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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 DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE

REPORT OF THE DRAFTING COMMITTEE

The attached material comprises the text of those draft Articles which were referred to and approved by the Drafting Committee in clean and marked-up versions. Comments on the Report of the Drafting Committee will be provided verbally by the Chairman of the Drafting Committee.

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**DRAFT CONVENTION ON COMPENSATION FOR DAMAGE
TO THIRD PARTIES, RESULTING FROM ACTS OF
UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT**

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

- a) “An act of unlawful interference” means an act which is defined as a offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, as amended and in force from time to time.
- b) An “event” occurs when damage is caused by an aircraft in flight as a result of an act of unlawful interference.
- c) An aircraft is considered to be “in flight” at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.
- d) “International flight” means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State.
- e) “Maximum mass” means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used.
- f) “Operator” means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The operator shall not lose its status as operator by virtue of the fact that another person commits an act of unlawful interference.
- g) “Person” means any natural or legal person, including a State.
- h) “State Party” means a State for which this Convention is in force.

- i) “Third Party” means a person other than the operator, passenger or consignor or consignee of cargo; in the case of a collision, “third party” also means the operator, owner and crew of the other aircraft and the passenger or consignor or consignee of cargo on board the other aircraft.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, as a result of an act of unlawful interference. This Convention shall also apply to such damage that occurs in a State non-party as provided for in Article 26.
2. If a State Party so declares to the Depositary, this Convention shall also apply to damage to third parties that occurs in the territory of that State Party which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.
3. For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Chapter II

Liability of the Operator and Related Issues

Article 3 — Liability of the Operator

1. The operator shall be liable for damage within the scope of this Convention upon condition only that the damage was caused by an aircraft in flight.
2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.
3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminently suffering death or bodily injury.
4. Damage to property shall be compensable¹.
5. Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.
6. No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or supplements to these Conventions in force from time to time.

¹ The Final Clauses will need to make clear the relationship between this Convention and other international legal instruments.

7. Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 4 — Limit of Operator's Liability

The liability of the operator shall not exceed for each aircraft and event:

- a) 750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;
- b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;
- c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;
- d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;
- e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;
- f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;
- g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;
- h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;
- i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;
- j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.]

Article 5 — Events involving two or more operators or other persons

- 1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.
- 2. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.
- 3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 6 — Advance Payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 7 — Insurance

1. Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. If such insurance or guarantee is not available to an operator on a per event basis, the operator may satisfy this obligation by insuring on an aggregate basis. States Parties shall not require their operators to maintain such insurance or guarantee to the extent that they are covered by a decision made pursuant to Article 11, paragraph 1(d) or Article 18, paragraph 3.

2. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators. Proof that an operator is covered by a decision made pursuant to Article 11, paragraph 1(d) or Article 18, paragraph 3, shall be sufficient evidence for the purpose of this paragraph.

Chapter III

The Supplementary Compensation Mechanism²

Article 8 — The constitution and objectives of the Supplementary Compensation Mechanism

1. An organization named the Supplementary Compensation Mechanism is established by this Convention. The Supplementary Compensation Mechanism shall be made up of a Conference of Parties, consisting of the States Parties, and a Secretariat, headed by a Director.

2. The Supplementary Compensation Mechanism shall have the following purposes:

- a) to provide compensation for damage according to Article 18, paragraph 1, pay damages according to Article 18, paragraph 3, and provide financial support under Article 25;
- b) to make advance payments under Article 19, paragraph 1, and to take reasonable measures after an event to minimize or mitigate damage caused by an event, according to Article 19, paragraph 2; and
- c) to perform other functions directly compatible with these purposes.

3. The Supplementary Compensation Mechanism shall have its seat at the same place as the International Civil Aviation Organization.

4. The Supplementary Compensation Mechanism shall have international legal personality.

² The name of the Mechanism has not yet been decided.

5. In each State Party, the Supplementary Compensation Mechanism shall be recognized as a legal person capable under the laws of that State of assuming rights and obligations, entering into contracts, acquiring and disposing of movable and immovable property and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director of the Supplementary Compensation Mechanism as the legal representative of the Mechanism.

6. The Supplementary Compensation Mechanism shall enjoy tax exemption and such other privileges as are agreed with the host State. The funds of the Supplementary Compensation Mechanism [, and any proceeds from them,] shall be exempted from tax in all States Parties

7. The Supplementary Compensation Mechanism shall be immune from legal and administrative actions, except in respect of actions relating to credits obtained according to Article 17 or to compensation payable according to Article 18. The Director of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions. The immunity of the Director may be waived by the Conference of Parties. The other personnel of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions in relation to acts performed by them in their official capacity. The immunity of the other personnel may be waived by the Director.

Article 9 — The Conference of Parties

The Conference of Parties shall:

- a) determine its own rules of procedure and, at each meeting, elect its officers;
- b) establish the regulations of the Supplementary Compensation Mechanism and the Guidelines for Compensation;
- c) appoint the Director and determine the terms of his or her employment and, to the extent this is not delegated to the Director, the terms of employment of the other employees of the Supplementary Compensation Mechanism;
- d) delegate to the Director, in addition to powers given in Article 11, such powers and authority as may be necessary or desirable for the discharge of the duties of the Supplementary Compensation Mechanism and revoke or modify such delegations of authority at any time;
- e) decide the period for, and the amount of, initial contributions and fix the contributions to be made to the Supplementary Compensation Mechanism for each year until the next meeting of the Conference of Parties;
- f) in the case where the aggregate limit on contributions according to Article 14, paragraph 3, has been applied, determine the global amount to be disbursed to the victims of all events occurring during the time period with regard to which Article 14, paragraph 3, was applied;
- g) appoint the auditors;
- h) vote budgets and determine the financial arrangements of the Supplementary Compensation Mechanism including the Guidelines on Investment, review expenditures, approve the accounts of the Supplementary Compensation Mechanism, and consider the reports of the auditors and the comments of the Director thereon;

- i) examine and take appropriate action on the reports of the Director, including reports on claims for compensation, and decide on any matter referred to it by the Director;
- j) decide whether to apply Article 25 and set the maximum amount of such assistance and the further conditions for it, if necessary;
- k) determine which States non-party and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Conference of Parties and subsidiary bodies;
- l) establish any body necessary to assist it in its functions, including if appropriate, an Executive Committee consisting of representatives of States Parties, and define the powers of such body;
- m) decide whether to obtain credits and grant security for credits obtained pursuant to Article 17, paragraph 4;
- n) as appropriate, enter into arrangements on behalf of the Supplementary Compensation Mechanism with the International Civil Aviation Organisation and other international bodies; and
- o) consider any matter relating to the Convention that a State Party or the International Civil Aviation Organisation has referred to it.

Article 10 — The meetings of the Conference of Parties

1. The Conference of Parties shall meet once a year, unless a Conference of Parties decides to hold its next meeting at another interval. The Director shall convene the meeting at a suitable time and place.
2. An extraordinary meeting of the Conference of Parties shall be convened by the Director:
 - a) at the request of no less than one-fifth of the total number of States Parties;
 - b) if an aircraft has caused damage falling within the scope of this Convention, and the damages are likely to exceed the applicable limit of liability according to Article 4 of the Convention by more than 50 percent of the available funds of the Supplementary Compensation Mechanism;
 - c) if the aggregate limit on contributions according to Article 14, paragraph 3, has been reached; or
 - d) if the Director has exercised the authority according to Article 11, paragraph 1 d) or e).
3. All States Parties shall have an equal right to be represented at the meetings of the Conference of Parties and each State Party shall be entitled to one vote. The International Civil Aviation Organisation shall have the right to be represented, without voting rights, at the Conference of Parties.
4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority of the votes cast. Decisions under Article 9, subparagraphs a), b), c), d), e), j) and l) shall be taken by a majority consisting of two-thirds of the votes.

Article 11 — The Secretariat and the Director

1. The Supplementary Compensation Mechanism shall have a secretariat led by a Director. The Director shall hire personnel, supervise the secretariat and direct the day-to-day activities of the Supplementary Compensation Mechanism. In addition, the Director:

- a) shall report to the Conference of Parties on the functioning of the Supplementary Compensation Mechanism and present its accounts and a budget;
- b) shall collect all contributions payable under this Convention, administer and invest the funds of the Supplementary Compensation Mechanism in accordance with the Guidelines on Investment, maintain accounts for the funds, and assist in the auditing of the accounts and the funds in accordance with Article 17;
- c) shall handle claims for compensation in accordance with the Guidelines for Compensation, and prepare a report for the Conference of Parties on how each has been handled;
- d) may decide to temporarily take action under Article 19 until the next meeting of the Conference of Parties;
- e) shall decide to temporarily take action under Article 18, paragraph 3, until the next meeting of the Conference of Parties called in accordance with Article 10, paragraph 2 d); and
- f) shall decide any other matter delegated by the Conference of Parties.

2. The Director and the other personnel of the Secretariat shall not seek or receive instructions in regards to the discharge of their responsibilities from any authority external to the Supplementary Compensation Mechanism. Each State Party undertakes to fully respect the international character of the responsibilities of the personnel and not seek to influence any of its nationals in the discharge of their responsibilities.

Article 12 — Contributions to the Supplementary Compensation Mechanism

The contributions to the Supplementary Compensation Mechanism shall be:

- (a) the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party;
- (b) such amounts as the Conference of Parties may specify in respect of general aviation for business purposes.

The operator shall collect these amounts and remit them to the Supplementary Compensation Mechanism³.

³ It needs to be considered whether, for the purpose of collection and remittance of contributions, the word “operator” sufficiently covers the concept of “carrier”.

Article 13 — Basis for fixing the Contributions⁴

1. Contributions shall be fixed having regard to the following principles:
 - a) the objectives of the Supplementary Compensation Mechanism should be efficiently achieved;
 - b) competition within the air transport sector should not be distorted;
 - c) the competitiveness of the air transport sector in relation to other modes of transportation should not be adversely affected; and
 - d) in relation to general aviation, the costs of collecting contributions shall not be excessive in relation to the amount of such contributions.
2. The Conference of Parties shall fix contributions in a manner that does not discriminate between States, operators, passengers and consignors or consignees of cargo on the basis of nationality.
3. On the basis of the budget drawn up according to Article 11, paragraph 1 a), the contributions shall be fixed having regard to:
 - a) the upper limit for compensation set out in Article 18, paragraph 2;
 - b) the need for reserves where Article 18, paragraph 3 is applied;
 - c) claims for compensation, measures to minimize or mitigate damages and financial assistance under the Convention;
 - d) the costs and expenses of administration, including the costs and expenses incurred by meetings of the Conference of Parties;
 - e) the income of the Supplementary Compensation Mechanism; and
 - f) the availability of additional funds for compensation pursuant to Article 17, paragraph 4.

Article 14 —Contributions

1. At its first meeting, the Conference of Parties shall decide the period and the rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. If a State Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such declaration from the time it takes effect. The period and the rate shall be equal for all States Parties.

⁴ The final clauses are likely to provide a threshold for the entry into force defined in order to ensure that the number of passengers and the amounts of cargo is sufficient for the financial viability of the Supplementary Compensation Mechanism.

2. Contributions shall be fixed in accordance with paragraph 1 so that the funds available amount to at least [25 %][100 %] of the limit of compensation set out in Article 18, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to at least [50 %][100 %] of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which the Convention subsequently enters into force.
3. The total amount of contributions collected by the Supplementary Compensation Mechanism within any period of two consecutive calendar years shall not exceed three times the maximum amount of compensation according to Article 18, paragraph 2, of this Convention.
4. The contributions collected by an operator in respect of a State Party may not be used to provide compensation for an event which occurred prior to the entry into force of the Convention for that State Party.

Article 15 — Collection of the Contributions

1. The Conference of Parties shall establish in the Regulations a transparent, accountable and cost-effective mechanism supporting the collection and remittal of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens. Contributions which are in arrears shall bear interest as provided for in the Regulations.
2. Where an operator does not collect or does not remit contributions it has collected to the Supplementary Compensation Mechanism, the Director shall take appropriate measures against such operator with a view to the recovery of the amount due. Each State Party shall ensure that an action to recover the amount due may be taken within its jurisdiction, notwithstanding in which State Party the debt actually accrued.

Article 16 — Duties of States Parties

1. Each State Party shall take appropriate measures, including imposing such sanctions as it may deem necessary, to ensure that an operator fulfils its obligations to collect and remit contributions to the Supplementary Compensation Mechanism.
2. Each State Party shall ensure that the following information is provided to the Supplementary Compensation Mechanism:
 - a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party; and
 - b) the identity of the operators performing such flights.

Where a State Party has made a declaration under Article 2, paragraph 2, it shall ensure that information detailing the number of passengers and quantity of cargo departing on commercial flights between two airports in that State Party, and the identity of the operators performing such flights, is also provided. In each case such statistics shall be *prima facie* evidence of the facts stated therein.

3. Where a State Party does not fulfil its obligations under paragraph 2 of this Article and this results in a loss for the Supplementary Compensation Mechanism, the State Party shall be liable for such loss. The Conference of Parties shall, on recommendation by the Director, decide whether the State Party shall pay for such loss.

Article 17 — The funds of the Supplementary Compensation Mechanism

1. The funds of the Supplementary Compensation Mechanism may only be used for the purposes set out in Article 8, paragraph 2.

2. The Supplementary Compensation Mechanism shall exercise the highest degree of prudence in the management and preservation of its funds. The funds shall be preserved in accordance with the Guidelines on Investment. Investments may only be made in State Parties.

3. Accounts shall be maintained for the funds of the Supplementary Compensation Mechanism. The Auditors of the Supplementary Compensation Mechanism shall review the accounts and report on them to the Conference of Parties.

4. Where the Supplementary Compensation Mechanism is not able to meet valid compensation claims because insufficient contributions have been collected, it may obtain credits from financial institutions for the payment of compensation and may grant security for such credits.

Chapter IV

Compensation from the Supplementary Compensation Mechanism

Article 18 — Compensation

1. The Supplementary Compensation Mechanism shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party. Where the damage is caused by an aircraft in flight on a flight other than an international flight, compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

2. The maximum amount of compensation available from the Supplementary Compensation Mechanism shall be [3 000 000 000] Special Drawing Rights for each event. Payments made according to paragraph 3 and distribution of amounts recovered according to Article 24, paragraph 2, shall be in addition to the maximum amount for compensation.

3. If and to the extent that the Conference of Parties determines and for the period that it so determines that insurance in respect of the damage covered by the Convention is wholly or partially unavailable with respect to amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport, whether generally or, in relation to a particular operator following an event affecting that operator, the Supplementary Compensation Mechanism shall in respect of future events causing damage compensable under this Convention pay the damages for which the affected operator or operators are liable according to Articles 3 and 4 and such payment shall discharge such liability of the affected operator or operators. The Conference of Parties may decide on a

fee, the payment of which by the affected operator or operators, for the period covered, shall be a condition for the Supplementary Compensation Mechanism taking the action specified in this paragraph.

Article 19 — Advance Payments and other measures

1. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute recognition of a right to compensation and may be offset against any amount subsequently paid by the Supplementary Compensation Mechanism.

2. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may also take other measures to minimize or mitigate damage caused by an event.

Chapter V

Special Provisions on Compensation and Recourse

Article 20 — Acts or omissions of victims

If the operator or Supplementary Compensation Mechanism proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the Supplementary Compensation Mechanism shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article 21 — Court Costs and other Expenses

The limits prescribed in Articles 4 and 18, paragraph 2, shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action if that is later than the expiry of such period.

Article 22 — Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and 18, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily injury and mental injury in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respect of other damage.

Article 23 — Additional Compensation

1. To the extent the total amount of damages exceeds the limits applicable according to Articles 4 and 18, paragraph 2, persons who have suffered damage may, in accordance with paragraphs 2 and 3 of this Article, claim compensation from the operator.
2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has
 - a) intentionally committed an act of unlawful interference; or
 - b) contributed to the event by an act or omission, which:
 - i) falls within the regulatory responsibility and actual control of the operator;
 - ii) is, other than the act of unlawful interference, the primary cause of the event; and
 - iii) is done with disregard of a known, probable and imminent risk.
3. For the purposes of paragraph 2 b) iii), the senior management of an operator shall be conclusively deemed not to have disregarded a risk where, as regards the relevant area of security, the operator has adopted the applicable industry standard⁵ and, at the time of the incident, held a valid evaluation certificate relating thereto. The foregoing does not limit other grounds on which the senior management may establish that it has not disregarded such risks.

Article 24 — Right of Recourse

1. Subject to paragraph 2, neither an operator nor the Supplementary Compensation Mechanism shall have a right of recourse against any person, except if that person or, if it is a legal person, its senior management, has intentionally committed an act of unlawful interference.
2. The Supplementary Compensation Mechanism shall have a right of recourse against the operator for compensation subject to the conditions set out in Article 23, paragraphs 2 and 3, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been completed.
3. Any amount recovered under paragraph 2 of this Article shall, in the first instance, be used to provide compensation for damages resulting from the event which gave rise to the recourse action, which exceed the maximum amount specified in Article 18, paragraph 2.

Chapter VI

Assistance in case of events in States non-party

Article 25 — Assistance in case of events in States non-party

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-party, the

⁵ The current relevant industry standard is the IATA Operational Safety Audit standard.

Conference of Parties may decide, on a case by case basis, that the Supplementary Compensation Mechanism shall provide financial support to that operator. Such support may only be provided in respect of damage that would have fallen under the Convention if the State non-party had been a State Party and if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the provisions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of the Parties. The financial support shall not exceed the maximum amount for compensation set out in Article 18, paragraph 2. If the solvency of the operator liable is threatened even if support is given, such support shall only be given if the liable operator has sufficient arrangements protecting its solvency.

Chapter VII

Exercise of Remedies and Related Provisions

Article 26 — Exclusive Remedy

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage due to an act of unlawful interference, however founded, whether under this Convention or in tort or in contract or otherwise, can only be brought against the operator and shall be subject to the conditions and limits of liability set out in this Convention. No claims shall lie against any other person for compensation for such damage.
2. Paragraph 1 shall not apply to an action against an individual who has intentionally committed an act of unlawful interference.

Article 27 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article 28 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Articles 4 and 18 shall be reviewed by the Director, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in Article 27.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Director shall inform the Conference of Parties of a revision of the limits of liability. Any such revision shall become effective six months after the meeting of the Conference of Parties, unless a majority of the States Parties register their disapproval. The Director shall immediately notify all States Parties of the coming into force of any revision.

Article 29 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred.

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territorial airspace of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 30 — Intervention by the Supplementary Compensation Mechanism

1. Each State Party shall ensure that the Supplementary Compensation Mechanism has the right to intervene in proceedings brought against the operator in its courts.

2. Except as provided in paragraph 3, the Supplementary Compensation Mechanism shall not be bound by any judgement or decision in proceedings to which it has not been a party.

3. If an action is brought against the operator in a State Party, each party to such proceedings shall be entitled to notify the Supplementary Compensation Mechanism of the proceedings. Where such notification has been made in accordance with the law of the court seized and in such time that the Supplementary Compensation Mechanism had time to intervene to the proceedings, the Supplementary Compensation Mechanism shall be bound by a judgement or decision in proceedings even if it has not intervened.

Article 31 — Recognition and Enforcement of Judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 29 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

- a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;

- b) the defendant was not served with notice of the proceedings in such time and manner as to allow him or her to prepare and submit a defence;
 - c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognised as final and conclusive under the law of the State Party where recognition or enforcement is sought;
 - d) the judgement has been obtained by fraud of any of the parties;
 - e) the right to enforce the judgement is not vested in the person by whom the application is made; or
 - f) the ground of refusal has been notified, before the occurrence of an event, to the Depositary by the State Party where recognition or enforcement is sought.
4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.
5. Where a judgement is enforceable, payment of any costs recoverable under the judgement shall also be enforceable.

Article 32 — Regional and multilateral agreements on the recognition and enforcement of judgements

1. State Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.
2. State Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.
3. The provisions of Chapter VII of this Convention shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 33 — Period of Limitation

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within three years from the date of the event which caused the damage.
2. The right of compensation according to Article 18 shall be extinguished if an action is not brought, or a notification pursuant to Article 30, paragraph 3, is not made, within three years from the date of the event which caused the damage.
3. The method of calculating such three year period shall be determined by the law of the court seized of the case.

Article 34 — Death of Person Liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER VIII**Application of the Convention****Article 35 — State Aircraft**

This Convention shall not apply to damage caused by state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

[Final Provisions to be inserted]

— END —



International Civil Aviation Organization

WORKING PAPER

LC/33-WP/3-1
Appendix B

LC/33-WP/3-22
30/4/08

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 DAMAGE CAUSED BY AIRCRAFT TO
THIRD PARTIES, IN CASE OF UNLAWFUL INTERFERENCE**

REPORT OF THE DRAFTING COMMITTEE

The attached material comprises the text of those draft Articles which were referred to and approved by the Drafting Committee in clean and marked-up versions. Comments on the Report of the Drafting Committee will be provided verbally by the Chairman of the Drafting Committee.

==

APPENDIX B

DRAFT CONVENTION ON COMPENSATION FOR DAMAGE ~~CAUSED BY AIRCRAFT~~
TO THIRD PARTIES, ~~IN CASE~~ RESULTING FROM ACTS OF
UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

- a) “An act of unlawful interference” means an act which is defined as ~~an~~ offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, ~~or any amendment or Protocol thereto which is in force among the State Parties concerned~~ as amended and in force from time to time.
- b) ~~“Event” means an~~ An “event ~~where~~” occurs when damage is caused by an aircraft in flight as a result of an act of unlawful interference.
- c) An aircraft is considered to be “in flight” at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.
- d) “International flight” means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State.
- e) “Maximum mass” means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used.
- ~~ef~~ “Operator” means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The operator shall not lose its status as operator by virtue of the fact that another person commits an act of unlawful interference.
- ~~fg~~ “Person” means any natural or legal person, including a State.
- ~~gh~~ “State Party” means a State for which this Convention is in force.

- i) ~~h)~~ —“Third Party” means a person other than the operator, passenger or consignor or consignee of cargo; in the case of a collision, “third party” also means the operator, owner and crew of the other aircraft and the passenger or consignor or consignee of cargo on board the other aircraft.

Article 2 — Scope⁺

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, as a result of an act of unlawful interference ~~when the operator of the aircraft has its principal place of business, or if it has no such place of business, its permanent residence, in another State whether or not a State Party~~. This Convention shall also apply to such damage that occurs in a State non-party as provided for in Article 26.
2. If a State Party so declares to the Depositary, this Convention shall also apply to ~~such~~ damage ~~which~~ to third parties that occurs in the territory of that State Party ~~when the operator of the aircraft has its principal place of business, or if it has no such place of business, its permanent residence, in that State Party, which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.~~
3. For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Chapter II

Liability of the Operator and Related Issues

Article 3 — Liability of the Operator

1. The operator shall be liable for damage ~~sustained by third parties~~ within the scope of this Convention upon condition only that the damage was caused by an aircraft in flight.
2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.
3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminently suffering death or bodily injury.
4. Damage to property shall be compensable¹.

⁺ ~~The connecting factor of the operator to a specific State may need further consideration if relevant definitions are changed by ICAO.~~

¹ The Final Clauses will need to make clear the relationship between this Convention and other international legal instruments.

5. Environmental damage shall be compensable, ~~if and~~ insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

6. No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or supplements to these Conventions in force from time to time.

~~4.7.~~ Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

~~5.~~ ~~Damages due to death, bodily injury and damage to property shall be compensable. Damages due to mental injury shall be compensable if caused by a recognisable psychiatric illness resulting either from bodily injury or from a reasonable fear of exposure to death or bodily injury.~~

Article 4 — Limit of Operator's Liability

The liability of the operator shall not exceed for each aircraft and event:

- a) 750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;
- b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;
- c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;
- d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;
- e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;
- f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;
- g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;
- h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;
- i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;
- j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.]

Article 5 — Events involving two or more operators or other persons

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.
2. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.
3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 6 — Advance Payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 7 — Insurance

1. Having regard to ~~Articles 4 and 19, paragraph 3~~, Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. If such insurance or guarantee is not available to an operator on a per event basis, the operator may satisfy this obligation by insuring on an aggregate basis. States Parties shall not require their operators to maintain such insurance or guarantee to the extent that they are covered by a decision made pursuant to Article 11, paragraph 1(d) or Article 18, paragraph 3.

2. An operator may be required by the State Party ~~in or~~ into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators. Proof that an operator is covered by a decision made pursuant to Article 11, paragraph 1(d) or Article 18, paragraph 3, shall be sufficient evidence for the purpose of this paragraph.

Chapter III

The Supplementary Compensation Mechanism²

Article 8 — The constitution and objectives of the Supplementary Compensation Mechanism

1. An organization named the Supplementary Compensation Mechanism is established by this Convention. The Supplementary Compensation Mechanism shall be made up of a Conference of Parties, consisting of the States Parties, and a Secretariat, headed by a Director.
2. The Supplementary Compensation Mechanism shall have the following purposes:

² The name of the Mechanism has not yet been decided.

- a) to provide compensation for damage according to Article ~~19,18~~, paragraph 1, ~~and financial support pay damages~~ according to ~~Articles 19, Article 18~~, paragraph ~~2,3~~, and ~~26~~provide financial support under Article 25;
 - b) to make advance payments under Article ~~20,19~~, paragraph 1, and to take reasonable measures after an event to minimize or mitigate damage caused by an event, according to Article ~~20,19~~, paragraph 2; and
 - c) to perform other functions directly compatible with these purposes.
3. The Supplementary Compensation Mechanism shall have its seat ~~{~~at the same place as the International Civil Aviation Organization~~}~~.
4. The Supplementary Compensation Mechanism shall have international legal ~~capacity~~personality.
5. In each State Party, the Supplementary Compensation Mechanism shall be recognized as a legal person capable under the laws of that State of assuming rights and obligations, entering into contracts, acquiring and disposing of movable and immovable property and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director of the Supplementary Compensation Mechanism as the legal representative of the Mechanism.
- ~~5.6.~~ The Supplementary Compensation Mechanism shall enjoy tax exemption and such other privileges as are agreed with the host State. The funds of the Supplementary Compensation Mechanism [, and any proceeds from them,] shall be exempted from tax in all States Parties~~.~~
7. 6. The Supplementary Compensation Mechanism shall be immune from legal and administrative actions, except in respect of actions relating to credits obtained according to Article ~~18~~17 or to compensation payable according to Article ~~19,18~~. The Director ~~and other personnel~~ of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions. The immunity of the Director may be waived by the Conference of Parties. The other personnel of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions in relation to acts performed by them in their official capacity. The immunity of the other personnel may be waived by the Director³.

Article 9 — The Conference of Parties

The Conference of Parties shall:

- a) determine its own rules of procedure and, at each meeting, elect its officers;
- b) establish the regulations of the Supplementary Compensation Mechanism and the Guidelines for Compensation;

^{3.} ~~The Articles of Agreement of the International Monetary Fund and the International Development Association, and the Convention Establishing the Multilateral Investment Guarantee Agency, grant the following to Executive Directors, and officers and employees:~~

- ~~i) immunity from legal process with respect to acts performed by them in their official capacity;~~
- ~~ii) not being local nationals, the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange restrictions as are accorded by the States Parties concerned to the representatives, officials and employees of comparable rank of other States Parties; and~~
- ~~iii) the same treatment in respect of travelling facilities as is accorded by the States Parties concerned to representatives, officials and employees of comparable rank of other States Parties.~~

- c) appoint the Director and determine the terms of his or her employment and, to the extent this is not delegated to the Director, the terms of employment of the other employees of the Supplementary Compensation Mechanism;
- d) delegate to the Director, in addition to powers given in Article 11, such powers and authority as may be necessary or desirable for the discharge of the duties of the Supplementary Compensation Mechanism and revoke or modify such delegations of authority at any time;
- e) decide the period for, and the amount of, initial contributions and fix the contributions to be made to the Supplementary Compensation Mechanism for each year until the next meeting of the Conference of Parties;
- f) in the case where the aggregate limit on contributions according to Article ~~13~~[14, paragraph 3](#), has been applied, determine the global amount to be disbursed to the victims of all events occurring during the time period with regard to which Article ~~13~~[14, paragraph 3](#), was applied;
- g) appoint the auditors;
- h) vote budgets and determine the financial arrangements of the Supplementary Compensation Mechanism including the Guidelines on Investment, review expenditures, approve the accounts of the Supplementary Compensation Mechanism, and consider the reports of the auditors and the comments of the Director thereon;
- i) examine and take appropriate action on the reports of the Director, including reports on claims for compensation, and decide on any matter referred to it by the Director;
- j) decide whether to apply Article ~~26~~[25](#) and set the maximum amount of such assistance and the further conditions for it, if necessary;
- k) determine which States non-party and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Conference of Parties and subsidiary bodies;
- l) establish any body necessary to assist it in its functions, including if appropriate, an Executive Committee consisting of representatives of States Parties, and define the powers of such body; ~~and~~
- m) decide whether to obtain credits and grant security for credits obtained pursuant to Article 17, paragraph 4;
- n) as appropriate, enter into arrangements on behalf of the Supplementary Compensation Mechanism with the International Civil Aviation Organisation and other international bodies; and
- o) ~~m)~~ consider any matter relating to the Convention that a State Party or the International Civil Aviation Organisation has referred to it.

Article 10 — The meetings of the Conference of Parties

1. The Conference of Parties shall meet once a year, unless a Conference of Parties decides to hold its next meeting at another interval. The Director shall convene the meeting at a suitable time and place.
2. An extraordinary meeting of the Conference of Parties shall be convened by the Director:
 - a) at the request of no less than one-fifth of the total number of States Parties;
 - b) if an aircraft has caused damage falling within the scope of this Convention, and the damages are likely to exceed the applicable limit of liability according to Article 4 of the Convention by more than 50 percent of the available funds of the Supplementary Compensation Mechanism;
 - c) if the aggregate limit on contributions according to Article ~~13~~14, paragraph 3, has been reached; or
 - d) if the Director has exercised the authority according to Article 11, paragraph 1 d) or e).
3. All States Parties shall have an equal right to be represented at the meetings of the Conference of Parties and each State Party shall be entitled to one vote. The International Civil Aviation Organisation shall have the right to be represented, without voting rights, at the Conference of Parties.
4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority of the votes cast. Decisions under Article 9, subparagraphs a), b), c), d), e), j) and l) shall be taken by a majority consisting of two-thirds of the votes.

Article 11 — The Secretariat and the Director

1. The Supplementary Compensation Mechanism shall have a secretariat led by a Director. The Director shall hire personnel, supervise the secretariat and direct the day-to-day activities of the Supplementary Compensation Mechanism. In addition, the Director:
 - a) shall report to the Conference of Parties on the functioning of the Supplementary Compensation Mechanism and present its accounts and a budget;
 - b) shall collect all contributions payable under this Convention, administer and invest the funds of the Supplementary Compensation Mechanism in accordance with the Guidelines on Investment, maintain accounts for the funds, and assist in the auditing of the accounts and the funds in accordance with Article ~~18~~17;
 - c) shall handle claims for compensation in accordance with the Guidelines for Compensation, and prepare a report for the Conference of Parties on how each has been handled;
 - d) may, ~~where appropriate~~, decide to temporarily take action under ~~Articles 19, paragraph 3, and 20~~Article 19 until the next meeting of the Conference of Parties;
 - e) shall decide to temporarily take action under Article 18, paragraph 3, until the next meeting of the Conference of Parties called in accordance with Article 10, paragraph 2 d); and
 - ~~e~~f) shall decide any other matter delegated by the Conference of Parties.

2. The Director and the other personnel of the Secretariat shall not seek or receive instructions in regards to the discharge of their responsibilities from any authority external to the Supplementary Compensation Mechanism. Each State Party undertakes to fully respect the international character of the responsibilities of the personnel and not seek to influence any of its nationals in the discharge of their responsibilities.

Article 12 — ~~The~~ Contributions to the Supplementary Compensation Mechanism

The contributions to the Supplementary Compensation Mechanism shall be :

- (a) the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party. ~~The operator shall collect the mandatory amounts and remit them to the Supplementary Compensation Mechanism.~~⁴

~~Article 13 — Aggregate limit on collection of contributions — The total amount of contributions collected by the Supplementary Compensation Mechanism within a period of two consecutive years shall not exceed three times the maximum amount of compensation according to Article 19, paragraph 2, of this Convention.~~ :

- (b) such amounts as the Conference of Parties may specify in respect of general aviation for business purposes.

The operator shall collect these amounts and remit them to the Supplementary Compensation Mechanism³.

Article ~~14~~13 — Basis for fixing the Contributions⁵⁴

1. Contributions shall be fixed having regard to the following principles:
- a) the objectives of the Supplementary Compensation Mechanism should be efficiently achieved;
 - b) competition within the air transport sector should not be distorted; ~~and~~
 - c) the competitiveness of the air transport sector in relation to other modes of transportation should not be adversely affected; and
 - d) in relation to general aviation, the costs of collecting contributions shall not be excessive in relation to the amount of such contributions.

⁴ ~~It needs to be considered whether, for the purpose of collection and remittance of contributions, the word “operator” sufficiently covers the concept of “carrier”.~~

³ It needs to be considered whether, for the purpose of collection and remittance of contributions, the word “operator” sufficiently covers the concept of “carrier”.

⁵⁴ The final clauses are likely to provide a threshold for the entry into force defined in order to ensure that the number of passengers and the amounts of cargo is sufficient for the financial viability of the Supplementary Compensation Mechanism.

2. ~~When fixing the contributions, the~~The Conference of Parties shall ~~ensure their uniform and non-discriminatory application to all States Parties and their~~fix contributions in a manner that does not discriminate between States, operators, passengers and consignors or consignees of cargo ~~regardless of when they become Parties, and also with regard to states not yet parties. The contributions collected in respect of a State Party may not be used to provide compensation for an event which occurred prior to the entry into force of the Convention for that State Party.~~on the basis of nationality.

3. On the basis of the budget drawn up according to Article 11, paragraph 1 a), the contributions shall be fixed having regard to:

- a) the upper limit for compensation set out in Article ~~19,18~~, paragraph 2;
- b) the need for reserves where Article ~~19,18~~, paragraph 3 is applied;
- c) claims for compensation, measures to minimize or mitigate damages and financial assistance under the Convention;
- d) the costs and expenses of administration, including the costs and expenses incurred by meetings of the Conference of Parties;
- e) the income of the Supplementary Compensation Mechanism; and
- f) the availability of additional funds for compensation pursuant to Article ~~18,17~~, paragraph 4.

Article ~~15~~14 — ~~Initial Contributions and pre-funding~~

1. At its first meeting, the Conference of Parties shall decide the period and the rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. If a State Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such declaration from the time it takes effect. The period and the rate shall be equal for all ~~States~~Sates Parties.

2. Contributions shall be fixed in accordance with paragraph 1 so that the funds available amount to at least [25 %][100 %] of the limit of compensation set out in Article ~~19,18~~, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to at least [50 %][100 %] of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which the Convention subsequently enters into force.

3. The total amount of contributions collected by the Supplementary Compensation Mechanism within any period of two consecutive calendar years shall not exceed three times the maximum amount of compensation according to Article 18, paragraph 2, of this Convention.

4. The contributions collected by an operator in respect of a State Party may not be used to provide compensation for an event which occurred prior to the entry into force of the Convention for that State Party.

Article ~~16~~15 — Collection of the Contributions

1. The Conference of Parties shall establish in the Regulations a transparent, accountable and cost-effective mechanism supporting the collection and remittal of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens. Contributions which are in arrears shall bear interest as provided for in the Regulations.
2. Where an operator does not collect or does not remit contributions it has collected to the Supplementary Compensation Mechanism, the Director shall take appropriate measures against such operator with a view to the recovery of the amount due. Each State Party shall ensure that an action to recover the amount due may be taken within its jurisdiction, notwithstanding in which State Party the debt actually accrued.

Article ~~17~~16 — Duties of States Parties

1. Each State Party shall ~~ensure that any obligation to collect and remit contributions to the Supplementary Compensation Mechanism arising under this Convention is fulfilled and take any~~take appropriate measures ~~under its law~~, including imposing such sanctions as it may deem necessary, ~~with a view to the effective execution of any such obligations. to ensure that an operator fulfils its obligations to collect and remit contributions to the Supplementary Compensation Mechanism.~~
2. Each State Party shall ensure that the following information is provided to the Supplementary Compensation Mechanism:
 - a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party; and
 - b) the identity of the operators performing such flights.

Where a State Party has made a declaration under Article 2, paragraph 2, it shall ensure that information detailing the number of passengers and quantity of cargo departing on commercial flights between two airports in that State Party, and the identity of the operators performing such flights, is also provided. In each case such statistics shall be *prima facie* evidence of the facts stated therein.

3. Where a State Party does not fulfil its obligations under paragraph 2 of this Article and this results in a loss for the Supplementary Compensation Mechanism, the State Party shall be liable for such loss. The Conference of Parties shall, on recommendation by the Director, decide whether the State Party shall pay for such loss.

Article ~~18~~17 — The funds of the Supplementary Compensation Mechanism

1. The funds of the Supplementary Compensation Mechanism may only be used for the purposes set out in Article 8, paragraph 2.
2. The Supplementary Compensation Mechanism shall exercise the highest degree of prudence in the management and preservation of its funds. The funds shall be preserved in accordance with the Guidelines on Investment. Investments may only be made in State Parties.
3. Accounts shall be maintained for the funds of the Supplementary Compensation Mechanism. The Auditors of the Supplementary Compensation Mechanism shall review the accounts and report on them to the Conference of Parties.

4. Where the Supplementary Compensation Mechanism is not able to meet valid compensation claims because insufficient contributions have been collected, it may obtain credits from financial institutions for the payment of compensation and may grant security for such credits.

Chapter IV

Compensation from the Supplementary Compensation Mechanism

Article ~~19~~18 — Compensation

1. The Supplementary Compensation Mechanism shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party, ~~regardless of the State in which the operator had its principal place of business, or if it had no such place of business, its permanent residence. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according Article 4. Where the operator has its principal place of business, or if it has no such place of business, its permanent residence, in the State Party where the damage occurs. Where the damage is caused by an aircraft in flight on a flight other than an international flight,~~ compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

2. The maximum amount of compensation available from the Supplementary Compensation Mechanism shall be [3 000 000 000] Special Drawing Rights for each event. ~~Financial support given~~Payments made according to paragraph 3 and distribution of amounts recovered according to Article ~~25~~24, paragraph 2, shall be in addition to the maximum amount for compensation.

3. If and to the extent that the Conference of Parties determines and for the period that it so determines that insurance in respect of the damage covered by the Convention is wholly or partially unavailable with respect to amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport, ~~the Conference of Parties may decide that whether generally or, in relation to a particular operator following an event affecting that operator,~~ the Supplementary Compensation Mechanism shall in respect of future events causing damage compensable under this Convention, ~~provide financial support to operators for the payment of pay the~~ damages for which ~~they~~the affected operator or operators are liable according to Articles 3 and ~~4.4~~ and such payment shall discharge such liability of the affected operator or operators. The Conference of Parties may decide on a fee, the payment of which by the affected operator or operators, for the period covered, shall be a condition for ~~access to the protection given by such decision~~the Supplementary Compensation Mechanism taking the action specified in this paragraph.

Article ~~20~~19 — Advance Payments and other measures

1. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute recognition of a right to compensation and may be offset against any amount subsequently paid by the Supplementary Compensation Mechanism.

2. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may also take other measures to minimize or mitigate damage caused by an event.

Chapter V

Special Provisions on Compensation and Recourse

Article ~~21~~20 — Acts or omissions of victims

If the operator or Supplementary Compensation Mechanism proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the Supplementary Compensation Mechanism shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article ~~22~~21 — Court Costs and other Expenses

The limits prescribed in Articles 4 and ~~19~~18, paragraph 2, shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the ~~carrier~~operator has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action if that is later than the expiry of such period.

Article ~~23~~22 — Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and ~~19~~18, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death ~~and~~, bodily injury and mental injury in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respect of other damage.

Article ~~24~~23 — Additional Compensation

1. To the extent the total amount of damages exceeds the limits applicable according to Articles 4 and ~~19~~18, paragraph 2, persons who have suffered damage may, in accordance with paragraphs 2 and 3 of this Article, claim compensation from the operator.

2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has

- a) intentionally committed an act of unlawful interference; or
- b) contributed to the event by an act or omission, which:
 - i) falls within the regulatory responsibility and actual control of the operator;
 - ii) is, other than the act of unlawful interference, the primary cause of the event; and
 - iii) is done with disregard of a known, probable and imminent risk.

3. For the purposes of paragraph 2 b) iii), the senior management of an operator shall be conclusively deemed not to have disregarded a risk where, as regards the relevant area of security, the operator has adopted the applicable industry standard⁶⁵ and, at the time of the incident, held a valid evaluation certificate relating thereto. The foregoing does not limit other grounds on which the senior management may establish that it has not disregarded such risks.

Article ~~25~~²⁴ — Right of Recourse

1. Subject to paragraph 2, neither an operator nor the Supplementary Compensation Mechanism shall have a right of recourse against any person, except if that person or, if it is a legal person, its senior management, has intentionally committed an act of unlawful interference.

2. The Supplementary Compensation Mechanism shall have a right of recourse against the operator for compensation subject to the conditions set out in Article ~~24~~²³, paragraphs 2 and 3, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article ~~24~~²³, paragraph 1, have been completed.

3. Any amount recovered under paragraph 2 of this Article shall, in the first instance, be used to provide compensation for damages resulting from the event which gave rise to the recourse action, which exceed the maximum amount specified in Article ~~19~~¹⁸, paragraph 2.

Chapter VI

Assistance in case of events in States non-party

Article ~~26~~²⁵ — Assistance in case of events in States non-party

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-party, the Conference of Parties may decide, on a case by case basis, that the Supplementary Compensation Mechanism shall provide financial support to that operator. Such support may only be provided in respect of damage that would have fallen under the Convention if the State non-party had been a State Party and if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the provisions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of the Parties. The financial support shall not exceed the maximum amount for compensation set out in Article ~~19~~¹⁸, paragraph 2. If the solvency of the operator liable is threatened even if support is given, such support shall only be given if the liable operator has sufficient arrangements protecting its solvency.

Chapter VII

Exercise of Remedies and Related Provisions

Article ~~27~~²⁶ — Exclusive Remedy

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage due to an act of unlawful interference, however founded, whether under this Convention or in tort or in contract or otherwise, can only be brought against the operator and shall be subject to the conditions and limits of liability set out in this Convention. No claims shall lie against any other person for compensation for such damage.

⁶⁵

The current relevant industry standard is the IATA Operational Safety Audit standard.

2. Paragraph 1 shall not apply to an action against an individual who has intentionally committed an act of unlawful interference.

Article ~~28~~27 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article ~~29~~28 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Articles 4 and ~~19~~18 shall be reviewed by the Director, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in Article ~~28~~27.
2. If the review referred to in the preceding paragraph concludes that the inflation ~~fact~~factor has exceeded 10 per cent, the Director shall inform the Conference of Parties of a revision of the limits of liability. Any such revision shall become effective six months after the meeting of the Conference of Parties, unless a majority of the States Parties register their disapproval. The Director shall immediately notify all States Parties of the coming into force of any revision.

Article ~~30~~29 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred.
2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territorial airspace of which the aircraft was in or about to leave when the event occurred.
3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article ~~31~~30 — Intervention by the Supplementary Compensation Mechanism

1. Each State Party shall ensure that the Supplementary Compensation Mechanism has the right to intervene in proceedings brought against the operator in its courts.

2. Except as provided in paragraph 3, the Supplementary Compensation Mechanism shall not be bound by any judgement or decision in proceedings to which it has not been a party.

3. If an action is brought against the operator in a State Party, each party to such proceedings shall be entitled to notify the Supplementary Compensation Mechanism of the proceedings. Where such notification has been made in accordance with the law of the court seized and in such time that the Supplementary Compensation Mechanism had time to intervene to the proceedings, the Supplementary Compensation Mechanism shall be bound by a judgement or decision in proceedings even if it has not intervened.

Article ~~32~~31 — Recognition and Enforcement of Judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article ~~30~~29 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

- ~~f~~a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;
- b) the defendant was not served with notice of the proceedings in such time and manner as to allow him or her to prepare and submit a defence;
- c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognised as final and conclusive under the law of the State Party where recognition or enforcement is sought;
- d) the judgement has been obtained by fraud of any of the parties;
- e) ~~and the right to enforce the judgement is not vested in the person by whom the application is made; or~~
- f) the ground of refusal has been notified, before the occurrence of an event, to the Depositary by the State Party where recognition or enforcement is sought.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered; ~~or.~~

~~f) the right to enforce the judgement is not vested in the person by whom the application is made.~~

5. ~~4.~~ Where a judgement is enforceable, payment of any costs recoverable under the judgement shall also be enforceable.

Article ~~33~~³² — Regional and multilateral agreements on the recognition and enforcement of judgements

1. State Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.
2. State Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.
3. The provisions of Chapter VII of this Convention shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article ~~34~~³³ — Period of Limitation

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within three years from the date of the event which caused the damage.
2. The right of compensation according to Article ~~49~~¹⁸ shall be extinguished if an action is not brought, or a notification pursuant to Article ~~31~~³⁰, paragraph 3, is not made, within three years from the date of the event which caused the damage.
3. The method of calculating such three year period shall be determined by the law of the court seized of the case.

Article ~~35~~³⁴ — Death of Person Liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER VIII

Application of the Convention

Article ~~36~~³⁵ — State Aircraft

This Convention shall not apply to damage caused by state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Article 37 — Nuclear Damage

~~No liability shall arise under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or any amendment or addition thereto which is in force.~~

[Final Provisions to be inserted]