

## **Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty**

### **Liability Arising From Environmental Emergencies**

#### *Preamble*

The Parties,

Recognising the importance of preventing, minimising and containing the impact of environmental emergencies on the Antarctic environment and dependent and associated ecosystems;

Recalling Article 3 of the Protocol, in particular that activities shall be planned and conducted in the Antarctic Treaty area so as to accord priority to scientific research and to preserve the value of Antarctica as an area for the conduct of such research;

Recalling the obligation in Article 15 of the Protocol to provide for prompt and effective response action to environmental emergencies, and to establish contingency plans for response to incidents with potential adverse effects on the Antarctic environment or dependent and associated ecosystems;

Recalling Article 16 of the Protocol under which the Parties to the Protocol undertook consistent with the objectives of the Protocol for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems to elaborate, in one or more Annexes to the Protocol, rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol;

Noting further Decision 3 (2001) of the XXIVth Antarctic Treaty Consultative Meeting regarding the elaboration of an Annex on the liability aspects of environmental emergencies, as a step in the establishment of a liability regime in accordance with Article 16 of the Protocol;

Having regard to Article IV of the Antarctic Treaty and Article 8 of the Protocol;

Have agreed as follows:

#### *Article 1*

## Scope

This Annex shall apply to environmental emergencies in the Antarctic Treaty area which relate to scientific research programmes, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5) of the Antarctic Treaty, including associated logistic support activities. Measures and plans for preventing and responding to such emergencies are also included in this Annex. It shall apply to all tourist vessels that enter the Antarctic Treaty area. It shall also apply to environmental emergencies in the Antarctic Treaty area which relate to other vessels and activities as may be decided in accordance with Article 13.

## Article 2

### Definitions

For the purposes of this Annex:

- (a) “Decision” means a Decision adopted pursuant to the Rules of Procedure of Antarctic Treaty Consultative Meetings and referred to in Decision 1 (1995) of the XIXth Antarctic Treaty Consultative Meeting;
- (b) “Environmental emergency” means any accidental event that has occurred, having taken place after the entry into force of this Annex, and that results in, or imminently threatens to result in, any significant and harmful impact on the Antarctic environment;
- (c) “Operator” means any natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area. An operator does not include a natural person who is an employee, contractor, subcontractor, or agent of, or who is in the service of, a natural or juridical person, whether governmental or non-governmental, which organises activities to be carried out in the Antarctic Treaty area, and does not include a juridical person that is a contractor or subcontractor acting on behalf of a State operator;
- (d) “Operator of the Party” means an operator that organises, in that Party’s territory, activities to be carried out in the Antarctic Treaty area, and:
  - (i) those activities are subject to authorisation by that Party for the Antarctic Treaty area; or
  - (ii) in the case of a Party which does not formally authorise activities for the Antarctic Treaty area, those activities are subject to a comparable regulatory process by that Party.

The terms “its operator”, “Party of the operator”, and “Party of that operator” shall be interpreted in accordance with this definition;

- (e) “Reasonable”, as applied to preventative measures and response action, means measures or actions which are appropriate, practicable, proportionate and based on the availability of objective criteria and information, including:
  - (i) risks to the Antarctic environment, and the rate of its natural recovery;

- (ii) risks to human life and safety; and
- (iii) technological and economic feasibility;

(f) “Response action” means reasonable measures taken after an environmental emergency has occurred to avoid, minimise or contain the impact of that environmental emergency, which to that end may include clean-up in appropriate circumstances, and includes determining the extent of that emergency and its impact;

(g) “The Parties” means the States for which this Annex has become effective in accordance with Article 9 of the Protocol.

### *Article 3*

#### **Preventative Measures**

1. Each Party shall require its operators to undertake reasonable preventative measures that are designed to reduce the risk of environmental emergencies and their potential adverse impact.
2. Preventative measures may include:
  - (a) specialised structures or equipment incorporated into the design and construction of facilities and means of transportation;
  - (b) specialised procedures incorporated into the operation or maintenance of facilities and means of transportation; and
  - (c) specialised training of personnel.

### *Article 4*

#### **Contingency Plans**

1. Each Party shall require its operators to:
  - (a) establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment or dependent and associated ecosystems; and
  - (b) co-operate in the formulation and implementation of such contingency plans.
2. Contingency plans shall include, when appropriate, the following components:
  - (a) procedures for conducting an assessment of the nature of the incident;
  - (b) notification procedures;
  - (c) identification and mobilisation of resources;
  - (d) response plans;
  - (e) training;
  - (f) record keeping; and

(g) demobilisation.

3. Each Party shall establish and implement procedures for immediate notification of, and co-operative responses to, environmental emergencies, and shall promote the use of notification procedures and co-operative response procedures by its operators that cause environmental emergencies.

## *Article 5*

### **Response Action**

1. Each Party shall require each of its operators to take prompt and effective response action to environmental emergencies arising from the activities of that operator.

2. In the event that an operator does not take prompt and effective response action, the Party of that operator and other Parties are encouraged to take such action, including through their agents and operators specifically authorised by them to take such action on their behalf.

3. (a) Other Parties wishing to take response action to an environmental emergency pursuant to paragraph 2 above shall notify their intention to the Party of the operator and the Secretariat of the Antarctic Treaty beforehand with a view to the Party of the operator taking response action itself, except where a threat of significant and harmful impact to the Antarctic environment is imminent and it would be reasonable in all the circumstances to take immediate response action, in which case they shall notify the Party of the operator and the Secretariat of the Antarctic Treaty as soon as possible.

(b) Such other Parties shall not take response action to an environmental emergency pursuant to paragraph 2 above, unless a threat of significant and harmful impact to the Antarctic environment is imminent and it would be reasonable in all the circumstances to take immediate response action, or the Party of the operator has failed within a reasonable time to notify the Secretariat of the Antarctic Treaty that it will take the response action itself, or where that response action has not been taken within a reasonable time after such notification.

(c) In the case that the Party of the operator takes response action itself, but is willing to be assisted by another Party or Parties, the Party of the operator shall coordinate the response action.

4. However, where it is unclear which, if any, Party is the Party of the operator or it appears that there may be more than one such Party, any Party taking response action shall make best endeavours to consult as appropriate and shall, where practicable, notify the Secretariat of the Antarctic Treaty of the circumstances.

5. Parties taking response action shall consult and coordinate their action with all other Parties taking response action, carrying out activities in the vicinity of the environmental

emergency, or otherwise impacted by the environmental emergency, and shall, where practicable, take into account all relevant expert guidance which has been provided by permanent observer delegations to the Antarctic Treaty Consultative Meeting, by other organisations, or by other relevant experts.

## *Article 6*

### **Liability**

1. An operator that fails to take prompt and effective response action to environmental emergencies arising from its activities shall be liable to pay the costs of response action taken by Parties pursuant to Article 5(2) to such Parties.
2. (a) When a State operator should have taken prompt and effective response action but did not, and no response action was taken by any Party, the State operator shall be liable to pay the costs of the response action which should have been undertaken, into the fund referred to in Article 12.  
  
(b) When a non-State operator should have taken prompt and effective response action but did not, and no response action was taken by any Party, the non-State operator shall be liable to pay an amount of money that reflects as much as possible the costs of the response action that should have been taken. Such money is to be paid directly to the fund referred to in Article 12, to the Party of that operator or to the Party that enforces the mechanism referred to in Article 7(3). A Party receiving such money shall make best efforts to make a contribution to the fund referred to in Article 12 which at least equals the money received from the operator.
3. Liability shall be strict.
4. When an environmental emergency arises from the activities of two or more operators, they shall be jointly and severally liable, except that an operator which establishes that only part of the environmental emergency results from its activities shall be liable in respect of that part only.
5. Notwithstanding that a Party is liable under this Article for its failure to provide for prompt and effective response action to environmental emergencies caused by its warships, naval auxiliaries, or other ships or aircraft owned or operated by it and used, for the time being, only on government non-commercial service, nothing in this Annex is intended to affect the sovereign immunity under international law of such warships, naval auxiliaries, or other ships or aircraft.

## *Article 7*

### **Actions**

1. Only a Party that has taken response action pursuant to Article 5(2) may bring an action against a non-State operator for liability pursuant to Article 6(1) and such action may be brought in the courts of not more than one Party where the operator is incorporated or has its principal place of business or his or her habitual place of residence. However, should the operator not be incorporated in a Party or have its principal place of business or his or her habitual place of residence in a Party, the action may be brought in the courts of the Party of the operator within the meaning of Article 2(d). Such actions for compensation shall be brought within three years of the commencement of the response action or within three years of the date on which the Party bringing the action knew or ought reasonably to have known the identity of the operator, whichever is later. In no event shall an action against a non-State operator be commenced later than 15 years after the commencement of the response action.
2. Each Party shall ensure that its courts possess the necessary jurisdiction to entertain actions under paragraph 1 above.
3. Each Party shall ensure that there is a mechanism in place under its domestic law for the enforcement of Article 6(2)(b) with respect to any of its non-State operators within the meaning of Article 2(d), as well as where possible with respect to any non-State operator that is incorporated or has its principal place of business or his or her habitual place of residence in that Party. Each Party shall inform all other Parties of this mechanism in accordance with Article 13(3) of the Protocol. Where there are multiple Parties that are capable of enforcing Article 6(2)(b) against any given non-State operator under this paragraph, such Parties should consult amongst themselves as to which Party should take enforcement action. The mechanism referred to in this paragraph shall not be invoked later than 15 years after the date the Party seeking to invoke the mechanism became aware of the environmental emergency.
4. The liability of a Party as a State operator under Article 6(1) shall be resolved only in accordance with any enquiry procedure which may be established by the Parties, the provisions of Articles 18, 19 and 20 of the Protocol and, as applicable, the Schedule to the Protocol on arbitration.
5. (a) The liability of a Party as a State operator under Article 6(2)(a) shall be resolved only by the Antarctic Treaty Consultative Meeting and, should the question remain unresolved, only in accordance with any enquiry procedure which may be established by the Parties, the provisions of Articles 18, 19 and 20 of the Protocol and, as applicable, the Schedule to the Protocol on arbitration.  
  
(b) The costs of the response action which should have been undertaken and was not, to be paid by a State operator into the fund referred to in Article 12, shall be approved by means of a Decision. The Antarctic Treaty Consultative Meeting should seek the advice of the Committee on Environmental Protection as appropriate.
6. Under this Annex, the provisions of Articles 19(4), 19(5), and 20(1) of the Protocol, and, as applicable, the Schedule to the Protocol on arbitration, are only applicable to liability of a Party as a State operator for compensation for response action that has been undertaken to an environmental emergency or for payment into the fund.

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## *Article 8*

### **Exemptions from Liability**

1 An operator shall not be liable pursuant to Article 6 if it proves that the environmental emergency was caused by:

- (a) an act or omission necessary to protect human life or safety;
- (b) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character, which could not have been reasonably foreseen, either generally or in the particular case, provided all reasonable preventative measures have been taken that are designed to reduce the risk of environmental emergencies and their potential adverse impact;
- (c) an act of terrorism; or
- (d) an act of belligerency against the activities of the operator.

2. A Party, or its agents or operators specifically authorised by it to take such action on its behalf, shall not be liable for an environmental emergency resulting from response action taken by it pursuant to Article 5(2) to the extent that such response action was reasonable in all the circumstances.

## *Article 9*

### **Limits of Liability**

1. The maximum amount for which each operator may be liable under Article 6(1) or Article 6(2), in respect of each environmental emergency, shall be as follows:

- (a) for an environmental emergency arising from an event involving a ship:
  - (i) one million SDR for a ship with a tonnage not exceeding 2,000 tons;
  - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that referred to in (i) above:
    - for each ton from 2,001 to 30,000 tons, 400 SDR;
    - for each ton from 30,001 to 70,000 tons, 300 SDR; and
    - for each ton in excess of 70,000 tons, 200 SDR;
- (b) for an environmental emergency arising from an event which does not involve a ship, three million SDR.

2. (a) Notwithstanding paragraph 1(a) above, this Annex shall not affect:
- (i) the liability or right to limit liability under any applicable international limitation of liability treaty; or
  - (ii) the application of a reservation made under any such treaty to exclude the application of the limits therein for certain claims;

provided that the applicable limits are at least as high as the following: for a ship with a tonnage not exceeding 2,000 tons, one million SDR; and for a ship with a tonnage in excess thereof, in addition, for a ship with a tonnage between 2,001 and 30,000 tons, 400 SDR for each ton; for a ship with a tonnage from 30,001 to 70,000 tons, 300 SDR for each ton; and for each ton in excess of 70,000 tons, 200 SDR for each ton.

- (b) Nothing in subparagraph (a) above shall affect either the limits of liability set out in paragraph 1(a) above that apply to a Party as a State operator, or the rights and obligations of Parties that are not parties to any such treaty as mentioned above, or the application of Article 7(1) and Article 7(2).

3. Liability shall not be limited if it is proved that the environmental emergency resulted from an act or omission of the operator, committed with the intent to cause such emergency, or recklessly and with knowledge that such emergency would probably result.

4. The Antarctic Treaty Consultative Meeting shall review the limits in paragraphs 1(a) and 1(b) above every three years, or sooner at the request of any Party. Any amendments to these limits, which shall be determined after consultation amongst the Parties and on the basis of advice including scientific and technical advice, shall be made under the procedure set out in Article 13(2).

5. For the purpose of this Article:

- (a) “ship” means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms;
- (b) “SDR” means the Special Drawing Rights as defined by the International Monetary Fund;
- (c) a ship’s tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.

## ***Article 10***

### **State Liability**

A Party shall not be liable for the failure of an operator, other than its State operators, to take response action to the extent that that Party took appropriate measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Annex.

## ***Article 11***

### **Insurance and Other Financial Security**

1. Each Party shall require its operators to maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under Article 6(1) up to the applicable limits set out in Article 9(1) and Article 9(2).
2. Each Party may require its operators to maintain adequate insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability under Article 6(2) up to the applicable limits set out in Article 9(1) and Article 9(2).
3. Notwithstanding paragraphs 1 and 2 above, a Party may maintain self-insurance in respect of its State operators, including those carrying out activities in the furtherance of scientific research.

## ***Article 12***

### **The Fund**

1. The Secretariat of the Antarctic Treaty shall maintain and administer a fund, in accordance with Decisions including terms of reference to be adopted by the Parties, to provide, *inter alia*, for the reimbursement of the reasonable and justified costs incurred by a Party or Parties in taking response action pursuant to Article 5(2).
2. Any Party or Parties may make a proposal to the Antarctic Treaty Consultative Meeting for reimbursement to be paid from the fund. Such a proposal may be approved by the Antarctic Treaty Consultative Meeting, in which case it shall be approved by way of a Decision. The Antarctic Treaty Consultative Meeting may seek the advice of the Committee of Environmental Protection on such a proposal, as appropriate.

3. Special circumstances and criteria, such as: the fact that the responsible operator was an operator of the Party seeking reimbursement; the identity of the responsible operator remaining unknown or not subject to the provisions of this Annex; the unforeseen failure of the relevant insurance company or financial institution; or an exemption in Article 8 applying, shall be duly taken into account by the Antarctic Treaty Consultative Meeting under paragraph 2 above.
4. Any State or person may make voluntary contributions to the fund.

### *Article 13*

#### **Amendment or Modification**

1. This Annex may be amended or modified by a Measure adopted in accordance with Article IX(1) of the Antarctic Treaty.
2. In the case of a Measure pursuant to Article 9(4), and in any other case unless the Measure in question specifies otherwise, the amendment or modification shall be deemed to have been approved, and shall become effective, one year after the close of the Antarctic Treaty Consultative Meeting at which it was adopted, unless one or more Antarctic Treaty Consultative Parties notifies the Depositary, within that time period, that it wishes any extension of that period or that it is unable to approve the Measure.
3. Any amendment or modification of this Annex which becomes effective in accordance with paragraph 1 or 2 above shall thereafter become effective as to any other Party when notice of approval by it has been received by the Depositary.

# **FINAL REPORT**

**Agenda Item 8: Liability**

***Item 8: The Question of Liability as referred to in Article 16 of the Protocol***

- (1) The Working Group had before it the *Chair's Revised Personal Draft of 2 June 2004* (WP 47), the *Chairman's Report on Informal Consultations Convened in New York from 13 to 15 April 2005* (IP 109), together with *Outcomes of the Informal Consultations Convened in New York from 13 to 15 April 2005* (WP 48), and *Drafting and Other Proposals Presented to the Informal Consultations Convened in New York from 13 to 15 April 2005 Which Require Further Consideration* (WP 49). Further revisions of the Chair's draft were produced during the meeting as WP 48 Rev.1 and WP 48 Rev.2 and WP 48 Rev.2/Corr 1.
- (2) Discussions on draft article 9 were conducted in the Working Group under the coordination of Mr Mark Simonoff (USA), on the basis of the revised text from the New York intersessional (WP 48).
- (3) The Working Group established an open-ended Drafting Committee, composed of representatives from each of the four language groups, in order to review and finalise the text of the draft Annex. The Drafting Committee met on 13 June 2005 and was chaired by Mr Rene Lefeber (Netherlands). The draft Annex was revised and reported back by the Drafting Committee as WP 48 Rev.3.
- (4) There was general agreement that it was appropriate to include a preamble in the draft Annex, notwithstanding the fact that a preamble had not been included in any of the existing Annexes, in order to set the Annex in the context of certain key considerations such as, "the importance of preventing, minimising, and containing the impact of environmental emergencies on the Antarctic environment", the provisions of Article IV of the Antarctic Treaty, articles 8, 15 and 16 of the Protocol, the priority accorded to the preservation of Antarctic for scientific research, and Decision 3 (2001).
- (5) In the context of discussion on draft Article 1, concerning the scope of the Annex, many delegations emphasised the importance of the widest possible scope of application for the Annex. In respect of draft article 1 in the Chairman's revised draft of 2 June 2004 (WP 47), several delegations noted that it might not be appropriate for application of the Annex to be dependent on the way in which States Parties interpreted Article VII(5). Other delegations objected to a broad approach, noting that the obligation to take response action contained in Article 15 of the Protocol was limited to activities for which notification was required under Article VII(5). In response, others noted that the obligation under Article 16 of the Protocol applied more broadly to activities taking place in the Antarctic Treaty Area and covered by the Protocol.
- (6) In particular, several delegations proposed that the Annex should not be applied to the activities of fishing vessels, expressing the view that the relationship between the Protocol and activities covered by CCAMLR was regulated by the Protocol together with the Madrid Final Act, and that the issue was better addressed in that context. Several delegations were of the opposite view, and expressed their

disappointment that it had not been possible to obtain agreement to include environmental emergencies arising from the activities of such vessels within the Annex, particularly given the number of such vessels operating in the Antarctic Treaty Area. These delegations expressed disagreement with the interpretation that such situations were adequately regulated by CCAMLR and so fell outside Article 16 of the Protocol. It was accordingly agreed to include a specific provision providing for other activities to be included within the scope of Annex in the future, through the amendment procedure set out in draft Article 13.

- (7) It was considered that all tourist vessels, including those not landing parties in Antarctica should be covered by the Annex, in order to avoid any doubt in light of possible differing interpretations of Article VII(5), and there was general support to amend draft Article 1 accordingly. In this context it was also proposed that it would be appropriate in the future to consider specifically including the overflight of tourist aircraft within the Annex.
- (8) As regards draft article 2(b) containing the definition of “environmental emergency”, there was general agreement that the definition of “environmental emergency” contained in the Chairman’s revised draft of 2 June 2004 (WP 47) should be amended to read “‘Environmental emergency` means any accidental event which has occurred and which results in, or imminently threatens to result in,...”. It was also generally agreed to amend the draft definition to clarify that the Annex would only apply to accidental events that had occurred after the Annex has become effective.
- (9) There was extensive discussion of draft articles 2(c) and (d) containing the definitions of “operator” and “operator of a Party”, and general support for the proposal to separate the definitions into separate paragraphs. The definition of “operator” was further refined in order to make clear that it was not intended to include individuals carrying out, but not organising or responsible for, activities in the Antarctic Treaty area (such as, for example, the Captain of a vessel in that capacity, or individual members of an organised tourist expedition). It was also made clear that the term “operator” was not intended to include a juridical person that was a contractor or subcontractor acting on behalf of a State operator. It was understood that environmental emergencies arising from the activities of such juridical persons would be addressed through the provisions of the Annex relating to State operators.
- (10) In relation to draft article 2(f) containing the definition of “response action”, there was general agreement to replace “to prevent” with “to avoid” in order to clarify that this definition applied to measures taken to avoid the impact of an environmental emergency that had already occurred, not the broader concept of preventative measures as provided for in draft article 3.
- (11) In this context, some concern was expressed with the inclusion of clean-up measures in the draft definition. However, it was emphasised that the reference to clean up was in the context of measures to “avoid, minimise or contain the impact” of an environmental emergency, and was qualified by the references to “reasonable measures” and “appropriate circumstances” elsewhere in the definition. In addition, several delegations emphasised that the reference to clean

up measures represented a careful compromise. In this context, some delegations expressed their disappointment that it had not been possible to reach agreement to include restorative or restitutionary measures within the definition.

- (12) In the context of draft Article 5, there was support for a proposal to include an additional paragraph 1(bis) (WP 49), with the intention to enhance notification of environmental emergencies and exchange of information in order to better enable rapid and appropriate response action to be taken. Several delegations suggested that it was not necessary to create a specific obligation to provide such notification, and that this issue could be better addressed through another mechanism, such as a Resolution. In this context, it was noted that the issue had already been addressed in the context of the general reference to notification procedures in draft Article 4(3). It was also noted that it would be appropriate to expand Resolution 6 (2003) to include the exchange of such information. It was accordingly agreed that it was not necessary to include paragraph 1(bis) in the text.
- (13) In respect of draft article 6(2) regarding the liability of an operator in a situation where no response action had been taken, there was considerable discussion of the need to maintain maximum flexibility in the drafting of this article, given that the mechanism used to implement the obligation would vary significantly amongst States. There was general agreement to distinguish between the situation of a State and non-State operator. It was emphasised, however, that notwithstanding the particular mechanism to be adopted, it was important that the amount of payment to be made into the fund should reflect as much as possible the costs of the response action that should have been taken. The view was also expressed that payment into the fund should not be deemed as having a punitive element.
- (14) Also in the context of this draft article, it was noted that the expression “should have taken prompt and effective response action but did not” was intended to encompass three situations: where no response action had been taken; where response action had been taken but it was not prompt; or where response action had been taken but it was not effective.
- (15) In the context of the discussion on draft article 7, the Netherlands, on behalf of the Parties that were also members of the European Union, made a statement confirming the understanding that only a State Party might bring an action under draft article 7(1) (a copy of this statement is attached at Annex A). Accordingly, the text proposed in WP34 of ATCM XXVII was withdrawn.
- (16) In respect of draft article 7(1), it was also understood that multiple actions would not be brought by the same Party against a single operator.
- (17) In respect of draft article 8, for the purposes of insurability, a view was expressed that it was important to replicate the standard IMO defences from liability, as well as an exemption for acts of terrorism. It was noted in response that the specific context of the draft Annex might make the replication of all such defences inappropriate. A specific proposal was made however to include an additional exemption to cover environmental emergencies arising from situations of armed conflict or terrorism (WP 49). In this context, it was noted that such an exemption was included in several existing maritime liability conventions, and that insurance

would not be available to cover liability in such circumstances. Several delegations expressed hesitation with regard to the proposal, noting that there was no accepted definition of “terrorism”, and that the exemption for armed conflict was unnecessary given that Antarctica had been preserved for peaceful purposes under the Antarctic Treaty. It was ultimately agreed to include an exemption regarding terrorism or acts of belligerency. It was also agreed to include a requirement that the operator asserting an exemption would have the burden to prove it.

- (18) Also in the context of draft article 8, there was general agreement that it was not appropriate to provide a specific exemption from liability for scientific activities. In this regard, however, it was noted by some delegations that in circumstances where an environmental emergency had been caused by a scientific activity, the amount of compensation for which an operator might be liable should take account of that fact. Some concern was also expressed that the text was taken an unduly commercial approach.
- (19) In respect of draft article 9(1), it was considered that the limits of liability in the case of an environmental emergency arising from an event involving a ship should reflect the limits of liability contained in the 1996 Protocol to the Convention on the Limitation of Liability for Maritime Claims (LLMC). In this context, regard was had to the benefit of compatibility between the draft Annex and existing liability regimes for insurance purposes.
- (20) An appropriate savings clause was inserted into this article to clarify the relationship between the draft Annex and the liability or right to limit liability under existing international regimes limiting liability in respect of States that were Party to those regimes. In this context it was understood that under draft article 7 a non-State operator would generally be sued for liability pursuant to draft article 6(1) in the courts of the Party where the operator was incorporated or had its principal place of business or his or her habitual place of residence. A Party as a State operator would not be subject to any actions in a Party’s domestic courts.
- (21) In respect of draft article 9(1)(b), several delegations supported the adoption of a higher limit of 4 million SDR in respect of a land-based environmental emergency, given the special nature of the Antarctic environment. On the other hand, several delegations supported a lower limit of 2 million SDR, and emphasised the importance of basing the limit of liability in respect of a land-based environmental emergency on the worst case scenario figures advised by COMNAP, taking account of the potential that higher limits could unreasonably deter legitimate activities such as scientific research.
- (22) Regarding draft article 9(3) in response to a concern raised by a delegation, it was noted that the reference to “committed with the intent to cause such emergency, or recklessly and with knowledge that such emergency would probably result” was intended to ensure that the limits of liability were only excluded in the most serious circumstances of culpability; that is, where the harm was either done intentionally or with such recklessness and knowledge that it almost equated to intention.

- (23) In the context of draft article 9(5)(b) defining ‘Special Drawing Rights’, there was discussion of whether it was necessary to specify a date for conversion of SDR into national currency. The group concluded that article 9 itself did not need to specify a date or method for ascertaining that date. However, Parties should provide a method for ascertaining the date of SDR conversion in their national laws implementing the Annex, with regard to actions specified in draft article 7(1) and the enforcement mechanism in draft article 7(3). In respect of actions specified in draft article 7(1) there was much support for specifying in national law the date of judgment as the date of conversion. In respect of arbitration under draft articles 7(4) or 7(5), there was support for the notion that the date of conversion would best be determined in the context of the applicable procedure, and that in the case that liability under these provisions was resolved by recourse by an arbitral tribunal, the date of conversion might best be the date of the award.
- (24) Regarding article 11, with respect to the obligation to require operators to maintain adequate insurance or similar financial guarantee, it was emphasised that it was important to ensure that satisfactory insurance would be available in order to enable the Annex to operate effectively and to ensure that legitimate activities were not unintentionally or unreasonably deterred.
- (25) In that context, advice was provided regarding the unavailability of insurance cover for environmental emergencies arising from armed conflict or terrorism. The point was also made that, should Parties decide to implement the liability under draft article 6(2) by way of criminal sanction, it would in many cases be very difficult for operators to obtain insurance against such liability. There was general agreement therefore to amend draft article 11 to clarify that the obligation to require insurance was mandatory only in respect of liability under draft article 6(1), but that Parties could choose also to require insurance in respect of liability under draft article 6(2) if they so wished.
- (26) One delegation also expressed the view that the requirement for compulsory insurance for land-based activities might endanger the entry into force of the Annex since – at least for the time being – insurance covering the liability for land based activities under the Annex seemed not to be available. Taking into account the uncertainty as to whether such insurance would be available in the future, and acknowledging in particular the interests of operators and the insurance industry in insurance being available and the liability limit of 3 million SDR, that delegation was prepared to accept the requirement under draft article 11(1) in order not to hinder adoption of the Annex.
- (27) Some delegations expressed hesitation that, given the breadth of the proposed definition of “ship”, the limits of liability in draft article 9(1) would also apply to very small vessels such as yachts and landing craft, which would be most unlikely to create an environmental emergency within the definition of the Annex and proposed that such vessels be exempted from the obligation to maintain insurance. In this context, it was noted that under the existing insurance market it could be difficult or prohibitive for such vessels to obtain insurance to the prescribed limit. It was noted however, that some very small vessels such as liferafts or tenders would be included within the insurance cover obtained for the primary vessel.

- (28) In respect of draft article 12, it was generally accepted that there should be no automatic right to receive reimbursement from the fund, and that the ATCM would retain the discretion in all cases whether or not to approve applications for reimbursement. The structure of the draft article was amended in order better to reflect this approach.
- (29) There was no objection to the proposal that draft article 12(3) in the Chairman's revised draft of 2 June 2004 (WP 47) should be deleted, on the basis that any other function for the fund lay outside the scope of the Annex.
- (30) Meeting adopted Measure 1 (2005) *Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty – "Liability Arising From Environmental Emergencies"*.
- (31) Bearing in mind Decision 3 (2001), and the view of several delegations that the draft Annex did not completely discharge the obligations under Article 16 of the Protocol, the Meeting also adopted Decision 1 (2005), in order to record the intention to review on an annual basis steps towards entry into force of the Annex and to take a decision not later than 5 years after the adoption of the Annex on the establishment of a time-frame for the resumption of negotiations, in accordance with Article 16, to elaborate further rules and procedures as may be necessary relating to liability for damage arising from activities taking place in the Antarctic Treaty Area and covered by the Protocol.
- (32) The Meeting congratulated Ambassador Don McKay who directed this discussion with incredible patience and skill.
- (33) Argentina stressed that adoption of the Liability Annex had been achieved thanks to the consensus which is the golden rule in the Antarctic cooperation. It also thanked the work done by Professor Francesco Francioni, Rudi Wolfrum, and many others who have made it possible for the Antarctic Treaty Meeting to arrive at this conclusion.
- (34) Australia warmly welcomed the adoption of Annex VI and congratulated Ambassador Don McKay and the host country.
- (35) The United States joined in welcoming this great achievement, considering it a true milestone in the Antarctic cooperation.
- (36) Sweden expressed its warm appreciation as host country of the XXVIII ATCM for the adoption of Annex VI at this meeting.
- (37) Ambassador Don McKay remarked that it had been a very long process and that very many people had been involved. He said that the spirit of camaraderie and flexibility shown during the years of negotiations had been essential to provide solutions and to enabled the ATCM to get consensus on this issue. Ambassador McKay also thanked Sweden for the huge effort it had made to wrap this issue up during this meeting.

## **Annex A**

### **Statement of the Member States of the European Union**

#### **that are also Antarctic Treaty Consultative Parties in the Working Group on Liability of the XXVIII Antarctic Treaty Consultative Meeting**

Mr. Chairman, dear colleagues,

On behalf of the Member States of the European Union that are also Antarctic Treaty Consultative Parties, the Netherlands recalls working paper XXVII ATCM/WP-34 and the relating statement it made during the XXVII ATCM. We sought your indulgence, understanding and assistance with respect to a question that stems from developments in Community law. These developments relate to the division of competence between the European Community and the Member States of the European Union in respect of some matters governed by the draft annex, namely some of the provisions on actions for compensation. Since the entry into force of a Community Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the jurisdiction of domestic courts within the European Community in those matters is governed by the relevant provisions of that Regulation. In order to safeguard the integrity of the said Regulation, the Council of the European Union has requested the Member States of the European Union that are also Antarctic Treaty Consultative Parties to ensure that the relevant Community rules continue to apply.

The discussions on the provisions on actions for compensation at the XXVII ATCM were fruitful and have further clarified the meaning of these provisions. We have further reflected on the matter in light of these discussions and the amendments made to these provisions. It has appeared during the XXVII ATCM that only a State Party can take response action pursuant to draft Article 5.2 and bring an action pursuant to draft Article 7.1. This understanding is reflected in the Final Report of the XXVII ATCM where the Chair of our Working Group noted general support that actions could only be brought by State Parties and, in this connection, also noted that there was a general understanding that only State Parties could take response action pursuant to draft Article 5.2 (para.101). Hence, the attribution of jurisdiction to domestic courts pursuant to draft Article 7.1 does not relate to civil and commercial matters under the Regulation.

Although the general understanding of this Working Group would seem to be inherent in the version of the draft annex that was circulated at the end of the XXVII ATCM, it could be further clarified by explicating that only State Parties can bring an action under draft Article 7.1. Such clarification would eliminate the risk that a domestic court permits agents and operators that have been specifically authorized by a State Party to take response action on their behalf under draft Article 5.2 to bring a direct action under draft Article 7.1. A proposal to that end has been discussed intersessionally and is reflected in a document, circulated by the Chair of our Working Group after the consultations in New York from 13 to 15 April, that contains revised draft articles reflecting the general consensus in the consultations.<sup>1</sup> Since this proposal reflects the general understanding of the Working Group on Liability at the XXVII ATCM, as noted in the Final Report of that meeting, we hope it is supported by our colleagues so that we can put this matter aside.

Thank you for your attention.

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<sup>1</sup> The following proposal for the first sentence of draft Article 7.1 has been circulated: Only a Party that has taken response action pursuant to Article 5(2) may bring an action against a non-State operator for liability pursuant to Article 6(1) and such action may only be brought in the courts of the Party where the operator is incorporated or has its principal place of business or his or her habitual place of residence.





Stockholm 2005



ATCM XXVIII

XXVIII ANTARCTIC TREATY  
CONSULTATIVE MEETING  
XXVIII TRAITÉ SUR L'ANTARCTIQUE  
RÉUNION CONSULTATIVE  
XXVIII TRATADO ANTÁRTICO  
REUNIÓN CONSULTIVA  
XXVIII ДОГОВОР ОБ АНТАРКТИКЕ  
КОНСУЛЬТАТИВНОЕ СОВЕЩАНИЕ

WP 70

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Agenda Item: ATCM 8  
Presented by: New Zealand  
Original Language: English

## Decision XXX (2005)

### **Annex VI on Liability Arising from Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty**

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## Decision XXX (2005)

### **Annex VI on Liability Arising from Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty**

The Representatives

Welcoming the adoption of Measure ... (2005);

Recalling the undertaking in Article 16 of the Protocol on Environmental Protection to the Antarctic Treaty;

Recalling Decision 3 (2001) of the XXIVth Antarctic Treaty Consultative Meeting regarding the elaboration of an Annex on the liability aspects of environmental emergencies, as a step in the establishment of a liability regime in accordance with Article 16 of the Protocol;

Decide:

1. To evaluate annually, from the adoption of Annex VI to the Protocol, progress towards its becoming effective in accordance with Article IX of the Antarctic Treaty, and what action may be necessary and appropriate to encourage Parties to approve the Annex in a timely fashion;
2. Not later than five years from the adoption of the Annex, in light of the evaluation pursuant to paragraph 1 above, to take a decision on the establishment of a time-frame for the resumption of negotiations, in accordance with Article 16 of the Protocol, to elaborate further rules and procedures as may be necessary relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by the Protocol.