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33rd SESSION

Montréal, 21 April–2 May 2008

REPORT

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REPORT OF THE 33RD SESSION OF THE LEGAL COMMITTEE

Letter of Transmittal

To: President of the Council

From: Chairman of the Legal Committee

I have the honour to submit, in accordance with Rule 46 of the *Rules of Procedure of the Legal Committee,* the Report of the 33rd Session of the Legal Committee.

Gilles Lauzon, Q.C.

Montreal, 20 May 2008

LEGAL COMMITTEE – 33RD SESSION

(Montréal, 21 April to 2 May 2008)

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1. Place and Duration

1.1 The 33rd Session of the Legal Committee was held at Montréal from 21 April to 2 May 2008. The Chairman of the Legal Committee, Mr. Gilles Lauzon Q.C., (Canada), presided over the Session.

2. Opening addresses

2.1 The meeting was declared open by **the Chairman of the Legal Committee.** The **President of the Council,** Mr. Roberto Kobeh González, welcomed all delegates and observers. Referring to the proud history of the Committee, he mentioned that it had prepared most innovatively and successfully a number of international air law conventions for the benefit of the global aviation community. It was against this backdrop of high expectation that this Session of the Committee met, principally to consider the subject "Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks".

2.2 He further recalled that this subject had been in the Work Programme of the Legal Committee since 2000. When a draft convention was considered by the 32nd Session of the Committee in March 2004, the Committee concluded that further work was needed. Subsequently, in May 2004, the Council decided to establish a Special Group to further advance the work. The Special Group held six meetings and concluded that the draft convention from the 32nd Session of the Committee should be split into two separate conventions, one dealing with general or safety-related risks, and the other with terrorism-related risks. The Group focused on the dual principles of protection for victims and that for the civil aviation sector. The Group concluded that a supplementary compensation mechanism would be necessary to meet these two goals as regards the terrorism-related risks. Consequently, the Group developed two draft conventions, with the provisions on the supplementary compensation mechanism being an integral part of the convention covering the terrorism risks.

2.3 The President took this opportunity to thank and congratulate Mr. Henrik Kjellin (Sweden) for his chairmanship of the Special Group. He also expressed his gratitude to the two Rapporteurs, Messrs. Michael Jennison (United States) and Aníbal Mutti (Argentina). Noting that this would be the last session chaired by Mr. Gilles Lauzon, the President thanked him for his remarkable patience, intellect and leadership during his tenure as Chairman of the Committee.

2.4 The President informed the meeting that, when the Council decided on 7 December 2007 to convene this session, it also decided that the same priority should be accorded by the Committee to each of the two draft conventions. Acknowledging the complexities raised by this subject and the difficulties in reaching consensus on many fundamental issues, he placed great confidence in the Legal Committee in the fulfilment of its tasks. Following this Session, the Council would consider the results and decide on the future course of work. If one or both of the draft instruments are deemed sufficiently mature, the next step would be for the Council to convene a Diplomatic Conference to finalize the text or texts.

2.5 The Chairman expressed his thanks to the President for his kind remarks. He trusted that he would receive further cooperation from all participants at this Session, with a view to producing a draft instrument or instruments which is/are ratifiable.

3. Agenda and Working Arrangements

3.1 The Committee adopted the provisional agenda shown in LC/33-WP/1 without change as its agenda of the Session, which is presented in **Attachment A** to this Report.

3.2 The working papers considered by the Committee are listed by agenda items in **Attachment B** to this Report.

3.3 The action taken by the Committee in respect of each item is reported on separately in the Report. The material is arranged according to the numerical sequence of the agenda items considered by the Committee.

4. Meetings

4.1 The Committee held 16 meetings, all of which were held in open sessions.

4.2 The Secretary of the Committee was Mr. D. Wibaux, Director of the Legal Bureau of ICAO. The Deputy Secretary was Mr. S.A.A. Espínola, Principal Legal Officer. Mr. J.V. Augustin, Senior Legal Officer, Messrs. B. Verhaegen, J. Huang, A. Jakob, Legal Officers, and Ms. M. Weinstein, Legal Adviser, were Assistant Secretaries. Other officials of the Organization also provided services to the Committee.

5. Representation of States and International Organizations

5.1 Forty-eight Contracting States and eight international organizations were represented by 148 representatives and observers at this Session of the Legal Committee. The names of the representatives and observers appear in **Attachment C** to this Report.

6. Records of Proceedings

6.1 The Committee **decided** that in application of Rule 45 of its Rules of Procedure, the minutes of the 33rd Session need not be prepared.

Agenda Item 2: Report of the Secretariat

2:1 The Secretariat presented LC/33-WP/2-1 (*Note on Documentation and Working Arrangements)*, which was **noted** by the Committee.

2:2 The Secretariat also presented LC/33-WP/2-2. The main purpose of this paper was to report to the Committee on relevant developments in the work of ICAO in the legal field other than those items on the Committee's work programme, having taken place since the 32nd Session of the Legal Committee.

2:3 The Committee was informed of the legal work undertaken in relation to the establishment of the Public Key Directory (PKD). The PKD allows for the verification and authentication of e-passports worldwide. A Memorandum of Understanding (MoU) regarding participation in the ICAO Public Key Directory (PKD) was developed, which came into effect on 8 March 2007.

2:4 In the environmental field, legal opinions were provided to the Committee on Aviation Environmental Protection (CAEP). Moreover, the Council established the Council Special Group on Legal Aspects of Emissions Charges (CSG-LAEC) which met in September 2005. The Special Group conducted its analysis on the basis of a list of legal questions addressing emissions charges at the local level as well as at the global level, which was prepared by the CAEP Emissions Charges Task Force at a meeting convened in April 2005.

2:5 The Legal Bureau was closely involved in several projects relating to aviation safety, including the development of legal guidance pursuant to Assembly Resolution A35-17: *Protecting information from safety data collection and processing systems in order to improve aviation safety*. Consequently, the Council approved in March 2006 Attachment E of Annex 13 to the *Convention on International Civil Aviation,* "*Legal guidance for the protection of information from safety data collection and processing systems*". The objective of the guidance material is to prevent the inappropriate use of information collected solely for the purpose of improving aviation safety. The Legal Bureau also contributed to the development of a procedure for transparency and disclosure regarding significant compliance shortcomings with respect to safety-related standards and recommended practices. The procedure was approved by the Council in 2005 (State letter AN 11/41-05/87 dated 12 August 2005), which aims at implementing Article 54 j) of the *Convention on International Civil Aviation*.

2:6 In December 2005, the Council established a Working Group to review the *Rules of Procedure for the Council* (Doc 7559) and the *Rules of Procedure for Standing Committees of the Council* (Doc 8146). The Legal Bureau provided Secretariat services to this Group, whose work resulted in the adoption by the Council of new editions of Docs 7559 and 8146, as well as a revised Delegation of Authority to the President of the Council.

2:7 There had been a significant number of cases against ICAO as a defendant or co-defendant in the courts of different countries on the issue of immunities. In general, ICAO had received assistance and cooperation from the authorities of the respective countries on the issue of immunities. In one instance, a high-level court at the location of Headquarters had rejected an appeal of one former staff member of ICAO on the ground that ICAO has immunity.

2:8 The Committee **noted** LC/33-WP/2-2.

Agenda Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

3:1 The Secretary introduced LC/33-WP/3-1 (*Introductory Note*) which contains the summary and texts of the two draft conventions. One of the Rapporteurs, Mr. A. Mutti, presented LC/33-WP/3-4 which analyzed the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties (the "General Risks Convention"). The other Rapporteur, Mr. M. Jennison, then presented LC/33-WP/3-3 containing his Report on the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties in Case of Unlawful Interference ("the Unlawful Interference Compensation Convention").

3:2 The Chairman sought introduction of other working papers before starting discussions on Agenda Item 3. After ALADA presented LC/33-WP/3-2, Germany presented LC/33-WP/3-5 (*Exceptions to the Limitations on the Operator's Liability ("breakability")*), LC/33-WP/3-6 (*Exoneration of Other Service Providers*) and LC/33-WP/3-7 (*The Supplementary Compensation Mechanism* (*SCM*)). IATA then presented opening remarks, submitting first that a general risks convention was not needed for the reasons explained in LC/33-WP/3-10 which was presented later. However, this observer declared its cautious optimism that a compromise between the due compensation of victims and the safeguarding of the aviation industry could be achieved in an aviation terrorism convention. This would be based on key elements: third-party victims should be treated with compassion and compensated for their monetary losses; such compensation should go promptly to the victims themselves; the funds available for compensation should exceed the assets of the airlines; and airlines' liability must be subject to a hard cap. This observer therefore agreed with the balanced proposal reflected in the Joint Industry Paper, i.e. LC/33-WP/3-9 as introduced by the Aviation Working Group (AWG).

3:3 One delegate introduced for information of the Committee LC/33-WPs/3-8 and 3-11 which presented the work accomplished so far by the Supplementary Compensation Mechanism (SCM) Task Force: Draft rules of procedure of the Conference of Parties (COP) of the SCM; Draft Regulations of the SCM; and Draft Guidelines on Investment. Such work-in-progress was **noted** with satisfaction by the Committee and the Chairman invited those who wished so to join and provide input to the Task Force. The introduction by the Air Crash Victims Families Group (ACVFG) of LC/33-WPs/3-12 through 3-15 was deferred.

3:4 After the Delegate of Japan presented LC/33-WP/3-16 (*Issues to be addressed with respect to the Procedures for Limitation of the Operator's Liability*), the Chairman proposed that the specific proposals therein, as well as in other papers previously introduced, be taken into consideration while the Committee would review the draft instruments clause-by-clause. Meanwhile, the Chairman opened the floor for further general comments. One delegate, Chairman of the Council Special Group on the Modernization of the Rome Convention of 1952 (SG-MR), summarized the process that the Group went through so as to produce the draft conventions for the Committee's consideration. Another delegate, Vice-Chair of the SG-MR, wished to further emphasize the shift of mind that took place in the context of unlawful interference since the previous session of the Committee, from the principle of liability towards the concept of risk allocation.

3:5 One delegation expressed its gratitude for the excellent work of the Special Group, noting that the modernization of the 1952 Rome Convention was an attempt of same importance as the efforts which led to the adoption of the 1999 Montreal Convention, and indicated that any views it would take during the Committee would not prejudge its position at any Diplomatic Conference. Another delegation equally praised the work of the Special Group, while indicating that differing proposals such as those presented in LC/33-WPs/3-5 through 3-7 were certainly worth considering. In view of the points made in LC/33-WP/3-10, it reminded that both draft conventions were for review by the Committee, i.e. including the General Risks

Convention which would be of great importance for its region – Africa – where domestic law was not always effective in this domain; the review of both drafts by the Committee was agreed by the Council whose decision had to be respected. This delegation was also of the opinion that ICAO should be given an oversight responsibility regarding the SCM.

3:6 Following an invitation by the Chairman to make general statements, one delegation expressed its appreciation for the reports which had been presented by the Rapporteurs, the Council Working Group and the Secretariat. In the view of this delegation, the Conventions represented a balance between the interests of the victims and those of the operators. This delegation was confident that the Committee would be able to finalize the work on the draft texts and stated that it would be proud to propose Rome as the venue for the Diplomatic Conference. Taking note of this statement, the Chairman expressed the hope that the Council would look favorably to the suggestion of hosting the Diplomatic Conference in Rome.

3:7 The Committee thereafter agreed to proceed with an article-by-article review of the **Unlawful Interference Compensation Convention** as set out in **Appendix B of LC/33-WP/3-1**, on the understanding that the Rapporteur of the General Risks Convention would track consequential changes to the latter text as necessary.

3:8 With respect to **Article 1 a),** one delegation noted that the French text needed to be aligned so as to accord with the wording which is used in The Hague and Montreal Conventions (*infraction pénale*).

3:9 The Rapporteur on the Unlawful Interference Compensation Convention referred the Committee to paragraph 3.2.1 of his Report and the potential problem in a situation where a State Party to the Unlawful Interference Compensation Convention might not have ratified one of the specified conventions or an amendment thereto. In this context, the Chairman and the Secretary stated that the security conventions concerned had attained almost universal acceptance.

3:10 One delegation noted that the Committee had several options available to resolve this issue: 1) to rely on the definitions of the existing security conventions which are almost globally accepted; 2) to leave the definition of acts of unlawful interference to the determination of the State where the accident occurred; or 3) to devise an autonomous definition only for the Convention at hand. This delegation expressed its preference for the first option. Another delegation was of the view that the expression "which is in force among the States Parties" may give rise to difficulties; certainty in the application of the Convention was required. This delegation preferred option 3. Another delegation suggested that it would be prudent to rely on the virtually global acceptance of the security conventions. At the time of the Diplomatic Conference, it would be known if any new protocols would be adopted, and if such amendments were in force in the State where the damage occurred, it would be possible to accommodate this. Another delegation suggested to consider a self-standing definition, for sake of legal certainty.

3:11 In his **conclusion** on this point, the Chairman noted that the Montreal and Hague Conventions had garnered almost universal acceptance and that it would therefore be appropriate to refer to them without further qualification for them being in force. He suggested to have the text accordingly end after the term "1971". Insofar as amendments to these instruments which were in force in the relevant State were concerned, the Chairman invited the Drafting Committee to be established to find an appropriate wording.

3:12 With respect to the wording of **Article 1 b),** the drafting Committee was invited to review the text so as to possibly avoid the redundant use of the word "event".

3:13 In response to a query raised by one delegation, the Chairman noted that the definition of "in flight" in **Article 1 c)** had been broadened when compared to the 1952 Rome Convention on account of the fact that the new text intended to cover the situations which are addressed in the Tokyo, Hague and Montreal security conventions respectively. In relation to the term "in flight", the Rapporteur invited the Committee to take note of LC/32-WP/3-1 — Introductory Note, which provided an annotated text indicating the origin of the individual articles.

3:14 **Articles 1 d), e), f) and g)** were **endorsed** by the Committee.

3:15 Referring to a point which had been addressed in the Report of the Rapporteur, one delegation suggested in relation to **Article 1 h)** to receive clarification from the aviation insurers regarding the situation of the owner of the aircraft hull and the contemplated protection of these persons in case of mid-air collisions under the Unlawful Interference Compensation Convention. This delegation further stated that the 1999 Montreal Convention had established unbreakable liability limits for consignors and consignees of cargo and queried whether the solution currently foreseen in Article 1 h) circumvented these hard liability caps. Addressing the first part of the query, an observer from the insurance industry explained that the insurer of the operator which was not at fault would have a subrogated right against the operator at fault. The observer stated that in this situation the innocent operator would be regarded as a third party, adding that not all aircraft, particularly aircraft involved in general aviation, were insured on a hull basis. It was thus correct to treat them as third party for the purpose of the Unlawful Interference Compensation Convention. Regarding the first issue, the Chairman concluded that it would be appropriate to cover the owner of the hull under the new convention. Commenting on the second part of the query raised earlier, the Chairman wondered if it was indeed intended to provide for a windfall of sorts for the benefit of the cargo owner or consignee who already had the possibility of receiving full compensation beyond the 17 SDR per kilo limit by virtue of a special declaration of interest. In this context, one delegation suggested to defer a final decision on this matter upon the Committee's review of Article 5 (Events involving two or more operators or other persons). The Committee **agreed** with this approach.

3:16 One delegation submitted for consideration to provide a definition for the term "senior management" mentioned in Article 24.

3:17 The Committee thereafter considered **Article 2** (Scope). With regard to this article, the Rapporteur invited the Committee to take note of his observations contained in paragraph 3.3 of the Report, which had set out the pros and cons with respect to the application of the new regime to domestic aviation.

3:18 Responding to a query by one delegation in relation to paragraph 1 and the formulation "whether or not a State Party", one delegation explained that there had been a policy decision to also include into the ambit of the convention damage caused by aircraft of a non-State Party. This was done on account of the objective of victim and operator protection, the delegation explained. Addressing another query, the Chairman explained that the funding of the SCM is based on a departure tax which would be levied from all aircraft leaving from a State Party, including aircraft from non-States Parties.

3:19 In reviewing paragraph 1 and the wording "in another State", the Chairman observed that the convention would only apply to a foreign air carrier and would *a priori* not be applicable to domestic carriers engaged in international operations unless a declaration was made. The Chairman invited the Committee to reflect on this point. Addressing this point, one delegation expressed the view that the current wording suggested that operators registered in a State Party and operating internationally would not be covered. This delegation provided the hypothetical example of a flight from London to a point in South Africa conducted by a carrier registered in South Africa. Damage occurring in South Africa would

therefore appear to fall outside the scope of the convention, which would not be the intended result. This delegation proposed to insert additional text to ensure that international flights of the carrier would also be covered. The delegation proposed to insert in line four the term "that State Party or" before "another State". Having taking note of the proposal, the Chairman wondered whether this solution would render paragraph 2 and its optionality useless.

3:20 On the subject of domestic application, one observer referred the Committee to LC/33-WP/3-9, in which it was proposed to make the convention applicable on a mandatory basis to domestic as well as international flights. In the view of this observer, it was not justified to treat victims differently based on the nature of the flight. This approach would also provide a better funding basis for the SCM, taking into account the fact that over 50 per cent of all scheduled air traffic was domestic in character. This observer favoured the deletion of paragraph 2 while endorsing the notion which had been put forward with respect to an amendment to paragraph 1.

3:21 In the ensuing discussion, another delegation supported an amendment to Article 2 to the end that the international flight of a carrier of a State Party would be covered. In the view of this delegation, it represented a fair solution as these carriers contributed to the funding of the SCM. This delegation favored to retain the opt-in provision set out in paragraph 2 as it provided comfort to those States which would be reluctant to embrace the notion that contributions collected from domestic flights of one State would be used to compensate a damage resulting from the domestic flight of another State. Another delegation suggested to review this point from the perspective of where the damage occurred and to devise a solution which from the point of view of the State Party concerned provided the best solution with regard to victim and operator protection. This delegation wondered if the need to respect the concerns of States regarding domestic carriage would be better addressed in an opt-out clause instead of an opt-in mechanism. On the issue whether to devise an opt-out mechanism as opposed to an opt-in clause, the discussion revealed that a majority of delegations preferred an opt-in clause. In this respect, the Chairman noted that there had been some discomfort with the notion of a mandatory application to domestic flights, as had been proposed earlier by one observer. One delegation expressed caution with regard to a change of focus from the "operator" to "traffic".

3:22 In his **conclusion** on this point, the Chairman noted that paragraph 1 should properly convey that the convention would apply to both international and domestic carriers and invited the Drafting Committee to consider for paragraph 2 an opt-in clause to cover domestic flights, as opposed to domestic carriers.

3:23 The Committee thereafter **endorsed Article 2, paragraph 3** without discussion.

3:24 The Committee continued its deliberations with a review of **Article 3** (Liability of the Operator)**.** With respect to paragraph 1, one delegation queried as to the reason why the expression "or by any person or thing falling therefrom", which was featured in the 1952 Rome Convention, had been deleted. One delegate, Chairman of the SG-MR, explained that the deletion was due to a drafting matter, not a policy decision, on account of the fact that ultimately the damage was caused by the aircraft.

3:25 One observer referred the Committee to LC/33-WP/3-9, which contained a proposal to amend paragraph 1 due to the fact that the damage was caused by an act of unlawful interference with an aircraft in flight. This observer also proposed to change the title of the Convention to underline the act of unlawful interference as the cause of the damage. Commenting on the latter proposal, one delegation stated that such title change would do no harm. As regards the former proposal, several delegations expressed support to more prominently reflect the element of an act of unlawful interference as the primary cause of the

damage in paragraph 1 of Article 3, and to amend the text accordingly. In his **summary** on this point, the Chairman noted that there were no objections regarding the proposed change to the title of the convention. In relation to paragraph 1, the Chairman invited the Drafting Committee to consider to insert in an adequate way the notion of "unlawful interference" along the lines of what had been suggested by the observer. The Secretariat was invited to review the French text of paragraph 1.

3:26 With respect to **Article 3, paragraph 2**, the Drafting Committee was invited to explore whether it would be possible to clarify this provision with a view to establishing a closer link between the act of unlawful interference being the basis for compensation, taking into account the existing definition of the word "event". In this context, one delegation reserved its position and cautioned not to inadvertently burden the victim with a duty of proving that the damage was caused by an act of unlawful interference.

3:27 In relation to environmental damage, **Article 3, paragraph 3**, the Rapporteur recalled that it was considered appropriate to leave this matter to the State concerned as the liability regime for such type of damage differed from State to State. One delegation, supported by another, expressed the view that the current draft was not sufficiently clear. Unlike other conventions such as in the field of nuclear damage, the text did not establish any criteria of what constituted environmental damage, nor took into account the potential economic impact in terms of insurability or the lack thereof, and the potential for a substantial lessening of funds of the SCM. Noting that the notion of environmental damage was not adequately addressed in legal systems of many developing countries, one delegation stated that it would be necessary to create legal certainty and a level playing field. This delegation proposed to insert the wording …"or where such law does not exist as determined by the Secretariat of the Supplemental Compensation Mechanism" after the term "State Party" in paragraph 3.

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 had 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 the deletion of paragraph 3 because, firstly, the modernization of Rome exercise was based on a 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 A delegate, Chairman of the 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 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 the 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 matter 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** (**Friends of the Chairman Group 1**) 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, Sweden, 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** (The Supplementary Compensation Mechanism), 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. The 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 for 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 the same, 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 international legal personality 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 accurate and should be aligned with the English version. Paragraph 7, dealing with the immunities of the SCM, its Director and other staff, should be split.

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 (**Friends of the Chairman Group 2**), 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 Iceland and Greenland 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 which inspired the proposals of the Special Group.

3:75 The Committee, considering that **Articles 9** (The Conference of Parties) **and 10** (The meetings of the Conference of Parties) were closely linked to Article 8, decided to defer the discussion of the latter Article until the results of the Friends of the Chairman Group 2 became available.

3:76 With respect to **Article 11** (The Secretariat and the Director), 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-line 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** (Contributions to the Supplementary Compensation Mechanism), one delegation, supported by three other delegations, expressed the view that there did not seem to be a justification to exclude 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 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 Committee to be reviewed accordingly.

3:80 In considering **Article 13** (Aggregate limit on collection of contributions), 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 Committee 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** (Basis for fixing the Contributions), 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, a delegate, Chairman of the SG-MR, 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 a delegate, Chairman of the SG-MR, provided explanations on the background of **Article 15** (Initial Contributions and pre-funding), the Committee was satisfied therewith and considered **Article 16** (Collection of the Contributions). 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** (Duties of States Parties), following background comments from a delegate, Chairman of the SG-MR, one delegation questioned the meaning of "loss" in the third paragraph, wondering in relation to Article 12 whether the State would be made liable for failure to ensure contributions from general aviation operators. This remark 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, Nigeria, Russia,

Singapore, South Africa, Sweden, United Kingdom and United States of America, as well as IATA and AWG.

3:87 Regarding **Article 18** (The funds of the Supplementary Compensation Mechanism), 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. A delegate, Chairman of the SG-MR, informed that this proposal was actually pre-empted by the Task Force which was 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 Friends of the Chairman Group 2, 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, one delegate, Chairman of the SG-MR, advised that this wording had been modelled after similar provisions in the 1992 *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (the "IOPC Convention"). 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 noted a veiled reference to the 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** (Compensation). 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 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 the 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 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.

3:91 The Committee resumed its review of **Article 19, paragraph 3.** The Chairman recalled the Committee's earlier discussion on this point which had shown a divergence of views regarding the issue as to whether or not to provide for an automatic and mandatory drop-down mechanism.

3:92 One delegation supported the notion of a mandatory drop-down mechanism in cases where the standard set out in paragraph 3 was fulfilled. This delegation invited the Committee to consider in this context Flimsy No. 2 and explained that an amendment to the text was nevertheless necessary in order to address the situation when a particular operator was not in a position to obtain insurance coverage. One observer, who had argued in favour of the automatic drop-down feature, was of the opinion that the proposal advanced by the delegation had merit. This sentiment was echoed by another observer who advised the Committee that an automatic drop-down was needed in situations similar to those of the 9/11 events when two or more aircraft of the same operator were the subject of an act of unlawful interference. In such a situation, the aggregate insurance coverage available to that operator could otherwise be exhausted to not even cover compensation in the first layer.

3:93 One delegation fully supported an automatic drop-down mechanism and mentioned in this context that it behoved on States to ameliorate the situation of the carrier in this type of circumstance, as the act of unlawful interference was principally addressed against the State. Acknowledging that multiple acts of unlawful interference directed against the same operator represented a particular problem that needed to be addressed, one delegation expressed the view that it was sufficient to leave this matter to the discretion of the Conference of Parties. To do otherwise and provide for a mandatory drop-down would run contrary to existing European Community rules on insurance and would prevent ratification by a number of States. To the extent the operator concerned had procured all insurance as required under the Convention, it was however fair to offer some kind of financial assistance in certain circumstances, similar to the notion that is described in Article 26, this delegation stated. Remarking that Flimsy No. 2 had correctly identified the issue of the unavailability of insurance coverage for a particular operator as a distinct problem, the Chairman stated that some States would presumably find some comfort in the fact that it remained within the discretion of the Conference of Parties to address the drop-down, as there could always be cases of an incurious airline with a bad reputation for implementing security measures. One delegation was of the view that this matter required further consideration, particularly as regards the conditions and length of the drop-down in relation to events effecting the same operator. Based on this intervention, the Chairman established an additional group (**Friends of the Chairman Group 3**) to deal with this issue, comprised of the Delegations of France and Japan and the observers of AWG, IATA and LMBC. The group was requested to complete its review in the most expeditious manner.

3:94 The Committee thereafter turned its attention to **Article 20** (Advance Payments and other measures). One delegation invited the Committee to consider the provision at hand together with **Article 6** (Advance Payments) and to clarify the situation so as to avoid the potential for double payments to a natural person. In relation to this point, one delegate, Chairman of the SG-MR, explained that in principle the primary obligation with respect to advance payments rested with the operator; if the operator made the payment there would be no longer the immediate economic need to make the payment under Article 20. The latter provision was put in place to address the drop-down situation where the payment would be made by the SCM, subject to a decision of the Conference of Parties and the Compensation Guidelines. Certain clarifications on this point might nevertheless be required, it was stated. In this respect, one observer mentioned that the compensation guidelines envisaged a liaison between the insurers and the SCM which would easily identify any double payments.

3:95 With respect to advance payments and compensation to be paid by the SCM, one delegation proposed to clarify that such payments ought to be exempted from any currency or transfer restrictions.

Noting that this issue might be sensitive in certain jurisdictions, the Chairman invited this delegation to produce a flimsy for consideration by the Committee. On this basis, the Committee **agreed** on Articles 6 and 20.

3:96 **Article 21** (Acts or omissions of victims) was **accepted** without discussion.

3:97 **Article 22** (Court Costs and other Expenses), which was imported from Article 22, paragraph 6 of the Montreal Convention, was **adopted** by the Committee.

3:98 The Committee commenced with its review of **Article 23** (Reduced Compensation). In relation to this Article, the Committee recalled its earlier deliberations on the subject of "mental injury" as a separate head of damage. While one observer reiterated its arguments against the recognition of such type of injury, several delegations expressed the view that in light of the earlier discussions, "mental injury", to the extent recognized under the Convention, ought to receive the same treatment as "death and bodily injury" insofar as the priority over property damage was concerned. The Chairman tasked the Drafting Committee to adequately accommodate this point. In addition, the Committee agreed to clarify in line two of Article 23 that reference should be made to "Articles 4 and 19, paragraph 2".

3:99 As further regards Article 23, one delegation invited the Committee to consider the proposal for an amendment as set out in the Appendix to LC/33-WP/3-16. Commenting thereon, another delegation regarded the gist of the proposal suitable in the context of maritime law. This delegation noted however that the proposal could have implications for the forum provisions in the Convention. On account of this latter intervention, the Chairman remarked that the proposed amendment might not be suitable in the context of aviation. On this basis, the Committee concluded its consideration of Article 23.

3:100 The Committee thereafter turned its attention to **Article 24** (Additional Compensation). One delegation expressed its concerns regarding this provision and suggested to the Committee to consider its submissions which were contained in LC/33-WP/3-5. This delegation recalled its main objections against the draft text. In the view of this delegation, the proposal prevented the victim from receiving additional compensation from the carrier even if the carrier was in a position to effect payment, not having to use its own funds for neither the first nor the second layer. The draft text ran counter to fundamental principles of tort law, raised constitutional issues and effectively provided no incentive for the air carrier to live up to its moral responsibility and to comply with security measures. An unbreakable cap despite fault-based actions was not compatible with fundamental legal principles, the delegation noted. It invited the Committee to consider its proposal set out in paragraph 4 of the aforementioned working paper, which called for exceptions to the limitation of liability in case where the senior management has not complied with its supervisory duties or did not select its servants and agents properly.

3:101 The Rapporteur remarked that a hard cap on liability was considered essential for the operators as a *quid pro quo* for accepting a strict liability regime, noting that this feature remained at the same time a controversial element. He referred the Committee to the considerations contained in paragraphs 3.15 and 4.6 of the Rapporteur's Report. He stated that in case the liability cap was easily breakable, the new instrument would no longer mainly serve as a mechanism for a speedy victim compensation but would instead invite litigation on the subject of the carrier's behaviour.

3:102 In the ensuing discussion, four delegations stated that they fully shared the concerns of the delegation which had spoken earlier.

3:103 One delegation, supported by several others, was of the view that the current draft reasonably catered to the core interests of the victims. This delegation expressed some concern regarding the

proposal contained in paragraph 4 of LC/33-WP/3-5 and the notion of joint and several "liability" of the SCM. Another delegation recalled that the purpose of the Convention was one of risk management and risk allocation while ensuring victims' compensation. It regarded a hard cap as essential to the success of the entire project. Another delegation suggested to see these interventions in the context of a paradigm shift which has occurred, particularly in a situation where airlines were innocent victims. In the rare cases where the airline had partially contributed to the damage, it remained necessary to resort to tort law principles; any deviations thereto ought to be reasonable so as to remain ratifiable, this delegation stated. The delegation recalled that it had submitted working paper LC/33-WP3-21, which suggested to consider in tandem Article 24 and Article 27, and which contained a proposal for the broadening of situations under which additional compensation could be sought.

3:104 Another delegation expressed the view that the operator should only be exonerated when there was no intention on his part and that the concept of senior management should include all persons who took binding decisions on behalf of the operator, a notion which was supported by another delegation. As regards the burden of proof in paragraph 2 of Article 24, two delegations expressed the view that it should be placed on the operator instead of the victim. One delegation submitted for consideration to place the burden of proof on the SCM.

3:105 One observer, as did several delegations, regarded Article 24 as the keystone of the entire Convention and stated that the outcome regarding this point would determine whether the instrument could be supported by the industry. The observer remarked that in terms of compensation the victims would have more funds available than under a normal tort system, in the form of insurance and the SCM. In addition, prompt compensation was ensured due to the imposition of strict liability on the part of the airlines. Regarding the point of moral responsibility, it was stated that the airlines had every incentive to avoid an act of unlawful interference and that they took their responsibility in terms of security requirements very seriously. This sentiment was echoed by one delegation which remarked that security matters in aviation were highly regulated not only by Annex 17 but also through best industry practices.

3:106 Two other delegations expressed the view that a cap of liability was required. In their view, the current draft sought to achieve a balance regarding the interests of the operator and those of the victims while ensuring that the operator would not be overburdened.

3:107 One delegation, which had initially shared similar concerns regarding a departure from traditional tort law principles, remarked that it had attained a better understanding of the underlying principles and ideas contained in the current text of Article 24. Once these principles were embraced, one ought to realize that the Convention no longer represented a traditional tort law regime. This delegation was willing to accept the new structure and was mindful of the concerns expressed by others, which were made from a different perspective. It was thus imperative for the Committee to find a common perspective, as the project would otherwise fail. This delegation invited the Committee to move beyond the vision to regard what was proposed as being simply another tort law regime towards a vision which focused on the sharing of the risks and costs in the case of extraordinary events. Some details regarding paragraphs 2 and 3 of Article 24 nevertheless needed to be addressed, as the level of behaviour required for breaking the cap and some conditions remained too narrow. This delegation invited the Committee to constructively discuss these paragraphs on this basis. In a similar vein, another delegation expressed the view that the rationale behind the innovative philosophy of Article 24 justified the consideration of new solutions.

3:108 A proposal to delete Article 24 was not approved. Instead, the Committee decided to retain it and proceed with its discussion.

3:109 During the ensuing discussion, one delegation proposed to replace the term "person claiming compensation" appearing in the chapeau of paragraph 2 by "Supplementary Compensation Mechanism", and another delegation proposed to reverse from the victim to the operator the burden of proof provided for in paragraph 2. The Committee did not approve either of these proposals.

3:110 One delegation asked clarification on the legal value of the "applicable industry standard" referred to in paragraph 3. An observer explained that what IATA does is to check whether their member airlines follow the applicable legal standards, be those established by ICAO or otherwise, like national laws and regulations, which are reflected in the so-called IATA Standards used to audit its member airlines. If an airline follows such standards, it could not be found to be in gross-negligence if some unlawful act occurs, although there might be other grounds for airlines to claim non-gross-negligence.

3:111 One delegation, referring to concerns expressed in relation to breaking the cap of liability, was of the view that such possibility is almost inexistent. The only case would be when the carrier is the perpetrator of the act. As regards the use by the carrier of the industry standard argument to avoid a break of the cap, the delegation considered that it is a practical solution because this is regarded as the industry best practice and is, therefore, where one would normally look at for the purposes of paragraph 2 b).

3:112 One delegation proposed that, if Article 24 was to be retained as the Committee had decided, the following changes should be made thereto: the term "servants and agents" should be added to "senior management" in the chapeau of paragraph 2, and the term "disregard of a known, probable and eminent risk" in paragraph 2 b) iii) should be replaced by "recklessness and knowledge that damage will probably result".

3:113 With respect to the first proposal, two delegations expressed support. One of them explained that because of the increasing practice of outsourcing services, including in the security field, airlines may lose control of outsourced activities. However, four delegations and one observer expressed disagreement with this proposal, explaining that it would upset the system as designed and that the adoption of any wording that could lead to breaking the liability cap would likely open the door to bankruptcy of airlines with serious social consequences. Hence this proposal was rejected.

3:114 As regards the proposed change to paragraph 2 b) iii), and taking into account the linkage of this provision to paragraph 3 where the reference to "applicable industry standard" had raised concerns during previous discussion, it was decided to continue with the consideration of this issue in the next meeting.

3:115 The Chairman then invited Sweden to introduce **Flimsy No. 1** containing the **Report of the Friends of the Chairman Group 1** regarding a revised text for Article 7 on insurance. The revised text was **approved** as proposed without discussion.

3:116 **Article 28** (Conversion of Special Drawing Rights) which streamlines the procedure outlined at Article 23, paragraph 1 of the 1999 Montreal Convention, **was accepted** without discussion.

3:117 With regard to **Article 29** (Review of Limits), one delegation clarified that the reference to "inflation fact" in **paragraph 2** should read "inflation factor". Another delegation, in considering **paragraph 1**, voiced some doubt as to whether it was appropriate for the Director of the SCM to be charged with the review of the sums in Article 4 given that they had no relation to an act of intervention by the Mechanism. The Chairman noted that there was a need for coordination with liability limits; if the review did not include Article 4 sums, it was possible to envision a gap in coverage between Article 4 and Article 19. One delegation, supported by another delegation, found it difficult to appreciate why the Director alone would be vested with such a right given that it was not an operational issue and that it fell within the

prerogative of States as members of the Conference of Parties. Another delegation suggested that, for the avoidance of doubt as to the approval role currently in paragraph 2, this power should instead be in paragraph 1. The Committee **approved** Article 29 in principle, subject to the Drafting Committee considering increasing the visibility of the Conference of Parties in the first paragraph.

3:118 In response to a question raised by a delegation with regard to **Article 30** (Forum), paragraph 1, *vis-à-vis* "where the damage occurred", a delegate, Chairman of the SG-MR, echoed by another delegation, explained that there had been a clear intention to move away from the 1952 Rome Convention to emphasize victim protection. To that end, Article 30 covers instances where events taking place in a non-State Party result in damages within a State Party, ensuring that a connection is made to where the damage occurs. **Paragraph 2** addresses the problem where damage occurs in several States given that it is not always easy to determine where the aircraft is when the damage occurs. The Committee **accepted** Article 30 as is**,** subject to a proposal by one delegation to replace "incidente" with "suceso" in paragraph 2 of the Spanish text as the latter word was more consistent with "event".

3:119 **Article 31** (Intervention by the Supplementary Compensation Mechanism) was **accepted** by the Committee without comment.

3:120 During consideration of **Article 32** (Recognition and Enforcement of Judgements), one delegation reiterated its concerns raised at the SG-MR regarding its desire to delete **paragraph 3**. This delegation explained that since each State has different legal rules regarding enforcement of judgements, this paragraph could be an impediment to the ratification of the Convention, and suggested instead a reference to the national law of the State where the damage occurs. A delegate, Chairman of the SG-MR's Sub-Group on Procedural Matters, explained that subparagraphs a) through f) were in square brackets because there had been no consensus on whether reference should be made solely to domestic law, or whether a common set of rules should apply. In this delegate's view, which was supported by six other delegations, the latter choice was preferable. One of these delegations noted that subparagraph e) had to be made compatible grammatically with the chapeau of paragraph 3. The Chairman then established an additional group **(Friends of the Chairman Group 4)**, comprised of the Delegations of China, Senegal, Sweden and the United Kingdom, which was tasked to review paragraph 3 in a most expeditious manner. The compatibility of subparagraph e) with the chapeau of paragraph 3 of Article 32 was **referred** to the Drafting Committee.

3:121 **Article 33** (Regional and multilateral agreements on the recognition and enforcement of judgements) was **accepted** by the Committee without comment.

3:122 With regard to **Article 34** (Period of Limitation), one observer referred the Committee to LC/33-WP/3-9 which proposed at paragraph 2.2.11 that the period of limitation be two years as in the 1929 Warsaw Convention, the 1999 Montreal Convention and the 1952 Rome Convention. Further, the industry had a right to know who the claimants would be within a short period of time and there would be no significant harm to claimants in reducing the period. Another observer, in supporting this view, pointed out that claimants would be compensated sooner, allowing less time for the funding to run out. All delegations who spoke supported retaining the three-year limitation period as a minimum. The various reasoning expressed by these delegations for maintaining the longer limitation period in a third-party context (versus a contractual regime covered under, *inter alia*, the Montreal Convention) was that it was more difficult to identify victims and goods and to calculate the associated damages and, in some cases, to evaluate whether the damages occurred as a result of an act of unlawful interference or otherwise. On a point of clarification raised by one delegation as to why there was a disparity between the limitation periods in the two draft Conventions, the Rapporteur for the General Risks Convention cited the experience under the 1952 Rome Convention as justification for maintaining the two-year period. This differed somewhat from

the Unlawful Interference Compensation Convention, where the deliberate nature of, and the intent to cause, the damage could complicate claims by victims. The text of Article 34 was **endorsed** by the Committee as is, subject to replacing "incidente" in **paragraphs 1 and 2** in the Spanish text of the Article with "suceso" as per the reasoning stated in the context of Article 30.

3:123 **Article 35** (Death of Person Liable) and **Article 36** (State Aircraft) were **endorsed** by the Committee without comment.

3:124 Upon discussion of **Article 37** (Nuclear Damage), the Chairman reminded the Committee that it had agreed to come back to this provision in the context of environmental damage of a nuclear nature. One observer, supported by another observer, referred the Committee to LC/33-WP/3-9 which proposed at paragraph 2.2.12 that liability for uninsurable nuclear damage be excluded. One delegate, Chairman of the SG-MR, understood that the two conventions on nuclear liability mentioned in the Article had to do with channelling liability to operators of nuclear facilities for acts involving nuclear material stolen from those facilities. One delegation, in supporting the statements of the above delegate and both observers, suggested re-drafting the text to capture complementary conventions and domestic legislation that would give further protection in these cases. Another delegation expressed doubt as to whether "a nuclear incident" necessarily involved an act of unlawful interference.

3:125 One delegation acknowledged that there was a degree of agreement that the operator should not be liable for nuclear damage. One delegation, supported by another delegation, echoed this view, stating that the risks did not emanate from aviation activities but from nuclear facilities. When the Chairman proposed deleting Article 37 in its entirety, one delegation cautioned that such deletion would subject the operator to the strict liability regime of the Convention. Another observer reiterated the proposal in LC/33-WP/3-9 to delete all of the text after "incident" in the first line of the Article. In response to this, one delegation, supported by two other delegations, cautioned that since "nuclear incident" is not defined in the Convention, reference should be made to definitions in other relevant conventions. In concluding the consideration of Article 37, the Chairman **referred** the Article to the Drafting Committee and tasked it to consider adopting one of two approaches which would best reflect the rest of the terms of the Convention: either delete the text following "incident" in the first line and clarify what constitutes a nuclear incident; or merely provide that nuclear damage shall not be compensable under this Convention (or, alternatively, follow the wording of Article XIV of the 1978 Montreal Protocol).

3:126 The Committee then turned to **Article 18** (The funds of the Supplementary Compensation Mechanism). One delegation proposed the inclusion of a financial security clause to protect States Parties from liability arising from actions, omissions or obligations of the SCM pursuant to their membership in the Mechanism. Such liability could arise as a result of, *inter alia*, investment of the funds by the SCM pursuant to **paragraph 2** of Article 18 or obtaining credits from financial institutions pursuant to Article 18, paragraph 4. One delegate, Chairman of the SG-MR, found the proposal interesting but noted that it was akin to a clause dealing with the winding up of the SCM, and was of a kind generally dealt with in the final clauses of an instrument at a Diplomatic Conference. The Chairman, in agreeing with this suggestion, invited the delegations to consider this matter carefully and to be prepared to present their positions at the Diplomatic Conference.

3:127 The Chairman of the **Friends of the Chairman Group 2** presented **Flimsy No. 3** which examined the relationship between ICAO and the Supplementary Compensation Mechanism. The Attachment to the Flimsy contained eight proposals which were intended to clarify the nature of that relationship. The Chairman of the Legal Committee invited the Committee to provide comments on each of these proposals itemized in the Attachment.

3:128 With regard to item 1, the Legal Committee **commended** the Diplomatic Conference to give careful consideration as to whether the Preamble of the Convention should contain a description of the relationship between ICAO and the SCM, including that the SCM has been set up under the auspices of ICAO.

3:129 In noting the proposal at item 2 to delete the square brackets in Article 8 (The Supplementary Compensation Mechanism), paragraph 3, one delegation requested clarification as to why there was no corresponding amendment to paragraph 4 of that Article or whether the SCM had its own legal personality distinct from ICAO. The Chairman of the Group confirmed that ICAO and the SCM would have distinct personalities, but some relationship should be established in order to enable ICAO to facilitate the SCM's work by entering into an arrangement. Further clarification was provided by the Group Chairman regarding the "seat at the same place as" ICAO as being Montreal. The Committee **agreed** to remove the square brackets from Article 8, paragraph 3, with the Chairman urging the Drafting Committee to note the change.

3:130 Regarding items 3 and 4, the Chairman noted that consideration of **Article 9** (The Conference of Parties) had been put on hold pending this discussion. Item 3 contained a proposal to insert a new subparagraph in Article 9 with the following wording: "as appropriate, enter into arrangements on behalf of the Supplementary Compensation Mechanism with the International Civil Aviation Organization and other international bodies". The Committee **agreed** with the addition of the subparagraph, which should be put in an appropriate place to be suggested by the Drafting Committee. Item 4 proposed that the words "or the International Civil Aviation Organization" be inserted after the words "State Party" in Article 9, **subparagraph m**), as this would allow ICAO to enter points on the Agenda of the Conference of Parties. This insertion was **accepted** by the Committee for the Drafting Committee to note.

3:131 The text proposed at item 5 would be added at the end of **Article 10** (The meetings of the Conference of Parties), paragraph 3, as follows: "The International Civil Aviation Organization shall have the right to be represented, without voting rights, at the Conference of Parties". This text was also **accepted** without objection, for the Drafting Committee to note.

3:132 As the proposals in items 6 and 7 dealt with the Regulations of the SCM, the Committee wished to record in this Report its acceptance in principle of these proposals, which will be considered later on by those charged with drafting and approving the Regulations.

3:133 The Committee wanted it to be noted in this Report that it accepted in principle the proposal described in item 8 and recommended that the Secretariat bring to the attention of the Diplomatic Conference that a resolution be set out indicating that the first meeting of the Conference of Parties should take place in Montréal at the premises of ICAO .

3:134 In considering the totality of **Article 9** (The Conference of Parties), the Committee considered it **approved**, subject to the amendments agreed.

3:135 The Committee then considered **Article 10** (The meetings of the Conference of Parties). One delegation proposed that **paragraph 3** be amended to reflect not only equal rights to member States, but should also provide for proportionate votes based on the amount of contributions made to the SCM (weighted voting). This was in line with the precedents of the World Bank and the International Monetary Fund and was in keeping with the idea that investment funds of sovereign States should be managed similarly to those of private financial entities. Another delegation averred that ratifiability of the Convention would be made more difficult without such an amendment in particular with regard to States making higher

contributions. In opposing the proposal, one delegation suggested it would on the contrary impede ratification. This was supported by five other delegations feeling that such weighted voting would compromise the payment of compensation to developing States, and claiming that the decision-making process of the Conference of Parties should be based on the principle of "one State, one vote", upon which ICAO was founded. The Committee therefore **decided** to leave the text as is.

3:136 One delegation, supported by another, recommended that reference be made in Article 10, **paragraph 4**, to Article 9, subparagraph e) with regard to initial contributions. The Committee **agreed** to insert the reference to **subparagraph e)** in paragraph 4 of Article 10 and commended the same to the Drafting Committee.

3:137 The Committee next considered **Article 32, paragraph 3.** The **Friends of the Chairman Group 4** suggested to remove the square brackets in that paragraph and to retain the text. It further suggested to introduce a new subparagraph to provide additional grounds to refuse recognition and enforcement of a judgement. To ensure the transparency of the system, such additional grounds could be invoked only under the condition that they have been notified to the depositary of the Convention upfront and in advance. The Committee **approved** in principle this proposal and **requested** the Drafting Committee to prepare the text of the new subparagraph.

3:138 The Committee then considered **Articles 25** (Right of Recourse)**, 26** (Assistance in case of events in States non-party) **and 27** (Exclusive Remedy). With respect to **Article 26**, an observer proposed that if it is decided that the SCM shall provide financial support under Article 26 to an operator which is liable for damage occurring in a State non-Party, such support should be subject to the condition that the State non-Party agrees to be bound by the terms and conditions of the Convention. A draft text to that effect was presented in LC/33-WP/3-9. Several delegations supported this proposal. They believed that it would be reasonable to request a State non-Party to abide by the terms and conditions of the Convention, through retroactive legislation or otherwise, in order to enjoy the benefit from the Convention. The Committee **accepted** this proposal and **tasked** the Drafting Committee to examine the wording of the proposed amendment in LC/33-WP/3-9.

3:139 Further consideration of Articles 25 and 27 was based on LC/33-WP/3-6 and LC/33-WP/3-9. Several delegations expressed strong reservation to the current text of Articles 25 and 27. By providing an exclusive remedy against the operator, Article 27 would effectively shield other entities from their liability, regardless of the possibility that they may also have contributed to the damage. Such a broad exoneration was considered to be in contravention with basic principles of tort and contract law, according to which any entity should be held accountable for its fault. These delegations might accept certain exoneration clauses applicable to owners, lessors and financiers of aircraft, but would have difficulties in extending the same exoneration to such entities as air navigation service providers, airports, security providers and ground handling service providers. Exoneration of these latter entities would not provide incentives to improve security measures. Moreover, the exclusion of the liability of manufactures would present a serious problem, since this would contradict with European Community (EC) law on product liability and would affect the ratifiability of the Convention by EC Member States. Last but not least, the concept could put the victims in a disadvantageous position. In the event that the SCM is exhausted and the victims remain uncompensated or inadequately compensated, they would be deprived of their rights to pursue other entities which have contributed to the damage. Accordingly, it was suggested to delete Article 27. In addition, these delegations also believed that the permitted recourse under Article 25 was extremely narrow and unnecessarily restrictive. It could hardly be considered fair if the operator, which would be held strictly liable for damage, could not have a right of recourse against those who actually caused or contributed to the damage. In the view of these delegations, Article 25 should be amended by

incorporating the draft provisions proposed in LC/33-WP/3-6 in order to retain the broader possibility for recourse.

3:140 In contrast with the aforementioned view, one observer believed that Article 27 was one of the cornerstones of the Convention and should be retained in its current form. The industry preferred to allocate liability among themselves instead of lengthy involvement in litigation. They should be allowed to do so since the interests of the victims would not be affected. Channelling of liability was not a new concept. It was reflected in certain international treaties such as the *Convention on Third Party Liability in the Field of Nuclear Energy* of 1960. In this context, some delegations underlined the need to establish an efficient compensation system at minimum cost. At issue was not product liability or principles of tort law, but compensation for damage caused by terrorist acts. When States come to an international forum to negotiate a treaty, certain flexibilities were essential, including the necessary adjustments of their respective national law.

3:141 The Chairman stated that the core of this project was to provide full compensation to victims. Great efforts had been devoted in the past to achieve this ultimate goal. In order to defeat terrorism, every participant should display flexibility. Coming from a civil law jurisdiction, he believed that the civil law system is open to novel ideas and renovation. With that in mind, he appealed to delegations and observers to make the project work.

3:142 A delegate, Chairman of the SG-MR, intervened at this juncture by stating that there was room for improving Article 25, but the deletion of the Article might not be the best solution. Perhaps consideration could be given to the possibility of widening the base of contribution to the scheme. Entities other than operators could be asked to contribute to the scheme in exchange for their protection under such a scheme.

3:143 A large number of delegations subsequently took the floor and underlined the need to establish a well-balanced system. They were in favour of retaining both Articles 25 and 27, subject to necessary amendments to address the concerns discussed above. Consequently, the Committee **decided** to establish another group (**Friends of the Chairman Group 5**) to work on this matter; this Group was composed of France, Germany, Japan, Sweden, Singapore, South Africa and the United States, as well as IATA and AWG, under the chairmanship of Sweden.

3:144 The Committee then **approved** the contents of **Flimsy No. 4** without any change and **requested** the Drafting Committee to incorporate revised **Article 19, paragraph 3**, into the draft Convention.

3:145 The Chairman suggested that, in the absence of a representative of the Air Crash Victims Families Group to introduce its working papers LC/33-WP/3-12 through LC/33-WP/3-15, LC/33-WP/3-17 and LC/33-WP/3-19, the Committee take note thereof and take into account proposals made therein as appropriate in considering the relevant draft provisions on general risks. The Chairman further suggested that there should be no need to introduce information papers LC/33-WP/3-18 and LC/33-WP/3-20 presented by the Supplementary Compensation Mechanism Task Force and by the Chairman of the Special Group on the Modernization of the Rome Convention of 1952, respectively. The Committee **agreed** with these suggestions.

3:146 The Committee turned to the consideration of the **Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties (LC/33-WP/3-1, Appendix C)**. The Chairman encouraged

the Committee to concentrate on the principles behind the draft provisions and leave drafting details for the Drafting Committee.

3:147 In considering the draft convention article by article, the Committee **approved** without changes the **title** of the Convention and **paragraphs b), c), d), e) and f)** of **Article 1** regarding definitions. With respect to **paragraph a)**, it was decided to change the definition of an act of unlawful interference in line with the change which had been made to the same definition in paragraph a) of Article 1 of the draft Unlawful Interference Compensation Convention. As regards paragraph f), one observer proposed to exclude the consignor or consignee of cargo in the case of collision, but this proposal was not supported.

3:148 In relation to **Article 2** (Scope), **paragraph 1**, and in line with what had been decided for the equivalent provision in the draft Unlawful Interference Compensation Convention, it was decided to qualify the flight as international, give the States the possibility of declaring that this provision also applies to their domestic flights and insert in Article 1 a definition of international flight. To this end, paragraph 1 was sent to the Drafting Committee.

3:149 In addition, one observer, supported by another observer, proposed that an exoneration similar to the one established in Article 5 of the Rome Convention of 1952 in respect of damage directly resulting from armed conflicts or civil disturbances should be contemplated. In view of the hesitation shown by some States in adopting the proposed exoneration because of the strict liability regime of the operator, it was decided to leave this issue in abeyance.

3:150 **Article 3** (Liability of the Operator), **paragraph 1**, was **approved** without change. With respect to **paragraph 2**, one observer, supported by two delegations, proposed to redraft **paragraph 2 a)** in a positive fashion rather than the current negative formula. Another observer proposed that the two-tier liability regime provided for in the Montreal Convention of 1999 and an overall liability cap of the operator based on the actual weight of the aircraft be adopted, in line with Article 4 of the other draft Convention. Another observer proposed that a liability cap should also apply to the rest of the industry sector, considering that if the cap was to be limited to the operator this would only serve to shift the liability to others in the industry. A number of delegations, taking into account that the establishment of a cap for the operator would facilitate the insurability of its liability, supported this proposal but opposed to extending such cap to the rest of the industry, considering that operators have strict liability while the other sectors of the industry do not. It was decided to set up a Special Sub-Group composed of Argentina, Germany, Romania, Uganda, AWG and IATA to study this matter and present a solution on the following day. **Paragraphs 3 and 5** were **approved** without changes and **paragraphs 4 and 6** were **referred** to the Drafting Committee to be aligned with the equivalent provisions approved for the draft Unlawful Interference Compensation Convention.

3:151 **Article 4** (Events involving two or more operators or other persons) was **approved** without changes; **Article 5** (Court Costs and other Expenses) was **approved** with the replacement of the word "carrier', appearing in the fourth line, by "operator"; **Article 6** (Advance Payments) was approved without changes; **Article 7** (Insurance) was **approved** with the insertion of the term "in or" after "State Party" appearing in the beginning of the third line; **Articles 8** (Acts or Omissions of Victims), **9** (Rights of Recourse) **and 10** (Exclusive Remedy) were **approved** without changes.

3:152 As regards **Article 10 *bis*** (Exoneration of Status Liability), there was some discussion as to whether the square brackets around the provision should be removed. There were views in favour, considering that the parties covered by this provision have no involvement in the operation of the aircraft, and against, considering that such exoneration should not be granted because there is no global cap. Even if

there was a majority in favour of removing the square brackets, it was **decided** to refer this matter to the Sub-Group set up to study paragraph 2 of Article 3.

3:153 **Article 11** (Conversion of Special Drawing Rights) was **approved**, subject to an amendment in the Spanish version regarding the translation of the English term "judicial proceedings" which should be translated to "procesos judiciales", and **Article 12** (Review of Limits) was **approved** without changes.

3:154 With respect to **Article 13** (Forum), it was indicated that the title in the French version should be "For". One delegation proposed to add to **paragraph 1** the jurisdiction of the State where the operator has its principal place of business. One observer, supported by some delegations, was of the view that there was no valid reason to give the victims in this draft Convention a treatment different from that given in the other draft Convention. A number of delegations, recognizing merit in the proposed additional jurisdiction, voiced support thereto. It was **decided to refer** this matter to the Drafting Committee with the guidance that the additional jurisdiction be inserted in square brackets and the Drafting Committee analyze its impact in the process of distribution of the compensation to various victims in the case of intervention of different jurisdictions. **Paragraphs 2 and 3** were approved without changes.

3:155 As regards **Article 14** (Recognition and Enforcement of Judgements), it was decided to remove the square brackets around the **subparagraphs** under **paragraph 3** and include a clause along the lines of that added to Article 32 of the draft Unlawful Interference Compensation Convention. **Article 15** (Regional and Multilateral Agreements on the Recognition and Enforcement of Judgements) was **approved**, subject to a correction in the Spanish version, and **Article 16** (Period of Limitation) was **approved** with the increase from two to three years of the time limit for bringing action, in line with what was adopted in the draft Unlawful Interference Compensation Convention.

3:156 **Articles 17** (Death of Persons Liable) **and 18** (State Aircraft) were **approved** without changes and **Article 19** (Nuclear Damage) was **approved** subject to the changes which had been made to Article 37 (Nuclear Damage) of the draft Unlawful Interference Compensation Convention and a correction in the Russian version.

3:157 The Committee thereafter considered **LC/33-WP/3-22** which contained the Report of the Drafting Committee in relation to the text of the Unlawful Interference Compensation Convention, save as regards the three distinct Articles (24, 25 and 27) which remained the subject of ongoing consultations.

3:158 In relation to the **title of the instrument**, the Chairperson of the Drafting Committee, the delegate of the United Kingdom, explained that the change in the title was due to the expressed desire to more accurately reflect that the damage caused by the aircraft was due to an act of unlawful interference .

3:159 The definitions contained in **Article 1** (Definitions) **paragraphs a) and b)** were **adopted** without discussion. In relation to the newly introduced definition for "international flight" in **paragraph d),** the Chairperson recalled that the Committee had decided to focus on the nature of the flight instead of the nationality of the air carrier. It was explained that the said provision was linked to the Article on scope (Article 2).

3:160 In relation to the proposed definition, one delegation observed that in Article 12 (Contributions to the Supplementary Compensation Mechanism) mention was made to the term "international commercial flight". This delegation raised a query as regards the difference in terminology. Another delegation submitted for consideration to use the definition of "international flight" which was

found in the Chicago Convention. In relation to this latter intervention, it was explained that the Drafting Committee had been inspired by the notion of what is contained in the 1999 Montreal Convention. Subject to the above comments, paragraph d) was **adopted**.

3:161 In relation to **Article 2** (Scope), it was observed that the text inadvertently created an incongruous situation insofar as it did not provide for the possibility of the application of the Convention in the case of events involving domestic flights for a State Party which has not made a statement of opt-in consistent with **paragraph 2**. The Committee **agreed** to address this point when considering the new Article 25 (Assistance in case of events in States non-Parties) (former Article 26).

3:162 As regards the amendments to **Article 3** (Liability of the Operator), **paragraph 1**, the Chairperson explained that they were designed to give more prominence to the fact that the damage was principally due to an act of unlawful interference, as now highlighted in the revised scope article (Article 2). As regards **paragraph 3** of Article 3, it was remarked that the text endeavoured to address the situations were persons on the ground were literally on the scene of the accident and fearing for their lives. In relation to **paragraph 4**, the Chairperson noted that the issue of the interrelationship with other air law instruments such as the 1999 Montreal Convention and the potential windfall for the consignor of cargo in case of mid-air collisions constituted a complicated issue which could ultimately only be addressed in the Final Clauses. Explanations were also provided with respect to **paragraphs 5 and 6**.

3:163 Based on an intervention made by one delegation, the Committee **agreed** to tighten the text in Article 3, paragraph 3 by inserting the word "only" before "if" in line two. The Committee also agreed to have the sentence conclude with "likelihood of imminent death or bodily injury". In taking into account the possibility for an application of the Convention in States non-Parties, the Committee further **agreed** to delete in paragraph 5 of the Article the word "Party". The Delegation of France would contact the Secretariat concerning the French text.

3:164 **Article 4** (Limit of Operator's Liability), **Article 5** (Events involving two or more operators or other persons) and **Article 6** (Advance Payments) were **adopted** without discussion.

3:165 In relation to **Article 7** (Insurance), it was noted that the proper reference should be in both instances to Article 11, paragraph 1 e).

3:166 The Committee thereafter **adopted Article 8** (The constitution and objectives of the Supplementary Compensation Mechanism) on the understanding that necessary changes to the Arabic text would be made. In relation to **paragraphs 5 and 6** of the Article, one delegation was invited to submit a working paper so as to record its comments.

3:167 **Article 9** (The Conference of Parties), **Article 10** (The meetings of the Conference of Parties) and **Article 11** (The Secretariat and the Director) were **approved** without discussion.

3:168 In the consideration of **paragraph b)** of **Article 12** (Contributions to the Supplementary Compensation Mechanism), views were divided as to how and to what extent general aviation should be captured under this provision. While several delegations preferred to refer only to "general aviation" with no further qualification, a number of other delegations were of the view that a qualification was required in order to avoid the inclusion of entities such as leisure pilots, aerial flight clubs, etc. which did not perform carriage for reward or hire. Commenting on the views expressed, the Chairman suggested to leave it to the discretion of the Conference of Parties to consider both in terms of scope of persons and amounts to be collected the extent to which general aviation ought to be captured. Mindful of the diversity of operations involving

general aviation, the Committee agreed to substitute the term "for business purposes" with "or any sector thereof". **With this modification**, the Article was **adopted** by the Committee.

3:169 As regards **Article 13** (Basis for fixing the Contributions) (formerly Article 14), in light of the earlier decision as regards Article 12, the Committee **agreed** to add at the end of **paragraph d)** the expression "taking into account the diversity that exists in this sector".

3:170 The Chairperson of the Drafting Committee presented the two principal changes made to **Article 14** (formerly Article 15) (Contributions). First, **paragraph 3** set out the aggregate limit on the collection of contributions which had been contained in Article 13 of the previous draft. Second, the text of **paragraph 4** was moved from former Article 14, paragraph 2 to emphasize that a State Party will not pay for terrorist incidents that occur before they become members of the SCM. It was also pointed out that "States" at the last line of paragraph 1, was misspelled. One delegation, supported by another delegation, felt that the title of the Article was too vague and too vast, and suggested the alternative wording "Period and rate of contributions". Article 14 was **approved** by the Committee subject to the change of title and the above-mentioned editorial correction.

3:171 **Article 15** (formerly Article 16) (Collection of the Contributions) was **approved** subject to an amendment to the French text **in paragraph 2** which replaces "perçoit" with "collecte".

3:172 In considering **paragraph 2**, **subparagraph a)** of **Article 16** (formerly Article 17) (Duties of States Parties), one delegation, supported by another delegation, stated that there was a lack of clarity as to how contributions would be made to the SCM in respect of general aviation. To that end, the supporting delegation proposed the insertion of a new **subparagraph b)** to read "such information on general aviation flights as the Conference of Parties may decide". The Chairperson of the Drafting Committee averred that general aviation activities also needed to be reflected in the context of domestic traffic, with the Chairman proposing that "such information on general aviation flights as the Conference of Parties may decide," be inserted after "State Party" in the second to last line of paragraph 2. The Committee **adopted** Article 16 with the two changes mentioned above.

3:173 **Article 17** (formerly Article 18) (The funds of the Supplementary Compensation Mechanism) was **adopted** by the Committee without comment**.**

3:174 The Chairperson of the Drafting Committee explained that the changes to **Article 18** (formerly Article 19) (Compensation), **paragraph 1**, were in line with the amendments to paragraphs 1 and 2 of Article 2 (Scope) with regard to, respectively, the Convention's automatic application to all international flights into a State Party and the opt-in provision for domestic flights. The Chairperson of the Drafting Committee clarified that, as proposed in Flimsy No. 4 by the Friends of the Chairman Group 3, the term "financial support" in **paragraph 2** was replaced by "payments made" in order to more accurately reflect the drop-down facility's application to the payment of damages *per se*. One delegation, supported by two other delegations, expressed some concern as to the vagueness of the term "an event affecting that operator" in the fifth line of **paragraph 3** in that it could be understood to refer to an event involving one particular operator only. One of the supporting delegations clarified that the employed terminology such as "whether generally" and "If and to the extent that the Conference of Parties determines" already sufficiently denoted that the situation would also encompass events that did not affect the operator directly. On this basis, the Committee **approved** Article 18.

3:175 **Article 19** (formerly Article 20) (Advance Payments and other measures)**, Article 20** (formerly Article 21) (Acts or omissions of victims), **Article 21** (formerly Article 22) (Court Costs and other

Expenses) and **Article 22** (formerly Article 23) (Reduced Compensation) were **approved** by the Committee without comment.

3:176 The Chairman deferred the discussion on **Article 23** (formerly Article 24) (Additional Compensation), **Article 24** (formerly Article 25) (Right of Recourse), **Article 25** (formerly Article 26) (Assistance in case of events in States non-party) and **Article 26** (formerly Article 27) (Exclusive Remedy).

3:177 The Committee **approved** without comment **Article 27** (formerly Article 28) (Conversion of Special Drawing Rights) and **Article 28** (formerly Article 29) (Review of Limits).

3:178 With regard to **Article 29** (formerly Article 30) (Forum), one delegation, expressing concern as to the problem of competency if damage occurs in a State non-Party, suggested that wording be added stating that an action could be brought before the courts of a State non-Party pursuant to Article 25 (formerly Article 26). The Chairman suggested that Article 25 itself permitted the Conference of Parties to impose on States non-Parties the rules which would be appropriate. The same delegation, supported by another delegation, suggested that the title of Article 29 in the French text be changed to "juridiction compétente" in line with Article 33 of the 1999 Montreal Convention. The Committee **approved** Article 29 subject to the change of title in the French text.

3:179 **Article 30** (formerly Article 31) (Intervention by the Supplementary Compensation Mechanism), **Article 31** (formerly Article 32) (Recognition and Enforcement of Judgements), **Article 32** (formerly Article 33) (Regional and multilateral agreements on the recognition and enforcement of judgements), **Article 33** (formerly Article 34) (Period of Limitation), **Article 34** (formerly Article 35) (Death of Person Liable) and **Article 35** (formerly Article 36) (State Aircraft) were **approved** without comment.

3:180 The deletion of **Article 37** was **accepted** given that the concept of nuclear damage was now covered under Article 3, paragraph 6.

3:181 **Flimsy No. 5**, presented by Japan, proposed a revised text to Article 8, paragraph 6 and a new paragraph 7 dealing with the immunity respectively of the SCM and its funds, and of the Director and other personnel. This delegation stressed the importance of including such immunity in the draft Convention in line with other conventions and requested that this point be taken into account for the future when this issue is next discussed.

3:182 One observer wished it noted in this Report that the industry encourages States Parties to express their support with regard to the third layer (as referred to in paragraph 2.3.1 of the Rapporteur's Report). In this context, it was submitted that this could be included as a statement in the Preamble to the Convention.

3:183 One delegation wanted to reiterate its views that passengers, inasmuch as they are victims of acts of unlawful interference, should not be deprived of the right to claim compensation from the SCM. In a similar vein, another delegation deemed it appropriate to consider the interrelationship of this Convention and the 1999 Montreal Convention.

3:184 The Committee thereafter considered **Flimsy No. 8**, presented by the Delegate of Sweden, which contained a compromise package comprising the articles which dealt with "Additional Compensation"(former Article 24), "Right of Recourse" (former Article 25) and "Exclusive Remedy" (former Article 27). Commenting on the aim which was behind the proposal, the Chairman of the Legal Committee stated that the endeavour was to broaden the consensus as far as possible in the Committee

with a view to attempting to satisfy the largest group possible.

3:185 The Delegate of Sweden explained that the proposal confirmed the principle of breakability above the second tier, as well as the principles of recourse and channeling. In relation to paragraph 2 of Article 24 (Additional Compensation), the delegate explained that the term "intent or recklessly" was now featured as had been proposed. In relation to paragraph 3, the delegate noted that it had not been possible in the Group to find consensus how to qualify these concepts further. The proposal provided for a protection for a careful operator by virtue of a presumption in favour of the operator in case of compliance with relevant regulatory requirements. To take into account that the standard in assessing and interpreting reckless behaviour differed in the various jurisdictions, the proposal contained an option for States to introduce an absolute (objective) standard in terms of a commonly applied branch standard shared among a large number of airlines, such as the IATA Operational Safety Audit (IOSA) Programme.

3:186 As far as "agents" and "servants" were concerned, the delegate remarked that the views remained divergent. The proposal suggested to include these persons if they committed the act of unlawful interference and required the operator to have a system in place which ensured proper control in terms of selection of personnel (security screening). If subsequent to the hiring new information would come to light in terms of a security risk regarding an employee, it was further incumbent upon the operator to promptly react. The delegate of Sweden informed that the proposal contained a definition for "senior management" which encompassed persons who had decision-making powers in relation to the overall operations of the operator concerned.

3:187 Turning to Article 25 (Right of Recourse of the Operator), the delegate of Sweden confirmed that paragraph 1 maintained recourse claims against the perpetrator of the act of unlawful interference. In relation to paragraph 3 of the Article, which limited the general principle set out in paragraph 2, the delegate noted that it was not considered fair on the one side to protect the financial position of the operator while permitting on the other to pursue through recourse actions other, smaller industry participants in an unrestricted fashion. As the goal was also to protect the entire aviation sector following an act of unlawful interference, it was therefore considered adequate to permit recourse actions only to the extent the other entities could reasonably be covered for such claims by insurance. It was further explained that the proposal did not provide for a right of recourse against non-operational parties such as financiers or lessors, nor for such right against manufacturers to the extent the contribution related to the approved design. The proposal also confirmed that an operator who had been found liable to pay additional compensation had no right of recourse.

3:188 The Delegate of Sweden explained that Article 25 had been split into two separate articles so as to distinguish between the right of recourse of the operator and the right of recourse of the SCM. With respect to the latter, the new Article 25 *bis* mirrored in paragraphs 1, 2 and most of paragraph 3, in substance what had been proposed as regards the operator's right of recourse. In relation to paragraph 3, the right of recourse against entities other than the operator was conditional upon their intentional or reckless behaviour, the delegate explained. It was further explained that the last sentence of paragraph 3 was deemed necessary so as to provide that the SCM could not pursue a recourse action to the extent it could give rise to the application of the drop-down mechanism. This was considered appropriate in light of the fact that the SCM's limit of liability per event by far exceeded that of the operator and aimed to prevent a situation where the unavailability of insurance cover was not due to the act of unlawful interference itself, but rather as a result of recourse actions by the SCM against multiple entities.

3:189 As regards Article 27 (Exclusive Remedy), the Delegate of Sweden remarked that the proposal retained the provision as contained in the text set out in LC/33-WP/3-1, Appendix B. The

Diplomatic Conference should nevertheless pay particular attention to paragraph 2, the delegate submitted. Concluding his presentation of the compromise package, the delegate stated that the proposals contained therein constituted in his assessment a reasonable basis for the future work.

3:190 The Chairman, on behalf of the Committee, thanked the Delegate of Sweden for the enormous effort which he and the Group had undertaken, a sentiment which was shared by all delegations and observers who spoke on this point.

3:191 In the ensuing discussion, while acknowledging that the proposal did not have unanimous support, many delegations stated that significant progress had been made and remarked that the proposal represented a reasonable basis which could be submitted to a Diplomatic Conference for the future work to be carried out.

3:192 Addressing the substance of some of the provisions, one of these delegations commented favourably on the solution proposed in Article 24, paragraph 5, in a situation where terrorists had infiltrated an airline. This delegation also found it sensible to leave it to the national law how to exercise the right of recourse. As regards paragraph 4, this delegation expressed its preference to focus more on the domestic law of each State instead on the particulars of security operations of a given airline. This delegation considered the proposed definition of "senior management" as being too narrow. It expressed the view that the fact of submitting the exercise of the right of recourse to the existence of insurance coverage at an economically reasonable cost gives rise to both legal and practical difficulties. The capacity of the States to accept the channelling of liability to the carrier depends on the condition of the exercise of the right of recourse. In the view of another of these delegations, the package struck a balance between the interests concerned. This delegation remarked that the element of "agents" and "servants" required further reflection, as did the insurance aspect introduced in paragraph 3 of Articles 25 and 25 *bis*.

3:193 Acknowledging the good intent behind the compromise package, one delegation stated that the proposal did not address the concerns which had been expressed by it. The feature of channelled liability in combination with a virtually unbreakable limit unjustly deprived the victims of compensation, this delegation stated. Unless Article 24 was revised, this delegation considered the retention of Article 27 unacceptable. Concerns regarding the exoneration provision were also expressed by an observer, remarking that these entities would be unduly absolved from any liability even though they did not even contribute to the SCM. This observer further saw the need to address in a more stringent way the aspect of organizational duties of the operator in terms of selection and supervision of staff.

3:194 One delegation, supported by another, stated that the proposal continued to depart in too significant a manner from basic tort-law principles and expressed similar concerns to the ones which had been mentioned earlier with respect to Articles 24 and 27. Like two other delegations, this delegation considered the threshold of breakability as being too high, and recalled its comments set out in LC/33-WP/3-5 and LC/33-WP/3-6. It submitted to keep in mind the basic principle which was sought to be achieved by the Convention, namely fair and just compensation for the victims. As regards the "change of thinking" which was advocated by the proponents of the new approach, the delegation remarked that the Committee dealt with a liability Convention after damage had occurred. This delegation nevertheless regarded the proposal contained in Flimsy No. 8 as a viable basis for further discussions.

3:195 In the view of another delegation, the proposal went a long way to meeting the concerns which had been expressed. Linguistic amendments to Article 24, paragraph 5, had to be considered. Similar to a point raised earlier, this delegation also deemed it necessary to more adequately capture the situation involving the middle management of the operator. This delegation noted for attention that the term "person"

mentioned in paragraph 2 of Article 25 encompassed "States", on the basis of the definition contained in Article 1 g) in LC/33-WP/3-22. As regards the required "change of thinking", this delegation stated that the attempt had been to move away from the vision of a liability convention towards a scheme dealing primarily with the aspect of victim compensation.

3:196 In the view of one observer, the proposed compromise was barely acceptable to the industry. This observer expressed particular concern with the lack of certainty and diversity of standards in Article 24, leaving it to the State concerned to determine when the operator could benefit from the safe-harbour clause. It represented a huge concession on the part of airlines which required further reflection, the observer stated. Another observer regarded the proposal in relation to Article 25 *bis*, paragraph 3, to be significantly less favourable to what had been featured in the original text.

3:197 In his summary, the Chairman stated that there was consensus that Flimsy No. 8 represented a good document which could be forwarded to the Diplomatic Conference. Regarding certain linguistic issues, the Chairman wondered if these could still be addressed by the Committee.

3:198 The Chairman invited the Delegate of the United Kingdom to introduce **Flimsy No. 10** containing proposed amendments to Article 25 of the draft Unlawful Interference Compensation Convention regarding assistance in non-Party States. The delegate recalled that the objective of the proposed amendments, in accordance with the policy guidance given by the Committee, was to provide for compensation to third parties for damage caused by an aircraft in the course of a domestic flight in a State Party that has not made a declaration under Article 2, paragraph 2. She explained that the introduction of this concept in Article 25 required the enlargement of the scope of the Convention in Article 2. Accordingly, a new provision was introduced as paragraph 3 b) in Article 2 consistent with the new provision introduced as paragraph 2 in Article 25. She further explained that the text in square brackets at the end of paragraph 2 of Article 25 was meant to establish a connecting factor with the State concerned and that the changes proposed to the text of paragraph 3 resulted from the new paragraph 2.

3:199 During the ensuing discussion, it was realized that the proposed amendments were complicating the system as it had been designed and, more importantly, would give protection to parties which, possibly by choice, have not consented to contributions to the system. Strong and prevailing concerns were expressed that it would not be fair to expand the Convention to allow such protection. The delegations voicing these concerns advocated that the original texts should be maintained. Subsequently, the Committee decided not to approve the proposed changes to Articles 2 and 25 set out in Flimsy No. 10.

3:200 The Committee considered the Report of the Drafting Committee attached to **LC/33-WP/3-23** (The General Risks Convention). One delegation requested clarification of the term "as amended and in force from time to time" in Article 1, paragraph a), since the term was not clear in the Russian version. For example, a State may consider that the amendment is in force upon its ratification but in fact it is not so until a certain period of time specified in the final clauses of the treaty has lapsed. The Chairperson of the Drafting Committee explained that the term "from time to time" is an "ambulatory" reference designed to track automatically all amendments. Another delegation proposed to use the term "as amended and in force at the time of the event" and this proposal was **accepted** by the Committee. The Committee also **instructed** the Secretariat to align the two draft conventions in this regard and the different language versions taking into account the input of the relevant delegations.

3:201 One delegation proposed to include a definition of "event" in this Convention. While this proposal would merit consideration, it was **decided** that this issue should be raised in the Diplomatic Conference.

3:202 Referring to Article 3, one delegation mentioned that the text was not adequately drafted for environmental damage. The Chairman considered this matter as a substantive issue which should not be discussed at this stage.

3:203 The Committee then considered **Flimsy No. 6** presented by the Chairperson of the Special Sub-Group on Article 3 and Article 10 *bis* of the General Risks Convention. It was agreed to delete Article 3, paragraph 2, and to accept Article 3 *bis* and 3 *ter* as proposed in the flimsy. In response to a question why Article 3 *bis*, paragraphs 2) a) and b) were drafted in the negative sense, it was explained that the drafting followed the text of the Montreal Convention of 1999. With respect to Article 10 *bis*, it was **decided** to remove the square brackets and to retain the text therein. The Committee also **agreed** to include the definition of "maximum mass" following Article 1 e) of the Unlawful Interference Compensation Convention.

3:204 The Aviation Working Group proposed in **Flimsy No. 7** to include the following new text because, in its view, of the need to balance the airline cap, thus preventing a significant shift in risk against manufacturers, who are often involved in aviation litigation:

> Article 3 *qtr*
> "Limit of the Manufacturer's Liability
> Any liability under applicable law of the manufacturer of an aircraft, or its engines or component parts, for damage sustained by third parties which is caused by the aircraft in flight, shall not exceed in aggregate the limit for such aircraft specified in Article 3 *bis*."

3:205 This proposal was supported by some delegations. Others preferred not to accept the text at this stage. It was **decided to note** the text for the purpose of further study.

3:206 With respect to Article 3, **paragraph 4**, it was suggested to delete the word "Party" to align the text with the comparable provision in the Unlawful Interference Compensation Convention, but it was explained that in the latter Convention, the deletion was necessary to cover cases of assistance in case of events in States non-Party. The Committee **decided** to leave paragraph 3 unamended. The Committee **agreed** with the suggestion of a delegation to align paragraph 6 with the comparable provisions in the Unlawful Interference Compensation Convention.

3:207 **Articles 5** (Court Costs and other Expenses), **6** (Advance Payments), **7** (Insurance) and **8** (Acts or omissions of victims) were **approved** without comment.

3:208 As regards **Article 9** (Right of Recourse), the Committee **agreed** to remove the square brackets in the first line.

3:209 **Article 10** (Exclusive Remedy) was **accepted** without comment.

3:210 In respect of **Article 10 *bis*** (Exoneration of Status Liability), the Committee **agreed** with the recommendation of the Group on Articles 3 and 10 *bis* that the brackets be removed around the title and body of the Article. One delegation expressed its understanding that "lessor" referred to a financial lessor and not those involved in operational aspects, such as of wet and damp leased aircraft.

3:211 **Articles 11** (Conversion of Special Drawing Rights) and **12** (Review of Limits) were **accepted** without comment.

3:212 On **Article 13** (Forum), certain modifications were agreed in the French version to ensure linguistic accuracy and consistency. As regards the words in square brackets in **paragraph 1**, the Chairperson of the Drafting Committee explained that the Legal Committee had requested an additional forum where the operator had its principal place of business. One observer recalled that the intention of the Legal Committee had been to provide an additional jurisdiction, namely the headquarters of the operator, and not a third jurisdiction where the operator might have an additional office. The Chairman confirmed that the Legal Committee had intended to refer to the headquarters of an operator. The Committee **decided** to leave the text in square brackets for decision by the Diplomatic Conference. **Paragraphs 2 and 3** were **accepted** without comment.

3:213 **Articles 14** (Recognition and Enforcement of Judgements) and **15** ((Regional and multilateral agreements on the recognition and enforcement of judgements) were **approved** without comment.

3:214 With respect to **Article 16** (Period of Limitation), one delegation believed that the word "event" should be defined. Another delegation supported this idea, pointing out that wording could be borrowed from Article 2, paragraph 1. These suggestions were **noted** for future consideration by the Diplomatic Conference.

3:215 **Articles 17** (Death of Person Liable) and **18** (State Aircraft) were **approved** without comment.

3:216 As regards **Article 19** (Nuclear Damage), the Chairperson of the Drafting Committee explained that it was aligned with the other draft convention, although the placement in the text was different. As regards the phrase "in force from time to time", the Committee **agreed** that appropriate adjustments would be made in the French and Russian texts to make it "ambulatory", and it would be made consistent with the amended text in the final clause of Article 1, paragraph a).

3:217 Reverting to **Article 2, paragraph 1**, one delegation noted that the new draft had significantly widened the scope of application of the Convention. While the broadening was appropriate in the case of the other convention, this was not the case here. It was fair that this convention would not apply only in the case of damage in the territory of a State Party; the operator should come from another State Party. This concern was shared by one observer and another delegation. The Chairman stated that the Drafting Committee had been tasked to adopt the same policy in respect of both conventions. In any case, there were advantages with the current text as States could implement this for domestic accidents also. A State could have a single regime and would also benefit from execution of judgements in all States, not necessarily only in that of the operator.

3:218 The text of the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, found in LC/33-WP/3-23, was **approved as amended.**

3:219 Subsequently, the Committee **accepted** without comment **LC/33-WP/3-24** which provided the text of the Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, as agreed by the Committee up to this point; and **LC/33-WP/3-25** which set out the text of the Convention on Compensation for Damage Caused by Aircraft to Third Parties, as agreed by the Committee.

3:220 The Committee thereafter turned its attention to the revised text of the "Compromise Package" set out in Flimsy No. 8 Revised (referred to in the meeting as Flimsy No. 10 Revised).

Flimsy No. 8 Revised presented drafting changes to Flimsy No. 8 suggested by the Chairperson of the Drafting Committee.

3:221 Highlighting the changes, the Chairperson of the Drafting Committee noted that an attempt had been made to remain faithful to the policy intentions which had been expressed by the Committee.

3:222 In relation to Article 24 in Flimsy No. 8 Revised (Article 23 in LC/33-WP/3-24) (Additional Compensation), paragraphs 1 and 2 remained virtually unchanged from Flimsy No. 8, and the situation according to which recklessness would not be presumed was set out in paragraph 3. Paragraph 4 of said Article 24 provided an opt-in clause for a State Party to further specify the conditions of, and exceptions to, the operation of the lack of presumption. As regards paragraph 5, the Chairperson of the Drafting Committee remarked that the insertion of the word "security" before "information" in line 5 may render it possible to delete the first set of square brackets appearing in line four (around "requires/provides for"). It was further explained that the text in the second set of square brackets made it clearer which "agents" and "servants" the provision is concerned with. Finally, the definition of the term "senior management" was tightened.

3:223 As regards Article 25 (Right of Recourse of the Operator) (Article 24 in LC/33-WP/3-24) and Article 25 *bis* (Right of Recourse of the Supplementary Compensation Mechanism) (Article 24 *bis* in LC/33-WP/3-24) of Flimsy No. 8 Revised, the Chairperson of the Drafting Committee stated that the conditions for the exercise of the right of recourse, contained in paragraphs 3 of Articles 25 and 25 *bis* in Flimsy No. 8, could now be found in Article 25 *ter* (Restrictions on rights of recourse). Regarding the latter provision, paragraphs 1 and 2 applied to both the operator and the SCM, paragraph 3 to the operator only, and paragraph 4 to the SCM only. It was noted that in paragraph 1, second line, after the term "lessor" a comma had to be inserted.

3:224 It was explained that there were some small amendments in relation to paragraphs 1 and 2 of Article 25, concerning the notion that recourse actions could only be taken after all judicial proceedings regarding the claims had been concluded and judgments satisfied.

3:225 In relation to Article 25, paragraph 2, one delegation recalled its earlier intervention regarding the word "person" which included a "State", based on the definition contained in Article 1. This delegation submitted for future consideration to potentially qualify paragraph 2 along the lines of "For the purposes of this Article, a person shall not include a State".

3:226 The Committee **agreed** to insert the revised text of the compromise package into the text set out in WP/3-24 and tasked the Secretariat to ensure a proper re-numbering of all Articles in the Draft Convention, with the comma inserted in paragraph 1 of Article 25 *ter*.

3:227 In responding to the invitation by the Chairman to air general comments regarding the Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, one delegation reiterated the concerns it had expressed in working papers WP/3-16 and WP/3-21. In the view of this delegation, it was essential to facilitate full compensation and an equitable distribution process, with a view to enhancing the ratifiability of the Convention.

3:228 In closing the debate on Item 3 of the Agenda, the Chairman congratulated the Committee for having reached agreement on the texts of both draft Conventions and remarked on the significance of this achievement.

3:229 With respect to the Unlawful Interference Compensation Convention, he said that a new approach had been devised, in that this Convention instead of focusing on liability focuses on compensation

and embraces novel ideas in this regard. Some States had shown reservations to some of these ideas, considering them incompatible with principles of their constitutional laws or national policies. However, these States had made efforts to make compromises and achieve consensus on a text which, in spite of a small number of provisions in square brackets where consensus was not possible at this stage, the Committee considered as a final draft ready for transmittal to the Council and for presentation to States and ultimately to a Diplomatic Conference.

3:230 The Chairman encouraged delegations to promote in the meantime this draft Convention and the novel ideas embraced therein, in particular to States not present at this Session of the Committee, with a view to ensuring the success of the envisaged Diplomatic Conference. In this regard, he recalled the success of the Cape Town Convention and Protocol of 2001 which had also introduced novel ideas and initially raised reservations on the part of some States, including those at the Legal Committee. It was his conviction that the proposed Unlawful Interference Compensation Convention would equally be successful.

3:231 As regards the draft Convention on General Risks, the Chairman recognized that, perhaps due to the less innovative concepts and provisions dealt with therein, it had raised fewer difficulties among States. He praised in particular the industry sector for its cooperation and positive contribution in support of the text agreed upon by the Legal Committee. This text was also considered by the Committee to be a final draft ready for transmittal to the Council and for presentation to States and ultimately to a Diplomatic Conference.

3:232 The text of the *Draft Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* developed by the Committee is found at **Attachment D**. The text of the *Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties* resulting from the work of the Committee is found in **Attachment E**.

Agenda Item 4: Consideration of other items on the General Work Programme of the Legal Committee

4:1 The Secretariat presented LC/33-WP/4-1 (*Acts or offences of concern to the international aviation community and not covered by existing air law instruments)*, which reported the progress of the work relating to aviation security conventions, including the recent work of the Special Sub-Committee. The Chairman of the Sub-Committee took this opportunity to thank the members of the Sub-Committee and the Secretariat for their cooperation. He informed the meeting that the Council would decide in the near future whether a third meeting of the Sub-Committee would be convened. Based on this report and the support expressed at the meeting, the Committee **decided** to maintain the Special Sub-Committee for further work on this item.

4:2 The Committee then considered Item No. 3 of its General Work Programme "Consideration, with regard to CNS/ATM systems, including global navigation satellite system (GNSS) and the regional multinational organism, of the establishment of a legal framework". The Committee **noted** LC/33-WP/4-2, presented by the Secretariat, and LC/33-WP/4-8, presented by EUROCONTROL. It also **noted** a statement by a delegation underlining the need to provide technical assistance to developing countries.

4:3 The Committee **noted without comments** working paper LC/33-WP/4-3 (*International interests in mobile equipment (aircraft equipment*)).

4:4 The Committee next **noted** LC/33-WP/4-4 (*Review of the question of the ratification of international air law instruments*) presented by the Secretariat, which provided information on Item No. 5 on the General Work Programme of the Committee.

4:5 The Committee then considered Item No. 6 on its Work Programme, namely, "*United Nations Convention on the Law of the Sea* – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments" on the basis of LC/33-WP/4-5, presented by the Secretariat, and LC/33-WP/4-7, presented by Indonesia (*Proposal to Amend Article 2 of the Chicago Convention*).

4:6 LC/33-WP/4-5 was **noted** by the Committee.

4:7 LC/33-WP/4-7 states, *inter alia*, that taking into consideration the *United Nations Convention on the Law of the Sea* (UNCLOS) (1982), there is a need to amend Article 2 of the Chicago Convention to "reflect current developments of laws on territory, including the complete and exclusive sovereignty of States in the air now including the air above the land areas, internal waters, archipelagic waters, territorial waters which its breath is 12 nautical miles from the baselines." LC/33-WP/4-7 was supported by one other delegation.

4:8 Background information on the past work in ICAO on this subject was provided by the Secretary. This included a Secretariat Study and a Rapporteur's Report, and consideration by past sessions of the Legal Committee.

4:9 One delegation noted that there had already been an ICAO Secretariat Study on this subject which concluded that there was no need for a textual amendment of Article 2 of the Chicago Convention. The sovereignty of States over their archipelagic waters was restricted by virtue of Article 53 of UNCLOS which provides a right of archipelagic sea lanes passage to other States; all foreign ships and aircraft enjoy the right of such passage in the designated sea lanes and air routes. If consideration was to be given to

amending Article 2, other issues should also be taken into account, as Article 2 contains some outdated language.

4:10 Another delegation stated that archipelagic States exercised rights over these areas but only within certain conditions. A distinction should be drawn between archipelagic waters and territorial waters; in the former but not the latter, certain rights were granted to foreign vessels. It would be difficult to amend Article 2 of the Chicago Convention to state that archipelagic waters is territory within the meaning of the Article. Further legal debate was needed on this issue.

4:11 Two delegations suggested to refer the matter to the Council for further consideration.

4:12 One delegation wondered about the practical benefits of an Article 2 amendment.

4:13 One delegation stated that the Secretariat Study in 1984 read the provisions of the two conventions in a way to achieve a harmonious outcome consistent with modern practice. This delegation was not clear that there were practical or operational problems being revised. It also agreed that the matter should be referred to the Council, perhaps in the context of work currently underway in relation to the reform of ICAO. However, the question of amending Article 2 was not one to be taken lightly; it would take many years to be adopted and come into force, and a cost/benefit analysis should be applied.

4:14 The Chairman concluded that the solution was perhaps not a simple transposition of Article 2 provisions to archipelagic waters and was more nuanced. The Committee **agreed** that the Secretary should bring the issue to the Council to obtain the latter's views.

4:15 The Secretariat presented working paper LC/33-WP/4-6 (*Safety Aspects of Economic Liberalization and Article 83 bis*) which, in accordance with a decision of the Council, was submitted to the Committee for a study by a Sub-Committee on how to improve relevant ICAO provisions and guidance material in order to facilitate greater usage of Article 83 *bis* of the Chicago Convention. The Council had taken this decision during its 175th Session in considering paragraphs 2.2.3.1 and 2.3.4.3 of a Report on the Study on the Safety and Security Aspects of Economic Liberalization conducted by the Secretariat contained in C-WP/12480. Also at the request of the Council, the Legal Bureau had reviewed the guidance contained in *Circular 295* to determine if there were any aspects which should be referred to the Legal Committee for study. No such aspects had been identified. The Council itself had mentioned in C-DEC 176/12 that it was likely that the low number of agreements under Article 83 *bis* registered with ICAO was not attributable to legal aspects of the Article but rather to difficulties encountered by States in their bilateral negotiations.

4:16 One delegate commented that his State had not entered into a single agreement under Article 83 *bis* and that this had not been due to any legal problems arising from such Article, but rather for reasons of technical or political nature.

4:17 The Committee, in adopting the action proposed, **concluded** that no legal aspects pertaining to Article 83 *bis* and relating to the issues raised in paragraphs 2.2.3.1 and 2.3.4.3 of the Study on the Safety and Security Aspects of Economic Liberalization could be identified for further study by a Sub-Committee.

Agenda Item 5: Review of the General Work Programme of the Legal Committee

5:1 The Deputy Secretary presented LC/33-WP/5, which contained a report regarding the developments in the work programme since the 32nd Session of the Legal Committee, as follows:

5:2 The Committee noted the information provided and confirmed the work programme and priority of items as set out in paragraph 4.2 of the working paper, as follows:

"1) Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks;

2) Acts or offences of concern to the international aviation community and not covered by existing air law instruments;

3) Consideration, with regard to CNS/ATM systems including global navigation satellite systems (GNSS) and the regional multinational organisms, of the establishment of a legal framework;

4) International interests in mobile equipment (aircraft equipment);

5) Review of the question of the ratification of international air law instruments; and

6) *United Nations Convention on the Law of the Sea* – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments."

Agenda Item 6: Election of the Chairman and Vice-Chairmen of the Committee

6:1 The Committee considered this item on the basis of LC/33-WP/6. In conformity with Rule 6 of its Rules of Procedure, the Committee proceeded to the election of its Chairman and of its First, Second, Third and Fourth Vice-Chairmen.

6:2 Mr. Henrik Kjellin (Sweden) was elected as **Chairman**. He was nominated by the Delegation of Lebanon; this nomination was seconded by the Delegations of the United States, India, France, Mexico and Egypt.

6:3 The following candidates were proposed for the positions of **Vice-Chairmen**:

First Vice-Chairman: Mr. M. B. Jennison (United States) was nominated by the Delegation of Nigeria; the nomination was seconded by the Delegations of France and Egypt.

Second Vice-Chairman: Mr. A.H. Mutti (Argentina) was nominated by the Delegation of the Republic of Korea; the nomination was seconded by the Delegations of Chile and Colombia.

Third Vice-Chairman: Ms. S.H. Tan (Singapore) was nominated by the Delegation of Brazil; the nomination was seconded by the Delegations of Japan, Egypt and Sweden.

Fourth Vice-Chairman: Mr. M. Sourang (Senegal) was nominated by the Delegation of Switzerland; the nomination was seconded by the Delegations of Cameroon and France.

All candidates for Vice-Chairmen were elected.

6:4 The officers so elected shall hold office from the end of the 33rd Session until the end of the 35th Session of the Committee, as specified in Rule 6 of the *Rules of Procedure* of the Legal Committee.

Agenda Item 7: Date, place and agenda of the 34th Session of the Legal Committee

7.1 The Committee considered this item on the basis of LC/33-WP/7, presented by the Secretariat. Upon a recommendation of the Chairman, the Committee decided that it should be left to the Council to determine the date, place and agenda of the 34th Session of the Legal Committee.

Agenda Item 8: Report on work done at the Session

8:1 The Committee reviewed and approved, with a number of modifications, the report on work done in the first nine days of the Session. With respect to the items discussed on the last day of the Session, Friday, 2 May 2008, the Committee **agreed** to delegate to the Chairman the authority to approve that portion of the Report on behalf of the Committee.

Closing of the Session

8:2 One delegation thanked the Chairman for the manner in which he had discharged his functions. Solutions had been found to many difficult problems. The Chairman had provided excellent leadership and shouldered a heavy workload. The delegation stated that the Chairman was the legitimate heir to the intellectual excellence and best legal traditions evident from the time of the CITEJA to the current time.

8:3 These sentiments were echoed by another delegation, which thanked the Chairman for all his work for the years he was Chairman of the Committee.

8:4 Another delegation highlighted that the Chairman had shepherded the Committee through the work which resulted in the adoption of the Cape Town instruments and the two current draft conventions on compensation for damage, both projects which required conceptual breakthroughs. The immense intellectual capacity and acuity of the Chairman had greatly contributed to these achievements.

8:5 The Chairman concluded by thanking those delegations for the kind words addressed to him. He could not have reached these results without the spirit of compromise exhibited by delegations and their willingness to view problems from fresh and different perspectives. The Chairman further praised all persons and entities involved in the work leading to the success of this Session of the Legal Committee, including the Chairman and the Vice-Chairman of the Special Group of the Council, the two Rapporteurs, the Chairman of the Drafting Committee and the Secretariat.

AGENDA FOR THE 33RD SESSION OF THE LEGAL COMMITTEE

Item 1: Adoption of the Agenda

Item 2: Report of the Secretariat

Item 3: Compensation for damage caused by aircraft to third parties arising from acts of unlawful interference or from general risks

Item 4: Consideration of other items on the General Work Programme of the Legal Committee

Item 5: Review of the General Work Programme of the Legal Committee

Item 6: Election of the Chairman and Vice-Chairmen of the Committee

Item 7: Date, place and agenda of the 34th Session of the Legal Committee

Item 8: Report on work done at the Session

LIST OF WORKING PAPERS

WORKING PAPER	TITLE
Agenda Item 1	
LC/33-WP/1	Provisional Agenda
Agenda Item 2	
LC/33-WP/2-1	Note on Documentation and Working Arrangements
LC/33-WP/2-2	Developments in the Legal Work of the Organization
Agenda Item 3	
LC/33-WP/3-1	Introductory Note
LC/33-WP/3-2	Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference or from general risks
LC/33-WP/3-3	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Report of the Rapporteur
LC/33-WP/3-4	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties – Report of the Rapporteur
LC/33-WP/3-5	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Exceptions to the Limitations of the Operator's Liability ("Breakability")
LC/33-WP/3-6	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Exoneration of Other Service Providers
LC/33-WP/3-7	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – The Supplementary Compensation Mechanism (SCM)
LC/33-WP/3-8	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Work of the Supplementary Compensation Mechanism (SCM) Task Force
LC/33-WP/3-9	Convention on Compensation for Damages Caused by Aircraft to Third Parties (Acts of Unlawful Interference) – Joint Industry Paper

LC/33-WP/3-10	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties (General Risks Convention)
LC/33-WP/3-11	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Work of the Supplementary Compensation Mechanism (SCM) Task Force – Guidelines on Compensation
LC/33-WP/3-12	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties Arising from Acts of Unlawful Interference or from General Risks
LC/33-WP/3-13	Advance Payments
LC/33-WP/3-14	Exclusive Remedy
LC/33-WP/3-15	Breakability and Cap Adjustments to the Operator's Liability
LC/33-WP/3-16	Issues to be Addressed with Respect to the Procedures for Limitation of the Operator's Liability
LC/33-WP/3-17	Supplementary Compensatory Mechanism – Chapter III to Chapter VII
LC/33-WP/3-18	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Work of the Supplementary Compensation Mechanism (SCM) Task Force – A SCM Funding Model
LC/33-WP/3-19	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference – Reduced Compensation – Article 23 with Contributions to the Supplementary Compensation Mechanism – Article 12 and Aggregate Limit on Collection of Contribution – Article 13
LC/33-WP/3-20	Controlling the Financial Effects of Terrorism
LC/33-WP/3-21	Japanese Position on Articles 24 and 27 of the Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, in case of Unlawful Interference
LC/33-WP/3-22	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties in case of Unlawful Interference – Report of the Drafting Committee
LC/33-WP/3-23	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties – Report of the Drafting Committee
LC/33-WP/3-24	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft

LC/33-WP/3-25	Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties

Agenda Item 4

LC/33-WP/4-1	Acts or Offences of Concern to the International Aviation Community and not Covered by Existing Air Law Instruments
LC/33-WP/4-2	Consideration, with Regard to CNS/ATM Systems, Including Global Navigation Satellite Systems (GNSS) and the Regional Multinational Organisms, of the Establishment of a Legal Framework
LC/33-WP/4-3	International Interests in Mobile Equipment (Aircraft Equipment)
LC/33-WP/4-4	Review of the Question of the Ratification of International Air Law Instruments
LC/33-WP/4-5	United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and Other International Air Law Instruments
LC/33-WP/4-6	Safety Aspects of Economic Liberalization and Article 83 *bis*
LC/33-WP/4-7	The Implication of the United Nations Convention on the Law of the Sea for the Application of the Chicago Convention and its Annexes and other International Air Law Instruments – Proposal to Amend Article 2 of the Chicago Convention
LC/33-WP/4-8	A Practical Way Forward: Model Framework Agreement for the Implementation, Provision, Operation and Use of a Global Navigation Satellite System for Air Navigation Purposes

Agenda Item 5

LC/33-WP/5	Review of the General Work Programme of the Legal Committee

Agenda Item 6

LC/33-WP/6	Note on the Election

Agenda Item 7

LC/33-WP/7	Date, place and agenda of the 34th Session of the Legal Committee

Agenda Item 8

LC/33-WP/8	Draft Report on the Work of the Legal Committee during its 33rd Session: Organization of the Meeting
LC/33-WP/8-1	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 2
LC/33-WP/8-2	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 4
LC/33-WP/8-3	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:1 to 3:5
LC/33-WP/8-4	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:6 to 3:27
LC/33-WP/8-5 and Corrigendum No. 1	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:28 to 3:90
LC/33-WP/8-6	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:91 to 3:115
LC/33-WP/8-7	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:116 to 3:144
LC/33-WP/8-8	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:145 to 3:156
LC/33-WP/8-9	Draft Report on the Work of the Legal Committee during its 33rd Session: Agenda Item 3, paragraphs 3:157 to 3:218

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DRAFT CONVENTION ON COMPENSATION FOR DAMAGE TO THIRD PARTIES, RESULTING FROM ACTS OF UNLAWFUL INTERFERENCE INVOLVING AIRCRAFT

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

a) "An act of unlawful interference" means an act which is defined as an offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, and any amendment in force at the time of the event.

b) An "event" occurs when damage is caused by an aircraft in flight as a result of an act of unlawful interference.

c) An aircraft is considered to be "in flight" at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.

d) "International flight" means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State.

e) "Maximum mass" means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used.

f) "Operator" means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority. The operator shall not lose its status as operator by virtue of the fact that another person commits an act of unlawful interference.

g) "Person" means any natural or legal person, including a State.

h) "Senior management" means members of an operator's supervisory board, members of its board of directors, or other senior officers of the operator who have the authority to make and have significant roles in making binding decisions about how the whole of or a substantial part of the operator's activities are to be managed or organized.

i) "State Party" means a State for which this Convention is in force.

j) "Third Party" means a person other than the operator, passenger or consignor or consignee of cargo; in the case of a collision, "third party" also means the operator, owner and crew of the other aircraft and the passenger or consignor or consignee of cargo on board the other aircraft.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, as a result of an act of unlawful interference. This Convention shall also apply to such damage that occurs in a State non-party as provided for in Article 27.

2. If a State Party so declares to the Depositary, this Convention shall also apply to damage to third parties that occurs in the territory of that State Party which is caused by an aircraft in flight other than on an international flight, as a result of an act of unlawful interference.

3. For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Chapter II

Liability of the Operator and Related Issues

Article 3 — Liability of the Operator

1. The operator shall be liable for damage within the scope of this Convention upon condition only that the damage was caused by an aircraft in flight.

2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto.

3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

4. Damage to property shall be compensable[1].

[1] The Final Clauses will need to make clear the relationship between this Convention and other international legal instruments with reference to claims for property damage.

5. Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State in the territory of which the damage occurred.

6. No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and any amendment or supplements to these Conventions in force at the time of the event.

7. Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 4 — Limit of Operator's Liability

The liability of the operator shall not exceed for each aircraft and event:

[a) 750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;

b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;

c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;

d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;

e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;

f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;

g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;

h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;

i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;

j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.]

Article 5 — Events involving two or more operators or other persons

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.

2. If two or more operators are so liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.

3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 6 — Advance Payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 7 — Insurance

1. Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. If such insurance or guarantee is not available to an operator on a per event basis, the operator may satisfy this obligation by insuring on an aggregate basis. States Parties shall not require their operators to maintain such insurance or guarantee to the extent that they are covered by a decision made pursuant to Article 11, paragraph 1(e) or Article 18, paragraph 3.

2. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators. Proof that an operator is covered by a decision made pursuant to Article 11, paragraph 1(e) or Article 18, paragraph 3, shall be sufficient evidence for the purpose of this paragraph.

Chapter III

The Supplementary Compensation Mechanism[2]

Article 8 — The constitution and objectives of the Supplementary Compensation Mechanism

1. An organization named the Supplementary Compensation Mechanism is established by this Convention. The Supplementary Compensation Mechanism shall be made up of a Conference of Parties, consisting of the States Parties, and a Secretariat, headed by a Director.

2. The Supplementary Compensation Mechanism shall have the following purposes:

[2] The name of the Mechanism has not yet been decided.

a) to provide compensation for damage according to Article 18, paragraph 1, pay damages according to Article 18, paragraph 3, and provide financial support under Article 27;

b) to make advance payments under Article 19, paragraph 1, and to take reasonable measures after an event to minimize or mitigate damage caused by an event, according to Article 19, paragraph 2; and

c) to perform other functions directly compatible with these purposes.

3. The Supplementary Compensation Mechanism shall have its seat at the same place as the International Civil Aviation Organization.

4. The Supplementary Compensation Mechanism shall have international legal personality.

5. In each State Party, the Supplementary Compensation Mechanism shall be recognized as a legal person capable under the laws of that State of assuming rights and obligations, entering into contracts, acquiring and disposing of movable and immovable property and of being a party in legal proceedings before the courts of that State. Each State Party shall recognize the Director of the Supplementary Compensation Mechanism as the legal representative of the Mechanism.

6. The Supplementary Compensation Mechanism shall enjoy tax exemption and such other privileges as are agreed with the host State. The funds of the Supplementary Compensation Mechanism [, and any proceeds from them,] shall be exempted from tax in all States Parties

7. The Supplementary Compensation Mechanism shall be immune from legal and administrative actions, except in respect of actions relating to credits obtained according to Article 17 or to compensation payable according to Article 18. The Director of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions. The immunity of the Director may be waived by the Conference of Parties. The other personnel of the Supplementary Compensation Mechanism shall be immune from legal and administrative actions in relation to acts performed by them in their official capacity. The immunity of the other personnel may be waived by the Director.

Article 9 — The Conference of Parties

The Conference of Parties shall:

a) determine its own rules of procedure and, at each meeting, elect its officers;

b) establish the regulations of the Supplementary Compensation Mechanism and the Guidelines for Compensation;

c) appoint the Director and determine the terms of his or her employment and, to the extent this is not delegated to the Director, the terms of employment of the other employees of the Supplementary Compensation Mechanism;

d) delegate to the Director, in addition to powers given in Article 11, such powers and authority as may be necessary or desirable for the discharge of the duties of the Supplementary Compensation Mechanism and revoke or modify such delegations of authority at any time;

e) decide the period for, and the amount of, initial contributions and fix the contributions to be made to the Supplementary Compensation Mechanism for each year until the next meeting of the Conference of Parties;

f) in the case where the aggregate limit on contributions according to Article 14, paragraph 3, has been applied, determine the global amount to be disbursed to the victims of all events occurring during the time period with regard to which Article 14, paragraph 3, was applied;

g) appoint the auditors;

h) vote budgets and determine the financial arrangements of the Supplementary Compensation Mechanism including the Guidelines on Investment, review expenditures, approve the accounts of the Supplementary Compensation Mechanism, and consider the reports of the auditors and the comments of the Director thereon;

i) examine and take appropriate action on the reports of the Director, including reports on claims for compensation, and decide on any matter referred to it by the Director;

j) decide whether to apply Article 27 and set the maximum amount of such assistance and the further conditions for it, if necessary;

k) determine which States non-party and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Conference of Parties and subsidiary bodies;

l) establish any body necessary to assist it in its functions, including if appropriate, an Executive Committee consisting of representatives of States Parties, and define the powers of such body;

m) decide whether to obtain credits and grant security for credits obtained pursuant to Article 17, paragraph 4;

n) as appropriate, enter into arrangements on behalf of the Supplementary Compensation Mechanism with the International Civil Aviation Organisation and other international bodies; and

o) consider any matter relating to the Convention that a State Party or the International Civil Aviation Organisation has referred to it.

Article 10 — The meetings of the Conference of Parties

1. The Conference of Parties shall meet once a year, unless a Conference of Parties decides to hold its next meeting at another interval. The Director shall convene the meeting at a suitable time and place.

2. An extraordinary meeting of the Conference of Parties shall be convened by the Director:

a) at the request of no less than one-fifth of the total number of States Parties;

b) if an aircraft has caused damage falling within the scope of this Convention, and the damages are likely to exceed the applicable limit of liability according to Article 4 of the Convention by more than 50 percent of the available funds of the Supplementary Compensation Mechanism;

c) if the aggregate limit on contributions according to Article 14, paragraph 3, has been reached; or

d) if the Director has exercised the authority according to Article 11, paragraph 1 d) or e).

3. All States Parties shall have an equal right to be represented at the meetings of the Conference of Parties and each State Party shall be entitled to one vote. The International Civil Aviation Organisation shall have the right to be represented, without voting rights, at the Conference of Parties.

4. A majority of the States Parties is required to constitute a quorum for the meetings of the Conference of Parties. Decisions of the Conference of Parties shall be taken by a majority of the votes cast. Decisions under Article 9, subparagraphs a), b), c), d), e), j) and l) shall be taken by a majority consisting of two-thirds of the votes.

Article 11 — The Secretariat and the Director

1. The Supplementary Compensation Mechanism shall have a secretariat led by a Director. The Director shall hire personnel, supervise the secretariat and direct the day-to-day activities of the Supplementary Compensation Mechanism. In addition, the Director:

a) shall report to the Conference of Parties on the functioning of the Supplementary Compensation Mechanism and present its accounts and a budget;

b) shall collect all contributions payable under this Convention, administer and invest the funds of the Supplementary Compensation Mechanism in accordance with the Guidelines on Investment, maintain accounts for the funds, and assist in the auditing of the accounts and the funds in accordance with Article 17;

c) shall handle claims for compensation in accordance with the Guidelines for Compensation, and prepare a report for the Conference of Parties on how each has been handled;

d) may decide to temporarily take action under Article 19 until the next meeting of the Conference of Parties;

e) shall decide to temporarily take action under Article 18, paragraph 3, until the next meeting of the Conference of Parties called in accordance with Article 10, paragraph 2 d); and

f) shall decide any other matter delegated by the Conference of Parties.

2. The Director and the other personnel of the Secretariat shall not seek or receive instructions in regards to the discharge of their responsibilities from any authority external to the Supplementary Compensation Mechanism. Each State Party undertakes to fully respect the international character of the responsibilities of the personnel and not seek to influence any of its nationals in the discharge of their responsibilities.

Article 12 — Contributions to the Supplementary Compensation Mechanism

The contributions to the Supplementary Compensation Mechanism shall be:

(a) the mandatory amounts collected in respect of each passenger and each [tonne] of cargo departing on an international commercial flight from an airport in a State Party. Where a State Party has made a declaration under Article 2, paragraph 2, such amounts shall also be collected in respect of each passenger and each [tonne] of cargo departing on a commercial flight between two airports in that State Party;

(b) such amounts as the Conference of Parties may specify in respect of general aviation or any sector thereof.

The operator shall collect these amounts and remit them to the Supplementary Compensation Mechanism[3].

Article 13 — Basis for fixing the Contributions[4]

1. Contributions shall be fixed having regard to the following principles:

a) the objectives of the Supplementary Compensation Mechanism should be efficiently achieved;

b) competition within the air transport sector should not be distorted;

c) the competitiveness of the air transport sector in relation to other modes of transportation should not be adversely affected; and

d) in relation to general aviation, the costs of collecting contributions shall not be excessive in relation to the amount of such contributions, taking into account the diversity that exists in this sector.

2. The Conference of Parties shall fix contributions in a manner that does not discriminate between States, operators, passengers and consignors or consignees of cargo on the basis of nationality.

3. On the basis of the budget drawn up according to Article 11, paragraph 1 a), the contributions shall be fixed having regard to:

a) the upper limit for compensation set out in Article 18, paragraph 2;

b) the need for reserves where Article 18, paragraph 3 is applied;

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[3] It needs to be considered whether, for the purpose of collection and remittance of contributions, the word "operator" sufficiently covers the concept of "carrier".

[4] The final clauses are likely to provide a threshold for the entry into force defined in order to ensure that the number of passengers and the amounts of cargo is sufficient for the financial viability of the Supplementary Compensation Mechanism.

c) claims for compensation, measures to minimize or mitigate damages and financial assistance under the Convention;

d) the costs and expenses of administration, including the costs and expenses incurred by meetings of the Conference of Parties;

e) the income of the Supplementary Compensation Mechanism; and

f) the availability of additional funds for compensation pursuant to Article 17, paragraph 4.

Article 14 — Period and Rate of Contributions

1. At its first meeting, the Conference of Parties shall decide the period and the rate of contributions in respect of passengers and cargo departing from a State Party to be made from the time of entry into force of the Convention for that State Party. If a State Party makes a declaration under Article 2, paragraph 2, initial contributions shall be paid in respect of passengers and cargo departing on flights covered by such declaration from the time it takes effect. The period and the rate shall be equal for all States Parties.

2. Contributions shall be fixed in accordance with paragraph 1 so that the funds available amount to at least [25 %][100 %] of the limit of compensation set out in Article 18, paragraph 2, within four years. If the funds available are deemed sufficient in relation to the likely compensation or financial assistance to be provided in the foreseeable future and amount to at least [50 %][100 %] of that limit, the Conference of Parties may decide that no further contributions shall be made until the next meeting of the Conference of Parties, provided that both the period and rate of contributions shall be applied in respect of passengers and cargo departing from a State in respect of which the Convention subsequently enters into force.

3. The total amount of contributions collected by the Supplementary Compensation Mechanism within any period of two consecutive calendar years shall not exceed three times the maximum amount of compensation according to Article 18, paragraph 2, of this Convention.

4. The contributions collected by an operator in respect of a State Party may not be used to provide compensation for an event which occurred prior to the entry into force of the Convention for that State Party.

Article 15 — Collection of the Contributions

1. The Conference of Parties shall establish in the Regulations a transparent, accountable and cost-effective mechanism supporting the collection and remittal of contributions. When establishing the mechanism, the Conference of Parties shall endeavour not to impose undue burdens. Contributions which are in arrears shall bear interest as provided for in the Regulations.

2. Where an operator does not collect or does not remit contributions it has collected to the Supplementary Compensation Mechanism, the Director shall take appropriate measures against such operator with a view to the recovery of the amount due. Each State Party shall ensure that an action to recover the amount due may be taken within its jurisdiction, notwithstanding in which State Party the debt actually accrued.

Article 16 — Duties of States Parties

1. Each State Party shall take appropriate measures, including imposing such sanctions as it may deem necessary, to ensure that an operator fulfils its obligations to collect and remit contributions to the Supplementary Compensation Mechanism.

2. Each State Party shall ensure that the following information is provided to the Supplementary Compensation Mechanism:

a) the number of passengers and quantity of cargo departing on international commercial flights from that State Party;

b) such information on general aviation flights as the Conference of Parties may decide; and

c) the identity of the operators performing such flights.

Where a State Party has made a declaration under Article 2, paragraph 2, it shall ensure that information detailing the number of passengers and quantity of cargo departing on commercial flights between two airports in that State Party, such information on general aviation flights as the Conference of Parties may decide, and the identity of the operators performing such flights, is also provided. In each case such statistics shall be *prima facie* evidence of the facts stated therein.

3. Where a State Party does not fulfil its obligations under paragraph 2 of this Article and this results in a loss for the Supplementary Compensation Mechanism, the State Party shall be liable for such loss. The Conference of Parties shall, on recommendation by the Director, decide whether the State Party shall pay for such loss.

Article 17 — The funds of the Supplementary Compensation Mechanism

1. The funds of the Supplementary Compensation Mechanism may only be used for the purposes set out in Article 8, paragraph 2.

2. The Supplementary Compensation Mechanism shall exercise the highest degree of prudence in the management and preservation of its funds. The funds shall be preserved in accordance with the Guidelines on Investment. Investments may only be made in State Parties.

3. Accounts shall be maintained for the funds of the Supplementary Compensation Mechanism. The Auditors of the Supplementary Compensation Mechanism shall review the accounts and report on them to the Conference of Parties.

4. Where the Supplementary Compensation Mechanism is not able to meet valid compensation claims because insufficient contributions have been collected, it may obtain credits from financial institutions for the payment of compensation and may grant security for such credits.

Chapter IV

Compensation from the Supplementary Compensation Mechanism

Article 18 — Compensation

1. The Supplementary Compensation Mechanism shall, under the same conditions as are applicable to the liability of the operator, provide compensation to persons suffering damage in the territory of a State Party. Where the damage is caused by an aircraft in flight on a flight other than an international flight, compensation shall only be provided if that State Party has made a declaration according to Article 2, paragraph 2. Compensation shall only be paid to the extent that the total amount of damages exceeds the limits according to Article 4.

2. The maximum amount of compensation available from the Supplementary Compensation Mechanism shall be [3 000 000 000] Special Drawing Rights for each event. Payments made according to paragraph 3 and distribution of amounts recovered according to Article 25, paragraph 2, shall be in addition to the maximum amount for compensation.

3. If and to the extent that the Conference of Parties determines and for the period that it so determines that insurance in respect of the damage covered by the Convention is wholly or partially unavailable with respect to amounts of coverage or the risks covered, or is only available at a cost incompatible with the continued operation of air transport, whether generally or, in relation to a particular operator following an event affecting that operator, the Supplementary Compensation Mechanism shall in respect of future events causing damage compensable under this Convention pay the damages for which the affected operator or operators are liable according to Articles 3 and 4 and such payment shall discharge such liability of the affected operator or operators. The Conference of Parties may decide on a fee, the payment of which by the affected operator or operators, for the period covered, shall be a condition for the Supplementary Compensation Mechanism taking the action specified in this paragraph.

Article 19 — Advance Payments and other measures

1. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute recognition of a right to compensation and may be offset against any amount subsequently paid by the Supplementary Compensation Mechanism.

2. Subject to the decision of the Conference of Parties and in accordance with the Guidelines for Compensation, the Supplementary Compensation Mechanism may also take other measures to minimize or mitigate damage caused by an event.

Chapter V

Special Provisions on Compensation and Recourse

Article 20 — Acts or omissions of victims

If the operator or Supplementary Compensation Mechanism proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator or the Supplementary Compensation Mechanism shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article 21 ─ Court Costs and other Expenses

The limits prescribed in Articles 4 and 18, paragraph 2, shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action if that is later than the expiry of such period.

Article 22 — Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Articles 4 and 18, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily injury and mental injury in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respect of other damage.

Article 23 – Additional Compensation

1. To the extent the total amount of damages exceeds the limits applicable according to Articles 4 and 18, paragraph 2, a person who has suffered damage may, in accordance with this Article, claim compensation from the operator.

2. The operator shall be liable for such additional compensation to the extent the person claiming compensation proves that the operator, or, if it is a legal person, its senior management, has contributed to the occurrence of the event by an act or omission done with intent or recklessly and with knowledge that damage would probably result and which:

   a) falls within the regulatory responsibility and actual control of the operator; and

   b) is, other than the act of unlawful interference, the primary cause of the event.

3. Without prejudice to paragraph 4, an operator, or, if it is a legal person, its senior management

will be presumed not to have been reckless if, as regards the relevant area of security, it proves that a system to ensure compliance with applicable regulatory requirements has been established and that the system was applied in relation to the event.

4. If a State Party so declares to the Depository, an operator shall conclusively be deemed to not have been reckless in respect of an event causing damage within the territory of that State Party if, as regards the relevant area of security, it proves that a system to ensure compliance with such commonly applied standard as has been specified by that State Party in its declaration has been established and audited. The existence of such a system and completion of such an audit shall not be conclusive if, prior to the event, the competent authority in that State Party has issued a finding that the operator has not met all applicable security requirements established by that State.

5. Where a servant or agent of the operator has committed an act of unlawful interference, the operator shall not be liable if it proves that a system to ensure effective selection of servants and agents has been established by its senior management and that such system [requires/provides for] [with regard to the security aspect and] a prompt response to security information concerning such servants and agents and was applied in relation to the servant or agent [who committed the act].

Article 24 — Right of Recourse of the Operator

1. The operator liable for damage shall have a right of recourse against any person who has committed the act of unlawful interference. No such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.

2. Nothing in this Convention shall prejudice the question whether an operator liable for damage has a right of recourse against any other person, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been finally settled and satisfied.

Article 25 — Right of Recourse of the Supplementary Compensation Mechanism

1. The Supplementary Compensation Mechanism shall have a right of recourse against any person who has committed the act of unlawful interference. No such claim may be enforced until all claims from persons suffering damage due to an event have been finally settled and satisfied.

2. Subject to paragraph 1 of this Article, the Supplementary Compensation Mechanism shall have a right of recourse against the operator for compensation subject to the conditions set out in Article 23, provided that no such claim may be enforced until all claims made under Article 3, paragraph 1, and Article 23, paragraph 1, have been finally settled and satisfied.

3. Any amount recovered under paragraph 2 of this Article shall, in the first instance, be used to provide compensation for damages resulting from the event which gave rise to the recourse action, which exceed the maximum amount specified in Article 18, paragraph 2.

Article 26 - Restrictions on rights of recourse

1. No right of recourse shall lie under Article 24, paragraph 2 or Article 25, paragraph 2 against an owner, lessor, or financier retaining title of or holding security in an aircraft, or against a manufacturer of an aircraft, its engines or component parts in relation to the approved design of an aircraft, its engines or components.

2. The rights of recourse under Article 24, paragraph 2 and Article 25, paragraph 2 shall not arise to the extent that the damage caused by an event could not reasonably have been covered by insurance.

3. An operator shall have no right of recourse in relation to any additional compensation for which it is liable under Article 23.

4. The Supplementary Compensation Mechanism shall not pursue any claim under Article 25, paragraph 2 if to do so could give rise to the application of Article 18, paragraph 3.

Chapter VI

Assistance in case of events in States non-party

Article 27 — Assistance in case of events in States non-party

Where an operator, which has its principal place of business, or if it has no such place of business, its permanent residence, in a State Party, is liable for damage occurring in a State non-party, the Conference of Parties may decide, on a case by case basis, that the Supplementary Compensation Mechanism shall provide financial support to that operator. Such support may only be provided in respect of damage that would have fallen under the Convention if the State non-party had been a State Party and if the State non-Party agrees in a form acceptable to the Conference of Parties to be bound by the provisions of this Convention in respect of the event giving rise to such damage unless otherwise agreed by the Conference of the Parties. The financial support shall not exceed the maximum amount for compensation set out in Article 18, paragraph 2. If the solvency of the operator liable is threatened even if support is given, such support shall only be given if the liable operator has sufficient arrangements protecting its solvency.

Chapter VII

Exercise of Remedies and Related Provisions

Article 28 — Exclusive Remedy

1. Without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights, any action for compensation for damage due to an act of unlawful interference, however founded, whether under this Convention or in tort or in contract or otherwise, can only be brought against the operator and shall be subject to the conditions and limits of liability set out in this Convention. No claims shall lie against any other person for compensation for such damage.

2. Paragraph 1 shall not apply to an action against an individual who has intentionally committed an act of unlawful interference.

Article 29 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article 30 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Articles 4 and 18 shall be reviewed by the Director, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in Article 29.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Director shall inform the Conference of Parties of a revision of the limits of liability. Any such revision shall become effective six months after the meeting of the Conference of Parties, unless a majority of the States Parties register their disapproval. The Director shall immediately notify all States Parties of the coming into force of any revision.

Article 31 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred.

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territorial airspace of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 32 — Intervention by the Supplementary Compensation Mechanism

1. Each State Party shall ensure that the Supplementary Compensation Mechanism has the right to intervene in proceedings brought against the operator in its courts.

2. Except as provided in paragraph 3, the Supplementary Compensation Mechanism shall not be bound by any judgement or decision in proceedings to which it has not been a party.

3. If an action is brought against the operator in a State Party, each party to such proceedings shall be entitled to notify the Supplementary Compensation Mechanism of the proceedings. Where such notification has been made in accordance with the law of the court seized and in such time that the Supplementary Compensation Mechanism had time to intervene to the proceedings, the Supplementary Compensation Mechanism shall be bound by a judgement or decision in proceedings even if it has not intervened.

Article 33 — Recognition and Enforcement of Judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 31 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;

b) the defendant was not served with notice of the proceedings in such time and manner as to allow him or her to prepare and submit a defence;

c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognised as final and conclusive under the law of the State Party where recognition or enforcement is sought;

d) the judgement has been obtained by fraud of any of the parties;

e) the right to enforce the judgement is not vested in the person by whom the application is made; or

f) the ground of refusal has been notified, before the occurrence of an event, to the Depositary by the State Party where recognition or enforcement is sought.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.

5. Where a judgement is enforceable, payment of any costs recoverable under the judgement shall also be enforceable.

Article 34 — Regional and multilateral agreements on the recognition and enforcement of judgements

1. State Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.

2. State Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.

3. The provisions of Chapter VII of this Convention shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 35 ─ Period of Limitation

1. The right of compensation according to Article 3 shall be extinguished if an action is not brought within three years from the date of the event which caused the damage.

2. The right of compensation according to Article 18 shall be extinguished if an action is not brought, or a notification pursuant to Article 32, paragraph 3, is not made, within three years from the date of the event which caused the damage.

3. The method of calculating such three year period shall be determined by the law of the court seized of the case.

Article 36 — Death of Person Liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER VIII

Application of the Convention

Article 37 — State Aircraft

This Convention shall not apply to damage caused by state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

[Final Provisions to be inserted]

— END —

DRAFT CONVENTION ON COMPENSATION FOR DAMAGE CAUSED BY AIRCRAFT TO THIRD PARTIES

Chapter I

Principles

Article 1 — Definitions

For the purposes of this Convention:

a) "An act of unlawful interference" means an act which is defined as an offence in the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at the Hague on 16 December 1970, or the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, and any amendment in force at the time of the event.

b) An aircraft is considered to be "in flight" at any time from the moment when all its external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.

c) "International flight" means any flight whose place of departure and whose intended destination are situated within the territories of two States, whether or not there be a break in the flight, or within the territory of one State if there is an agreed stopping place in the territory of another State.

d) "Maximum mass" means the maximum certificated take-off mass of the aircraft, excluding the effect of lifting gas when used.

e) "Operator" means the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

f) "Person" means any natural or legal person, including a State.

g) "State Party" means a State for which this Convention is in force.

h) "Third Party" means a person other than the operator, passenger or consignor or consignee of cargo; in the case of a collision, "third party" also means the operator, owner and crew of the other aircraft and the passenger or consignor or consignee of cargo on board the other aircraft.

Article 2 — Scope

1. This Convention applies to damage to third parties which occurs in the territory of a State Party caused by an aircraft in flight on an international flight, other than as a result of an act of unlawful interference.

2. If a State Party so declares to the Depositary, this Convention shall also apply where an aircraft in flight other than on an international flight causes damage in the territory of that State, other than as a result of an act of unlawful interference.

3. For the purposes of this Convention a ship or aircraft in or above the High Seas including the Exclusive Economic Zone shall be regarded as part of the territory of the State in which it is registered. Drilling platforms and other installations permanently fixed to the soil in the Exclusive Economic Zone or the Continental Shelf shall be regarded as part of the territory of the State which has jurisdiction over such platform or installation.

Chapter II

Liability of the Operator and Related Issues

Article 3 — Liability of the Operator

1. The operator shall be liable for damage sustained by third parties upon condition only that the damage was caused by an aircraft in flight.

2. There shall be no right to compensation under this Convention if the damage is not a direct consequence of the event giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

3. Damages due to death, bodily injury and mental injury shall be compensable. Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury.

4. Damage to property shall be compensable[1].

5. Environmental damage shall be compensable, insofar as such compensation is provided for under the law of the State Party in the territory of which the damage occurred.

6. Punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[1] The Final Clauses will need to make clear the relationship between this Convention and other international legal instruments with reference to claims for damage to property.

Article 4 – Limit of the operator's liability

(1) The liability of the operator arising under Article 3 shall not exceed for each aircraft and event:

a) [750 000 Special Drawing Rights for aircraft having a maximum mass of 500 kilogrammes or less;

b) 1 500 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 kilogrammes but not exceeding 1 000 kilogrammes;

c) 3 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 1 000 kilogrammes but not exceeding 2 700 kilogrammes;

d) 7 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 2 700 kilogrammes but not exceeding 6 000 kilogrammes;

e) 18 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 6 000 kilogrammes but not exceeding 12 000 kilogrammes;

f) 80 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 12 000 kilogrammes but not exceeding 25 000 kilogrammes;

g) 150 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 25 000 kilogrammes but not exceeding 50 000 kilogrammes;

h) 300 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 50 000 kilogrammes but not exceeding 200 000 kilogrammes;

i) 500 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 200 000 kilogrammes but not exceeding 500 000 kilogrammes;

j) 700 000 000 Special Drawing Rights for aircraft having a maximum mass of more than 500 000 kilogrammes.]

(2) The limits in paragraph 1 of this Article shall only apply if the operator proves that the damage:

a) was not due to its negligence or other wrongful act or omission or that of its servants or agents; or

b) was solely due to the negligence or other wrongful act or omission of another person.

Article 5 – Reduced Compensation

If the total amount of the damages to be paid exceeds the amounts available according to Article 4, the total amount shall be awarded preferentially to meet proportionately the claims in respect of death, bodily and mental injury in the first instance. The remainder, if any, of the total amount distributable shall be awarded proportionately among the claims in respect of other damage.

Article 6 — Events involving two or more operators or other persons

1. Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.

2. If two or more operators are liable, the recourse between them shall depend on their respective limits of liability and their contribution to the damage.

3. No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability.

Article 7 ─ Court Costs and other Expenses

The court may award, in accordance with its own law, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the operator has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action if that is later than the expiry of such period.

Article 8 — Advance Payments

If required by the law of the State where the damage occurred, the operator shall make advance payments without delay to natural persons who may be entitled to claim compensation under this Convention, in order to meet their immediate economic needs. Such advance payments shall not constitute a recognition of liability and may be offset against any amount subsequently paid as damages by the operator.

Article 9 — Insurance

Having regard to Article 4, States Parties shall require their operators to maintain adequate insurance or guarantee covering their liability under this Convention. An operator may be required by the State Party in or into which it operates to furnish evidence that it maintains adequate insurance or guarantee. In doing so, the State Party shall apply the same criteria to operators of other State Parties as it applies to its own operators.

Chapter III

Recourse and exoneration

Article 10 — Acts or omissions of victims

If the operator proves that the damage was caused, or contributed to, by an act or omission of a claimant, or the person from whom he or she derives his or her rights, done with intent or recklessly and with knowledge that damage would probably result, the operator shall be wholly or partly exonerated from its liability to that claimant to the extent that such act or omission caused or contributed to the damage.

Article 11 — Right of Recourse

Subject to Article 13, nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any person.

Chapter IV

Exercise of Remedies and Related Provisions

Article 12 — Exclusive Remedy

Any action for compensation for damage to third parties caused by an aircraft in flight brought against the operator, or its servants or agents, however founded, whether under this Convention or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Article 13 – Exoneration of Status Liability

Neither the owner, lessor or financier retaining title or holding security of an aircraft, not being an operator, nor their servants or agents, shall be liable for damages under this Convention or the law of any State Party.

Article 14 — Conversion of Special Drawing Rights

The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value in a national currency shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operations and transactions. The value in a national currency, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State to express in the national currency of the State Party as far as possible the same real value as the amounts in Article 4.

Article 15 — Review of Limits

1. Subject to paragraph 2 below, the sums prescribed in Article 4, shall be reviewed by the Depositary, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned of Article 14.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has

exceeded 10 per cent, the Depositary shall notify the States Parties of a revision of the limits of liability. Any such revision shall become effective six months after the notification to the States Parties, unless a majority of the States Parties register their disapproval. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

Article 16 — Forum

1. Subject to paragraph 2 of this Article, actions for compensation under the provisions of this Convention may be brought only before the courts of the State Party where the damage occurred [or the State in which the operator of the aircraft has its principal place of business].

2. Where damage occurs in more than one State Party, actions under the provisions of this Convention may be brought only before the courts of the State Party the territorial airspace of which the aircraft was in or about to leave when the event occurred.

3. Without prejudice to paragraphs 1 and 2 of this Article, application may be made in any State Party for such provisional measures, including protective measures, as may be available under the law of that State.

Article 17 — Recognition and Enforcement of Judgements

1. Subject to the provisions of this Article, judgements entered by a competent court under Article 16 after trial, or by default, shall when they are enforceable in the State Party of that court be enforceable in any other State Party as soon as the formalities required by that State Party have been complied with.

2. The merits of the case shall not be reopened in any application for recognition or enforcement under this Article.

3. Recognition and enforcement of a judgement may be refused if:

a) its recognition or enforcement would be manifestly contrary to public policy in the State Party where recognition or enforcement is sought;

b) the defendant was not served with notice of the proceedings in such time and manner as to allow him to prepare and submit a defence;

c) it is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which is recognised as final and conclusive under the law of the State Party where recognition or enforcement is sought;

d) the judgement has been obtained by fraud of any of the parties;

e) the right to enforce the judgement is not vested in the person by whom the application is made; or

f) the ground of refusal has been notified, before the occurrence of an event, to the Depositary by the State Party where recognition or enforcement is sought.

4. Recognition and enforcement of a judgement may also be refused to the extent that the judgement awards damages, including exemplary or punitive damages, that do not compensate a third party for actual harm suffered.

5. Where a judgement is enforceable, payment of any costs recoverable under the judgement shall also be enforceable.

Article 18 ─ Regional and multilateral agreements on the recognition and enforcement of judgements

1. State Parties may enter into regional and multilateral agreements regarding the recognition and enforcement of judgements consistent with the objectives of this Convention, provided that such agreements do not result in a lower level of protection for any third party or defendant than that provided for in this Convention.

2. State Parties shall inform each other, through the Depositary, of any such regional or multilateral agreements that they have entered into before or after the date of entry into force of this Convention.

3. The provisions of Chapter IV of this Convention shall not affect the recognition or enforcement of any judgement pursuant to such agreements.

Article 19 — Period of Limitation

1. The right to compensation according to Article 3 shall be extinguished if an action is not brought within three years from the date of the event which caused the damage.

2. The method of calculating such three year period shall be determined in accordance with the law of the court seized of the case.

Article 20 — Death of Person Liable

In the event of the death of the person liable, an action for damages lies against those legally representing his or her estate and is subject to the provisions of this Convention.

CHAPTER V

Application of the Convention

Article 21 — State Aircraft

This Convention shall not apply to damage caused by state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Article 22 — Nuclear Damage

No liability shall arise under this Convention for damage caused by a nuclear incident as defined in the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy or nuclear damage as defined in the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and any amendment or supplements to these Conventions in force at the time of the event.

[Final Provisions to be inserted]

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