The Prospects for an Antarctic Environmental Liability Regime

René Lefeber

In view of the discussions at Consultative Meetings and in the ‘Group of Legal Experts on Liability’ convened under Article 16 of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, the Consultative Parties seem to have agreed on the development of a special civil liability regime for damage to the Antarctic environment and dependent and associated ecosystems. This is also reflected in the draft annex on environmental liability, proposed by the chairman of the Group of Legal Experts on Liability (Eighth Offering or EO), and in the proposals of Australia, of Chile, of the Netherlands, of South American Consultative Parties jointly, and of the United Kingdom – that all were on the agenda of the 1999 Consultative Meeting in Lima. This chapter will analyse, in the light of the aforementioned proposals, the need and desirability of specific procedural and substantive rules of a special civil liability regime for damage to the Antarctic environment and dependent and associated ecosystems.

---

2 See an overview provided by Skåre, Chapter 9 in this book.

THE DEVELOPMENT OF AN ANTARCTIC ENVIRONMENTAL LIABILITY REGIME

One controversial issue is whether an Antarctic environmental liability regime should be laid down in a single annex covering damage to the Antarctic environment and dependent and associated ecosystems arising from all activities covered by the Protocol5 or step by step in different annexes. Although Article 16 of the Protocol does not exclude the development of two or more annexes, the idea of a step-by-step approach originates in a United States proposal, originally submitted at the 1996 Consultative Meeting in Utrecht, to focus on the implementation of Article 15 of the Protocol (on emergency response action).6 One could have sympathy for the priority attached by the United States to the further regulation of emergency response action in view of the events following the Bahia Paraiso oil spill.7 The Bahia Paraiso was a vessel which was owned by the Argentine government and flew the Argentine flag. However, in the absence of adequate action taken by Argentina in the aftermath of the oil spill, it was the United States, Chile, Korea and Spain that incurred a substantial part of the costs for the immediate response measures and the Netherlands for the further response measures, namely the costs connected with the salvaging of the fuel and oil remaining in the hull of the wreckage.8

Although a step-by-step approach is not excluded by the text of Article 16 of the Protocol, it cannot encroach on the obligation to ultimately develop a comprehensive special liability regime for damage to the Antarctic environment and dependent and associated ecosystems. The Protocol applies to environmental impacts from all human activities conducted in the Antarctic Treaty9 area with the exception of activities regulated by the 1946 International Convention for the Regulation of Whaling10, the 1972 Convention for the Conservation of Antarctic Seals11, and the 1980 Convention on the Conservation of Antarctic Marine Living Resources12.13 The damage to the Antarctic environment and dependent and associated ecosystems that

7 See also Lefeber, Chapter 10 in this book.