Liability Annex: Finish It!

Parties have been working on the liability annex required by the Protocol since 1991. The pace of progress has been glacial as every permutation of approach and philosophy has been tried.

The offering now on the table is admittedly a limited-purpose instrument, focused mainly on emergency response action under Article 15 of the Protocol, far from the comprehensive annex ECO and many Parties support. But as crafted under the able leadership of Ambassador McKay, it will take the Antarctic Treaty System a significant step forward in addressing some Article 16 obligations and emergency response actions. Momentum has been achieved during the past two negotiating sessions. It is time to strike this deal, which is accepted by the great majority of Parties.

However, a few Parties remain resistant to some key aspects of this compromise package. ECO urges them to keep in mind the bigger picture (including their Article 16 obligations) and to retain the following crucial provisions:

1. The scope of the Annex must go beyond the advance notification provisions of the Antarctic Treaty, in order to reflect the operative reality of large numbers of fishing and whaling vessels operating in the Southern Ocean. Given the Protocol’s mandate to cover dependent and associated ecosystems, and the absence of any liability regime under CCAMLR, it will simply be an abdication of responsibility if the Antarctic Treaty Parties opt to leave out of the liability regime the largest class of human activity in the Antarctic, as well as the largest commercial activity in the region.

2. States must agree to some form of residual liability for the failure of private operators under their jurisdiction to take effective response actions that result in serious harm to the environment. Otherwise, we will be leaving a giant loophole in the liability regime, which will remove a key incentive for Parties to ensure that operators do the right thing and take effective, timely actions.

3. Liability must be possible when response action is deemed not to be feasible by the operator responsible for an accident, but yet there are harmful environmental impacts that are serious and lasting. The draft text would require this in Article 6(3), which is a crucial provision. Without it there will be no incentive for operators to take effective response and cleanup actions.

This is not a matter of opening the door to subjective judgments about the ‘price’ of the harm caused. There are abundant precedents in both domestic and international law for handling this, and there is no doubt that this Liability Annex will include an upper monetary limit on liability in any case.

4. The upper limit on liability must be adequate to cover the costs of various types of accidents. ECO can understand the reasons why both State Parties and other operators want a limit. But we should not ignore the operative reality drawn from other regions, such as Galicia in the recent Prestige accident. Some Parties appear to support a limit so low, so modest, as to be negligible.

Deconstructing the Protocol’s Promise

One of the more disappointing developments since the Protocol entered into force has been the effective weakening of some of its more progressive initiatives: Obligations in relation to ‘dependent and associated’ ecosystems; Obligations to address cumulative impact; Capacity to designate ‘marine areas’ as protected areas under Annex V; Capacity to designate ‘specially protected species’ under Annex II; and Commitments regarding ‘comprehensive’ protection of the environment
This has occurred in various ways – and often sequentially. At first the initiative is ignored. Stage two sees the argument that the initiative is unclear – either conceptually or in scope. Stage three is the defence that the requisite technical capacity has yet to be developed. At stage four jurisdictional complexities in relation to other ATS instruments gain prominence, and the capacity under the Protocol is made contingent on agreement to each specific proposal by an earlier convention body. This last stage arises because of the politically and structurally conservative manner in which the ATS has evolved, whereby each new convention is placed on top of the pre-existing ones with implicit instructions not to intrude into previous conventions’ areas of responsibility. This may have been politically expedient for regime development, but it creates immense problems if we are aiming (as is declared in the Protocol) at comprehensive protection of the Antarctic environment.

How can we ensure comprehensive protection, include responsibilities towards dependent and associated ecosystems and address cumulative impact if the Protocol cannot reach into the marine area, or touch certain taxa, because these are supposedly already the sole prerogative of ICRW, CCAMLR or CCAS? What sense does it make – in a region where every bird and mammal (and much of the terrestrial flora and fauna) is dependent upon the marine environment – to repeatedly deny the Protocol adequate competence on the grounds that this particular facet is within the sole purview of one of these other instruments? By what curious calculus is it possible to address cumulative impact if one cannot presume to address fishing or whaling activities through EIA, to say nothing of course about the direct and secondary impacts of these activities, including liability for oil spills from those vessels?

The truth is that comprehensive protection is absolutely impossible without effective integration of the various activities conducted in the Antarctic region – and where else can this be done but under the Protocol? The reasons behind this silly state of affairs are clear. States which have reluctantly conceded these capacities to the Protocol can both revise the Protocol and provide themselves with a veto on the specific issue through sending it to a less environmentally predicated instrument. CCAS and CCAMLR were, after all, established primarily to regulate resource exploitation of the marine environment. They pay lip service to conservation, but their core function is resource exploitation.

So, if you require CCAMLR sign-off on any marine protected area proposals arising as ASPAs or SMAs under Protocol Annex V, you know jolly well that no substantial area will be agreed to. The fishing states who determine CCAMLR’s priorities will of course veto most such proposals at CCAMLR. A worrying analogue to the protected areas situation has arisen here in Madrid. Now CCAMLR or CCAS sign-off is also being argued for any Specially Protected Species defined as a ‘marine’ species. What might be the next step? Perhaps the mutation of ‘conservation’ as presently understood under the Protocol to the more restrictive definition under CCAMLR where ‘conservation includes rational use’? With bioprospecting emerging as the next resource exploitation issue, this would be awfully convenient wouldn’t it?

That the newer – and more progressive – environmentally focussed Protocol is being deconstructed before our eyes, and some of its key capacities made hostage to older resource exploitation agreements – which are (in the case of CCAMLR) already manifestly failing to adequately address their own key challenges (IUU fishing and non-compliance by Members) - should worry everybody. While CCAMLR seems likely to become a significant brake on the more progressive developments of the Protocol, it has not yet shown any inclination to import any of the Protocol’s core management tools into its own regime. ECO submits that the day we see CCAMLR introducing EIA is the day to entertain a role for CCAMLR in the Protocol’s business.

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