



A36-WP/296  
LE/13  
21/9/07

**ASSEMBLY — 36TH SESSION**  
**LEGAL COMMISSION**

**DRAFT TEXT FOR THE REPORT**  
**ON**  
**AGENDA ITEM 45**

The attached material on Agenda Item 45 is submitted for consideration by the Legal Commission.

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**Agenda Item 45: Progress report on compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks**

45.1 This Item was considered on the basis of A36-WP/11 presented by the Council, A36-WP/233 presented by Singapore and Sweden and A36-WP/74 presented by the International Air Transport Association (IATA).

45.2 A36-WP/11 provided for the information of the Assembly a progress report since its 35th Session on the work carried out on compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks. It stated that the Special Group established by the Council in 2004 held six meetings and developed the texts of two draft conventions, namely:

- a) Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference (commonly referred to as “the Unlawful Interference Compensation Convention”); and
- b) Convention on Compensation for Damage Caused by Aircraft to Third Parties (commonly called “the General Risks Convention”).

45.3 The paper highlighted the most important provisions of each draft Convention and concluded by stating that, at the sixth meeting of the Special Group, there was broad agreement that it had completed its work, and it decided to recommend to the Council to convene a session of the Legal Committee to further develop the texts of the two draft conventions.

45.4 A36-WP/233 highlighted the significant developments in the work of the Council Special Group especially as regards the draft Unlawful Interference Compensation Convention. It emphasized that there had been a break away from the liability regime of the 1999 Montreal Convention, and that there would be no limits on individual claims but there would be a global limitation on air carrier liability. It provided information on a Supplementary Compensation Mechanism (SCM) to be established under the Convention and the fact that the Convention would provide for an integrated approach covering the whole air transport industry. It stated that these significant developments were supported by the broadest majority at the sixth meeting of the Special Group and that the same majority agreed that the text of the draft Convention was mature enough to be considered by the Legal Committee. It concluded by inviting the Assembly, *inter alia*, to request the Council to further advance the work on the draft Conventions on compensation to third parties, and in particular, in the case of unlawful interference, by placing it on the agenda of the next session of the Legal Committee and convening the next session as early as possible in 2008.

45.5 A36-WP/74 dealt with the draft Unlawful Interference Compensation Convention only. It advocated that the final text must contain an unbreakable cap of the operator’s liability and should also: exonerate and/or otherwise protect non-operators; provide that the capped liability in the treaty and recourse to the funds of the SCM are exclusive remedies, thus ensuring finality of claims; limit actions for compensation to the jurisdiction where physical damage occurs; limit damage payments from the

operators and the funds to annual aggregates; and address ground rules for operation of the funds of the SCM, including drop-down when insurance is unavailable or exhausted.

45.6 Many delegations and one observer supported the proposal in A35-WP/233 that a session of the Legal Committee should be convened to further advance the work of the Special Group on the draft conventions, noting that the texts were sufficiently mature; some references were made to the balance struck between protection of victims and that of the industry. A few of these delegations pointed out that some details in the draft texts were still unresolved, but felt confident that these would be settled upon further consideration. Some others considered that the current texts, especially that of the draft Unlawful Interference Compensation Convention, had improved significantly since it was considered by the last session of the Legal Committee.

45.7 Referring to the General Risks text, one observer spoke of the need to adjust the scope of the operator's liability, and to take a decision on the level of liability in the first tier. As regards the other draft Convention, the observer did not favour an unbreakable cap on liability; it stated that the limit should be exceeded or broken in the case of illicit acts.

45.8 One delegation expressed the opinion that the current draft of the Unlawful Interference Compensation Convention would be unratifiable for a large number of States. First, the protection of victims would change for the worse while the protection of airlines would become predominant. Second, the financing system was not feasible and the financing model was not fair and transparent as it would not establish a link between contributions and risk of damage; general aviation, business flights conducted by private companies and empty or test flights would not be included in the financing system although general aviation stood to benefit from the protections offered by the Convention. Further, the draft excessively exonerated airlines, in the case where they held a valid certificate on their security performance. The delegation also did not favour the exclusive remedy provision, by which claims would be channelled to the operator only except in the case of intentional commission of an act of unlawful interference. The delegation proposed to suspend the work regarding this draft Convention for the time being or to concentrate on the draft Convention concerning general risks in order to focus ICAO's efforts and resources on other tasks.

45.9 In relation to the draft Unlawful Interference Compensation text, one delegation referred to the need for a unified stance on the best way to calculate the level of compensation to achieve fairness in the context of regional groupings.

45.10 Another delegation stated that in the case of acts of unlawful interference, operators and airports should not be liable: States should be liable. In the case of General Risks text, a better definition of the term "General Risks" was necessary to distinguish between damage arising from faults of the operator as compared to that caused by natural phenomena, such as hurricanes.

45.11 A delegation believed that the future work should focus on the draft Unlawful Interference Compensation Convention, as it had reservations on the possibility to advance the work on the General Risks text, citing a lack of evidence of strong demand for the latter. It also suggested that States should be given flexibility to consent to only certain components of the Unlawful Interference Compensation Convention, by having that Convention in a modular form. Furthermore, at the Legal Committee, this text should be considered at the same session as the drafts to be considered in the Commission under Agenda Item 46: Acts or offences of concern to the international aviation community

and not covered by existing air law instruments. An appropriate venue should be considered for that session of the Committee so as to generate interest in the world community about ICAO's work in this area.

45.12 One delegation expressed concern about the difficulties in giving a value to human life, and consequently, to determining what would be an appropriate level to cap liability.

45.13 The continuing threat of terrorism was highlighted by one delegation, which stated that it was incumbent on States to use their efforts to create a good legal framework which would provide stability to the aviation industry and ensure fair compensation to their citizens. All victims, including airlines, should be protected. This delegation was yet to be convinced of the necessity or desirability of the General Risks text.

45.14 In summarizing the discussion on this Agenda Item, the Chairperson stated that, with one exception, all delegations who spoke agreed that the work of the Special Group had resulted in a good product, although it was recognized that some issues still remained to be settled. The majority agreed that this work was sufficiently mature to go to the Legal Committee; it was therefore concluded that this encompassed both draft Conventions. However, two delegations had reservations about the General Risks text and further indications on whether or not this text should also go to the Committee could be given when the Commission would consider Agenda Item 47: Work Programme of the Organization in the legal field.