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French only)¹**

LEGAL COMMITTEE – 33RD SESSION

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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

**CONVENTION ON COMPENSATION FOR DAMAGES
CAUSED BY AIRCRAFT TO THIRD PARTIES
(ACTS OF UNLAWFUL INTERFERENCE)**

Joint Industry Paper

(Presented by
the International Air Transport Association;
the International Union of Aviation Insurers;
the London Market Insurance Brokers Committee;
the Civil Air Navigation Services Organization;
Airports Council International; and
the Aviation Working Group)

1. BACKGROUND

1.1 On 9.11, terrorists hijacked four aircraft, converted them into weapons of mass destruction by flying them into office buildings, and killed thousands of innocent victims – in an attempt to influence foreign policy.

1.2 Since shortly after 9.11, the International Civil Aviation Organization has been developing a new treaty designed to ensure compensation to victims of aviation-related terrorism while at the same time protecting the aviation industry from the threat of unwarranted legal and financial exposure where the industry's products and services were merely the instrumentality through which such criminal acts of terrorism were committed.

1.3 The Special Group on the Modernization of the Rome Convention of 1952 has held six meetings to develop a draft Convention on Compensation for Damages caused by Aircraft to Third Parties, in the case of Unlawful Interference ("**Aviation Terrorism Convention**").

2. DISCUSSION

2.1 This paper sets out the joint position of the above-identified organizations on the Aviation Terrorism Convention, and, as such, represents a broad and uniform industry view.

¹ English and French versions provided by the Joint Industry.

2.2 We support the Aviation Terrorism Convention, provided that revisions to the text are made ensuring:

- 2.2.1 the name of the instrument is changed to reflect the primary cause of the loss rather than the means by which the loss occurred (Title; see also Article 3);
- 2.2.2 applicability to all flights, international and domestic (Articles 2 and 12);
- 2.2.3 damages due to mental injury are excluded (Article 3);
- 2.2.4 mandatory insurance requirements recognize the “drop-down” mechanism (Article 7);
- 2.2.5 contributions to the supplemental compensation fund (“SCM”) provide equal treatment to passengers flying transit and direct routes (Article 12);
- 2.2.6 limits on aggregate compensation from, as well as contributions to, the SCM (Article 13);
- 2.2.7 consistency between the airlines’ capped liability and the availability of insurance through a mandatory “drop-down” mechanism (Article 19);
- 2.2.8 the airline’s liability cap is substantially unbreakable (Article 24);
- 2.2.9 rights of recourse within the industry are determined in accordance with an agreed industry standard (which we have suggested in the Annex), reflecting the realities of inter-industry arrangements, insurance practicalities, and appropriate allocations of risk in this context (Article 25);
- 2.2.10 that payment of funds from the SCM to those in a non State Party is linked to compliance with the terms of the instrument (Article 26);
- 2.2.11 the period of limitation is two years (Article 34); and
- 2.2.12 liability for uninsurable nuclear damage is excluded (Article 37).

2.3 Annexed hereto are our specific comments on the Aviation Terrorism Convention.

2.4 The Aviation Terrorism Convention, if adopted with the revisions set out in the Annex, would provide a sound legal framework to address the consequences of aviation terrorism, which, in accordance with the terminology used in other legal texts, are referred to therein as “acts of unlawful interference”. It would treat all victims of aviation terrorism more fairly than applicable national laws, because:

2.4.1 For third-party victims on the ground, benefits would include assurances of certain, prompt and substantial compensation – “certain” because the proceeds from airline insurance policies and the SCM would be paid to third-party victims on the basis of strict liability; “prompt” because they would not be required to undergo long and expensive trials in order to prove negligence on the part of airlines or other parties; and “substantial” because the combination of the proceeds from an airline’s insurance policy and a supplementary compensation fund are likely to exceed the assets of any airline whose aircraft is used by terrorists to inflict massive damages on third-parties.

2.4.2 Airline victims of terrorist actions would benefit from a substantially unbreakable cap on liability for losses in excess of their insurance policies (the first tier of compensation).

2.4.3 The other major participants in the aviation sector would be protected from unwarranted legal and financial exposure caused by such criminal activity through a treaty structure that channels financial responsibility to those most efficiently able to provide compensation, namely, the insured airline and the supplementary compensation mechanism, and sets out an agreed industry standard addressing the extent of operator's recourse.

2.5 These three features summarized above are essential and interconnected. They are expressed and interrelated in a manner that achieves the above-noted high-level objectives and should be ratifiable, as governments focus on the unique facts and requirements of a system addressing terrorism. Without the **substantially unbreakable liability cap** (Article 24), the **exclusive remedy provision** (Article 27), and **agreed industry standard on recourse** (Article 25, as amended in the Annex, which has no impact on victim protections), the Aviation Terrorism Convention cannot be supported by industry.

2.6 The Aviation Terrorism Convention, with the revisions set out in the Annex, will materially enhance the ability of the global insurance markets to underwrite terrorism cover and efficiently absorb underwritten losses.

2.7 The concepts in the Aviation Terrorism Convention have been tested. They are present in other treaties addressing large and unquantifiable exposures. While these concepts modify general liability rules, they are required in this specific context.

3. CONCLUSION

3.1 We urge the Legal Committee to revise the Aviation Terrorism Convention in accordance with the recommendations made in the Annex, then to recommend to the ICAO Council that a Diplomatic Conference be convened for adoption of the revised text.

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ANNEX

SPECIFIC COMMENTS ON AVIATION TERRORISM CONVENTION

The following are our specific comments on the draft Aviation Terrorism Convention. After a short comment on each point, suggested drafting is provided, marked against the current text. Articles and paragraphs that are not included and marked would remain as drafted.

We reserve the right, individually and collectively, to make supplemental comments relating to the points below and those not addressed, including, in particular (i) on whether there should be an annual aggregate limit for an individual operator's liability under Article 4, with the SCM paying compensation in the event that limit is exceeded, and (ii) in respect of the SCM generally, a topic not addressed in detail below.

Title

Comment: The title of the instrument should reflect the primary cause of the loss, not the intermediate victims of terrorist actions.

Drafting: Convention on Compensation for Damages to Third Parties caused by Acts of Unlawful Interference involving Aircraft ~~to Third Parties, in the case of Unlawful Interference~~

Article 2 — Scope

Comment: The convention should apply to domestic as well as international flights. If that were not the case (i) victims would be compensated differently based on the nature of the flight, which raises a basic fairness point in this context, (b) the SCM would be under-funded or the fees would be twice as high; (c) industry would not be protected in the domestic context; (d) the reality of global insurance policies would be disregarded; (e) EU internal market requirements would give rise to issues of compatibility with EU law; and (f) the Convention would not address the factual scenario which gave rise to 9.11, the primary reason for development of the Convention. Terrorism is an international problem, as are many of its causes and consequences. There is aviation precedent for a functional concept on the connecting factor needed to trigger application of a treaty, thus avoiding the need to employ a traditional internationality standard in this specific context.

Drafting:

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in 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 that State Party or 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 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.~~

Article 3 — Liability of the Operator

Comment: The provision establishing the principle of the operator's strict liability should reflect the proposed amended title of the instrument.

Drafting:

1. The operator shall be liable for damages sustained by third parties upon condition only that the damage was caused by the unlawful interference with an aircraft in flight.

Comment: In line with the parallel provision (Article 17(1)) in the Convention for the Unification of Certain Rules for International Carriage by Air ("**Montreal Convention**"), damages should exclude mental injury. The policy reasons for that exclusion (including risk of large scale unsubstantiated claims) are at least as strong in this context.

Drafting:

5. Damages due to death and, bodily injury (excluding mental 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 7 — Insurance

Comment: To the extent that the drop-down applies under Article 19(3), an operator's liability should be reduced. *See infra* Article 19. Correspondingly, mandatory insurance requirements to cover liability under the Convention should be reduced in such case to that extent.

Drafting:

~~Having regard to Articles 4 and 19, paragraph 3,~~ States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention, taking into account any reduction of liability under Article 19, paragraph 3. An operator may be required by the State Party 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.

Article 12 — The Contributions to the Supplementary Compensation Mechanism

Comment: The final setting and mechanics of contributions should not disadvantage transit passengers compared to those flying direct routes. In view of our comment on Article 2, the distinction between international and domestic flights should be removed.

Drafting:

The contributions to the Supplementary Compensation Mechanism shall be 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. Such contributions shall ensure equal treatment between passengers flying transit and direct routes. ~~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.

Article 13 — Aggregate limit on collection of contributions

Comment: There should be an aggregate limit on compensation paid by the SCM as well as an aggregate limit on contributions. Otherwise, the SCM's liability would carry over between periods, which, in effect, would result in the operator's funding obligation being carried forward. With this revision, the provision would address the duration of contribution as well as the amount. If damage exceeds the amount specified in this Article (three times the maximum compensation payable under Article 19(2)) during a two-year period, then the third layer of compensation, namely, State solidarity, should apply. Finally, there should be a limit on the SCM's administrative costs.

Drafting: The title should be revised as follows: **Aggregate limits relating to the Supplementary Compensation Mechanism on collection of contributions**. The text should be revised as follows:

The total amount of contributions collected, and the total compensation paid, 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. The annual administrative costs relating to the Supplementary Compensation Mechanism shall not exceed [X].*

Article 19 — Compensation

Comment: The drop-down mechanism is critical to the overall balance of interests under the Convention. It should be employed on a mandatory basis. The current wording sets an unreasonably high standard, and, moreover, is discretionary. That is the *quid pro quo* for requiring contributions to the SCM. If employed, the SCM should assume liability, rather than provide financial support. The latter approach results in the operator having an uninsured liability, and in its dependence on the mechanism and funding (including in the risky multiple loss scenario) to ensure solvency. That is not proper from a legal, financial, or policy perspective. Finally, a conforming change is needed to Article 11(1)(d).

Drafting:

3. ~~If to the extent~~ 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~~ the Supplementary Compensation Mechanism shall assume the operator's liability to pay damages under in respect of future events causing damage compensable under this Convention, provide financial support to operators for the payment of damages for which they are liable according to Articles 3 and 4. The Conference of Parties may decide on a fee, the payment of which, for the period covered, shall be a condition to such assumption of liability for access to the protection given by such decision.

Article 24 — Additional Compensation

Comment: The liability cap must be substantially unbreakable. That is the *quid pro quo* for the operator's counter-intuitive strict liability for criminal acts of terrorism. In particular, the action of

* To further maximize funds available to compensate victims, the SCM should be organized and structured to ensure that its proceeds are tax exempt. Accordingly, the brackets in Article 8(5) should be deleted.

individual employees or agents, or the specific facts relating to a terrorist event, must not break the liability cap. The only exception should be intentional acts by senior management (meaning executives, not pilots or managers). We accept the terms of Article 24(2)(a).

We believe Article 24(2)(b) should be deleted, as being outside the above-noted *quid pro quo*. Any retention of it, on which we expressly reserve our position, is predicated upon revisions that ensure an exceptionally high standard centered on the intentional acts of senior management, coupled, critically, with a corporate safe-harbor based on adoption of an agreed industry standard, which is objective, certifiable, and, with that certification, provides an absolute defense under the Convention against any attempt to break the liability cap. Accordingly, we have placed Article 24(2)(b) – (3) in square brackets.

Drafting:

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 the intent to cause damage, or recklessly and with knowledge that such damage would probably result~~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 acted with the intent to cause damage, or recklessly and with knowledge that such damage would probably result if~~disregarded a risk where, as regards the relevant area of security,~~ the operator has adopted the~~an~~ applicable industry standard* 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 — Right of Recourse

Comment: The right of recourse is an inter-industry allocation of risk and insuring responsibility. That allocation, in turn, is impacted by cross-indemnities, which themselves reflect the structure and economics of the air transport industry. In light of the foregoing, we propose revisions to Article 25. These revisions have no impact on victim protection issues under the Convention.

Drafting:

1. Subject to paragraphs 2 and 3 of this Article, 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.

* Without limitation, an applicable industry standard would include the IATA Operational Safety Audit standard (IOSA) or a comparable program that applies exclusively to security standards.

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, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 24, paragraph 1, have been completed.

3. Nothing in this Convention shall prejudice any right of an operator or its insurer to pursue a recourse claim under applicable law against a third party with an operational interest, but only to the extent of:

(a) such third party's relative percentage of the total fault of all persons causing damages in connection with an event; and

(b) the insurance maintained by such third party against such damages at the time of the event and which would be payable to the operator or its insurer in connection with that recourse claim.

For purposes of the foregoing, a "third party with an operational interest" means a person other than the operator who provides operational services relating to an aircraft, and, without limitation, excludes (i) lessors and financiers of an aircraft, its engines, or other component parts, and (ii) the manufacturer of the aircraft, its engine or other component parts to the extent of any claims relating to the approved design of an aircraft, its engines or other component parts or any design warning relating to such aircraft, engines or components.

Under no circumstances shall the foregoing permit a recourse claim for amounts above the liability limits set out in Article 4.

4. The applicable law referred to in paragraph 3 of this Article shall be that agreed between an operator and a third party, whether or not that law has a connection with the parties or with an event, and, absent such an agreement, shall be the law selected by the courts with jurisdiction over the recourse claim. The courts of a State Party chosen for this purpose by an operator and a third party have jurisdiction in respect to any claim brought under paragraph 3 of this Article, whether or not the forum has a connection with the parties or with an event. Such jurisdiction shall be exclusive unless otherwise agreed between the parties. Any such forum selection agreement shall be in writing and concluded in accordance with the formal requirements of the law of the chosen forum.

35. 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, paragraph 2.

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

Comment: SCM support in the case of damage in a State non-party should be based on the principle that victims and industry have substantially the same rights as if the damage occurred in a State party. Beyond general fairness, any other approach would provide a disincentive to ratify the Convention.

Drafting:

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 terms and conditions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of Parties. The financial support shall not exceed the maximum amount for compensation set out in Article 19, 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.

Article 34 — Period of Limitation

Comment: In line with the parallel provision (Article 35(1)) in the Montreal Convention, the period of limitation should be two years.

Drafting:

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within twothree years from the date of the event which caused the damage.
2. The right of compensation according to Article 19 shall be extinguished if an action is not brought, or a notification pursuant to Article 31, paragraph 3, is not made, within twothree years from the date of the event which caused the damage.
3. The method of calculating such twothree year period shall be determined by the law of the court seized of the case.

Article 37 — Nuclear Damage

Comment: Insurance is not available for liability for nuclear damage. As aviation insurance policies have a complete exclusion for nuclear damage, the economic logical of having operators strictly liable does not apply to this risk.

Drafting:

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.~~