

Antarctica (Environmental Protection: Liability Annex) Amendment Bill

Government Bill

Explanatory note

General policy statement

This Bill amends the Antarctica (Environmental Protection) Act 1994 by inserting a *new Part 5A*. The Bill implements many of New Zealand's obligations under Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (the **Liability Annex**). The Liability Annex deals with liability for environmental emergencies occurring in Antarctica. It was adopted in 2005 by the 28th Antarctic Treaty Consultative Meeting but has not yet entered into force.

The Bill requires operators (those organising or conducting Antarctic activities) to take prompt, effective response action when environmental emergencies arise from their activities. New Zealand operators must notify the Ministry of Foreign Affairs and Trade if they cause or discover an environmental emergency. If an operator fails to take prompt, effective response action, a Party to the Liability Annex (an **Annex Party**) may do so, and the defaulting operator must reimburse the Annex Party's costs.

Where no Annex Party takes response action to an environmental emergency caused by a New Zealand operator, the High Court may order the operator to pay an amount representing the costs that would

have been incurred had prompt and effective response action been taken. This amount will be paid into an Environmental Protection Fund administered by the Antarctic Treaty Secretariat.

The Bill also sets out the situations in which an operator is exempt from liability, and imposes a financial limit on liability (expressed in International Monetary Fund special drawing rights, equivalent to a minimum of US\$1.5 million for environmental emergencies involving a ship, and US\$4.5 million for other environmental emergencies). Liability is strict, and attaches to both State and non-State operators. The Bill removes the requirement for the Attorney-General to consent to civil proceedings against operators, since the Bill aims to facilitate such actions and requiring the Attorney-General's approval could be seen as a barrier.

The Liability Annex does not define "State operator". Instead, each Annex Party must decide which of its operators are State operators. New Zealand will accept another Annex Party's decision, because State operators are not exempt from liability. Each Annex Party will be responsible for the actions of its State operators under international law. For this reason, the Bill does not cover the State operators of other Annex Parties, which will instead be covered by the relevant Annex Party's domestic legislation.

The Liability Annex will enter into force once it has been approved by all 28 Antarctic Treaty Consultative Parties, including New Zealand. Enactment of this Bill will enable New Zealand to approve the Liability Annex. The Bill will be brought into force by Order in Council once the Liability Annex itself enters into force.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides that the Act comes into force on a date to be appointed by Order in Council. The Order in Council will be made when it is known when the Liability Annex will enter into force, which will be when it has been approved by all the Antarctic Treaty Consultative Parties. The Act should come into force on the same day that the Liability Annex enters into force.

Clause 3 provides that the Act amends the Antarctica (Environmental Protection) Act 1994 (the **principal Act**).

Clause 4 amends section 6. That section provides that the consent of the Attorney-General is required before any proceedings under the principal Act are instituted against certain people. The amendment excludes civil proceedings commenced under *new sections 37E and 37F* from the scope of this requirement, meaning that proceedings under those sections can be brought without the Attorney-General's consent.

Clause 5(1) inserts *new Part 5A*, comprising *new sections 37A to 37I*.

Part 5A

Liability for environmental emergencies

Preliminary provisions

New section 37A sets out the purpose of *new Part 5A*, which is to implement New Zealand's obligations under the Liability Annex.

New section 37B defines terms used in this Part. Key definitions are environmental emergency, New Zealand operator, and prompt and effective response action. The definitions closely reflect the definitions and terminology used in the Liability Annex.

Responding to environmental emergencies

New section 37C requires New Zealand operators whose activities give rise to an environmental emergency to notify the Ministry of Foreign Affairs and Trade (the **Ministry**). It is an offence not to do so.

New section 37D requires New Zealand operators whose activities give rise to an environmental emergency to take prompt and effective response action. It is an offence not to do so.

Civil liability for failure to take response action

New section 37E provides that if a New Zealand operator or a New Zealand resident operator whose activities give rise to an environmental emergency fails to take prompt and effective response action, then the operator is liable to pay the costs incurred by any Annex Party that does take response action. An application for an order requiring a non-State operator to pay the costs must be made to the High Court. The application may be made only by the Minister, if the Ministry took the action, or by another Annex Party that took the

action. Article 7(4) to (6) deals with what happens when the operator is a State operator. An operator is liable whether or not it knew of the environmental emergency.

New section 37F provides for the situation where no Annex Party has taken response action following an environmental emergency caused by a New Zealand operator or a New Zealand resident operator. In that situation, the operator whose activities gave rise to the environmental emergency is liable to pay the costs of the response action that should have been taken. An application for an order requiring a non-State operator to pay the costs of the response action that should have been taken may be made to the High Court. The application may be made only by the Minister, or by a person authorised by an Annex Party to apply on its behalf. Money paid following an order under this section is paid into the Environmental Protection Fund. Article 7(4) to (6) deals with what happens when the operator is a State operator.

New section 37G sets out some limits on the civil liability imposed by *new sections 37E and 37F*. This relieves operators from liability for environmental emergencies caused by acts necessary to protect human life or safety, exceptional natural disasters, acts of terrorism, or acts of belligerency against the operator.

New section 37H imposes limits on the amount of liability under *new sections 37E and 37F*. These are determined by reference to the Liability Annex. Regulations made under section 55(2) may update the text of the Annex to reflect agreed changes to these limits.

New section 37I provides that if an environmental emergency arises from the activities of 2 or more operators, liability is joint and several.

Clause 5(2) adds the text of the Liability Annex, set out in the *Schedule*, to the Protocol on Environmental Protection to the Antarctic Treaty, which is set out in Schedule 2 of the principal Act.

Regulatory impact statement

Executive summary

Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability Arising from Environmental Emergencies (the **Liability Annex**) was adopted by the 28th Antarctic Treaty Consultative Meeting (**ATCM**) in June 2005. New Zealand and other Antarc-

tic Treaty countries are now seeking to approve the Liability Annex so that it can enter into force.

The Liability Annex establishes a regime of liability for damage to the Antarctic environment arising from activities conducted there by Parties to the Antarctic Treaty and its Protocol on Environmental Protection. Operators (those organising Antarctic activities) must take preventative measures to reduce the likelihood of accidents harming the Antarctic environment; establish contingency plans to deal with harmful incidents; and take prompt, effective response action when environmental emergencies arise from their activities. If an operator fails to take prompt and effective response action to protect the environment, others may endeavour to do so, and the defaulting operator must reimburse their costs.

The Liability Annex also establishes legal mechanisms for the recovery of these costs; sets out certain exemptions from liability; requires Antarctic operators to have insurance; and imposes a financial limit on liability (expressed in International Monetary Fund special drawing rights, equivalent to a minimum of US\$1.5 million for environmental emergencies involving a ship, and US\$4.5 million for other environmental emergencies). Liability is strict (it does not require proof that the environmental emergency arose from an operator's fault or negligence) and applies to both government and private operators. Legislation will be needed to implement most aspects of the Liability Annex.

Nature and timing of proposed treaty action

The Antarctic Treaty entered into force for New Zealand on 23 June 1961. The Protocol on Environmental Protection to the Antarctic Treaty (the **Environmental Protocol**) entered into force for New Zealand on 14 January 1998. The Liability Annex was adopted by the ATCM held in Stockholm in June 2005.

The Liability Annex has not yet entered into force. It is proposed that New Zealand approve the Liability Annex in advance of the 50th anniversary of the signing of the Antarctic Treaty in 2009.

Reasons for New Zealand to become party to treaty

Background

The adoption of the Liability Annex fulfils a longstanding obligation on Antarctic Treaty countries, including New Zealand, to conclude an annex to the Environmental Protocol setting out legal liability for damage to the Antarctic environment. This obligation is contained in article 16 of the Environmental Protocol. The Liability Annex is an important element of the Antarctic environmental protection regime. The Liability Annex will enter into force once it has been approved by all Antarctic Treaty Consultative Parties, including New Zealand (Environmental Protocol, article 9(2) and Antarctic Treaty, article IX). New Zealand plays an active role in the Antarctic Treaty System and strongly supports its objectives.

Approving the Liability Annex is an opportunity to highlight and promote, both domestically and internationally, New Zealand's support for a strong environmental protection regime for Antarctica. In addition, because of the leading role New Zealand played in chairing the negotiations, New Zealand will be expected to be one of the first countries to formally approve the Liability Annex. To date, only Sweden, Peru, Poland, and Spain have approved the Liability Annex. Twenty of the remaining 24 Antarctic Treaty Consultative Parties have indicated that they have started their internal review processes for approving the Liability Annex. As well as New Zealand, these countries include Australia, Brazil, China, France, Germany, the United Kingdom, and the United States of America.

It is proposed that New Zealand adopt the legislation necessary to approve the Liability Annex, but not bring this legislation into force until the Liability Annex itself enters into force following its approval by all the Antarctic Treaty Consultative Parties. This process is expected to take several years.

***Advantages and disadvantages to New Zealand
of treaty entering into force and not entering
into force***

Advantages of treaty action

The Liability Annex is an important element in the effective implementation of the Antarctic environmental protection regime, of which New Zealand is a strong supporter.

The advantages to New Zealand of approval of the Liability Annex (which, together with approval by the other Antarctic Treaty Consultative Parties, will enable its subsequent entry into force) are—

- the Liability Annex meets New Zealand’s objective of securing as broad a liability regime as possible; and
- while there was no agreement to include liability for irreparable damage to the environment in the Liability Annex, a commitment was secured to future negotiations of a further regime to cover situations of irreparable damage; and
- requiring operators to take preventative measures and establish contingency plans will reduce the likelihood of accidents harming the Antarctic environment (for which New Zealand would have search and rescue responsibility if such accidents occurred in the Ross Sea region of Antarctica); and
- being one of the first countries to approve the Liability Annex is an opportunity to highlight and promote, both domestically and internationally, New Zealand’s support for a strong environmental protection regime for Antarctica.

The status quo is for liability for environmental emergencies in Antarctica to be governed by the general provisions of article 15 of the Environmental Protocol and the international legal principles governing state responsibility. Neither of these sources provides sufficient certainty for operators, whether private or State, as to their potential liability. To create clear, enforceable legal obligations, the Liability Annex is required.

Disadvantages of treaty action

There are no significant disadvantages to New Zealand approving the Liability Annex. The only costs incurred as a result of approving the Liability Annex relate to insurance requirements, and are analysed in the costs and effects section below.

Disadvantages of not taking treaty action

Given New Zealand's leading role as chair of the Liability Annex negotiations and a significant player in Antarctic affairs, a decision not to approve the Liability Annex would harm New Zealand's international reputation.

On balance, officials consider that it is in New Zealand's interest to approve the Liability Annex, as the costs are minor whereas the benefits to the Antarctic environment and to New Zealand's reputation are significant and long term.

***Legal obligations that would be imposed on
New Zealand by treaty action, position for
reservations to treaty, and outline of any
dispute settlement mechanisms***

New Zealand's legal obligations under the Liability Annex, once it entered into force, would include—

- requiring New Zealand operators to take preventative measures to reduce the likelihood of accidents harming the Antarctic environment, and to establish contingency plans to deal with harmful incidents (Liability Annex, articles 3 and 4); and
- requiring New Zealand operators to take prompt response action when environmental emergencies arise from their activities (Liability Annex, article 5(1)); and where they do not do so, establishing their liability to pay the costs of the response action that they should have taken (Liability Annex, article 6); and
- establishing a notification procedure for an operator who discovers an environmental emergency, so that the Government can consider whether to take response action itself; and promoting the use of notification procedures and cooperative response procedures by New Zealand operators who cause environmental emergencies (Liability Annex, articles 4 and 5); and
- establishing legal mechanisms for the recovery of response action costs (Liability Annex, article 7) and the situations in which liability is exempted (Liability Annex, article 8); and

- setting the financial limits on the compensation for which an operator may be liable (Liability Annex, article 9) and requiring operators to carry insurance up to these limits.

These are the same legal obligations that other parties to the Liability Annex would have upon the entry into force of the Liability Annex.

Reservations

The Environmental Protocol does not allow States to make reservations, either to the Environmental Protocol or to its annexes, which form an integral part of the Environmental Protocol (Environmental Protocol, articles 9(1) and 24).

Dispute resolution mechanisms

The Environmental Protocol's existing dispute resolution procedures, set out in articles 18 to 20, will also apply to the Liability Annex (Environmental Protocol, article 9). If a dispute arises concerning the Liability Annex's interpretation or application, the parties to the dispute are to consult among themselves as soon as possible with a view to resolving the dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other agreed peaceful means (Environmental Protocol, article 18). Parties can choose to resolve disputes relating to an annex using either or both of the International Court of Justice and the Arbitral Tribunal (details of which are contained in the Schedule to the Environmental Protocol). By default, Parties are deemed to have accepted the competence of the Arbitral Tribunal (Environmental Protocol, article 19(3)). If parties to a dispute have not accepted the same means, or have both accepted both means, then the dispute shall be submitted to the Arbitral Tribunal, unless the parties agree otherwise (Environmental Protocol, article 19(5) and (6)).

***Measures that Government could or should
adopt to implement treaty action, including
specific reference to implementing legislation***

New implementing legislation

Legislation will be required to implement most of New Zealand's obligations under the Liability Annex, including—

- requiring New Zealand operators to take prompt and effective response action when environmental emergencies arise from their activities (Liability Annex, article 5(1)); and where they do not do so, establishing their liability to pay the costs of the response action that they should have taken (Liability Annex, article 6); and
- establishing a notification procedure for an operator who discovers an environmental emergency, so that the Government can consider whether to take response action itself; and promoting the use of notification procedures and cooperative response procedures by New Zealand operators who cause environmental emergencies (Liability Annex, articles 4 and 5); and
- establishing legal mechanisms for the recovery of response action costs (Liability Annex, article 7) and the situations in which liability is exempted (Liability Annex, article 8); and
- setting the financial limits on the compensation for which an operator may be liable (Liability Annex, article 9).

This legislation will take the form of an amendment to the existing Antarctica (Environmental Protection) Act 1994 (the **1994 Act**). The amending Bill is expected to contain approximately 5 clauses of medium complexity. Regulations will be needed to bring the amending legislation into force, following the entry into force of the Liability Annex.

Implementation using administrative procedures

Some Liability Annex obligations will not require legislative amendments, as they can instead be implemented through existing administrative procedures. These obligations will be attached as conditions (**Ministerial directions**) to environmental impact assessments conducted under the 1994 Act. Section 10(1)(b) of the 1994 Act provides that the Minister may “direct any person carrying out ... any activity”

in Antarctica to “abide by such conditions as the Minister considers appropriate in order to avoid or minimise the effects of the activity on the Antarctic environment”.

The obligations proposed to be implemented as conditions in this way are operators’ obligations to take preventative measures and establish contingency plans (Liability Annex, articles 3 and 4) and to carry insurance or a financial guarantee to cover their liability (Liability Annex, article 11). This is an appropriate mechanism for implementing these obligations, since reducing the risk of environmental emergencies occurring in Antarctica is one of the Liability Annex’s primary aims. The New Zealand procedures for non-governmental visitors to Antarctica (available on the Ministry of Foreign Affairs and Trade’s Internet site) will be updated to ensure non-State operators are aware of the requirement to provide this information along with their environmental impact assessment.

Economic, social, cultural, and environmental costs and effects of treaty action

Environmental

Approving the Liability Annex, and therefore ultimately allowing it to enter into force, will have long-term benefits for the Antarctic environment. In particular, requiring operators to take preventative measures and establish contingency plans will reduce the likelihood of accidents harming the Antarctic environment. Imposing legal liability to clean up or pay the costs of response action where damage does occur will act as an incentive for operators to minimise damage to the environment.

Economic

The Liability Annex is not expected to have any impact on the economy.

Costs to New Zealand of compliance with treaty

There will be ongoing compliance costs for New Zealand operators in the Antarctic, both governmental and non-governmental, as a result of implementing the Liability Annex obligations outlined above.

However, these are expected to be minimal as operators already have insurance in place.

Private operators

Alongside the current environmental impact assessment required for proposed Antarctic activities, private operators will need to demonstrate they have—

- undertaken reasonable preventive measures designed to reduce the risk of environmental emergencies and their potential adverse impact; and
- established contingency plans, in co-operation with other operators, for responses to incidents with potential adverse impacts on the Antarctic environment; and
- maintained adequate insurance or other financial security, such as a bank guarantee, to cover liability for response action taken by a party to the Environmental Protocol where the operator fails to take prompt and effective response action. Such insurance must cover liability up to the financial limits of liability set out in article 9(1) and (2) of the Liability Annex (expressed in International Monetary Fund special drawing rights, equivalent to a minimum of US\$1.5 million for environmental emergencies involving a ship, and US\$4.5 million for other environmental emergencies). These limits were judged to reflect an appropriate balance between the need to set limits sufficiently high to offer a deterrent, and the need to keep financial risks within reasonable limits.

State operators

State (government) operators must also meet the same requirements as private operators, outlined above. However the Liability Annex allows parties to elect to self-insure rather than carry insurance for State operators. Since Antarctica New Zealand's activities are primarily land-based, the maximum level of exposure for which it may be liable in respect of any one incident is 3 million SDRs (currently equivalent to approximately US \$4.5 million). Antarctica New Zealand currently carries public liability insurance sufficient to cover this exposure. As a result, there is no need to take up the self-insurance option in respect of Antarctica New Zealand.

The New Zealand Defence Force (NZDF) operates C-130 Hercules and P3K Orion aircraft in the Antarctic. Accordingly, its maximum level of exposure in respect of any one incident would also be US \$4.5 million. In the case of an environmental emergency arising from a ship (should NZDF operate vessels in the Antarctic Treaty area in the future), the limit on liability is set at US \$1.5 million for a ship of 2 000 gross tonnes, increasing by a sliding scale with each additional tonne. NZDF currently carries aviation and marine protection and indemnity insurance sufficient to cover this exposure. As a result, there is no need to take up the self-insurance option in respect of NZDF.

New Zealand government agencies such as the Ministry of Fisheries and the National Institute of Water and Atmospheric Research also undertake scientific research voyages from time to time in the Antarctic Treaty area (south of 60°S). Such voyages will also be covered by the Liability Annex once it enters into force. As these voyages are ship-based, the relevant limit on liability for an environmental emergency arising from their activities would start at US \$1.5 million for a ship of 2 000 gross tonnes, increasing by a sliding scale with each additional tonne. Such voyages have previously carried public liability insurance sufficient to cover this exposure, and would be required to do so following the Liability Annex's entry into force. As a result, there is no need to take up the government self-insurance option provided in the Annex in respect of State operators conducting Antarctic research voyages.

***Completed or proposed consultation with
community and parties interested in treaty
action***

Government agencies represented on the Officials' Antarctic Committee (the Treasury; Antarctica New Zealand; the Ministries of Defence, Environment, Fisheries, Research, Science and Technology, Tourism, and Transport; the Departments of Conservation and of the Prime Minister and Cabinet; New Zealand Defence Force; Land Information New Zealand; and Maritime New Zealand) and the Ministry of Justice have been consulted on and support the proposed treaty action. The Ministry of Economic Development, the Parliamentary Counsel Office, and the National Institute of Water and Atmospheric Research were also informed.

Representatives of the International Association of Antarctica Tour Operators (**IAATO**), the Antarctic tourism industry body, and of Antarctic environmental NGOs were involved in the Liability Annex negotiations. Interested parties will also have the opportunity to comment on the Liability Annex's domestic implementation during the Parliamentary treaty examination process and the select committee process.

Subsequent protocols or amendments to treaty and their likely effects

Future annexes

The Liability Annex creates liability for the costs of response action (such as containing an oil spill), but does not create liability for irreparable damage to the environment itself. This reflects adamant resistance from a number of countries during the negotiation of the Liability Annex. However, in a compromise, the ATCM decided when adopting the Liability Annex to defer the issue of irreparable damage to future negotiations.

The ATCM adopted Decision 1 (2005), which provides that, within 5 years, the ATCM will take a decision on the establishment of a time frame for the resumption of negotiations “to elaborate future rules and procedures as may be necessary” relating to liability for irreparable damage.

Amendment procedure

The Liability Annex may be amended or modified by a Measure adopted in accordance with article IX(1) of the Antarctic Treaty (Liability Annex, article 13). Article 13(2) of the Liability Annex provides for an expedited amendment procedure, with amending Measures that do not specify otherwise deemed to be accepted 1 year after their adoption, unless a party requests otherwise. All Measures require consensus to be adopted.

New Zealand would consider any amendments or modifications to the Liability Annex on a case by case basis, and any decision to accept an amendment or modification would be subject to the usual domestic approvals and procedures.

Withdrawal or denunciation provisions

There is no withdrawal or denunciation provision in the Liability Annex itself. The Antarctic Treaty and the Environmental Protocol contain limited provisions dealing with withdrawal. In the case of the Environmental Protocol, this is not possible until at least 50 years after its entry into force (January 2048). In addition, it is possible to withdraw from either treaty at any time by consent of all parties to the treaty (Vienna Convention on the Law of Treaties, article 54).

Any decision by New Zealand to withdraw from the Antarctic Treaty or the Environmental Protocol would be subject to the usual domestic approvals and procedures.

Adequacy statement

The Ministry of Foreign Affairs and Trade has determined that this national interest analysis is adequate.

Hon Murray McCully

**Antarctica (Environmental
Protection: Liability Annex)
Amendment Bill**

Government Bill

Contents

	Page
1 Title	2
2 Commencement	2
3 Principal Act amended	2
4 Consent of Attorney-General required for certain proceedings	2
5 New Part 5A inserted	2

Part 5A

Liability for environmental emergencies

Preliminary provisions

37A Purpose of Part	2
37B Interpretation for this Part	3
<i>Responding to environmental emergencies</i>	
37C New Zealand operators to give notice of environmental emergencies	4
37D New Zealand operators to take response action	5
<i>Civil liability for failure to take response action</i>	
37E Recovery of cost of response action taken by others	5
37F Order to pay money where no response action taken	6
37G Exemptions from liability	7

cl 1	Antarctica (Environmental Protection: Liability Annex) Amendment Bill	
	37H Limits on amount of liability	8
	37I Joint and several liability	8
	Schedule	9
	Annex VI added to Schedule 2	

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Antarctica (Environmental Protection: Liability Annex) Amendment Act **2009**.
 - 2 Commencement**
This Act comes into force on a date appointed by the Governor-General by Order in Council.
 - 3 Principal Act amended**
This Act amends the Antarctica (Environmental Protection) Act 1994.
 - 4 Consent of Attorney-General required for certain proceedings** 10
 - (1) Section 6(1) is amended by inserting “but subject to **subsection (3)**,” after “any other enactment,”.
 - (2) Section 6 is amended by adding the following subsection:
“(3) Subsection (1) does not apply to proceedings under **sections 37E and 37F**.” 15
 - 5 New Part 5A inserted**
 - (1) The following Part is inserted after section 37:

“Part 5A
“Liability for environmental emergencies 20
“Preliminary provisions
- “37A Purpose of Part**
The purpose of this Part is to implement New Zealand’s obligations under Annex VI to the Protocol on Environmental

Protection to the Antarctic Treaty (commonly known as the Liability Annex), which concerns liability for environmental emergencies occurring in Antarctica.

“37B Interpretation for this Part

In this Part, unless the context otherwise requires,— 5

“**Annex VI** means Annex VI to the Protocol, entitled Liability Arising from Environmental Emergencies

“**Annex Party** means a contracting party for which Annex VI is in effect

“**environmental emergency** means an accidental event that— 10

“(a) results in, or imminently threatens to result in, a significant and harmful impact on the Antarctic environment; and

“(b) occurs after this Part comes into force

“**Environmental Protection Fund** means the fund referred to in Article 12 of Annex VI 15

“**Ministry** means the Ministry of Foreign Affairs and Trade

“**New Zealand operator** means an operator who organises, in New Zealand, an expedition to Antarctica where one of the following applies: 20

“(a) the operator is a New Zealand resident operator; or

“(b) the expedition proceeds from New Zealand as its final point of departure for Antarctica; or

“(c) the expedition uses a New Zealand ship or aircraft

“**New Zealand resident operator** means an operator that is a New Zealand citizen or is ordinarily resident in New Zealand (within the meaning of section 7(2)) 25

“**operator** means a person who organises an expedition to Antarctica, but does not include either of the following:

“(a) in the case of a State operator (as identified by an Annex Party), a contractor or subcontractor (other than a natural person) acting on behalf of the State operator: 30

“(b) in any other case, an employee, contractor, subcontractor, agent, or other person in the service of the person organising the expedition 35

“**preventative measures** means reasonable measures designed to reduce the risk of environmental emergencies and

their potential adverse impact, and may include any of the following:

“(a) the use of specialised structures or equipment incorporated into the design and construction of facilities and means of transportation: 5

“(b) specialised procedures incorporated into the operation or maintenance of facilities and means of transportation:

“(c) specialised training of personnel

“**prompt and effective response action** means response action that— 10

“(a) is taken promptly after an environmental emergency arises; and

“(b) is as effective as the person who takes, or could take, the response action is reasonably capable of achieving in the circumstances 15

“**reasonable measures**, in relation to preventative measures and response action, means measures or actions that are appropriate, practicable, proportionate, and based on objective criteria and information, including information about— 20

“(a) the risks to the Antarctic environment and the rate of natural recovery; and

“(b) the risks to human life and safety; and

“(c) technological and economic feasibility

“**response action**, in relation to an environmental emergency, means— 25

“(a) determining the extent of the emergency and its impact; and

“(b) taking reasonable measures (including, where appropriate, clean-up) to avoid, minimise, or contain the impact of the environmental emergency. 30

“Compare: Annex VI Articles 2, 3(2)

“Responding to environmental emergencies

“**37C New Zealand operators to give notice of environmental emergencies** 35

“(1) A New Zealand operator whose activities give rise to an environmental emergency, or who discovers an environmental

emergency, must immediately notify the Ministry of the emergency.

“(2) A New Zealand operator who, knowing that the operator’s activities have given rise to an environmental emergency, fails to comply with **subsection (1)** commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 12 months, a fine not exceeding \$100,000, or both. 5

“(3) For the purposes of this section,—

“(a) the cause of the environmental emergency is irrelevant to the obligation in **subsection (1)**; and 10

“(b) a New Zealand operator is deemed to know that the operator’s activities have given rise to an environmental emergency if a reasonable person in the circumstances of the operator who was exercising reasonable care would have known of the environmental emergency. 15

“Compare: Annex VI Article 4(3)

“**37D New Zealand operators to take response action**

“(1) A New Zealand operator whose activities give rise to an environmental emergency must take prompt and effective response action. 20

“(2) A New Zealand operator who, knowing that, or being reckless as to whether, the operator’s activities have given rise to an environmental emergency, fails to take prompt and effective response action commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 2 years, a fine not exceeding \$200,000, or both. 25

“(3) However, a New Zealand operator is not liable to conviction under this section if the environmental emergency, or the failure to take prompt and effective response action, was a result of any of the circumstances described in **section 37G(1)(a) to (d)**. 30

“Compare: Annex VI Article 5(1)

“*Civil liability for failure to take response action*

“**37E Recovery of cost of response action taken by others** 35

“(1) This section applies to an operator—

- “(a) who is a New Zealand operator or a New Zealand resident operator; and
- “(b) whose activities give rise to an environmental emergency; and
- “(c) who fails to take prompt and effective response action. 5
- “(2) An operator to whom this section applies is liable to pay the costs incurred by any Annex Party in taking response action.
- “(3) An application for an order requiring an operator, other than a New Zealand State operator, to pay the costs incurred in taking response action may be made to the High Court by— 10
- “(a) the Minister, if the Ministry (either directly or through an agent) took response action on behalf of New Zealand as an Annex Party; or
- “(b) any person on behalf of another Annex Party that took response action, whether the response action was taken directly by the Annex Party or through an agent. 15
- “(4) An order may be made under this section against an operator whether or not the operator knew of the environmental emergency.
- “(5) An application for an order under this section may not be made more than 3 years after the later of— 20
- “(a) the date on which the response action was begun; or
- “(b) the date on which the Annex Party that took the response action knew, or ought reasonably to have known, the identity of the operator. 25
- “(6) However, an application under this section may not be made later than 15 years after the date on which the response action was begun.
- “Compare: Annex VI Articles 6(1), (3), 7(1)
- “37F Order to pay money where no response action taken 30**
- “(1) This section applies to an operator—
- “(a) who is a New Zealand operator or a New Zealand resident operator; and
- “(b) whose activities give rise to an environmental emergency; and 35
- “(c) who fails to take prompt and effective response action.

- “(2) If no Annex Party takes prompt and effective response action, an operator to whom this section applies is liable to pay the costs of the response action that should have been undertaken.
- “(3) An application for an order requiring an operator, other than a New Zealand State operator, to pay the costs of response action that should have been taken may be made to the High Court by— 5
- “(a) the Minister (on behalf of New Zealand as an Annex Party); or
- “(b) a person authorised in writing by any other Annex Party to make the application on its behalf. 10
- “(4) The order must require the operator to pay an amount of money that the High Court determines represents the costs that would have been incurred if prompt and effective response action had been taken following the environmental emergency. 15
- “(5) The amount of money specified in an order under this section is payable—
- “(a) directly into the Environmental Protection Fund; or
- “(b) to the Ministry, in which case the Ministry must pay the amount received directly into the Environmental Protection Fund. 20
- “(6) An order may be made under this section against an operator whether or not the operator knew of the environmental emergency.
- “(7) An application for an order under this section may not be made more than 15 years after the date on which the Annex Party on whose behalf the application is made became aware of the environmental emergency to which the proceedings relate. 25
- “Compare: Annex VI Articles 6(2), (3), 7(3)
- “**37G Exemptions from liability** 30
- “(1) The High Court may not make an order against an operator under **section 37E or 37F** if the operator proves that the environmental emergency was caused by any of the following:
- “(a) an act or omission necessary to protect human life or safety: 35
- “(b) an event constituting, in the circumstances of Antarctica, a natural disaster of an exceptional character that

- could not have been reasonably foreseen, either generally or in the particular case, provided that all reasonable preventative measures, designed to reduce the risk of environmental emergencies and their potential adverse impacts, were taken: 5
- “(c) an act of terrorism:
- “(d) an act of belligerency against the activities of the operator.
- “(2) If the Ministry takes response action under **section 37D**, then neither the Ministry nor any agent specifically authorised by the Ministry to take that action is liable for any environmental emergency resulting from the response action, to the extent that the response action was reasonable in all the circumstances. 10
- “(3) To avoid doubt, the Ministry is not liable for the failure of a New Zealand operator (other than a New Zealand State operator) to take response action. 15
- “Compare: Annex VI Articles 8(1), (2), 10
- “37H Limits on amount of liability**
- “(1) The amount of liability under **section 37E or 37F** is subject to the limitations set out in subparagraphs (a) and (b) of Article 9(1) of Annex VI (subject to Article 9(2)), as those subparagraphs are amended from time to time in accordance with Article 9(4). 20
- “(2) The limits on liability referred to in **subsection (1)** do not apply if the court is satisfied that the environmental emergency resulted from an act or omission of the operator that was committed with the intention of causing an emergency, or done recklessly and with knowledge that an emergency would probably result. 25
- “Compare: Annex VI Article 9(1), (3) 30
- “37I Joint and several liability**
- If an environmental emergency arises from the activities of 2 or more operators, the operators are jointly and severally liable, except that an operator who establishes that only part 35

of the environmental emergency resulted from its activities is liable only in respect of that part.

“Compare: Annex VI Article 6(4)”.

- (2) Schedule 2, which sets out the Protocol on Environmental Protection to the Antarctic Treaty, is amended by adding Annex VI, as set out in the **Schedule**. 5

Schedule
Annex VI added to Schedule 2

s 5(2)

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

Liability Arising from Environmental
Emergencies 10

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; 15

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; 20

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; 25

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; 30

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;

5

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.

10

15

20

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;

25

(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;

30

(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

35

Article 2—*continued*

- 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; 5
- (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 10
- (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; 15
- (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: 20
- (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; 25
- (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; 30
- (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: 5
 - (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 10
 - (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 15
 - (b) co-operate in the formulation and implementation of such contingency plans.
2. Contingency plans shall include, when appropriate, the following components: 20
 - (a) procedures for conducting an assessment of the nature of the incident;
 - (b) notification procedures;
 - (c) identification and mobilisation of resources; 25
 - (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. 30

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.

Article 5—continued

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.

Article 6—*continued*

- (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.

Article 7—*continued*

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.

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; 5
 - (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 de- 10

Article 8—*continued*

- signed 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. 5
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. 10

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

Article 9—*continued*

- (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 purposes 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;

Article 9—*continued*

- (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. 5

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). 10
- 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). 15
- 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. 20

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*, 25

Article 12—*continued*

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.

Article 13—*continued*

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.