



## **INTERNATIONAL CONFERENCE ON AIR LAW**

(Montréal, 20 April to 2 May 2009)

### **PROPOSALS ON THE DRAFT CONVENTIONS**

(Presented by China)

#### **1. INTRODUCTION**

1.1 This paper aims at providing the views of China on the two draft conventions.

1.2 For the Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (Unlawful Interference Convention), we have the following major concerns:

- the rights of the Supplementary Compensation Mechanism (SCM) and its Director;
- the relationship between ICAO and the SCM;
- the principles relating to general aviation;
- the period for the operator or the SCM to take recourse action and the right of recourse of the SCM; and
- the need to include an article regarding “States with more than one System of Law” in the Final Clauses.

1.3 For the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention), our major concerns are:

- the operator’s liability in respect of damage which is a direct consequence of armed conflicts and civil disturbances; and
- the need to include an article regarding “States with more than one System of Law” in the Final Clauses.

1.4 We also wish to seek clarifications on some of the provisions and to propose some changes to the texts of the two draft conventions.

## 2. DRAFT UNLAWFUL INTERFERENCE CONVENTION

### 2.1 Major Concerns

#### 2.1.1 The rights of the SCM and its Director

2.1.1.1 Under the Unlawful Interference Convention, the authority as empowered to the SCM and its Director is too broad with little obligation. We believe that it is necessary to restrict the rights of the SCM and its Director. The related clauses should be revised as follows:

- a) Article 8 paragraph 5 provides the SCM's capacity of "entering into contracts, acquiring and disposing of movable and immovable property", whereas Article 8 paragraph 7 makes clear that the Director of the SCM shall be immune from legal and administrative actions, with the exceptions of actions relating to credits obtained according to Article 17 and to compensation payable according to Article 18. In such case, it needs to make clear that such immunities in Article 8 paragraph 7 do not include activities like entering into contracts, acquiring and disposing of movable and immovable property. It is suggested that the first line of Article 8 (7) be amended to read as "**The Supplementary Compensation Mechanism shall be immune from legal and administrative actions, except in respect of actions relating to activities in paragraph 5 of this Article,** credits obtained according to...";
- b) clarifications need to be sought from the Conference on whether "appropriate measures" in Article 15 paragraph 2 refer only to actions (lawsuits) brought in a State Party or it just refers generally to activities that could realize the recovery of contributions due. If it is the latter, words should be added into the sentence to make sure that such other methods of recovery will be exercised only in accordance with one's national law; and
- c) the Director's rights to take temporary action with regard to advance payment and dropdown in Article 11 paragraph 1d) and e) shall be made in accordance with the Guidelines for Compensation. Therefore, we suggest that "**in accordance with the Guidelines for Compensation**" be added after "**under Article 19**" in d) and "**Article 18, paragraph 3,**" in e).

#### 2.1.2 Relationship between ICAO and the SCM

2.1.2.1 The Unlawful Interference Convention provides that the SCM is an independent international organization which has international legal personality. However, unlike most of the international organizations which normally comprise three levels of regulatory system, the SCM is made up of a Conference of Parties (COP) and a Secretariat headed by a Director. The Secretariat headed by the Director has both administrative functions and substantial rights, which includes investment management of the SCM fund and dealing with compensation matters. Daily supervision towards the Director is only reflected in its obligation to report to the COP, which is obviously lacking in supervision opportunities due to limitation of meeting period.

2.1.2.2 In addition, according to the secondary instrument (Guidelines on Investment) of the Unlawful Interference Convention, the supervisory function for investment activities of the SCM fund is concentrated in the hands of the Director, with little day-to-day supervision from the upper level organ.

With the highest amount of 9 billion SDR at hand, safety of the SCM fund could possibly be endangered if lacking in daily exterior supervision.

2.1.2.3 In consideration of the simple character of the matters that the SCM handles, establishing an organization similar to the Council of ICAO in between the COP and the Secretariat will sacrifice efficiency of the SCM. In that case, with all its experience and expertise in the aviation industry, the Council or Secretariat of ICAO could take up the daily supervisory function toward the Secretariat and the Director of the SCM, while maintaining the efficiency of a two-tier system.

2.1.2.4 From the above, we suggest that the following be added into the Convention:

- a) to make clear in the Convention that the Council or Secretariat of ICAO has supervisory function over the SCM Secretariat;
- b) SCM Secretariat shall report periodically to ICAO Council or Secretariat, on matters including its administrative expenses and the SCM fund investment (e.g. on a monthly basis). ICAO Council or Secretariat may also require the Director of the SCM to report on specific matters; and
- c) the ICAO Council or Secretariat has the right to propose, subject to decision by the COP, to dismiss the Director when it violates provisions in the Convention and its secondary instruments in order to safeguard the smooth operation and safety of the SCM fund.

### 2.1.3 General Aviation

2.1.3.1 We are of the view that as a general principle, parties which enjoy the protection of the SCM should contribute to the SCM. As such, the COP should by all means try to collect contribution from general aviation. For example, to fix the contribution based on the weight of the aircraft. If the COP ultimately finds that the costs of collecting contributions from general aviation are excessive in relation to the amount of such contributions, such flights should be excluded from the contribution to and the protection of the SCM. These principles should be added to Article 13 paragraph 1.

### 2.1.4 Period for Recourse Action - Article 24 and Article 25

2.1.4.1 These two Articles provide that an operator or the SCM cannot enforce a recourse claim against a person that has committed an unlawful act or against any other person until such time as all claims from victims have been finally settled and satisfied. Consideration should be given to removing the last sentence on paragraph 1 and 2 of these two articles (that read: “no such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied” and “provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been finally settled and satisfied”, respectively) as an operator and its insurers or the SCM may not be able to resolve all claims for several years by which time the responsible person may have disappeared.

### 2.1.5 Right of Recourse of the SCM - Article 25

2.1.5.1 Article 25, paragraph 2 limits the SCM’s right of recourse to the operator. However, there are other persons or legal persons that might have by fault or negligence contributed to the damage (airports, airport handling companies, airport security companies, traffic control, etc.) and consequently should also be liable. To be in line with Article 24, paragraph 2, we consider that the right of recourse of the SCM against any other persons should be included in Article 25. We suggest that “Nothing in this

Convention shall prejudice the question whether the SCM has a right of recourse against any other person” to be inserted as the first sentence of Article 25, paragraph 2.

#### 2.1.6 States with more than one System of Law

2.1.6.1 We propose that the Article regarding “States with more than one system of law” in the draft final clauses for the Unlawful Interference Convention be replaced by the proposed Article below.

2.1.6.2 The proposed Article takes account of the fact that sometimes different systems of law are practised in different territorial units under the sovereignty of a single State. It therefore facilitates the implementation of the Convention in different territorial units of such a State. The draft Article also serves to clarify the meaning of certain terms in the Convention so as to make the references more appropriate in their application to a territorial unit.

2.1.6.3 The proposal is of particular relevance to China because the Hong Kong and Macau Special Administrative Regions maintain their own systems in various aspects such as their own legal and judicial systems. As the proposed Article is drafted in general terms, it would facilitate the implementation of the Convention in China and also in any other States in which different systems of law exist.

2.1.6.4 The proposed Article to be added to the Final Clauses is as follows:

#### **“Article [xx] - States with more than one system of law**

- 1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.**
- 2. A declaration made under paragraph 1 of this Article shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.**
- 3. For a declaration made under Article 2, paragraph 2, by a State Party having two or more territorial units in which different systems of law are applicable, it may declare that this Convention shall apply to damage to third parties that occurs in all its territorial units or in one or more of them and may modify this declaration by submitting another declaration at any time.**
- 4. In relation to a State Party which has made a declaration under paragraph 1 or 3 of this Article -**
  - (a) for the purpose of a declaration under Article 23, paragraph 4, it may declare in respect of an event causing damage within one or more of its territorial units and may modify the declaration by submitting another declaration at any time; and**
  - (b) the references in Article 29 to national currency and national currencies shall be construed as referring respectively to the currency and currencies of the relevant territorial unit of that State.”**

2.1.7 Chinese Text

2.1.7.1 Considering Chinese is one of the working languages both in UN and ICAO, it is proposed that Chinese Text of the Unlawful Interference Convention be taken as one of the official texts.

2.2 **Clarifications to be sought**

2.2.1 Article 3

2.2.1.1 Mental Injury - Clarification shall be sought as to whether “direct exposure” excludes all mental injuries that are not on spot.

2.2.2 Article 4

2.2.2.1 “Each aircraft and event” - how does this apply in case multiple aircraft from the same operator are involved in one event? Does the limit refer to each aircraft involved? In this case why does the Article refer to “event”?

2.2.3 Article 5

2.2.3.1 We would like to seek clarification on how does Article 5 apply in case one aircraft is subject to an act of unlawful interference and is used as a weapon against another aircraft in flight. Does the Montreal Convention of 1999 apply to the aircraft that is not directly subject to acts of unlawful interference? Are the passengers in the aircraft that is not directly subject to acts of unlawful interference victims that can be compensated under the Unlawful Interference Convention? Does the General Risk Convention apply to the aircraft that is not directly subject to acts of unlawful interference?

2.2.3.2 In case of mid-air collision, is the liability cap the added cap of the collided aircrafts? If one carrier in the collision is responsible to the third party jointly and severally, does it need to continue to compensate when its own cap is exhausted? What if that carrier who has already paid compensation to third parties under the added cap does not have fault at all?

2.2.4 Article 12

2.2.4.1 It is not clear whether there will be a tax liability on contributions collected by operators. Consideration should be given to making it clear that the contributions should be tax-free.

2.2.5 Article 24 and Article 25

2.2.5.1 It is not clear as to why different formulations are used in paragraph 1 (“until all claims from persons suffering damage due to an event have been finally settled and satisfied”) and paragraph 2 (“until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been finally settled and satisfied”). Clarification should be sought.

2.2.6 Article 25 paragraph 3

2.2.6.1 For Article 25 paragraph 3, it seems “paragraph 2” in the first line should read “paragraphs 1 and 2”. Clarification should be sought.

## 2.2.7 Article 26 paragraph 2

2.2.7.1 Clarification needs to be sought regarding understanding and standard of “reasonably” in Article 26 paragraph 2. It is suggested that the end of Article 26 paragraph 2 be revised to “**caused by an event could not have been covered by insurance available at the market**”.

## 2.2.8 Article 35 paragraph 1

2.2.8.1 Clarification should be sought as to whether the reference to Article 23 should also be added to Article 35 paragraph 1.

## 2.3 **Comments on editorial issues**

### 2.3.1 Article 1(a)

2.3.1.1 The end of the definition of “an act of unlawful interference” now makes reference to “at the time of the event”. The definition of an “event” in Article 1(b) also makes reference to “an act of unlawful interference”. These definitions are circular without explaining one another. To avoid this ambiguity, consideration could be given to replacing “and any amendment in force at the time of the event” at the end of Article 1(a) with “and any amendment thereto which is in force at the time when damage is caused by an aircraft in flight as a result of such act”.

### 2.3.2 Article 1(j)

2.3.2.1 It is suggested to amend “Party” in “Third Party” to the lower case.

### 2.3.3 Article 2 paragraph 3

2.3.3.1 The word “including” in the first line should be “and” in order to make clear that “Exclusive Economic Zone” is different from and should not be included in “High Seas”.

### 2.3.4 Article 12(a) and Article 16 paragraph 2(a)

2.3.4.1 Consistency should be maintained in the use of definitions in a convention. Given that there is a definition of “international flight” in Article 1(d), consideration could be given to replacing “international commercial flight” in Article 12(a) and “international commercial flights” in Article 16 paragraph 2(a) with “international flight for commercial services” and “international flights for commercial services” respectively.

### 2.3.5 Article 23 paragraph 4

2.3.5.1 This provision provides that a State can issue a finding prior to an event occurring that an operator has not met applicable security requirements and therefore cannot benefit from the defence provision in Article 23 paragraph 4. Consideration should be given amending the Article to read “... if, prior to the event, the competent authority in that State Party has issued a finding that the operator has not met all applicable security requirements established by that State **and the finding remains valid and is not withdrawn**”.

2.3.6 Article 23 paragraph 5

2.3.6.1 This provision provides that an operator is not excused from the unlawful actions of employees, servants or managers of middle and lower level if the operator is unable to prove that it had a system in place for vetting such persons prior to employment and applied this system in relation to the person who committed the terrorist. Consideration should be given to defining the level of security level which would satisfy the requirement and which would be feasible from a practical perspective.

2.3.6.2 The meaning of the sentence "...such system [requires/ provides for] [with regard to the security aspect and] a prompt response to security information concerning such services and agents..." is not clear. In particular, it is necessary to define clearly what "a prompt response to security information" is.

2.3.7 Article 24 paragraph 1 and Article 25 paragraph 1

2.3.7.1 It is stated that "...No such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied." It seems that "due to the same event" is more appropriate than "due to an event".

2.3.8 Article 26

2.3.8.1 The phrase "not being an operator," should be added after "financier retaining title of or holding security in an aircraft," (*cf.* Article 13 of the General Risks Convention) to deal with the situation that the owner, lessor or financier retaining title of or holding security in an aircraft is at the same time an operator.

2.3.9 Article 28 paragraph 2

2.3.9.1 The term "an individual" is used in Article 28 paragraph 2. Does it also include legal persons (in addition to natural persons)? If yes, the word "person" as defined by the Convention is more preferable here.

3. **GENERAL RISKS CONVENTION**

3.1 **Major Concerns**

3.1.1 Armed Conflict and Civil Disturbances - Article 3

3.1.1.1 Consideration should be given to adding a paragraph to the General Risks Convention to exonerate operator's liability from damages which is a direct consequence of armed conflicts and civil disturbances because events due to above circumstances may not be covered by Unlawful Interference Convention which will then fall into the General Risk Convention. It is obviously unfair to have operators liable for such events.

3.1.2 States with more than one system of law

3.1.2.1 We propose that the article regarding "States with more than one system of law" in the draft final clauses for the General Risks Convention be replaced by the proposed Article below.

3.1.2.2 The proposed Article takes account of the fact that sometimes different systems of law are practised in different territorial units under the sovereignty of a single State. It therefore facilitates the implementation of the Convention in different territorial units of such a State. The draft Article also

serves to clarify the meaning of certain terms in the Convention so as to make the references more appropriate in their application to a territorial unit.

3.1.2.3 The proposal is of particular relevance to China because the Hong Kong and Macau Special Administrative Regions maintain their own systems in various aspects such as their own legal and judicial systems. As the proposed Article is drafted in general terms, it would facilitate the implementation of the Convention in China and also in any other States in which different systems of law exist.

3.1.2.3 The proposed Article to be added to the Final Clauses is as follows:

**“Article [xx] - States with more than one system of law**

- 1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.**
- 2. A declaration made under paragraph 1 of this Article shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.**
- 3. For a declaration made under Article 2, paragraph 2, by a State Party having two or more territorial units in which different systems of law are applicable, it may declare that this Convention shall apply to damage to third parties that occurs in all its territorial units or in one or more of them and may modify this declaration by submitting another declaration at any time.**
- 4. In relation to a State Party which has made a declaration under paragraph 1 or 3 of this Article, the references in Article 14 to national currency and national currencies shall be construed as referring respectively to the currency and currencies of the relevant territorial unit of that State.”**

3.1.3 Chinese Text

3.1.3.1 Considering Chinese is one of the working languages both in UN and ICAO, it is proposed that Chinese Text of the General Risks Convention be taken as one of the official texts.

3.2 **Clarifications to be sought**

3.2.1 Article 16 paragraph 1

3.2.1.1 If the wording in square brackets is adopted, actions for compensation under the provisions of this Convention may also be brought in the courts of a non-State Party. This appears not to be in line with the provision in the first part of Article 16 paragraph 1. Further, if there is more than one forum, clarification should be sought. For example, would the choice of jurisdiction be at the option of the victims or the operators bearing in mind that in the Montreal Convention of 1999, the choice rests with the plaintiffs, i.e. the victims?

3.2.1.2 Having said that, China tends to be in favour of a single forum as it will bring all claims to one jurisdiction.

### 3.3 **Comments on editorial issues**

#### 3.3.1 Article 1(a)

3.3.1.1 The end of the definition of “an act of unlawful interference” now makes reference to “at the time of the event”. Unlike the Unlawful Interference Convention, there is no definition for an “event”. If the definition of “event” (same as the Unlawful Interference Convention) is added to this Convention, for the same reasons for Article 1(a) of the Unlawful Interference Convention above, consideration could be given to replacing “and any amendment in force at the time of the event” at the end of Article 1(a) to “and any amendment thereto which is in force at the time when damage is caused by an aircraft in flight as a result of such act”.

#### 3.3.2 Article 1(h)

3.3.2.1 It is suggested to amend “Party” in “Third Party” to the lower case.

#### 3.3.3 Article 2 paragraph 2

3.3.3.1 In order to make the scope of this Convention clearer and achieve consistency with the Unlawful Interference Convention, it is suggested to add “to third parties that occurs” after “damage” in the second line.

— END —