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INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 20 April to 2 May 2009)

COMMENTS ON THE TWO DRAFT CONVENTIONS

(Presented by Egypt)

1. At the outset, the Delegation of Egypt notes that even though the modernization of the Convention has embraced the notion of justice and equity in compensating victims of accidents of aircraft in flight, it has not pursued the same principle with respect of the operator's liability and the reasons that could be invoked to disclaim its liability for the accidents vis-à-vis third parties.

2. The Convention extended the liability of the operator to compensation for mental injury. However, mental injury is difficult to prove as it is difficult to determine whether such injury resulted from the accident or for other reasons prior to the occurrence.

3. The Convention adopted a wider concept of an aircraft in flight, based on the definition in The Hague Convention of 1970. We would advocate retaining the definition in The Rome Convention of 1952 in order to limit the operator's liability. This is particularly so, as the definition in the Draft Convention applies only to passengers at the extent of their being under the authority of the operator. This does not correspond to the objective of the Convention in terms of compensation to the third parties. Accordingly, Article 1 b) (Definitions) should be amended as follows: "An aircraft is considered to be in flight from the moment power is applied for the purpose of take-off until the moment when the landing run ends".

4. While the Draft Convention gives the operator the right of recourse against the person who caused the unlawful interference, it has suspended the enforcement of judgements in favour of the operator against the perpetrator until all settlements have been made between the operator and the victims. This may be a protracted process of litigation for such settlements to be completed and might result in the forfeiture of the right to enforce the decision, especially in states where the statute of limitation extends for shorter periods.

5. The Unlawful Interference Compensation Convention has not adopted any principles on the right of the operator to disclaim liability for the accident whether in cases of *force-majeure* or if it is established that it and its employees and subordinates have taken all the necessary precautions to prevent the incidence of the damage.

6. We consider that IATA should be accorded a prominent role in the higher management of the Supplementary Compensation Mechanism, as it is the entity acting on behalf of the airlines and is responsible for coordinating their positions and harmonizing their views. IATA should be invited to attend the meetings of the Conference of the Parties without the right of vote.

7. The “exclusive economic zone” in Article 2 (3) should be defined.

8. Article 3 (5) should be deleted pending the development of an international convention or mechanism to regulate environmental matters.

9. It is suggested to add the following phrase at the end of Article 9 (o): “without prejudice to the provisions of the Convention or to anything that might create new financial obligations or additional burdens on the operator”.

10. The obligatory amounts representing contributions to the supplementary compensation mechanism, provided for in Article 12, should be collected not by the operator but rather by the State Party, it being a signatory to the Convention and a member of the Supplementary Compensation Mechanism. Any commitments or legal liability that may be applied to the operators should be through a State Party.

11. The Convention establishes a direct relationship between the Supplementary Compensation Mechanism and the operator in respect of non-remittance of contributions, in accordance with Article 15 (2). It further neutralized the position of States to act for the Director of the Compensation Mechanism against the operator in such states, to recover the amounts due.

12. Article 26 (1) represents an outright disregard of the terms and rules of justice and equity which constitute an overriding principle of the Convention; in effect this paragraph denies the right of recourse by the operator against the manufacturer if it has been established that the accident was caused by a defect in the approved design of the aircraft, its engines or component parts.

13. In Article 2 (2) – Scope, the words “international flight” should be read “other than on an international flight” to correspond with the concept of Article 18 (1).

14. The last part of Article 5 (2) should be amended to empower the Supplementary Compensation Mechanism to take action against the operator by virtue of its separate legal personality. This will insure that no action may be taken against the operator by a State Party in any court worldwide.

15. We consider that the enforcement of the judgments provided for in Article 33 (1) in any other State Party, should be predicated on the absence of any appeal to nullify the judgement. The judgement should be considered final in the State whose courts have passed the judgement and no appeal of any kind shall be receivable.

16. The title of Article 35 should be "مدة السقوط" (period of forfeiture) instead of "مدة التقادم" (period of limitation). This will insure that the three-year period will not constitute a constraint on the operator, if the victim takes any legal action before its expiry.

17. Article 35 (3) should be amended to read as follows: “The calendar year shall be used as a basis for calculation from the date of the event that caused the damage.

18. Article 4 of the Draft Convention includes a determination of the maximum compensation limits for the victims of an accident. The compensation limits start from 750 ,000 to 700,000,000 Special Drawing Rights, based on the aircraft weight. These are the same words used in the Rome Convention. We are of the opinion that the limits indicated between brackets in Article 4 of the two drafts are fully adequate. Therefore, we suggest that the brackets be deleted and the indicated amounts be retained. Special mention should be made of the mechanism established under Article 4 of the General Risks Draft to tie the amount of compensation to inflation. Such mechanism should be adopted in

the Unlawful Interference Compensation Convention. We reiterate our approval of the limits as indicated in Article 4 of the two drafts.

19. According to Article 27 of the Unlawful Interference Compensation Convention, the scope of the Convention extends to States non-Party to the Convention. For the Convention to apply in cases of accidents in a State non-Party, the Article requires that the operator should have its principal place of business or its permanent residence in a State Party. It also provides that the compensation mechanism will have a discretionary power to pay or not pay compensation to victims in a State non-Party.

20. It also requires that a State non-Party shall take into consideration the protection provided by the Convention to the operator; this means that such State agrees to the provisions of the Convention. This may beg the question as to what form such agreement would take; would it require the State to promptly ratify the Convention - which is unlikely – or that the Head of the Government pledge to abide by the provisions of the Convention. The Head of the Government may not, however, be empowered to make such a declaration. This will subsequently make it difficult to apply the Convention to States non-Party. Therefore, we suggest to recommend that a State Party should undertake to include in its bilateral and multilateral air transport agreements concluded with a State non-Party, a provision for adherence to the provisions of the Unlawful Interference Compensation Convention. This would be considered an advance undertaking by the State non-Party and would also encourage States to adhere to the Convention, and facilitate the process of its application. Furthermore, standards should be developed to determine when to compensate victims in a State non-Party.

21. According to the Rome Convention of 1952, the competent court is the court of the State where the accident takes place. The present draft of the General Risks Convention however proposes to add the court of the principal place of residence of the aircraft operator, as is shown in brackets in Article 16 (1). We consider that even though the Montreal Convention of 1999 expanded the available jurisdictions and that Montreal Convention is considered a remarkable model to be followed, the nature of damages involved differs from the nature of damages addressed by the General Risks Convention. According to this Convention, the accident occurs in the territory of one State and any extension of jurisdictions would slow down the process of compensating the victims and would make it difficult to establish a maximum limit of compensation in each State. We therefore suggest to delete the phrase between brackets and maintain the jurisdiction in the courts of the state Party where the damage occurs, as provided for in the Rome Convention of 1952.

22. Article 12 (Contributions to the Supplementary Compensation Mechanism) provides that the amounts shall be collected in respect of each passenger. Egypt considers that this is the right approach as it insures equality between airlines. However, in respect of cargo, the word “tonne” is still between brackets. We feel that adopting such approach in respect of cargo will not be equitable for a number of reasons, as follows:

a) there are types of goods that are light in weight but high in value that occupy large space aboard an aircraft. The contributions for such items will be small. On the other hand, there are types of goods that are heavy in weight but low in value. This will lead to the loss of large sums of money to the Supplementary Compensation Mechanism;

b) there are aircraft that carry passengers, baggage and goods, all-cargo aircraft and mail-only aircraft. There are large aircraft that carry a small percentage of cargo and there are small aircraft that carry a high percentage of goods. Accordingly, it is difficult to adopt the “tonne” standard which is now between brackets;

c) for this reason it is suggested to adopt a standard based on the volume of space available for goods aboard each aircraft. A unit of measurement would then be established and related to the amount of contributions. The contributions may be collected on the basis of each aircraft movement, whether international or domestic, in respect of the all-cargo flights;

d) as for combo flights, the available space assigned for cargo may be calculated and the third of such space may be assumed to be for cargo and the rest for passenger baggage; and

e) such a proposal would produce increased contributions, and will also achieve equity and make it easier to determine and collect contributions for each type of aircraft. The only requirement will be to calculate the rate of aircraft movements in domestic and international flights, to determine the amount of contribution, regardless of the volume or nature of goods.

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