



**WORKING PAPER**

**ASSEMBLY — 37TH SESSION**

**LEGAL COMMISSION**

**Agenda Item 58: Progress report on the item “Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks”**

**REPORT OF THE WORK OF THE PREPARATORY COMMISSION FOR THE ESTABLISHMENT OF THE INTERNATIONAL CIVIL AVIATION COMPENSATION FUND**

(Presented by Canada, Singapore, South Africa and the United Kingdom)

**EXECUTIVE SUMMARY**

This paper presents supplementary information on the work of the Preparatory Commission for the Establishment of the International Civil Aviation Compensation Fund established by Resolution of the International Conference on Air Law that concluded on 2 May 2009.

**Action:** The Assembly is invited to:

1. note the additional information provided in this paper; and
2. urge States with experts enjoying the necessary qualifications and experience to join in the work of the Preparatory Commission as observers.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective <b>B</b> as it aims at enhancing global aviation security by neutralizing the financial effects of terrorism and Strategic Objective <b>F</b> as it provides information on progress in preparing the implementation of an international air law instrument.
<i>Financial implications:</i>	No additional resources required.
<i>References:</i>	Doc 9920, <i>Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft. Final Act of the International Conference on Air Law</i> , (Montréal, 20 April to 2 May 2009). Assembly Working Paper A37-WP/31.

## 1. INTRODUCTION

1.1 The International Conference on Air Law held in Montreal from 20 April to 2 May 2009 adopted the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft*. That innovative Convention implements the notion of claims channelling and limits the liability of aircraft operators to insurable amounts and establishes an international organization with legal personality named the International Civil Aviation Compensation Fund to provide compensation for damages in excess of the operators' limits. The Fund will provide the compensation and other forms of financial support to victims fairly in accordance with the terms of the Convention. The organization's principal source of funds will be contributions collected in respect of passengers and cargo departing on international flights. Passengers and cargo departing on domestic flights will also contribute wherever a State has by formal declaration decided to apply the Convention domestically. General aviation may also be called upon to contribute.

1.2 Resolution No. 2 of the 2009 International Conference on Air Law set up a Preparatory Commission for the Establishment of the International Fund. That Commission is made up of persons having the necessary qualifications and experience and designated by certain States<sup>1</sup>. The resolution requires that the Fund be set up in an objective, transparent and fair manner and that it become ready to be operated with a target date of 2 May 2011 and at the latest by the time of the entry into force of the Convention. As mentioned in working paper A37-WP/31, the Commission has held a preliminary meeting at ICAO headquarters from 8 to 9 September 2009, its first meeting in Pretoria, South Africa, from 25 to 27 January 2010; and its second meeting in London, United Kingdom, from 21 to 23 June 2010. ICAO participated in the work of the PCIF at all those meetings. The following organisations have sought and obtained observer status: the Air Crash Victims' Families Group, the Airline Association of Southern Africa, the Aviation Working Group, the International Air Transport Association, the International Union of Aerospace Insurers and the London and International Insurance Brokers Association. Work is progressing at a good pace.

## 2. WORK OF THE PREPARATORY COMMISSION

2.1 The task of the Preparatory Commission is in effect to anticipate decisions that will have to be taken by the Conference of Parties to the Convention and to prepare a series of instruments for immediate consideration by that Conference at the entry into force of the Convention. It has also tried to anticipate the options available to States if a catastrophic event were to occur before the Convention entered into force.

2.2 The Commission is very much aware of the importance of its task in the fight against international terrorism as it tends to undermine the aim of wreaking economic havoc. It also realizes the important leadership role ICAO has assumed within the UN system in focussing on international solidarity with the victims of terrorism and their families. In adopting this Convention, ICAO has risen to the call of the UN Secretary General to take practical steps to implement their commitments to promote and protect the rights of terrorism victims.

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<sup>1</sup> According to the resolution those persons are to be nominated by the following States: Canada, China, Côte d'Ivoire, Czech Republic, Ethiopia, Finland, Japan, Kenya, Mexico, Saudi Arabia, Singapore, South Africa, Switzerland, United Arab Emirate, United Kingdom and United States.

2.3 The Conference of Parties is the political body that oversees the Fund. As a first step, the PCIF has prepared Rules of Procedure for the Conference of Parties for consideration and adoption by the Conference at its first meeting in accordance with Article 9(a) of the Convention.

2.4 Also of prime concern to the Commission has been the development of the Regulations of the International Fund required by Article 9(b) of the Convention. This is an overarching task dependent on a large number of policy choices as to the structure of the Fund. A number of sub-groups are providing input into different sections of the Regulations. This part of the Commission's work programme is therefore not expected to be completed until more conclusions are reached as to the overall scheme.

2.5 A considerable amount of labour is going into developing a recommendation on the period and amount of initial contributions to the Fund. While a decision on a suitable amount in respect of passengers is approaching completion, details of a decision in respect of cargo and general aviation need further examination on issues of principle. An important consideration is that the cost of collection from a given source should not exceed the amounts that can be fairly collected from that source. Non-discrimination is also a consideration dictated by the Convention itself. The Commission is keenly aware that the concept of a non-governmental source of funding was a key feature to the successful adoption of the Convention. Unlike other approaches that have not been successful, the Convention is not dependent on heavy government funding and therefore tends to level the playing field between States.

2.6 Should insurance cease to be available to aircraft operators, the Convention would effectively require the International Fund effectively to become an insurer in respect of the initial tier of liability (the so-called "drop-down"). Here important issues arise as to premiums to be collected by the Fund from the aircraft operators and others to cover the additional liability. Other issues are the maintaining to the extent possible the cooperation of insurance experts in the claims settlement process and preparing the resumption of normal activity by the aviation war risk insurance industry.

2.7 Guidelines on Investment and financial governance arrangements are particularly delicate issues. The challenge here is to ensure that the Fund avoid the pitfalls into which too many international organisations have fallen and to make sure that the Fund develops a reputation for good financial management as befits the international civil aviation community. Reliance on carefully selected experts is part of key to success in this area.

2.8 The development of Guidelines for Compensation raises the issue of fairness to bona fide victims while avoiding abuses. As demonstrated by the experience of the International Oil Pollution Compensation Funds whom the Commission is consulting, close work with the insurance industry experts is important in this connection as is the development of the public's perceptions of the Fund's fairness in dealing with victims.

2.9 General Guidelines on Assistance in Case of Events in States non-Party (Article 28) have reached the final phases of development. Here the challenge has been to maintain an interest in early ratification by all States while being sensitive to the sovereignty of the Third Party State when an aircraft operator from a Party States has fallen victim to an act of unlawful interference in the Third Party State. Sensitivity to the aircraft operator's plight is an important ingredient.

2.10 An important information note is being developed which outlines the principal legal options for rapidly putting into force the benefits of the Convention on an interim basis following a crisis occurring prior to the normal entry into force of the Convention.

2.11 The Fund is to be headquartered at the same place as ICAO. In accordance with Article 9(q) of the Convention a request is being developed asking ICAO to assume an assistance, guidance and supervisory role as far as the principles and objectives of the Chicago Convention are concerned. The challenge here is to develop a request that respects the sovereignty of both organisations while ensuring the intended benefits.

### 3. CONCLUSION

3.1 The 2009 Convention is an innovative instrument. For the first time in a convention on private international air law, the focus has been placed not so much on issues of fault or presumed fault, but more simply on insuring compensation for third party victims and fair treatment for industry victims. The notion of channelling has been implemented to avoid wasteful litigation and duplication of insurance for the same event. Those new approaches to international problem solving present special challenges that require innovative thinking on the part of the Preparatory Commission in developing the details of its operations. The task is as important as it is challenging.

3.2 While its membership was established by Resolution of the 2009 Conference on Air Law, the Commission does not consider itself a closed group. An increasing number of industry observers are joining in its work. Observers from States having experts enjoying the necessary qualifications and experience can also contribute very positively to the thinking going on within and around the Commission, to the enrichment of its discussions.

3.3 The Assembly is therefore invited to urge States with experts having the necessary qualifications and experience but who are not currently represented on the Preparatory Commission to join in the work of that Commission as active observers.

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