of insurance in the amount determined by the Panel of the MTIB, but not more than 1 percent inclusive, as well as voluntary contributions and donations. Directions of financing in this case are determined under the Regulations on the Preventive Measures Fund of the MTIB, approved by the Decision of the MTIB Panel.

With this consideration in mind, as well as on the basis of the general provisions of the insurance laws, we can conclude that it is quite possible to finance preventive measures, provided for by the acts of the environmental laws, which are aimed at reducing the level of environmental insurance risk. However, introduction of appropriate amendments to the laws should be the necessary legal basis, in particular, establishment of a financial mechanism for implementing such preventive measures, as well as setting an appropriate fund of preventive measures at the legal level.

**Conclusions.** Summarizing the above, we can conclude that the limited compensatory and preventive functions of environmental insurance indicates feasibility of the legal support of the ecological function of environmental insurance, which is closely related to the compensatory and preventive functions, but is implemented in a slightly different area.

This function lies in ensuring the quality of the environment by implementing: firstly, the possibility, inherent in the insurance model itself, but not provided by law, to allocate environmental insurance funds to preventive measures aimed at avoiding negative changes in the environment; secondly, the possibility, declared in the laws, but not provided with specific legal norms, to use the financial resources of insurance funds to finance measures related to eliminating the adverse effects of natural or technogenic accidents (disasters) by establishing an obligation to use funds received as insurance payments under environmental insurance contracts for the intended purpose — for financing measures to restore the quality of natural sites.

In our opinion, the ecological function of environmental insurance should become the most important feature of insurance protection in the sphere of ecological relations.

In order to reflect the ecological function of environmental insurance at the regulatory level, we suggest supplementing the Law of Ukraine *On Environmental Protection*, Article 49-1, which shall provide: an obligation of the insured and the beneficiary to use indemnification, related to compensation, for the damage inflicted to the insured natural sites, to finance measures pertaining to the restoration of the quality of such sites, as well as to eliminate negative changes in the environment which have led to occurrence of the relevant insured event; 2) creation of the Guarantee Fund for financing measures related to reducing the level of environmental insurance risks and providing environmental safety.

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