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WORKING PAPER

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Subject No. 16.3: International Air Law Conventions

COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES ARISING FROM ACTS OF UNLAWFUL INTERFERENCE OR FROM GENERAL RISKS

(Presented by Germany)

EXECUTIVE SUMMARY

This paper refers to the work of the Special Group of the Legal Committee concerning the modernization of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952.

It comes to the conclusion that the concept as drafted by the Special Group suffers from severe deficiencies and therefore suggests to suspend the project of modernization for the time being, or to concentrate on the Draft Convention Concerning General Risks.

Action: The Council is invited to instruct the Legal Committee to suspend work on the project of modernization of the Convention on Damage Caused by Aircraft to Third Parties on the Surface, or to concentrate its work on the Draft Convention Concerning Damage Caused by Aircraft to Third Parties (General Risks).

Strategic Objectives:	This working paper relates to Strategic Objectives F as it provides information on the preparation of International Air Law Instruments and invites action connected thereto.
Financial implications:	None.
References:	

1. INTRODUCTION

1.1 The 31st Session of the Legal Committee (Montreal, 28 August to 8 September 2000) included in its work programme the subject "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." On 5 June 2002 the Council decided to establish a Secretariat Study Group, which held four meetings. The 32nd Session of the Legal Committee in March 2004 concluded that more work was needed on this subject, and accordingly the Council on 31 May 2004 decided to establish a Special Group on the Modernization of the Rome Convention, which held six meetings and developed two draft Conventions, one dealing with compensation for damage caused by aircraft to third parties in case of unlawful interference, and the other one on compensation for damage caused by aircraft to third parties.

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

2.1 The Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties in Case of Unlawful Interference comprises a system of strict, but capped liability of airlines and mandates them to maintain insurance for this liability. As a second layer, it adds a fund for victims' compensation. Basic requirements must be fulfilled for this construction to be viable; however, the concept as drafted suffers from severe deficiencies concerning all such requirements:

Basic Requirements	**Outcome of Negotiations**
► The fund must be well financed	► The financing concept of the fund is inoperable
► The Convention must be widely ratified	► Unbreakable cap contradicts fundamental principles of law
► The Convention must strike a fair balance between the interests of the victims and the airline industry	► Vast exoneration disregards victims' interests

2.2 The financing of the fund (SCM) has no sound basis, and cannot guarantee the functioning of the system as a whole.

2.2.1 The Draft provides for a financing system which relies on a universal passenger-ticket charge and an insurance-like mechanism of separate funds for each calendar year.

2.2.2 Even though it is vitally important to know how many contracting States and what share of global air traffic would be needed in order to ensure sufficient funding, no such calculation has been effected.

2.2.3 The importance of this question is emphasized by the fact that the fund foreseen within the frame of the Globaltime-project has just failed due to lack of acceptance among the States.

2.2.4 Furthermore, the financing model cannot achieve fair and transparent levying and assessment of contributions, and it would not establish a link between contributions and the risk of damage or the probability of occurrence.

2.2.5 General aviation, business flights conducted by private companies and empty or test flights would not be included in the financing system. That would not only considerably slow down the building up of the SCM's funds, but would also create unfairness among those who operate aircraft. It is inconsistent to affirm a need to include these operators in the first layer and to include them in the protection of the second layer, but to deny a need to collect contributions in return for these benefits in the second layer.

2.2.6 These problems could be avoided by calculating the contributions on the basis of the maximum take off weight (MTOW) of each airplane. The respective MTOW-category mirrors the risk that is set by the airplane. Therefore these categories are also used to stagger the different limitations of liability.

2.3 Due to the (almost) unbreakable cap on liability - even in cases of intent or gross negligence - the Draft contradicts fundamental principles of law in many States.

2.3.1 According to the Draft, the liability of the airlines shall be restricted to their insurance. If they hold a valid certificate on their security performance, this applies even in cases of intent or gross negligence on the part of their employees. The result of this is simply that the operator will not pay a single dollar of compensation out of his own pocket, regardless of his fault in an individual case. No matter whether victims remain uncompensated - the airlines are protected from claims. This is referred to as the "unbreakable cap".

2.3.2 It is a core element of the concept of a modern State of law to provide citizens with protection namely for their lives, health and property. This includes the basic requirement to establish a fair set of legal rules and –in response to violations– for a legal cause of action. Much of this flows directly from constitutional law. For States that provide for such a legal framework on these grounds, limited liability in case of intent or gross negligence may well contradict fundamental principles of law and raise serious constitutional concerns. This will –in practice– prevent many States from ratifying the Convention.

2.4 The vast exoneration of entities and persons contributing to the damage puts the victims at a disadvantage that is not justifiable and contradicts the aim of the Convention. It should not be expected that policymakers can implement such a system.

2.4.1 The Draft provides that the claim against the operator is an "exclusive remedy". Thus, it completely exonerates other entities that have contributed to the damage and even recourse is excluded.

2.4.2 This complete exclusion of liability is granted to the other entities without their contributing to the SCM and in disregard of the principles of tort and contract law. As a consequence, victims may well remain uncompensated, whereas those who have contributed to the damage are protected by the Convention and continue to operate. This "channelling" of claims onto the operator is especially critical concerning entities that are involved in operational areas of air traffic and therefore constitutes severe risks for the operators' safety, such as air navigation service providers, airports, security providers and ground handling service providers.

2.4.3 Apart from that, such a general exclusion of liability would extend to manufacturers of aircraft as well. This contradicts European Community law on product liability and must prevent EC Member States from ratifying the Convention.

3. CONCLUSION

3.1 Upon conclusion of the last meeting of the Special Group in Montreal 26-29 June 2007, a majority of participants took the view that the current Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties in Case of Unlawful Interference should be presented to the ICAO Council and be forwarded to the Legal Committee. The merits lie with the opposite view.

3.2 Due to the aforementioned major flaws - a very select list that could be extended - the Draft can hardly be deemed to be the basis for a ratifiable instrument. The protection of the victims is not sufficient; some States would even have to lower their standards. The mere existence of a fund (SCM) that will most probably lack monetary means for a long time cannot compensate for severely cutting into the victims' rights under the current national regimes. In many States, implementing such a policy would not be a realistic option. Without major changes, the Draft Convention will therefore most likely share the fate of the Rome Convention of 1952, which was not ratified by a large number of States. As a natural consequence, the fund (SCM) will never actually start to work.

3.3 Considering the negotiations during the last five years in view of the aforementioned concerns, it does not seem promising to continue struggling for a solution and undertake further cost-intensive steps. Furthermore it does not seem auspicious either to hope for the Legal Committee to solve these important problems within the Draft Convention. If a small group was not able to reach a consensus and to solve the problems for several years, it would be even more difficult for a larger and less flexible body in such a short time. Additionally it has to be taken into account that the Committee will address these issues for the very first time and therefore will first have to accomplish in-depth analysis and lead the same discussions that have already taken place within the Special Group before being able to tackle the aforementioned issues.

For the time being, a compromise for an effective instrument cannot be reached. To prevent further efforts and spending, it appears necessary to suspend the project for the time being or to concentrate on the Draft Convention concerning general risks and exclude terrorist related risks.

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