



LEGAL COMMISSION

Agenda Item 35: Assistance in the field of aviation war risk insurance

ASSISTANCE IN THE FIELD OF AVIATION WAR RISK INSURANCE

SUMMARY

This paper reports to the Assembly on action taken pursuant to Resolution A33-20, in particular the development of an international contingency mechanism to provide non-cancellable third-party aviation war risk coverage through a non-profit special purpose insurance entity, with multilateral government backing for the initial years (“Globaltime”).

Action by the Assembly is in paragraph 7.

REFERENCES

State letter LE 4/64-03/65
dated 30 June 2003

Assembly Resolutions A33-20 and
A33-26 (*Assembly Resolutions in Force
as of 5 October 2001*) (Doc 9790)

1. BACKGROUND

1.1 Further to the tragic events of 11 September 2001 in the United States, a seven-day notice of cancellation of war risk insurance coverage was given by insurance underwriters to airlines and other insured parties around the world, effective 24 September 2001. At the request of the airline industry, in light of the possible impact of this action on airline operations, the President of the Council, following consultation with the parties, appealed to all Contracting States of ICAO by State letter EC 2/6-01/94 dated 21 September 2001, to take such measures to ensure that aviation and air transport services are not disrupted. In particular, emphasis was placed on the need to support the airline operators and, as required, the other parties, by providing a commitment to cover the risks left open by these developments until the insurance markets stabilize. Further State letters EC 2/6-01/101 dated 25 October 2001, LE 4/64-01/128 dated 14 December 2001 and LE 4/64-02/30 dated 18 March 2002 reiterated the appeal and urged States to extend these measures. To a large degree, States responded positively to the appeal of the President.

1.2 In light of this situation, the 33rd Session of the Assembly adopted Resolution A33-20: *Coordinated Approach in Providing Assistance in the Field of Aviation War Risk Insurance*. The Assembly urged Contracting States to work together to develop a more enduring and coordinated approach to this important and urgent problem, and directed the ICAO Council to establish a Special Group. Accordingly, the Council of ICAO, during the first meeting of its 164th Session on 22 October 2001 (C-DEC 164/1), decided to establish the Special Group on Aviation War Risk Insurance (SGWI). In particular, the Group was tasked to review the problem of aviation war risk insurance and to develop recommendations for coordinated and appropriate assistance mechanisms for airline operators and other affected parties with respect to aviation war risk insurance, to be operated if and when necessary to the extent the insurance markets are unable to provide sufficient coverage.

1.3 For the short- and medium term, the SGWI (SGWI/2 Report) recommended the setting up of an international mechanism funded by insurance premiums to provide non-cancellable third-party aviation war risk coverage through a non-profit special purpose insurance entity, with multilateral government backing for the initial years. As a long-term solution, the SGWI recommended that an international convention be developed which would limit the third-party liability of the aviation industry for losses arising from war, hijacking and related perils.

2. SHORT - AND MEDIUM TERM: GLOBALTIME

2.1 Noting with interest the proposal of the Special Group on Aviation War Risk Insurance (C-WP/11744), the Council, during the 6th meeting of its 165th Session on 4 March 2002, agreed to establish the Council Group on Aviation War Risk Insurance (CGWI) to work with the Secretariat to review the SGWI recommendation (C-DEC 165/6).

2.2 In consideration of the outcome of the CGWI meetings (C-WP/11794), the Council, on 27 May 2002 during the 4th meeting of its 166th Session (C-DEC 166/4), approved in principle the SGWI recommendation to establish a global aviation war risk insurance scheme ("Globaltime"). It also approved, in principle, a draft Participation Agreement subject to finalization by the Secretariat with the assistance of an informal group of experts, for final approval by the Council. The commencement of the global scheme, in which participation is voluntary, will be subject to the signature of such Participation Agreement by a sufficient number of Contracting States, the sum of whose ICAO contribution rates should amount to at least 51% in terms of Resolution A33-26: *Assessments to the General Fund for 2002, 2003 and 2004* (the Assembly Resolution being used as the basis for determining the provision of guarantees to the global scheme). The President of the Council accordingly informed Contracting States and sought expressions of intent to participate, by State letters LE 4/64-02/55 dated 6 June, LE 4/64-02/72 dated 12 July and LE 4/64-02/100 dated 6 November 2002, respectively.

2.3 Pursuant to its decision of 27 May 2002 to approve in principle the recommendation of the SGWI for the establishment of Globaltime and in view of the meeting of the Secretariat with the informal group of experts in London on 19 September 2002 (C-WP/11874), the Council, during the third meeting of its 167th Session on 21 October 2002, tasked the Council Group on Aviation War Risk Insurance (CGWI) to work with the Secretariat to consider proposals for finalization of the Participation Agreement (C-DEC 167/3).

2.4 The Council, on 13 March 2003 during the 13th meeting of its 168th Session (C-DEC 168/13), approved in principle the recommendations of CGWI (C-WP/11946). It also entrusted a sub-group (“review group”) of the Special Group on Aviation War Risk Insurance (SGWI-RG) with the task of reviewing Globaltime in light of the conditions of participation set by certain States in reply to the State letters referred to in the foregoing paragraph 2.2, and making any adjustments thereto and to the revised draft Participation Agreement. Contracting States were advised of these developments through State letter LE 4/64-03/36 dated 28 March 2003.

2.5 Upon recommendation of SGWI-RG/1 (SGWI-RG/1Report and C-WP/12003), the Council, on 9 June 2003 during the 11th Meeting of its 169th Session, approved the amended draft Participation Agreement, subject to any final adjustments to be eventually approved by the Council, and decided to retain Globaltime on a contingency basis (C-DEC 169/11). Subject to effective participation by States representing at least 51% of ICAO contribution rates, Globaltime will be activated when there is a further failure of the commercial insurance market as determined by the ICAO Council, in which event the Insurance Entity shall commence its operations, possibly at short notice. The Council confirmed this approach when it considered C-WP/12078 on 4 November 2003 during the 10th meeting of its 170th Session (C-DEC 170/10). As of 15 June 2004, Contracting States representing 46.36% of annual contributions rates have indicated their intention to participate in Globaltime, some of which (34.93%) under certain conditions, and the 51% threshold of intentions to participate has so far not been reached (see Status of expressions of intent at Appendix A). Details of the Council Decision, including a copy of the amended draft Participation Agreement, have been conveyed to all Contracting States through State letter LE 4/64-03/65 dated 30 June 2003.

2.6 In summary, Globaltime is intended to provide non-cancellable third-party aviation war risk cover from an excess point to be determined by the Insurance Entity, up to U.S.\$ 1.5 billion per occurrence and per aircraft. Insurance cover would be available to the airlines as well as to other aviation parties, such as airports, ground handling companies, equipment lessors, financiers, etc. However, it would be a condition that their respective Contracting State joins the scheme by providing its guarantee to Globaltime as pro-rated on its ICAO contribution rate for a maximum U.S.\$ 15 billion total cap (see copy of the amended draft Participation Agreement in Appendix B herewith). For further details, reference is made to the SGWI/2 Report, as well as to the Questions and Answers at Attachment E to State letter LE 4/64-02/55 dated 6 June 2002 and the Additional Questions and Answers at Attachment C to State letter LE 4/64-02/11 dated 6 November 2002 (this material is available on the ICAO public Web site, at www.icao.int through ‘ICAO in action’ under the Legal Bureau’s activities – Meetings).

3. LONG TERM: MODERNIZED ROME CONVENTION

3.1 For the long term, SGWI considered potential reform to third-party liability rules, taking into account damage caused by acts of war and allied perils or similar unlawful interference, and the question of possible limitations of liability. On this basis, SGWI recommended expedited consideration of a new draft international convention on third-party liability and possibly other related mechanisms to be prepared as rapidly as possible, taking into account, and balancing in an equitable manner: a) the economic situation of the aviation industry in the light of the events of 11 September 2001; b) the limitation of aviation industry liability for damage arising from war and allied perils or similar unlawful interference; and c) victim protection.

3.2 Since the item “Consideration of the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952” is part of the General Work Programme of the Legal Committee, the Council decided that the Legal Committee would consider this question of third-party liability rules for the long term in relation to terrorist acts (C-DEC 165/6) under this item. Information on this Item is provided in A35-WP/18.

4. CURRENT MARKET SITUATION

4.1 Considering that features of the coverage currently offered by certain commercial insurers replicate important elements of Globaltime, it can be concluded that the ICAO global scheme has had a stimulating effect on the private insurance market and contributed to its stabilization. On the basis of information provided by the industry to ICAO, there is now increasingly available cover for war risk insurance in the private market. Certain commercial insurers are offering to major carriers carrying more than ten million passengers annually 12 months of non-cancellable third-party coverage with a limit of liability of U.S.\$ 1 billion for any one occurrence, U.S.\$ 2 billion in the aggregate, at a premium of approximately U.S.\$ 0.65 per passenger, in excess of the primary U.S.\$ 50 million in the aggregate. This coverage also offers an automatic “drop down” as well as passenger coverage in the event of cancellation of AVN52D at an additional premium of U.S.\$ 2.00 per passenger. A few major carriers have been able to purchase up to U.S.\$ 1 billion additional aggregate limit at extra cost. For other carriers, up to U.S.\$ 1 billion aggregate is available at variable cost depending on passenger volume. For entities such as air service providers, airports, manufacturers, etc., capacity is being offered for a limit of up to U.S.\$ 1 billion aggregate, subject to a 30-day notice for cancellation or premium adjustment. Full passenger and third-party cover in the amount of U.S.\$ 50 million in the aggregate continues to be available in the market for variable premium, subject to a 7-day cancellation/premium review clause. However, the market is intending to introduce in the near future total exclusions for ‘dirty bombs’ and biological, chemical and electromagnetic attacks.

4.2 Nevertheless, a certain number of governmentally-supported national programmes are still in place. In particular, pursuant to the enactment of the U.S. Homeland Security Act of 2002, the U.S. FAA Program has been expanded since 16 December 2002 to cover not only third-party but also hull, passenger and crew war risk even though these covers remain fully available from the aviation insurance market. U.S. air carriers therefore have the option of purchasing from the FAA the entirety of their war risk cover for a premium of approximately 20 cents per passenger, a fraction of the commercial cost currently charged by the commercial market, which has raised concerns in other parts of the world in terms of fair competition. The FAA Program is currently valid until 31 August 2004 with provision to extend until 31 December 2004 and the U.S.\$ 100 million cap on air carriers liability arising from acts of terrorism also applies during this period. Further legislation is required to extend the duration of the \$100 million liability cap.

5. CONCLUSIONS

5.1 Pursuant to Assembly Resolution A33-20, the Council developed and approved in principle “Globaltime” as a short- and medium term contingency scheme to provide non-cancellable third-party aviation war risk coverage through a non-profit special purpose Insurance Entity, guaranteed by participating States for the initial years. It is a condition for the setting-up and operation of Globaltime that Contracting States representing 51% of ICAO contribution rates (Resolution A33-26 refers) declare their intention to participate in Globaltime. So far, the 51% threshold of intentions to participate has not been reached. It is a further condition that there is further failure of the commercial insurance market, as determined by the ICAO

Council. Upon fulfilment of these two conditions the Insurance Entity would be set up and commence its operations. Meanwhile, therefore, the global scheme is held in contingency mode.

5.2 For the long term, to consider potential reform of third-party liability rules through expedited consideration of a new draft international convention on third-party liability or other related mechanisms, the Council tasked the Legal Committee to examine this matter under Item 3 of its General Work Programme: “Consideration of the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952”. The status of this Item is addressed in A35-WP/18.

6. FINANCIAL IMPACT

6.1 There are no direct budgetary implications.

6.2 With reference to the conditions mentioned in the above paragraph 5.1, if the non-profit Insurance Entity had to be formally incorporated, costs could arise from the fees for an ICAO outside counsel in relation to draft statutes, and other required connected expenses related to the finalization of the participation agreement and certain other relevant documents, which would be carried out by the Secretariat. The Council authorized the Secretary General to advance funds, if required to this end, such funds to be recovered from the insurance entity if and when it became operational, subject to approval by the President of the Council under delegation of authority (C-WP/11794 and C-DEC 166/4 refer).

7. ACTION OF THE ASSEMBLY

7.1 The Assembly is invited to:

- a) note the information contained in this paper; and
- b) give further guidance, as appropriate.

— — — — —

APPENDIX A**STATUS OF EXPRESSIONS OF INTENT TO PARTICIPATE
IN A GLOBAL AVIATION WAR RISK INSURANCE SCHEME**

(as at 15 June 2004)

Contracting States which replied affirmatively or favourably with conditions:

Ref. No.	State	Position	Contribution Rate (2004) %
1	Afghanistan	Yes	0.06
2	Algeria	Yes	0.07
3	Australia	Yes (conditional)	1.62
4	Austria	Yes (conditional)	0.75
5	Bahrain	Yes	0.06
6	Belgium	Yes (conditional)	0.92
7	Botswana	Yes	0.06
8	Brazil	Yes (conditional)	1.98
9	Cameroon	Yes	0.06
10	Canada	Yes	2.24
11	Chad	Yes	0.06
12	Chile	Yes	0.29
13	China	Yes	1.52
14	Colombia	Yes (conditional)	0.24
15	Congo	Yes	0.06
16	Costa Rica	Yes	0.06
17	Cuba	Yes	0.06

Ref. No.	State	Position	Contribution Rate (2004) %
18	Ecuador	Yes	0.06
19	Egypt	Yes	0.17
20	El Salvador	Yes	0.06
21	Eritrea	Yes	0.06
22	Estonia	Yes	0.06
23	Ethiopia	Yes	0.06
24	Finland	Yes (conditional)	0.43
25	France	Yes (conditional)	5.27
26	Gambia	Yes	0.06
27	Germany	Yes (conditional)	7.55
28	Greece	Yes (conditional)	0.44
29	Guatemala	Yes	0.06
30	Honduras	Yes	0.06
31	Hungary	Yes (conditional)	0.12
32	Ireland	Yes (conditional)	0.28
33	Italy	Yes (conditional)	3.69
34	Jamaica	Yes	0.06
35	Jordan	Yes	0.06
36	Kenya	Yes	0.06
37	Lebanon	Yes	0.06
38	Libyan Arab Jamahiriya	Yes	0.06
39	Madagascar	Yes	0.06
40	Mauritius	Yes	0.06
41	Mexico	Yes (conditional)	0.92
42	Monaco	Yes (conditional)	0.06
43	Netherlands	Yes (conditional)	1.92

Ref. No.	State	Position	Contribution Rate (2004) %
44	Nigeria	Yes	0.06
45	Oman	Yes	0.08
46	Peru	Yes	0.09
47	Portugal	Yes (conditional)	0.40
48	Qatar	Yes	0.06
49	Republic of Korea	Yes	2.36
50	Russian Federation	Yes	0.82
51	Rwanda	Yes	0.06
52	Sao Tome and Principe	Yes	0.06
53	Saudi Arabia	Yes	0.61
54	Senegal	Yes	0.06
55	Seychelles	Yes	0.06
56	Sierra Leone	Yes	0.06
57	Singapore	Yes	1.14
58	Slovakia	Yes (conditional)	0.06
59	South Africa	Yes (conditional)	0.53
60	Spain	Yes (conditional)	1.99
61	Togo	Yes	0.06
62	Turkey	Yes (conditional)	0.44
63	United Kingdom	Yes (conditional)	5.26
64	United Republic of Tanzania	Yes (conditional)	0.06
65	Viet Nam	Yes	0.06
66	Yemen	Yes	0.06
67	Zimbabwe	Yes	0.06
Total			46.36

Contracting States which replied negatively:

Ref. No.	State	Position	Contribution Rate (2004) %
1	Azerbaijan	No	0.06
2	Barbados	No	0.06
3	Belarus	No	0.06
4	Bhutan	No	0.06
5	Croatia	No	0.06
6	Denmark	No	0.55
7	Iraq	No	0.09
8	Japan	Not as proposed (*)	14.22
9	Luxembourg	No	0.24
10	Maldives	No	0.06
11	Norway	No	0.50
12	Papua New Guinea	No	0.06
13	Paraguay	No	0.06
14	Philippines	No	0.17
15	Sweden	No	0.76
16	The former Yugoslav Republic of Macedonia	No	0.06
Total			17.07

Contracting States which informed that they will advise later about their position (21 States):

Argentina, Burkina Faso, Czech Republic, Ghana, Indonesia, Kuwait, Lao People's Democratic Republic, Lesotho, Myanmar, Nepal, New Zealand, Pakistan, Poland, Republic of Moldova, Romania, Switzerland, Thailand, Trinidad and Tobago, Uganda, Ukraine and United Arab Emirates.

- (*) Japan informed, following the visit of the President of the Council, that the proposed scheme was difficult to agree to, particularly with reference to the proposed share of Japan of 14.58% (contribution rate for 2002); however, ICAO was requested to further consider Japan's concerns.

APPENDIX B

[ATTACHMENT C to State letter LE 4/64-03/65]

DRAFT PARTICIPATION AGREEMENT FOR THE GLOBAL SCHEME REGARDING THE PROVISION OF AVIATION WAR RISK INSURANCE

Whereas the Insurance Entity (hereinafter the “IE”) has been established as a not-for-profit entity for the sole purpose of providing aviation insurance cover on prescribed terms for certain war and allied perils related liability risks faced by airline operators and other commercial entities which provide aviation related services, in order to replace or complement insurance cover which has been withdrawn or reduced by the commercial insurance market and in consideration of the situation which prevailed following the events of 11 September 2001;

Whereas the aviation insurance cover is to be provided to such airline operators and other commercial entities who are eligible to be Original Insureds under insurance policies (hereinafter the “Insurance Policies”) to be issued by the IE;

Whereas the States parties hereto (hereinafter the “Participating States”) undertake to guarantee the obligations of the IE under the above-mentioned Insurance Policies to the extent as prescribed herein;

Whereas the International Civil Aviation Organization (ICAO) has offered its good offices in accordance with Article 44 of the *Convention on International Civil Aviation* (Chicago, 1944) and pursuant to ICAO Assembly Resolution A33-20;

Whereas consequently the present Participation Agreement has been developed in order to define the rights and obligations of the parties involved;

IT IS AGREED AS FOLLOWS:

1. DEFINITIONS

1.1 For the purpose of this Agreement, the following expressions shall have the following meaning:

Anniversary Date means the twelfth calendar month anniversary of the Commencement Date and each twelfth calendar month anniversary of each Anniversary Date thereafter;

Aviation War Risk Cover means war and allied perils aviation insurance cover for liability arising out of bodily injury and property damage to third parties (other than injury to aircraft passengers as defined under Article 4.3), as set out in Extended Coverage Endorsements AVN52 D, E, F and G, and any derivatives thereof, caused by:

- (a) war, invasion, acts of foreign enemies, hostilities (whether war has been declared or not), civil war, rebellion, revolution, insurrection, martial law, military law, military or usurped power or attempts at usurpation of power; or
- (b) strikes, riots, civil commotions or labour disturbances; or
- (c) an act of one or more persons (whether or not as agent of a sovereign power) for political or terrorist purposes (whether the resulting loss or damage is accidental or intentional); or
- (d) a malicious act or act of sabotage; or
- (e) hi-jacking or an unlawful seizure or wrongful exercise of control of the aircraft or crew in flight (including an attempt at such seizure or control) made by any person acting without the consent of the insured; or
- (f) confiscation, nationalization, seizure, restraint, detention, appropriation, requisition or use by or under the order of a government (civil, military or de facto) or public or local authority.

Commencement Date means the date this Scheme enters into force as provided for in Article 8.1, first sentence;

Council means the Council of the International Civil Aviation Organization;

Excess Point means (a) [U.S.\$ 50 million] aggregate for those Original Insureds whose primary aviation insurance policies are subject to Extended Coverage Endorsement AVN52D or AVN52F or any derivatives thereof, as the case may be, or (b) a lesser amount as stipulated under the primary aviation insurance policies for those Original Insureds subject to Extended Coverage Endorsement AVN52E or AVN52G or any derivatives thereof, as the case may be, or, in accordance with Article 4.2, an increased amount;

Incorporated means set up as a corporate entity as a result of incorporation or, where the applicable law does not provide for incorporation, set up as a corporate entity as a result of adoption of corporate statutes and registration under the applicable law.

Insured Event means an event giving rise to a claim under the Insurance Policies;

Original Insureds means the parties specified in Article 5.1 a), b) and d) which are issued with Insurance Policies by the IE and those automatically covered as contemplated in Article 5.1 c);

Scheme means the overall mechanism whereby the Participating States have agreed to provide guarantees to the IE for provision of Aviation War Risk Cover for Original Insureds, on the terms and subject to the conditions set out in this Agreement;

Secretary General of ICAO means the Secretary General of the International Civil Aviation Organization or the officer(s) designated by that person to act on his/her behalf with regard to this Agreement;

Total incurred losses means all paid losses plus the estimated value of all outstanding losses as established by professional loss adjusters/lawyers appointed by the IE; and

Working Day means a day on which banks are open for general banking business in the State where the IE is legally situated.

2. **PURPOSE**

2.1 The purpose of this Agreement is for the Participating States to guarantee certain obligations of the IE, and to establish the proration, limits, and payment mechanisms related thereto and to provide for the obligations of the not-for-profit IE towards the Participating States.

3. **ELIGIBILITY AND PARTICIPATION**

3.1 This Agreement is open for signature by all Contracting States of ICAO.

3.2 The undersigned Participating State shall be deemed to be bound by the terms and the conditions of this Agreement on the date of its signing thereof.

3.3 The undersigned Participating State hereby covenants with the IE and all other Participating States so that it is hereby, and will continue to be, bound by the provisions of this Agreement, as amended from time to time, as provided herein.

4. **SCOPE OF COVERAGE**

4.1 The IE shall provide Aviation War Risk Cover from the Excess Point per insured up to U.S.\$ 1.5 billion. For operators who have cover under AVN52D and AVN52F or any derivatives thereof, the Scheme limit shall be U.S.\$ 1.5 billion for any one insured, any one occurrence, any one aircraft. This limit shall apply in addition to the primary passenger and third-party limits then provided by the commercial markets. A lower limit of U.S.\$ 500 million shall apply for those operators who have cover under AVN52E and AVN52G or any derivatives thereof.

4.2 The IE shall facilitate maximum market participation in providing Aviation War Risk Cover to the aviation industry. Accordingly, subject to the IE's assessment in consultation with the Council of ICAO, based on professional advice, of market capacity, continuity and the impact of the premium costs to the policy holders, the IE shall, as the situation may require, modify the Excess Point under the Scheme.

4.3 Notwithstanding Article 4.1, if Original Insureds lose their cover under their primary aviation insurance policies due to cancellation by the commercial aviation insurance market of the primary third party war risk insurance cover up to the Excess point or their passenger war risk insurance cover, the IE covenants that the IE's Aviation War Risk Cover shall automatically extend to include such cancelled covers. In the case of extension of cover to passenger war risk insurance cover, the limits of cover specified in Article 4.1 shall increase to U.S.\$ 2 billion and up to U.S.\$ 750 million respectively.

4.4 For Original Insureds who have purchased in the commercial markets policies covering limits above the Excess Point and are unable to cancel these policies, the Aviation War Risk Cover provided by the IE may apply in excess of such higher limits until the policies expire. Consideration shall be given by the IE to reducing the premium rate levels for such Original Insureds until then.

5. ORIGINAL INSUREDS

5.1 For as long as the undersigned Participating State continues to be a party to this Agreement, Aviation War Risk Cover will be available for the following parties (the “Original Insureds”):

- a) Any air carrier or other aircraft operator including business operators and cargo carriers incorporated in the undersigned Participating State that is so designated for the purposes of the present Agreement by the Civil Aviation Authority or equivalent authority in the Participating State. The Participating State shall regularly provide the IE with updated lists of such operators that qualify for coverage under this Scheme in accordance with the terms and conditions applicable under their primary aviation insurance policy.
- b) Any service provider incorporated in the undersigned Participating State who is in the business to provide services or goods in the Participating State to any person or entity engaged in the aviation industry. Any such service provider shall qualify for coverage under this Scheme in accordance with the terms and conditions applicable under their primary aviation insurance policy.
- c) Any other person or entity that such carrier or operator or service provider may be contractually required to name as additional insured under its primary aviation insurance policy, including lessors, financiers and manufacturers, shall be automatically included hereunder as additional insured and the Insurance Policy shall automatically incorporate all related contractual requirements.
- d) Any lessors, financiers and manufacturers incorporated in the undersigned Participating State who purchase their own primary aviation insurance shall, in addition to any contractual protection described above, qualify for coverage under this Scheme as well.

5.2 The Scheme shall provide Aviation War Risk Cover to those parties identified in this Article who shall remain Original Insureds for so long as they perform all their obligations under the Insurance Policies, and as long as their Participating States continue to be parties to this Agreement.

6. OBLIGATIONS OF THE INSURANCE ENTITY

6.1 The IE undertakes to build up reserves out of the premiums paid by Original Insureds and investment income earned on those premiums.

- a) The IE shall meet any claims through funds accumulated from premiums, earned investment income and possibly other financial mechanisms, including borrowings, while Participating States shall be guarantors of last resort only.
- b) In the event such claims exceed funds accumulated from premiums and earned investment income, the IE may obtain necessary borrowings from credit institutions, provided that such borrowings and the interest charged thereon shall under no circumstances exceed the total cap of maximum liability established under Article 7.4 below. Accordingly:

- i) The IE may offer a security interest in future premiums payable to the IE, which shall have priority over all subsequent claims against the IE.
- ii) Notwithstanding anything in this Agreement to the contrary, the guarantees under Article 7 shall extend, for the direct benefit of the credit institutions, to support any such borrowings.
- iii) The financial transactions contemplated by this Article 6.1 shall be documented on customary commercial terms.

6.2 If, as a result of claims from the Original Insureds, the IE requires funds to be advanced from the Participating States' guarantees to meet claim obligations, the IE shall repay these monies through increased premiums, or by any other appropriate means as approved by the Board. Such monies advanced shall be repaid with interest.

6.3 Additionally after two years following the Commencement Date, in the event the IE has accumulated sufficient premium reserves, it shall be required to consider taking advantage of any then available reinsurance cover available at reasonable cost as determined by the Board.

6.4 The IE shall ensure that there is in force at all times for its directors, officers and employees liability insurance in relation to their position as directors, officers and employees of the IE; it shall purchase and maintain insurance at a reasonable cost indemnifying the IE and its directors, officers and employees against liability which it or they may incur as a consequence of any error or omission on behalf of any of them in the course of the operation of the business or the conduct of the affairs of the IE.

7. OBLIGATIONS OF PARTICIPATING STATES

7.1 In consideration of the IE agreeing to provide in the Insurance Policies for non-cancellable Aviation War Risk Cover in accordance with the terms of this Agreement, except in case of non-payment of premium and policy fee, the undersigned Participating State agrees to provide a guarantee to the IE for the purpose of being able to meet claims arising from Insurance Policies issued by the IE to Original Insureds incorporated in the territory of the undersigned Participating State or any other Participating State party to this Agreement.

7.2 The Participating State's guarantee hereunder is several, not joint, and limited to its individual share in accordance with its ICAO contribution rate as per ICAO Assembly Resolution [A33-26]: *Assessment to the General Fund for [2002, 2003 and 2004]* (Schedule 1 attached to this Agreement) in respect of 100% of all losses for insured events occurring during its participation, provided always that the IE has first obtained the written consent from the Board to the settlement of such losses or judgement has been rendered by a court of competent jurisdiction and any subsisting rights of appeal have been exhausted. The Participating State's payment under the guarantee shall follow the settlements of the IE, including without-prejudice settlements, but excluding *ex gratia* payments.

7.3 Without prejudice to the generality of the above, the undersigned Participating State shall pay amounts due from it within 20 working days from the IE's call under the guarantee in the case of the IE having consented to a settlement, or within a lesser period as required by any court decision rendered, as referred to in Article 7.2 above. Such payments shall be remitted to the IE in cleared funds or shall be drawn down by any letter of credit provided by a Participating State for this purpose.

7.4 Each Participating State's maximum liability under the Scheme shall be capped. It is established that the total cap, if all ICAO Contracting States participate in the Scheme, shall be U.S.\$ 15 billion, this figure to decrease in proportion to the ratio of Participating States. The maximum exposure of each Participating State shall be its ICAO contribution percentage of U.S.\$ 15 billion as at the Commencement Date and remain unchanged. If the amount of participation is less than 100% then the amount of U.S.\$ 15 billion for the Scheme's cap shall be proportionally reduced so that each actual Participating State's loss threshold amount remains constant.

8. COMMENCEMENT

8.1 This Agreement and its Schedules which form an integral part thereof shall enter into force once a number of ICAO Contracting States sign this Agreement, the sum of whose ICAO contribution rates amount to at least 51% in accordance with the ICAO contribution rates as referred to in Article 7.2, and once the Council, further to its determination that a market failure occurred, will have decided that the implementation of this Agreement is warranted. For subsequent Participating States, this Agreement shall enter into force on the date of its signature.

8.2 The Participating States shall advise the Secretary General of ICAO of their decision to participate in the Scheme in accordance with the model notice in Schedule 2. The IE shall obtain from the Secretary General necessary confirmation of States participation. The Secretary General shall also notify all other Participating States accordingly.

9. DURATION OF STATES' PARTICIPATION

9.1 Subject to the conditions in this Article, this Agreement shall initially remain in force for sixty (60) months from the Commencement Date.

9.2 Any Participating State may withdraw from this Agreement subject to a 12-month notice of cancellation to the IE, not to be given before the second anniversary from the Commencement Date. That withdrawal does not limit its liability hereunder attributable to the period prior to the effective date of that withdrawal.

9.3 In consultation with the Board, a review of this Agreement shall be held six months before the third Anniversary Date by the Council which, subject to the absence of substantial claims, may decide to terminate the Scheme six months thereafter. Otherwise, a review by Participating States of this Agreement shall be held six months before the fifth Anniversary Date, with option to cancel or suspend the Scheme six months thereafter.

9.4 Notwithstanding the above, a review of this Agreement by the Participating States may be held at any time in the event the total of the incurred losses is close to reaching the loss threshold amount as certified by the IE, with the option to cancel or suspend the Scheme three months thereafter.

9.5 In the event of any cancellation or suspension notice given by one or more Participating States, the other Participating States shall be notified promptly by the IE. Should any such cancellation or suspension notice be effected by Participating States whose combined participation under the Scheme totals more than 25% of the total guarantee, the other Participating States shall be entitled to review their participation.

10. POOL

10.1 The IE shall collect premiums from each Original Insured other than those under Article 5.1 c) to build a pool to meet claims made under its Insurance Policies.

10.2 In the event of a major loss or payout under an Insurance Policy, and should it be determined that this may materially reduce the premium reserves, the IE may adjust upwards the premiums payable under the Insurance Policies upon a 30-day notice.

10.3 Subject to the preceding paragraph 10.2, the premium charges under the Insurance Policies shall be maintained at approximately the same levels as established in the first year, for a period up to five years from the Commencement Date.

11. BOOKS AND RECORDS

11.1 The IE shall prepare and maintain full and proper accounts, books and records which record in all material aspects all transactions, matters and things relating to this Agreement.

11.2 Such accounts, books and records shall be open to the inspection of and audit by ICAO, or its duly authorized representative, on behalf of Participating States at any time, both during the currency of this Agreement and following the expiry of this period for as long as there is any exposure or liability (whether actual or potential) under the Insurance Policies or under this Agreement, and in any case for as long as such accounts, books and records are required to be maintained by any statutory or regulatory requirements. The IE shall instruct its employees and/or its agents to give all information and explanations to ICAO, or its duly authorized representatives, in relation to the above.

12. REPORTING

12.1 On or before (*date to be inserted*), each year or more frequently if required, the Board of the IE shall submit a report to the Participating States on its activities during the preceding year and on other relevant issues.

12.2 Such report shall also be transmitted to the Council of ICAO.

13. AMENDMENTS

13.1 This Agreement may be amended by an instrument in writing signed by duly authorised representatives of the IE and all Participating States.

13.2 Upon initiative of the Board of the IE, amendments to this Agreement may also be considered at a meeting called for that purpose.

14. **ACCESSIONS**

14.1 This Agreement shall be open for signature by the designated administrative entity of any ICAO Contracting State referred to in Article 3 above. The participation shall be confirmed to the Secretary General of ICAO in accordance with Schedule 2.

15. **NO ASSIGNMENT**

15.1 This Agreement and each and every covenant, term and condition of this Agreement shall be binding upon and operate to the benefit of the IE and the Participating States only and such rights shall not be assignable, directly or indirectly, by the IE or any Participating State.

16. **TERMINATION**

16.1 The IE may cease operations pursuant to Articles 9.3 to 9.5 above. The IE may also cease operations following the entry into force of an international convention or agreement limiting third-party war risk liability or if the market returns to provide full cover at reasonable cost and reasonable notice of cancellation. In the case of such cessation of operations, the IE shall notify all participating States of the termination of this Agreement, to become effective 30 days thereafter.

16.2 In the event the IE ceases to operate in accordance with a decision by the Board, the latter shall be responsible for taking appropriate steps in consultation with the Council of ICAO relating to the termination of this Agreement and the winding up of operations, including as regards the distribution of the accumulated capital/premiums.

16.3 Participating States shall remain liable after termination in accordance with their individual share for all amounts to be paid to the IE in respect of all Insured Events occurring prior to the effective termination. For the avoidance of doubt, the IE shall be entitled to the remittance of cleared funds or the drawing down of any letter of credit from a former Participating State in relation to such an Insured Event and the Participating State shall be obliged to pay the amount demanded despite the prior termination of this Agreement.

17. **WARRANTY OF CAPACITY AND POWER AND WAIVER OF SOVEREIGN IMMUNITIES AND PRIVILEGES**

17.1 Each Participating State hereby irrevocably warrants that its agent representing the designated administrative entity referred to in Article 14 has full powers to execute this Agreement by attaching evidence to that effect.

17.2 Each Participating State irrevocably agrees that this Agreement is and will be treated for all purposes as a commercial agreement.

17.3 Each Participating State irrevocably agrees that it will not in any proceedings whatsoever arising out of this Agreement raise any defence to any claim made against it invoking any lack of power or authority to execute the Agreement or out of any legal or constitutional impediment to performance of this Agreement.

17.4 In connection with proceedings relating to the application, interpretation, validity or enforcement of the guarantee provided to the IE under Article 7 of this Agreement, each Participating State irrevocably waives any immunity or other benefit that it may otherwise be able to claim in any jurisdiction and before any court, tribunal or other juridical body or before any executive body involved in the execution of judgements:

- a) protecting the Participating State from the initiation or continuation of any such proceedings;
- b) giving the Participating State any procedural advantage in any such proceedings; and/or
- c) protecting any of its assets from attachment or execution (whether before or after any judgement or award) or from any other legal process, whether such immunity or other benefit has to be claimed or not.

17.5 Notwithstanding Article 17.4, in case a Participating State's domestic law does not permit such waiver of sovereign immunity, or where a Participating State otherwise prefers, it may provide for the benefit of the IE an irrevocable letter of credit from a financial institution in good standing and acceptable to the IE, for the full amount of its guarantee in accordance with Articles 7.2 and 7.3.

18. **ARBITRATION**

18.1 Any dispute or difference arising out of or in connection with this Agreement which cannot be settled by negotiation within 30 days shall be referred to and decided by arbitration in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL).

18.2 The arbitral tribunal ("the Tribunal") shall consist of three arbitrators. Each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator, who shall also act as Chairman of the Tribunal.

18.3 Within 45 days after the Tribunal has been constituted, the Claimant shall deliver to the Respondent a Statement of Case. Within 45 days of receipt of the Claimant's Statement of Case, the Respondent shall deliver to the Claimant his Statement of Defence.

18.4 The arbitration shall be conducted in one of the working languages of ICAO mutually agreed by the parties.

18.5 Any Award of the Tribunal shall be final and binding upon the parties.

18.6 Each party irrevocably submits to the jurisdiction selected for the purpose of enforcing any Award.

19. NOTICES AND LANGUAGE

19.1 Any notice to be given under this Agreement shall be in one of the working languages of ICAO and in writing delivered personally or sent by first class pre-paid recorded delivery (air mail if overseas) or by facsimile to the party due to receive such notice at the address (or, as the case may be, sent to the fax number) appearing in this Agreement or at such other address or fax number as it may have notified to the other party in accordance with this clause and shall be marked for the attention of the person specified below or such other person as it may have notified to the other party in accordance with this clause.

Notices to the IE:

To: [Name of Insurance Entity]
Att: [Name, Title]
Fax No.:
Full address:

Notice to Participating State:

To: [Name of Participating State]
Att: [Name, Title]
Fax No.:
Full address:

Notice to ICAO:

To: Secretary General of ICAO
Att: [Name]
Fax No.: 1 (514) 954 - 6077
Full address: 999 University Street
Montreal, Quebec
Canada H3C 5H7

19.2 Any notice delivered personally shall be deemed to be received when it is delivered and any notice sent by pre-paid recorded delivery post shall be deemed (in the absence of evidence of earlier receipt) to be received two days after posting (five days if sent by air mail) and in proving the time of despatch it shall be sufficient to show that the envelope containing such notice as properly addressed, stamped and posted. A notice sent by fax shall be deemed to have been delivered when the fax is received by the machine to which it is being sent, provided that where, in the case of delivery by hand or transmission by fax, such delivery or transmission occurs after 17:00 hours on a Working Day or on a day which is not a Working Day service shall be deemed to occur at 9:00 hours a.m. on the next following Working Day.

20. GOVERNING LAW AND JURISDICTION

20.1 This Agreement shall be governed in all respects by the law of the domicile of the IE with due regard to the general principles of law.

21. **COUNTERPARTS**

21.1 This Agreement may be executed in any number of separate counterparts, each of which is an original but all of which together constitute one and the same instrument.

For and on behalf of the IE:

For and on behalf of (Participating State):

(name)

(name)

(title)

(title)

(signature)

(signature)

(place, date)

(place, date)

Attachments:

- Schedule 1 (A33-26)
- Schedule 2 (Notice of Signature)

SCHEDULE 1

A33-26: Assessments to the General Fund for 2002, 2003 and 2004

The Assembly resolves that the amounts to be assessed on Contracting States for 2002, 2003 and 2004 pursuant to Article 61, Chapter XII of the Convention, shall be determined in accordance with the scales set out below:

	2002	2003	2004
	%	%	%
Afghanistan	0.06	0.06	0.06
Albania	0.06	0.06	0.06
Algeria	0.07	0.07	0.07
Andorra	0.06	0.06	0.06
Angola	0.06	0.06	0.06
Antigua and Barbuda	0.06	0.06	0.06
Argentina	0.72	0.79	0.86
Armenia	0.06	0.06	0.06
Australia	1.66	1.64	1.62
Austria	0.77	0.76	0.75
Azerbaijan	0.06	0.06	0.06
Bahamas	0.06	0.06	0.06
Bahrain	0.06	0.06	0.06
Bangladesh	0.07	0.07	0.06
Barbados	0.06	0.06	0.06
Belarus	0.06	0.06	0.06
Belgium	0.95	0.93	0.92
Belize	0.06	0.06	0.06
Benin	0.06	0.06	0.06
Bhutan	0.06	0.06	0.06
Bolivia	0.06	0.06	0.06
Bosnia and Herzegovina	0.06	0.06	0.06
Botswana	0.06	0.06	0.06
Brazil	1.64	1.80	1.98
Brunei Darussalam	0.06	0.06	0.06

Bulgaria	0.06	0.06	0.06
Burkina Faso	0.06	0.06	0.06
Burundi	0.06	0.06	0.06
Cambodia	0.06	0.06	0.06
Cameroon	0.06	0.06	0.06
Canada	2.30	2.26	2.24
Cape Verde	0.06	0.06	0.06
Central African Republic	0.06	0.06	0.06
Chad	0.06	0.06	0.06
Chile	0.29	0.29	0.29
China	1.25	1.38	1.52
Colombia	0.21	0.25	0.24
Comoros	0.06	0.06	0.06
Congo	0.06	0.06	0.06
Cook Islands	0.06	0.06	0.06
Costa Rica	0.06	0.06	0.06
Côte d'Ivoire	0.06	0.06	0.06
Croatia	0.06	0.06	0.06
Cuba	0.06	0.06	0.06
Cyprus	0.06	0.06	0.06
Czech Republic	0.17	0.16	0.16
Democratic People's Republic of Korea	0.06	0.06	0.06
Democratic Republic of the Congo	0.06	0.06	0.06
Denmark	0.57	0.56	0.55
Djibouti	0.06	0.06	0.06
Dominican Republic	0.06	0.06	0.06
Ecuador	0.06	0.06	0.06
Egypt	0.17	0.17	0.17
El Salvador	0.06	0.06	0.06
Equatorial Guinea	0.06	0.06	0.06
Eritrea	0.06	0.06	0.06
Estonia	0.06	0.06	0.06
Ethiopia	0.06	0.06	0.06
Fiji	0.06	0.06	0.06
Finland	0.44	0.43	0.43
France	5.40	5.32	5.27
Gabon	0.06	0.06	0.06
Gambia	0.06	0.06	0.06
Georgia	0.06	0.06	0.06
Germany	7.74	7.63	7.55

Ghana	0.06	0.06	0.06
Greece	0.41	0.45	0.44
Grenada	0.06	0.06	0.06
Guatemala	0.06	0.06	0.06
Guinea	0.06	0.06	0.06
Guinea-Bissau	0.06	0.06	0.06
Guyana	0.06	0.06	0.06
Haiti	0.06	0.06	0.06
Honduras	0.06	0.06	0.06
Hungary	0.12	0.12	0.12
Iceland	0.06	0.06	0.06
India	0.40	0.40	0.39
Indonesia	0.25	0.25	0.24
Iran (Islamic Republic of)	0.23	0.24	0.24
Iraq	0.10	0.09	0.09
Ireland	0.28	0.28	0.28
Israel	0.48	0.47	0.47
Italy	3.78	3.73	3.69
Jamaica	0.06	0.06	0.06
Japan	14.58	14.36	14.22
Jordan	0.06	0.06	0.06
Kazakhstan	0.06	0.06	0.06
Kenya	0.06	0.06	0.06
Kiribati	0.06	0.06	0.06
Kuwait	0.17	0.17	0.17
Kyrgyzstan	0.06	0.06	0.06
Lao People's Democratic Republic	0.06	0.06	0.06
Latvia	0.06	0.06	0.06
Lebanon	0.06	0.06	0.06
Lesotho	0.06	0.06	0.06
Liberia	0.06	0.06	0.06
Libyan Arab Jamahiriya	0.06	0.06	0.06
Lithuania	0.06	0.06	0.06
Luxembourg	0.13	0.20	0.24
Madagascar	0.06	0.06	0.06
Malawi	0.06	0.06	0.06
Malaysia	0.54	0.54	0.54
Maldives	0.06	0.06	0.06
Mali	0.06	0.06	0.06
Malta	0.06	0.06	0.06

Marshall Islands	0.06	0.06	0.06
Mauritania	0.06	0.06	0.06
Mauritius	0.06	0.06	0.06
Mexico	0.92	0.93	0.92
Micronesia (Federated States of)	0.06	0.06	0.06
Monaco	0.06	0.06	0.06
Mongolia	0.06	0.06	0.06
Morocco	0.10	0.10	0.10
Mozambique	0.06	0.06	0.06
Myanmar	0.06	0.06	0.06
Namibia	0.06	0.06	0.06
Nauru	0.06	0.06	0.06
Nepal	0.06	0.06	0.06
Netherlands	1.97	1.94	1.92
New Zealand	0.37	0.36	0.36
Nicaragua	0.06	0.06	0.06
Niger	0.06	0.06	0.06
Nigeria	0.06	0.06	0.06
Norway	0.51	0.50	0.50
Oman	0.08	0.08	0.08
Pakistan	0.16	0.16	0.16
Palau	0.06	0.06	0.06
Panama	0.06	0.06	0.06
Papua New Guinea	0.06	0.06	0.06
Paraguay	0.06	0.06	0.06
Peru	0.10	0.09	0.09
Philippines	0.17	0.17	0.17
Poland	0.26	0.31	0.31
Portugal	0.41	0.40	0.40
Qatar	0.06	0.06	0.06
Republic of Korea	1.99	2.19	2.36
Republic of Moldova	0.06	0.06	0.06
Romania	0.07	0.07	0.06
Russian Federation	0.84	0.83	0.82
Rwanda	0.06	0.06	0.06
Saint Lucia	0.06	0.06	0.06
Saint Vincent and the Grenadines	0.06	0.06	0.06
Samoa	0.06	0.06	0.06
San Marino	0.06	0.06	0.06
Sao Tome and Principe	0.06	0.06	0.06

Saudi Arabia	0.63	0.62	0.61
Senegal	0.06	0.06	0.06
Seychelles	0.06	0.06	0.06
Sierra Leone	0.06	0.06	0.06
Singapore	1.10	1.15	1.14
Slovakia	0.06	0.06	0.06
Slovenia	0.06	0.06	0.06
Solomon Islands	0.06	0.06	0.06
Somalia	0.06	0.06	0.06
South Africa	0.52	0.53	0.53
Spain	2.04	2.01	1.99
Sri Lanka	0.06	0.06	0.06
Sudan	0.06	0.06	0.06
Suriname	0.06	0.06	0.06
Swaziland	0.06	0.06	0.06
Sweden	0.78	0.77	0.76
Switzerland	1.25	1.23	1.22
Syrian Arab Republic	0.07	0.07	0.07
Tajikistan	0.06	0.06	0.06
Thailand	0.58	0.58	0.57
The former Yugoslav Republic of Macedonia	0.06	0.06	0.06
Togo	0.06	0.06	0.06
Tonga	0.06	0.06	0.06
Trinidad and Tobago	0.06	0.06	0.06
Tunisia	0.06	0.06	0.06
Turkey	0.45	0.44	0.44
Turkmenistan	0.06	0.06	0.06
Uganda	0.06	0.06	0.06
Ukraine	0.06	0.06	0.06
United Arab Emirates	0.35	0.36	0.36
United Kingdom	5.39	5.31	5.26
United Republic of Tanzania	0.06	0.06	0.06
United States	25.00	25.00	25.00
Uruguay	0.06	0.06	0.06
Uzbekistan	0.06	0.06	0.06
Vanuatu	0.06	0.06	0.06
Venezuela	0.20	0.19	0.19
Viet Nam	0.06	0.06	0.06
Yemen	0.06	0.06	0.06
Yugoslavia	0.06	0.06	0.06

Zambia	0.06	0.06	0.06
Zimbabwe	0.06	0.06	0.06
	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>

SCHEDULE 2
MODEL
NOTICE OF SIGNATURE
OF
PARTICIPATION AGREEMENT
FOR THE GLOBAL SCHEME
REGARDING THE PROVISION OF AVIATION WAR RISK INSURANCE

The _____
(name of administrative entity designated by State in accordance with Article 14 of the Agreement)

hereby gives the Secretary General of the International Civil Aviation Organization (ICAO) notice of signature

for _____,
(name of State)

on _____ (date) _____, of the PARTICIPATION AGREEMENT FOR THE GLOBAL SCHEME REGARDING THE PROVISION OF AVIATION WAR RISK INSURANCE (Attachment [...] to ICAO State letter LE [...], dated [...] 2004), in accordance with Article 14 of the Agreement.

Done at _____ on _____.
(place) (date)

Signature of authorized agent of designated administrative entity
(in accordance with Article 17 of the Agreement)