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 3:28 to 3:90 of the draft Report of the Legal Committee relate to Agenda Item 3.

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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

3:28 In his summary of the discussion which had taken place up to this point, the Chairman noted that in some States there may not be any legislation regarding environmental damage as these were treated as ordinary tort claims or common law remedies in terms of restitution of property and clean-up costs; in other jurisdictions more sophisticated legislation may be in place. The question therefore remained whether it would be the Committee's intent to task the Secretariat of the SCM with devising the rules regarding environmental damage or to leave this to the national law of the State concerned. The Chairman stated that it might not be acceptable for some States to have a foreign entity such as the SCM dictate the rules. The Committee was invited to reflect on this point further. Some informal discussions indicated a willingness that certain aspects relating to environmental damage could be dealt with in detailed regulations which could be promulgated by the Conference of Parties (COP); he drew attention to the draft "Guidelines on Compensation" found as the Appendix to LC/33-WP/3-11, presented by the SCM Task Force. In the case of a shortfall of funds, draft Article 23 (Reduced Compensation) set out how the funds were to be distributed.

3:29 One observer stated that the term "environmental damage" was wide and could get broader. It could well be taken to include nuclear damage. The Joint Industry Paper (LC/33-WP/3-9) pointed out that insurance is not available for nuclear damage and proposed a re-draft of Article 37 (Nuclear Damage). It was necessary either to exclude nuclear damage from the scope of Article 3, paragraph 3, or to adopt the proposed re-draft of Article 37.

3:30 It was the interpretation of one delegation that under Article 3, paragraph 3, should there be an event in a jurisdiction without environmental laws, there would be no compensation even if there was environmental damage, and any mechanism to assess and compensate would be excluded; it was therefore necessary to re-draft Article 3, paragraph 3, to cater for these jurisdictions. The Chairman responded that in some States with no special environmental legislation, such damage would be handled like any other tort damage. One delegation supported by another accordingly wondered whether paragraph 3 could be deleted, as in States where no specific legislation existed recourse could be had to general laws; another delegation believed that deletion could enhance acceptability of the convention.

3:31 However, one observer responded that this last suggestion would go against the exclusive remedy concept; the Committee should try to avoid resort to national laws outside the framework of the convention. Another observer believed that there should be a reference to environmental damage in Article 3 because it was linked to the exclusive remedy provision; if the reference was deleted, there might be a temptation to believe that environmental damage was outside the scope of the convention and the cap would not apply. One delegation supported this last point, indicating that otherwise the carriers might not be sufficiently protected, and this would defeat a principal purpose of the convention. Another delegation would also oppose deletion of paragraph 3 because, firstly, the modernization of Rome exercise was based on proposal by Sweden which emphasized the environmental aspects and, secondly, recent conventions in other fields (e.g. nuclear, maritime pollution) provided for environmental damage.

3:32 It was the view of one delegation that if the paragraph was deleted, compensation for such damage would be covered by the general law. The Committee could say that environmental damage is compensable under the law: if it is specific law or general law, that would achieve the result of covering environmental damage under the convention.

3:33 The Chairman observed that environmental damage was essentially damage to property and was compensable under special legislation in some States and under the general law in others. There was a concern expressed that such damage should be dealt with lest the exclusive remedy clause was affected. It was tempting, and would be simple, to delete paragraph 3 and allow such damage to be considered as any other damage, governed by the rules in the convention. On the other hand, environmental damage currently had a high political profile and questions would be raised if it was not specifically covered in the convention. Therefore, unless a real prejudice would be created, a clause on environmental damage could be included which did not give rise to as many difficulties. It could be close to the current text. It would not be necessary to keep "if and" because such damage was compensable; "insofar as" took into account the extraordinary remedy and should be kept; it was also sensible to retain "law of the State Party in the territory of which the damage occurred." This issue should also be considered when dealing with Article 37 (Nuclear Damage). The Committee **decided** to refer this paragraph to the Drafting Committee, which was requested to take into account the comments made.

3:34 One delegate queried whether environmental damages could be considered to be damages suffered by third parties as defined in Article 1. It was explained by a delegation that environmental damage could affect two kinds of third parties: persons on the ground and States. This is why States were included in the definition of third parties.

3:35 **Article 3, paragraph 4** was **accepted** without comment. The paragraph states that punitive, exemplary or any other non-compensatory damages shall not be recoverable.

3:36 The Committee then considered **paragraph 5**, dealing with the types of compensable damages. On the specific issue of mental injury, the Rapporteur on this draft Convention reminded the Committee of his comments found in paragraph 3.5.1 of LC/33-WP/3-3. One observer also recalled the Joint Industry Paper (LC/33-WP/3-9) where the presenters suggested that mental injury should be excluded; specific wording to achieve this objective could be found in the Annex to the said paper. The observer explained that the system should provide for certain and prompt compensation, but the inclusion of mental injury might run counter to such objective. Such inclusion would not follow the principles of the Montreal Convention of 1999: passengers could not recover but third parties could, under very wide circumstances. Verification of the existence of mental injury could be difficult. Tests could be costly and the diagnosis subjective. Treatment could be lengthy. Quantum of damages should be established in a most simple fashion. If mental injury was not explicitly removed, the consequences could be dramatic, with the likelihood of upward pressure on insurance premiums. Deletion was necessary in a risk allocation scheme.

3:37 One delegation wondered whether such damages would be insurable and whether it reflected socio-cultural differences around the world; if both aspects were answered in the positive, it could go along with the text.

3:38 One delegation shared the concerns of the Rapporteur and the Joint Industry. Compensation for mental injury was too broad if it covered, for example, a television viewer of the event. It proposed to amend the last line of paragraph 5 as follows: "… or from a reasonable fear of direct exposure …".

3:39 A different view expressed was that the current draft represented progress compared to the Montreal Convention of 1999. It is true that Montreal 1999 made no explicit reference to mental injury, but it also did not prevent compensation for such damage.

3:40 Another delegation explained that its State had a statutory compensation scheme for personal injury and damages were compensated by the State through the scheme. It was important for the convention to allow claims brought in this State to be dealt with through the statutory scheme rather than through the courts.

3:41 One delegation believed that deletion of any reference to mental injury went too far. The language at the end of paragraph 5 was perhaps too broad and it suggested the following: "or from direct exposure to death or bodily injury."

3:42 The delegate of one State, Chairman of the Council Special Group (SG-MR), stated that in the Group, it was agreed that compensation to victims should be at least as good as that provided in Montreal 1999 and that the Group had tried to properly define what was a reasonable solution. He agreed that persons who viewed the event remotely or through the media should be excluded from recovery. In addition, the solution should also be insurable.

3:43 It was explained by an observer that standard insurance policies covered mental injury arising from physical injury, which was a very direct causal link.

3:44 A number of other delegations expressed the view that mental injury should be compensable, but that the circumstances of recovery should be narrower than the current draft; some wished that the Drafting Committee consider the suggestion in paragraph 3.41 above. The Chairman concluded that there was **agreement** to refer the matter to the Drafting Committee to consider the language "… or from direct exposure …"; persons watching on television should not be compensated.

3:45 The observer delegation which had earlier referred to LC/33-WP/3-9 which proposed the explicit exclusion of mental injury stated that if such injury was to be included, it should be limited to bodily injury. It could be difficult to determine if a case of mental injury was caused by an event and was not pre-existing.

3:46 The Committee then examined **Article 4** (Limit of Operator's Liability). One delegation believed that a per-person cap should be introduced, in line with the Rome Convention (1952) and its 1978 Protocol. Adoption of a cap for death or bodily injury would be beneficial to the operators and their insurers. The Chairman agreed that the convention had no cap on the amount an individual could claim; he noted that one of the features of Montreal 1999 was to eliminate those per-person caps.

3:47 The Rapporteur on this subject drew the attention of the Committee to paragraph 3.6.1 of his Report.

3:48 One delegation suggested that the phrase "liability of the operator" should be aligned in the English and French versions, and this was **referred** to the Drafting Committee.

3:49 The Delegation of Germany referred to the discussion and proposals on breakability in LC/33-WP/3-5 while that of Japan introduced LC/33-WP/3-16. The presenters agreed, at the suggestion of the Chairman, to defer substantive consideration of these papers to a more appropriate time in the future.

3:50 One delegation sought clarification of the words "each aircraft and event" in the chapeau, taking into consideration Article 5, paragraph 1. Could it mean "each aircraft involved in an event"?

3:51 Thereupon, the Committee considered **Article 5** (Events involving two or more operators or other persons). A delegate, Chairman of the SG-MR, responding to the above query explained that Article 5 dealt with the situation where more than one aircraft was involved in an event causing damage. Article 4 made clear that it is per aircraft involved in the event; it is a limitation per aircraft. Article 5 clarified this and provided for the interaction between the entities. Perhaps the drafting could be tightened by the Drafting Committee.

3:52 It was explained by a delegation that the words “per event” was added because of current practices in relation to war risk insurance. An observer added that after 9/11, the insurance market only provided third-party liability cover for war and terrorism risks on an aggregate basis. There was no more per-event cover for third-party liability.

3:53 Referring to Article 5, **paragraph 1**, and the issue of third parties, one delegation proposed that passengers and cargo owners should be subject to the 1999 Montreal Convention limitations. It was unfair to allow consignors and passengers to obtain compensation which exceeded the Montreal 1999 limits by using this convention.

3:54 The Chairman noted that in the definition of third party, part applied only in respect of collisions. One suggestion was that this Committee should not create a windfall situation for shippers or consignees of cargo. The **Drafting Committee was requested** to ensure elimination of potential windfall situations for consignors or consignees of cargo.

3:55 In relation to Article 5, **paragraph 2**, one delegation stated that liability of the operator was strict and its degree of fault or negligence was irrelevant and not considered. Therefore, it was doubtful if one should speak of their degree of contribution to the damage. It proposed replacement of paragraph 2 by a provision taken from a 1960’s draft convention on aerial collisions, to the effect that if none of the operators were at fault, liability should be in proportion to the respective masses of aircraft.

3:56 One delegate, Chairman of the SG-MR, stated that the proposed modification still depended on a determination that the operators were not at fault, which introduced the notion of contribution to damage, so perhaps the 1960’s text was not that different from paragraph 2. One could envisage getting rid of fault-based liability and relying purely on relative weight of the aircraft.

3:57 The Chairman invited industry observers to present their views on this issue; the Committee would resume its discussion of this issue at a later stage when this was done.

3:58 On **Article 6** (Advance Payments), one delegation advocated replacement of “damage” by “compensation” as the former connoted responsibility. The Drafting Group was **invited** to examine this proposal in relation to Article 6 and also throughout the convention.

3:59 The Committee next considered **Article 7** (Insurance).

3:60 One delegation noted that Article 4 set limits only for each aircraft and event. If there were more than one event, the operator’s liability could increase accordingly. How many events should an operator prepare for by having insurance? Words should be added in Article 7 to the effect that an operator needed to maintain insurance for only one event at a time.

3:61 An observer explained that insurance for each aircraft and event was no longer available from the market. The only operators which could obtain per aircraft per event insurance were those with certain government guarantees. It would be sensible to include in Article 7 a provision similar to European Union (EU) Regulation 785/2004 so that when insurance was not available on a per aircraft per event basis, an aggregate basis would suffice.

3:62 One delegation stated that the first layer rested on the availability and security of insurance but it was not certain whether Article 7 would guarantee that. What was “adequate” insurance could be quite difficult to determine depending on what was meant by “each aircraft and event”. Availability of insurance changes over time. The Article was not flexible enough to accommodate such changes. The COP could be given the power to determine the insurance requirements.

3:63 Further clarifications were provided by an observer. He stated that prior to 9/11, war and terrorism cover for third-party liability was on an each event each aircraft basis. After 9/11, cover was provided on the basis of US$ 1 billion for any one occurrence or US$ 2 billion aggregate. Some policies provided only for US$ 1 billion on an aggregate basis and the number of aircraft involved did not matter. Under the EU Regulation, aggregate limits are deemed to be in compliance with the requirements of adequate insurance.

3:64 The Chairman suggested that a **small group on insurance** be formed to draft a text which would reflect the reality of the insurance market, and which would provide States with the necessary assurances; this proposal was **accepted** by the Committee. The small group was made up of delegations of Canada, Japan, Singapore, IATA and LMBC.

3:65 One delegation questioned the worth of State guarantees. The Committee **agreed** that the small group on insurance should consider this also.

3:66 In considering **Article 8**, one delegation was of the view that there is no need to create an entity outside ICAO to administer the fund, since this responsibility could be carried out by ICAO at less cost and with greater comfort to Contracting States. To this end, the delegation proposed to change **paragraphs 3 and 5** to read as follows, respectively:

3:67 "3. The Supplementary Compensation Mechanism shall be constituted as a special agency of the International Civil Aviation Organization destined to the administration of the financial fund and shall have its seat at the same place of ICAO".

3:68 "5. Supplementary Compensation Mechanism, as an international organization, shall enjoy tax exemption and such other privileges as are recognized to ICAO".

3:69 Four delegations expressed support to these proposed amendments, while another four delegations did not agree thereto, considering that the burden of administering the Fund should not be imposed on ICAO and that a separate, solely dedicated entity was preferable.

3:70 One delegation, noting that the titles of Chapter III and Article 8 were equal, proposed to change the title of the Article to "Constitution and Objectives of the Supplementary Compensation Mechanism".

3:71 Another delegation proposed to divide **paragraph 4** into two paragraphs, one containing the first sentence of the current text establishing the legal capacity of the Supplementary Compensation Mechanism, and the other dealing with the related obligations of the States Parties. The same delegation found that the French version of **paragraph 6** was not and should be aligned with the English version.

3:72 One delegation observed that the cross-reference to Article 19, paragraph 2 referred to in paragraph 2 a) should be to Article 19, paragraph 3.

3:73 Following observations on the provisions of Article 8 dealing with privileges and immunities, the Chairman asked the Secretariat to review such provisions in the light of similar provisions existing in other conventions.

3:74 The Chairman further decided to set up a Second Group of Friends of the Chairman, composed of Brazil, Italy, Nigeria, Singapore and Sweden and chaired by Dr. Emilia Chiavarelli from Italy, to consider all proposed amendments to Article 8, having regard in particular to other experiences such as the role of ICAO under the Nordic Joint Financing Agreements of 1956 and as Supervisory Authority of the International Registry under the Cape Town Convention and Protocol of 2001, as well as the experience of the Oil Pollution Fund, in which the proposals of the Special Group were inspired.

3:75 The Committee, considering that **Articles 9 and 10** were closely linked to Article 8, decided to defer the discussion of the latter article until the results of the Second Group of Friends of the Chairman are available.

3:76 With respect to **Article 11**, one delegation proposed that the word "may", appearing in the beginning of **paragraph 1 d)**, should be replaced by "shall" and that a time-line should be fixed for the Conference of Parties to take the final decision.

3:77 Considering that the question of establishing a time-lime for the Conference of Parties was linked to Article 10, it was decided to defer further discussion of Article 11 until the discussion of Article 10.

3:78 As regards **Article 12**, one delegation, supported by three other delegations, expressed the view that there did not seem to be a justification to exclude the general aviation from contributing to the Supplementary Compensation Mechanism, considering that it would also benefit from the system. It was explained that the Special Group concentrated solely on the commercial aviation because it would not be practical nor economically viable to collect contributions from the users of general aviation.

3:79 In view of this explanation, it was decided that the general aviation should be included as a general principle, with the possibility of exemption when the cost of collecting the related contributions would be excessive in relation to the money to be collected. This Article was referred to the Drafting Group to be reviewed accordingly.

3:80 In considering **Article 13**, one delegation suggested that this Article should either be added to Article 15 as paragraph 2 or be placed immediately after the latter article due to the linkage between the two articles. It was decided to send it to the Drafting Group to this effect.

3:81 One observer proposed to amend this article in accordance with the wording suggested in the Annex to working paper LC/33-WP/3-9 to fix an upper limit to the amount to be paid by the Supplementary Compensation Mechanism. However, this proposal was not supported during the ensuing discussion and, therefore, was not approved.

3:82 As regards **Article 14**, it was noted that the last sentence of the second paragraph required alignment between the English and French versions (i.e. "in respect of a State Party" and "may not be used"). While the Chairman noted from the various interventions that the fairness principle which this provision aimed at was agreed upon, this paragraph was referred to the Drafting Committee for reflecting it properly. One delegation also wished that the principles of uniformity and non-discrimination as in the first sentence of the second paragraph be expressed more strongly so as to further ensure that the amount of contributions be equal whatever the nationality of contributors. In this connection, the Chairman of the Special Group drew attention to that the last sentence of the first paragraph of Article 15 referring to equal period and rate for all States Parties. Regarding the first paragraph, one observer suggested that there should be a fixed limit for contributions to the Fund. However, noting the second sentence in the second paragraph of Article 15, the Committee did not endorse this view.

3:83 After the Chairman of the Special Group had provided explanations on the background of **Article 15**, the Committee was satisfied therewith and considered **Article 16**. One delegation proposed to improve the second paragraph by adding the words “and ought to be collected” after “it has collected” so as to cover cases where no contributions were levied by an operator. In the same paragraph, another delegation also suggested to add the words “and payable” after “the amount due”. The Drafting Committee was tasked to address both proposals.

3:84 Concerning **Article 17**, following background comments from the Chairman of the Special Group, one delegation questioned the meaning of “loss” in the third paragraph, wondering in relation with Article 12 whether the State would be made liable for failure to ensure contributions from general aviation operators. This was supported by another delegation which was concerned about any discretionary recommendations of the Director under the last sentence of this paragraph, suggesting that guidelines should be developed therefor. The Chairman clarified that the loss would cover monies not collected for failure to provide due information under paragraph 2, and indicated that this clause was rather one of moral persuasion since it might be somehow illusive to institute legal action against a State. One delegation further observed that the Draft Regulations in LC/33-WP/3-8 would cover this issue with reference to Article 17 in terms of denial of compensation as modelled after the IOPC approach. In respect of the first paragraph, another delegation suggested that the word “ensuring” be added after “a view to”. This was left to the Drafting Committee.

3:85 Another delegation, with reference to Articles 16 and 17, sought the establishment of a mode of settlement of disputes. The Chairman concurred that this was certainly to be expected as an important ingredient for the success of the convention but observed that it was ICAO’s practice to leave such final clauses to the Diplomatic Conference.

3:86 The Chairman of the Legal Committee then announced the composition of the Drafting Committee: Argentina, Canada, Chile, China, France, Germany, Japan, Lebanon, Russia, Singapore, South Africa, Sweden, United Kingdom and United States of America, as well as IATA and AWG.

3:87 Regarding **Article 18**, one delegation submitted that guidelines would be desirable in respect of credits and securities mentioned in **paragraph 4**, alike the draft Guidelines on Investments referred to in paragraph 2. The Chairman of the Special Group informed that this proposal was actually pre-empted by the Task Force which was actually working on this matter, and that such material would be available for the Diplomatic Conference. One observer also proffered that the administrative costs of the SCM should be subject to a yearly limit. After indication from one delegation that such administrative issues were addressed by the Group chaired by Italy, it was agreed to consider this point when the Group would report.

3:88 Still on Article 18, in response to one delegation which found that the terms “highest degree of prudence” in paragraph 2 were vague, the Chairman of the Special Group advised that this wording had been modelled after similar provisions in IOPC. Concerning paragraph 4, the same delegation was of the view that credits had to be treated with extreme caution and had to be subject to conditions as in Article 20, first paragraph, i.e. decision of the COP and in accordance with guidelines. This was supported by one delegation which opined that such decisions could not be left to the Director alone. Another delegation affirmed that, in the absence of such conditions, it might be difficult for some States to ratify the convention. After one delegation actually noted a veiled reference to COP in Article 14, paragraph 3 (f), the Chairman concluded that there was agreement to involve the COP in this process as well as to have guidelines and that the Drafting Committee would consider the best place for such conditions, e.g. in Article 9 or in Article 18.

3:89 The Committee then proceeded to its consideration of **Chapter IV** (Compensation from the Supplementary Compensation Mechanism), starting with **Article 19**. With respect to the last part of **paragraph 1**, it was confirmed in connection with the discussions on Article 2 that the Drafting Committee would reflect a due reference to domestic "carriers", rather than to the "operator". As one delegation had reminded of proposals in LC/33-WPs/3-5 and 3-6 for amending the first paragraph, it was decided to consider them as part of a package when considering the issue of breakability as a whole. Concerning **paragraph 2**, the Chairman observed that figures in brackets are not a legal matter *per se* and would be for discussion at the Diplomatic Conference.

3:90 A discussion ensued on **paragraph 3** of Article 19, regarding the drop-down feature. After the Rapporteur had summarized the comments in Section 3.12 of his Report, one delegation proposed that wording to be added after "air transport" to the effect that some operators only might be protected by the drop-down since adequate insurance might not be available to some operators while others might find due coverage. One observer noted that, while agreeing with the substance of the proposal, its wording might restrict the scope of the clause by conditioning the drop-down to the occurrence of an aviation-related event while insurance markets may fail due to events in other sectors. This observer also submitted that the drop-down should be mandatory given the high standard for its triggering. Referring to LC/33-WP/3-9, it further stated that in this case the SCM should assume liability rather than merely providing compensation to the operators. One delegation, supported by another one, expressed its concerns about the observer's proposals considering that not so scrupulous operators would count on the SCM's intervention and would be not diligent enough. Given time constraints, the Chairman deferred discussion on this point. On the previous proposal from one delegation, considering that the Chairman of the Special Group had reminded that the drop-down was aimed at supporting the continuation of the air transport as a whole, the Chairman of the Committee asked that a precise text be submitted by the delegation to the Drafting Committee.