LC/33-WP/8-4
25/4/08

LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April – 2 May 2008)

Agenda Item 8: Report on work done at the Session

DRAFT REPORT ON THE WORK OF THE LEGAL COMMITTEE DURING ITS 33RD SESSION

The attached paragraphs 3:6 to 3:27 of the draft Report of the Legal Committee relate to Agenda Item 3.

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(5 pages)

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

3:6 Following an invitation by the Chairman to make general statements, one delegation expressed its appreciation for the reports which had been presented by the Rapporteurs, the Council Working Group and the Secretariat. In the view of this delegation, the Conventions represented a balance between the interests of the victims and the operators .This delegation was confident that the Committee would be able to finalize the work on the draft texts and stated that it would be proud to propose Rome as venue for the Diplomatic Conference. Taking note of this statement, the Chairman expressed the view that the Council would look favorably to the suggestion of hosting the Diplomatic Conference in Rome.

3:7 The Committee thereafter agreed to proceed with an article-by-article review of the Unlawful Interference Compensation Convention as set out in Appendix B of LC/33-WP/3-1, on the understanding that the Rapporteur of the General Risks Convention would track consequential changes to the latter text as necessary.

3:8 With respect to **Article 1 a),** one delegation noted that the French text needed to be aligned so as to accord with the wording which is used in The Hague and Montreal Conventions (*infraction pénale*).

3:9 The Rapporteur of the Unlawful Interference Compensation Convention referred the Committee to paragraph 3.2.1 of his Report and the potential problem in a situation where a State Party to the Unlawful Interference Compensation Convention might not have ratified one of the specified conventions or an amendment thereto. In this context, the Chairman and the Secretary stated that the security conventions concerned had attained almost universal acceptance.

3:10 One delegation noted that the Committee had several options available to resolve this issue: 1) to rely on the definitions of the existing security conventions which are almost globally accepted; 2) to leave the definition of acts of unlawful interference to the determination of the State where the accident occurred; or 3) to devise an autonomous definition only for the Convention at hand. This delegation expressed its preference for the first option. Another delegation was of the view that the expression “which is in force among the States Parties” may give rise to difficulties; certainty in the application of the Convention was required. This delegation preferred option 3. Another delegation suggested that it would be prudent to rely on the virtually global acceptance of the security conventions. At the time of the Diplomatic Conference, it would be known if any new protocols would be adhered to, and if such amendments were in force in the State where the damage occurred, it would be possible to accommodate this. Another delegation suggested to consider a self-standing definition, for sake of legal certainty.

3:11 In his conclusion on this point, the Chairman noted that the Montreal and Hague Conventions had garnered almost universal acceptance and that it would therefore be appropriate to refer to them without further qualification for them being in force. He suggested to have the text accordingly end after the term “1971”. Insofar as amendments to these instruments which were in force in the relevant State were concerned, the Chairman invited the Drafting Committee to find an appropriate wording.

3:12 With respect to the wording of **Article 1 b),** the drafting Committee was invited to review the text so as to possibly avoid the redundant use of the word “event”.

3:13 In response to a query raised by one delegation, the Chairman noted that the definition of "in flight" in **Article 1 c)** had been broadened when compared to the 1952 Rome Convention on account of the fact that the new text intended to cover the situations which are addressed in the Tokyo, Hague and Montreal security conventions respectively. In relation to the term "in flight", the Rapporteur invited the Committee to take note of LC/32-WP/3-1 — Introductory Note, which provided an annotated text indicating the origin of the individual articles.

3:14 **Articles 1 d), e), f) and g)** were endorsed by the Committee.

3:15 Referring to a point which had been addressed in the Report of the Rapporteur, one delegation suggested in relation to **Article 1 h)** to receive clarification from the aviation insurers regarding the situation of the owner of the aircraft hull and the contemplated protection of these persons in case of mid-air collisions under the Unlawful Interference Compensation Convention. This delegation further stated that the 1999 Montreal Convention had established unbreakable liability limits for consignors and consignees of cargo and queried whether the solution currently foreseen in Article 1 h) circumvented these hard liability caps. Addressing the first part of the query, the observer from the insurance industry explained that the insurer of the operator which was not at fault would have a subrogated right against the operator at fault. The observer stated that in this situation the innocent operator would be regarded as third party, adding that not all aircraft, particularly aircraft involved in general aviation, were insured on a hull basis. It was thus correct to treat them as third party for the purpose of the Unlawful Interference Compensation Convention. Regarding the first issue, the Chairman concluded that it would be appropriate to cover the owner of the hull under the new convention. Commenting on the second part of the query raised earlier, the Chairman wondered if it was indeed intended to provide for a windfall of sorts for the benefit of the cargo owner or consignee who already had the possibility of receiving full compensation beyond the 17 SDR per kilo limit by virtue of a special declaration of interest. In this context, one delegation suggested to defer a final decision on this matter upon the Committee's review of Article 5 (Events involving two or more operators or other persons). The Committee agreed with this approach.

3:16 One delegation submitted for consideration to provide a definition for the term "senior management" mentioned in Article 24.

3:17 The Committee thereafter considered **Article 2** (Scope). With regard to this article, the Rapporteur invited the Committee to take note of his observations contained in paragraph 3.3 of the Report, which had set out the pros and cons with respect to the application of the new regime to domestic aviation.

3:18 Responding to a query by one delegation in relation to paragraph 1 and the formulation "whether or not a State Party", one delegation explained that there had been a policy decision to also include into the ambit of the convention damage caused by aircraft of a non-State Party. This was done on account of the objective of victim and operator protection, the delegation explained. Addressing another query, the Chairman explained that the funding of the SCM is based on a departure tax which would be levied from all aircraft leaving from a State Party, including aircraft from non-States Parties.

3:19 In reviewing paragraph 1 and the wording "in another State", the Chairman observed that the convention would only apply to a foreign air carrier and would *a priori* be not applicable to domestic carriers engaged in international operations unless a declaration was made. The Chairman invited the Committee to reflect on this point. Addressing this point, one delegation expressed the view that the current wording suggested that operators registered in a State Party and operating internationally would not be covered. This delegation provided the hypothetical example of a flight from London to a point in South Africa conducted by a carrier registered in South Africa. Damage occurring in South Africa would

therefore appear to fall outside the scope of the convention, which would not be the intended result. This delegation proposed to insert additional text to ensure that international flights of the carrier would also be covered. The delegation proposed to insert in line four the term “that State Party or” before “another State”. Having taking note of the proposal, the Chairman wondered whether this solution would render paragraph 2 and its optionality useless.

3:20 On the subject of domestic application, one observer referred the Committee to LC/33-WP/3-9, in which it was proposed to make the convention applicable on a mandatory basis to domestic as well as international flights. In the view of this observer, it was not justified to treat victims differently based on the nature of the flight. This approach would also provide a better funding basis for the SCM, taking into account the fact that over 50 per cent of all scheduled air traffic was domestic in character. This observer favoured the deletion of paragraph 2 while endorsing the notion which had been put forward with respect to an amendment to paragraph 1.

3:21 In the ensuing discussion, another delegation supported an amendment to Article 2 to the end that the international flight of a carrier of a State Party would be covered. In the view of this delegation, it represented a fair solution as these carriers contributed to the funding of the SCM. This delegation favored to retain the opt-in provision set out in paragraph 2 as it provided comfort to those States which would be reluctant to embrace the notion that contributions collected from domestic flights of one State would be used to compensate a damage resulting from the domestic flight of another State. Another delegation suggested to review this point from the perspective of where the damage occurred and to devise a solution which from the point of view of the State Party concerned provided the best solution with regard to victim and operator protection. This delegation wondered if the need to respect the concerns of States regarding domestic carriage would be better addressed in an opt-out clause instead of an opt-in mechanism. On the issue whether to devise an opt-out mechanism as opposed to an opt-in clause, the discussion revealed that a majority of delegations preferred an opt-in clause. In this respect, the Chairman noted that there had been some discomfort with the notion of a mandatory application to domestic flights, as had been proposed earlier by one observer. One delegation expressed caution with regard to a change of focus from the “operator” to “traffic”.

3:22 In his conclusion on this point, the Chairman noted that paragraph 1 should properly convey that the convention would apply to both international and domestic carriers and invited the Drafting Committee to consider for paragraph 2 an opt-in clause to cover domestic flights, as opposed to domestic carriers.

3:23 The Committee thereafter endorsed **Article 2, paragraph 3** without discussion.

3:24 The Committee continued its deliberations with the review of **Article 3** (Liability of the Operator)**.** With respect to paragraph 1, one delegation queried as to the reason why the expression “or by any person or thing falling there from”, which was featured in the 1952 Rome Convention, had been deleted. One delegate, the Chairman of the Council Special Group, explained that the deletion was due to a drafting matter, not a policy decision, on account of the fact that ultimately the damage was caused by the aircraft.

3:25 One observer referred the Committee to LC/33-WP/3-9, which contained a proposal to amend paragraph 1 due to the fact that the damage was caused by an act of unlawful interference with an aircraft in flight. This observer also proposed to change the title of the Convention to underline the act of unlawful interference as the cause of the damage. Commenting on the latter proposal, one delegation stated that such title change would do no harm. As regards the former proposal, several delegations expressed support to more prominently reflect the element of an act of unlawful interference as the primary cause of the damage in paragraph 1 of Article 3, and to amend the text accordingly. In his summary on this point, the

Chairman noted that there were no objections regarding the proposed change to the title of the convention. In relation to paragraph 1, the Chairman invited the Drafting Committee to consider to insert in an adequate way the notion of “unlawful interference” along the lines of what had been suggested by the observer. The Secretariat was invited to review the French text of paragraph 1.

3:26 With respect to **Article 3, paragraph 2**, the Drafting Committee was invited to explore whether it would be possible to clarify this provision with a view to establishing a closer link between the act of unlawful interference being the basis for compensation, taking into account the existing definition of the word “event”. In this context, one delegation reserved its position and cautioned not to inadvertently burden the victim with a duty of proving that the damage was caused by an act of unlawful interference.

3:27 In relation to environmental damage, **Article 3, paragraph 3**, the Rapporteur recalled that it was considered appropriate to leave this matter to the State concerned as the liability regime for such type of damage differed from State to State. One delegation, supported by another, expressed the view that the current draft was not sufficiently clear. Unlike other conventions such as in the field of nuclear damage, the text did not establish any criteria of what constituted environmental damage, nor took into account the potential economic impact in terms of insurability or the lack thereof, and the potential for a substantial lessening of funds of the SCM. Noting that the notion of environmental damage was not adequately addressed in legal systems of many developing countries, one delegation stated that it would be necessary to create legal certainty and a level playing field. This delegation proposed to insert the wording …“or where such law does not exist as determined by the Secretariat of the Supplemental Compensation Mechanism” after the term “State Party” in paragraph 3.