



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

INFORMATION PAPER

Compensation for Damage Caused by Aircraft to Third Parties Arising from Acts of Unlawful Interference with Aircraft Operations or from General Risks

Opening Remarks of The International Air Transport Association (IATA)

1. IATA appreciates the opportunity to participate in this Diplomatic Conference as an observer. In fact, one of the original purposes of IATA was to present the views of the international airline industry in ICAO proceedings. In the sixty-three years since both organizations were founded, this cooperation has fostered the development of international commercial aviation, and promoted important interests of the State parties to ICAO, the travelling public and the airline industry.
2. This spirit of cooperation led IATA to remain engaged in the efforts to modernize the Rome Convention when other airline associations concluded that these efforts were fatally flawed, and declined to participate. We were cautiously optimistic that there was an opportunity to create conventions that would fairly balance the interests of third-party victims of airline disasters, the States and the airline industry.
3. At the close of the ICAO Legal Committee, I indicated that we would inform our member airlines of the draft conventions that emerged from those proceedings, obtain their feedback, and report back to the Diplomatic Conference. In my opening statement, I will summarize the views of the international airline industry in frank and honest terms. I anticipate that my remarks will not be popular with everyone in this room, but we will do the delegates no favor if our failure to honestly convey the views of the international airline community encourages you to adopt an unratifiable convention.
4. My opening remarks on the proposed General Risks Convention will be brief. It remains the overwhelming view of the airline industry that there is no need for an international convention to deal with the issue of compensation to third party victims arising from the general risks of airline operations. We understand, however, that some States believe that it would be useful to develop a common legal regime in this area, so we will comment on several specific points during the course of this conference.
5. My opening remarks on the proposed Unlawful Interference Convention will be more extensive. At the ICAO Legal Committee proceedings, IATA focused on fundamental principles that must be reflected in any principled, fair and balanced compromise among the interests of the States and all victims of unlawful interference with aircraft operations, including:

- a) **terrorist actions are directed against States, not airlines.** Sovereign states adopt policies to promote the interests of their citizens. Their governments are the targets of terrorists who seek political change through violence. A convention that limits third party victim compensation by providing that their exclusive remedy is to seek compensation from airlines does not constitute a balanced approach to the shared responsibility of States, airlines and other participants in the international aviation system to protect citizens from terrorism, and to compensate them for losses resulting from unlawful interference with aircraft operations;
- b) **airlines, their flight crews and their passengers are innocent victims of terrorist interference with aircraft operations.** When terrorists interfere with aircraft operations, their intended victims may include occupants of office buildings, government structures and people on the ground, but they almost invariably include airlines, flight crews and passengers;
- c) **third-party victims of unlawful interference with aircraft operations should be treated with compassion, and compensated for their monetary losses.** It simply is not fair to expect the unlucky victims to pay the entire price for their governments' adoption of policies designed to promote the interests of society as a whole;
- d) **airlines must adopt robust security programs.** Airlines have the inherent incentive to protect their flight crews, their passengers and third parties from unlawful interference with their aircraft operations. These incentives should be preserved and reflected in any convention;
- e) **airlines are willing to meet their responsibilities to their passengers and members of the general public, but do not like ticket taxes.*** States often treat airlines, and their passengers and shippers, as "cash cows" whenever they need resources to fund social programs. On some routes, ticket taxes exceed the amounts charged by airlines for their services. No airline would welcome yet another ticket tax;
- f) **the assets that could be obtained from bankrupting the unlucky airline victims of terrorism are limited, and shrinking in the current economic environment.** The worst possible convention, from the perspective of airlines and third-party victims alike, would guarantee that any airline that is attacked by terrorists in the future will be driven into bankruptcy by the imposition of a strict and unlimited liability law regime, or a soft cap on liability. Frankly, many airlines' assets have been greatly diminished in recent years as a result of the recession, high fuel prices, taxes, monopoly pricing by suppliers of goods and services to the airline industry and costly regulations; and it has become more difficult to secure terrorism insurance. In the past year, approximately forty airlines have gone bankrupt, and the survival of the largest national carriers of some of your countries is problematic; and
- g) **airline liability must be subject to a hard cap.** A reasonable and principled compromise would adopt a fair balance between the interests of all victims of terrorist interference with aircraft, including airlines and third-party victims. A fair compromise might impose strict liability on airline victims of terrorist actions in return for an unbreakable cap on their liability (or possibly a cap that could be broken if senior

* For purposes of this paper the term "ticket tax" includes taxes on airline passengers and shippers of air cargo.

management failed to adopt an internationally recognized security program such as IOSA, or otherwise engaged in intentional or reckless acts that were likely to result in third-party losses).

6. The Legal Committee adopted several amendments to the draft Unlawful Interference Convention that was submitted to it. From the airline industry perspective, some of these amendments were positive, but many of them were negative – particularly last-minute amendments that weakened the cap on airline liability.

7. Following the Legal Committee, IATA consulted with as many of our member airlines as possible. In an attempt to characterize the proposed terrorism convention in a neutral manner, we asked our members to think of it as an involuntary insurance policy. The coverage would protect an airline victim of terrorism from bankruptcy (with some exclusions). Premiums would be paid through the ticket tax. In summary, their reaction was as follows:

- a) **the proposed Unlawful Interference Convention enables States to avoid their responsibility for protecting their citizens from unlawful interference with aircraft operations, requires no use of State resources to compensate victims of attacks on society as a whole, and shifts almost all liability to airline victims of terrorism.** Through the exclusive remedy provisions of the proposed unlawful interference convention and other provisions, and the discretionary third layer of compensation, States would avoid any significant financial responsibility for compensating third party victims. Virtually, all of our members believe that the States should assume a larger portion of the burdens of any terrorism convention;
- b) **the imposition of strict liability for third-party losses would increase airline exposure as compared to the existing national laws of most countries.** Some national legal systems (including many civil law systems in continental Europe) impose strict liability on airlines for all losses suffered by third-party victims. In countries with negligence-based tort laws (such as the United States and Japan), however, airlines are responsible for third party losses only if plaintiffs can prove that the airlines' intentional or negligent acts were the proximate cause of their loss. And, in many countries (including many Latin American countries), their tort laws insulate airlines from liability for losses caused by terrorism. Moreover, the proposed convention would eliminate existing airline rights under almost all national legal systems to obtain recourse from other participants in the international aviation system who might have contributed to losses suffered by third parties;
- c) **the proposed Unlawful Interference Convention can strike a fair and principled balance between the interests of States, airline and third-party victims of terrorism only if it includes a substantially unbreakable cap on airline liability in excess of the amounts included in the first two layers of the proposed convention (airline insurance policies and the Special Compensation Mechanism).** The proposed convention imposes a new ticket tax, increases airline exposure for liability to third parties in most countries, and restricts rights of airlines to seek recourse against other responsible parties. If it is to be fair and balanced, airlines have to be given something in return. In IATA's opinion a substantially unbreakable cap (with the amendments that IATA will suggest during the course of this conference) provides the best opportunity to balance the interests of all victims of terrorist interference with aircraft operations, while preserving the incentive for all participants in the international aviation system to take all reasonable measures to protect airline crews, passengers and third persons;

- d) **a substantially unbreakable cap on airline liability in excess of insurance and a SCM would not unfairly cap compensation for individual victims of unlawful interference with aircraft operations.** First, there is nothing in the proposed Unlawful Interference Convention that would limit compensation by those who caused the loss. Terrorist organizations that caused third party losses would remain fully liable (some of these organizations may have funds that could be seized). Second, the cap that IATA proposed would not be absolute – it would include exceptions for intentional or reckless acts of senior airline management. Third, States can insure that there is no limit on compensation to individual third party victims by taking responsibility for compensation under the illusory third layer of the proposed convention. Finally, this rhetoric ignores the reality that there is always a limit on corporate compensation to victims. Even a confiscatory, punitive system cannot extract more assets from a corporation than it possesses. Leaving rhetoric aside, the real issue is whether the assets in the first two layers of the proposed convention (insurance plus the SCM) are likely to be greater than the assets of an easily bankruptable airline victim of terrorist interference with its aircraft. If so, an Unlawful Interference Convention with a substantially unbreakable cap on airline liability can increase, rather than limit, compensation to individual victims of terrorism;
- e) **even if the Delegates bring the proposed Unlawful Interference Convention back into balance by adopting IATA’s proposed amendments, the airlines would not view it as a “gift.”** Returning to the involuntary insurance concept, airlines can (and should) minimize the risk of terrorist interference with their aircraft through the adoption of robust security programs. Some airlines believe that they can reduce the risk to the point that prospects of collecting on the “insurance policy” are remote, and the “insurance premiums” (*i.e.*, the SCM ticket tax) are priced too high for the “coverage” they would receive. Others indicated that even if the “premiums” were reasonably related to the “coverage,” they could not afford to pay the premiums in the midst of the current economic crisis;
- f) **if the Delegates further weaken the cap on airline liability, the industry would view the proposed Unlawful Interference Convention as completely unbalanced, unfair, unprincipled and punitive.** In this event, it would be logical to assume that most airlines would fight against ratification of the treaty when it is presented to their countries for adoption; and
- g) **if a principled, fair and balanced Unlawful Interference Convention is not possible, compensation for third party losses should continue to be governed by national law.** Our members respect the hard work that representatives of State parties have devoted to this project, but for the airline industry the *status quo* represented by existing national laws is preferable to an unbalanced, unfair, unprincipled and punitive international convention.

8. IATA will remain engaged in a good faith effort to find a principled, fair and balanced compromise among the interests of States, airlines and third-party victims of terrorist interference with aircraft operations. If this is not possible, however, IATA respectfully submits that the delegates should retain the *status quo* – leaving this issue to national law.