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Liability for Environmental Damage in Antarctica: Adoption of Annex VI to Madrid Protocol

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Abstract. In 2005, the Antarctic Treaty System adopted the Annex to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (also known as Annex VI). Annex VI contains provisions on preventive measures and contingency planning. It creates responsibilities for state and non- state operators (such as tourist ship operators) regarding response action to any form of an environmental emergency. It also establishes what the liability would be for failure of the state or non-state to take action to respond to the emergency. Annex VI established exceptions from liability and limits of liability. The paper observed that Annex VI is not comprehensive enough and lacks regulations that would make the liability and accountability stricter. The paper also found that Annex VI imposes liability for mere damage to the environment, even where there is no economic loss or damage, something novel in environmental law. The paper noted that Annex VI is still waiting for the ratification by the present Consultative Parties and recommended for its speedy ratification.

Keywords: Environment, Environmental Protec tion, Environmental Emergency

1. Introduction

Antarctica, the seventh continent, is anomalous, compared with the six inhabited continents. Antarctica is a continent for scientists and, more recently, tourists. The question of who pays for environmental damage is controversial throughout the world. Establishing liability for environmental damage is even more essential in a place like Antarctica where the environment is fragile and easily disrupted. The occurrence of a man-made disaster such as an oil spill would be catastrophic for the Antarctic ecosystem and wildlife.

Government and non-government activities undertaken in the Antarctica are governed by the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty (the Environmental Protocol)

In 2005, the Antarctic Treaty System adopted the Annex to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (also known as Annex VI). The Annex contains provisions on preventative measures and contingency planning.

It creates responsibilities for state and non-state operators (such as tourist ship operators) regarding response action to any form of an environmental emergency. It also establishes what the liability would be for failure of the state or non-state to take action in respond to the emergency. The Annex established exceptions from liability and limits of liability were established.

Annex VI sets rules governing who is liable for preventing and dealing with environmental emergencies arising from scientific research, tourism and other activities in the Antarctic

Treaty area, such as logistic (shipping and aircraft) support. The aim of the Annex is to stipulate – before anything goes wrong – who could be held responsible for cleaning up after an environmental emergency, and the legal avenues to respond to disaster. It also allows compensation to be claimed from the polluter if someone else has to clean up.

Annex VI on Liability Arising from Environmental Emergencies was finally adopted in 2005 but it is still waiting for all the present Consultative Parties to ratify it.

2. The Antarctic Treaty System

The Antarctic Treaty System (ATS) is a unique regime at international law by which participating States cooperatively manage the Antarctic continent pursuant to a suite of international agreements. The ATS is composed of the Antarctic Treaty, several related agreements such as the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), the Madrid Protocol, and the recommendations and decisions of the Antarctic Treaty Consultative Meetings (ATCM) regarding subjects such as scientific cooperation and the conservation of the Antarctic environment. The related agreements between the parties have enabled the creation of legally binding rules governing activities in the Antarctica.

2.1 The Antarctic Treaty

The first of these agreements, which effectively operates as an overarching instrument for the regime, is the *Antarctic Treaty* (Treaty). This was established by its twelve original Parties in 1959 on the principles of reserving Antarctica for peaceful purposes, promoting international scientific cooperation and ensuring the continuance of international harmony. The Treaty entered into force on June 23, 1961.

2.2 The Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)

The Consultative Parties on the assumption that mining could be consistent with the preservation of the Antarctic environment negotiated the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). However, most countries opposed the agreement and same was subsequently abandoned.

2.3 Protocol on Environmental Protection (the Madrid Protocol)

At the fifteenth Antarctic Treaty Consultative Meeting in 1989, the Consultative Parties agreed to review the proposals for a comprehensive environmental regime. The Protocol on Environmental Protection (Known as the Madrid Protocol) was negotiated and rectified by the Consultative Parties in 1998. The objective of the Madrid Protocol is to protect the Antarctic environment and associated ecosystems. The Consultative Parties designated the Antarctic region as a natural reserve, devoted to peace and science in accordance with its goals of international scientific cooperation and the peaceful use of Antarctica.

The Madrid Protocol was adopted to supplement the Antarctic Treaty and to minimize the environmental impact of human activities in the Antarctica. The Madrid Protocol has been greatly instrumental in strengthening international co-operation with the Antarctic Treaty System as well as in changing the broader international community's perception about the
Antarctic Treaty System

Article 16 of the Madrid Protocol provided for the future adoption of a liability regime through and annex to the Madrid Protocol. Article 16 states that:

Consistent with the objectives of this Protocol for a comprehensive protection of the Antarctic environment and dependent and associated ecosystems, the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol. Those rules and procedures shall be included in one or more Annexes to be adopted in accordance with Article 9(2)

Thus, in June 2005, Annex VI on Liability Arising from Environmental Emergencies (Annex VI) was adopted by the Consultative Parties in Stockholm.

2.4 Annex VI to Protocol on Environmental Protection

The need for an Annex detailing liability in the event of an environmental emergency has been increasingly urgent due to the booming levels of human activity in the Antarctic, specifically in the commercial activities of tourism and fishing. The Annex was adopted after more than fourteen years of negotiations and represents the first step in accomplishing the goal established in 1991 by Article 16 of the Madrid Protocol. Despite support for a comprehensive liability regime, votes by the United States, Japan, and Russia resulted in a liability regime limited to response action for environmental emergencies.

The Annex touches on contingency and preventive measures. Its greatest achievement is the establishment of response action obligations and liability for failure to take such action in the face of an environmental emergency.

Activities in the Antarctica are run either by State Parties or Private Operators. To effectively regulate operators, the Annex established obligations and corresponding liability for both State and non-State operators.

After fifteen years of negotiations, Annex VI was adopted by the Consultative Parties in Stockholm. The purpose of the Annex is to ensure that all operators in Antarctica have an incentive to avoid environmental emergencies. The Annex aims to reduce the likelihood of harm- laws that impose certain requirements on their operators organising activities in the Antarctic treaty area. The law require operators to undertake preventive measures on activities causing accidents and to ensure responsibility for the costs involved in a response action to minimize the effect that any such accident might have on the environment by requiring Parties to adopt and develop contingency plans in order to avoid environmental emergencies.

A liability annex was necessary for providing a regime both to fix responsibility for environmental damage and to determine the necessary response action. Annex VI is the result of fifteen years of negotiations. The purpose of the Annex is to ensure that all operators in Antarctica have an incentive to avoid environmental emergencies. The language of the preamble to the Stockholm Annex supports the notion that the purpose of imposing liability is to deter State and operators from causing damage.

The Annex encouraged the States and the Operators carrying on activities in the Antarctica to take preventive measures. The degree to which States must require Operators to take preventive measures was changed from the "maximum extent practicable" to "reasonable preventive measures".

The annex allowed both Parties and the Operators to take response action. The Annex extends the obligation of the Parties to adopt laws requiring their Operators to take establish contingency plans and to take response action where their activities have caused an environmental emergency. The Annex also provides that Parties need to ensure their operators take preventive measures to reduce the likelihood of environmental emergencies. The Annex also expands, albeit in vague terms, on what amounts to an environmental emergency and what the aims of a response action are. In addition, the Annex sets out what the situation would be, should an operator failed to meet their response action obligations.

The Annex introduced Response action in its Article 2(f). Response action under the Annex is not limited to steps taken to contain an emergency. It also include clean-up actions. There was consensus among the Consultative Parties that response action applied to steps taken to avoid the consequences of an emergency that had already occurred.
The most significant provision of the Annex is the liability regime. Liability avoidance is the incentive for Operators to take immediate response action following an environmental emergency. An Operator whose activities in the

Antarctic region create an environmental emergency must take immediate response action. If an Operator fails to take response action, it will either be liable for the cost of action taken by the other Parties or it must pay the cost of clean-up to the environment protection fund.

Although the Annex is not a comprehensive liability regime, its represents a major step in realising the obligations of Article 16 of the Madrid Protocol and the goal of preserving the Antarctic environment.

3. Major Obstacles

Negotiation took fifteen years. The negotiations took long period of time for a number of reasons. These include:

(i) Substantive challenges. Decisions about the standard of liability to be imposed, which should be held liable and to whom, which activities and what type and level of damage or harm would attract liability, and whether there should be limits and exceptions to the liability are among the complex issues.

(ii) Procedural constraints. These include Diversity of legal systems,

(iii) Consensus required by all Consultative Parties,

(iv) Changing personnel over time and Language barriers.

(v) Political climate. Before the protocol enters into force in 1998, there was reluctance to seriously consider the liability Annex. The Operators did not support the discussion since it could affect operating budgets. Also lack of internet and urgency did not facilitate quick resolution of liability discussions

(vi) Rectification of the Annex. It is difficult to predict when the Annex will come into force. One of the challenges to bringing the Annex into force through ratification was identified as the ability to obtain insurance for land-based activities.

(vii) The Annex is not comprehensive. The negotiations for the Stockholm Annex involve a policy choice between a piecemeal approach and a comprehensive approach in developing liability regime. The Consultative Parties selected the piecemeal approach as a step in the establishment of a liability regime in accordance with Article 16. The Annex is limited in scope to providing for response action to environmental emergencies.

(viii) The scope of liability. A lot of issues as regard the scope of liability are yet to be resolved. The Annex's scope, one of the most fundamental issues, was unresolved despite the log period of negotiations. Effective negotiation could not be achieved because the parameter of the Annex was unclear.

(ix) The Annex evolved from a 'cut and paste' operation. The Annex was extrapolated from earlier recommendation and legal instruments such as the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).

(x) Advance notice. Liability only attaches when the environmental emergency results from activity that required advance notice. Thus, it is unclear whether reimbursement could be sought by a Party having responded to an environmental emergency caused by an activity that did not require advance notice. This is particularly problematic given that the activities that require advance notice.

(xi) Insufficient definitions of terms. Certain words and terms were used interchangeably. Terms like "liability", "compensation" and "reimbursement", were thrown around like paper planes rarely if ever defined. Some terms like "damage" were given explanation, but other similar terms such as

"harms" and "impact" were used but left without expansion as to what they might mean. While ambiguity would have been an asset in procuring consensus, it might also have hindered the logical progression of negotiation. The terms used in the Annex are not always consistent with those used in the Protocol. For example, the impact used to define environmental emergency in Article 2 of the Annex is described as "significant and harmful". This differs from the more familiar phrase used in the Protocol, "minor and transitory impact". There is no clear indication as to what amounts of significant or harmful impact or who would be in the position to decide when that threshold has been met.

(xii) The ecosystem is not protected. The Madrid Protocol envisaged the development of liability rules for the protection of the "the Antarctic environment" and "associated and dependent ecosystems", yet the Annex only applies to the former. Neither the Protocol nor the Annex specifically defines this. If the environment does not include its ecosystems then an environmental emergency will not arise, and thus liability will not attach, if an accidental event only harms the latter.

4. Conclusion

To date there appears to have been no attempt to bring an action for reimbursement of response action taken on another's behalf. However, as accessibility to Antarctica continues to improve and more people want to visit or conduct research in the continent, the need for Annex will likely become apparent. Annex VI represents an important first step in the performance of the obligation provided by Article 16 of the Madrid Protocol to establish a comprehensive liability regime for the environmental protection of the Antarctic environment. While it is only the first step, it is an important accomplishment that carves the path for development of additional liability Annexes, covering responsibility for a wider range of situations where harm results from activities being undertaken in the Antarctic Treaty area. Identification of the issues surrounding some of the more difficult elements of liability, left unresolved by the current Annex, might now prove useful as a platform from which to proceed for the establishment of these additional Annexes.

The liability Annex took 13 years to negotiate and lost much in terms of the scope of its application along the way, which reflects the complex and controversial nature of the problems tackled, as well as the procedural challenges and general political climate. Furthermore, guidelines might be required to make some of the more ambiguous provisions more clear, but it seems the ambiguity was often not accidental, illustrating a form of compromise employed to procure consensus. The focus must now to turn to bringing it into force. In theory at last, this should not prove problematic since all consultative Parties have agreed to its provisions and all that remains is for each to domestically implement them.

Before Annex VI was negotiated only the Parties to the Madrid treaty were liable for the damages done in the Antarctica. However, Annex VI introduced a new dimension to the Treaty by making the Operators also accountable for their actions in the Antarctica. This is a remarkable achievement in the sense that both the Participating States and the Operators are involved in the activities taking place in the Antarctica.

However, one will expect that a document that had taken 13 years to agree on would be precise and unequivocal. Yet there are a number of lacunas and area of ambiguity which arguably require resolution to ensure the effective implementation of the Annex.

If the international community is serious about their environments to protect the Antarctic environment, it is important that more time and resources are not spent debating how to protect

than spent actually protecting it. Of course, this is not easily done and the energy put into ensuring that a truly comprehensive liability regime is agreed on will help ensure more effective protection of the environment in the long run.

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