



LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 8: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 33RD SESSION

The attached paragraphs 3:116 to 3:144 of the draft Report of the Legal Committee relate to Agenda Item 3.

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

3:116 **Article 28** (Conversion of Special Drawing Rights) which streamlines the procedure outlined at Article 23, paragraph 1 of the 1999 Montreal Convention, **was accepted** without discussion.

3:117 With regard to **Article 29** (Review of Limits), one delegation clarified that the reference to “inflation fact” in **paragraph 2** should read “inflation factor”. Another delegation, in considering **paragraph 1**, voiced some doubt as to whether it was appropriate for the Director of the SCM to be charged with the review of the sums in Article 4 given that they had no relation to an act of intervention by the Mechanism. The Chairman noted that there was a need for coordination with liability limits; if the review did not include Article 4 sums, it was possible to envision a gap in coverage between Article 4 and Article 19. One delegation, supported by another delegation, found it difficult to appreciate why the Director alone would be vested with such a right given that it was not an operational issue and that it fell within the prerogative of States as members of the Conference of Parties. Another delegation suggested that, for the avoidance of doubt as to the approval role currently in paragraph 2, this power should instead be in paragraph 1. The Committee **approved** Article 29 in principle, subject to the Drafting Committee considering increasing the visibility of the Conference of Parties in the first paragraph.

3:118 In response to a question raised by a delegation with regard to **Article 30** (Forum), paragraph 1, *vis-à-vis* “where the damage occurred”, a delegate, Chairman of the SG-MR, echoed by another delegation, explained that there had been a clear intention to move away from the 1952 Rome Convention to emphasize victim protection. To that end, Article 30 covers instances where events taking place in a non-State Party result in damages within a State Party, ensuring that a connection is made to where the damage occurs. **Paragraph 2** addresses the problem where damage occurs in several States given that it is not always easy to determine where the aircraft is when the damage occurs. The Committee **accepted** Article 30 as is, subject to a proposal by one delegation to replace “incidente” with “suceso” in paragraph 2 of the Spanish text, for the latter term to be consistent with the Spanish definition of “event”.

3:119 **Article 31** (Intervention by the Supplementary Compensation Mechanism) was **accepted** by the Committee without comment.

3:120 During consideration of **Article 32** (Recognition and Enforcement of Judgements), one delegation reiterated its concerns raised at the SG-MR regarding its desire to delete **paragraph 3**. This delegation explained that since each State has different legal rules regarding enforcement of judgements, this could be an impediment to ratification of the Convention, and suggested instead a reference to the national law of the State where the damage occurs. The Chairman of the SG-MR’s Sub-Group on Procedural Matters explained that subparagraphs a) through f) were in square brackets because there had been no consensus on whether reference should be made solely to domestic law, or whether a common set of rules should apply. In this delegation’s view, which was supported by six other delegations, the latter choice was preferable. One of these delegations noted that subparagraph e) had to be made compatible grammatically with the chapeau of paragraph 3. The Chairman then established an additional **Friends of the Chairman Group (No. 4)**, comprised of the delegations of China, Senegal, Sweden and the United Kingdom, which was tasked to review paragraph 3 in a most expeditious manner. The compatibility of subparagraph e) with the chapeau of paragraph 3 of Article 32 was **referred** to the Drafting Committee.

3:121 **Article 33** (Regional and multilateral agreements on the recognition and enforcement of judgements) was **accepted** by the Committee without comment.

3:122 With regard to **Article 34** (Period of Limitation), one observer referred the Committee to LC/33-WP/3-9 which proposed at paragraph 2.2.11 that the period of limitation be two years as in the 1929 Warsaw Convention, the 1999 Montreal Convention and the 1952 Rome Convention. Further, the industry had a right to know who the claimants would be within a short period of time and there should be no significant harm to claimants in reducing the period. Another observer, in supporting this view, pointed out that claimants would be compensated sooner, allowing less time for the funding to run out. All delegations who spoke supported retaining the three-year limitation period as a minimum. The various reasoning expressed by these delegations for maintaining the longer limitation period in a third-party context (versus a contractual regime covered under, *inter alia*, the Montreal Convention) was that it was more difficult to identify victims and goods and to calculate the associated damages and, in some cases, to evaluate whether the damages occurred as a result of an act of unlawful interference or otherwise. On a point of clarification raised by one delegation as to why there was a disparity between the limitation periods in the two draft Conventions, the Rapporteur for the General Risks Convention cited the experience under the 1952 Rome Convention as justification for maintaining the two-year period. This differed somewhat from the Unlawful Interference Compensation Convention, where the deliberate nature of, and the intent to cause, the damage could complicate claims by victims. The text of Article 34 was **endorsed** by the Committee as is, subject to replacing “incidente” in **paragraphs 1 and 2** in the Spanish text of the Article with “suceso” as per the reasoning stated in the context of Article 30.

3:123 **Article 35** (Death of Person Liable) and **Article 36** (State Aircraft) were **endorsed** by the Committee without comment.

3:124 Upon discussion of **Article 37** (Nuclear Damage), the Chairman reminded the Committee that it had agreed to come back to this provision in the context of environmental damage of a nuclear nature. One observer, supported by another observer, referred the Committee to LC/33-WP/3-9 which proposed at paragraph 2.2.12 that liability for uninsurable nuclear damage be excluded. One delegate, Chairman of the SG-MR, understood that the two conventions on nuclear liability mentioned in the Article had to do with channelling liability to operators of nuclear facilities for acts involving nuclear material stolen from those facilities. One delegation, in supporting the statements of the above delegation and both observers, suggested re-drafting the text to capture complementary conventions and domestic legislation that would give further protection in these cases. Another delegation expressed doubt as to whether “a nuclear incident” necessarily involved an act of unlawful interference.

3:125 One delegation acknowledged that there was a degree of agreement that the operator should not be liable for nuclear damage. One delegation, supported by another delegation, echoed this view, stating that the risks did not emanate from aviation activities but from nuclear facilities. When the Chairman proposed deleting Article 37 in its entirety, one delegation cautioned that such deletion would subject the operator to the strict liability regime of the Convention. Another observer reiterated the proposal in LC/33-WP/3-9 to delete all of the text after “incident” in the first line of the Article. In response to this, one delegation, supported by two other delegations, cautioned that since “nuclear incident” is not defined in the Convention, reference should be made to definitions in other relevant conventions. In concluding the consideration of Article 37, the Chairman **referred** the Article to the Drafting Committee and tasked it to consider adopting one of two approaches which would best reflect the rest of the terms of the Convention: either delete the text following “incident” in the first line and clarify what constitutes a nuclear incident; or merely provide that nuclear damage shall not be compensable under this Convention (or, alternatively, follow the wording of Article XIV of the 1978 Montreal Protocol).

3:126 The Committee then turned to **Article 18** (The funds of the Supplementary Compensation Mechanism). One delegation proposed the inclusion of a financial security clause to protect States Parties from liability arising from actions, omissions or obligations of the SCM pursuant to their membership in the

Mechanism. Such liability could arise as a result of, *inter alia*, investment of the funds by the SCM pursuant to **paragraph 2** of Article 18 or obtaining credits from financial institutions pursuant to Article 18, paragraph 4. One delegate, Chairman of the SG-MR, found the proposal interesting but noted that it was akin to a clause dealing with the winding up of the SCM, and was of a kind generally dealt with in the final clauses of an instrument at a Diplomatic Conference. The Chairman, in agreeing with this suggestion, invited the delegations to consider this matter carefully and to be prepared to present their positions at the Diplomatic Conference.

3:127 The Chairman of the Friends of the Chairman Group 2 presented **Flimsy No. 3** which examined the relationship between ICAO and the Supplementary Compensation Mechanism. The Attachment to the Flimsy contained eight proposals which were intended to clarify the nature of that relationship. The Chairman of the Legal Committee invited the Committee to provide comments on each of these proposals itemized in the Attachment.

3:128 With regard to item 1, Members of the Legal Committee commended the Diplomatic Conference to give careful consideration as to whether the Preamble of the Convention should contain a description of the relationship between ICAO and the SCM, including that the SCM has been set up under the auspices of ICAO.

3:129 In noting the proposal at item 2 to delete the square brackets in Article 8 (The Supplementary Compensation Mechanism), paragraph 3, one delegation requested clarification as to why there was no corresponding amendment to paragraph 4 of that Article or whether the SCM had its own legal personality distinct from ICAO. The Chairman of the Group confirmed that ICAO and the SCM would have distinct personalities, but some relationship should be established in order to enable ICAO to facilitate the SCM's work by entering into an arrangement. Further clarification was provided by the Group Chairman regarding the "seat at the same place as" ICAO as being Montreal. The Committee **agreed** to remove the square brackets from Article 8, paragraph 3, with the Chairman urging the Drafting Committee to note the change.

3:130 Regarding items 3 and 4, the Chairman noted that consideration of **Article 9** (The Conference of Parties) had been put on hold pending this discussion. Item 3 contained a proposal to insert a new subparagraph in Article 9 with the following wording: "as appropriate, enter into arrangements on behalf of the Supplementary Compensation Mechanism with the International Civil Aviation Organization and other international bodies". The Committee **agreed** with the addition of the subparagraph, which should be put in an appropriate place to be suggested by the Drafting Committee. Item 4 proposed that the words "or the International Civil Aviation Organization" be inserted after the words "State Party" in Article 9, **subparagraph m**), as this would allow ICAO to enter points on the Agenda of the Conference of Parties. This insertion was **accepted** by the Committee for the Drafting Committee to note.

3:131 The text proposed at item 5 would be added at the end of **Article 10**, paragraph 3, as follows: "The International Civil Aviation Organization shall have the right to be represented, without voting rights, at the Conference of Parties". This text was also **accepted** without objection, for the Drafting Committee to note.

3:132 As the proposals in items 6 and 7 dealt with the Regulations of the SCM, the Committee wished to record in this Report its acceptance in principle of these proposals, which will be considered later on by those charged with drafting and approving the Regulations.

3:133 The Committee wanted it to be noted in this Report that it accepted in principle the proposal described in item 8 and recommended that the Secretariat bring to the attention of the Diplomatic

Conference that a resolution be set out indicating that the first meeting of the Conference of Parties should take place in Montréal at the premises of ICAO .

3:134 In considering the totality of **Article 9** (The Conference of Parties), the Committee considered it **approved**, subject to the amendments agreed.

3:135 The Committee then considered **Article 10** (The meetings of the Conference of Parties). One delegation proposed that **paragraph 3** be amended to reflect not only equal rights to member States, but should also provide for proportionate votes based on the amount of contributions made to the SCM (weighted voting). This was in line with the precedents of the World Bank and the International Monetary Fund and was in keeping with the idea that investment funds of sovereign States should be managed similarly to those of private financial entities. Another delegation averred that ratifiability of the Convention would be made more difficult without such an amendment in particular with regard to States making higher contributions. In opposing the proposal, one delegation suggested it would on the contrary impede ratification. This was supported by five other delegations feeling that such weighted voting would compromise the payment of compensation to developing States, and claiming that the decision-making process of the Conference of Parties should be based on the principle of “one State, one vote”, upon which ICAO was founded. The Committee therefore **decided** to leave the text as is.

3:136 One delegation, supported by another, recommended that reference be made in Article 10, **paragraph 4**, to Article 9, subparagraph e) with regard to initial contributions. The Committee **agreed** to insert the reference to **subparagraph e)** in paragraph 4 of Article 10 and commended the same to the Drafting Committee.

3:137 The Committee next considered the proposal to amend **Article 32, paragraph 3**. The Friends of the Chairman Group 4 suggested to remove the square brackets in that paragraph and to retain the text. It further suggested to introduce a new subparagraph to provide additional grounds to refuse recognition and enforcement of a judgement. To ensure the transparency of the system, such additional grounds could be invoked only under the condition that they have been notified to the depositary of the Convention upfront and in advance. The Committee **approved** in principle this proposal and **requested** the Drafting Committee to prepare the text of the new subparagraph.

3:138 The Committee then considered **Articles 25, 26 and 27**. With respect to **Article 26**, an observer proposed that if it is decided that the SCM shall provide financial support under Article 26 to an operator which is liable for damage occurring in a State non-Party, such support should be subject to the condition that the State non-Party agrees to be bound by the terms and conditions of the Convention. A draft text to that effect was presented in LC/33-WP/3-9. Several delegations supported this proposal. They believed that it would be reasonable to request a State non-Party to abide by the terms and conditions of the Convention, through retroactive legislation or otherwise, in order to enjoy the benefit from the Convention. The Committee **accepted** this proposal and **tasked** the Drafting Committee to examine the wording of the proposed amendment in LC/33-WP/3-9.

3:139 Further consideration of Articles 25 and 27 was based on LC/33-WP/3-6 and LC/33-WP/3-9. Several delegations expressed strong reservation to the current text of Articles 25 and 27. By providing an exclusive remedy against the operator, Article 27 would effectively shield other entities from their liability, regardless of the possibility that they may also have contributed to the damage. Such a broad exoneration was considered to be in contravention with the basic principle of tort and contract law, according to which any entity should be held accountable for its fault. These delegations might accept certain exoneration clauses applicable to owners, lessors and financiers of aircraft, but would have difficulties in extending the same exoneration to such entities as air navigation service providers, airports,

security providers and ground handling service providers. Exoneration of these latter entities would not provide incentives to improve security measures. Moreover, the exclusion of the liability of manufactures would present a serious problem, since this would contradict with European Community (EC) law on product liability and would affect the ratifiability of the Convention by EC Member States. Last but not least, the concept could put the victims in a disadvantageous position. In the event that the SCM is exhausted and the victims remain uncompensated or inadequately compensated, they would be deprived of their rights to pursue other entities which have contributed to the damage. Accordingly, it was suggested to delete Article 27. In addition, these delegations also believed that the permitted recourse under Article 25 was extremely narrow and unnecessarily restrictive. It could hardly be considered fair if the operator, who would be held strictly liable for damage, could not have a right of recourse against those who actually caused or contributed to the damage. In the view of these delegations, Article 25 should be amended by incorporating the draft provisions proposed in LC/33-WP/3-6 in order to retain the broader possibility for recourse.

3:140 In contrast with the aforementioned view, one observer believed that Article 27 was one of the cornerstones of the Convention and should be retained in its current form. The industry preferred to allocate liability among themselves instead of lengthy involvement in litigation. They should be allowed to do so since the interest of the victims would not be affected. Channelling of liability was not a new concept. It was reflected in certain international treaties such as the *Convention on Third Party Liability in the Field of Nuclear Energy* of 1960. In this context, some delegations underlined the need to establish an efficient compensation system at minimum cost. At issue was not product liability or principles of tort law, but compensation for damage caused by terrorist acts. When States come to an international forum to negotiate a treaty, certain flexibilities were essential, including the necessary adjustments of their respective national law.

3:141 The Chairman stated that the core of this project was to provide full compensation to victims. Great efforts had been devoted in the past to achieve this ultimate goal. In order to defeat terrorism, every participant should display flexibility. Coming from a civil law jurisdiction, he believed that the civil law system is open to novel ideas and renovation. With that in mind, he appealed to delegations and observers to make the project work.

3:142 The Chairman of the Special Group intervened at this juncture by stating that there was room for improving Article 25, but the deletion of the Article might not be the best solution. Perhaps consideration could be given to the possibility of widening the base of contribution to the scheme. Entities other than operators could be asked to contribute to the scheme in exchange for their protection under such a scheme.

3:143 A large number of delegations subsequently took the floor and underlined the need to establish a well-balanced system. They were in favour of retaining both Articles 25 and 27, subject to necessary amendments to address the concerns discussed above. Consequently, the Committee decided to establish another **Group of Friends of the Chairman (No. 5)** to work on this matter; this Group was composed of France, Germany, Japan, Sweden, Singapore, South Africa and the United States, as well as IATA and AWG, under the chairmanship of Sweden.

3:144 The Committee then **approved** the contents of **Flimsy No. 4** without any change and **requested** the Drafting Committee to incorporate revised **Article 19, paragraph 3**, into the draft Convention.