ATCM XXIII

Discussion on Liability Annex

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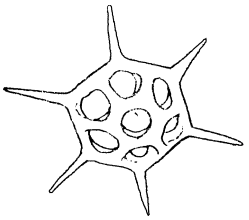
Working Group I of the XXIII Antartic Treaty Consultative Meeting met in Lima, Peru, from May 24–28 1999, to continue negotiations on a liability annex or annexes to the Madrid Protocol. The meeting made little progress due to disagreement on nearly all major issues among the delegations that were present and participating.[1] At the conclusion of the meeting, many delegates indicated their pessimism at the prognosis for concluding a liability annex. Further, according to some, it is unclear whether an annex on which agreement could be reached would be positive for the Antarctic environment.

Under the temporary and effective chairmanship of Mr. Don MacKay of New Zeeland, several proposals contained in Working Papers[2] were presented to the meeting, some of them building on the final Report of the Committee of Legal Experts (Wolfrum Report), others taking very different approaches. The meeting opted to focus on the new Working Papers, making only occasional and not always positive references to the Wolfrum Report. Several delegations expressed a desire to leave aside the "academic and legal approach" of the Wolfrum Report and insisted on "realism" as they saw it reflected in a report done by COMNAP (Council of Managers of National Antarctic Programmes). The meeting thus began with consideration of the COMNAP's assessment of the risk of environmental emergencies in Antarctica.

The COMNAP assessment was based on the replies from 17 of 29 COMNAP members. Six of the members reported no incidents, the remaining 11 reported 117. Twelve members did not replay at all and the report did attempt to review the activities of private actors. The COMNAP representative presenting the report concluded that there is little risk of environmental emergencies because incidents accur infrequently and cause little environmental harm, with a fuel spill being the most likely type of emergency. ASOC (Antarctic and Southern Ocean Coalition of NGOs) and IUCN – World Conservation Union – submitted a commentary on the COMNAP report (XXIII ATCH/IP91 on Environmental Liability) pointing out the narrowness of the study and other issues that should be considered to obtain a clear picture of environmental harm in Antarctica.

After the COMNAP discussion, each delegation that had prepared a Working Paper introduced it. The Netherlands text, a complete draft annex, was supported as a basis of discussion by Italy and France, but the US and Norway opposed using it, in part because of its comprehensive nature. The UK Working Paper, presented as a "new and realistic approach" based on the conditions in Antartica and real threats, was more limited than the Netherlands text. According to the UK because the Madrid Protocol requires a comprehensive environmental impact assessment (EIA), anything subject to the procedure and approved as a normal and ordinary consequence of it should not attract liability. Scientific projects could be given preference during the EIA (Environmental Impact Assessment) process (i.e., approved where a tourist operation causing similar impact would be denied), but science should not have preferential



Shell of a silicoflagellate (Source: Gross, M.G., 1995)
Courtesy: IWCO

treatment in respect of liability. The UK also proposed that the threshold to impose liability for damage should be "significant and lasting." They also insisted that the definition of operator should included all operators, state, public, and private.

Chile, in its presentation, said that its Working Paper reflected the Legal Experts Report, but also contained some differences. It attempted to adapt general international law on liability to take into consideration aspects of the Antarctic system that do not fit into the traditional law, such as harm to the commons and the preference given in the Antarctic Treaty to scientific activities. Uruguay spoke for the Latin American group in presenting a six nation set of draft principles produced at the conclusion of a symposium in Lima. The text supported prefernce for science and for related logistical activities. It also supported inclusion of dispute settlement procedure in the annex.

Finally, New Zealand introduced a proposal on joint and several liability. Several delegations, including Italy, Netherlands, and UK, agreed with the approach while others, especially Chile and Germany, had objections.

The comments and brief discussion after each report showed well-defined positions on many key issues and these positions did not change much throughout the week. None of the reports garnered consensus. The Chair proposed to use the Latin American Working Paper, No. 35, as a reference text, perhaps because its

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generality made it less subject to criticism than some of the more detailed proposals.

The remainder of the week was devoted to thematic discussions of key issues set forth in Working Paper 35. Before that discussion began, the US and Norway reminded the meeting that there is a broad, underlying and undecided question of whether to have a comprehensive text or one or more annexes on narrower topics. The US was alone in the public discussion in continuing to strongly favour the second approach.

The first thematic topic considered was the question of damage for which liability would ensue. It proved a particularly difficult subject and one to which the meeting returned throughout the week. As a delegate from Argentina noted, there can be no damage without an environmental impact, but not all impacts need be considered damage for purposes of liability.

The US and the UK gave new meaning to the term "scientific certainty" by insisting that operators need to know in advance that they will not be subject to liability for their activities after those activities have been given prior approval. Others argued that there should be no a priori exemption based on the EIA, but there could be exoneration after an incident through a series of exceptions written into the liability annex. The Netherlands insisted that the question of whether an activity is or is not exempt from liability should be decided by a judge after the fact, not by the entity that gives permission for the activity.

The delegates were unable to come to any agreement on the type of link that might or should exist between the EIA procedure and liability. The US argued that consequences foreseen by both Initial Assessments and Comprehensive Assessments should be exempt, otherwise science will be unduly burdened. The Netherlands disagreed and the UK eventually concurred that only those subject to and approved after a comprehensive assessment should be exempt. France agreed that there is a distinction between the legality of an activity and exoneration from liability. Sweden argued against any link between the EIA procedure and exemptions because it would weaken environmental protection. Other similarly objected that any linking system would face difficulties because of the differences in national EIA procedures that might result in many activities being approved without a proper assessment.

Other disagreements concerned the treatment of unforeseen or unforeseeable consequences and the threshold for liability, whether, as some said, it should include all harm that is not minor or transitory because that is the language of the Protocol, or whether liability should ensue only for harm that is "significant" "serious" and/or "lasting". The US and UK supported "significant and lasting" while others found this too high a threshold. Finally, the meeting became particularly heated over a UK proposal to exclude damage to "associated and dependant ecosystems" from the liability regime. The Latin American States viewed this as an attempt to renegotiate the Madrid Protocol which includes associated and dependant ecosystems within the purview of environmental protection.

Regarding unforeseen circumstances, the UK argued that if a good faith environmental impact assessment is done there should be no liability for unforeseen damage. Others pointed out the difference between unforseen and unforeseeable, asserting that only the latter should be exempt; if under the circumstances the activity could not reasonable have been expected to cause damage according to the best scientific evidence there would be notability. France noted that the UK paper would exempt from liability all consequences identified and found acceptable during the EIA and seemingly all consequences NOT identified during the EIA and wondered what then would be subject to liability.

The next issue addressed was the nature of the operator governed by the regime and whether it should include States as well as private actors and whether the type of activity being conducted should make a difference in the definition or the scope of liability. The discussion rapidly confused the issue of the definition of the operator with that of jurisdiction to determine liability, after the first intervention by Germany mentioned "genuine link" and "effective control". In fact, there was little disagreement over the inclusion of state and non-state actors in the definition of operator, jurisdictional questions produced far less consensus. The "gateway" States, particularly Argentina, expressed concern about the possibility of "residual" liability of the state for harm caused by an operator departing from an Argentine port, as approximately 80 per cent of them do. The problem became one of separating operator liability from port or other state jurisdiction, and whether that jurisdiction is mandatory or discretionary. The US asserted that port state jurisdiction is not permitted over activities in Antarctica, a position with which Italy and others strongly disagreed. All agreed that the State in which the activity is organized has jurisdiction, as does the state of nationality of the operator. Some States expressed more uncertainty about the question of the jurisdiction of the six final departure points, although several States already exercise it and deem it necessary because of the lack of territorial jurisdiction within Antarctica, which thus requires that enforcement be undertaken elsewhere. France noted that the Protocol itself refers to port state jurisdiction which is subsidiary to the state of origination of the Antarctic activity. Finally, Italy noted that the trend in international law is towards greater port state authority, witnessed by the March 19, 1999 agreement on the arrest of ships. There seemed to be general agreement that expansion of port state jurisdiction should not be equated with port state liability which no one seemed to favour.

The treatment of science was an unresolved dispute. On the one hand, the Latin American States sought a preferential liability regime for scientific activities and even for related logistical activities. Uruguay was adamant that preferential treatment must be in an annex on liability. On the other hand, the US, Australia, and most European countries except Germany argued for a regime in which all operators would be liable without preferential treatment for science, No one argued that science

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should be exempt entirely from liability, but beyond that the meeting remained divided,

The next topic taken up was the question of the nature of liability and whether it should be strict liability and/or joint and several liability. On this point, the delegates generally favoured strict liability but some wanted to retain flexibility in light of other topics for negotiation. They also discussed the problem of liability of the State for failing to comply with its treaty obligations regarding operators, without achieving consensus on the topic other than a general statement that it should be unusual.

The potential liability of third party interveners attempting to respond to an emergency took up much of the discussion, without clear results. The major concern and differences revolved around the question of whether a third party could intervene without authorization of the State of the operator or, in the case of a private party, that party's own State. It was generally agreed that third parties could assist, if requested to do so, in response to an environmental emergency, but much less agreement on the "volunteer" who sought to provide assistance. Some clarity was given in distinguishing immediate response actions from restoration and rehabilitation, the latter being more long term actions. In such case, it was generally agreed that state authorization should be required and that the action would most likely require a prior impact assessment to ensure that the damage was not exacerbated. Many noted that the ultimate question is one of who pays for the response, restoration, and rehabilitation. Most seemed to feel that where lawful response had been taken to an environmental emergency, the acting party could seek reimbursement from the party causing the emergency, but even on this there was disagreement.

On defences and exemptions, the Working Papers included a range of approaches, from a long list in the Latin American WP 35 to only two in the US proposal on emergency response measures. The question of the link between exceptions to substantive obligations in the Protocol and exemptions from liability also divided the participants. The UK argued that you cannot attach liability to a legal activity and since the Protocol exempts States from norms on environmental protection rules where necessary, e.g. to save human life, there can be no liability in the same circumstance. The issue remained open for further discussion.

Throughout the meeting, the Chairman suggested the creation of informal contact groups to discuss the more contentious divisions among the delegations. On the last day of the meeting, the convener of each group reported back and the debate reopened, with most delegations repeating their earlier positions. There were repeated yet again during the discussion of the draft final report, where the divisions became even clearer.

The first controversy regarding the final report came in response to a proposal by the Chairman to include a paragraph stating that "The Meeting reaffirmed its aim to provide the Antarctic Treaty System, in accordance with the provisions of the Protocol on Environmental Protection to the Antarctic Treaty, with a liability regime that would help to ensure effective protection for the environment of Antarctica and its dependent and associated ecosystems." The UK was obdurate that the last phrase should be eliminated, while Australia, New Zealand, the Netherlands and Uruguay insisted that the last phrase was essential to the paragraph, The least common denominator on which the delegates could agree was "The Meeting reaffirmed its aim to develop a liability regime" a result that was ridiculed by the French delegate as "dérisoire."

The discussion over the Chairman's drafted "points of convergence" produced more points of divergence, beginning with the links between liability and preventive and response actions, and the role of COMNAP and SCAR (Scientific Committee on Antarctic Research, of ICSU). A formula was found that kept the point in the text, but nothing could be done to salvage the Chairman's proposal to say "differences were considerably narrowed on the definition of damage" Even with the deletion of the word "considerably", the US objected and the statement was removed entirely from the report. The issue of preferential treatment for science produced a vague statement that "the regime will apply to all activities covered by the Madrid Protocol, bearing in mind the recognition in the Protocol of the value of Antarctica for scientific research" A similar vagueness masking enormous difficulties was the agreed statement that "The liability of a State not acting as operator should only be invoked in narrowly defined circumstances".

The final report reveals that there are few areas of consensus respecting a liability regime and they concern relatively minor points. Answers to the major questions continue to divide the consultative parties and risk producing a weak agreement if, in fact, any agreement at all is reached. The primary consideration of the States conducting the largest number of operations in Antarctica seems to be one of avoiding liability for the environmental consequences of their operations. While everyone expressed, at least in private, concern about huge tour ships planning to begin operations in Antarctica, none of the proposals has addressed cumulative and systemic harm to the environment from tourism or other activities. They have focused, instead, on the possibility of major accidents such as oil spills which are far less frequent than the often-repeated example of a tractor falling through the ice. Such "ordinary" environmental

Note

1 Several member States did not send delegates, notably Russia, Poland, and Bulgaria, while others, including China, Japan and Korea, were silent during the discussion on a liability regime.

2 The working papers submitted were:

WP 10 of New Zealand on Joint and Several Liability and International Collaborative Science

WP 13 of Germany on The Question of Liability as Referred to in Article 16 of the Protocol

WP 15 of Australia on Principles for an Antartic Liability Regime

WP16 of COMNAP on An Assessment of Environmental Emergencies Arising from Activities in Antartica

WP18 of Netherlands on Liability, with a proposed draft annex.

WP 21 of the UK on Liability, with proposed draft provisions

WP34 of Chile containing a Draft Annex on Environmental Liability to the Madrid Protocol

WP35 of the Latin American six (Argentina, Brazil, Chile, Peru and Uruguay) on Basic Definitions and Considerations for the Annex on the Liability Regime

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harm is assessed, if at all, at the national level, usually without knowledge of the impacts that may already have occurred or similar activities that may have been approved by other States. The Madrid Protocol rejected any notion of an international system of permitting or even exchange of information about national approvals. Thus, there should not be too much optimism about the possibilities of a liability regime. The Protocol itself makes achieving an effective regime extremely difficult and nine years of study and negotiations have not resulted in much progress. ❐