DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY

May 22, 1969

MEMORANDUM FOR [redacted] AFXPPGA

SUBJECT: Comments on Draft Position Paper

This memorandum responds to your request of May 21 for our review and comments on a draft position paper, "Liability Convention," for use at the eighth session of the Legal Subcommittee.

We have reviewed the subject position paper and have no comments. We concur in the use of the paper as written.

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POSITION PAPER (Second Draft)
U.N. COMMITTEE ON THE PEACEFUL
USES OF OUTER SPACE
LEGAL SUBCOMMITTEE

~~CONFIDENTIAL~~
EIGHTH SESSION
GENEVA
June 9 - July 4, 1969

Comments by Maj. McCarthy by 1500, 22 May

LIABILITY CONVENTION

PROBLEM

The principal item on the Subcommittee's agenda this year will again be the draft Convention on Liability for Damage Caused by Objects Launched into Outer Space. Preliminary indications are that the Subcommittee will begin formal consideration of this item at the beginning of the session's second week although, in that event, informal consultations would undoubtedly take place during the first week. Several important issues are still unresolved, including applicable law on measure of damages, treatment of international organizations, and perhaps most difficult, the procedure for settlement of disputes. For the first time, the United States will be prepared at this session to consider giving up its past strong preference for a limitation on liability in exchange for satisfactory resolution of the other points at issue if such a compromise will enable the Subcommittee to agree on a generally satisfactory text.

~~CONFIDENTIAL~~

BACKGROUND

The United States made the original proposal in the United Nations for a liability convention and has continued to press for its completion. At the Subcommittee's Sixth Session in 1967, we proposed the draft of a complete convention (A/AC.105/C.2/L.19). We have not stuck rigidly to our own text, however, and have been willing to consider reasonable alternatives.

The General Assembly adopted resolutions at both its 22nd and 23rd sessions requesting conclusion of the liability convention on an urgent basis. Several countries have made it clear that conclusion of a satisfactory liability convention will "facilitate" their adherence to the Astronaut Rescue Agreement.

The Report of the Subcommittee's 1968 session (A/AC.105/45) indicates provisional agreement has been reached on a number of provisions including (a) definitions of "damage" and "launching state", (b) a basic rule of absolute liability with certain exceptions, (c) joint and several liability for a joint launch, (d) exoneration from liability in certain cases, (e) presentation of claims including time-limits, and (f) pursuit of other remedies.

Since the Subcommittee's 1968 session, the Group of Five (Belgium, Hungary, India, USSR, USA) has held two series of informal meetings -- first in New York last fall and again in New Delhi this spring. On March 22, 1969, India issued a press release (Annex I) summarizing positions of the respective delegations on the most important unresolved issues. In early April the U.S. and Belgium briefed other

friendly members of the Outer Space Committee* in New York on the New Delhi talks. Some progress was made during these talks (e.g. Soviet accord on including nuclear damage) and agreement on a complete text might be possible at this session of the Subcommittee.

UNITED STATES POSITIONS

1. General. The United States strongly desires to reach agreement at this session of the Subcommittee on a complete liability convention consistent with the positions set forth in this position paper. The Delegation should use the first week of the session to consult other Subcommittee members and, as appropriate, to advise them of our positions as outlined below. In particular, the Delegation should find an early private opportunity to inform Belgium and India of its instructions on limitation of liability and then meet with the Friendly Fifteen.

It is possible that the Soviet Delegation will suggest the desirability of private Soviet-US bilateral consultations. In view of the now established pattern for Group of Five

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* The "Friendly Fifteen" includes Argentina, Australia, Austria, Belgium, Brazil, Canada, France, Iran, Italy, Japan, Lebanon, Mexico, Sweden, the UK and the USA.

discussions, the U.S. Delegation should express its preference for continuing informal consultations in this forum. Should the Soviets press for private bilaterals, the Delegation should seek instructions.

2. Limitation on Liability. The Delegation may inform other Subcommittee members that: (1) The United States still prefers a limitation as in the past; (2) The Delegation has no authority to agree to a complete draft convention without a limitation; (3) The Delegation, however, would be prepared to seek new instructions if it becomes convinced that a U.S concession on this point would make possible the conclusion of a generally satisfactory complete draft convention; (4) The Delegation should make clear that it believes that, as a minimum, such a text would have to include (a) a provision on international organizations satisfactory to members of ESRO and ELDO, (b) a satisfactory provision on the law applicable to measure of damages, and (c) an adequate provision on settlement of disputes.

Discussion - In the past the United States has strongly desired a limitation on the amount of liability per incident. At the 1968 session we advised other Subcommittee members

that we would consider an appropriate limitation to be any figure between $100 and $500 million. (See pages 8-11 of 1968 Position Paper - Annex II.)

Our position on limitation has attracted virtually no support among other Subcommittee members. Belgium and Canada have stated publicly that they could accept a "high" limit (presumably at the $500 million figure) and Australia has taken a similar position in private./ In the Group of Five talks last December Piradov (USSR) suggested a limit of $100 million for nuclear damage on condition that no limitation would apply to other types of damage. At the same meeting Krishna Rao made clear that India continued to oppose any limitation whatsoever. On his own initiative, however, he suggested that if India were to consider a limit it would probably have to be at least $500 million for nuclear damage and $1 billion for other types of damage. At the New Delhi Group of Five talks in March a Soviet delegate privately said that the maximum limit the USSR could accept would be $100 million for nuclear and non-nuclear damage. In public, however, both the Soviet and Indian delegations again firmly

France has opposed a limit; the UK has been silent.

opposed any limit whatsoever.

Our past desire for a limit on liability has been based on a feeling that the Senate would be reluctant to approve a treaty without a limitation and on the fact that virtually all other liability treaties have limitation provisions. Article VII of the Outer Space Treaty, on the other hand, does impose liability on launching states without a limitation, but this treaty deals with a broad range of space questions and is not strictly a liability agreement.

Early this year, the Department of State consulted Senators Symington and Gore and members of the staffs of Senators Anderson and Smith and of the Senate Committees on Astronautics and Space Sciences and on Armed Services. On the basis of these consultations we have concluded that the absence of a limitation would probably not be an obstacle to Senate approval assuming a good case can be made that, on balance, it would be in our national interest to become a party to the convention as finally drafted.

3. Applicable Law on Measure of Damages

(1) The Delegation should continue to support a provision whereby the compensation which a state shall be liable to pay for damages will be determined "in accordance with applicable principles of international law."

(2) The Delegation may also support proposals (a) to add the phrase "taking into account the law of the presenting state"(or of the place where the damage occurred) and (b) to give the parties to a claim the option of agreeing on some other standard as to measure of damages.

(3) The Delegation should oppose any formula based on the earlier Hungarian-Soviet proposal that measure of damages should be governed by the law of the launching state.

(4) The Delegation should also oppose the reference to the law of the respondent state in the New Delhi proposal of India. (Annex I, p. 2)

Discussion - In Article IV of our 1967 draft we proposed:

> "The compensation which a state shall be liable to pay for damage under this Convention shall be determined in accordance with applicable provisions of international law, justice and equity."

Last year our delegation was authorized to drop "justice and equity" in the interest of clarity and simplicity. (See Annex II, pages 12-14.) Based on last year's position paper we proposed to the Group of Five in New York:

> "The compensation which a Respondent State shall be liable to pay for damage under this Convention shall be determined in accordance with international law, taking into account the law of the Presenting State. The Respondent and Presenting States shall, however, be free to agree on applying some other standard."

This proposal is very close to the formulation in Article VI of India's draft convention (A/AC.105/C.2/L.32/Rev 1, see 1968 Subcommittee Report, page 24). Last fall the Soviets rejected this proposal, but said they could accept a simple reference to international law without mentioning the law of the presenting State.

The Belgians and Indians continue to insist on some reference to the law of the presenting state (or of the state where damage occurred) on the ground that international law alone is vague and thus favors the respondent state. The New Delhi proposal of India, designed as an all embracing compromise, was accepted by the USSR and Hungary but not by Belgium or the United States.

4. Exculpation of Passive Territorial State

(1) The Delegation should oppose the French proposal that a party to a joint launching, the full extent of whose cooperation is limited to a passive furnishing of its territory or facilities, should not be liable under the convention so long as the active participant is identified and is a party to the convention.

(2) If the French, Belgians or others press for some provision on this point and advance sound reasons for this deviation from the Outer Space Treaty, the Delegation may propose the following text:

> "If two or more states or international organizations actively and substantially participate in a cooperative space project, they shall be jointly and severally liable. However, a state whose sole contribution to such project is to make its territory available for launching shall not be considered an active and substantial participant for the purposes of this Article and shall not be liable under this convention if one or more active and substantial participants is identified and is a party to this convention. The parties to this convention participating in a space project shall be free to agree among themselves on sharing liability for any damage that may be caused by such project."

Discussion - Article VII of the Outer Space Treaty provides:

> "Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies."

We see no reason for changing this rule to exculpate a passive territorial state whose interests could be protected against the active state by means of a bilateral "hold harmless" agreement.

If the exculpation provision is pressed by the French, Belgians or other members, the Delegation should probe as to the practical reasons why a bilateral "hold harmless" agreement would not adequately protect the passive territorial state. The Delegation should propose the above text only if satisfied that real problems make a new rule desirable.

5. Settlement of Disputes

(1) The Delegation should continue to press for a procedure for settling disputes under the Convention by some form of compulsory third-party arbitration. The proposal made

by India at the New Delhi Group of Five Talks is acceptable (Annex I, page 3) except for a provision calling for the Chief Justices of the parties to select the Commission Chairman in the event the parties cannot agree. It would not be appropriate for the Executive Branch to agree to such a role for the Chief Justice of the United States.

(2) The Delegation should keep the Department of State informed of developments so that timely consideration can be given to falling back to a compulsory mediation procedure with public but non-binding recommendations for settlement of disputes if (a) it appears that the Soviets will not accept binding third-party settlement, (b) other friendly delegations are willing to yield on this point, and (c) such a concession will enable the Subcommittee to agree on an otherwise satisfactory convention.

Discussion - This issue will be among the most difficult to resolve. The USSR has steadfastly opposed any settlement procedure not expressly accepted by both parties to a dispute. The U.S. position has been that some form of compulsory third-party settlement would be essential if the liability convention is to represent progress beyond Article VII of the Outer Space Treaty. We were prepared in 1968, however, not to insist on

compulsory third-party settlement if other friendly delegations did not believe it worth fighting for and if they pressed us to concede. But most of our friends have been firm on this point (Belgium has indicated some flexibility), and our willingness to concede on limitation should encourage India and others to seek some give in the Soviet position.

The final U.S. position on this point, as well as that of the Soviets and others, will probably be determined to some extent by the outcome of the Vienna Conference on the Law of Treaties where third-party settlement of disputes is also a central issue. (On May 16 a compulsory third-party settlement procedure failed by about ten votes to receive the necessary two-thirds majority. Efforts are now underway to produce a compromise settlement procedure before the Conference ends on May 23.)

6. International Organizations

The Delegation should consult ESRO/ELDO members in Geneva and be guided by their attitudes toward current proposals.

Discussion - Our primary purpose has been to support any reasonable proposal acceptable to ESRO and ELDO whose membership

is represented on the Legal Subcommittee by Belgium, France, Italy and the U.K. Australia is a member of ELDO but not ESRO. At the 1968 session we were (and still are) willing to follow the precedent of Article 6 of the Astronaut Rescue Agreement, but the Soviets and Hungarians have insisted on modification of that formulation.

During the Group of Five talks last fall the Soviet Delegation accepted the proposal made by India at the 1968 session of the Subcommittee. (1968 Subcommittee Report, page 26.) In New Delhi the USSR backtracked, however, on the ground that an international organization should be bound by the liability convention if a majority of its members are parties without regard to whether or not the organization itself had accepted the convention. India then suggested a new formulation incorporating this idea (Annex I, page 2) which all delegations accepted ad referendum. The Belgian and U.S. delegations, however, made clear that their approval was also subject to general acceptance by ESRO/ELDO members. Vranken (Belgium) was to discuss this proposal with other ESRO/ELDO members in May.

7. Other Positions

On questions not specifically dealt with above the Delegation should be guided by the 1968 Position Paper (Annex II) to the extent not inconsistent with this paper, particularly with respect to the following issues:

(1) Definition of Space Object (Annex II - pages 4-7);

(2) Apportionment of the Amount Available (Annex II, pages 11 and 12);

(3) Damage Done in Launching State Territory (Annex II, pages 15-16);

(4) Damage Done in Outer Space and Certain Other Areas (Annex II, pages 16-18);

(5) Electronic and Radiation Interference (Annex II, pages 22-23);

(6) Juridical Persons (Annex II, pages 23-24); and

(7) Review Conference (Annex II, page 26).

8. Final Clauses

As in the past, the Delegation should state that it has no authority to discuss final clauses until agreement is

reached on all substantive provisions. It will be extremely difficult to resist an "All States" accession clause in view of the precedents in the Outer Space Treaty and the Assistance and Return Agreement. The Department will undertake timely consultations with the FRG Embassy if progress on unresolved issues makes agreement on a complete text appear likely.

L:L/UNA:SMBoyd:dws 5/19/69

Annex I

PRESS STATEMENT RELEASED BY THE GOVERNMENT OF INDIA 22 MARCH 1969

1. The Legal Sub-Committee of the U.N. Committee on Peaceful Uses of Outer Space has been considering for some time the subject of liability for damage caused by objects launched into outer space. Draft conventions in this regard had been tabled by Belgium, Hungary and the United States. At the seventh session of the Legal Sub-Committee in June, 1968, India and Italy also presented draft conventions on the subject.

2. The Convention could not be finalised at the seventh session of the Outer Space Legal Sub-Committee owing to certain differences between various delegations. In the course of informal consultations held in New York in November/December 1968 between Belgium, Hungary, the USSR, the US and India these differences were narrowed down. It was then agreed that further consultations should be held early this year. An official invitation was extended by the Government of India to the Governments of Belgium, Hungary, the USSR and the USA to meet in New Delhi.

3. Informal consultations were held between the five delegations from 13 March, 1969. Dr. A.J. Vranken of Belgium, Dr. A. Prandler of Hungary, Professor A.S. Piradov, Dr. Rybakov, Mr. Rubanov and Mr. Dementiev of the USSR and Mr. Reis, Mr. Almond and Mr. Viets of the United States represented their respective countries. Dr. K. Krishna Rao, Joint Secretary and Legal Adviser, Ministry of External Affairs presided over these consultations. The Indian Delegation included Shri R. Jaipal, Joint Secretary, U.N. Division, Shri C.R. Gharekhan, Deputy Secretary, U.N. Division and Shri S.N. Sinha, Law Officer of Ministry of External Affairs.

4. There was a free and frank exchange of views between the five delegations. Finally India suggested, pursuant to this exchange of views, the following principles for the overall settlement of the four outstanding issues mentioned below:

(A) International organisations.

In cases where a majority of members of an international organisation which conducts space activities are contracting parties to the liability convention, that organisation would be liable in terms of the convention for damage caused by it. If an international organisation is responsible in terms of the provisions of the convention for damage caused by its space object, both the organisation and its members are jointly and severally liable. Claims in respect of damage due to the space activities of such an international organisation shall be first presented to the organisation. If the organisation is unable to settle the claim within one year, the claimant may proceed against any one or more of the members of the organisation which are also parties to the convention.

(B) Applicable law.

It was proposed that the amount of compensation payable shall be determined in accordance with international law, taking into consideration the law of the claimant state and, where considered appropriate, the law of the respondent state. In case of conflict international law shall prevail.

(C) Settlement of claims.

A three-stage settlement procedure was proposed, comprising (1) diplomatic negotiations; (2) an enquiry commission constituted on the basis of parity, in case diplomatic negotiations are not productive; and (3) in the final resort, a tripartite claims commission composed of one nominee each of the respondent and claimant states, with the chairman being chosen by both. In case the claimant state and the respondent state are unable to agree directly on the nomination of the chairman, the respective chief justices of the two parties or other judicial officers or juris-consults of the two parties would nominate the chairman. If no agreement is forthcoming under this procedure then finally the U.N. Secretary-General or some other person of similar standing would be asked to nominate the chairman. The decision of the claims commission would be rendered on the basis of

majority vote and would be final and binding. The commission would have only limited competence, as to whether the damage had actually been caused by the respondent state and if so the quantum of compensation due therefor.

(D) Ceiling on liability.

The state which is responsible for the launching of a space object which has caused damage to other countries would be liable to pay compensation without limit for all such damage.

5. It was confirmed by all the delegations that in the framework of a general settlement, no distinction would be made between nuclear damage and non-nuclear damage.

6. The Delegation of Belgium agreed to the proposals concerning international organisations and settlement of claims. They were also in agreement with India's proposal regarding the question of ceiling on liability, i.e. that there should be no ceiling. However, the Belgian Delegation was prepared, if necessary, and as a matter of compromise, to agree to a relatively high ceiling. Concerning applicable law, the Belgian Delegation agreed that international law should be applicable but felt that further study was required in regard to what other systems of law should also be made applicable.

7. The Delegations of Hungary and the U.S.S.R. agreed with India's proposals on international organisations, applicable law and the question of ceiling. Both the Delegations received India's proposal concerning the settlement of claims with sympathy. However, in the view of these Delegations, the final stage of the procedure for the settlement of claims requires further study.

8. The Delegation of the United States agreed with India's proposal on international organisations and the settlement of claims. With regard to the proposal on applicable law, the U.S. Delegation was also of view that international law should be applicable. In the view of the U.S. Delegation, the question of also applying other systems

of law requires further study. On the question of a ceiling, the U.S. Delegation continued to hold the view that there should be a ceiling on liability.

9. It was clearly understood that whatever agreement was arrived at in relation to the above-mentioned proposals was on an ad referendum basis and in the context of reaching an overall settlement of the five major outstanding issues.

10. All the delegations expressed the view that the talks in New Delhi have helped considerably in widening the area of agreement in regard to major outstanding issues. All delegations agreed that it was now appropriate to consider concrete formulations. The Delegations of Belgium, Hungary, the USSR and the USA expressed their appreciation of the initiative taken by the Government of India in convening these talks, as also for the hospitality extended to them in the course of their stay in New Delhi.

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Annex II

POSITION PAPER (Final Paper)
U.N. COMMITTEE ON THE
PEACEFUL USES OF OUTER
SPACE--LEGAL SUBCOMMITTEE

~~CONFIDENTIAL~~
June 3-27, 1968

GENEVA

LIABILITY CONVENTION

PROBLEM

There are many outstanding questions upon which agreement must be reached in the Legal Subcommittee before a complete text of a Convention on Liability for Damage Caused by the Launching of Objects into Outer Space, originally a U.S. initiative in the U.N., may be forwarded for eventual General Assembly consideration. Recent General Assembly approval of the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space--a subject which had always been linked with liability in relevant General Assembly resolutions and especially in the minds of the non-space powers--has significantly heightened the desire of the non-space powers for conclusion of a liability convention. Several countries have made it clear that conclusion of a satisfactory liability convention will "facilitate" their adherence to the Astronaut Rescue Agreement.

Indeed, a significant part of the bargain struck at the 22nd General Assembly to secure ready approval of the largely U.S.-USSR Astronaut Rescue text was a strongly worded mandate for the Outer Space Committee to complete the preparation of the draft agreement on liability urgently and in any event not later than the beginning of the 23rd Session of the Assembly. Speaking in the Assembly last December 19, Ambassador Goldberg pledged the full support of the United States to this goal.

The most difficult outstanding issues are: whether or not the Convention will contain a limit on the amount available to compensate for damages in a particular incident and what that amount will be; and whether claims and disputes under the Convention will be submitted to third-party settlement procedures; and what law will be applied to determine the amount of compensation due for damage. Among the other outstanding questions are: the need for and terms of a definition of "space object"; whether exacerbated contributory negligence of an injured person should reduce the damages due him, and the degree of rashness which should be required to

have this effect; whether primary, secondary or no liability whatever should be imposed upon a state whose sole participation was that the launch took place from its territory or facility; what exceptions, if any, will be made to the rule that the Launching State will be liable for any damage done by objects it has launched or attempted to launch into outer space; and the manner in which the liability of international organizations in space activities should be dealt with.

The U.S., Belgian and Hungarian proposed treaty texts, as well as other proposals and records of areas of agreement, are contained in the 1967 Report of the Legal Subcommittee on the work of its Sixth Session, A/AC.105/37.

U.S. POSITIONS

1. Introduction. The United States strongly desires to reach agreement on the liability convention at this session of the Legal Subcommittee. Though seeking agreement on the basis of our proposals in A/AC.105/C.2/L.19 of June 19 last year, with a number of modifications noted below, we want to avoid having earlier preferences become an obstacle to consensus on reasonable alternatives.

2. "Space object". Though the U.S. is willing to include a satisfactory definition of "space object" in the agreement, we do not believe that such a definition can easily be worked out and we do not believe that the absence of a general definition would render the treaty more difficult to apply.

The Delegation may point out for the record that the term "space object" obviously includes all the objects launched in the space programs known or contemplated today, whether they be near or deep space probes; Earth or celestial body orbiters; celestial body landers; or cargo or personnel carriers to and from the Earth, space stations or celestial bodies. The Delegation may question whether even this much clarity is conveyed by the Belgian or Hungarian proposal.

If it appears tactically useful, the Delegation may propose that a description along the following lines be included in the agreement:

> "The term 'space object' includes parts of the object as well as its boosters and parts thereof."

Comment: The U.S. proposal, as well as the Belgian, applies only to damage done by a "space object". The Hungarian draft covers damage by an "object" during or after "launching". Both the Belgian and Hungarian proposals define "space object", the Belgian using the phrases "move in outer space" and "sustained there other than by the reaction of air." The Hungarian draft uses similar phrases. The 1967 U.S. draft contains no definition.

The Belgians have privately argued that a definition of "space object" is not only logically necessary to determine the activities to which the Convention will apply, but also that its inclusion will undercut the French argument that a definition of outer space is necessary and urgent. It seems likely, however, that the Belgian and Hungarian proposals, using the words "move in outer space", would exacerbate the outer space definition problem. Furthermore, these proposals are subject to interpretations which might exclude things that should be included, such as high-altitude sounding rockets, which arguably are not "sustained" in outer space, and those re-entry bodies which use aerodynamic forces at altitudes too high to be regarded as airspace.

The Delegation should avoid raising any question concerning the coverage of damage that might be caused by the nuclear warheads of objects launched into outer space. It is not our policy to seek to exclude such damage from the liability convention, whether by putting in an express exclusion or trying to build a legislative history in support of such an exclusion. The United States has no intention of engaging in activities in violation of the Limited Test Ban Treaty or the Outer Space Treaty; and the possibility of a U.S. nuclear ballistic missile "getting away" can be regarded as non-existent. In any case, any resulting damage would not be excluded from the coverage of Article VII of the Outer Space Treaty, and there would thus be no purpose in trying to get an exclusion from the implementing liability convention. It should be borne in mind that to do so would make the U.S. appear to consider such damage as a real possibility. Seeking an exclusion would likely involve discussions of the reliability of fail-safe mechanisms command and control arrangements and the like, which might become the focal point of Legal Subcommittee attention. This would be contrary to

our national interest. We do not now wish to stimulate international discussion of these matters, and certainly not in the U.N. Outer Space Committee which is a completely inappropriate forum.

If pressed privately by Japan, which has shown an interest in the matter, or by others, the Delegation should state that the U.S. considers any such damage to be extremely hypothetical, that it would, in any event, not be excluded from the coverage of the Space Treaty or the liability convention (unless some other delegation seeks an exclusion). We would make a similar statement to the Senate if a question on this point should be raised during hearings on the Convention.

On the other hand, the Delegation should do what it can to give the members of the Subcommittee a better understanding of the prospects of utilization of nuclear power sources and propulsion systems. It should continue to oppose the Hungarian effort to exclude nuclear damage arising from such technology; there is no reason to treat nuclear damage of this sort differently than any other damage.

3. Limitation of Liability. The United States strongly desires a limit per incident. We have no firm preference for a particular dollar limit, since, by the nature of things, such a figure is to a significant degree arbitrary and, therefore, depends upon negotiation. We are prepared to agree to any amount up to $500,000,000. The Delegation should, however, check with the Department before committing the United States to any particular figure.

Since the Soviets apparently feel free to oppose a limit, there will be a political price to pay for insisting upon one. To minimize it, the Delegation should undertake consultations aimed at inducing one or more of the ESRO-ELDO nations, Japan or India to share the burden of proposing or defending a dollar limit. In these consultations, the Delegation should indicate that we have no firm preference for any particular figure and could accept almost any of the liability treaty precedents. The Delegation may point out that we have hesitated to propose a specific figure partly for fear that it might be too high for all but the principal space powers.

If necessary to secure agreement on a reasonable limit, the Delegation may propose the addition of language along the following lines in connection with a limit:

> This limit of liability shall have no application if the damage was caused by an act or omission done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Comment: Since non-space powers are well aware that the Outer Space Treaty places no limit on liability for damage done by the launching, transit or descent of space objects, we may be unable to secure a limit of any amount in this Convention. It may be that the smallest figure that will enable the U.S. to bring around any of the non-space powers on the Outer Space Committee is $500,000,000, the amount established in the international agreements concluded under the Savannah Statute and by the Price-Anderson Act for nuclear damage indemnification within the United States. ~~On the assumption that nuclear warhead damage is not covered by the Convention, we can defend such a figure as greatly exceeding any probable damages from space incidents~~. We regard a specific limit as essential in order to obtain ratifications

by potential Respondent States. Indeed, there has been no detailed international liability agreement in any field, nuclear or otherwise, without a limit.

Other near space powers on the Committee should be sounded out privately on a limit and on the amount of such a limit. If they can be brought to view themselves as potential Respondent States, they may well develop a greater interest in a reasonable limit. We can point out that fairly low limits have been deemed appropriate and necessary by many in the international community in liability agreements in the potentially catastrophic area of nuclear damage and in the more closely analogous area of aviation. Among the precedents are:

a) Nuclear, Paris Convention of 1960: $15,000,000, but allows Parties to set any limit above $5,000,000.

b) Nuclear, Supplementary Convention to the Paris Convention, 1963: $120,000,000.

c) Nuclear, Brussels Convention on Liability of Operators of Nuclear Ships, 1962: 1500 million francs (approx. $100,000,000).

d) Nuclear, Vienna Convention, 1963: $5,000,000 minimum but Installation States may set higher limits.

e) Aviation, Rome Convention, 1952: Varies by weight: e.g., 500,000 francs (approx. $33,000) for aircraft of less than 1,000 kilos; 10,500,000 francs (approx. $693,000) for aircraft of 50,000 kilos. In addition it contains a 500,000 franc limit on the injury or death of a single person.

The additional language the Delegation is authorized to propose in connection with a limit is drawn from the Warsaw Convention and the Belgian contributory negligence proposal. Placed in context, it may provide reassurance necessary to secure agreement to a limit.

4. Apportionment of the amount available. The Delegation may agree to a formula that would (a) appropriate 50% of the available amount to meet claims in respect of loss of life and personal injury, and (b) allocate the remaining 50% equally among the total amount of property claims and any unsatisfied death and personal injury claims.

Comment: This amounts merely to changing the 75% loss of life and personal injury preference in our 1967 proposal to a 50% preference. The Belgians apparently prefer the lower figure, which parallels the 1952 Rome Convention on Damage to Third Parties on the Surface, and it is defensible

against charges that we value life and property equally since, in every case where loss of life and personal injury claims exceed 50% of the limit, the unsatisfied portion will be added to the amount of property claims and share in apportionment of the remaining 50%.

5. Measure of damages. Hungary's proposal that the law of the Launching State govern the measure of damage is undesirable. We continue to prefer that this be governed by "applicable principles of international law, justice and equity." As authorized earlier, the Delegation may agree to drop the words "justice and equity" if this clarifies our proposal for others. The Delegation may, in its discretion, propose to give the parties the option of agreeing on a law other than international law and may draw on the following language:

> The compensation which a Respondent State shall be liable to pay for damage under this Convention shall be determined in accordance with applicable principles of international law [, justice and equity] or in accordance with principles or local law agreed upon by the Presenting and Respondent States.

Comment: The only apparent justification for the Hungarian proposal to adopt the local law of the Launching State as controlling is the contention that local law is likely to be more certain and complete on this question than international law. However, Belgium's proposal that the local law of the injured person's country govern has the same possible virtue and the additional one of applying a system of law that takes into account the legitimate expectations of the injured party. Furthermore, Hungary's proposal does not meet the problem of multiple Launching States. In July last year, the Hungarians told us in the presence of the Belgians that they could accept a simple "international law" standard.

We prefer an international law standard for several reasons: (a) the difficulty of determining the local law on measure of damages in a federal system such as our own, (b) the difficulty of determining in advance the elements we will have agreed to compensate under a convention applying local law standards, (c) the unfamiliarity of foreign office claims divisions with a multiplicity of foreign local

law systems, and (d) the possibility of non-space powers developing special damages law for injuries caused by space objects.

On the other hand, it is not easy to rebut the Belgian argument that application of an international law standard could create opportunities for abuse by Respondent States absent third-party settlement procedures. A theoretically ideal solution--definition in the Convention of the elements compensable under an international law standard, such as the U.S. proposed to the Belgians in March last year--is difficult to draw up and almost impossible to negotiate in view of its length and detail.

6. Damage to permanent residents of the Launching State. Though our existing draft proposal permitting the presentation of claims on behalf of permanent resident non-nationals of the Launching State is in keeping with international practice and the principle of State diplomatic protection of its nationals, we are quite prepared to modify our Article VII to agree with the Belgian approach which would bar the presentation of such claims.

Comment: The Belgian draft is the only one to exclude from the Convention claims on behalf of nationals of one state who are permanent residents of the Launching State. The Belgian position appears justified. There is no apparent reason to grant an international remedy to an alien who has become a permanent resident of the Launching State since (a) he should normally be in as good a position as nationals of that State to pursue whatever local remedies may be available, and (b) the Convention deals with an area of unintentional injury where the State of nationality would not have the same kind of interest in providing diplomatic protection as it would in cases where its nationals are injured by the failure of the country in which they permanently resided to abide by minimal international standards of conduct.

7. Damage done in Launching State territory. In our view, an exclusion for any and all damage sustained in the territory of the Launching State is unnecessary. The Delegation may, however, accept such an exclusion if consensus develops in its favor.

Comment: The Belgian proposal contains such an exclusion. Its effect would be to leave only domestic remedies in the Launching State open to foreign nationals who were merely passing through its territory or airspace when injured, persons for whom those remedies would not be convenient or appropriate and whose uncompensated injuries would be a burden on the State to which they returned. On the other hand, this is not a point of particular importance.

8. Damage done in outer space and certain other areas. The United States is prepared to modify its past position favoring the exclusion from the Convention of damage done within a planned launch or recovery area and to space objects and their personnel during launching, transit or descent. The Delegation may propose covering such damage provided that liability in these cases is fault-based.

The gaps in the Hungarian proposal's coverage of outer space, probably inadvertent, are not justified in our view. Damage done by a space object to persons and property on a celestial body, whether inside or outside their space vehicle, should be covered on a non-fault basis, just as in the case

of damage sustained on the surface of the Earth. By contrast, it seems appropriate to apply the concept of liability for fault to injury to astronauts and equipment engaged in activities in outer space (except on celestial bodies).

The following revision of Article II of our 1967 proposal may be drawn on in working out agreed language to reflect these changes:

> 1. The Launching State shall be [absolutely] liable to pay compensation to the Presenting State in accordance with the provisions of this Convention, for damage shown to have been caused by the launching, transit or descent of all or part of a space object.
>
> 2. The Launching State shall not be liable for damage caused to persons and property within a launch facility or planned immediate recovery area for participation in or observation of the launch or recovery, or to space objects and their personnel during launching, transit, or descent, unless it is shown to have been caused by the fault of the Launching State.
>
> 3. In the event that the collision of space objects of two or more Launching States causes damage to others, the Launching States shall be jointly and severally liable for such damage. They may recover among themselves on the basis of comparative fault for any payments made to Presenting States pursuant to this paragraph and in compliance with Article III.

4. (Contributory negligence).

9. Natural disaster. The Delegation should continue our past opposition to the Hungarian proposal for exoneration of the Launching State in the event the damage was caused by a "natural disaster".

10. Contributory negligence. We continue to believe that relief should be given the Launching State to the extent that the injured party's recklessness contributed to his damage, although the problem is one more of abstract justice than practical significance. The U.S. formulation is technically better than the Hungarian; the Belgian formulation is the least desirable since it would apparently cover only what might be viewed as suicidal conduct. If our formulation is unacceptable to the Belgians and others, the Delegation may propose alternative language and may draw on the following suggestion:

> "If the damage suffered results either wholly or partially from a wilful act or omission or from a (reckless)(rash)(foolhardy)(grossly negligent) act or omission from which damage should (reasonably) have been anticipated, the liability of the Launching State to pay compensation under paragraph 1 of this Article shall, to that extent, be wholly or partially extinguished."

The Delegation may, as a fallback, acquiesce in a consensus on the Belgian proposal or on deletion of the concept entirely.

Comment: All three texts grant proportional relief for contributory recklessness. The U.S. and Hungarian texts are almost identical in their definition of such conduct, the U.S. text using "wilful or reckless act or omission" and the Hungarian text using "wilful act or gross negligence"; except for failing to use the word "omission", the Hungarian text presents no problem. The Belgian text is much stricter, requiring an act or omission that was intended to cause damage or was committed "rashly and in full knowledge that damage will probably result." Unlike the U.S. and Hungarian texts, the Belgian text makes the "reasonable man" test irrelevant and requires proof of actual knowledge on the part of the injured person, a burden of proof which would be extraordinarily difficult to meet.

We believe it inappropriate for the Launching State to be required to bear the entire cost of damage recklessly incurred or aggravated by others, but we could accept a

convention with the stricter Belgian standard since, first, no exoneration is provided by Article VII of the Outer Space Treaty and, second, the instances of contributory negligence are likely to be extremely rare. Since the concept would rarely be applicable and would not be expected to greatly reduce a Launching State's liability, we would not wish to make this a sticking point in opposition to clearly expressed majority sentiment.

The precedents in air law are closer to the U.S. and Hungarian standard than to the Belgian. However, Article II, paragraph 5, of the Brussels Convention of 1962 on Liability of Operators of Nuclear Ships provides:

> "If the operator proves that the nuclear damage resulted wholly or partially from an act or omission done with intent to cause damage by the individual who suffered the damage, the competent courts may exonerate the operator wholly or partially from his liability to such individual."

Belgium's particular language in the space liability proposal seems to be borrowed out of context from Articles 25 and 25A of the 1929 Warsaw Convention as amended at The Hague in 1955. These provisions do not deal with contributory negligence.

Rather, they make the Convention's limit of liability inapplicable if "the damage resulted from an act or omission of the servant or agent (of the air carrier) done with intent to cause damage or recklessly and with knowledge that damage would probably result." Other precedents in the area of contributory negligence are as follows:

a) The Warsaw Convention of 1929, Article 21: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

b) The Rome Convention of 1952, on Damage to Third Parties on the Surface, Article 6: "...If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless, there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority."

c) The Vienna Convention of 1963 on damage caused by land-based nuclear reactors, Article IV(2): "If the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act

or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person."

d) The Paris Convention of 1960 on Third Party Liability in the Field of Nuclear Energy: This Convention does not specifically cover the point and applies national law to any questions not covered in the Convention. It does contain a possible red herring in Article 6(f) which gives an operator a right of recourse against the individual whose act or omission done with intent to cause damage did cause the damage.

11. Absolute liability. The Delegation may drop the word "absolutely" from Article II(1) if an opportunity arises since some delegations have viewed this concept as requiring non-fault-based liability with no exceptions or exonerations, while we have always regarded certain proposed exceptions and exonerations as desirable.

12. Electronic and radiation interference. We believe that damage to one space object which might be done by radiation or other interference from another space object is not covered by the existing proposals for the Convention, and that it should not be. Similarly, we believe that these proposals do not and should not cover space system interference

with the operation of ground systems. The Delegation should take steps to see that this understanding is shared and reflected adequately in the drafting history. If this is not the shared understanding, the Delegation should propose treaty language to effect this exclusion.

Comment: The possible problems of interference between communications satellites, possible wipe-out of satellite sensors by radiation from another space object, interference with ground broadcasts and other ground activities, and other problems which may arise are far enough in the future to make detailed treaty obligations difficult. Our current proposal, which imposes liability for damage done by the launching, transit or descent of a space object, refers to impact damage and damage attendant to impact throughout this sequence, the area of current concern internationally.

13. Juridical persons. The Delegation may agree to drop the exclusion in Article VII of damage to juridical persons benefically owned by nationals of Respondent States, or to limit that exclusion to cases where such juridical persons are owned wholly by such nationals.

14. Claims commission. A non-parity claims commission is a central element of the liability convention if it is to represent progress beyond Article VII of the Outer Space Treaty. If we cannot persuade friendly delegations that this issue is worth fighting for and if they put considerable pressure on us to dispense with third-party settlement, the U.S. Delegation may acquiesce. The Delegation should in any event oppose provision for a "parity" commission as giving a completely illusory appearance of progress in the area of impartial settlement.

15. Election of other remedies. The Delegation may propose to modify our present Article IX(2) so that it will bar only the concurrent pursuit of other remedies, rather than extinguish the right to claim under the Convention if another remedy is pursued.

Whether or not this is done, the Delegation may propose the deletion of the words "against such Respondent State" from our formulation of Article IX(2). These words inadvertently leave open the possibility, in the event two or more Respondent States are involved in an incident, of a particular

claim being pursued against one outside the Convention and against others under the Convention.

The Delegation may also make a technical improvement in our proposed Article IX(2) by changing the words "whom it might represent" to "on whose behalf it is entitled to pursue a claim."

As revised on these points, Article IX(2) might read:

> If the Presenting State or a natural or juridical person on whose behalf it is entitled to present a claim elects to pursue a claim in the administrative agencies or courts of a Respondent State or pursue international remedies outside this Convention, the Presenting State shall not be entitled to pursue such claim concurrently under this Convention.

16. International Organizations. We are willing to modify our proposal to reflect the precedent established in Article 6 of the Astronaut Rescue Agreement (definition of "launching authority" to include certain international organizations) or whatever other reasonable formulation would be acceptable to the ELDO-ESRO membership. In addition, the Delegation should seek to establish, whether by building a record or by securing specific language in the Convention, that nationals of members of such international organizations

are nationals of a Launching State for the purpose of this Convention with the result that the Convention would not apply.

Comment: International arrangements for ensuring compensation to injured nationals of cooperating states cannot be appropriately dealt with by general multilateral convention.

17. Review Conference. The Delegation may agree to the inclusion of an article providing for a review conference to be held at some fixed time (e.g., ten years) after the Convention has entered into force.

Attachment:

1967 Outer Space Legal Subcommittee Report.