

LIABILITY
Draft proposal by the Netherlands

Article 1

Definitions

For the purposes of this Annex:

- (a) "impact" means any harmful effect unless insignificant, on the Antarctic environment or on dependent or associated ecosystems, caused by an activity in the Antarctic Treaty area. It does not include an effect which is the result of an activity that:
 - (1) has been assessed in a CEE in accordance with Article 8 of the Protocol and Annex I to the Protocol,
 - (2) has been judged acceptable in accordance with such procedure, and
 - (3) the harmful effects of which are within reasonably acceptable limits considering the consequences that are normally to be expected from such activity;
- (b) "damage" means:
 - (i) the costs of response measures;
 - (ii) the costs of measures of reinstatement;
 - (iii) compensation payable to the Fund under Article 7 of this Annex;to the extent these costs or compensation are the result of an impact.
- (c) "incident" means any sudden or continuous occurrence or any series of occurrences having the same origin, which causes an impact or creates a grave and imminent threat of causing such an impact;
- (d) "response measures" means any measures taken after an incident has occurred to prevent or minimise an impact, including prevention, containment, clean up and removal measures;
- (e) "measures of reinstatement" means any measures aiming to reinstate or restore damaged or destroyed components of the Antarctic environment or of dependent or associated ecosystems, or to introduce, where reasonable, the equivalent of these components into such environment or ecosystems;
- (f) "reasonable" means a property or state of affairs in which factors such as risk to the environment, rate of natural recovery of the environment, risk to human life and

safety, technological or economic feasibility of measures or costs of measures relative to the extent of an impact have been duly taken into account;

- (g) "operator" means
 - (i) any person who organizes in the territory of a Party an activity in the Antarctic Treaty area;
 - (ii) in so far as the law of a Party so provides:
 - (1) any person who is a national of that Party and organizes outside the territory of that Party an activity in the Antarctic Treaty area;
 - (2) any person who undertakes an activity in the Antarctic Treaty area and for whom the final place of departure for that activity is in the territory of that Party;
- (h) "person" means any natural or private or public legal person, including a State or any of its constituent subdivisions;
- (i) "Protocol" means the Protocol on Environmental Protection to the Antarctic Treaty;
- (j) "Fund" means the Antarctica Environmental Protection Fund established under Article 13 of this Annex.

Comment

The definitions of "incident", "response measures" and "measures of reinstatement" are similar to those in other international conventions on civil liability for damage, see e.g. Article 2 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention of 1993), Article 1 of the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention of 1996) and Article 1 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD Convention of 1989).

Article 2

Scope of Application

1. This Annex applies to incidents arising from activities covered by the Protocol which have been undertaken in the Antarctic Treaty area after the entry into force of this Annex.
2. Notwithstanding paragraph 1 above, this Annex shall not apply to incidents arising from activities undertaken pursuant to the International Convention for the Regulation of Whaling, the Convention for the Conservation of Antarctic Seals or the Convention on the Conservation of Antarctic Marine Living Resources, unless the incidents arise from acts or events occurring in connection with such activities and are not regulated by the Conventions concerned.

Comment

Paragraph 1 of this Article makes clear that no retroactive effect is intended. The reference to "incidents" rather than to "damage" is due to the fact that the notion of "damage" in the Annex has been given a rather limited scope and the fact that Article 4 prescribes measures to be undertaken by the operator.

Paragraph 2 excludes the application of the Annex to incidents arising from activities pursuant to the conventions mentioned, unless the incidents arise from acts or events occurring in connection with such activities and are not regulated by the conventions concerned.

Article 3

Relationship with Other International Agreements

1. Subject to paragraph 2 below, nothing in this Annex shall derogate from the rights and obligations deriving from other international agreements in force in the Antarctic Treaty area.
2. Nothing in this Annex shall be construed as limiting or derogating from any of the rights of persons, including the Fund, entitled to compensation for damage under this Annex or as limiting the provisions concerning the protection or reinstatement of the Antarctic environment or dependent or associated ecosystems, which may be provided under the laws of any Party or under any other international agreement to which it is a Party and in force in the Antarctic Treaty area.

Comment

With regard to possible conflicts between the present Annex and other liability treaty regimes the following may be noted:

A particular topic as regards the scope of the application of the liability regime on environmental damage in Antarctica as proposed in the Annex concerns the applicability of other relevant liability regimes. In this regard there exists a category of conventions that concur with the proposed regime while other conventions tend for exclusive application which has to be taken into account in respect of the cover under the proposed regime.

As regards the first group relating to conventions that are applicable in concurrence with the proposed Annex, reference can be made to, *inter alia*:

the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC Convention) and the 1996 Protocol thereto;
the 1989 Salvage Convention.

Both the 1976 LLMC and the 1996 Protocol establish the right of the shipowner to limit his liability for maritime claims. This might also be the case for claims for damage in the Antarctic. The proposed Annex might be applicable but the shipowner still has the right to limit his liability for environmental claims according to the limits set in the applicable limitation convention.

The 1989 Salvage Convention might geographically be applicable in the Antarctic when salvage operations take place to fulfill obligations to undertake precautionary measures or response actions.

State Parties to the Protocol which are also State Parties to the 1976 LLMC are: Australia, Belgium, China, Finland, France, Germany, Japan, Netherlands, New Zealand, Norway,

Poland, Spain, Sweden and United Kingdom

State Parties to the Protocol which are also signatories to the 1996 LLMC Protocol (not yet in force) are: Finland, Germany, Netherlands, Norway, Sweden and United Kingdom

State Parties to the Protocol which are also State Parties to the 1989 Salvage Convention are: Australia, China, India, Italy, Netherlands, Norway, Sweden and United Kingdom

Conventions that might be applied exclusively, in case they are in fact applicable, could be:

the 1969 Civil Liability Convention

the 1971 Fund Convention;

the 1992 Civil Liability Convention;

the 1992 Fund Convention

the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).

The definition of damage in these conventions includes also damage by contamination of the environment and it is further provided, that no claim for compensation for damage shall be made against the shipowner otherwise than in accordance with these conventions (exclusive applicability).

As regards the geographical scope of application it is relevant that states have specifically declared that these conventions are applicable in Antarctica.

In respect of the channeling of liability these conventions make the shipowner exclusively liable for damage occurred by contamination of the environment in the course of maritime transport. As has been said, when these conventions are to be applied no claim for compensation for damage shall be made against the shipowner otherwise than in accordance with these conventions (exclusive applicability).

State Parties to the Protocol which are also State Parties to the 1969 Civil Liability Convention are: Brazil, Chile, China, Ecuador, India, Italy, New Zealand, Peru, Poland and Russian Federation.

State Parties to the Protocol which are also State Parties to the 1971 Fund Convention are:, China, , India, Italy, New Zealand, Poland and Russian Federation.

State Parties to the Protocol which are also State Parties to the 1992 Civil Liability Convention are: Australia, Belgium, Finland, France, Germany; Japan, Netherlands, Norway, Republic of Korea, Spain, Sweden, United Kingdom and Uruquay.

State Parties to the Protocol which are also State Parties to the 1992 Fund Convention are: Australia, Finland, France, Germany, Japan, Netherlands, Norway, Republic of Korea, Spain, Sweden, United Kingdom and Uruguay.

State Parties to the Protocol which are also signatories to the 1996 International Convention

on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea - HNS Convention (not yet in force) are: Finland, Germany, Netherlands, Norway, Sweden and United Kingdom.

However, parties to those conventions are entitled to derogate therefrom inter se in another treaty arrangement, such as the present Liability Annex to the Protocol on Environmental Protection to the Antarctica Treaty. This is what is proposed in paragraph 2, thereby also giving priority to more favourable provisions for the protection or reinstatement of the Antarctic environment or dependent or associated ecosystems. An alternative, providing for the opposite, would be to delete paragraph 2 and keep paragraph 1 (with deletion of the words "subject to paragraph 2 below").

Article 4

Precautionary Measures, Response Measures and Measures of Reinstatement

1. An operator shall take reasonable precautionary measures to prevent incidents and shall prepare contingency plans to minimise the impact of incidents.
2. If an incident occurs the operator shall take reasonable and timely response measures.
3. If an impact has occurred the operator shall take reasonable measures of reinstatement.
4. The operator may authorise another person to take the measures referred to in paragraphs 2 and 3 above on his behalf.
5. Any other person may take the measures referred to in paragraph 2 above:
 - (a) if the operator has not taken or authorised another person to take such measures within a reasonable period of time, taking into account the specific circumstances of the case;
 - (b) if the operator has indicated that he will not take such measures or authorise another person to take such measures on his behalf;
 - (c) if the operator can not be identified or contacted through reasonable means within a reasonable period of time, taking into account the specific circumstances of the case; or
 - (d) if the specific circumstances of the case do not allow any delay of such response measures.
6. Any other person may take the measures referred to in paragraph 3 above:
 - (a) if the operator has not taken or authorised another person to take such measures within a reasonable period of time, taking into account the specific circumstances of the case;
 - (b) if the operator has indicated that he will not take such measures or authorise another person to take such measures on his behalf; or
 - (c) if the operator can not be identified.
7. Any measure referred to in paragraph 3 above shall be taken in conformity with the provisions of Annex I to the Protocol.
8. Nothing in this Article shall affect the obligations of Parties under Article 15 of the Protocol.

Comment

In formulating this new Article 4, the principal aims were to simplify the text substantially and to create maximum clarity with regard to the question who may take (under certain conditions) response measures and measures of reinstatement. Article 4 imposes the responsibility of taking measures in the first place on the operator as defined in Article 1(g). Because of clear definitions of the terms precautionary measures, response measures and measures of reinstatement - based on other international conventions and laid down in Article 1 - the first four paragraphs can be kept very short without limiting the clarity of the obligations. As far as the measures of reinstatement are concerned, it is important to stress that these measures will off course only be required if damage still exists after adequate response measures have been undertaken.

In developing paragraphs 5 and 6 of Article 4, regarding the possibilities of other persons to take response measures and measures of reinstatement, the purpose was to find a balance between two principles:

- (1) on the one hand, the protection of the Antarctic environment should not fully depend on the willingness of the operator to take measures;
- (2) on the other hand, the operator must have sufficient time to take his/her responsibility and to take the measures him/herself.

As a consequence, also other persons than the operator should have the right to take response measures and measures of reinstatement, however, the conditions laid down in paragraphs 5 and 6 should prevent that other persons act in a way that blocks or frustrates initiatives of the responsible operator. In this respect the difference between response measures and measures of reinstatement is that response measures should be undertaken as soon as possible, where measures of reinstatement may be delayed if necessary, for example to find the responsible operator. This is why other persons may also take response measures if the operator can not be identified or contacted within a reasonable period of time and if the specific circumstances of the case do not allow any delay of such response measures. This aspect of time also explains why paragraph 7 requires the application of the EIA-provisions of the Protocol for measures of reinstatement. By the way, formally this paragraph may be deleted as the preparation of an environmental impact assessment (PA, IEE or CEE) for measures of reinstatement is already required on the basis of the present Article 8 of the Protocol and Annex I to the Protocol. However, paragraph 7 increases the legal clarity and more in particular makes clear that the exoneration of the application of Annex I in cases of emergency (Article 7 of Annex I to the Protocol) does not apply to the situation in which measures of reinstatement must be taken..

Article 5

Strict Liability

An operator is strictly liable for damage caused by his activity in the Antarctic Treaty area.

Comment

In this Article it is made clear that the liability of the operator is strict, which means that no fault on his part is required to establish liability.

Article 6

Joint and Several Liability

1. When damage has been caused by two or more operators they will be jointly and severally liable for such damage. However, the operator who proves that only part of the damage was caused by him, shall be liable for that part of the damage only.
2. Each operator shall be entitled to the limits of liability applicable to each of them.
3. Nothing in this Annex shall prejudice any right of recourse of an operator against any third party.

Comment

This Article deals with the situation that damage is the result of the activities of more than one operator and it is not possible to establish the contribution of each operator to the damage. In that case claims for damage may be made severally against one or more of those liable or jointly against all liable at the choice of the claimant. This is without prejudice to the right of each operator to seek recourse on other liable operators (paragraph 3). In case a liability limit would apply, there is need to make clear that an operator can not be obliged to pay compensation beyond the limit of his liability. Damage in excess of this limit, can be claimed from the other (jointly and severally) liable operators (paragraph 2). This provision is common in international liability conventions.

Article 7

Obligation to Pay Compensation to the Fund

1. The operator who is responsible for the activity that caused damage shall provide compensation to the Fund in case:
 - (a) an impact cannot be repaired, or
 - (b) an impact can be repaired, but measures of reinstatement have not been undertaken in accordance with Article 4(6) of this Annex within 3 years after the incident that caused the impact took place.
2. The Antarctic Treaty Consultative Meeting shall - on the basis of an advice of the Committee for Environmental Protection:
 - (a) adopt under Article IX of the Antarctic Treaty guidelines for the calculation of the amount of compensation in the case of an impact referred to in paragraph 1 above;
 - (b) appoint under Article IX of the Antarctic Treaty six experts in the field of calculation of compensation for an impact.
3. The Parties shall notify the other Parties to the Protocol and the Fund of each situation in which an impact referred to in paragraph 1 above has been caused by an operator under its jurisdiction. Any other person may notify the Fund of such a situation.
4. After receipt of a notice as referred to in paragraph 3 above, the Fund will ask three experts designated in accordance with paragraph 2 (b) above to assess whether there was an impact referred to in paragraph 1 above. When this is the case, the experts will calculate the amount of compensation, taking into account the guidelines referred to in paragraph 2(a) above. The operator shall be required to provide the experts with all the relevant information. As soon as possible and in any case within six months after the receipt of the notice referred to in paragraph 3 above, the experts will give notice to the Parties, the operator and the Fund of the amount of compensation that must be paid by the operator in accordance with paragraph 1 above. The operator will pay the compensation to the Fund within two months after the receipt of this notice.
5. Each Party shall take the necessary measures to ensure that the Fund will have access to the national courts in case the operator does not pay the compensation in accordance with paragraphs 1 and 4 above.
6. Each year the Fund will report to the Antarctic Treaty Consultative Meeting with regard to the contributions it has received in accordance with the procedure laid down in this Article.

Comment

First of all, it must be stated that this is a very difficult Article. It is therefore a preliminary draft which should get a critical assessment. The draft is based on the following principles:

- the ATCM should adopt guidelines for the calculation of compensation to be paid by the operator in cases when the harmful effect of an impact cannot be remedied or if this is possible no measures have been taken to do so;
 - the ATCM should not be asked to deal with individual cases of unrepairs damage; the assessment and calculation of compensation in individual cases should be the task of independent experts;
 - a permanent group of experts should be appointed: these experts can build up a special expertise in the course of the years and the risk of big differences between interpretation and calculation in individual cases are limited;
 - the Fund should not be involved in the calculation process itself;
 - the practice with regard to this Article should be discussed during ATCMs on the basis of a report of the Fund.

It is clear that this Article is not the final solution of all questions. A concern is for example that the operator should not be stimulated to be passive: if the amount of compensation would in practice be very low, it would be profitable for the operator to wait and not to take any measures of reinstatement. Furthermore, the relation with the provision on the Fund asks for more attention.

Article 8

Extent of Liability

The operator shall not be liable under this Annex for damage which he proves was caused by:

- (a) 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 that all reasonable safety measures were taken by the operator to prevent damage;
- (b) an act of war, hostilities, or an act done with the intent to cause damage by a third party against which no reasonable safety measures could have been effective.
- (c) an act in a case of emergency to save human life, ships, aircraft or equipment or facilities of high value or to protect the environment, unless the emergency giving rise to the exemption was caused by the operator.

Comment

The exemptions mentioned in this Article can be found in other international conventions on liability, as there are the Paris and Vienna Conventions on Liability for Nuclear Damage, the conventions concerning liability for oil pollution at sea (CLC and IOPC Convention), liability for damage caused during the carriage of dangerous goods (CRTD) or the carriage of hazardous and noxious substances at sea (HNS) and liability for damage caused by activities dangerous to the environment (Lugano Convention). Subparagraph (c) is an abstraction from the provisions in the other Annexes to the Protocol dealing with cases of emergency to save human life, ships, aircraft or equipment or facilities of high value or to protect the environment.

Article 9

State Liability and Responsibility

1. Notwithstanding the liability of the operator provided for in this Annex, a Party shall be liable for damage caused by an operator under its jurisdiction which would not have occurred or continued if that Party would have fulfilled its obligations under Article 13 of the Protocol. Such liability shall be limited to that portion of liability not satisfied by the operator under its jurisdiction .
2. Nothing in paragraph 1 above shall affect the application of rules of international law on State responsibility.

Comment

Paragraph 1 creates a special liability for a Party - under the conditions mentioned in that paragraph - vis-a-vis another person who is entitled to compensation under this Annex which may be another Party or natural or legal person, including the Fund. The liability of the Party provided for in this Article must be deemed to be unlimited because it is a liability based on fault.

Article 10

Compulsory Insurance or Other Financial Security

1. Each Party shall ensure, taking due account of the nature and the risks of the activities undertaken, that non-State operators conducting activities in the Antarctic Treaty area maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover liability for damage up to the limits specified in Article 11 of this Annex.
2. Notwithstanding paragraph 1 above, each Party which is a Party to the International Convention on Limitation of Liability for Maritime Claims 1976, as amended by the 1996 Protocol, shall ensure that non-State operators, who are shipowners and sailors as defined in Article 1(1) of that Convention, conducting activities in the Antarctic Treaty area, shall ensure that liability for claims referred to in Article 2(1) of that Convention which are covered by this Annex is covered by insurance or other financial security up to the limits set under Article 6 of that Convention or the limits specified in Article 11 of this Annex, whichever are higher.

Comment

Since many activities in the Antarctic region are carried out by ships it is incumbent to consider the various conventions that exist in this field regarding liability and insurance. Compulsory insurance was already established under the 1969 Civil Liability Convention dealing with liability and compensation for damage caused by oiltankers and is recently reiterated in the Convention on Liability and Compensation for damage caused by the transport by sea of hazardous and noxious substances (HNS Convention). In case the 1969 CLC and the HNS Convention are not applicable in the Antarctic region (because states did not state so), it is of relevance for the application of the proposed Annex that the 1976 Limitation of Liability for Maritime Claims Convention (LLMC) will also be applicable to ships in the Antarctic for claims as mentioned in the CLC and HNS Convention. The 1976 Convention and 1996 Protocol grant the right to the shipowner, who in the context of the Environmental Protocol under circumstances can be regarded as operator, to limit his liability up to an amount relating to the tonnage of his ship. In assessing these specific shipowner limits due account has been given to the available insurance capacity.

Therefore reference is made in paragraph 2 to Article 2(1) LLMC in the sense that insurance cover or other financial security will be provided for the claims mentioned in that Article. This would be in consistency with current developments within IMO to ensure that shipowners have effective cover in respect of their ships for their liabilities to third parties (draft IMO Guidelines on shipowners' responsibilities in respect of maritime claims).

An outstanding issue is whether such requirements can also be introduced in case limits are set in Article 11 of this Annex which are higher than those under Article 6 LLMC. Further advise of P&I Clubs, which provide for insurance cover of ships, might be helpful. From the point of view of protecting the victim it is of course desirable that higher limits prevail, however practical experience has shown that this is not always possible in the field of

shipping. The insurance capacity for shipping activities is restricted and this has certainly to be taken into account when assessing the scope of liability of the shipowner and the salvor. One of the reasons of limitation of liability provided by the LLMC is that salvors are protected against uninsurable liabilities for damage caused during salvage operations. Insurable liability can therefore be seen as an incentive to protect the marine environment which also seems to be relevant in the Antarctic (Bahia Paraiso).

Article 11

Limits

[Liability for damage in accordance with Article 5 of this Annex shall not exceed... .]

Comment

See the comment to Article 10.

Article 12

Limitation periods

- 1.1. Actions for compensation under this Annex, including those brought against the Fund, or for measures under Article 4 of this Annex shall be subject to a limitation period of [.....] years from the date on which the person bringing the action knew or ought reasonably to have known of the damage and of the identity of the operator. The laws of the Parties regulating suspension or interruption of limitation periods shall apply to the limitation period prescribed in this paragraph.
2. However, in no case shall actions be brought after [.....] years from the date of the incident which caused the damage. Where the incident consists of a continuous occurrence the [...] years' period shall run from the end of that occurrence. Where the incident consists of a series of occurrences having the same origin the [...] years' period shall run from the date of the last of such occurrences.

Comment

See Article 17 Lugano Convention, Article 18 CRTD and Article 32 HNS.

Article 13

Antarctica Environmental Protection Fund

1. An Antarctica Environmental Protection Fund is hereby established.
2. The Fund shall pay compensation to any person suffering damage and entitled to compensation, if such person has been unable to obtain compensation for such damage under the terms of [Articles of] this Annex,
 - (a) because no liability for such damage arises under this Annex;
 - (b) because the identity of the operator cannot be established;
 - (c) because the operator is financially incapable of meeting his obligations in full and any financial security that may be provided under Article 10 of this Annex does not cover or is insufficient to satisfy the claims for compensation for such damage; or
 - (d) because such damage exceeds the limits of liability set in Article 11 of this Annex or under the terms of any other applicable international agreement.
3. If the Fund proves that the damage resulted wholly or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from negligence of that person, the Fund may be exonerated wholly or partially from its obligation to pay compensation to such person.
4. The aggregate amount of compensation payable by the Fund under this Article shall in respect of any such incident be limited, so that the total sum of that amount and the amount of compensation actually paid under this Annex shall not exceed [.....]
5. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4 above, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Annex shall be the same for all claimants.
6. Contributions to the Fund shall be made:
 - (a) in accordance with Article 7 of this Annex
 - (b)
7. The Fund is authorized to receive voluntary contributions.
8. The Fund shall in each Party be recognized as a legal person capable under the laws of that Party of assuming rights and obligations and being a party in legal proceedings

before the competent courts of that Party.

9. The Fund shall be capable of assuming rights and obligations under this Annex and of being a party in proceedings involving actions submitted to arbitration under Article 15 (2) of this Annex.
10. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with paragraph 2 above, acquire by subrogation the rights that the person so compensated may enjoy against the operator.

Comment

The Fund established under this Article shall pay compensation to any person suffering damage and entitled to compensation, if such compensation could not be obtained from, or even by, the operator through the application of the other provisions of the Annex. In a limited number of cases such a person should be able to apply to the Fund as a (subsidiary/supplementary) source from compensation.

The Article - which needs further reflection and elaboration - also provides for certain exoneration grounds for the Fund and for a limit to the aggregate amount of compensation to be paid in respect of a particular incident. Contributions to the Fund are to be made in accordance with Article 7 of the Annex, while possible further sources of contribution should be considered. The Fund should be able to act as a legal person before the competent courts of a Party or in arbitration proceedings envisaged under Article 15(2) of the Annex and acquire by subrogation rights that the person compensated by the Fund may enjoy against the operator.

Article 14

Jurisdiction, Recognition and Enforcement

1. Subject to Article 15 of this Annex, actions under this Annex may only be brought within a Party at the Court
 - (a) of the place where the operator has his habitual residence or his principal place of business;
 - (b) of the place where the operator organized an activity in the Antarctic Treaty area;
 - (c) of a Party of which the operator has the nationality.
2. Each Party shall ensure that its courts shall have jurisdiction to hear and determine actions brought in accordance with paragraph 1 above.
3. Where an action has been brought before a court having jurisdiction under paragraph 1 above against the operator, such court shall have exclusive jurisdiction over any action against the Fund in respect of the same damage.
4. Each Party shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings instituted against the operator before a court of that Party having jurisdiction under paragraph 1 above.
5. Except as otherwise provided in paragraph 6 below, the Fund shall not be bound by any decision in proceedings to which it has not been a party or by any settlement to which it is not a party.
6. Without prejudice to paragraph 4 above, where an action has been brought against an operator before a court having jurisdiction under paragraph 1 above, each party to the proceedings shall be entitled under the national law of that Party to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any decision rendered by the court in such proceedings shall, after it has become final and enforceable in the Party where the decision was given, become binding upon the Fund in the sense that the facts and findings in that decision may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.
7. Any decision given by a court having jurisdiction under paragraph 1 above, subject to any decision concerning the distribution referred to in Article 13(5) of this Annex in the case of a decision against the Fund, which is no longer subject to ordinary forms of review, shall be recognised in any Party, unless:
 - (a) such recognition is contrary to public policy in the Party in which recognition is sought;
 - (b) it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his

- defence;
- (c) the decision is irreconcilable with a decision given in a dispute between the same parties in the Party in which recognition is sought; or
 - (d) the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the Party addressed.
8. A decision recognised under paragraph 3 above which is enforceable in the Party of origin shall be enforceable in each Party as soon as the formalities required by that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.

Comment

See Articles 33-35 HNS, Article 23 Lugano Convention, Article 20 CRTD.

Article 15

Disputes and Actions Involving One or More Parties

1. Subject to paragraph 2 below, disputes between Parties concerning the interpretation and application of this Annex shall be settled in accordance with Articles 18, 19 and 20 of the Protocol, unless the parties otherwise agree.
2. Actions for compensation under this Annex, including those brought by or against the Fund, or for measures under Article 4 of this Annex, involving one or more Parties, shall be submitted to arbitration in accordance with the provisions of the Schedule to the Protocol on Arbitration, unless the Party or Parties involved agree that such action be brought before a court having jurisdiction under Article 14 of this Annex. For this purpose the Schedule to the Protocol shall apply to a party which is not a Party, as if it were a Party.
3. The award of the Arbitral Tribunal shall be binding and enforceable in each Party as if it were a final judgment of its highest court.
4. Where an action has been submitted to arbitration in accordance with paragraph 2 above against the operator, the provisions of Article 14 (3), (4), (5) and (6) of this Annex shall apply *mutatis mutandis* in respect of the Fund.

Comment

This Article provides that apart from disputes between Parties concerning the interpretation and application of the Annex, also actions for compensation under the Annex involving one or more Parties shall in principle be submitted to arbitration in accordance with the provisions of the Schedule to the Protocol on Arbitration.

Article 16

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. Unless the measure 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 of the Antarctic Treaty Consultative Parties notifies the Depositary, within that time period, that it wishes an extension of that period or that it is unable to approve the measure.
2. Any amendment or modification of this Annex which becomes effective in accordance with paragraph 1 above shall thereafter become effective as to any other Party when notice of approval by it has been received by the Depositary.

Comment

This text is entirely identical with the provisions on amendment and modification appearing in Annexes I, II, IV and V and (except for the word "measure" instead of "amendment" at the end of paragraph 1 of Article 13 of) Annex III.