



WORKING PAPER

LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE

THE SUPPLEMENTARY COMPENSATION MECHANISM (SCM)

(Presented by Germany)

1. INTRODUCTION

1.1 At its 182nd session the Council has decided to submit the Draft Convention on compensation for Damage Caused by Aircraft to Third Parties, in Case of Unlawful Interference to the 33rd session of the Legal Committee and requested that the Legal Committee takes into account the concerns raised by Germany in C-WP/13087 and pays attention to possible ways of protecting the interests of victims most efficiently and ensures the ratifiability of the revised Convention and the operability of the funding mechanism.

2. THE CURRENT DRAFT

2.1 The current draft foresees compensation in two layers. The first layer, 700 000 000 Special Drawing Rights (SDR) at maximum, is covered by the operator's insurance. For the second layer the draft establishes a Supplementary Compensation Mechanism (SCM) in Chapter III (Articles 8-18). The funding of the SCM relies on a universal passenger-ticket charge and an insurance-like mechanism of separate funds for each calendar year, attributing collected funds to States Parties and rolling over funds that have not been used for compensating victims of past acts of unlawful interference. The contributions are to be collected according to Article 12 as a departing fee in respect of each passenger and each tonne of cargo. The shortcomings of this approach and the resulting inoperability of the whole SCM are outlined in Working Papers that have been presented to the Special Group and are attached as Appendices A, B and C.

According to Article 17, paragraph 1, the States are obliged to ensure that the collection of the contributions by the airlines is conducted properly. And according to Article 17, paragraph 3, the State is liable for losses of the SCM occurring from airlines not paying the contributions.

2.2 These provisions are extremely complicated and imply a huge administrative burden for the respective State Party. They also constitute a grave financial risk for State Parties if they are liable for losses occurring from airlines not paying the contributions. The States cannot afford to be liable for the duties of the airlines. Furthermore the proposed model of financing the SCM does not cover all operators contributing to the risk of third party damage and who nevertheless are beneficiaries of the funds. General aviation is completely exempt from contributions, although many private flights on own account or fractional ownership flights, are operated with large aircraft and, because of the lower security regulations, even bear an increased risk of terrorist damage.

Even though it is vitally important to know how many contracting States would be needed in order to secure sufficient funding, no such calculation has been effected. The importance of this question is emphasized by the fact that the fund foreseen within the frame of the Globaltime-project has just failed due to lack of acceptance among the States.

3. PROPOSAL

3.1 Today it is important to work towards reduction of the administrative burden, not only to save the tax-payers' money, but also to obtain a transparent and efficient administration. In times of bureaucracy dismantling it is difficult to justify that yet another administrative responsibility is accepted. Moreover, the State does not have the resources to audit the operator's passenger volume. Since the SCM serves as a justification for limiting the operator's liability, it seems conceivable that the SCM could be organised by the air transport industry and without participation of the State Party.

Therefore Germany proposes to refrain from creating a SCM within the framework of the modernisation of the Rome Convention and to create solely a liability regime.

3.2 But if the Legal Committee takes the view that the SCM has to be included in the Convention, it is necessary to create a mechanism that is operable. The current financing concept lacks operability and therefore cannot guarantee the victim's compensation in the second layer. The financing within the framework of the passenger-based model cannot grant a fair levying, since the contributions are by no means related to the potential damages that could occur. Therefore Germany has presented an alternative financing model to the Special Group which foresees a levy linked to the weight of the aircraft and therefore to the potential risk of damage. The model is explained in the papers attached. The Council assigned the task to take into account the concerns raised by Germany with regard to the viability of the SCM and ensure its operability to the Legal Committee. A wording proposal for a weight-based contribution system, which is capable of achieving essential requirements, such as fair and transparent levying and assessment of contributions and which is also in line with practicability issues is enclosed (Appendix D).

APPENDIX A

**SPECIAL GROUP ON THE MODERNIZATION OF THE
ROME CONVENTION OF 1952 (SG-MR)**

Meeting of the Friends of the Chairman

(Brussels, 16 to 18 January 2007)

**COMMENTS ON A FINANCING MODEL BASED ON THE NUMBER OF PASSENGERS
– PROPOSAL OF A MODEL BASED ON THE WEIGHT OF THE AIRCRAFT –**

(Presented by Germany)

The financial concept for the Supplementary Compensation Mechanism has to satisfy the requirement of effecting a fair and transparent levying and assessment of contributions which is also in line with practicability. As is the case with every levying of insurance contributions, the contributions levied for a fund like the Supplementary Compensation Mechanism therefore have to be assessed, to the extent possible, according to the risk of damage or the probability of occurrence set by the individual member of the fund.

However, on this basis the levying of contributions assessed according to the number of passengers carried in the proposal of the coordinators LMBC and Singapore gives rise to considerable reservations:

1. The number of passengers carried is not a relevant factor for the assessment of the probability of damage caused to third parties and for the assessment of the probability of the Supplementary Compensation Mechanism having to make compensation payments to third parties who have suffered a damage.

2. The model presented does not cover all operators of aircraft who, by participating in air traffic, contribute to a risk of the occurrence of causing damage to third parties and to the probability of the Supplementary Compensation Mechanism having to make compensation payments and who participate in the fund.

- Exempt from contributions is general aviation, although many private flights, for example flights on own account or fractional ownership flights, are operated with large aircraft and, because of the lower security regulations, even bear an increased risk of terrorist damage;
- Exempt from contributions is also cargo transport for which the coordinators up to now have not submitted a proposal. Furthermore, the assessment of these contributions is very complicated. The model “1 SDR per passenger” cannot simply be transferred to cargo.

3. In order for a system based on numbers of passengers to work, the states would have to provide data on all the passengers who take off from or land in the country concerned. However, due to liberalised air traffic it is difficult to ascertain such data in Europe especially, which means that the proposed model is not practicable.

If, however, the contributions to the Supplementary Compensation Mechanism are based on the assessment of the risk set for occurrence of damage caused to third parties and payments by the Supplementary Compensation Mechanism to compensate for this damage, then two basic requirements will have to be made: All operators of all State Parties participating in the fund must pay contributions, the level of which is derived from the maximum take-off weight (MTOW) of the aircraft. This is due to the fact that the heavier an aircraft is and the larger the quantity of kerosene carried, the higher the probability of causing considerable damage to third parties and the higher the probability that the fund has to make payments to compensate for this damage.

Consequently, the same factors are relevant to the levying and assessment of contributions to the Supplementary Compensation Mechanism which, according to the Draft Convention, are already relevant to the extent of liability and the extent of the obligation to maintain insurance (Article 4, Article 8). These are already assessed according to the risk of damage caused to third parties which is based on the maximum take-off weight. Our proposal consists of the following:

- **The Convention states – as is the case in the current draft – that aircraft operators are obliged to make contribution payments to the fund.**
- **The level of the payments is assessed according to the maximum take-off weight of the aircraft of every operator of every State Party. For this purpose certain categories – possibly along the same lines as the categories of Article 4 – have to be established and for every one of these categories a certain level of contributions per annum has to be determined. As an alternative it would be possible to determine a certain contribution factor (X SDR) for a certain weight factor (e.g per 250, 500 or 1000 kg MTOW).**
- **These individual assessment parameters still have to be determined by the Task Force. This requires, on the one hand, the guarantee that the fund will have within good time sufficient means to pay compensation for a case of major damage (up to 3 billion SDR), but on the other hand that the contributions are reasonably adequate and acceptable to the airlines.**
- **An amount determined in this way for all the aircraft of every operator of a State Party has to be paid annually – in addition to the insurance for damage caused to third parties – by every operator of a State Party as contribution to the fund.**

Advantages of this kind of funding:

1. **Transparency**

The levying and assessment of contributions is fairly distributed – according to the extent of liability and the extent of the obligations to maintain insurance – by linking it to the probability of causing damage to third parties and the probability that the fund must step in. This reflects the fact that the risk of major damage increases with the size of the aircraft. The contribution to the fund which has to be paid is determined from the start and is thus a calculable factor.

2. **Fairness**

All aircraft operators of a State Party are included in the contribution system as potential parties responsible for damage. Commercial airlines have the possibility of passing on the contributions to passengers as well as to cargo.

3. **Practicability**

Since all aircraft are registered in certain states, it does not require much effort for the states to report the registered aircraft and to determine the individual maximum take-off weights. Furthermore, it is possible that the contributions to the fund are levied by and paid to the insurances, together with the contributions for the insurance for damage caused to third parties.

APPENDIX B

**TERMS OF REFERENCE OF THE SUPPLEMENTARY COMPENSATION MECHANISM
TASK FORCE**

**WORKING PAPER ON CONTRIBUTIONS TO THE SCM
(Point 4 of the Terms of Reference)**

(Presented by Germany)

Financing concepts

The discussion of the fundamental basis of the contributions to the SCM focused on two different models: one is passenger-based and the other is MTOW-based (comments on a financing model based on the number of passengers - proposal of a model based on the weight of the aircraft“, presented by Germany for the meeting of the friends of the chair, Brussels, 16 – 18 January 2007, attached to this WP). The delegation of Germany invites the members of the group to take notice of the table enclosed, introducing figures of possible MTOW-based assessment of contributions to the fund and share the following observations as to the core-differences of these concepts.

1. Figures of possible MTOW-based assessment of contributions to the SCM

Category	MTOW (kg)	SDR (per plane/year)
1	< 500	300
2	< 1.000	600
3	< 2.700	1.200
4	< 6.000	10.000
5	< 12.000	25.000
6	< 25.000	35.000
7	< 50.000	40.000
8	< 200.000	45.000
9	< 500.000	50.000
10	> 500.000	60.000

- The figures in this table have been developed in close cooperation with the German airlines and airline insurers and should be understood as open for discussion.
- Adjustments can lead to any level of contributions to the fund that may be envisaged by any pax-based concept.
- An MTOW-based concept does not call for specific changes to the concept of collection of contributions, except that collection via ticketing is not possible.

2. Observations on core-differences of passenger-based and MTOW-based concepts

Passenger-based	MTOW-based
<ul style="list-style-type: none"> ▪ not related to the potential damages 	<ul style="list-style-type: none"> ▪ directly related to the potential damages
<ul style="list-style-type: none"> ▪ cargo not included 	<ul style="list-style-type: none"> ▪ cargo included
<ul style="list-style-type: none"> ▪ general aviation not included 	<ul style="list-style-type: none"> ▪ general aviation included
<ul style="list-style-type: none"> ▪ concentration of contributions on passengers ▪ only (augmentation of ticket-prices only) 	<ul style="list-style-type: none"> ▪ distribution of contributions on many shoulders (depending on pricing-policy of airlines for pax and cargo)
<ul style="list-style-type: none"> ▪ collection of contributions: <ul style="list-style-type: none"> - assessment per ticket (per lag? relevance of hub-traffic? returned tickets?) - millions of single payments - huge administrative overhead (tracking of/accountance over payments) - unforeseeable overall amount of contributions to the fund - enforcement of contributions? 	<ul style="list-style-type: none"> ▪ collection of contributions: <ul style="list-style-type: none"> - single assessment per plane/year –little administrative action needed - single payment –neglectable administrative burden - volume of increase of the fund foreseeable and early known –(any amount achievable, no necessary difference to pax-based system) - easy to enforce
<ul style="list-style-type: none"> ▪ to whom should refunds belong? 	<ul style="list-style-type: none"> ▪ refunds after closing pre-funding can go to airlines
<ul style="list-style-type: none"> ▪ assistance to airlines in case of a drop down is borne by passenger-contributions 	<ul style="list-style-type: none"> ▪ assistance to airlines in case of a drop-down ▪ is borne by “airline-contributions”

APPENDIX C

THE SUPPLEMENTARY COMPENSATION MECHANISM TASK FORCE

(Singapore, 7 to 11 May 2007)

REFLECTIONS ON A MTOW-BASED MODEL OF CONTRIBUTIONS TO THE SCM

(Presented by Germany in June 2007)

In the TASK FORCE session in Singapore, Germany presented the suggestion of a MTOW-based model of funding the SCM. The discussion included several points of special importance:

1. One point of special interest has been how the levying of the contributions would have to be effected. The answer to this is that one fundamental idea of the model is to rely exclusively on advance-payments that have to go directly from the operator to the fund. This would exclude any need for enforcing late payments and eliminate the risk of losing contributions due to bankruptcy of operators. Furthermore direct payments would be the least expensive and at the same time the fastest procedure to deliver the contributions to the SCM.
2. Another point was the question on how airlines of non-contracting States would be enabled to cooperate with the fund. To solve this problem, the SCM should be open to direct payment by such airlines as well, be it only a fraction for a year.
3. This issue turned out to be closely linked to the question on how payment should effectively be ensured by the States Party. The proposition has in mind, that operators already have to demonstrate to the States they operate into, to fulfil insurance requirements. In the due course of this, they could as well demonstrate that the operator has contributed to the fund. If this requirement was not met, the States Party would be under the obligation to react in the same way as if the aircraft had not been properly insured. The administrative procedures for this should already be in place, the amount of additional workload would appear to be neglectably small.
4. In the course of the discussion it appeared to be useful to explain, that fixing amounts per aircraft, regardless of the use, an aircraft has been made of, not only is a prerequisite of a streamlined advance-payment basis of the contributions, but also reflects the fact, that any operator is by market mechanisms forced to make optimal use of each aircraft. Therefore it was deemed not to make much sense to go into details of counting passengers, cargo, kilometres or take-off and landing-procedures.
5. Placing the burden of the contribution on the operators would of course leave it to them, to decide in the customary way of calculating fees on how to distribute it to their clients. The operators should be in the best position to judge how this should be done.

APPENDIX D

WORDING PROPOSAL

– ON THE ISSUE OF THE FUNDING OF THE SCM –

(Presented by Germany)

Chapter III

The Supplementary Compensation Mechanism¹

<i>current draft, insofar as affected by this proposition</i>	<i>proposition</i>
<p>Article 8 — The Supplementary Compensation Mechanism</p> <p>...</p> <p>2. The Supplementary Compensation Mechanism shall have the following purposes:</p> <p>...</p> <p>c) to perform other functions directly compatible with these purposes.</p>	<p>Article 8 — The Supplementary Compensation Mechanism</p> <p>...</p> <p>2. The Supplementary Compensation Mechanism shall have the following purposes:</p> <p>...</p> <p>c) to collect contributions and administer its funds</p> <p>d) to perform other functions directly compatible with these purposes.</p>
<p>Article 9 — The Conference of Parties</p> <p>The Conference of Parties shall :</p> <p>...</p> <p>e) decide the period for, and the amount of, initial contributions and fix the contributions to be made to the Supplementary Compensation Mechanism for each year until the next meeting of the Conference of Parties;</p>	<p>Article 9 — The Conference of Parties</p> <p>The Conference of Parties shall:</p> <p>...</p> <p>e) decide on temporary completion of collection according to Article 15 para. 1;</p>

¹ The name of the Mechanism has not yet been decided.

<p>Article 10 — The meetings of the Conference of Parties</p> <p>...</p> <p>4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority of the votes cast. Decisions under Article 9, subparagraphs a), b), c), d), j) and l) shall be taken by a majority consisting of two-thirds of the votes.</p>	<p>Article 10 — The meetings of the Conference of Parties</p> <p>4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority of the votes cast. Decisions under Article 9, subparagraphs a), b), c), d), e), j) and l) shall be taken by a majority consisting of two-thirds of the votes.</p>
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Article 11 — The Secretariat and the Director

[remains unchanged]

<p>Article 12 — The Contributions to the Supplementary Compensation Mechanism</p> <p>The contributions to the Supplementary Compensation Mechanism shall be the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party. The operator shall collect the mandatory amounts and remit them to the Supplementary Compensation Mechanism.</p>	<p>Article 12 — The Contributions to the Supplementary Compensation Mechanism²</p> <p>The contributions to the Supplementary Compensation Mechanism shall be mandatory in respect of the aircraft of any operator for any day, during which the aircraft performs a flight in the airspace of any one of the contracting States.</p>
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<p>Article 14 —Basis for fixing the Contributions³</p> <p>[...]</p>	<p>Article 14 —Basis for fixing the Contributions</p> <p>[deleted]</p>
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² The final clauses are likely to provide a threshold for the entry into force defined in order to ensure that the **contributions collected are sufficient for the financial viability of the Supplementary Compensation Mechanism.**

³ The final clauses are likely to provide a threshold for the entry into force defined in order to ensure that the number of passengers and the amounts of cargo is sufficient for the financial viability of the Supplementary Compensation Mechanism.

<p style="text-align: center;">Article 15 — Initial Contributions and pre-funding</p> <p>1. At its first meeting, the Conference of Parties shall decide the period and the rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. If a State Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such declaration from the time it takes effect. The period and the rate shall be equal for all States Parties.</p> <p>2. Contributions shall be fixed so that the funds available amount to at least [25 %][100 %] of the limit of compensation set out in Article 19, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to at least [50 %][100 %] of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which the Convention subsequently enters into force.</p>	<p style="text-align: center;">Article 15 — Temporary Completion of Collection of funds for the SCM</p> <p>1. If the funds of the SCM are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and representing at least [50 %][100 %] of the upper limit for compensation according to Article 19, paragraph 2, the decision may be taken that the collection of funds for the SCM is temporarily completed.</p> <p>2. Even after an affirmative decision of the Conference of Parties on temporary completion of collection of the SCM, operators with the principal place of business in a State Party shall be required to continue to contribute to the SCM until that State Party has contributed for the same number of years as the State Party that has contributed for the highest number of years. Operators with the principal place of business in a non-contracting State shall be required to continue to contribute to the SCM for aircraft performing flights into States Party that still have to contribute to the SCM.</p>
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<p style="text-align: center;">Article 16 — Collection of the Contributions</p> <p>1. The Conference of Parties shall establish in the Regulations a transparent, accountable and cost-effective mechanism supporting the collection and remittal of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens. Contributions which are in arrears shall bear interest as provided for in the Regulations.</p> <p>2. Where an operator does not remit contributions it has collected to the Supplementary Compensation Mechanism, the Director shall take appropriate measures against such operator with a view to the recovery of the amount due. Each State Party shall ensure that an action to recover the amount due may be taken within its jurisdiction, notwithstanding in which State Party the debt actually accrued.</p>	<p style="text-align: center;">Article 16 — Collection of the Contributions</p> <p>1. The SCM shall hold a bank account in each State Party.</p> <p>2. To duly contribute to the SCM, an operator must with respect to a certain aircraft pay in advance to any bank account of the SCM the sum due for the category of MTOW, this aircraft belongs to according to paragraph 3. Any single payment must</p> <p>a) by a unique identifier refer to a single aircraft,</p> <p>b) indicate the MTOW-category the aircraft belongs to,</p> <p>c) indicate the period of time the payment is made for,</p>
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d) include an indication on the identification of the operator and the State of his principal place of business.

3. The contributions to the SCM for aircraft of the respective category shall be:

Category	MTOW (kg)	SDR (per plane/year)
1	< 500	300
2	< 1.000	600
3	< 2.700	1.200
4	< 6.000	10.000
5	< 12.000	25.000
6	< 25.000	35.000
7	< 50.000	40.000
8	< 200.000	45.000
9	< 500.000	50.000
10	> 500.000	60.000

The amounts set out herein are subject to review according to Article 29.

4. Operators may choose for each aircraft to pay the amounts due according to paragraph 3 for a year or a respective fraction for six months, three months, one month or one day. If payment is made

a) for six months, the fraction of the amount due according to paragraph 3 is increased by 5 percent,

b) for three months, the fraction of the amount due according to paragraph 3 is increased by 7,5 percent,

c) for one month, the fraction of the amount due according to paragraph 3 is increased by 10 percent,

d) for one day, the fraction of the amount due according to paragraph 3 is increased by 20 percent.

5. In respect of calculation of contributions the point in time relevant for conversion of monetary units shall be the first of November previous to the payment. Besides that, Article 28 applies.

Article 17 — Duties of States parties	Article 17 — Duties of States parties
<p>1. Each State Party shall ensure that any obligation to collect and remit contributions to the Supplementary Compensation Mechanism arising under this Convention is fulfilled and take any appropriate measures under its law, including imposing such sanctions as it may deem necessary, with a view to the effective execution of any such obligations.</p> <p>2. Each State Party shall ensure that the following information is provided to the Supplementary Compensation Mechanism:</p> <ul style="list-style-type: none"> a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party; and b) the identity of the operators performing such flights. <p>Where a State Party has made a declaration under Article 2, paragraph 2, it shall ensure that information detailing the number of passengers and quantity of cargo departing on commercial flights between two airports in that State Party, and the identity of the operators performing such flights, is also provided. In each case such statistics shall be <i>prima facie</i> evidence of the facts stated therein.</p> <p>3. Where a State Party does not fulfil its obligations under paragraph 2 of this Article and this results in a loss for the Supplementary Compensation Mechanism, the State Party shall be liable for such loss. The Conference of Parties shall, on recommendation by the Director, decide whether the State Party shall pay for such loss.</p>	<p>Each State Party shall require any operator for each of his aircraft performing flights in its airspace to in advance demonstrate payment of the contributions to the SCM by producing customary documents by banks, stating execution of payment and including the details set out in Article 16 para. 2. Each State Party shall ensure that any aircraft for which the correct contributions have not been made to the SCM in advance is treated as if it were not insured properly.</p> <p>[1. - 3.: deleted]</p>

Article 18 — The funds of the Supplementary Compensation Mechanism

[remains unchanged]