



Ministry of Sustainable Development

Division for Legal Services

Non paper on the implementation of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability arising from Environmental Emergencies

Introduction - a new Swedish Act on Antarctica

On 2 June 2006 the Swedish Parliament approved a new Swedish Act on Antarctica. This Act will replace the existing Act on Antarctica. The main purpose of the new Act is to implement Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty on Liability arising from Environmental Emergencies (The Stockholm Annex). In addition, other amendments have been made compared to the old Act in view of *inter alia* the work undertaken in ATCM. For example, a specific reference to meteorites in Antarctica has been included to make it clear that meteorites are covered by the prohibitions in the Act concerning activities relating to mineral resources. This non-paper describes the underlying reasoning behind some of the provisions in the new Act relating to liability in cases of environmental emergencies.

The implementation of the provisions on liability in the Stockholm Annex

The Stockholm Annex has been implemented in the new Act on Antarctica. Accordingly, the Act contains an obligation to minimise the effects of an environmental emergency and an obligation to pay the costs of response action taken by other Parties in cases where an operator has failed to undertake such response action. The specific provisions in the Annex regulating liability in situations where no response action has been taken by other Parties (Article 6.2 (a) and (b) of the Annex) have also been implemented in the new Act. As opposed to the situation where response action has been taken by other Parties, these situations raise the question of liability in cases where there are no direct costs for response action to be invoked by any legal or natural person. In relation to this issue the drafting of the relevant provisions in the new Act has been based on the following reasoning.

In principle, when damage to the environment has been caused on a property or in the territory of a state, the owner or the state may be entitled to compensation irrespectively of whether any actions were taken by them or others in response to the damage. The crucial aspect is to what extent the owner or the state has suffered from the damage itself and this does not necessarily have to be linked to costs arising from action taken in response to the damage. The fact that liability may arise without any



actions having been taken in response to an environmental emergency is therefore, in principle, not controversial.

However, in relation to Antarctica, there is no recognised owner or state that is in a position to claim compensation for damage caused to its territory. The lack of a state or owner with the prime responsibility and authority for protecting the Antarctic environment creates a special legal context that puts the Antarctic environment in a particularly vulnerable situation. This situation requires that significant responsibility must be taken by those states that are present in Antarctica in relation to any damage to the Antarctic environment that may result from such presence. Against this background, the Parties to the Antarctic Treaty have developed the regime on protection of the Antarctic environment. Through the provisions on liability pursuant to the Stockholm Annex the Parties have agreed to ensure that an operator shall not gain from not taking any response measures or from the fact that no response measures were taken by other Parties, as well as to provide for the possibility to take measures in situations where no response measures were taken. These aspects, relating to the unique legal conditions in Antarctica, should all be taken into account when addressing the issue of how to regulate liability in cases where no response action has been taken following an environmental emergency, as should indeed the unique character of the Antarctic environment itself. In this regard, and as the basis for this provision in the Swedish Act, those suffering from damages to the Antarctic environment are the Antarctic environment itself and, collectively, the states that through their participation in the Antarctic Treaty and the Protocol on Environmental Protection have a common interest in, and responsibility for, the protection and preservation of this environment.

In developing the provisions relating to liability in situations where no response action has been taken, note was also taken of the European Directive on environmental liability (2004/35/EC), which is similar in some respects. According to this Directive, in some situations liability may arise to pay for "secondary restoration" in cases where primary restoration is not possible. Thus, in such situations, and similar to what has been described above, direct links between the damage to the environment and measures taken in response to such damage are not a precondition for liability to arise.

According to the Act, payment of costs for response action that should have been taken but was not shall be made to a competent public authority to be specified by the government. This public authority will be responsible for forwarding such payment to the Fund. In the new Swedish Ordinance on Antarctica, the government has decided that such payment shall be made to the Swedish Polar Research Institute, which is also responsible for ensuring compliance with the Act or provisions emanating from the Act. In the Ordinance, further guidance is given on the applicable criteria for estimating the costs of the measures that should have been taken, in accordance with the relevant provisions of the Stockholm Annex. The amount of compensation required will not be decided by the competent authority as such, but if compensation has not been paid, or if the competent authority is of the opinion that the compensation is incorrect, it may bring charges against an operator in court. Thus, in



REGERINGSKANSLIET

the event of dispute, the level of compensation will ultimately be decided in court and the application of the provisions governing this evaluation will be guided by evolving practice from the courts.

In contrast to the rest of the provisions of the new Act, the specific provision governing liability to pay compensation in situations where no response measures have been taken will enter into force on the day the government so decides, since crucial functions concerning the operation of this provision (such as the fund) will not be operational until the Stockholm Annex enters into force. The same applies to the provision in the Ordinance governing the payment of such compensation.

SWEDISH ANTARCTIC RESEARCH PROGRAMME (SWEDARP)

3. Permanent Information

3.6. Relevant National Legislation

3.6.1. Act (2006:924) on Antarctica

The following is hereby enacted.

Definitions

Section 1. For the purpose of this act, the terms set out below are defined as follows:

Antarctica: the area south of 60° south latitude,

The Antarctic Treaty: the 1959 treaty on Antarctica (SÖ 1984:5)

The Protocol on Environmental Protection: the 1991 Protocol to the Antarctic Treaty on Environmental Protection (SÖ 1994:52),

Party: a State that is a contracting party to the Antarctic Treaty,

Operator: any natural or legal person on whose assignment activities or visits are organised, carried out or intended to be carried out in the Antarctic Treaty area,

The Antarctic environment: the Antarctic environment and dependent and associated ecosystems,

Environmental emergency: an event that results in, or threatens to result in, significant and harmful impact on the Antarctic environment,

Foreign permit: permit or consent required under the relevant laws of another Party to visit, or carry out activities in, Antarctica.

Ship: vessel of any type used in the marine environment, including fixed or floating platforms,

Observer: a person designated by another Party to monitor compliance with the Antarctic Treaty or the Protocol on Environmental Protection, and duly made known by that Party to the Government or to the competent public authority designated by the Government; or a person designated at an Antarctic Treaty Consultative Meeting to undertake inspections in accordance with procedures established at such a meeting,

Special Drawing Rights: Special Drawing Rights (SDR) used by the International Monetary Fund.

Scope of the Act

Section 2. This Act applies to:

1. Swedish nationals and Swedish legal persons,
2. foreign nationals resident in Sweden, and
3. foreign nationals taking part in an expedition or other activity that has a permit pursuant to the present Act.

The special provisions governing ships in Antarctica set out in Section 11 apply to Swedish ships and foreign ships, other than government ships operated for non-commercial purposes, used in operations in Antarctica where the operator is a Swedish national, a Swedish legal person or a foreign national resident in Sweden.

Sub-section 1 above notwithstanding, the Act shall not apply to an observer or to a person from another Party's expedition or station in Antarctica, provided that he or she is taking part in activities on an exchange basis and has been granted a permit pursuant to the present Act, or has been granted an exemption from the permit requirement.

General provisions on the protection of the Antarctic environment

Section 3. Under the present Act, it is forbidden to visit or carry out activities in Antarctica without a permit.

Subsection 1 above does not apply to:

1. overflights, or
2. the exercise of the freedom of navigation under international law with regard to the high seas.

Section 4. Persons who visit or carry out activities in Antarctica are required to take such measures in connection with their visit or activities as may be necessary to:

1. prevent that waste is produced and remains in Antarctica, and
2. otherwise protect and preserve the Antarctic environment.

Section 5. Carrying out nuclear explosions in Antarctica and the disposal there of radioactive waste material is prohibited.

Section 6. Unless otherwise expressly provided for by a permit pursuant to Section 3, the following activities are prohibited in Antarctica:

1. exploring for, collecting, examining, extracting or cultivating mineral resources and meteorites,
2. collecting or disturbing plant or animal species indigenous to Antarctica,
3. introducing animal or plant species not native to Antarctica onto land or the ice shelf, or into water in Antarctica, or
4. visiting specially protected areas. Paragraph 1, sub-section 2 above does not apply to captures permitted under the Convention on Conservation of Antarctic Marine Living Resources adopted in Canberra on 20 May 1980 (SÖ 1984:21). Such captures are governed by provisions in Council Regulation (EC) No 600/2004 of 22 March 2004 laying down certain technical measures applicable to fishing activities in the area covered by the Convention on Conservation of Antarctic Marine Living Resources¹, Council Regulation (EC) No 601/2004 of 22 March 2004 laying down certain control measures applicable to fishing activities in the area covered by the Convention on Conservation of Antarctic Marine Living Resources, and repealing Regulations (EEC) No 3943/90, (EC) No 66/98 and (EC) No 1721/1999², and by the Fisheries Act (1993:787) and provisions pursuant to that act.

¹ Official Journal of the European Union L 97, 1.4.2004, p. 1 (Celex 32004R0600).

² Official Journal of the European Union L 97, 1.4.2004, p. 16 (Celex 32004R0601).

Paragraph 1, sub-section 3 above does not apply to food supplies kept and handled under carefully controlled conditions.

Section 7. Persons visiting or carrying out activities in Antarctica shall undertake such protective measures and other precautions as may be needed to prevent environmental emergencies.

Before embarking on an activity in Antarctica, the operator concerned shall establish such contingency plans as may be needed to deal with environmental emergencies with regard to the said activity. Contingency plans shall be kept up to date as long as the activity in question is carried out.

Section 8. Should an activity covered by a permit pursuant to the present Act be found to cause, or occasion fears of causing, previously unforeseen harm or damage to the Antarctic environment, the said activity shall be terminated with immediate effect.

Section 9. In the event that an environmental emergency arises as a result of (from) an activity in Antarctica, the operator and the person or persons causing such environmental emergency shall take such reasonable measures necessary to promptly and effectively avoid, minimise or contain the impact of the emergency.

Section 10. Should there be grounds to believe that a mineral resource, a meteorite, a plant or an animal has been acquired in contravention of the provisions in the present Act, any interference with the said material, plant or animal that is likely to render its restoration more difficult is prohibited.

Special provisions on ships in Antarctica

Section 11. Discharges of any of the following from ships into the sea in Antarctica is prohibited:

1. oil or oily mixtures,
2. other noxious liquid substances, chemical substances or other substances in quantities or concentrations harmful to the marine environment,
3. untreated sewage, or
4. solid wastes.

While in Antarctica, ships shall retain on board all sludge, dirty ballast, tank washing waters and other oily residues and mixtures.

Sub-section 1, paragraph 3 notwithstanding, untreated sewage may be discharged from a ship certified to carry not more than 10 persons, and provided that the discharge is made further than 12 nautical miles from the nearest land or ice shelf.

Sub-section 4, paragraph 1 notwithstanding, food wastes may be discharged provided these are released further than 12 nautical miles from the nearest land or ice shelf, and provided they have previously been passed through a comminuter or grinder and are capable thereafter of passing through a screen with openings no greater than 25 mm.

Permits

Section 12. Under the present Act matters relating to permits are to be tried by the Government or by the competent public authority designated by the Government.

Section 13. An application for a permit must be accompanied by the environmental impact assessment that is needed to make an overall assessment of the effect on the Antarctic environment of the stay or activity concerned.

Section 14. A permit may only be granted if:

1. it is determined that the visitor activity in question will have less than a minor or transitory impact on the Antarctic environment, and

2. the applicant provides adequate insurance or other financial security to cover its liability in the event of an environmental emergency.

Subparagraph 1 above notwithstanding, a permit may be granted if special grounds exist, despite a perceived risk that a stay or activity will involve more than a minor or transitory impact on the Antarctic environment.

Permits for activities specified in Section 6, sub-section 1, paragraph 3 above may only be granted in the case of activities involving scientific research.

The State is not required to provide financial security as specified in sub-section 1, paragraph 2 above.

Section 15. A permit shall include any conditions that are needed to ensure protection of the Antarctic environment.

Section 16. A permit may be revoked if the permit-holder fails to meet its obligations according to the present Act, regulations issued pursuant to the Act or any conditions in the permit.

Activities where the operator is not covered by the Act

Section 17. Persons who organise or take part in a visitor activity in Antarctica must ensure that the operator, if not covered by the present Act, has a foreign permit if such a permit is required.

Section 18. The provisions set out in Sections 3–11 notwithstanding, persons who take part in a visit in an activity in Antarctica for which the operator has a foreign permit may permitted act in accordance with what is permitted under the terms of the foreign permit.

Financial liability for response action taken following an environmental emergency

Section 19. In the event of failure to fulfil the obligation to take response measures in accordance with Section 9 above, the operator shall be liable to pay compensation to the Party that has taken action in the operator's stead. Compensation shall cover the costs of the response measures taken.

Section 20. Should the obligation to take response action in accordance with Section 9 not be met and no such action be taken by any Party, the operator shall be liable to pay compensation to the competent public authority designated by the Government. Such

compensation shall be forwarded to the fund administered by the Secretariat of the Antarctic Treaty. The compensation shall as far as possible correspond to the costs of the response action that should have been taken.

Section 21. An operator shall not be liable to pay compensation pursuant to Sections 19 and 20 if the operator proves that the environmental emergency was caused by:

1. an act or omission necessary to protect human life or safety,
2. a natural event of an exceptional character which could not reasonably have been foreseen under the conditions normally prevailing in Antarctica, and whose impact could not reasonably have been prevented or minimised by the application of preventive measures or other precautions taken in the course of the activity,
3. an act of terrorism,
4. an act of belligerency against the activities of the operator, or
5. a measure specifically authorised by the State to remedy an environmental emergency resulting from someone else's activities, provided that the said measure was justified by the prevailing circumstances.

Section 22. Should an environmental emergency result from an activity involving a ship, the liability of an operator under Sections 19 or 20 shall be limited to 1 (one) million SDR where the ship's tonnage does not exceed 2,000 tons.

For ships with tonnage in excess thereof, the SDR limit shall be increased by:

1. 400 SDR for each ton from 2,001 to 30,000,
2. 300 SDR for each ton from 30,001 to 70,000, and
3. 200 SDR for each ton over 70,000.

Section 23. An operator's financial liability pursuant to Sections 19 and 20, in all cases other than those specified in Section 22, shall be limited to 3 million SDR.

Section 24. The provisions on the limits of liability set out in Sections 22 and 23 shall not apply if the environmental emergency was caused intentionally or was the result of grave negligence.

Section 25. The right of another Party to compensation from a non-State operator pursuant to Section 19 shall be forfeited if the said Party has not brought an action in the Stockholm City Court within at least three years of the commencement of the response action for which compensation is being claimed, 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 of the activity or visit in which the environmental emergency occurred, whichever is later.

The right to compensation ceases if no action is brought within 15 years of the date on which the response action commenced.

Exemption from permit requirement

Section 26. The Government or the competent public authority designated by it may in individual cases grant exemption from the permit requirement laid down in Section 3

above. Such exemptions may only be granted if the visit or activity is deemed to be of no significance for the Antarctic environment.

Case of emergency

Section 27. The prohibitions and obligations set out in Sections 3–11 and 17 shall not apply in cases of emergency relating to the safety of human life or of ships, aircraft or property of high monetary value.

In such situations each and every person shall act in such a way that the impact on the Antarctic environment is as minor as possible.

Authority to issue regulations

Section 28. The Government or the competent public authority designated by it may issue regulations on:

1. waste disposal in Antarctica,
2. which areas are such specially protected areas referred to in Section 6, sub-section 1, paragraph 4 above,
3. the obligation to undertake preventive measures pursuant to Section 7,
4. contingency plans pursuant to Section 7,
5. the requirements for an environmental impact assessment pursuant to Section 13, and
6. the assessment and payment of compensation pursuant to Section 20.

Supervision

Section 29. The Government or the competent public authority designated by it shall supervise compliance with the present Act, regulations issued pursuant to the Act and provisions in permits granted in accordance with the Act.

Section 30. Under the present Act, permit holders shall:

1. as and when requested, provide the supervising competent public authority with the information and documents needed to ensure effective supervision.
2. as and when requested, provide all observers with the information and documents they require to perform their assignments by the supervising competent public authority or the observer concerned.

Section 31. The supervising competent public authority and an observer are empowered to access any premises, areas or means of transport where an activity covered by either a prohibition or a permit requirement under the present Act is being conducted.

The supervising competent public authority is also empowered to investigate circumstances of importance to the application of any provision set out in the present Act, any regulations issued pursuant to the Act, or in a permit.

Section 32. The provisions relating to observers set out in Sections 30 and 31 above apply solely on land or the ice-shelf in Antarctica, and to all ships and aircraft at points of discharging of embarking cargoes cargos or personnel on land or the ice shelf.

Section 33. The supervising competent public authority may issue such injunctions or prohibitions as may be required to ensure compliance with the present Act, regulations issued pursuant to the Act and any provisions pursuant to a permit granted under the Act.

Injunctions or prohibitions may be combined with fines or penalties.

Penalties, etc.

Section 34. Fines or a maximum prison sentence of two years will be imposed on anyone who intentionally or through negligence:

1. violates a prohibition contained in Sections 3, 5, 6, 10 or 11 above,
2. violates Section 8 above by continuing to engage in an activity that should have been terminated,
3. violates Section 9 by failing to take action to avoid, minimise or contain the impact of an environmental emergency,
4. violates any condition included in a permit pursuant to Section 15,
5. violates Section 17 by failing to ensure that the operator has the permits required for its activities,
6. violates Section 27, sub-section 2, by acting in an emergency in such a way that the impact on the environment is greater than necessary, or
7. violates a provision in Sections 30 or 31 by failing to provide relevant information or documents, providing false or misleading information, or by refusing access to the designated supervising competent public authority or observer or obstructing inspection efforts by the former.

For serious offences, prison sentences of a minimum of six months and a maximum of six years shall be imposed. In judging the gravity of the offence, special consideration shall be given to whether the offence has or could have resulted in lasting, widespread damage, whether it was of a particularly dangerous nature or involved deliberate, serious risk-taking, or whether the perpetrator was guilty of grave negligence in a situation calling for exceptional watchfulness or skill.

Attempted offences shall be punishable under Chapter 23 of the Criminal Code.

No penalties shall be imposed for minor offences.

If an offence set out in sub-section 7, paragraph 1 above is punishable under the Criminal Code, the same offence shall not be punishable under the present Act.

Section 35. Fines shall be imposed on anyone who intentionally or through gross negligence:

1. violates any provision governing waste disposal that the Government or a competent public authority designated by the Government has issued pursuant to Section 28, sub-section 1.
2. violates any provision stipulating the obligation to take preventive measures or draw up contingency plans which the Government or a competent public authority designated by the Government has issued pursuant to Section 28, sub-section 3.

No penalties shall be imposed for minor offences.

Section 36. A person who fails to comply with a prohibition or injunction under the second paragraph of Section 33 shall not be sentenced under the present Act for the offence covered by the prohibition or injunction.

Section 37. Property that has been the subject matter of an offence under Section 34 above, or the value of that property, shall be forfeit unless such action proves manifestly unreasonable.

An article that has been used as an aid in an offence under Section 34 above, or the value of that article, may be declared forfeit if this is deemed necessary for preventive purposes, or if other special grounds exist.

Appeals

Section 38. Decisions taken in individual cases by instances other than the Government or a public court under the present Act or in accordance with regulations pursuant to the Act may be appealed before an administrative court.

A review permit is required for appeals to the administrative court of appeal.

The Swedish Environmental Protection Agency may appeal a decision by a competent public authority regarding permits under the present Act or in accordance with regulations issued pursuant to the Act.

The present Act will enter into force on a date to be decided by the Government in respect of Section 20, and otherwise on 1 October 2006, when the Antarctica Act currently in force (1993:1614) expires.

3.6.2. Ordinance (2006:1111) on Antarctica

The following is hereby enacted.

Definitions

Section 1. Terms and expressions used in this ordinance have the same meaning as in the Act (2006:924) on Antarctica.

Permits

Section 2. The Polar Research Institute issues permits pertaining to permits for visits or activities in Antarctica pursuant to the Act (2006:924) on Antarctica and issues regarding exemptions from permit requirements.

Section 3. Prior to deciding on granting a permit or an exemption the Polar Research Institute shall allow the Swedish Environmental Protection Agency to pronounce itself on the issue.

Section 4. In cases of visits or activities where the Polar Research Institute is the operator a permit or an exemption may only be granted if the Swedish Environmental Protection Agency so approves.

Liability to pay compensation pursuant to Section 20 of the Act (2006:924) on Antarctica

Section 5. Compensation pursuant to Section 20 of the Act (2006:924) on Antarctica shall be paid to the Polar Research Institute, which shall forward the compensation to the Fund administered by the Antarctic Treaty Secretariat.

Compensation shall be calculated on the basis of an evaluation of the costs of the reasonable measures that would have been needed, having regard to the specific circumstances, promptly and effectively avoid, minimise or contain the impact of the environmental emergency. In such evaluation the cost of determining the extent of the environmental emergency shall always be included.

Contingency plans

Section 6. When relevant in relation to environmental emergencies that can arise as a result of an activity, a contingency plan referred to in Section 7 of the Act (2004:924) on Antarctica shall include:

1. procedures for notification of environmental emergencies,
2. identification of available resources and how they can be mobilised,
3. procedures for determining the extent of environmental emergencies and other reasonable measures that can be taken in order to promptly and effectively avoid, minimise or contain the impact of such emergencies,
4. procedures for record keeping, and
5. training procedures that are relevant to the contingency plan.

Supervision etc.

Section 7. The Polar Research Institute shall supervise compliance with the Act (2006:924) on Antarctica, this ordinance and conditions issued pursuant to the Act.

If the Secretariat becomes aware that someone has violated such provisions or conditions, it shall take measures to ensure compliance and, if needed, refer the matter to prosecution.

Section 8. The Polar Research Institute shall receive information relating to environmental emergencies that have occurred in Antarctica and shall, if needed, forward such information to concerned Parties and others who are affected.

Section 9. The Swedish Environmental Protection Agency shall supervise that any decision on permits pursuant to the Act (2006:924) on Antarctica is compatible with the objectives of the Act.

This Ordinance shall enter into force on October 1, 2006 excepting Section 5, which shall enter into force on the day the Government so decides.