

## **Joint and Several Liability and International Collaborative Science**

### Introduction

Concerns have been expressed in the past that the draft Liability Annex to the Antarctic Environmental Protocol and in particular the concept of joint and several liability, if adopted, would have an adverse impact on international collaborative scientific programmes and shared logistical resources among Antarctic Treaty Parties. It has been contended that a joint and several liability regime might discourage Parties from entering into valuable joint projects such as the Cape Roberts Project.

2 This paper examines this contention and encourages the adoption of practical mechanisms to meet the needs of international science and the interests of the participating States. It concludes that the concept of joint and several liability should not necessarily affect the entering into collaborative science programmes in Antarctica.

### Background to the Cape Roberts Project

3 The Cape Roberts Project is a cooperative project between the Antarctic programmes of Australia, Germany, Italy, New Zealand, the United Kingdom, and United States. The aim of the project is to investigate Antarctic and glacial tectonic history for the period from 100 to 35 million years ago by drilling a series of holes several hundred metres into the sea floor off the shore fast sea-ice 15 kilometres from Cape Roberts in the Ross Sea.

4 From the outset the project has been based on international cooperation and collaboration, its framework having been agreed by discussions among scientists from all six countries. A Record of Understanding was signed in late 1993, designed to serve as a guide for the cooperation between the six partner countries during the project. The financial contributions are shared between the Parties with three Parties sharing the bulk of the project equally. Each contributing Party is entitled to a degree of scientific involvement in the project in general proportion to their contributions to the Project. Overall supervision of the Project is the responsibility of an International Steering Committee (ISC) while logistics support is the responsibility of the Operations/Logistics Management Group (OMG). The project is managed by Antarctica New Zealand, which is responsible for coordinating the logistic support and the drilling operation, including safety aspects.

5 It has been contended that the adoption of the concept of joint and several liability would place in jeopardy such collaborative programmes because all six States would become jointly and severally liable regardless of their share in the project or their efforts to prevent any damage. This, it is argued, may result in the Party against whom it is most easy to make a claim, or with the most resources, bearing the full (or disproportionate) burden of liability.

## Joint and Several Liability - The Nature of the Concept

6 New Zealand believes that joint and several liability is appropriate where the conduct leading to harm is a result of States acting in concert and where responsibility cannot easily be attributable to one State alone. Furthermore, there are a number of policy factors which support joint and several liability being adopted:

- it maximises the likelihood of harm being properly and fully compensated;
- it supports the objective of providing injured parties with the greatest opportunity to achieve compensation; and
- it operates as a deterrent and provides an incentive to prevent harm occurring on the part of all States participating in an international science project.

7 Participation in an enterprise to achieve a common benefit renders the costs or consequences of that enterprise common to all the participants. The allocation of the costs or consequences between the participants may vary. This suggests that States participating in a common enterprise should ultimately bear only the consequences of its share of the common enterprise. Cooperating States can establish a mechanism for settlement of allocation issues between them. This can be achieved through prior agreements establishing specific contribution or indemnity obligations representing their own views of the appropriate allocation of risk.

## International Precedents

8 There are a number of international legal precedents which provide for joint and several liability to deal with situations of multiple responsibility. These range from conventions concerning liability for nuclear accidents to those concerned with liability for environmental damage as a result of transportation by sea or seabed exploitation.<sup>1</sup> The adoption of joint and several liability has become an established precedent in international liability regimes.

9 The 1972 Convention on International Liability for Damage Caused by Space Objects goes beyond most other precedents by establishing a right of contribution from among those responsible for the damage. Where two or more States have jointly launched a space object they are jointly and severally liable. However a launching State which has paid compensation has the right to present a claim for indemnification to the other participants in the joint launching. Cooperating States may also conclude an

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<sup>1</sup> See for example, Vienna Convention on Civil Liability for Nuclear Damage, 1963 (Article II(3)(a)); Paris Convention on Third Party Liability in the Field of Nuclear Energy, 1960 (Article 5(b)); International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (Article 8); Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1977 (Article 5); and United Nations Convention on the Law of the Sea, 1982 (Article 139).

agreement regarding the apportioning of the financial obligation in respect of which they are jointly and severally liable (Article V).

10 The Space Objects Convention also deals with the situation of States acting independently with respect to a single event which causes damage. Article IV provides that a third party injured as a consequence of the collision of two space objects may claim compensation for the total injury from any or all of the launching States of either space object, irrespective of which may be ultimately responsible. As between the two launching States, however, the burden of compensation is divided according to the extent to which they were at fault. In this way the Convention adopted the concept of contribution based on comparative fault.

11 While the circumstances with which these international legal precedents deal and under which they were concluded may be different from that applying to the Antarctic situation, they nevertheless provide useful insights into the manner in which multiple responsibility may be handled in the Antarctic context. The Space Objects Convention in particular shows that participating States may choose to apportion liability unevenly by inter se agreement.

#### Apportionment of Liability

12 Apportionment could be agreed between the States collaborating in Antarctica, and may be premised on principles of causation, blameworthiness, or both, depending on the facts of a specific case. In this way a number of factors may be taken into account, such as:

- the character of each participating State's intent, negligence, or lack of due diligence;
- relative or proportional responsibility, including contributory conduct;
- the character of each State's financial participation, decision-making authority, or expected benefit of the enterprise;
- the measure of each State's legal authority or jurisdiction over the conduct producing the harm - ie the measure of its effective control of an event; and
- an analysis of relative causation, including the relative capacities of the States to prevent the injurious event or its repetition.

13 The Cape Roberts Project is a good example of the various interests which might be taken into account in deciding on any apportionment of liability as between the participating States.

## Conclusion

14 In the case of a joint scientific project, the shared values and expectations of the participants in the project mean that they can develop in advance a clear idea of the arrangements for the sharing of any allocation of reparations or any action to prevent or mitigate damage. Solutions can be arrived at which do justice to the interests of the participating and other States. But this does not necessarily lead to the conclusion that the adoption of joint and several liability would affect the carrying out of collaborative projects. Indeed, any problems concerning the uneven burden on one participating State which may be the consequence of joint and several liability should be overcome through efforts to address the issues by the participating States in advance of any incident occurring. Collaborative scientific endeavour need not be adversely affected.