I have been asked to speak about the status of the negotiations on the draft agreement on Liability for Damage to the Antarctic Environment, which are being undertaken by the Parties to the Antarctic Treaty, and their prospects for success.

There are some key points I’d like to make at the outset:

(1) The parties to the Antarctic Treaty have a legal obligation to conclude an agreement on Liability. This follows from Article 16 of the Protocol on Environmental Protection to the Antarctic Treaty (which entered into force on 14 January 1998), which provides:

[the Parties undertake to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol. Those rules and procedures shall be included in one or more Annexes.]

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(2) While the issues of legal liability for environmental damage are notably complex in whatever context, they are particularly difficult in the Antarctic context. Unlike other liability negotiations, in the case of Antarctica there is no economic or commercial enterprise involved which will ultimately bear the cost of liability (and which can build it into its cost structure). In Antarctica the activity is primarily governmental and science related, and that's where most of the burden will fall. Moreover the liability regime will cover damage to the environment per se - not to the economic interests of others (although that may be a minor element of it) - and will be extremely difficult to quantify. The Antarctic environment is a unique and fragile one, and impacts are difficult to assess, although we may perhaps be able to draw on American experience in Alaska. Overlying all of this is the complication that in Antarctica we are not dealing with undisputed sovereign territory.

(3) The Antarctic Treaty parties have however shown themselves able in the past to resolve the most complex of issues. The Antarctic Treaty itself reflects a unique capacity for problem-solving.

(4) The United States is key to a successful outcome. The Liability Annex will have to be adopted by consensus by Antarctic Treaty parties, and will have to be ratified by all parties. At the moment many countries are sheltering behind the United States position, and are not declaring themselves. If the United States comes to the party, these other countries will have to as well. The United States also has a huge capacity for "creative lawyering," of the sort that is required here to try and solve the issues. We need active United States engagement.

(5) We need some lateral thinking to break the current impasse, and as American lawyers you are well placed to provide it.

II. THE CURRENT STATE OF THE NEGOTIATIONS

What we have now is a stalemate, polarized around two competing texts and quite different approaches. One is the so-called "Eighth Offering" - a Chairman’s text produced by Professor Rudiger Wolfrum who chaired a "Legal Experts Group" dealing with Antarctic Liability, which was set up by the Antarctic Treaty Consultative Parties and held nine meetings over six years until it was transformed into a fully fledged negotiating group at this year’s Antarctic Treaty Consultative Meeting in Lima, Peru. The other text is the "United States draft," which was introduced by the United States three and a half years ago at a meeting of the Legal Experts Group in Utrecht, Netherlands.

A. The Eighth Offering

As its name implies, this Chairman’s text is in its eighth revision. It is the Chairman’s personal product, although it does of course reflect considerable
input from delegations. It takes a comprehensive approach to the issue of liability for environmental damage, and is highly complex, reflecting the application of impressive intellectual capital by the Chairman, but it also leaves many issues unresolved. The basic framework (as yet not entirely agreed) is as follows:

1. Operators conducting activities in the Antarctic incur liability if they cause damage to the Antarctic environment;
2. Damage is defined as any harmful effect of an impact on the Antarctic environment, which is over a particular threshold (to exclude de minimus), with certain exceptions including for impacts identified during an environmental evaluation process;
3. Liability is strict (and also probably joint and several where several operators are involved);
4. An operator is required to take reasonable precautionary measures, and also to take response action where an incident occurs;
5. When an operator does not take response action another State Party, or in certain circumstances another entity or person, may do so;
6. The operator is then liable to reimburse the reasonable costs of the other party for the response action they have taken;
7. Where the damage to the environment cannot be repaired, the operator has to contribute an amount to an “Environmental Protection Fund,” by processes yet to be determined;
8. The Fund would be used to compensate States and other entities for the costs of response action in those situations where liability (and reimbursement) do not attach;
9. There would be financial limits on liability;
10. Non State operators would be required to take out insurance or other financial security to cover liability;
11. States Parties would have residual liability for damage caused by their operators, but only to the extent that they have failed to carry out their own obligations as a State Party; and
12. A dispute settlement regime would be included.

As I have said, this is a comprehensive and complex regime. While the general framework is there, and some provisions have been exhaustively discussed and are close to finality, others are much less so. A great deal remains to be resolved.

B. The United States Proposal

The United States draft is much simpler. It takes a less comprehensive approach than the Eighth Offering, and is designed to cover “environmental
emergencies” only. Article 15 of the Protocol on Environmental Protection to the Antarctic Treaty imposes an obligation on Parties to take response action in the event of emergencies, and under the United States proposal liability would attach only where a Party failed to take such action. An element of the United States Proposal is, however, that a further annex or annexes could be drawn up to cover other aspects of liability for environmental damage.

C. The Different Positions

The United States draft was introduced at a time when the liability discussions had been going through a particularly bleak period, with little progress being made on the Chairman’s current “Offering.” The United States introduced its proposal to try and break the stalemate. Its introduction coincided, however, with a spurt of progress on the Chairman’s “offering,” with the result that many delegations viewed the United States text as an unnecessary distraction from the main game.

Since that time modest progress has continued on the Chairman’s “offerings” although, as noted, a great many issues remain to be resolved. For its part, the United States text has remained on the table, and continues to reflect the United States position (as well as that of some other countries).

Accordingly, the future elaboration of a liability regime is bedeviled by a fundamental difference of approach between delegations. This is over the basic question of whether we should be seeking to elaborate a so-called “comprehensive” (or single) annex, or a so-called “limited” annex (which could be the first in a series of annexes focussing on particular aspects of the liability problem). Until this fundamental issue is resolved there will inevitably be limits as to the further progress that will be possible.

D. The Need for a “Third Way”

The two approaches have been extensively debated in the past, without resolution, and it is fair to say that further debate between these two options per se is unlikely to resolve the matter. With neither side willing to move from its basic position, delegations have increasingly talked of the need for a “Third Way” - that is to say, an approach which is neither the “comprehensive” approach or the “limited” approach, but which bridges the two positions or takes yet another road.

Ideally, too, it should also be designed to make the work more manageable. As the discussion of Antarctic Liability has developed, there has been an increase in the magnitude and number of issues needing to be negotiated, which adds to the complexity of pulling together a package as such. And as the potential time span for producing a concrete outcome has grown commensurately, there is inevitably a danger that the negotiating process will flag.
Moreover, as we shall have to produce an outcome which can be adopted by consensus, and which can then be ratified by all Parties within a reasonable time, size and complexity is unlikely to assist such an outcome.

At the end of the negotiations on liability which I chaired, at the Lima Antarctic Treaty Consultative Meeting earlier this year, that is the challenge which I put to delegations.

While the Lima negotiations had made progress in some areas, it was apparent to me that resolution of these fundamental differences in position was required.

My Personal Report to the Lima ATCM, as Chairman, which is annexed to this paper, canvasses this question. It also identifies one possible “Third Way,” which would comprise the following:

(1) a single annex providing for a comprehensive regime, thus meeting the objectives of many delegations. The annex itself would include all the generic items which would be common to a liability regime of whatever nature, and in respect of which there is already agreement or agreement is foreseeable. It would utilize a great deal of work already done and (without wishing to minimize unduly the complexity of the issues remaining) could, hopefully, be developed reasonably quickly.

(2) It would contain a binding commitment to subsequently develop detailed schedules, by way of measures, on (1) Preventative Measures, (2) Damage from Environmental Emergencies, (3) Response Action and Remedial Action, and (4) Unrepaired and Irreparable damage. (Using measures to build on the Annex would not be an entirely novel concept; all of the other Annexes to the Protocol can be amended or modified by way of measures, which are adopted by consensus).

This approach would also have the advantage of reducing our work to reasonably digestible bites. It would enable a step by step approach while meeting the positions of delegations wanting a single annex and comprehensive coverage.

I stress that this is not the only way through this impasse. And it may not be without its own difficulties. It has been suggested to me, for example, that there might be difficulty getting the United States’ Senate to ratify an Annex which was “open-ended” in this way. My response would be that the Antarctic Treaty, which has been ratified by the United States, is similarly open-ended, in that it allows measures to be adopted subsequently which are “binding” on States. My proposal would be no more open-ended than that. And, as with the adoption of measures under the Antarctic treaty, a consensus would be required.
for their adoption, which would require specific United States agreement in each instance.

E. The Next Steps

What is now needed is some lateral thinking. This is where we need your help. I have the greatest admiration for the creativity of American lawyers, and I don’t believe that the current dilemma is insurmountable. We need a “third Way.” Would the proposal in my report work, or can you see another “third Way.” I’m sure you can come up with an answer to this, unfettered by governmental positions. If you cannot do it today then maybe you or (if you are involved in the academic area) your students, can do it subsequently. It’s a great case study. And we would very much welcome your contribution.

III. ANNEX

As indicated in the Report of Working Group I on Item 10, this paper is circulated, on a personal basis, in an endeavor to identify a way forward. It should be viewed purely in that light.

As is also evident from the Report of Working Group 1 on Item 10, there was useful progress in a number of respects in this first round of negotiations in the Working Group. The Report identifies various areas of convergence, and it is fair to say that other prospective areas of progress can also be seen at this stage. Ultimately, however, what we are talking about is a package, or several packages, and convergence is not likely to develop in some key areas until the overall shape of the package (or packages) is clearer.

Some valuable work was also done in the informal contact groups, which were set up to facilitate discussion on a range of subjects. The coordinators of some of these groups were able to produce texts reflecting the stage reached in their discussions, and as I foreshadowed in Working Group 1, these are attached as a matter of record so that this work is not lost. It must be clear, however, that these texts do not reflect agreed positions, either on the part of those participating in the informal contact groups or the meeting as a whole. They are simply to aid further discussion. Indeed, some delegations specifically entered reservations in respect of some of these texts, and on others there was not time for discussion.

On the basis of comments made in the meeting, and to me informally, I think it will be useful in future meetings to continue using informal contact groups to help clarify differences between delegations on particular issues - and hopefully identify solutions - as this is sometimes difficult across the conference floor. It needs to be emphasized that such groups are open ended (that is

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1. Personal report of the chairman on the liability discussion in WGI.
to say, open to all delegations with an interest in the issue in question), although this of course creates a practical limitation on the number of groups which can be established at any one time, given the pressure on small delegations.

Another very useful development at this meeting, was a much more integrated approach involving SCAR and COMNAP. This helped inform the discussion, even though both organizations were not able to be present for all of the time, and points the way towards an even more integrated approach in the future, including outside of formal meetings. For example, future informal contact groups on some issues are likely to benefit from being multi-disciplined, and having in them scientists and operators as well as lawyers and policy experts. It may also be appropriate to include other representative organizations on occasion, such as IAATO on behalf of tourism operators.

Notwithstanding these positive and encouraging developments, however, the future elaboration of a liability regime remains bedeviled by a fundamental difference of approach between delegations. This is over the basic question of whether we should be seeking to elaborate a so-called "comprehensive" (or single) annex, or a so-called "limited" annex (which could be the first in a series of annexes focussing on particular aspects of the liability problem). Until this fundamental issue is resolved there will inevitably be limits as to the further progress that will be possible.

This issue has been extensively debated in the past, without resolution, and it is fair to say that further debate between these two options per se is unlikely to resolve the matter. On the one hand, it is clear that many delegations are now willing to negotiate on the basis of a so-called "limited" annex, which would involve a fundamental departure from their position. Other delegations, however, are unwilling to negotiate on the basis of the sort of "comprehensive" approach that would follow the approach of the eighth offering, as this would depart from their fundamental position. This in no way derogates from the hugely useful work done in the Group of Legal Experts, and the Chairman's offerings, as acknowledged at the Tromso ATCM. It is entirely due to that work that we are able to identify the issues involved in putting together an Antarctic liability regime, together with a range of possible solutions (it is also worth noting that other bodies outside of the Antarctic Treaty System have found liability issues extraordinarily complex and difficult to solve). We are, however, now in a new phase of our work, that of negotiation in Working Group 1 as mandated by the Tromso ATCM.

That new phase, and the fundamental differences that I have referred to, suggest that we should now be looking for a new approach which bridges the two positions or takes yet another road. Ideally, it should also be designed to make our work more manageable. As the discussion of Antarctic Liability has developed, there has been an increase in the magnitude and number of issues needing to be negotiated, which adds to the complexity of pulling together a
package as such. And as the potential time span for producing a concrete outcome has grown commensurately, there is inevitably a danger that the negotiating process will flag. Moreover, what we shall have to produce is an outcome which can be adopted by consensus, and which can then be ratified by all Parties within a reasonable time. Size and complexity is unlikely to assist such an outcome.

Attached to this document is one possible new approach, which would bridge the fundamental differences I have referred to. There may be others which occur to delegations, but it is in terms of a new approach that I believe we should now be thinking.

The approach attached is a framework for a liability regime as follows:

1) a single annex providing for a comprehensive regime, thus meeting the objectives of many delegations. The annex itself would include all the generic items which would be common to a liability regime of whatever nature, and in respect of which there is already agreement or agreement is foreseeable. It would utilize a great deal of work already done and (without wishing to minimize unduly the complexity of the issues remaining) could, hopefully, be developed reasonably quickly.

2) It would contain a binding commitment to subsequently develop detailed schedules, by way of measures, on 1) Preventative Measures, 2) Damage from Environmental Emergencies, 3) Response Action and Remedial Action, and 4) Unrepaired and Irreparable damage. (Using measures to build on the Annex would not be an entirely novel concept; all of the other Annexes to the Protocol can of course be amended or modified by way of measures, which are adopted by consensus).

This approach would also have the advantage of reducing our work to reasonably digestible bites. It would enable a step by step approach while meeting the positions of delegations wanting a single annex and comprehensive coverage. It would require a decision as to which schedules should be developed first, but this might be guided by COMNAP’s identification of the most pressing area of concern - damage from environmental emergencies - on which we already have a substantial proposal before us. Another possibility might be to consider parallel work on the prevention of damage, which would require closely integrated input from a range of disciplines including scientists and operators. Care would obviously need to be taken to ensure that the schedules did not overlap unduly, and also that the sequential entry into force of the schedules did not create problems for one schedule vis-a-vis another.

I would recommend this to colleagues as a possible way forward. If not, we need to find some other approach to bridge these fundamental differences.
IV. POSSIBLE FRAMEWORK FOR ANNEX VI TO THE PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY LIABILITY FOR DAMAGE TO THE ANTARCTIC ENVIRONMENT

A. Purpose

B. Scope of Application

C. Relationship with Other International Agreements

D. Definitions

For the purposes of this Annex (including the Schedules hereto as appropriate):
“Fund” means...
“Operator” means...
“Person” means...
“Protocol” means...
...[other terms which may be common to the Annex and the Schedules...]

E. Obligations of Parties

F. Establishment of Jurisdiction

G. Schedules

To enable the effective implementation of this Annex, the Parties undertake to adopt measures, in accordance with Article IX(i) of the Antarctic Treaty, comprising the following Schedules to this Annex:

Schedule 1: Preventative Measures
Schedule 2: Damage from Environmental Emergencies
Schedule 3: Response Action and Remedial Action
Schedule 4: Unrepaired and Irreparable Damage

H. Standard of Liability

I. Joint and Several Liability

J. State Liability and Responsibility

K. Financial Limits

Liability under this Annex shall not exceed the amounts set out in the relevant Schedule.
L. **Time Limits of Liability**

Liability under this Annex shall be subject to any limitation periods set out in the relevant Schedule.

M. **Antarctic Environment Protection Fund**

N. **Dispute Settlement**

O. **Amendment or Modification**
V. SCHEDULES TO ANNEX VI

Schedule 1: Preventative Measures

Schedule 2: Damage from Environmental Emergencies

Schedule 3: Response Action and Remedial Action

Schedule 4: Unrepaired and Irreparable Damage