LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

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

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

SUPPLEMENTARY COMPENSATORY MECHANISM

Chapter III to Chapter VII

(Presented by the Air Crash Victims Families Group)

1. BACKGROUND

1.1 Chapters III through Chapter VII of the *"Draft Convention On Compensation for Damages Caused by Aircraft to Third Parties, in Case of Unlawful Interference"* create a "Supplementary Compensation Mechanism" which is intended to provide additional funds to available to pay full damages to victims (awarded by settlement or adjudication), once the insurance coverage of the operator and of any other joint liable third parties are exhausted, or to be the first provider in case no other party is found liable for compensation of damages incurred. (e.g. the terrorist attacks by means of hijacked aeroplanes on the on the World Trade Center, New York and other targets in the United States on September 11, 2001).

1.2 The concept to establish a supplementary compensation mechanism was first included in the *Guatemala City Protocol, 1971 to the "Convention for the Unification of Certain Rules and Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 29 September 1955* (Article 35A) and carried over to the *"Montreal Additional Protocols No. 3, 1975"*.

1.3 In the process to ratify the "*Montreal Additional Protocols No. 3., 1975",* the United States Department of Transportation submitted the model of a "Supplemental Compensation Plan" *(102nd Congress, 1st Session, Exec.Rpt.102-1- February 5, 1991, Appendix II).*

1.4 Subsequently, Senators George J. Mitchell, Senate Majority Leader and Wendell H. Ford, Chairman of the Committee on Commerce, Science and Transportation's Aviation subcommittee introduced on July 2, 1992 in the 102nd Congress (*2nd Session)* the "*Supplemental Compensation Act of 1992" (S. 2945),* (attached to the Federal Administration Reauthorization Bill Title XVII, Sections 1701-1706).

1.5 After the terrorist attacks by means of four hijacked aeroplanes on September 11, 2001, attempts were made by to create international mechanisms to address the economic consequences of those catastrophes (Global Time, Equi Time, Euro Time).

1.6 Meanwhile the United States addressed the aftermath of the September 11, 2001 terrorist attacks of hijacked aeroplanes by fast track remedial legislation: *"The Air Transportation Safety and System Stabilization Act" (Public Law 107-42 – September 22, 200).*

1.7 In 2004 the *"Special Group on the Modernization of the Rome Convention of 1952"*(MR-SG) was tasked by the ICAO Legal Committee to address the creation of a "Supplementary Compensation Mechanism".

1.8 The SG-MR decided to include a "Supplementary Compensation Mechanism" in a separate (possibly companion) *"Draft Convention on Compensation for Damages Caused by Aircraft to Third Parties, in Case of Unlawful Interference"*.

2. DISCUSSION

2.1 Neither the United States initiatives in 1991 and in 1992 - to create a Supplemental Compensation Plan, within the ratification process of the Montreal Additional Protocol No 3 of the Warsaw Convention, nor the attempt to do so by legislative means were successful (see 1.3. and 1.4.).

2.2 The post September 11, 2001 efforts at ICAO, in the United States and in Europe to address the economic consequences of this apocalyptic occurrence, for international aviation, through "Global Time", "Equi Time" or "Euro Time" did not meet with sufficient acceptance, either.

2.3 Since 2004 the SG-MR has been developing a "Supplementary Compensation Mechanism" with particular attention to the "International Oil Pollution Compensation Fund 1992".

2.4 **Do we need an international "Supplementary Compensation Mechanism"** in addition to the mandatory insurance coverage without which air carriers cannot operate under State laws or international treaties?

2.4.1 An International "Supplementary Compensation Mechanism" is desirable because it would act as a **"cushion"** available in the consequence of major air tragedies, where either the amount of insurance coverage of the carrier is not sufficient to pay for all of the damages incurred, **or**

2.4.2 the SCM would become the first provider, if and when neither carrier nor any other third parties are found liable as a consequence of the incident, **before**

2.4.3 States would be called to fulfil their social obligations towards its citizens to address compensation to victims of an apocalyptic tragedy (**national emergency**) caused by the means of an aeroplane.

2.4.4 The "Supplementary Compensation Mechanism" would:

2.4.4.1 Relieve the carrier or any other parties, either separate or jointly responsible for the tragedy of the obligation to pay for damages (settlements or adjudications), for that portion remaining after contracted (mandatory) insurance funds have been exhausted.

2.4.4.2 (cover any shortfalls of insurers)

2.4.4.3 (a) assist with and/or assure the full payment of victims settled or adjudicated damages

(b) prevent that the victims become unpaid "general creditors" for the shortfalls

(c) in case the operator should seek to shed its financial obligations by seeking States' various bankruptcy or reorganization (debtor in possession) laws (as they have done repeatedly in the past to void unwanted employee Union Contracts, or divest themselves from under funded employees pension trusts obligations).

2.5 **The Model for a successful post catastrophe crisis management solution is already available.**

2.5.1 The **unlawful interference** by means of terrorist attacks by means of the use of four hijacked aeroplanes in the United States on September 11, 2001 is the only actual occurrence of a magnitude that would have required the services of the "Supplementary Compensation Mechanism".

2.5.1.1 The "*Air Transportation Safety and System Stabilization Act (Public Law 107-42-2001*

(a) addresses the needs of the air carriers: reimbursement of losses, credit lines, cash flow assistance, insurance premium subsidies about $20 bio.

(b) fast track process and payment of victims damages about $ 7.6 bio.

2.5.1.2 The "*September 11th Victims Compensation Fund of 2001"* received 7,304 claims for injuries or wrongful death. 5,560 proven claims were resolved and paid within 24 months at a processing cost of 1.2%, requiring a staff averaging 200 persons. **Only 90 victims and/or families chose to pursue the carriers in judicial proceedings** of which 83 cases were settled and 7 cases still await adjudication. (see Information paper L/33-WP/3-12 and *"Final Report of the Special Master For the September 11th Victim Compensation Fund of 2001, Vols. I and II").*

2.6 **Funding of the Supplementary Compensation Mechanism**

2.6.1 Past legislative failures of funding through passenger contributions (now also freight forwarders contributions) and the other three post 9/11 attempts with the "Equi" type plans are examples what is unsuccessful – and prevents ratification by important States needed to make the Supplementary Compensation Plan viable.

2.6.1.1 Insurance premiums paid by carriers are already part of their business costs passed on to passengers and air freight shippers in the ticket price and/or freight rate.

2.6.1.2 Funding of the SCM through another passenger ticket/freight based contribution involves small surcharges on over two billion transactions annually, in many currencies, worldwide – costly to process - and to audit as to compliance – even in our present electronic/clearing house operations environment.

2.6.1.3 Other more cost effective sources have to be found, are available and have been suggested to fund the SCM.

2.7 **Structure and administration of the Supplementary Compensation Mechanism**

2.7.1 Inasmuch as the SCM is essentially only a financial link ("cushion") between funds available from carrier/insurer/potential third parties/insurers and the ultimate provider of last resort, the respective Government (s), the administrative structure needed should be of modest proportion - since the pre incident mechanism's activities are limited to the

2.7.1.1 The collection of contributions,

2.7.1.2 The management and investment of contributed funds (probably outsourced),

2.7.1.3 Requiring only a skeleton administrative staff,

2.7.1.4 Advance planning for the time the fund may be the first provider,

2.7.1.5 Pre-catastrophe planning and interaction with carriers/insurers.

2.7.2 Once an tragedy happens causing harm to third parties:

2.7.2.1 the SCM would become only involved if the totality of the damages exceed the operator's or joint liable parties' insurance coverage, or

2.7.2.2 If there is no liable party and the SCM would become sole provider.

2.7.2.3 It takes some time to determine who is responsible to for pay damages.

2.7.2.4 It takes time for victims to file claims.

2.7.2.5 It takes time for claims to be processed, settled or adjudicated.

2.7.2.6 Meanwhile the local, regional, State authorities non Government humanitarian organizations, etc. together with the operator are the first responders and provide the first services, including advance payments.

2.7.2.7 The SCM has therefore time to assess its involvement, its exposure and can plan the needed cash flow to pay for its portion of the damages – and staff their operation, if needed.

2.8 Unlawful interference by means of hijacked aeroplanes causing substantial damages to third parties, causing damages in excess of insurance coverage are very rare.

2.8.1 The most recent outrageous aviation related terrorist plan was discovered in the United Kingdom – where the potential perpetrators are now on trial - would have involved the destruction of ten aeroplanes with passengers, over the high seas.

2.8.2 Civilian incidents have involved pilot suicides that occurred either over isolated areas or over the high seas, without any damages to third parties.

2.9 The present process, started with the task to modernize the 1952 Rome Convention (General Risks). After the September 11, 2001 catastrophe, the scope of the SG-MR was extended in 2004, to include the creation of the "Supplementary Compensation Mechanism".

2.10 **Since 2001/2004 the need to address the resolution of cataclysmic damages has returned to peaceful civil aviation by the introduction of a new generation of "jumbo" planes weighing 650 tons, carrying 92,000 gallons of fuel and transporting up to 1,000 passengers.**

2.10.1 An unintended crash of such a behemoth of a plane can cause damages to third parties, equalling or even exceeding the consequences of acts of unlawful interference.

2.10.2 Carriers' insurance may cover the loss of the hull and the damages incurred by the passenger at the time of occurrence – but it may be insufficient to compensate fully third parties (see *"Air Liability Insurance Form Number USA 2000 AL issued to US Airways Group, Inc. – Attached to and made part of Policy Number SP6487AL – 1/8/2000 – 1/10/20001- Limit of Liability (1) and (2)"*.

2.11 The existence of a "Supplementary Compensation Mechanism" is therefore important to cover shortfalls in available compensation funds to all, irrespective whether the catastrophe is due because of unlawful interference or whether the tragedy occurred because of unintended civilian causes. (especially, if the SCM would be funded by passenger ticket/freight surcharges).

3 CONCLUSIONS

3.1 The already existing and tested "September 11th Victims Compensation Fund of 2001" should be the guideline for the construction and implementation of the "Supplementary Compensation Mechanism" – because it has become the benchmark of the level of assistance to address the needs of the operators - as well as repair the damages of the innocent victims.

3.2 Ratifiability in important States needed in a modernized Rome Convention with a Supplementary Compensatory Mechanism "cushion" would be facilitated through the coverage of **all** potential cataclysmic tragedies.

4 ACTIONS

4.1 Serious consideration should be given to extend the SCM to civilian catastrophes.

4.2 Serious consideration should be given whether to merge the "Unlawful Interference" Draft into the "Strict Liability" Draft – or vice versa – to create one Convention (to encourage and facilitate ratification).

4.3 The word "may" in the Conventions should be replaced by the words "should" or "must".

4.4 The success of the Convention requires strict "Compliance and Enforcement" provisions, where not already provided.

4.5 Article 24 (2) (3) should be stricken – since it is a reversal of Montreal 1999 and re-introduces costly, lengthy, complicated litigation.

4.6 Article 32 (3) should be revisited.

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