



## LEGAL COMMITTEE - 32ND SESSION

(Montreal, 15 - 21 March 2004)

**Agenda Item 3: Consideration of the modernization of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952**

### OUTLINE OF A POSSIBLE INTERNATIONAL ADDITIONAL COMPENSATION MECHANISM TO COMPENSATE THIRD PARTIES ON THE SURFACE

(Presented by an informal group coordinated by Australia)

#### RATIONALE

This flimsy is presented to facilitate discussion by the Legal Committee of options for an international additional compensation recovery mechanism for compensating third parties on the surface when the total damages exceed the insurance cover available to the operator. This mechanism would act to share risk for catastrophic events between aircraft operators and air transport users to ensure that victims in a Contracting State receive compensation without the need to draw on their government's funds. The purpose of this paper is to explain and illustrate what the mechanism could look like and to see whether there is support for the basic underlying idea. As the attached table illustrates, this mechanism is quite different to the Globaltime insurance scheme. A more refined proposal with draft text will require considerable additional discussion on specific policy aspects, probably focusing on the points set out in this paper.

This idea builds on concepts proposed in Flimsy 1, but aims to avoid some of the equity and rationing problems associated with global liability caps for catastrophic accidents. It also seeks to avoid the possibility where an operator is held liable without sufficient insurance, thus resulting in their insolvency and denying appropriate compensation to victims. This mechanism is modelled closely on the International Oil Pollution Fund, which has been in operation for over 30 years. Further background information on the IOPF is attached. This proposal is presented to show that States could have at least three options for compensating third parties on the surface:

- A. Elect to not participate in the new international regime, thus leaving third parties on the surface to be compensated under domestic law on either a strict liability basis (with or without a cap) or on a fault liability basis as is applicable in each State.
- B. Participate in the new regime governing compensation for surface damage caused by foreign aircraft – with the two-tier structure proposed and possibly a global cap.

- B. In addition to option B, choose to participate in an optional international additional compensation scheme that would allow all victims to recover as great a portion of their losses as possible (ideally without apportionment) for infrequent catastrophic events where losses may exceed any global caps in the new regime or where commercial insurance is exhausted, voided or cancelled.

#### KEY ELEMENTS OF SUCH A MECHANISM

1. Liability for individual aircraft operators would be limited to a global trigger point that approximates the level of private insurance on the commercial market (requiring a linkage with articles 3 & 4).<sup>1</sup>
2. This trigger point would be reviewed periodically, possibly using the mechanism described in Article 12 of the Secretariat's draft to ensure that this scheme only operates to cover liabilities not covered by the commercial insurance market and does not act to crowd out commercial cover. A suggested policy for trigger point review would be to set and maintain the global trigger point 5-10% above the level of commercial insurance to encourage insurers to increase their coverage.
3. Where insurance was reduced or cancelled, the mechanism would apply from a trigger point revised in response to the reduction or cancellation.
4. Once claims had reached the trigger point, or it was apparent from the scale of the event it was clear that they would reach the trigger point, the mechanism entity would step in and assume the liabilities of the operator.<sup>2</sup> The entity would draw on its own funds to pay these claims.
5. Victims would receive some money from private insurances initially. Historical practice from the insurance industry has shown that there is usually a delay of some years between claim lodgement, and final determination due to assessment & processing delays. This time would allow the collection rate to be adjusted to meet foreseeable payments from the entity's funds.
6. The source of the mechanism's funds would be contribution revenue levied by participating States and remitted to the entity. This contribution revenue would be levied on the basis of national aviation activity and collected at a relatively low rate to recover losses over a timeframe of 10-15 years.<sup>3</sup>
7. The collection rate of the mechanism would be reviewed on a periodic basis by Contracting States.
8. The maximum funds available under the additional compensation mechanism for any one year will need to be capped for participating States budget reasons and would depend on the sum of the contributions of participating States.

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<sup>1</sup> If the new regime has different trigger points for basic incidents and incidents arising from unlawful interference, this scheme could work with either type of trigger point.

<sup>2</sup> NB Another alternative could be to adopt the approach used by the International Oil Pollution Fund (IOPF) whereby the Fund steps in to deal with serious incidents and assumes the responsibility for all claims. It then recovers the limits of the ship operator's insurance from the ship operator.

<sup>3</sup> (cf private insurers who must meet regulated solvency requirements must increase premium revenue or withdraw from the risk (i.e. cancel policies) thus consequently are less able to distribute losses more evenly over longer periods).

ATTACHMENT A

COMPARISON OF A POSSIBLE INTERNATIONAL ADDITIONAL COMPENSATION MECHANISM & THE ICAO GLOBALTIME WAR RISK INSURANCE SCHEME

Feature	International Additional Compensation Mechanism	ICAO Globaltime Scheme
1. Scheme Description	International fund	Mutual insurance entity supported by multilateral government guarantees
2. Entity	Very small international entity formed under international law (e.g. a maximum of 5 staff) - possibly closely linked to ICAO like IFFAS or the Cape Town Convention Registry	Insurance company
3. Legal Form	International treaty, most likely in the form of an Optional Supplementary Protocol or alternatively a separate Convention	Participating Agreement (private contract) between insurance entity and participating States
4. Losses covered	Losses that exceed available commercial insurance and/or global trigger point under the new regime (the level of which will be subject to adjustment)	Losses arising out of war risks above US\$ 50 million
5. Type of cover	Payment undertaking under text of instrument and reflected in domestic statute	Insurance cover under policy issued to operator by insurance entity - i.e. private contract
6. Risks covered	Damage covered under the new regime <ul style="list-style-type: none"> <li>- Physical injury, death &amp; property damage arising from an impact of an aircraft</li> </ul> but not including pure acts of State: <ul style="list-style-type: none"> <li>- armed conflict</li> <li>- seizure of property</li> </ul>	War Risks covered under AVN52C <ul style="list-style-type: none"> <li>- acts of war</li> <li>- terrorism</li> <li>- hijacking</li> <li>- sabotage</li> <li>- demonstrations, strikes &amp; civil insurrections</li> <li>- seizure of property</li> </ul>
7. Entities offered cover	Affected operators that suffer loss estimated to be in excess of their insurance cover in the territory of the Contracting State <i>where the damage occurs</i>	Carriers and other aviation industry operators from the participating State
8. Extent of cover	Damage covered in the new regime [which could include domestic flights depending on whether the new regime applies domestically]	International and domestic third-party liability of insured operator
9. Maximum cover	Per incident excess of cap (based on current market insurance) with exact level determined on basis of national participation in the mechanism	US\$ 1.5 billion excess of US\$ 50 million - maximum of 10 incidents (for all insureds)

Feature	International Additional Compensation Mechanism	ICAO Globaltime Scheme
10. Method of funding claims	Post funded (i.e. costs recovered after the event, when amounts are known)	Partially pre-funded through premiums, with post funding through adjustable premiums when losses occur
11. Source of funds	Through participating States revenue systems – probably in the form of a low passenger through-put levy at airports, but States could choose to fund their proportion using other approved methods	Private insurance policy premiums levied on aviation industry participants
12. Maximum financial exposure of each participating State	Each participating State's contribution amount to be determined based on the method of allocation	Each participating State's ICAO contribution percentage of US\$ 15 billion
13. Method of allocation of national contributions	Purely on national aviation activity alternatives - National passenger boardings/ cargo kg loaded - aircraft take-offs Where domestic activity is covered in a State, domestic activity would be added to international activity	Based on ICAO budget contribution percentages
14. Duration	Ongoing but would hibernate when there was no active incident requiring claims to be processed	3-5 years
15. Commencement	Instrument would have to enter into force with a minimum number of ratifications and a minimum percentage of national contributions	Expressions of intent from States totalling 51% of ICAO contributions
16. Date of effect for Joining State	Probably 6 months after accession	Upon signature
17. Termination by each participating State	Upon 12-month notice and only after discharging all obligations arising out of incidents affecting the participating State	12-month notice

**ATTACHMENT B**  
**THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992**

Explanatory note prepared by the 1992 Fund Secretariat

*February 2004*

**1     Introduction**

Compensation for pollution damage caused by spills from oil tankers is governed by an international regime elaborated under the auspices of the International Maritime Organization (IMO). The framework for the regime was originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). This 'old' regime was amended in 1992 by two Protocols, and the amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Conventions entered into force on 30 May 1996.

Due to a number of recent denunciations of the 1971 Fund Convention, this Convention ceased to be in force on 24 May 2002. A large number of States have also denounced the 1969 Civil Liability Convention. Therefore this note deals primarily with the 'new regime', ie the 1992 Civil Liability Convention and the 1992 Fund Convention.

The **1992 Civil Liability Convention** governs the liability of shipowners for oil pollution damage. The Convention lays down the principle of strict liability for shipowners and creates a system of compulsory liability insurance. The shipowner is normally entitled to limit his liability to an amount which is linked to the tonnage of his ship.

The **1992 Fund Convention**, which is supplementary to the 1992 Civil Liability Convention, establishes a regime for compensating victims when the compensation under the applicable Civil Liability Convention is inadequate. The **International Oil Pollution Compensation Fund 1992**, generally referred to as the **IOPC Fund 1992** or the **1992 Fund**, was set up under the 1992 Fund Convention. The 1992 Fund is a worldwide intergovernmental organisation established for the purpose of administering the regime of compensation created by the 1992 Fund Convention. By becoming Party to the 1992 Fund Convention, a State becomes a Member of the 1992 Fund. The Organisation has its headquarters in London.

As at 1 February 2004, 94 States had ratified the 1992 Civil Liability Convention, and 86 States had ratified the 1992 Fund Convention. The States Parties are listed in the Annex.

**2     1992 Civil Liability Convention**

**2.1    Scope of application**

The 1992 Civil Liability Convention applies to **oil pollution damage** resulting from spills of **persistent oil** from tankers.

The 1992 Civil Liability Convention covers pollution damage suffered in the **territory, territorial sea or exclusive economic zone (EEZ)** or equivalent area of a State Party to the Convention. The flag State of the tanker and the nationality of the shipowner are irrelevant for determining the scope of application.

'**Pollution damage**' is defined as loss or damage caused by contamination. In the case of environmental damage (other than loss of profit from impairment of the environment) compensation is restricted to costs actually incurred or to be incurred for reasonable measures to reinstate the contaminated environment.

The notion of pollution damage includes measures, wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ or equivalent area of a State Party to the Convention ('preventive measures'). Expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The 1992 Civil Liability Convention covers spills of cargo and/or bunker oil from laden, and in some cases unladen sea-going vessels constructed or adapted to carry oil in bulk as cargo (but not to dry cargo ships).

Damage caused by non-persistent oil, such as gasoline, light diesel oil, kerosene etc, is not covered by the 1992 Civil Liability Convention.

## 2.2 Strict liability

The owner of a tanker has strict liability (ie he is liable also in the absence of fault) for pollution damage caused by oil spilled from his tanker as a result of an incident. He is exempt from liability under the 1992 Civil Liability Convention only if he proves that:

- (a) the damage resulted from an act of war or a grave natural disaster, or
- (b) the damage was wholly caused by sabotage by a third party, or
- (c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

## 2.3 Limitation of liability

The shipowner is normally entitled to limit his liability under the 1992 Civil Liability Convention. The limits were increased by some 50.37% on 1 November 2003 as follows. The increased limits apply to incidents occurring on or after that date:

- (a) for a ship not exceeding 5 000 units of gross tonnage, 4 510 000 Special Drawing Rights (SDR) (US\$6.7 million);
- (b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 4 510 000 SDR (US\$6.7 million) plus 631 SDR (US\$ 934) for each additional unit of tonnage; and
- (c) for a ship of 140 000 units of tonnage or over, 89 770 000 SDR (US\$ 133 million)<sup><1></sup>.

If it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, the shipowner is deprived of the right to limit his liability.

## 2.4 Channelling of liability

Claims for pollution damage under the 1992 Civil Liability Convention can be made only against the registered owner of the tanker concerned. This does not preclude victims from claiming compensation outside this Convention from persons other than the owner. However, the Convention prohibits claims against the servants or agents of the owner, members of the crew, the pilot, the charterer (including bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or preventive measures. The owner is entitled to take recourse action against third parties in accordance with national law.

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<1> The unit of account in the 1992 Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this document, the SDR has been converted into US dollars at the rate of exchange applicable on 30 January 2004, ie 1 SDR = US\$ 1.481310.

## **2.5 Compulsory insurance**

The owner of a tanker carrying more than 2 000 tonnes of persistent oil as cargo is obliged to maintain insurance to cover his liability under the 1992 Civil Liability Convention. Tankers must carry a certificate on board attesting the insurance coverage. When entering or leaving a port or terminal installation of a State Party to the 1992 Civil Liability Convention, such a certificate is required also for ships flying the flag of a State which is not Party to the 1992 Civil Liability Convention.

Claims for pollution damage under the 1992 Civil Liability Convention may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage.

## **2.6 Competence of courts**

Actions for compensation under the 1992 Civil Liability Convention against the shipowner or his insurer may only be brought before the Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred.

## **3 1992 Fund Convention**

### **3.1 Supplementary compensation**

The 1992 Fund pays compensation to those suffering oil pollution damage in a State Party to the 1992 Fund Convention who do not obtain full compensation under the 1992 Civil Liability Convention for one of the following reasons:

- (a) the shipowner is exempt from liability under the 1992 Civil Liability Convention because he can invoke one of the exemptions under that Convention; or
- (b) the shipowner is financially incapable of meeting his obligations under the 1992 Civil Liability Convention in full and his insurance is insufficient to satisfy the claims for compensation for pollution damage; or
- (c) the damage exceeds the shipowner's liability under the 1992 Civil Liability Convention.

In order to become Parties to the 1992 Fund Convention, States must also become Parties to the 1992 Civil Liability Convention.

The 1992 Fund does not pay compensation if:

- (a) the damage occurred in a State which was not a Member of the 1992 Fund; or
- (b) the pollution damage resulted from an act of war or was caused by a spill from a warship; or
- (c) the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined (ie a sea-going vessel or seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo).

### **3.2 Limit of compensation**

The maximum amount payable by the 1992 Fund in respect of an incident occurring before 1 November 2003 was 135 million SDR (US\$200 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. The limit was increased by some 50.37% to 203 million SDR (US\$300 million) on 1 November 2003. The increased limit applies only to incidents occurring on or after this date.

### 3.3 Competence of courts

Actions for compensation under the 1992 Fund Convention against the 1992 Fund may only be brought before the Courts of the State Party to that Convention in whose territory, territorial sea or EEZ or equivalent area the damage occurred.

Experience in past incidents has shown that most claims are settled out of court.

### 3.4 Organisation of the 1992 Fund

The 1992 Fund has an Assembly, which is composed of representatives of all Member States. The Assembly is the supreme organ governing the 1992 Fund, and it holds regular sessions once a year. The Assembly elects an Executive Committee comprising 15 Member States. The main function of this Committee is to approve settlements of claims.

The 1992 Fund shares a Secretariat with the 1971 Fund (see section 4 below). The joint Secretariat is headed by a Director, and has at present 26 staff members.

### 3.5 Financing of the 1992 Fund

The 1992 Fund is financed by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of crude oil and heavy fuel oil (contributing oil) in a State Party to the 1992 Fund Convention.

#### *Basis of Contributions*

The levy of contributions is based on reports of oil receipts in respect of individual contributors. Member States are required to communicate every year to the 1992 Fund the name and address of any person in that State who is liable to contribute, as well as the quantity of contributing oil received by any such person. This applies whether the receiver of oil is a Government authority, a State-owned company or a private company. Except in the case of associated persons (subsidiaries and commonly controlled entities), only persons having received more than 150 000 tonnes of contributing oil in the relevant year should be reported.

Oil is counted for contribution purposes each time it is received at a port or terminal installation in a Member State after carriage by sea. The term received refers to receipt into tankage or storage immediately after carriage by sea. The place of loading is irrelevant in this context; the oil may be imported from abroad, carried from another port in the same State or transported by ship from an off-shore production rig. Also oil received for transshipment to another port or received for further transport by pipeline is considered received for contribution purposes.

#### *Payment of Contributions*

Annual contributions are levied by the 1992 Fund to meet the anticipated payments of compensation and administrative expenses during the coming year. Each contributor pays a specified amount per tonne of contributing oil received. The amount levied is decided each year by the Assembly.

The Director issues an invoice to each contributor, following the decision taken by the Assembly to levy annual contributions. A system of deferred invoicing exists whereby the Assembly fixes the total amount to be levied in contributions for a given calendar year, but decides that only a specific lower total amount should be invoiced for payment by 1 March in the following year, the remaining amount, or a part thereof, to be invoiced later in the year if it should prove to be necessary.

The contributions are payable by the individual contributors directly to the 1992 Fund. A State is not responsible for the payment of contributions levied on contributors in that State, unless it has voluntarily accepted such responsibility.

*Level of Contributions*

Payments made by the 1992 Fund in respect of claims for compensation for oil pollution damage may vary considerably from year to year, resulting in fluctuating levels of contributions. The following table sets out the contributions levied by the 1992 Fund during the period 1996-2003.

Annual contributions	Date due	Total contribution £	Contribution per tonne of contributing oil £
1996	01.02.1997	4 000 000	0.0110440
	01.09.1997	10 000 000	0.0188066
1997	01.02.1998	9 500 000	0.0114295
	<i>Maximum deferred levy</i>	30 000 000	<i>(No deferred levy made)</i>
1998	01.02.1999	28 200 000	0.0400684
	01.09.1999	9 000 000	0.0134974
1999	Credit: 01.03.2000	-3 700 000	-0.0056367
	01.09.2000	53 000 000	0.0552651
2000	01.03.2001	49 500 000	0.0545770
	<i>Maximum deferred levy</i>	43 000 000	<i>(No deferred levy made)</i>
2001	01.03.2002	41 000 000	0.0428439
	<i>Maximum deferred levy</i>	21 000 000	<i>(No deferred levy made)</i>
2002	01.03.2003	31 000 000	0.0274518
2003	01.03.2004	82 000 000	0.0052994
	<i>Maximum deferred levy</i>	40 500 000	

#### 4 International Oil Pollution Compensation Supplementary Fund

Additional compensation is likely to be available in future for victims of oil pollution from oil tanker accidents, following the adoption of a Protocol establishing an International Oil Pollution Compensation Supplementary Fund. The Protocol was adopted by a Diplomatic Conference held at the Headquarters of the International Maritime Organization (IMO) in London in May 2003.

The aim of the Supplementary Fund is to supplement the compensation available under the 1992 Civil Liability and Fund Conventions with an additional third tier of compensation. Membership of the Supplementary Fund is optional and any State which is a Member of the 1992 Fund may join the Supplementary Fund.

The Supplementary Fund will have available an amount of 547 million SDR (US\$ 810 million), in addition to the amount of 203 million SDR (US\$ 300 million) which is available in the present 1992 Fund after the increase which took effect on 1 November 2003. As a result, the total amount available for compensation for each incident in the States which are Members of the Supplementary Fund will be 750 million SDR (US\$ 1 110 million).

One important effect of the Protocol will be that, in practically all cases, it will be possible to pay compensation at 100% of the amount of the damage agreed between the Fund and the victim. It will also avoid the need to fix the level of payment below 100% of the amount of the damage suffered during the early stages of most major incidents as has been the case in respect of several recent incidents.

The Protocol will enter into force three months after it has been ratified by at least eight States which have received a combined total of 450 million tons of contributing oil in a calendar year. The Supplementary Fund will only pay compensation for pollution damage in States which are Members of the Supplementary Fund for incidents which occur after the Protocol has entered into force.

— END —