



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

**JAPANESE POSITION ON ARTICLES 24 AND 27 OF THE DRAFT CONVENTION ON
COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE
OF UNLAWFUL INTERFERENCE**

(Presented by Japan)

1. It is the goal of the draft Unlawful Interference Compensation Convention to strike a fair balance between the needs of victims suffering from an event caused by unlawful interference on the one hand and the interests of airlines on the other. In this regard, Japan notes that the draft Convention provides special rules of the tort law. This is true even though the draft Unlawful Interference Compensation Convention is basically built on the idea of risk allocation, considering the fact that the airlines are also victims in most of the unlawful interference cases. The liability issue will be relevant in a case when there is partly contributing negligence on the side of the airline or other related entity. In such a case, the diversion from the existing tort law principles needs to be reasonable if we want an instrument that is universally acceptable.
2. Japan finds that Article 24 (Additional Compensation) and Article 27 (Exclusive Remedy) are the key provisions in this regard, because both will deprive the damaged party of the right to sue under the tort law. It may be understood if we consider a hypothetical case in which an employee of the airline intentionally aids the terrorist to make an unlawful attack. Under the current text, the damaged party cannot sue the airline for any amount exceeding the maximum provided in Article 4, because it is not the airline's senior management that committed an act of unlawful interference intentionally. The damaged party can neither sue the guilty employee because of the exclusivity of Article 27. This result may appear to be unjust. It is also a significant departure from the general rules of tort law.
3. In light of the preceding, the position of Japan is, first, Articles 24 and 27 must be discussed together. This is necessary because we need to have a whole picture about the Convention when measuring how it is different from the general tort law. Secondly, Japan wishes to broaden the possibility for additional compensation under Article 24 to cover cases where the damage was caused by an act or omission of servants and agents of the operator, not only of its senior management. Thirdly, it would be proposed that Article 27 be just deleted.
4. Last but not least, the concept of "disregard of a known, probable and imminent risk" as mentioned in Article 24 (2) (iii) may better be replaced by the more common phrase "recklessly and with knowledge that the damage would probably result" in order to enhance the foreseeability to the operator about the consequence of its application.

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