

ASOC ANALYSIS OF FIRST ANTARCTIC LIABILITY REGIME

At the XXVIII Antarctic Treaty Consultative Meeting held in Stockholm in June, the parties to the Antarctic Treaty's Environmental Protocol finalized an important new Annex to the Protocol, on *Liability Arising from Environmental Emergencies*. The Liability Annex was adopted as a legally binding Measure, and will enter into force once all the present Consultative Parties have ratified it. A Decision adopted at the same time commits Parties to annually evaluate progress towards its becoming effective.

While it is not the comprehensive liability regime that was hoped for by many, the Stockholm Annex does represent a significant step forward in realizing the objectives of Article 16 of the Madrid Protocol. The positive concepts contained in the Annex include:

1. Article 2(f) expands the definition of response action. Response action under the Annex is not limited to steps taken to contain an emergency; it may also include clean-up actions.
2. Some of the most important text in the Annex is in Article 6, which provides a much-needed incentive for operators to take immediate response action and thereby avoid liability. If an operator fails to take such action, it is still liable for the cost of response action taken by other Parties, or it must pay the clean-up cost to the fund established in Article 12.
3. Despite a few specific exemptions in Article 8, Article 6(3) establishes a strict liability standard. Unlike negligence, which tends to create arbitrary exemptions, strict liability unequivocally holds operators liable for damage caused. Further, the strict liability standard prevents Parties from successfully advocating exemptions that would only apply to a single class of operators.
4. Article 6(2)(a) and (b) establish the critical link between the failure to act and liability by creating a disincentive for operators to conclude that a response action is simply not feasible. Operators cannot escape liability where response action was indeed feasible. This article prevents a situation where the increased damage would result in a decreased likelihood of liability.
5. Article 6(2) speaks to residual liability in cases where operators neglect to take response action by giving the State Party an incentive to monitor private operators.
6. Article 5(2) on response action deals with the situation where someone other than the causal operator discovers the emergency. Article 5(2) is a major step in protecting the environment because it specifically accounts for a Party other than the causal operator taking response action.
7. Article 5(3)(a) establishes a procedure that is intended to encourage other Parties to step in and take action when an emergency is found by someone who didn't cause it.
8. Article 5(4) provides for some Party to initiate response action in the situation where multiple operators may be responsible but it is not immediately clear which Party is the causal Party. This is certainly a positive development because it attempts to ensure that Parties do not sit around with their hands tied after an emergency when the identity of the causal operator is unknown.
9. Article 8 on exemptions from liability is also quite significant because it provides an incentive to take response action by offering insulation from liability in certain specific instances. Article 8(1)(b) establishes an exemption for unforeseeable harm if reasonable preventative measures were taken to reduce the risk of emergencies. Article 8(2) ensures that Parties have an incentive to take response action by exempting States that take reasonable response action from liability for damage that may result from the response action. Article 8(2) avoids the situations where an operator causes an emergency and then worsens the situation through further incompetence, and then argues it is exempt from liability for the second emergency.
10. A significant aspect of Article 9 on liability limits is the Article 9(4) provision of periodic ATCM review of the limits. This provision is critical because it maintains the effectiveness of the Annex by enabling adjustments of the

limits for inflation. Without the fast-track amendment process, the limits would likely be out-of-date by the time of ratification.

Although the new Annex is an overwhelmingly positive development, there are a few areas that cause concern:

1. A highly contentious issue, the Annex does not address sovereignty in Antarctica. This is problematic because the majority of ships and aircraft in Antarctica are owned or operated by States. The Article 6(5) grant of sovereign immunity will reduce the effectiveness of the Annex. Depending on how the Parties interpret this, it could end up being a large loophole.
2. The Annex is limited as to which activities it covers. The focus is on activities for which advance notice is required under Article VII(5) of the Antarctic Treaty. So, it will not ordinarily cover fishing and whaling activities, which are seen as covered by their own international instruments (although not, we observe, their own liability regimes) or activities such as “innocent-passage” or aircraft overflights without landing. The Annex explicitly states that it applies to all tourist vessels entering the Antarctic Treaty area, so they are covered even if they don’t land in the Area. The decision to leave out the marine-pollution aspects of fishing vessels came only after a long debate, which showed clearly that the overwhelming majority of Parties believe fishing vessels should be covered. There are more fishing vessels operating in the Southern Ocean than any other type of vessel, and this opens up a significant loophole in the Annex.
3. There are issues with some of the definitions in Article 2:
 - Impact is restricted to “significant and harmful” rather than “less than/no more than/more than minor and/or transitory”. This alters the burden of proof used in the Madrid Protocol. Further, the reasonability of response action is based on supposedly objective criteria that are not objective in practice because the list includes factors such as technology, economics, and practicality, but not actual values.
 - The Article 3(1) requirement that States require operators to take “reasonable” preventative measures rather than preventative measures “to the maximum extent practicable” could reverse the burden of proof. The “maximum extent practicable” might not require the operator to do much in a given case, but the operator would still have to show this to be true. Whereas with “reasonable” preventative measures, the operators do not have to show anything and the burden actually shifts onto those who oppose the action or lack of it.
 - Article 5(2) states that other Parties are encouraged, but not required, to take response action. The Annex would have been more effective in its goal of environmental protection if the party that detected the damage – to the extent of its capacity – should immediately begin response action without waiting until responsibility is established.
 - Article 5(3)(b) is at odds with the case where the identity of the responsible party is unclear. The linking of response action to a finding of “imminent risk” suggests that the administrative process is more valuable than the environment because those who discover the emergency are not obligated to act.
 - There is concern regarding the exemption in Article 8(2). The “reasonable circumstances” language may discourage response action because of fear of liability since response action can often be risky.
 - Article 11 on insurance remains unclear, as it does not address whether punitive damages are covered by the insurer or if direct action against the insurer is allowed. It also does not address the potential liability for those whose advice or decisions cause activity resulting in an emergency and whether such personal liability can be insured against.

This first liability annex does not include an article stating that further annexes are required to meet the obligations of Madrid Protocol Article 16 of a comprehensive liability regime, as proposed by many Parties and ASOC. Instead, in the Decision adopting the Annex there is a soft commitment to review whether an additional liability annex is needed after five years.