The 1983 Korean Air Lines Incident: Highlighting the Law of International Air Carrier Liability

Steven N. Avruch
The 1983 Korean Air Lines Incident: Highlighting the Law of International Air Carrier Liability

1. Introduction

At approximately 3:26 a.m. Japan Standard Time on September 1, 1983, the pilot of a Soviet Sukhoi-15 interceptor fired a heat seeking air-to-air missile, striking within seconds a Korean Air Lines (KAL) Boeing 747 jumbo jet, which had been flying in Soviet airspace for over two and one-half hours. The missile exploded upon impact. The KAL jetliner plummeted approximately 34,000 feet and crashed into the Sea of Japan, killing all 269 passengers and crew members aboard.

Among the passengers who died were sixty-one U.S. citizens. As of November 1, 1984, survivors of passengers killed in the incident had filed approximately 160 lawsuits in U.S. courts. Not all of the lawsuits named the same defendants. Among the possible co-defendants are the U.S.S.R., South Korea, the United States, and other nations.

1. See TIME, Sept. 19, 1983, at 22-24 [hereinafter cited as TIME]. The actual time was between 1826:20 Greenwich Mean Time (G.M.T.), Aug. 31, 1983, when the Soviet pilot announced, "I have executed the launch," and 1826:22 G.M.T., when the pilot revealed, "[the Target is destroyed." Id. at 24.

2. See id. at 22-24. Virtually all of the information available regarding the final hours of KAL Flight 007 is derived from the transcript released by the U.S. government of the radio conversations between the Soviet fighter pilots involved in the incident and Soviet ground control. For a complete transcript of the Soviet air-to-ground radio transmissions, see N.Y. Times, Sept. 7, 1983, § 1, at 14, col. 1. These radio conversations were intercepted and taped by voice-activated recording devices operated by Japanese ground radar installations. TIME, supra note 1, at 22. For a complete chronology of KAL Flight 007 during the three hours before being shot down, see N.Y. Times, Sept. 26, 1983, § 1, at 6, col. 1.


4. Id. at 12.

5. THE ECONOMIST, Sept. 10, 1983, at 37. In addition to the United States, it is unclear how many other nations had citizens aboard KAL Flight 007. One report stated that citizens of sixteen nations were aboard. N.Y. Times, Sept. 9, 1983, § 1, at 10, col. 5. Other reports listed thirteen nations as having citizens aboard Flight 007, including Australia, Canada, Great Britain, Hong Kong, India, Italy, Japan, the Philippines, South Korea, Sweden, Taiwan, Thailand, and the United States. See, e.g., N.Y. Times, Sept. 3, 1983, § 1, at 4, col. 6; N.Y. Times, Sept. 12, 1983, § 1, at 10, col. 1.

Among the U.S. casualties was Lawrence P. McDonald, a U.S. Congressman from Georgia and the archconservative chairman of the John Birch Society. N.Y. Times, Sept. 2, 1983, § 1, at 6, col. 1. Ironically, Representative McDonald was a self-avowed enemy of the Soviet Union and viewed military strength as "America's only hope to avert the destruction threatened by the international Communist conspiracy." Id.


7. Id.

8. The U.S.S.R., the nation which shot down the KAL jet, is an obvious defendant. In order to recover, a plaintiff would have to establish the illegality of the Soviet action in shooting down KAL Flight 007 under The Chicago Convention on International Civil Aviation, opened for signature Dec. 7, 1944, 1 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as The Chicago Convention of 1944]. The Chicago Convention of 1944 governs the legality of a nation's use of force in bringing
down an intruding airliner. See generally id. arts. 1-42. The Chicago Convention of 1944 defines state aircraft as “[a]ircraft used in military, customs and police services . . .” Id. art. 3(b). Given the fact that the U.S.S.R. claims that KAL Flight 007 was indeed performing an espionage mission for the U.S. and South Korean governments, N.Y. Times, Sept. 6, 1983, § 1, at 1, col. 4, it would be necessary to resolve in court whether KAL Flight 007 was indeed performing an espionage mission, and if so, whether such an activity transformed the plane’s status from “civilian” to “military.” For a discussion of the legality of shooting down an intruding civilian airplanes, see Hughes, Aerial Intrusions by Civilian Airliners and the Use of Force, 45 J. AIR L. & COM. 595 (1980).

A threshold requirement prior to litigating on the merits, however, is to obtain jurisdiction over the Soviet Union in a court of competent jurisdiction. There are several possible forums in which to bring an action against the Soviet Union. None, however, are likely to grant jurisdiction. One such possible forum is a U.S. district court. It is likely that the U.S.S.R. would be able to dismiss the suit for lack of jurisdiction under the doctrine of sovereign immunity, as codified in the United States by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1976) [hereinafter cited as the FSIA]. The FSIA codifies the well-accepted principle of international law that the courts of one state generally have no jurisdiction to entertain suits against another state for actions arising out of that state’s public, non-commercial activities. See generally Restatement (Second) of Foreign Relations Law of the United States §§ 65-72 (1965). Since the Soviet Union’s action in shooting down an intruding aircraft is clearly a non-commercial state activity, a sovereign immunity defense by the U.S.S.R. would very likely succeed in dismissing the lawsuit.


For a case in which a Soviet-bloc nation shot down a civilian airliner yet refused to submit to the jurisdiction of the I.C.J., see Aerial Incident of 27 July 1955 (U.S. v. Bulgaria), 1960 I.C.J. 146 (Order of May 30) (El Al Israeli passenger airplane shot down by Bulgarian military jet fighters near Greco-Bulgarian border, killing all 58 persons on board, including some Americans; case dismissed by the I.C.J. for lack of compulsory jurisdiction over Bulgaria). See generally Gross, Bulgaria Invokes the Conally Amendment, 56 AM. J. INT’L L. 357 (1962).

A third possible forum in which to sue the U.S.S.R. is within the Soviet domestic legal system itself. Any suit brought against the U.S.S.R. in Soviet courts, however, would most likely be dismissed.

Thus, survivors of passengers killed on KAL Flight 007 would be unlikely to obtain jurisdiction over the U.S.S.R. in any court of justice. It remains an outside possibility, however, that the United States, through appropriate diplomatic channels, might succeed in persuading the U.S.S.R. to offer on an ex gratia basis compensation to families of the victims of the KAL Flight 007 aerial incident. In fact, there is some precedent for the expectation that international diplomatic pressure could lead to compensation in aerial incidents involving Soviet-bloc nations. For example, when Yugoslavia shot down an unarmed military transport plane on August 19, 1946, the Yugoslav government later offered compensation, but on an ex gratia basis only. Hughes, supra, at 609. In another incident, Bulgaria made an ex gratia payment of $200,000 to the Israeli government after shooting down an Israeli El Al passenger airliner in 1955. N.Y. Times, Sept. 10, 1983, § 1, at 30, col. 4. Given Bulgaria’s refusal to submit to the I.C.J.’s jurisdiction and the small amount of the payment, this action is best interpreted as a goodwill gesture rather than as a good faith attempt to compensate fully the families of victims.

9. South Korea is a possible defendant since the Soviet Union alleges that the South Korean government was conducting an espionage mission through the use of its national airline, KAL. N.Y. Times, Sept. 4, 1983, § 1, at 18, col. 5 (South Korean government dismisses Soviet allegations of spying,
States, Japan, Boeing Co., Litton Industries, Inc., and KAL. This Comment focuses exclusively, however, on the remedies available against KAL, the carrier involved in the incident, under applicable U.S. and international law.

The law governing the liability of air carriers in international aviation incidents has been the focus of extensive development and analysis, dating back to the infancy of the international aviation industry. Yet despite many years and repeated attempts to develop a workable and enforceable international standard, the law today remains more volatile and less uniform than ever. The KAL

calling such claim "a flagrant lie"). It is likely, however, that South Korea would refuse to submit to the jurisdiction of a U.S. court by pleading the defense of sovereign immunity. See supra note 8.

10. The United States is a possible defendant on four bases: (1) for allegedly using KAL Flight 007 for intelligence-gathering purposes, N.Y. Times, Sept. 6, 1983, § 1, at 1, col. 4; (2) for recklessly endangering KAL Flight 007 by tailing the KAL jet with its RC-135 military reconnaissance plane, under the theory that but for the RC-135’s flying close to KAL Flight 007, the Soviets would not have mistaken the KAL Boeing 747 for the U.S. Air Force Boeing 707 and therefore would not have shot down Flight 007, N.Y. Times, Sept. 5, 1983, § 1, at 1, col. 6; (3) for negligence in allegedly closely monitoring the progress of KAL Flight 007 through the use of U.S. listening devices but not alerting either the KAL pilot or the Soviet authorities of the intrusion, despite the fact that the United States was aware of the deviation of KAL Flight 007 from its intended flight path, N.Y. Times, Sept. 8, 1983, § 1, at 11, col. 1; and (4) for remaining a party to an international convention limiting the liability of KAL to the survivors of passengers to such a severe extent that continued adherence to the convention’s limit constitutes a “taking” under the fifth amendment to the U.S. Constitution, thereby permitting recovery from the United States under the Tucker Act, see infra note 94. See infra notes 89-103 and accompanying text (discussing issue of a “taking”). See also infra notes 17-88 and accompanying text (discussing the liability limitation provisions of the Warsaw Convention and the Montreal Agreement). For an extensive analysis implicating the responsibility of the United States in the KAL Flight 007 incident, see Pearson, K.A.L. 007: What the U.S. Knew And When We Knew It, 239 Nation 105 (1984).

11. Japan could be sued for allegedly tracking the progress of KAL Flight 007 with its radar installations and listening devices, yet failing to take any steps to avert the tragedy by alerting either the pilot, the United States, or the U.S.S.R. N.Y. Times, Sept. 8, 1983, § 1, at 11, col. 1. This is similar to the theory under which the United States could be sued. See supra note 10.

12. Boeing Co., the builder of the KAL 747 jumbo jet which was shot down, is a possible defendant under a product liability theory. If Boeing should be found jointly liable with KAL, and if the Warsaw Convention as modified by the Montreal Agreement limits KAL’s liability to $75,000, see infra notes 73-88 and accompanying text, then Boeing’s liability may far exceed $75,000 in order to fully compensate the victims. See infra notes 350-59 and accompanying text (discussing risk-shifting). Thus Boeing, unlike KAL, might be subject to unlimited liability and therefore forced to bear a disproportionate share of the court’s ultimate judgment. See, e.g., infra notes 358-59 and accompanying text (discussing fears of certain U.S. senators that an international agreement limiting the liability of air carriers in international aviation accidents may unfairly burden the manufacturers of aircraft and aircraft parts).

13. Litton Industries, Inc., which manufactured the three computerized navigational systems aboard KAL’s Boeing 747 jet, N.Y. Times, Sept. 3, 1983, § 1, at 6, col. 5, is also a possible co-defendant. Since some newspaper reports have intimated that one possible explanation for KAL Flight 007’s straying off course into Soviet airspace is a malfunction of the navigational equipment, N.Y. Times, Sept. 4, 1983, § 1, at 4, col. 1, Litton Industries may be wholly or jointly liable. See also Boston Globe, July 23, 1984, at 7, col. 1. If indeed Litton is found jointly liable, then it may be subject to pay a disproportionate share of the total judgment since, unlike KAL, it is not entitled to limited liability. See infra notes 350-59 and accompanying text (discussing risk-shifting).

14. See infra notes 368-97 and accompanying text.


16. See infra text accompanying notes 398-418.
incident serves both as an excellent case study to highlight the inadequacies of current law, and as a springboard to suggest ways to create a more acceptable, just, and uniform international aviation standard.

This Comment first traces the history and development of the law of international air carrier liability, from the Warsaw Convention in 1929 to the Montreal Agreement of 1966. The Comment then reviews recent judicial and legislative developments in the United States that, for a short time, seriously threatened continued U.S. participation in the international aviation system. The author then postulates what remedies are available, under the current state of the law, to the survivors of passengers killed in the KAL incident. Finally, the Comment sets forth some suggestions with respect to developing a new international standard that would be acceptable to both the United States and other nations, that would restore uniformity, and that would be in the best interests of U.S. citizens traveling abroad.

II. INTERNATIONAL AIR CARRIER LIABILITY LAW: HISTORICAL BACKGROUND

A. The Warsaw Convention

A series of international treaties and agreements, beginning with the Warsaw Convention, has restricted compensation and awards of damages from air carriers in international aviation incidents. The Warsaw Convention is a multinational agreement drafted with two goals in mind: first, to establish uniformity with respect to claims arising out of international aviation; and second, to limit


18. As of July 1976, 114 nations were parties to the Warsaw Convention, including: Afghanistan, Algeria, Argentina, Australia (including Norfolk Island), Austria, Bahamas, Barbados, Belgium, Benin, Botswana, Brazil, Bulgaria, Burma, Cameroon, Canada, China (People's Rep.), Colombia, Congo (Brazzaville), Cuba, Cyprus, Czechoslovakia, Denmark (not including Greenland), Dominican Rep., Ecuador, Egypt, Ethiopia, Fiji, Finland, France (including French colonies), Gabon, The Gambia, Germany (Dem. Rep.), Germany (Fed. Rep.), Ghana, Greece, Grenada, Guinea, Guyana, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Korea (Dem. Rep.), Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Nauru, Nepal, Netherlands (including Curaçao), New Zealand, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Philippines, Poland (including Free City of Danzig), Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa (including Southwest Africa), Spain (including colonies), Sri Lanka, Sudan, Surinam, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Tonga, Trinidad and Tobago, Tunisia, Uganda, Union of Soviet Socialist Republics, United Kingdom, United States, Upper Volta, Venezuela, Viet-Nam, Western Samoa, Yemen (Aden), Yugoslavia, Zaire, and Zambia. 3 Av. L. REP. (CCH) 11 27,054 (July 1976).

19. The Warsaw Convention, in its introduction, states that it was designed to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, supra note 17, preamble.
the potential liability of international air carriers in case of accident.\textsuperscript{20}

The Warsaw Convention contains several major provisions. It standardizes, among contracting nations, the documentation required for passengers and cargo\textsuperscript{21} on international flights.\textsuperscript{22} It also standardizes various procedural rules relating to claims for loss and damage.\textsuperscript{23} Finally, the Warsaw Convention limits the liability of air carriers in the event of accident causing death or injury to passengers, and in the event of loss of or damage to cargo.\textsuperscript{24}

The liability limitations of the Warsaw Convention are explicitly set forth in Article 22\textsuperscript{25} which expresses the limitations in terms of the Poincaré franc.\textsuperscript{26}

\textbf{20. Warsaw Convention, supra note 17, arts. 17-25.} The drafters of the Convention considered the goal of limiting the potential liability of air carriers to be more important than the goal of establishing international uniformity with respect to claims procedures. See Lowenfeld & Mendelsohn, supra note 15, at 498-99 n.9.

\textbf{21. See Warsaw Convention, supra note 17, arts. 3-4 (ticketing) and arts. 5-16 (waybills).}

\textbf{22. The provisions of the Warsaw Convention apply only to "international transportation," which is defined as:}

any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

\textbf{Id. art. 1(2).}

\textbf{23. See id. arts. 26-30.}

\textbf{24. See id. arts. 17-25.}

\textbf{25. Article 22 of the Warsaw Convention reads:}

\begin{enumerate}
  \item (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
  
  (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
  
  (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.
  
  (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

\textbf{Warsaw Convention, supra note 17, art. 22.}

\textbf{26. Article 22(4) of the Warsaw Convention defines the Poincaré franc as a coin "consisting of 65 1/2 milligrams of gold . . . [which] may be converted into any national currency in round figures." Warsaw Convention, supra note 17, art. 22(4).} Until the United States abandoned the gold standard in the 1970s, see infra notes 122-28 and accompanying text, the dollar value of the Poincaré franc was calculated by converting the value of 65 1/2 milligrams of gold into U.S. dollars.
a passenger to 125,000 Poincaré francs, or approximately $8300. The liability of an air carrier for loss of or damage to cargo is limited to 250 Poincaré francs, or approximately $9.07 per pound.

The liability limit for death of or personal injury to a passenger was considered low even in 1929, but the drafters of the Warsaw Convention adopted it in order to encourage the growth of international air travel. The drafters considered the protection afforded by a liability limitation to be essential to the survival of the then fledgling aviation industry. In the absence of any such liability limitation, the aviation industry faced the potentially ruinous alternatives of either exorbitant insurance premiums or debilitating damage suits in the event of a single catastrophic accident.

Although the Warsaw Convention's low liability limitation was a major concession to the airline industry, the passenger received as a quid pro quo the benefit of Article 20, which established negligence as the basis for liability. Rather than requiring the passenger to establish the carrier's negligence, however, Article 20 shifted the burden of proof so that the carrier was presumed liable unless it established that it had "taken all necessary measures to avoid the damage or that it was impossible for [it] to take such measures."

An important additional concession which the Warsaw Convention gave to the

27. Warsaw Convention, supra note 17, art. 22(1).
28. The 125,000 Poincaré franc liability limit was worth $8291.88 in 1965. In re Aircraft at Kimpo International Airport, Korea, on November 18, 1980, 558 F. Supp. 72, 73 (C.D. Cal. 1983).
29. Warsaw Convention, supra note 17, art. 22(2).
32. See id. at 499-500.
33. See id. at 500.
34. See id. at 500.
35. Article 20 of the Warsaw Convention reads:

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Warsaw Convention, supra note 17, art. 20 (emphasis added).


With the passage of the Montreal Agreement in 1966, the carrier was forced to waive its Article 20 defenses and agree to be strictly liable for all carriage-related injuries occurring on flights stopping in the United States. See infra notes 80-83 and accompanying text.
passenger was the "willful misconduct" exception of Article 25,\textsuperscript{37} which eliminated the benefits of the Warsaw Convention's liability limitation if the passenger could establish that the accident and damage arose out of the willful misconduct of the carrier or its agents.\textsuperscript{38} Thus, a passenger was entitled to potentially unlimited recovery if the passenger could prove willful misconduct on behalf of the air carrier.

B. The Hague Protocol

As the aviation industry grew more stable and profitable, and as travel became much safer,\textsuperscript{39} it began to appear that the special protection afforded to the international air carriers by the Warsaw Convention's low liability limitations was no longer justifiable.\textsuperscript{40} Furthermore, recoveries in domestic aviation accidents in developed nations, such as France, Great Britain, and the United States, far exceeded the recovery amounts permitted by the Warsaw Convention in international aviation accidents.\textsuperscript{41} To address these developments, particularly the large discrepancy in recoveries for passenger death or injury between domestic and international air accidents, an international conference was assembled at The Hague in 1955 to amend the Warsaw Convention.\textsuperscript{42}

At the Hague Conference, the United States became the leading proponent for a significantly higher liability limit.\textsuperscript{43} U.S. delegates originally sought to raise the liability limitation from $8300, under the Warsaw Convention, to $25,000.\textsuperscript{44} Delegates from other nations opposed such an increase,\textsuperscript{45} however, and the U.S.

\begin{itemize}
  \item \textsuperscript{37} Article 25 of the Warsaw Convention reads:
    \begin{enumerate}
    \item The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his \textit{wilful misconduct} or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to \textit{wilful misconduct}.
    \item Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.
    \end{enumerate}
  \end{itemize}

Warsaw Convention, \textit{infra} note 17, art. 25 (emphasis added).

\begin{itemize}
  \item \textsuperscript{38} Lowenfeld & Mendelsohn, \textit{supra} note 15, at 503.
  \item \textsuperscript{39} One court, observing that the airline industry was no longer in its infancy, stated, "[t]he pioneering conditions and the lack of technical advancement and passenger safeguards which faced the industry when Warsaw was adopted have been supplanted by a technologically and commercially mature industry." \textit{In re Aircrash in Bali, Indonesia on April 22, 1974}, 462 F. Supp. 1114, 1125 (C.D. Cal. 1978), \textit{rev'd on other grounds} 684 F.2d 1301 (9th Cir. 1982).
  \item \textsuperscript{40} Lowenfeld & Mendelsohn, \textit{supra} note 15, at 504. \textit{See also} A. LOWENFELD, \textit{AVIATION LAW} § 4.1 (1972).
  \item \textsuperscript{41} Loggans, \textit{Personal Injury Damages in International Aviation Litigation: The Plaintiff's Perspective}, 15 J. Mar. L. Rev. 541, 545 (1980). For a discussion of the tremendous discrepancy between recoveries in domestic airline accidents and recoveries in international airline accidents, see \textit{infra} note 209.
  \item \textsuperscript{42} Lowenfeld & Mendelsohn, \textit{supra} note 15, at 504-05.
  \item \textit{Id.} at 506-07.
  \item \textit{Id.} at 506.
  \item \textit{Id.} at 506-07.
\end{itemize}
delegates were forced to settle with a compromise $16,600 limit for passenger death or injury.46

The U.S. delegates at The Hague were not entirely satisfied with such a small increase in the liability limit,47 and only unenthusiastically48 signed in 1956 what is known as the Hague Protocol.49 Among the motivating reasons for signing the Hague Protocol were the belief of the delegates that it was in the national interest of the United States, the largest air-traveling nation in the world, to be a member of an international aviation agreement, the belief that it would place U.S. citizens and airlines in a better position than they would otherwise occupy in the absence of an increased limit, and the belief in the advantages of uniformity in international aviation law.50

The Hague Protocol was submitted to the U.S. Senate in 1959.51 Primarily because of objections to its low liability limits, however, the Senate refused to ratify the Hague Protocol.52 The $8300 ceiling of the Warsaw Convention continued to remain in effect in the United States.53

C. The Montreal Agreement

The U.S. Senate not only refused to ratify the Hague Protocol, but also began to oppose liability limitations of any type.54 U.S. Senators and government

---

46. Id. The Hague Protocol exactly doubled the Warsaw Convention liability limit to 250,000 Poincar francs, which was worth approximately $16,600. Id. at 507.

47. Although the increase in the liability limit was unsatisfactory in the minds of many U.S. delegates, the delegates were not unmindful of the perceived advantages of the Hague Protocol. These advantages included: (1) an assured forum; (2) protection against contractual limits of liability; (3) protection against lower limits applying at the place of the accident; and (4) avoidance of the chaos of conflicting laws that would be applicable without a treaty. Id. at 510.

48. Id. at 512.


52. See Lowenfeld & Mendelsohn, supra note 15, at 515-16.


officials began to question the desirability of continued adherence by the United States to the Warsaw Convention. The President, various legislators, and leaders in the private sector proposed a variety of compromise measures designed to make the Convention more palatable to those senators opposed to the liability limitations. None, however, proved to be acceptable.

As pressure mounted against the low liability limits of the Warsaw Convention, it appeared increasingly likely that the United States would denounce the Warsaw Convention pursuant to Article 39 of the Convention. The United States was reluctant to take this move, since denunciation would be a major setback not only to the development of uniform international aviation law, but also to international cooperation in general. However, given the mounting pressures caused primarily by the ever-increasing discrepancy between recoveries in domestic and international aviation accidents, U.S. government officials believed there was no choice but to give notice of denunciation. On November 15, 1965, the United States deposited its formal Notice of Denunciation of the Warsaw Convention with the Polish Government. Because the denunciation would not become effective until May 15, 1966, the United States was able to

55. See generally id. Opposition to any type of liability limit was strengthened by a series of airplane crashes involving well-known persons in which the Warsaw Convention limited recovery to what was considered to be an unconscionably low amount. Id. at 515. See, e.g., Block v. Compagnie Nationale Air France, 229 F. Supp. 801 (N.D. Ga. 1964) (Atlanta Art Association members killed on takeoff at Paris on June 3, 1962; Warsaw Convention limited damages to $8300); Kelley v. Societe Anonyme Belge d'Exploitation de la Navigation Aerienne (SABENA), 242 F. Supp. 129 (E.D.N.Y. 1965) (U.S. Olympic Skating Team killed in air crash near Brussels on Feb. 15, 1961; Warsaw Convention limited damages to $8300); Capehart v. Aerovias Nacionales de Colomb ia, S.A. (AVIANCA), Civil No. 10,315 (E.D. Fla. 1963) (son and daughter-in-law of U.S. Senator Homer Capehart of Indiana killed in crash landing at Montego Bay, Jamaica, on Jan. 21, 1960; damages eventually exceeded Warsaw limit only because of a willful misconduct finding under Article 25 of the Convention).


57. See id.

58. See id. at 546-52. Article 39 of the Warsaw Convention reads:

(1) Any one of the High Contracting Parties may denounce this Convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Warsaw Convention, supra note 17, art. 39.


60. Id. at 553 (citing Civil Aeronautics Board (CAB) charts showing: "(1) the average recovery between 1950 and 1964 for a fatality on a Warsaw [international] case was $6489 as compared with a $38,499 average recovery on a non-Warsaw [domestic] case; and (2) during the period of 1958-64 the average recovery for a fatality on a non-Warsaw case had risen to over $32,000.").


63. See Article 39(2) of the Warsaw Convention, supra note 58, which provides that denunciation will not become effective until six months after formal notification of denunciation.
offer a glimmer of hope to the remaining proponents of international air carrier liability law. In a State Department press release announcing the denunciation, the United States suggested that it would withdraw the denunciation before its effective date if there were a reasonable prospect of a new international agreement on liability limitation in the vicinity of $100,000. Given this six month deadline, an international conference was convened in Montreal in 1966 (known as the Montreal Conference) for the purpose of establishing a new internationally recognized liability limit. At the Montreal Conference, however, delegates were unable to agree upon a new liability limit, and the conference closed without having established a new agreement.

Despite the failure of the Montreal Conference to establish a new liability limit, there were still last ditch efforts made to achieve some type of resolution of the problem before the effective date of the denunciation. With the effective date imminent, U.S. and foreign officials began to realize more fully the serious implications of denunciation by the United States and looked for some possible acceptable alternative. They found that alternative in a document which has come to be known as the Montreal Agreement, and the United States formally withdrew its denunciation of the Warsaw Convention on May 14, 1966, the day before it was to take effect.

---

64. Both the Federal Aviation Administration (FAA) and the Department of Commerce were among the most powerful proponents of continued U.S. adherence to the Warsaw system. See Lowenfeld & Mendelsohn, supra note 15, at 548.
65. Dep't St. Press Release No. 268, 53 Dep't St. Bull. 923 (1965). In the press release announcing the denunciation, the stated reason for the action was dissatisfaction over the Convention's prevailing low limits on liability for passenger injury and death. Id. The press release further provided:

The United States would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transportation in the area of $100,000 per passenger or on uniform rules but without any limit of liability, and if, pending the effectiveness of such international agreement, there is a provisional arrangement among the principal international airlines waiving the limits of liability up to $75,000 per passenger.

Id. at 924.
67. Id.
68. See id. at 586-96.
69. Id. at 587.
Unlike the Warsaw Convention and the Hague Protocol, the Montreal Agreement is not an international agreement, but rather a contract between the United States and the principal U.S. and foreign international air carriers serving the United States. 72 Moreover, the Montreal Agreement does not replace the Warsaw Convention. 73 Rather, as a special contract under Article 22(1) of the Warsaw Convention, 74 it imposes only a few expressly specified changes while incorporating all the other remaining provisions of the Convention. 75 The principal effect of the Montreal Agreement is to raise the liability limit for passenger death or injury from $8300 under the Warsaw Convention to $75,000 per passenger. 76 However, the Montreal Agreement applies only to international transportation, as defined in the Warsaw Convention, 77 provided that the intended journey includes a point of departure, point of destination, or an agreed to stopping place in the United States. 78 International transportation that does not begin, end, or stop in the United States is not covered under the Montreal Agreement. 79

In addition to raising the liability limit to $75,000, the Montreal Agreement eliminated the air carrier's "all necessary measures" defense under Article 20(1) of the Warsaw Convention, 80 thereby creating absolute or "no-fault" liability. 81

72. For a list of all the U.S. and foreign air carriers who have signed the Montreal Agreement, see 3 Av. L. Rep. (CCH) ¶ 27,130 (June 1983). KAL is among the foreign carriers who have signed the Montreal Agreement. 73. See Lowenfeld & Mendelsohn, supra note 15, at 597.
74. The Montreal Agreement expressly states that it is a special contract under Article 22(1) of the Warsaw Convention. Montreal Agreement, supra note 70, 31 Fed. Reg. 7302. For the full text of Article 22, see supra note 25.
75. Lowenfeld & Mendelsohn, supra note 15, at 597.
76. Id. The Montreal Agreement provides, in pertinent part, that the "limit of liability for each passenger for death, wounding, or other bodily injury [is] $75,000 inclusive of legal fees . . . and costs." Montreal Agreement, supra note 70, 31 Fed. Reg. 7302. The Agreement also provides that recovery is limited to $58,000, if legal fees and costs are excluded. Id.
77. See supra note 22.
79. See id. The Montreal Agreement specifically provides that its "limitations shall be applicable to international transportation by the carrier as defined in the Convention or [Hague] Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place." Id. See also supra note 22 (Warsaw Convention's definition of international transportation under Article 1(2)).
80. Article 20(1) of the Warsaw Convention allowed the air carrier to avoid liability upon a showing that it took all necessary measures to avoid damages, or that such measures were impossible to undertake. See supra notes 35-36 and accompanying text.
81. See Montreal Agreement, supra note 70, 31 Fed. Reg. 7302. The Montreal Agreement states that
was believed that the establishment of no-fault liability would expedite and maximize recovery to the plaintiffs who needed it most.\textsuperscript{82} Furthermore, long and costly lawsuits would likely be avoided in most cases.\textsuperscript{83}

Although the Montreal Agreement established absolute liability, it did not establish an absolute ceiling on recovery. Since the Montreal Agreement incorporates all unamended provisions of the Warsaw Convention,\textsuperscript{84} the willful misconduct exception of Article 25 of the Warsaw Convention remains applicable.\textsuperscript{85} The burden of proof, however, still rests upon the plaintiff seeking unlimited damages.\textsuperscript{86} Thus, if the plaintiff can prove the carrier guilty of willful misconduct, recovery could exceed the $75,000 liability limit imposed by the Montreal Agreement.

The Warsaw Convention, as modified by the Montreal Agreement, controlled the liability of all international air carriers flying in the United States\textsuperscript{87} and, as late as 1982, was considered the current state of the law.\textsuperscript{88} Shortly thereafter, however, certain judicial and legislative developments in the law of international air carrier liability began to cast into doubt the enforceability of both the Warsaw Convention and the Montreal Agreement in U.S. courts.

\textsuperscript{82} 54 DEP'T ST. BULL. 955, 956 (1966).

\textsuperscript{83} Id.

\textsuperscript{84} See supra notes 74-75 and accompanying text.

\textsuperscript{85} The Montreal Agreement provides, "nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in the death, wounding, or other bodily injury of a passenger." Montreal Agreement, supra note 70, 31 Fed. Reg. 7302.

\textsuperscript{86} See supra notes 37-38 and accompanying text.

\textsuperscript{87} See supra note 72.

\textsuperscript{88} See, e.g., O'Rourke v. Eastern Airlines, 555 F. Supp. 226 (E.D.N.Y. 1982) ($75,000 limit on liability as provided by the Warsaw Convention, as modified by the Montreal Agreement, is an absolute ceiling on liability, and as an international treaty represents the supreme law of the land).
III. INTERNATIONAL AIR CARRIER LIABILITY LAW: RECENT DEVELOPMENTS IN U.S. COURTS

A. Judicial Invalidation of the Warsaw Convention

1. Bali

In *In re Aircrash at Bali, Indonesia on April 22, 1974*, the Ninth Circuit Court of Appeals addressed the constitutionality of limiting claims for compensation under the Warsaw Convention. *Bali* consolidated several separate wrongful death actions filed by the survivors of passengers killed in the 1974 crash of a Pan American World Airways jet in Bali, Indonesia. The court suggested that the Convention’s liability limits may constitute a “taking” without just compensation within the meaning of the fifth amendment, and therefore may be unconstitutional.

The court raised the issue of a “taking” *sua sponte*, and suggested that compensation may be available under the Tucker Act. Citing the concurring and dissenting opinion of Justice Powell in *Dames & Moore v. Regan*, the court suggested that recovery should be available under the Tucker Act to various creditors of the government of Iran if an executive agreement, entered into with Iran to secure the release of U.S. hostages, in fact effected a “taking” of the creditors’ property. Stating that “claims for compensation are property interests that cannot be taken for public use without compensation,” the Ninth Circuit reasoned that the plaintiffs’ wrongful death claims for compensation in *Bali* were no different than the claims of the creditors in *Dames & Moore*. Thus, the court concluded that the *Bali* plaintiffs’ claims were in fact property interests...
within the purview of the just compensation clause of the fifth amendment, thereby opening the door for a finding that the deprivation of those claims constituted an unconstitutional "taking."99

In determining whether the U.S. government has taken private property for which compensation is due under the fifth amendment, a court must decide whether any property interests exist at all.100 The *Bali* court concluded only that the plaintiffs' claims were legitimate property interests.101 Recognizing that the Court of Claims is the proper forum in which to resolve the issue of whether the Warsaw Convention effected a "taking,"102 the *Bali* court remanded the case to the Court of Claims for such determination.103

2. Franklin Mint

*Bali* was the first indication that U.S. courts might no longer enforce the Warsaw Convention's liability limits. Approximately one month104 after *Bali* was decided, the Second Circuit Court of Appeals, in *Franklin Mint Corp. v. Trans World Airlines*,105 determined that the Warsaw Convention's liability limitations, at least with respect to cargo, were indeed unenforceable in U.S. courts.106 The case was filed by the Franklin Mint Corporation (Franklin Mint), which had shipped a $250,000107 collection of numismatic materials from the United States to England via Trans World Airlines (TWA).108 The shipment never arrived, having been either lost or destroyed.109 Although it made no special declaration of value, Franklin Mint sought to recover from TWA in excess of the liability limit established by the Warsaw Convention for the international transportation of cargo.110

The Second Circuit agreed with Franklin Mint, and concluded that recovery could exceed the Warsaw Convention's liability limits.111 The court reasoned that Article 22 of the Warsaw Convention,112 which expressed the liability limits in

---

99. Id.
100. Id.
101. Id.
102. Id. at 1312, 1315-16.
103. Id. at 1315-16.
104. *Bali* was decided on Aug. 24, 1982. *Franklin Mint* was decided on Sept. 28, 1982.
106. Id. at 311.
108. *Franklin Mint*, 690 F.2d at 304.
109. Id.
110. Id. at 304-05. See also Article 22(2) of the Warsaw Convention (limiting liability for international transportation of cargo), *supra* note 25.
111. *Franklin Mint*, 690 F.2d at 311.
112. See *supra* note 25.
terms of “Poincaré francs” or French gold,\textsuperscript{113} had become unenforceable in the United States when Congress abandoned the gold standard by repealing the Par Value Modification Act\textsuperscript{114} in 1976.\textsuperscript{115} The Second Circuit reached this conclusion after extensively analyzing the history and treatment of the Article 22 gold clause in U.S. and international practice.\textsuperscript{116}

When the Warsaw Convention was drafted, gold was chosen as the official unit of conversion in the Article 22 liability clause primarily because of its perceived advantages over any particular national currency.\textsuperscript{117} The price of gold was set by law in most countries, including the United States.\textsuperscript{118} In 1945, pursuant to the Bretton Woods Agreement,\textsuperscript{119} the United States became a party to the International Monetary Fund (IMF), which instituted a system of international currency exchange that tied each nation’s currency to the dollar value of gold at $35 per troy ounce.\textsuperscript{120} A persistent balance-of-payments deficit in the United States in the 1950s and 1960s, however, led to a massive depletion of the U.S. gold reserves, which in turn led to the demise of the gold standard.\textsuperscript{121} In 1971, the United States reneged its commitment under the Bretton Woods Agreement to convert dollars for gold,\textsuperscript{122} which indicated not only that the “official” U.S. dollar value for gold had become purely hypothetical, but also that the use of gold in the IMF international currency exchange system was in jeopardy.\textsuperscript{123} The United States devalued the dollar in 1971 by raising the official price of gold to $38 per

\textsuperscript{113} See id.


\textsuperscript{115} Franklin Mint, 690 F. 2d at 311.

\textsuperscript{116} Id. at 306-11.

\textsuperscript{117} Unlike a particular national currency such as the dollar or pound (which can fluctuate in value because of unilateral actions by that particular currency’s national government), gold was seen as a stable unit of conversion that would ensure judgments of uniform value that tended to reflect real values better than currency. Boehringer Mannheim Diagnostics v. Pan American World Airways, 531 F. Supp. 344, 350 (S.D. Tex. 1981) (citing Heller, The Warsaw Convention and the “Two Tier” Gold Market, 7 J. World Trade L. 126, 129 (1973); Heller, The Value of the Gold Franc — A Different Point of View, 6 J. Mar. L. & Com. 73, 91-92 (1974); Martin, The Price of Gold and the Warsaw Convention, 4 Air L. 70, 71 (1979)).

\textsuperscript{118} In 1934, the United States established an official gold price of $35 per troy ounce. United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934); Presidential Proclamation No. 2072, 48 Stat. 1730 (1934).


\textsuperscript{120} Boehringer, 531 F. Supp. at 350. Each nation’s currency was assigned a par value that was then tied to the dollar value of gold at $35 an ounce. Id. This system was known as the gold standard.

\textsuperscript{121} Franklin Mint, 690 F.2d at 307. From 1955 to 1958, U.S. gold reserves decreased in value from approximately $24 billion to around $10 billion. Id.

\textsuperscript{122} See S. REP. No. 678, 92d Cong., 2d Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2209, 2212.

\textsuperscript{123} Boehringer, 531 F. Supp. at 351.
ounce, and again in 1973 by raising the price to $42.22 per ounce. Finally, in 1976 the United States agreed to abolish the official price of gold altogether by ratifying amendments to the Jamaica Accord, an IMF agreement that abolished the concept of an official price of gold. The 43-year link between the dollar and gold formally terminated in 1978, when the IMF amendments became effective.

With the abolition of the official price of gold, it became unclear what monetary standard to use to determine liability under Article 22 of the Warsaw Convention. Four alternative units of conversion were suggested: first, the last official price of gold in the United States; second, the current free market price of gold; third, the Special Drawing Right (SDR), a unit of account of the IMF.


126. The Jamaica Accord was not an international treaty, but rather an endorsement by the Interim Committee of the Board of Governors of the IMF of certain proposed changes in the international monetary system. These changes were eventually incorporated into the Second Amendment of the Articles of Agreement of the IMF, Apr. 30, 1976, [1976-77] 29 U.S.T. 2203, T.I.A.S. No. 8937. See Press Communiqué of the Interim Committee of the Board of Governors of the IMF, Fifth Meeting, Kingston, Jamaica, Jan. 7-8, 1976, reprinted in International Monetary Fund, 1976 Annual Report 122 (1976) [hereinafter cited as Annual Report]. Among the changes endorsed by the Jamaica Accord was the abolition of the official price of gold. See Annual Report, supra, at 45.

127. See Act of Oct. 19, 1976, supra note 114. Although Congress repealed the official price of gold in general, it permitted its continued use for the limited purpose of determining the value of gold held in the form of gold certificates. See 31 U.S.C. § 5117 (1982). The Senate noted that this was the “only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold . . . .” S. REP. NO. 1295, 94TH CONG., 2D Sess. 18, reprinted in 1976 U.S. Code Cong. & Ad. News 5950, 5966-67.


129. See Franklin Mint, 690 F.2d at 308.


The SDR was created by the IMF in 1969 to replace gold and foreign currency in the international money reserve markets. IMF banks exchange SDRs for other convertible currencies as though they were lines of credit against which reserves are borrowed for use in central banks. Methods of calculating SDRs change over time, but currently are calculated in reference to the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of any of the five currencies in one SDR is a function of the percentage weights assigned to each currency. The dollar value of one SDR is calculated by adding the dollar value of each currency included based on the daily market exchange rate. SDRs tend to be less prone to fluctuation than the free market price of gold. This relative stability led the Warsaw signatories to propose that the SDR be adopted as the official unit of conversion for the Warsaw Convention (Montreal Protocols).

The proposal that the SDR be adopted as the official unit of conversion for the Warsaw Convention was part of the Montreal Protocols, discussed infra notes 208-367 and accompanying text.
and fourth, the current value of the modern French franc.\textsuperscript{131}

There was widespread dissension and differing practices within the United States as to which of the four standards to use. For instance, following the second devaluation of the dollar in 1973,\textsuperscript{132} the Civil Aeronautics Board (CAB) directed the international air carriers serving the United States to set tariffs that reflected the new "official" gold price of $42.22 per ounce.\textsuperscript{133} When the United States abandoned its "official" price for gold in 1976,\textsuperscript{134} however, the CAB took no action to revise the limiting tariffs set in 1974.\textsuperscript{135} Rather, after exhibiting some initial confusion as to what the conversion method should be,\textsuperscript{136} the CAB agreed to continue to engage in the "legal fiction" that an official gold price exists in order to meet the requirements of the Warsaw Convention.\textsuperscript{137} This decision, under which the CAB directed all airlines to continue to rely upon the last official price of gold as the method for determining liability under the Warsaw Convention, remains in effect today.

Courts in the United States were unable to agree upon the proper method for determining the liability limitation required by the Warsaw Convention. At least three courts followed the CAB's directives and opted for the last official price of gold as the correct, albeit artificial, basis for conversion.\textsuperscript{138} Another court, how-

\begin{itemize}
  \item \textsuperscript{131} Franklin Mint, 690 F.2d at 305.
  \item \textsuperscript{132} See supra note 125 and accompanying text.
  \item \textsuperscript{134} See supra notes 127-128 and accompanying text.
  \item \textsuperscript{135} Boehringer, 531 F. Supp. at 352.
  \item \textsuperscript{136} See id. The CAB's Bureau of Compliance and Consumer Protection suggested in a March 1980 memorandum that the abolition of the official price of gold removed the legal basis for using the old gold-based limits of the Warsaw Convention. Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits at 4 (March 18, 1980), as cited in Boehringer, 531 F. Supp. at 352 n.38. The Bureau withdrew the suggestion a year later in a May 1981 memorandum, which advocated that the CAB should continue to use the last official price of gold in observing the liability requirements of the Warsaw Convention. Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits at 5 (May 20, 1981), as cited in Boehringer, 531 F. Supp. at 352 n.39.
  \item \textsuperscript{137} See Bureau of Compliance and Consumer Protection Memorandum of May 20, 1981, supra note 136.
  \item \textsuperscript{138} See, e.g., In re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833 (E.D.N.Y. 1982), aff'd 705 F.2d 85 (2d Cir.), cert. denied 104 S. Ct. 147 (1983) (in determining liability of air carrier under Warsaw Convention for airplane crash resulting in deaths of, among others, eight American boxers affiliated with the U.S. Amateur Athletic Union Boxing Team, court held that the calculation is appropriately made in terms of the last official price of gold ($42.22 per ounce)); Maschinenfabrik Kern, A.G. v. Northwest Airlines, 502 F. Supp. 232 (N.D. Ill. 1983) (court recognized the last official price of gold in the United States as the basis for conversion in determining liability limits under the Warsaw Convention); Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 18 Av. Cas. (CCH) 17,178 (N.D. Ill. 1982) (gold standard price of $42.22 per ounce most nearly effectuates the intention of the Warsaw Convention).
\end{itemize}
ever, opted for the free market price of gold method.\textsuperscript{139}

The inability of various segments of the U.S. government to agree upon an appropriate method of conversion was mirrored by a general disagreement among various nations of the world in selecting a universally recognized method for calculating liability under the Warsaw Convention. Courts in India\textsuperscript{140} and Greece\textsuperscript{141} had chosen the free market price of gold. The SDR had been adopted administratively in Britain\textsuperscript{142} and legislatively in Sweden.\textsuperscript{143} The Netherlands\textsuperscript{144} and Italy\textsuperscript{145} reached the same result by judicial decree. Only French courts had decided that the current French franc was equivalent to the Warsaw Convention's Poincaré franc and should be used as the unit of conversion under the Convention.\textsuperscript{146}

In \textit{Franklin Mint}, the Second Circuit considered each of the four suggested alternatives as a possible replacement for the Poincaré franc of the Warsaw Convention, yet dismissed each possibility as inadequate.\textsuperscript{147} In refusing to adopt any method of conversion, the court stated:

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty approval by the Senate or by legislation passing both Houses of the Congress. . . . Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.\textsuperscript{148}

\begin{footnotes}
\item[139] \textit{Boehringer}, 551 F. Supp. at 353 (airline's limitation of liability under Warsaw Convention was properly determined by reference to the current free market price of gold).
\item[143] \textit{See Sweden's Carriage by Air Act (1957), amendment to ch. 9, § 22, effective Apr. 27, 1978, translated and reprinted in Brief for Defendant at A57-61, Franklin Mint, 525 F. Supp. 1288.}
\item[147] \textit{Franklin Mint}, 690 F.2d at 310.
\item[148] \textit{Id.} at 311.
\end{footnotes}
Thus, the Second Circuit concluded that it was not within the authority of the judiciary to select the conversion method for calculating liability under the Warsaw Convention. Such a decision, the court implied, was solely within the province of the executive or legislative branches of the federal government.

3. Kimpo

In Franklin Mint, the Second Circuit addressed only whether the Warsaw Convention's liability limits were enforceable with respect to cargo, and did not rule on whether the limits were enforceable with respect to damages for death or personal injury to passengers. This question, however, was answered three months later by the District Court for the Central District of California in In re Aircrash at Kimpo International Airport, Korea on November 18, 1980. In Kimpo, the survivors of passengers killed in a 1980 crash of a KAL jet near Seoul, Korea, filed wrongful death actions against KAL, seeking to recover in excess of the $75,000 liability limit established by the Warsaw Convention as modified by the Montreal Agreement. The Kimpo court supported the decision of the Second Circuit in Franklin Mint, and extended the unenforceability of the Warsaw Convention's liability limits to damages for death or personal injury to passengers.

In adopting the rationale expressed by the Second Circuit in Franklin Mint, and in holding that the Warsaw Convention's limits on liability were unenforceable, the Kimpo court did not apply the facts of the case to the applicable law of international air carrier liability with respect to passenger death or injury. The Kimpo court did not explain why the rationale of the Second Circuit, which in Franklin Mint refused to enforce the Warsaw Convention's liability limits because enforcement would require a judicial determination of an appropriate basis of conversion to replace gold, should be extended to the Montreal Agreement. It ignored the fact that unlike the Warsaw Convention, the Montreal Agreement utilizes dollars rather than gold as the basis for its liability limit. It likewise ignored the fact that the Montreal Agreement covers liability for death or personal injury to passengers, while the Warsaw Convention continues to cover damages to or loss of cargo. Nevertheless, without resolving the discrepancies in facts between the two cases, the Kimpo court concluded that just as the Second

149. See id.
150. See id.
151. Article 22(2) of the Warsaw Convention, supra note 25, limited recovery to 250 Poincaré francs per kilogram for loss of baggage or cargo.
152. See Franklin Mint, 690 F.2d 303.
154. Id.
155. Id. at 74-75.
156. See id.
Circuit in *Franklin Mint* had refused to enforce the liability limits with respect to cargo, so too should it refuse to enforce the liability limits with respect to passengers.\(^{158}\)

The *Bali*, *Franklin Mint*, and *Kimpo* cases, considered together, cast considerable doubt as to the enforceability of the Warsaw Convention and Montreal Agreement. It became unclear whether air carriers were indeed subject to unlimited liability with respect to passengers and cargo. The U.S. Supreme Court granted certiorari in the *Franklin Mint* case,\(^{159}\) however, and its subsequent decision erased any doubts as to the continued viability of the Warsaw Convention.

B. Franklin Mint: The Warsaw Convention Reinstated

1. The Supreme Court Decision

In *Franklin Mint Corp. v. Trans World Airlines, Inc.*,\(^{160}\) the U.S. Supreme Court reinstated the validity of the Warsaw Convention by rejecting the Second Circuit's declaration that the Warsaw Convention was unenforceable in U.S. courts.\(^{161}\) The Second Circuit, having recognized that Article 22 of the Warsaw Convention phrased the liability limitations for cargo in terms of gold,\(^{162}\) had earlier concluded that the repeal of the Par Value Modification Act in 1978\(^{163}\) had rendered the Warsaw Convention unenforceable.\(^{164}\) Thus, the Supreme Court in *Franklin Mint* focused on two discrete issues. First, did the repeal of the Par Value Modification Act render the Warsaw Convention's liability limitations unenforceable in the United States?\(^{165}\) Second, assuming the continued enforceability of the Warsaw Convention, what was the appropriate unit of conversion to determine the Warsaw Convention's liability limitations?\(^{166}\)

In determining whether the congressional repeal of the Par Value Modification Act could be construed as rendering the Warsaw Convention's liability limitations unenforceable in the United States, the Supreme Court first recognized the existence of a well-established canon of construction that directs "against finding implicit repeal of a treaty in ambiguous congressional action."\(^{167}\)
The Court noted that there was absolutely no reference to the Warsaw Convention in either the legislative history or text of the act repealing the Par Value Modification Act.\textsuperscript{168} Stating that “[l]egislative silence is not sufficient to abrogate a treaty,”\textsuperscript{169} the Court concluded that the repeal of the Par Value Modification Act was entirely unrelated to the Warsaw Convention.\textsuperscript{170} Thus, the Court admonished, “[t]he repeal of a purely domestic piece of legislation should ... not be read as an implicit abrogation of any part of [the Warsaw Convention].”\textsuperscript{171}

Next, the Court pointed out that the executive branch supported the continued enforceability of the Warsaw Convention in the United States.\textsuperscript{172} Recognizing, however, that Article 39 of the Warsaw Convention\textsuperscript{173} provided a mechanism for the executive and legislative branches' withdrawal from the Warsaw Convention, the Court concluded that it was “unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself.”\textsuperscript{174}

Finally, the Court considered whether the Warsaw Convention could be found unenforceable under the doctrine of \textit{rebus sic stantibus}.\textsuperscript{175} In its brief, petitioner Franklin Mint had suggested that the Warsaw Convention was no longer enforceable since there had been a substantial change in conditions since its promulgation.\textsuperscript{176} The Court rejected this argument, however, stating that only nations, not private persons, could invoke the doctrine of \textit{rebus sic stantibus} as an excuse for terminating treaty obligations.\textsuperscript{177} Because Franklin Mint was a private person, and because the United States continued to uphold the validity of the treaty, the Court concluded that the doctrine of \textit{rebus sic stantibus} did not apply.\textsuperscript{178}

Thus, the Court concluded that the repeal of the Par Value Modification Act did not affect the continued enforceability of the Warsaw Convention in the United States,\textsuperscript{179} and that “the [cargo liability] limit remains enforceable in

\textsuperscript{168} Id. The Court recognized that there was also no reference to the Warsaw Convention in the legislative histories of the Par Value Modification Acts themselves. \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} The rule of \textit{rebus sic stantibus} has been defined as follows:
An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.
\textsuperscript{176} Franklin Mint, 104 S. Ct. at 1783.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} at 1784.
United States courts.”180 Having reached this determination, the Court then focused its attention upon selecting the appropriate unit of conversion for determining the liability limitations set forth in the Warsaw Convention.

The Court ruled that the last official price of gold in the United States181 was the appropriate unit of conversion.182 It based this decision on a policy of judicial deference to the treaty-making powers of the political branches. The CAB-sanctioned cargo liability limit of $9.07 per pound,183 the Court stated, “represented an Executive-Branch determination, made pursuant to properly delegated authority, of the appropriate rate for converting the Convention’s liability limits into United States dollars. We are bound to uphold that determination unless we find it to be contrary to law established by domestic legislation or by the Convention itself.”184

In selecting the last official price of gold as the appropriate unit of conversion, the Court was influenced by its belief that such a determination would be “sufficiently consistent” with the purposes of the Warsaw Convention and the intent of the Convention’s framers.185 The use of the last official price of gold, the Court wrote, would satisfy several of the Convention’s objectives, including the continuation of a reasonable liability limitation.186 Moreover, its use would ensure that a stable, predictable, and reliable limitation would remain in effect.187

The Court also discussed why it declined to adopt the free market price of gold as the method for converting the Convention’s liability limitations into U.S. dollars. Referring to the extreme fluctuations in the price of gold on the international market in recent years,188 the Court stated, “reliance on the gold market would entirely fail to provide a stable unit of conversion on which carriers could rely.”189 Furthermore, referring to the repeal of the Par Value Modification Act in the United States and similar acts in other nations, the Court stated, “[t]he 1978 decision by many of the Convention’s signatories to exit from the gold market cannot sensibly be construed as a decision to compel every air carrier and

180. Id.
181. The last official price of gold, $42.22 per ounce, was established by the Par Value Modification Act of 1973. See supra note 114.
182. Franklin Mint, 104 S. Ct. at 1784.
183. A liability limit of $9.07 per pound for loss of or damage to cargo had been set by the CAB in 1974 as the appropriate interpretation of the gold-based liability limitation provisions of Article 22 of the Warsaw Convention. See supra note 133. The $9.07 figure was calculated by using the then official price of gold, $42.22 per ounce, as the unit of conversion. See id.
184. Franklin Mint, 104 S. Ct. at 1785.
185. Id. at 1785.
186. Id.
187. Id. The Court did concede that international uniformity, another objective of the Convention, might only be achieved in the long run by requiring periodic adjustment of the CAB’s dollar-based limitation to reflect, among other factors, possible future fluctuations of the value of the U.S. dollar in relation to other western currencies. Id.
188. The Court noted, as an example, that the price of gold ranged from $490 to $850 per ounce in a four month period between January and April, 1980. Id. at 1786.
189. Id.
air transport user to enter it." Thus, the Court concluded that a liability limit of $9.07 per pound, based upon the last official price of gold in the United States, was "not inconsistent with the Convention."

2. The Stevens Dissent

In a strongly worded dissent, Justice John Paul Stevens criticized the majority decision in *Franklin Mint*. He condemned in particular the "freewheeling approach" of the Court in adopting the last official price of gold as the appropriate unit of conversion for determining the liability limitations of the Warsaw Convention. By adopting this approach, Justice Stevens believed, the Court had in effect rewritten the Warsaw Convention. Berating the majority for exceeding its authority, Justice Stevens concluded, "[t]he task of revising an international treaty is not one that this Court has any authority to perform."

Justice Stevens first analyzed the principles of treaty construction and the appropriate role of the judiciary in enforcing treaties. He quoted an 1821 opinion by Justice Story:

> [T]his Court does not possess any treaty-making power. That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial function. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind.

Next, Justice Stevens launched into an historical analysis of the Warsaw Convention to determine its objectives. International uniformity, he concluded, was the "touchstone" of the Convention. In order to achieve international uniformity, the delegates at Warsaw consciously selected gold as a common standard of value. They believed that gold had a relatively constant value. Paper
money, on the other hand, was subject to "fluctuating and uncertain value," and therefore was expressly rejected by the Convention as a standard of value.

Taking into account the plain language of the Warsaw Convention, its legislative history, and general principles of international law, Justice Stevens concluded that the gold standard, no matter how anachronistic it may be, was in fact the standard of value adopted by the Warsaw Convention. He stated, "[t]he intention of the Convention simply could not be more manifest." Thus, reasoning that the Court is "as obliged to apply the standard of value agreed upon by the Convention as [it is] obliged to apply the liability limitation," Justice Stevens concluded that the majority erred in not selecting the free market price of gold as the appropriate unit of conversion.

IV. INTERNATIONAL AIR CARRIER LIABILITY LAW: THE MONTREAL PROTOCOLS

A. Background

In his dissenting opinion in Franklin Mint, Justice Stevens suggested that if the premise of the majority were correct that the liability limitation of the Warsaw Convention was unworkable, then the only appropriate remedy would be amendment of the Convention by the parties. In fact, the parties had already commenced efforts to update the Warsaw Convention and Montreal Agreement. In 1971, having recognized the increasing discrepancies between amounts recovered in domestic airline crashes and amounts recovered in international airline crashes, the U.S. government joined with the international community...
in yet another effort to replace the Warsaw Convention and the Hague Protocol.\footnote{210}

The Guatemala City Protocol,\footnote{211} a new international treaty designed to amend the Warsaw Convention and Hague Protocol, was the first attempt to update the law of international air carrier liability.\footnote{212} Among the many changes set forth in the Guatemala City Protocol, the most significant was an increase in the carrier liability limit for passenger death or injury to $100,000.\footnote{213} As a quid pro quo for raising the liability limit, however, the Guatemala City Protocol made the ceiling absolute by eliminating the willful misconduct clause that had been included in the Warsaw Convention, the Hague Protocol, and the Montreal Agreement.\footnote{214} In addition, the Guatemala City Protocol, at the insistence of the United States, included a provision that would permit individual nations to adopt a domestic compensation system to supplement the Protocol's $100,000 passenger liability limit.\footnote{215}

major airline accidents from 1977 to 1983. In one chart, the survivors of passengers killed on domestic flights received average recoveries of $198,600, while survivors of passengers killed on international flights received average recoveries of only $70,900. See chart reprinted in 129 CONG. REC. S2239 (daily ed. Mar. 7, 1983). The second chart presents virtually identical statistics: domestic recoveries averaged $180,600, while international recoveries averaged only $65,200. See chart reprinted in 129 CONG. REC. S2259 (daily ed. Mar. 7, 1983). In both charts, approximately eighty-five percent of all settlements were below $325,000, the amount of recovery that would be available under the Montreal Protocols if ratified by the U.S. Senate. See charts reprinted in 129 CONG. REC. S2239, S2259 (daily ed. Mar. 7, 1983).

210. The $8300 limit of the Warsaw Convention and the $16,600 limit of the Hague Protocol were still the applicable limits in most of the world, since the $75,000 ceiling established by the Montreal Agreement applied only to flights departing, arriving, or stopping in the United States. See supra notes 70-88 and accompanying text.


212. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 1ST SESS., REPORT ON MONTREAL AVIATION PROTOCOLS Nos. 3 AND 4, at 3 (Comm. Print 1983) [hereinafter cited as Senate Report]. Only 25 nations are signatories to the Guatemala City Protocol. They are, in alphabetical order: Argentina, Belgium, Brazil, Canada, China, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, France, Germany, Guatemala, Israel, Italy, Jamaica, Luxembourg, New Zealand, Nicaragua, Spain, Switzerland, Trinidad & Tobago, United Kingdom, United States, and Venezuela. 3 AV. L. REP. (CCH) ¶ 27,129 (June 1983).

213. Senate Report, supra note 212, at 3. This new increased liability limit of the Guatemala City Protocol was still based on the Poincaré franc. The Guatemala City Protocol also provided for a system of no-fault liability, relaxed jurisdictional requirements that would allow U.S. citizens to sue in U.S. courts under most circumstances, and a "settlement inducement clause" which would permit courts to impose attorney's fees if the carrier did not make a timely settlement offer at least equivalent to the ultimate recovery. In addition to increasing the passenger liability limit to approximately $100,000, the Guatemala City Protocol also provided for an increase in the cargo liability limit to $1000 per passenger (in lieu of the existing $9 per pound). Id. 214. See text of Article 25 of the Warsaw Convention, supra note 37.

214. Senate Report, supra note 212, at 3. Pursuant to this enabling provision, the U.S. government and Prudential Insurance Company developed a supplemental compensation plan (SCP) that would provide $200,000 per passenger coverage in addition to the approximately $120,000 carrier liability limit (adjusted for inflation) provided by the Guatemala City Protocol. The CAB, on July 20, 1977,
Following the opening for signature of the Guatemala City Protocol, and before the United States could consider ratification, a series of conferences were convened in Montreal primarily to consider detailed provisions relating to cargo shipments. The final conference, known as the Montreal Diplomatic Conference, was held in September 1975. Aware of the demise of the gold standard as the basis for world currency conversion, delegates at the 1975 Montreal Diplomatic Conference recognized the need to adopt a new method for currency conversion. Article 22 of the Warsaw Convention, as amended by the Hague and Guatemala City Protocols, still based its liability limits in terms of the Poincaré franc. The United States believed this to be an appropriate time to amend the Warsaw Convention’s liability limits to reflect the recent abandonment of the gold standard, and persuaded Norway to propose at the Diplomatic Conference a substitution of the SDR for the existing Poincaré franc conversion clause.

The Montreal Conference adopted four separate protocols, which are collectively known as the Montreal Protocols. The first three protocols, Montreal Nos. 1-3, were limited in practical effect to substituting the SDR for the Poincaré franc as the unit of conversion for calculating carrier liability for passenger death or injury. Montreal No. 1 amended the Warsaw Convention, Montreal No. 2 amended the Hague Protocol, and Montreal No. 3 amended the

---

216. Senate Report, supra note 212, at 3-4. The International Civil Aviation Organization (ICAO) Legal Subcommittee conducted negotiations with respect to cargo provisions in Montreal in September 1972 and October 1974. A Working Group met in Montreal in April 1975 to resolve conflicts between the cargo amendments and provisions of the Guatemala City Protocol. The cargo provisions drafted by the 1974 ICAO Legal Subcommittee formed the basis for the Montreal Diplomatic Conference, which was held in Montreal in September 1975. Id.
217. Id. at 4.
218. Id.
219. See text of Article 22 of the Warsaw Convention, supra note 25.
220. See supra notes 117-37 and accompanying text (discussing the demise of the gold standard).
221. See supra note 130.
223. Id.
224. Id.
Guatemala City Protocol. The fourth protocol, Montreal No. 4,228 contained basic amendments to the cargo provisions of the Warsaw Convention, as revised by the Hague Protocol, including the substitution of the gold clause with an SDR clause.229

Of the four protocols, only Montreal No. 3 and No. 4 came before the U.S. Senate for ratification.230 Since they incorporated all of the recent Guatemala City Protocol rules regarding liability limitations and substituted the SDR for the Poincaré franc,231 Montreal No. 3 and No. 4 essentially superseded the Guatemala City Protocol.232 Thus, ratification of Montreal Protocol No. 3 and No. 4 would render ratification of the Guatemala City Protocols superfluous and unnecessary.233

Montreal Protocol No. 3 and No. 4 came before the U.S. Senate for its advice and consent in March 1983.234 Initially, several factors suggested that the Protocols would be easily ratified. First, the Senate Foreign Relations Committee had endorsed the Protocols by a sixteen to one vote.235 Second, the U.S. Senate had not rejected a treaty for over twenty years.236 Furthermore, ratification of the Protocols was endorsed by numerous influential persons, including President Reagan,237 several previous administrations,238 other present and former gov-

228. Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, as Amended by the Protocol done at The Hague on Sept. 28, 1955, done at Montreal on Sept. 25, 1975 [hereinafter cited as Montreal Protocol No. 4].
229. Senate Report, supra note 212, at 5.
230. See id. at 4.
231. Montreal Protocol No. 3 contained provisions affecting passengers and their baggage. Montreal Protocol No. 4 focused primarily on the carriage of cargo. See id. at 4-5.
232. See id. at 4.
233. See id.
235. Senate Report, supra note 212, at 5. On November 17, 1981, the Senate Foreign Relations Committee voted sixteen to one to report the Montreal Protocols, including the three provisos, favorably to the Senate for advice and consent. Only Senator Biden voted against reporting the Protocols to the Senate. The 97th Congress, however, never had the opportunity to consider the Protocols, which were one of six treaties left pending at the adjournment of the 97th Congress. Under Senate rules the Protocols were automatically re-referred to the Foreign Relations Committee in the 98th Congress, which by voice vote ordered them favorably reported before the full Senate. This time, however, only fourteen members of the Committee asked to be recorded in favor, two were opposed, and one voted "present." Id.
ernment officials,239 the Air Transport Association of America (ATA),240 and some of the media.241 Despite this support, the Senate heavily contested ratification.242

The Senate debate on the Montreal Protocols highlights the controversy in the United States over whether the United States should remain a party to an international aviation agreement limiting the liability of carriers on international flights. The next section outlines the content of the Montreal Protocols. It is followed by an extensive analysis of the Senate debate.

B. Content of the Montreal Protocols

The Montreal Protocols, designed to replace the Warsaw Convention, the Hague Protocol, the Guatemala City Protocol, and the Montreal Agreement, contained five major changes in the law of international air carrier liability.

First, the Protocols imposed absolute or "no-fault" liability upon the carrier in the event of passenger death or personal injury.243 The establishment of no-fault liability was the direct consequence of eliminating the "all necessary measures" or "due care" defense that was permitted under Article 20 of the Warsaw Convention.244 Although the Montreal Agreement had provided for a similar arrangement, the Protocols were the first time such a provision had been set forth in a multilateral treaty.


244. See text of Article 20 of the Warsaw Convention, supra note 35. Although Article 20 of the Consolidated Text permits the air carrier to use the "all necessary measures" defense for damage occasioned by delay, it does not permit the use of the defense for personal injury or death. See Consolidated Text, supra note 243, at 29.
Second, the Protocols provided for an unsurpassable liability limit of 100,000 SDRs for passenger injury or death,\(^{245}\) 1000 SDRs per passenger for loss or damage of baggage,\(^{246}\) and 17 SDRs per kilogram for loss, damage, or delay in the carriage of cargo.\(^{247}\) The Consolidated Text of the Warsaw Convention as amended by the Montreal Protocols states, "[s]uch limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."\(^{248}\) These provisions manifest the elimination of the willful misconduct clause that was contained in Article 25 of the Warsaw Convention,\(^{249}\) which permitted recoveries to exceed the liability limits upon proof of the carrier's "willful misconduct."\(^{250}\)

Third, the Protocols contained a "settlement inducement clause," which was designed to force airlines to settle claims within six months by imposing additional expenses (court costs and attorney fees) if settlement had not been reached within that time period.\(^{251}\)

Fourth, the Protocols would facilitate suits against foreign airlines in the United States by permitting an action in the domicile of the passenger (or passenger's decedent) if the airline has an "establishment" there.\(^{252}\)

Fifth, the Protocols recognized the right of each participating state, at its option, to establish a supplemental compensation plan (SCP)\(^{253}\) within its territories that would supplement the recoveries under the Protocols of its citizens.\(^{254}\)

Of the five major changes proposed by the Montreal Protocols, the establishment of no-fault liability and the elimination of the willful misconduct clause received the most attention in the U.S. Senate debate.\(^{255}\) The elimination of the willful misconduct clause proved to be perhaps the biggest rallying cry of those senators opposed to ratification of the Protocols.\(^{256}\) Considerable dissatisfaction, however, was also expressed over the establishment of no-fault liability.\(^{257}\) This

---

245. See Article 22(1)(a) of the Consolidated Text, supra note 243, at 29. 100,000 SDRs in March 1983 were worth approximately $109,000. 129 Cong. Rec. S2239 (daily ed. Mar. 7, 1983) (statement of Sen. Percy).

246. See Article 22(1)(c) of the Consolidated Text, supra note 243, at 30.

247. See Article 22(2)(a) of the Consolidated Text, supra note 243, at 30. In the transportation of cargo the liability limit may be increased upon agreement of the parties and payment of a supplementary sum, if necessary. This is known as the "special declaration" concept. Id.

248. See Article 24 of the Consolidated Text, supra note 243, at 32.

249. Senate Report, supra note 212, at 17 (referring to Articles X and XI of Montreal Protocol No. 3).

250. See supra note 37.

251. See Article 22(3) of the Consolidated Text, supra note 243, at 30.

252. See Article 28 of the Consolidated Text, supra note 243, at 33-34.

253. See infra notes 305-07 and accompanying text.

254. See Article 35A of the Consolidated Text, supra note 243, at 35-36.


256. See infra notes 339-45 and accompanying text.

257. See infra notes 342-45 and accompanying text.
dissatisfaction suggests a misunderstanding of the development of the law of international air carrier liability within the United States, since no-fault liability was not a new concept there. In fact, the United States had been operating under a system of no-fault liability, as established by the Montreal Agreement, for seventeen years. The Protocols merely codified no-fault liability in a legitimate multilateral treaty. Thus, the Protocols extended the doctrine of absolute liability so that the doctrine would apply to international aviation accident litigation not only in the United States, but in all nations signatory to the Protocols as well.

In sum, only three significant changes in applicable U.S. law, which had not already been instituted by adopting the Montreal Agreement, would be instituted by ratifying the Protocols. First, the Protocols would eliminate the willful misconduct exception, so that recoveries could never exceed the Protocols' liability limits. Second, the Protocols would substitute the SDR for the Poincaré franc as the unit of conversion. Third, the Protocols would implement an SCP at the option of each signatory nation.

The Senate Foreign Relations Committee recommended that the Protocols be ratified with three provisos attached. The first proviso would prohibit the president from depositing the instruments of ratification that would bring the Protocols into force until he has determined that an SCP, as reviewed by the CAB, adequately and fairly protects the interests of U.S. air travelers. The second proviso would direct the president to denounce the Protocols if at any time he determines, based upon periodic reviews by the CAB, that the SCP no longer best serves the interests of U.S. air travelers and that continued adherence to the Protocols by the United States is no longer advisable. The third proviso would require the U.S. government to continue actively its efforts to increase the liability limit provided for in the Protocols and to remain perpetually dissatisfied with the Protocols' present limits.

258. See id.
260. See Senate Report, supra note 212, at 15 (referring to Article VI of Montreal Protocol No. 3). Insofar as the Montreal Agreement was an executive order of the President of the United States, it applied only to air transportation involving the United States. See supra notes 78-79 and accompanying text.
261. See supra notes 248-50 and accompanying text.
262. See supra notes 245-47 and accompanying text.
263. See supra notes 253-54 and accompanying text.
265. Senate Report, supra note 212, at 8.
266. Id.
267. Id.
C. Senate Debate of the Montreal Protocols

Of the two Montreal Protocols before the Senate, Protocol No. 3, which contained provisions affecting airline passengers, received the most attention.\footnote{268}{See generally 129 CONG. REC. S2235-62 (daily ed. Mar. 7, 1983); 129 CONG. REC. S2270-79 (daily ed. Mar. 8, 1983).} It was clearly considered to be the more important of the two protocols, as shown by the fact that the Senate extensively debated the pros and cons of the liability limits exclusively with respect to passengers.\footnote{269}{Id.} Protocol No. 4, which contained provisions affecting cargo, was not discussed.

This was the first time that U.S. lawmakers had ever debated the liability limits of air carriers on international flights as set forth in an international agreement.\footnote{270}{The only other time an international agreement limiting the liability of air carriers on international flights came before the U.S. Senate for its advice and consent was in 1934, when the Warsaw Convention was ratified by voice vote without any debate whatsoever. See 78 CONG. REC. 11,582 (1934).} Therefore, the arguments set forth by both the proponents and opponents of ratification provide a significant historical record of perceived advantages and disadvantages of continued U.S. participation in an international aviation agreement limiting air carrier liability.

1. Arguments in Favor of Ratification

Senator Nancy Kassebaum of Kansas was among the most vocal proponents of ratification. Summarizing the positive aspects of the Montreal Protocols, Senator Kassebaum stated:

The protocols will guarantee recovery for damages without the need to prove fault, specifically including acts of terrorism, war, sabotage, hijacking, and natural disasters; assure access to U.S. courts by American citizens; assure cash recoveries, in most cases, within 6 months of an accident rather than years later; reduce legal expenses to normal hourly rates rather than 20 to 40 percent of the victims' recoveries; mandate annual review of the system by the Civil Aeronautics Board and withdrawal by the United States if the system proves inadequate; assure automatic increases in liability levels every 5 years and continued efforts by the U.S. Government to negotiate ever higher levels of airline liability; preserve international consensus on a uniform system of compensation which would protect Americans worldwide and not leave some citizens to the mercy of foreign courts and very low limits on recoveries.\footnote{271}{129 CONG. REC. S2270 (daily ed. Mar. 8, 1983) (statement of Sen. Kassebaum).}
tion system. Senator Percy, Chairman of the Senate Foreign Relations Committee, captured these sentiments, stating, "$[w]hatever the reservations which some Members may feel [about ratifying the Protocols], we are better off doing so than remaining with the present system."273

During the debate, the proponents repeatedly stressed the following eight points:

a. *Increase in Liability Limit Necessary and Relevant*

The Senate debate took place when U.S. courts had begun to refuse to enforce the liability limits of the Warsaw Convention.274 The proponents of ratification believed that legislative action was necessary in order to clarify the growing confusion in the law of international air carrier liability.275 They were aware of the reasoning of the Second Circuit, which had stated, "a unit [of conversion] must be selected either through treaty approval by the Senate or by legislation passing both Houses of the Congress."276 Approval by the Senate of the Montreal Protocols not only would increase recovery in international aviation accidents, but also would cause the adoption of the SDR as the unit of conversion.277 Thus, the proponents feared that unless the Senate took action in approving the Protocols, thereby adopting the SDR as the unit of conversion, courts in future cases would be reluctant to enforce any liability limit at all.278

The issue raised in *Bali* whether the Warsaw Convention's liability limitations constitute an unconstitutional taking under the fifth amendment would be similarly resolved by ratification of the Montreal Protocols.279 The new SCP

---

273. 129 CONG. REC. S2235 (daily ed. Mar. 7, 1983). *See also* the following remarks:

[The Montreal Protocols] are by no means a perfect solution to the problem of assuring adequate compensation for American[s] in international travel, but they are certainly a great improvement over the present system, which benefits only a very few of the most affluent citizens at the expense of everyone else.


Contrary to what opponents to ratification may say, the choice we confront is not between the Warsaw system and some ideal system fashioned by American lawyers in American courts. It is not a question of uniformity but instead is a choice between the present outdated system of accident compensation and a significantly improved system.

274. *See, e.g.*, *Bali*, 684 F.2d 1301; *Franklin Mint*, 690 F.2d 303; *Kimpo*, 558 F. Supp. 72.
275. For example, Sen. Percy stated:

The protocols would actually resolve the problems raised in the *Franklin Mint* and *Kimpo* cases by establishing a uniform, reliable unit of measurement. They would also go a long way in easing the problem raised by the court in the *Bali* case which resulted because of a concern by the court that the present system could not be said to provide adequate compensation to accident victims.

276. *Franklin Mint*, 690 F.2d at 311.
279. *See, e.g.*, *supra* notes 89-103 and accompanying text.
provision would increase total compensation from $75,000 (under the Montreal Agreement) to approximately $309,000. This $309,000 recovery ceiling of the Montreal Protocols, the proponents of ratification pointed out, would be adequate to fully compensate over eighty-five percent of claimants. Therefore, recovery would be fairly substantial, and the risk that a U.S. court might refuse to enforce the liability limitations of the Montreal Protocols because they constituted an unconstitutional taking under the fifth amendment would be greatly diminished.

b. *International Uniformity in U.S. National Interest*

The proponents stressed the importance of ratification as an indication of U.S. leadership in the international aviation community. One Reagan Administration official suggested that ratification by the United States might encourage other nations to follow suit. This uniformity was considered important in order to protect the U.S. traveling public from unconscionably low recoveries when forced to litigate abroad. In many cases, a U.S. citizen would be unable to sue an airline in U.S. courts. Without an international treaty such as the Montreal Protocols governing the litigation, the U.S. air traveler would be subject to the tort laws of the nation where the crash occurred. In such a case:

280. The $309,000 figure breaks down into a $109,000 recovery from the carrier and a $200,000 recovery under the SCP. See supra note 245 (value of 100,000 SDRs in March 1983 is $109,000). See also infra text accompanying notes 304-05 (value of proposed U.S. SCP is $200,000).

281. See charts reprinted in 129 Cong. Rec. S2239, S2259 (daily ed. Mar. 7, 1983). Since recoveries in excess of $309,000 are normally afforded only to persons whose earning potential is high enough to expect such a recovery, those fifteen percent who would not be fully compensated by the Protocols and the SCP are likely to have other options for recovery at their disposal. See letter from former Secretary of State Warren Christopher to Sen. Byrd (July 2, 1982), reprinted in 129 Cong. Rec. S2237-38 (daily ed. Mar. 7, 1983). For example, wealthy individuals who are killed in airplane crashes are likely to carry additional personal insurance or own considerable assets, the benefits of which presumably would be passed on to their survivors. See 129 Cong. Rec. S2239 (daily ed. Mar. 7, 1983) (statement of Sen. Percy). See also Washington Times editorial (Feb. 28, 1983), reprinted in 129 Cong. Rec. S2236 (daily ed. Mar. 7, 1983).


285. A U.S. traveler would be unable to obtain jurisdiction in a U.S. forum if, for example, the airline ticket was purchased in a foreign country and the airplane crashed on a purely domestic flight within that country.
situations, the amount of recovery could be far below the level allowed by U.S. law.286

Not all nations have as extensive a recovery system as that provided by U.S. common law, the proponents stressed.287 Thus, the proponents attempted to discredit as clearly erroneous the argument that tort law in foreign nations is equivalent to U.S. tort law.288 Recovery to the U.S. plaintiff who is forced to litigate abroad would be limited to $8,900 or $16,600, even when litigating in a nation that is a signatory to the Warsaw Convention or the Hague Protocol.289 As a leader in international air travel, the proponents argued, the United States should take the initiative in updating the law by ratifying the Montreal Protocols, and then encourage other nations to follow suit.290

c. Additional Forum Facilitates Litigation

The Montreal Protocols would offer the survivors of airline crashes an additional forum in which to bring their claims.291 Under the Protocols, claims may be brought in any country in which the passenger is domiciled or resides, or in which the carrier has an “establishment.”292 Even Senator Strom Thurmond of South Carolina, an opponent of ratification, recognized the advantages inherent

286. The case of Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965) illustrates such a scenario. In Tramontana, a U.S. Navy airplane, carrying members of the U.S. Navy Band on a flight from Buenos Aires to Galeao, Brazil, collided in midair with a Varig Airlines plane over Rio de Janeiro. Varig Airlines is a Brazilian corporation with its principal place of business in Brazil. Tramontana, 350 F.2d at 469. Brazilian law limited damages to 100,000 Brazilian cruzeiros, which was equivalent to approximately $170. Id. The Court of Appeals for the District of Columbia Circuit determined that, under conflict-of-law rules, the Brazilian law must be applied, and therefore affirmed a Brazilian court’s award of $170 to the wife of an American passenger aboard the U.S. Navy plane.

Although demonstrating that recoveries can be as low as $170 under a given nation’s tort law, the Tramontana case is not entirely on point. Brazil was a signatory to the Warsaw Convention, see supra note 18, but the Convention’s liability provisions were not applicable to the facts of the case. The Convention’s coverage is limited in terms to claims by or on behalf of passengers of the carrier against which recovery is sought. Tramontana, 350 F.2d at 470 n.5. Since the American traveler killed was a passenger on board a U.S. Navy plane, and not a passenger of Varig Airlines, his wife could not sue Varig Airlines under the Convention. Therefore, regular Brazilian law applied, which set a maximum recovery ceiling of $170. Id. at 469.

It should be noted that even with the adoption of the Montreal Protocols, the result in Tramontana would not be any different were the same accident to occur again. Recovery would still be limited to $170. Tramontana illustrates, however, the low level of damages which many nations allow without an international agreement pushing those limits higher.


289. See supra notes 26 (Warsaw Convention) and 46 (Hague Protocol) and accompanying text.

290. See supra note 282 and accompanying text.

291. See supra text accompanying note 252.

292. See id. See also Senate Report, supra note 212, at 5.
in an additional possible forum. He pointed out, "[t]his should insure Americans access to U.S. courts in almost all cases."293

d. Protocols Provide For Speedier, Less Costly Settlements

The Montreal Protocols would provide for the settlement of most cases within six months by imposing a penalty of attorney's fees and court costs on a defendant who fails to settle within the prescribed time period.294 With the implementation of such a settlement inducement plan, the proponents argued, both the incentive to make low offers and the delay between the time of filing a claim and final recovery would be dramatically reduced.295

The proponents also stressed that the $309,000 recovery that would be available under the Protocols as supplemented by the SCP was not significantly below the typical recovery in recent domestic air crash settlements.297 They pointed out that "gouging" by lawyers who charged excessively high fees cut significantly into the total recovery received by plaintiffs in many domestic air crash cases decided under common tort law.298 Although the Protocols would not specifically provide for hourly rates, the proponents argued, they would institute a rather routine recovery system of absolute liability and settlement within six months, and therefore contingent fee arrangements by plaintiffs' lawyers would no longer be necessary.299 Thus, under the Protocols, plaintiffs would recover a much greater proportion of the final settlement than would be possible in domestic aviation accident cases. As a corollary, plaintiffs' lawyers would recover a proportionately smaller percentage.

e. Other Avenues To Recovery Still Available

The liability limits imposed by the Montreal Protocols would not preclude recovery from other tortfeasors. The Protocols would place limits on only the carrier's liability.300 Accordingly, in situations in which several parties were

294. See supra text accompanying note 251. See also Senate Report, supra note 212, at 4-5.
296. See supra note 280 and accompanying text.
297. See supra note 209.
300. See Article 22 of the Warsaw Convention, supra note 25.
jointly liable for the wrongful death of a passenger in an international aircrash, a plaintiff could recover in excess of $309,000. The carrier itself would not be liable in excess of $309,000.

f. Protocols Establish SCP

The proponents stressed the fact that the Protocols would be adopted with the SCP, which would allow recoveries in the United States to exceed the air carrier's maximum liability limit of $109,000. The SCP, developed by the CAB and Prudential Insurance Co., offered not only a $200,000 supplement in case of death, but also unlimited medical expenses in case of injury. Thus, ratification of the Protocols and the subsequent adoption of the SCP by the United States would ensure that recovery in international air crash litigation in U.S. courts approximates recovery in domestic air accidents.

A further advantage of the SCP would lie in its flexibility. Under the provisos added to the Protocols, the SCP could be incremented at the discretion of the president and the CAB. Additionally, the president would retain the option to denounce the entire treaty should he decide that the SCP no longer satisfactorily serves the interests of U.S. air travelers.

g. Provisos Provide For Future Efforts to Increase Liability Limits

The proponents conceded that the liability limits of the Montreal Protocols were not ideal. They believed, however, that the United States would be much better off with the Protocols than under the current system. They believed that the Protocols were not an end in themselves, but rather a means to an end — by adopting the significantly increased limits of the Protocols at that time, the United States would reap the benefits of the Protocols while at the same time

301. See supra note 280. Sen. Thurmond recognized this possibility, stating: "[T]he protocols do not in any way limit the amount which may be recovered from a wrongdoer other than the carrier. If a passenger or his representative can establish fault on the part of another party, such as the manufacturer of the aircraft or the air traffic controller guiding it[s] flight, then recovery may be had against that party as well, under the principles generally applicable to joint tort feasors."

302. See supra note 245 and accompanying text.

303. See id.

304. Senate Report, supra note 212, at 3.

305. Id. at 5. The SCP would be funded by a two dollar surcharge on international tickets. Id. This version of the SCP was originally developed for implementation under the Guatemala City Protocol. See supra note 215.

306. See supra note 266 and accompanying text.

307. See id.


actively pursuing even greater limits. The provisos would ensure that the U.S. government actively pursues such future increases in the liability limits.

h. Rejection of Protocols Would Lead to Chaos

The proponents stressed that ratification of the Protocols was necessary to ensure uniformity in the international aviation community. Senator Percy stated, "[f]ailure to approve [the Protocols] would not only forego an opportunity to make significant improvements in the present system of accident compensation, but would undermine our influence in the international aviation system and make future improvements in that system even harder to obtain." Senator Kassebaum reiterated the parade of horribles that would ensue from a rejection of the Protocols, characterizing the current state of international aviation law as "enormously complicated, unfair, and deteriorating."

Throughout the Senate debate, the proponents of ratification stressed the benefits offered by the Protocols. They pointed out that ratification would ensure continued international uniformity, substantially increased liability limitations, and increased ease of litigation. Not all the senators agreed that such benefits would result, however. In fact, the opponents of ratification found a great deal to criticize in the Protocols.

2. Arguments Against Ratification

Senator Ernest Hollings of South Carolina led the opponents of ratification of the Montreal Protocols in the Senate debate. Repeatedly criticizing the no-fault provisions of the Protocols while extolling the virtues of the U.S. tort law principle that each person should be compensated according to the damage or harm suffered, Senator Hollings advised:

The defeat of these treaties is necessary to insure the right of every American to secure adequate and just compensation for personal

311. See supra note 267 and accompanying text.
316. Id.
injuries or death caused by the negligence of an international airline. The treaties under consideration strike at the very heart of the well-developed U.S. common law principle that a culpable tortfeasor be responsible for fully compensating his victim. The treaties, because they place a strict limit on liability, will do serious harm to the high level of safety that we have come to routinely expect from air travel. And finally, the treaties impose a costly system of liability insurance that is inadequate to meet the needs of today's international air traveler and is therefore, no more than a ripoff of the flying public.\(^{317}\)

During the debate, the opponents repeatedly stressed four points. First, they opposed the liability limits of the Protocols. Second, they believed that the Protocols' elimination of the willful misconduct exception would lead to decreased air safety. Third, they strongly opposed the SCP. Finally, they believed that rejection of the Protocols would not decrease U.S. prestige in the international aviation community.

a. **Liability Limits Unacceptable**

The opponents rejected the Protocols' liability limit of 100,000 SDRs on two grounds. First, they asserted that any liability limit is inconsistent with U.S. tort law.\(^{318}\) Second, they argued that if indeed there must be a limit, the 100,000 SDR limit was far too low and totally unacceptable.\(^{319}\)

Senator Hollings criticized the Protocols for being inconsistent with U.S. tort law.\(^{320}\) He stressed that any liability limit is not in the tradition of the U.S. legal system, which guarantees that a tortfeasor fully compensate a victim.\(^{321}\) Any limit on the airlines' liability would leave many plaintiffs not fully compensated.\(^{322}\) Senator Hollings noted that to remedy this, these plaintiffs might sue other parties not covered by the liability limits of the Protocols, including the manufacturers of the component parts of the airplane or the U.S. government.\(^{323}\) Accordingly, despite the argument advanced by the proponents that the absolute liability doctrine, liability limit, and settlement inducement clauses of the Protocols would encourage speedier settlements and less costly litigation, the Protocols would, to the contrary, encourage litigation against other potential defendants.\(^{324}\) Therefore, the Protocols would delay rather than expedite settlements.

\(^{318}\) See infra notes 320-24 and accompanying text.
\(^{319}\) See infra notes 325-38 and accompanying text.
\(^{321}\) See supra note 320.
\(^{323}\) Id.
\(^{324}\) Id.
The opponents viewed the 100,000 SDR limit itself as the second problem presented by the liability limits of the Protocols. They attacked these limits on several grounds. First, the opponents argued that there would be a tremendous disparity between recoveries for airline crashes on domestic flights and for those on international flights. They noted that in international air accidents, domestic recoveries could far exceed recoveries governed by the Protocols, even between passengers on the same flight. Senator Hollings openly expressed his skepticism of the accuracy of the AT A's statistics that indicated that only fifteen percent of all airline crash settlements are below the amount of recovery provided by the Protocols. He suggested that the statistics were based on incidents that were outdated or significantly lower than would be typical. Senator Hollings pointed out that more representative recoveries could be found in the 1979 DC-10 airplane crash in Chicago, in which the average settlement approximated $436,000.

Second, the opponents argued that inflation had rendered the real value of the 100,000 SDR liability limit of the Montreal Protocols below the $75,000 limit which was established by the Montreal Agreement in 1966. The value of 100,000 SDRs was approximately $109,000 at the time of the Senate debate.

325. 129 Cong. Rec. S2246 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings). In fact, passengers sitting next to each other on the same flight could be treated differently depending on a variety of factors. For example, Passenger A could be booked on a flight from Rome to New York, with a stopping point in Boston. Passenger B could be on the same flight, but only on the Boston to New York leg. If the plane crashes en route from Boston to New York, Passenger A would be considered on an international flight and therefore limited in recovery under the Protocols or Convention. Passenger B, on a purely domestic flight, would be able to sue without regard to a liability limitation. Thus, it is conceivable that B's recovery could far exceed A's, simply because of the requisite liability limitation.

Sen. Hollings pointed out a real-life example of this situation in the case of the Pan American World Airways 727 crash in New Orleans, Louisiana on July 19, 1982, in which all 146 passengers, some of whom were flying on "international tickets" that showed previous stops in South America, were killed. Sen. Hollings stated:

"Absurdly, had such an accident occurred under the [Montreal Protocols], surviving families of the victims flying on domestic tickets could receive compensation commensurate with their loss — $1 million or more as the case may be — while families of victims holding international tickets would be limited to settlements of less than $109,000 . . . ."


327. Id.

328. Id. Sen. Hollings cited the example of the Pan Am World Airways 747 collision with a KLM 747 at the Tenerife airport in the Canary Islands in 1977. Id. A statistical analysis in the Tenerife crash is set forth in a chart reprinted in the Congressional Record. See chart reprinted in 129 Cong. Rec. S2259 (daily ed. Mar. 7, 1983). Sen. Hollings cited authorities who believed that the average settlements arising from this incident were comparatively low because many of the passengers killed were elderly. Sen. Hollings stated, "[s]ince most of these passengers had few if any dependents and limited economic earning potential, the average settlement tended to be unusually low." 129 Cong. Rec. S2249 (daily ed. Mar. 7, 1983).


331. Id.
Recognizing that $109,000 was worth approximately $59,000 in 1966 dollars, which is $16,000 below the limit established by the Montreal Agreement in 1966, Senator Hollings argued that "the claimant's right to full compensation for his loss have [sic] been greatly diminished." Moreover, Senator Lautenberg, also opposed to ratification, suggested that the 100,000 SDR limit was arbitrary and capricious, and therefore could be struck down as such by a court.

Third, Senator Hollings objected to using the SDR as the unit of conversion, since the IMF could modify SDR conversion rates and potentially further decrease the U.S. dollar value of the SDR. Senator Hollings concluded that the Senate "must not shift the risk of downward valuations to our potential American claimants."

Finally, Senator Hollings suggested that the effect of the recent "Bali, Franklin Mint, and Kimpo cases, which would have left the airlines open to unlimited liability, had caused the airlines to support strongly ratification of the Protocols." Noting that "perhaps the rush to ratify the treaties during the lame duck session was with an eye toward the Kimpo decision being handed down," Senator Hollings concluded that the limitation was in the interest of the airlines, rather than the passengers.

b. Elimination of the Willful Misconduct Exception Would Lead to Unsafe Flying Conditions

Senator Hollings vehemently opposed the Montreal Protocols' elimination of the willful misconduct exception. He believed that such an elimination would foster an awareness by the air carriers that their liability could never exceed the limits set by the Montreal Protocols, even in the most flagrant cases of wanton recklessness. This awareness, Senator Hollings feared, might lead to a relaxa-

332. Id.
333. Sen. Lautenberg stated:
   "[I]t is an arbitrary limit, that has little or no relation to the actual damages of each injured person, or the type of conduct of the airline. Our workers compensation schemes have limits too, but they are related to the earnings and real losses of the injured worker. There is some fairness in that system. Unfortunately, there is little fairness in the protocols' limits.

335. Id.
337. Id.
338. Id. Sen. Hollings suggested that the airlines would receive two subsidies upon ratification of the Montreal Protocols. One would be from the passengers, the other from the U.S. government. Id. See also infra notes 350-59 and accompanying text (discussing risk-shifting).
340. Id. Sen. Hollings stated:
   To remove from potential discovery the carelessness—or even recklessness—of airlines, both foreign and domestic, is to thwart one of the two primary goals of the American tort system: Prevention. To limit the possible recovery of an American family... is to destroy the other goal.
tion of safety precautions by the air carriers.\textsuperscript{341}

It is noteworthy that much of Senator Hollings' attack was directed against the no-fault nature of the Montreal Protocols, which would limit recovery even when the airline was at fault.\textsuperscript{342} In international aviation incidents, the adoption of no-fault or absolute liability provisions would benefit the passenger by expediting settlement, increasing certainty of recovery, and reducing legal expenses, all of which would not be possible under a law permitting the carrier to prove its "due care."\textsuperscript{343} The Montreal Agreement, however, had already established no-fault liability in the United States by eliminating the "due care" defense of the carrier.\textsuperscript{344} In fact, no-fault liability had been applied consistently by U.S. courts since the adoption of the Montreal Agreement in 1966, without a noticeable decrease in air safety.\textsuperscript{345} Thus, despite Senator Hollings's assertions, the Montreal Protocols' adoption of no-fault liability was not new, and would not in any way change the existing law in the United States.

c. \textit{The SCP is Inadequate to Fully Compensate Victims of International Air Accidents}

The opponents of ratification strongly opposed the SCP, which would have created a mandatory passenger insurance program adding an additional $200,000 to recovery.\textsuperscript{346} Senator Hollings attacked the SCP proposal as "outrageous and ... a monumental ripoff."\textsuperscript{347} Much of his attack focused on the fact of out tort system, namely compensation. The Montreal Protocols are unique in that they would nullify both goals simultaneously.

\textit{Id.}

\textsuperscript{341} \textit{Id.}

\textsuperscript{342} In the Senate debate, Sen. Hollings confused the concept of "no-fault" liability with the concept of "willful misconduct." For example, he stated, "[e]limination of the issue of fault would likewise eliminate the incentive on the part of international carriers to improve these safety related areas ... [and the fact that the Protocols would not improve safety] is another reason to defeat this no-fault concept." 129 \textit{Cong. Rec.} S2246 (daily ed. Mar. 7, 1983) (emphasis added). The issue of fault, however, was eliminated seventeen years before, with no discernible decrease in safety. \textit{See infra} notes 344-45 and accompanying text. The elimination of fault was adopted entirely for the benefit of the passenger. \textit{See infra} note 345 and accompanying text. Elimination of the willful misconduct exception, however, would indeed seem only to benefit the air carrier. Thus, while Sen. Hollings repeatedly referred to the elimination of fault, he was most likely concerned with the elimination of the willful misconduct exception and its effect on safety.

Sen. Biden of Delaware, also an opponent of ratification, was better able to distinguish between the concepts of fault and willful misconduct. He stated, "[i]f the willful misconduct exception is eliminated, examinations into airline fault will be eliminated. And I feel that this would reduce the incentive for airlines to be safety conscious." 129 \textit{Cong. Rec.} S2278 (daily ed. Mar. 8, 1983).

\textsuperscript{343} Lowenstein & Mendelsohn, supra note 15, at 571.

\textsuperscript{344} \textit{See supra notes} 80-81 and accompanying text.

\textsuperscript{345} \textit{See id.} Numerous U.S. government agencies, including the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB), closely monitor the operation of airlines flying in the United States. This system "has led to an unprecedented safety record for air travel" in the United States. Senate Report, \textit{supra} note 212, at 13.


\textsuperscript{347} \textit{Id.}
that the cost of insurance with a maximum recovery limit of $200,000 under the SCP might exceed four dollars per ticket as a per passenger surcharge, whereas the existing insurance cost for unlimited liability on international flights was approximately fifty-three cents. Recognizing this eight-fold increase in insurance for seemingly less possible maximum recovery, Senator Hollings called the SCP "an obnoxious plan."

Senators Hollings and Biden were also greatly disturbed by what they believed to be a "game of risk-shifting." They feared that ratification of the Montreal Protocols would result in three distinct groups subsidizing the air carriers: U.S. airline passengers, the U.S. government, and manufacturers of aircraft and aircraft parts. The first subsidy would result from the seemingly excessively high per passenger surcharge of four dollars to cover the air carriers' increased insurance costs for the SCP. The second and third subsidies would result from the Protocols' limitation of air carrier liability that would leave many plaintiffs not fully compensated. The senators opposing ratification feared that these plaintiffs would seek recovery from other sources in order to become fully compensated. One such alternative source might be the U.S. government. Referring to the Ninth Circuit's decision in *Bali*, the opponents believed that the adoption of the Montreal Protocols' 100,000 SDR liability limit might still be adjudged an unreasonable impairment of a survivor's right to full compensation, in which case the U.S. government could be liable under the Tucker Act. Another likely target for plaintiffs who were dissatisfied with the Montreal Protocols' liability limits might be the manufacturers of aircraft or aircraft parts. Thus, the Senate opponents were concerned that the Montreal Protocols would shift the risk from international airlines, including foreign airlines, to U.S. airline passengers, the U.S. government, and aircraft manufacturers.

Senator Hollings also objected to the fact that, by means of the first and second provisos, the Senate would be giving to the president and the CAB "carte
blanche authority" to decide whether the SCP was in the public interest. He believed that by withholding ratification of the Montreal Protocols, the Senate would adequately protect its role as a check against the executive branch, as well as benefit U.S. citizens.

d. **Rejection Would Not Impair National Prestige Nor is There a Need For International Uniformity**

The opponents of ratification rejected both the suggestion that the U.S. national interest would be strengthened by ratifying the Protocols, as well as the suggestion that non-ratification would undermine U.S. influence in the area of international aviation law. Senator Hollings suggested that uniform liability limits were not in the national interest or in the interest of U.S. citizens, since "Americans, with one of the highest standards of living in the world, would be ... forced to settle just claims for less compensation than they would dare settle for in the domestic market." Furthermore, Senator Hollings believed that foreign countries and their airlines, not the United States, would be the ones to benefit from the liability limits of the Protocols.

C. **Senate Vote on the Montreal Protocols**

On March 8, 1983, the U.S. Senate voted on Montreal Protocols No. 3 and No. 4. Fifty senators voted in favor of ratification, forty-two against, and one answered "present." Since the requisite two-thirds of the senators present did not vote in favor of ratification, the Senate rejected the Protocols, thereby leaving the international aviation system with respect to air carrier liability in greater confusion and disarray than ever. Not until the U.S. Supreme Court handed down its *Franklin Mint* decision thirteen months later did the situation clarify, at least in the United States.

V. **LIABILITY OF KAL UNDER THE WARSAW CONVENTION**

A. **Background**

Approximately 160 actions have been filed in U.S. courts by the survivors of

---

361. *Id.*
363. *Id.*
364. Sen. Hollings stated, "[t]here is no embarrassment in rejecting these treaties. On the contrary, every Senator should be proud to do so. We were elected to protect America's national interest, not to pawn it away." *Id.*
366. *Id.*
367. See generally supra text accompanying notes 160-91.
passengers killed in the shooting down of KAL Flight 007.\textsuperscript{368} These actions have been consolidated for trial in the U.S. District Court for the District of Columbia.\textsuperscript{369} Although at the time of the KAL incident the law of international air carrier liability was in marked disarray, the confusion disappeared in the United States approximately seven months later when the Supreme Court handed down its \textit{Franklin Mint} decision.\textsuperscript{370} \textit{Franklin Mint} unequivocally declared that the Warsaw Convention remains enforceable in the United States,\textsuperscript{371} and therefore the Warsaw Convention governs in the typical international air accident trial.\textsuperscript{372}

The forthcoming KAL Flight 007 litigation does not promise to be a typical international air accident trial. Because of the unusual circumstances surrounding the case, it is likely that plaintiffs will attempt to circumvent the $75,000 liability limitation of the Warsaw Convention, as modified by the Montreal Agreement.\textsuperscript{373} In determining whether KAL will in fact be subject to unlimited liability, the trial will likely focus on two central issues: first, whether shot-down airliners are covered by the Warsaw Convention; and second, whether any willful misconduct existed on the part of KAL. This section addresses both questions.

B. \textit{Does the Warsaw Convention's Definition of "Accident" Cover Shot-Down Airliners?}

The liability of an airline to its passengers is delineated in Article 17 of the Warsaw Convention, which provides that an airline shall be liable for the death or injury of a passenger if the accident which caused the damage occurred on board the aircraft or in the process of embarking or disembarking.\textsuperscript{374} Thus, Article 17 requires as a condition precedent to liability under the Warsaw Convention a determination that an "accident" occurred and that the accident proximately caused the injury sustained.\textsuperscript{375}

\begin{itemize}
\item \textsuperscript{368} \textit{See In re KAL Disaster of September 1, 1983, M.D.L. No. 565 Misc. 85-0345 (D.D.C. filed Nov. 17, 1983).}
\item \textsuperscript{369} \textit{Id.}
\item \textsuperscript{370} \textit{See generally supra} notes 160-91 and accompanying text.
\item \textsuperscript{371} \textit{See supra} notes 179-80 and accompanying text.
\item \textsuperscript{372} \textit{See generally supra} notes 160-91 and accompanying text.
\item \textsuperscript{373} \textit{See supra} note 76 and accompanying text.
\item \textsuperscript{374} \textit{Article 17 of the Warsaw Convention reads:}
\begin{quote}
The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
\end{quote}
\textit{Warsaw Convention, supra} note 17, art. 17.
\item \textsuperscript{375} \textit{Id.} A determination that an "accident" has occurred is also a precondition to liability under the Montreal Agreement. As a special contract under the Warsaw Convention, the Montreal Agreement incorporates all unamended provisions of the Warsaw Convention. \textit{See supra} notes 74-75 and accompanying text. Since the Montreal Agreement did not amend Article 17, the Warsaw Convention requirements still hold. \textit{See Montreal Agreement, supra} note 70, 31 Fed. Reg. 7302.
\end{itemize}
Unfortunately, the Warsaw Convention does not explicitly define what constitutes an “accident” within the purview of Article 17. There are no U.S. cases which have addressed the question whether the acts of a sovereign nation third party in shooting down an airliner over its airspace constitutes such an accident. If the Warsaw Convention is to apply, however, and in order to find KAL absolutely liable up to a limit of $75,000 per passenger, then the KAL aerial incident must qualify as an accident within the terms of Article 17.

Courts have defined “accident” on several levels. In a general context, “accident” has been defined as “an undesigned, sudden and unexpected event,” or an “unexpected untoward event which happens without intention or design.” The idea that an “accident” arises from an abnormality or malfunction in the operation of the aircraft was supported by another court, which ruled that an injury arising “from ordinary, anticipated and required programmed changes in the aircraft’s operation, all of which were performed purposefully under the careful control of the plane’s crew in the normal and prudent course of flight control is not an accident.” Thus, these definitions all suggest that an “accident” is an unusual or unexpected event.

The shooting down of a civilian airliner would seem to be such an unusual or unexpected event. This determination is supported by the few cases which have attempted to define the meaning of “accident” under the Warsaw Convention.

376. See Article 17 of the Warsaw Convention, supra note 374.

In the context of the operation of aircraft, one court gave the following jury charge:

An accident is an event, a physical circumstance, which unexpectedly takes place not according to the usual course of things. If the event on board an airplane is an ordinary, expected, and usual occurrence, then it cannot be termed an accident. To constitute an accident, the occurrence on board the aircraft must be unusual or unexpected, an unusual or unexpected happening.

DeMarines v. KLM Royal Dutch Airlines, 433 F. Supp. 1047, 1052 (E.D. Pa. 1977), rev'd on other grounds 580 F.2d 1193 (3d Cir. 1978) (absent evidence that aircraft's repressurization as it descended was "unusual or unexpected," there was no "accident" under the Warsaw Convention and the passenger was unable to recover for loss of equilibrium and other injuries purportedly caused by such an incident).

379. Warshaw v. Trans World Airlines, 442 F. Supp. 400, 413 (E.D. Pa. 1977) (routine repressurization of cabin of jet aircraft as it descended from high altitude to land, accomplished in normal and usual fashion without any complications or external disruptions and in accordance with customarily anticipated pre-planned mode, was not an "accident" under Article 17 of the Warsaw Convention as modified by the Montreal Agreement; passenger therefore could not recover damages for deafness occasioned by such repressurization).

Furthermore, the fact that the intentional acts of third parties caused the accident, and not those of the carrier, does not act as a bar to liability of the carrier. Thus, given the fact that hijackings and other acts of international terrorism have been held to be "accidents" within the meaning of Article 17, and given the fact that incidents of less magnitude have been classified as "accidents," it seems logical to extend the definition of the term "accident" under Article 17 to include shot-down airliners.

The KAL aerial incident apparently constitutes such an "accident" within the meaning of Article 17. While flying on an apparently non-military commercial flight, KAL 007 was shot down by the Soviet Union. Clearly, it was an unusual or unexpected event. Therefore, the incident satisfies the definitional requirements of Article 17, and may be classified as an "accident."

Even though the KAL aerial incident may be classified as an "accident" under Article 17, such a classification is merely a precondition to imposing liability under the Montreal Agreement. For the Montreal Agreement to apply, KAL must be a signatory and KAL Flight 007 must have originated, terminated, or stopped in the United States. KAL is a signatory to the Montreal Agreement. Furthermore, Flight 007 originated in New York and refueled in Anchorage. Therefore, the Montreal Agreement clearly governs, and KAL should be liable up to $75,000 per passenger.

C. Did KAL Commit Willful Misconduct?

The Montreal Agreement preserved the Warsaw Convention's "willful misconduct" exception, which provides for unlimited recovery if the plaintiff can

381. See, e.g., Busserl, 351 F. Supp. at 707 ("the innocent victims of wilful acts by [third parties] are to be able to recover from the carrier, even in respect to acts of sabotage to the aircraft. . . . It was the final intent of the parties [contracting at the Montreal Conference of 1966] to render the carriers liable to the innocent victims of such intentional acts [by third parties]."). See also Evangelinos v. Trans World Airlines, 396 F. Supp. 95, 100 (W.D. Pa. 1975), rev'd on other grounds., 550 F.2d 152 (3d Cir. 1977) (en banc) (no attempt was made by the Montreal Agreement to limit the application of an "accident" as defined in Article 17 of the Warsaw Convention to exclude the criminal act of a third party).

382. See supra note 380.

383. See, e.g., Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611 (S.D.N.Y. 1955) (passenger's fall from aircraft after removal of boarding stairs constitutes an "accident").

384. Although KAL Flight 007 was apparently a purely civilian commercial flight, the Soviet Union has charged that its trespass into Soviet airspace was intentional in order to perform military espionage for the U.S. and South Korean governments. See, e.g., N.Y. Times, Sept. 17, 1983, § 1, at 1, col. 4. N.Y. Times, Sept. 6, 1983, § 1, at 1, col. 4.

385. See supra note 375 and accompanying text.


387. See supra note 72.

388. See supra note 79 (discussing Montreal Agreement's definition of international transportation).

389. See generally notes 70-88 and accompanying text (discussing the Montreal Agreement).
establish willful misconduct on the part of the carrier. In order to exceed the $75,000 recovery limit, therefore, the plaintiff must prove that the accident occurred as the result of the willful misconduct of either the airline or its agents.

Several courts have defined willful misconduct under Article 25 of the Warsaw Convention. One court defined it as "the willful performance of an act that is likely to result in damage or willful action with a reckless disregard of the probable consequences." Other courts have required that actual prior knowledge must be found before one may be found liable for willful misconduct. Thus, a determination whether there is willful misconduct in a particular case is a question of fact which must be resolved by a jury, using the standard or definition of "willful misconduct" in the particular court's jurisdiction.

Since it is unclear why Flight 007 was straying over Soviet airspace, a jury would have to take into account the available evidence and the testimony of experts in determining whether there was indeed willful misconduct on the part of KAL. Such willful misconduct would be found if the jury determined either

390. See supra note 37 (text of Article 25 of the Warsaw Convention).
391. Wing Hang Bank v. Japan Air Lines, 367 F. Supp. 94, 96-97 (S.D.N.Y. 1973) (no "willful misconduct" present under Warsaw Convention when package, shipped on international flight, containing $250,000, was stolen from airline's valuable freight storage area, and such storage area was kept under guard, monitored via closed circuit television, and had been robbed only once in prior year).
392. See, e.g., Maschinenfabrik, 562 F. Supp. at 240 (willful misconduct occurs "where an act or omission is taken with knowledge that the act will probably result in injury or damage or with reckless disregard of the probable consequences"); Saaybe v. Penn Central Transportation, 438 F. Supp. 65, 68 n.6 (E.D. Pa. 1977) ("willful misconduct" means that the actor desired to bring about the result that followed, or at least that the actor was aware that it was substantially certain to ensue); Berner v. British Commonwealth Pacific Airlines, 346 F.2d 240, 246 (2d Cir. 1965) (trial court erred in concluding that the Second Circuit does not require, for a finding of willful misconduct, knowledge that damage would probably result); Pekelis v. Transcontinental & Western Air, 187 F.2d 122, 124 (2d Cir.), cert. denied 341 U.S. 951 (1951) ("willful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences... [or] the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission.") (emphasis supplied).
394. The most reliable method for ascertaining the circumstances under which a fatal passenger airplane accident occurred is by reviewing the tapes of the "black box," a recording device positioned in the tail section of U.S.-built passenger aircraft. There are actually two "black boxes," one which records instrument readings and flight data, the other which records cockpit voice transmissions and conversations. The black box is designed to withstand the impact of an airplane crash and ocean depths down to 20,000 feet. The black box emits a "pinging" signal to identify its location, but the water-activated batteries which create the "pinging" are not guaranteed to last more than thirty days. See TIME, supra note 1, at 25; N.Y. Times, Sept. 23, 1983, § 1, at 3, col. 1.

A massive search effort was conducted in the Sea of Japan for the black box of KAL Flight 007 for approximately two months after the crash occurred. The "pinging" signal was heard, but the black box was never located. The United States called off its search for the KAL black box on November 5, 1983. N.Y. Times, Nov. 6, 1983, § 1, at 8, col. 1.
that the pilot flew over Soviet airspace in order to "cut corners" and save time, or that the KAL jet was on a spy mission and its flight over Soviet territory was intentional. If the plaintiffs can produce evidence showing that the pilots failed to re-program the navigational systems, or erroneously entered the wrong coordinates, then it is less clear whether a jury would find willful misconduct under the definitions given above.

VI. Analysis

The law of international air carrier liability has been the subject of extensive debate and analysis in the United States in recent years. A significant misunderstanding of the law continues to exist at the highest levels of U.S. government, however, as illustrated by both the decision of the Second Circuit Court of Appeals in Franklin Mint and by the U.S. Senate debate on the Montreal Protocols. Therefore, an analysis of these recent judicial and legislative actions is appropriate.

A. Franklin Mint

The U.S. Constitution provides that treaties of the United States "shall be the supreme Law of the Land; and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Generally, the Constitution reserves to the executive and legislative branches of the U.S. government the power to make and break treaties. This treaty-making power is exclusive, and the judiciary lacks authority to abrogate a treaty unless it is either unconstitutional or has been superseded by subsequently enacted and conflicting legislation. Yet in Franklin Mint, the Second Circuit Court of Appeals refused to enforce the Warsaw Convention, thereby effectively abrogating the treaty. While the court

396. See supra note 384.
398. U.S. CONST. art. VI, cl. 2.
400. Doe ex dem. Clark v. Braden, 57 U.S. (16 How.) 635, 656 (1854). Specifically, the Braden court stated:

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

Id.

The rule in Braden has been adhered to in subsequent Supreme Court decisions. See Reid v. Covert, 354 U.S. 1, 16-17 (1957); Terlinden v. Ames, 184 U.S. 270, 288-89 (1902); Geofroy v. Riggs, 133 U.S. 258, 267 (1890).
402. The Second Circuit in Franklin Mint concluded that the liability limits of the Warsaw Convention were prospectively unenforceable in U.S. courts. Franklin Mint, 690 F.2d at 311.
believed its deference to Congress to select the appropriate unit of conversion for the Warsaw Convention's liability limits was judicial inaction, it was in fact judicial action since its effect was to essentially repeal an established multilateral treaty.403

The Supreme Court, in reviewing the Second Circuit's decision in Franklin Mint, properly rejected the Second Circuit's ruling that the Warsaw Convention was prospectively unenforceable in U.S. courts. It reached this conclusion by determining that Congress had not intended to abrogate the Warsaw Convention by repealing the Par Value Modification Act.404 Absent such superseding legislation, therefore, only the political branches of the government, not the judiciary, could invalidate an international treaty.405

B. The Montreal Protocols

The U.S. Senate's failure to ratify the Montreal Protocols was motivated, in significant part, by the belief of many senators that recovery under a system of unlimited liability would be far greater than that under the Protocols' system of limited liability.406 This belief was fostered by the Second Circuit's decision in Franklin Mint, which suggested that the Warsaw Convention's liability limitations were no longer enforceable in U.S. courts. What these senators failed to anticipate, however, was the subsequent reversal of the Second Circuit's holding by the U.S. Supreme Court. In Franklin Mint, the Supreme Court clearly reinstated the validity of the Warsaw Convention's liability limitations with respect to both cargo and passengers. Thus, in the aftermath of Franklin Mint, plaintiffs in such international aviation accidents as the KAL Flight 007 incident would be able to recover, at most, $75,000 (unless they could establish willful misconduct). Had the Senate ratified the Montreal Protocols, however, such plaintiffs would have been eligible to receive up to $309,000.

In rejecting the Montreal Protocols, the Senate failed to recognize that many foreign nations do not have as similarly generous a system of tort law as exists in the United States.407 While it is arguably true that in a few instances recovery under U.S. tort law might exceed the $309,000 limit that would have been provided by the Protocols and SCP, it is not true that recovery by U.S. citizens who are forced to litigate in foreign nations will be nearly as great.408 Since the United States has not taken the lead in updating international air carrier liability law, U.S. air travelers forced to litigate under the domestic law of foreign nations

403. Id.
404. Franklin Mint, 104 S. Ct. at 1784.
405. See supra notes 400-01 and accompanying text.
406. See generally supra notes 318-38 and accompanying text.
407. See generally supra notes 286-88 and accompanying text.
408. See generally id.
will in some instances receive absurdly low recoveries.\textsuperscript{409} Even in those nations that still uphold such international air carrier treaties as the Warsaw Convention or Hague Protocol, it is unlikely that recovery would exceed $8300, as provided by the Warsaw Convention, or $16,600, as provided by the Hague Protocol, unless that nation has adopted either the Guatemala City or the Montreal Protocols, in which case maximum recoveries would be $100,000 or 100,000 SDRs, respectively.\textsuperscript{410}

U.S. citizens constitute the majority of the international air traveling public,\textsuperscript{411} and the U.S. government has a responsibility to see that its citizens receive adequate compensation for air disasters whether they occur in the United States or abroad. One of the principal motivating factors of the U.S. delegates for signing the Montreal Protocols was to increase to an acceptable level the recoveries that could be obtained by its citizens worldwide.\textsuperscript{412} While such recoveries might not fully compensate the plaintiff, they are larger than recoveries that a survivor may receive under less generous tort law systems of other nations. The Montreal Protocols also promised to be a starting point for further increases in the air carrier liability limit, and not an end in themselves.\textsuperscript{413} Yet the Senate failed to ratify them, and in so doing apparently disregarded its responsibilities to U.S. citizens who now must litigate abroad or pursue lengthy and expensive litigation in U.S. courts.

The Senate debate of the Montreal Protocols also illustrates confusion by some lawmakers with the interpretation of basic legal terms. The Protocols’ establishment of no-fault liability was often confused with the elimination of the willful misconduct exception.\textsuperscript{414} Furthermore, some of the cited statistics seem to be erroneous. For example, Senator Hollings expressed his disapproval of the SCP because of what he believed was a four dollar per passenger surcharge.\textsuperscript{415} Admittedly, this would be more than the current cost of unlimited liability insurance. Experts in the insurance industry, however, estimate that the actual cost would be closer to two dollars per passenger.\textsuperscript{416} Even if insurance rates were to increase, however, such increases could be justified by the fact that the Montreal Protocols and SCP together would provide greater recoveries across the board for U.S. citizens, and would eliminate lengthy, expensive litigation across the board for U.S. citizens, and would eliminate lengthy, expensive litigation.

\begin{itemize}
\item \textsuperscript{409} See supra note 286 (discussing the Tramontana case).
\item \textsuperscript{410} See, e.g., supra note 245 and accompanying text.
\item \textsuperscript{411} 129 Cong. Rec. S2251 (daily ed. Mar. 7, 1983) (statement of Sen. Hollings: “Each year Americans constitute over 50% of the international traveling public. Americans annually generate over half the revenues that the international airlines receive.”).
\item \textsuperscript{412} Senate Report, supra note 212, at 2-3.
\item \textsuperscript{413} See supra notes 264-67 and accompanying text (discussing the provisos attached to the Montreal Protocols). See also supra notes 310-11 and accompanying text.
\item \textsuperscript{414} See supra note 342.
\item \textsuperscript{415} See supra notes 348-49 and accompanying text.
\item \textsuperscript{416} Senate Report, supra note 212, at 7.
\end{itemize}
with the adoption of the settlement inducement clause. Moreover, even a four dollar surcharge for the SCP does not seem excessive if it could serve as a guarantee of up to $200,000 in case of death and unlimited medical benefits in case of injury. Thus, the benefits of adopting the Montreal Protocols would outweigh the accompanying burdens.

C. Author's Recommendations

The KAL Flight 007 incident illustrates the continuing need to update the law of international air carrier liability. In litigation arising out of that incident, the Warsaw Convention will likely limit KAL's liability to $75,000 per passenger. Such unreasonably low recoveries are clearly not in the best interests of either the United States or its citizens. To remedy the situation, the United States should take two discrete steps.

First, the U.S. Senate should immediately reconsider ratifying the Montreal Protocols in light of the Supreme Court's recent decision in Franklin Mint. In reconsidering ratification, the senators should keep in mind that the Montreal Protocols are not an end in themselves, but rather, an interim step in the United States' ongoing efforts to increase potential recoveries in international aviation accidents, while still remaining a party to an international aviation agreement.

Second, the United States should take steps to arrange yet another international conference on the topic of international air carrier liability. Taking a lesson from the March 1983 Senate debate on the Montreal Protocols, the U.S. delegates to the new conference should recognize that any new agreement, if it is to have a realistic chance of ratification, must contain a liability limitation significantly exceeding $100,000, utilizing the SDR or another internationally agreed upon unit of conversion, for passenger death or injury. This new agreement should also reinstate the willful misconduct exception clause that was eliminated by the Montreal Protocols.

There is no reason to object to the restoration of the willful misconduct clause. There is no longer any need to protect the airlines from potentially debilitating lawsuits since the airline industry is no longer fledgling, and since the airlines are routinely subjected to unlimited liability in U.S. domestic air crash litigation. Furthermore, unlike proving fault, the willful misconduct exception could be raised only at the plaintiff's option. A plaintiff unwilling to undergo lengthy litigation could settle immediately for a substantial sum. Alternatively, the plaintiff who could afford to sit out a lengthy trial might opt to litigate in order to be "justly compensated." By restoring the willful misconduct clause, a new international aviation agreement would appease those who opposed its elimination in the Montreal Protocols on the grounds that its elimination would leave the

417. See supra note 251 and accompanying text.
418. See supra note 305 and accompanying text.
airlines no incentive to be safety conscious. Thus, restoration of the willful misconduct clause would provide substantial recoveries to those in immediate need. Moreover, airlines would still be held responsible for their willful misconduct. As a bargaining point at the new conference, the U.S. delegates could suggest that the willful misconduct clause apply only to flights entering, leaving, or stopping in the United States. This would still cover the vast majority of U.S. air travelers, although such a concession would dilute the desired uniformity of the new agreement.

In sum, a new protocol should be drafted, adopting the SDR as a unit of conversion, adopting a liability limit significantly exceeding $100,000 in value for passenger death or injury, and restoring the willful misconduct exception. The only effective difference between the new protocol and the Montreal Protocols, therefore, would lie in the increased liability limits and the restoration of the willful misconduct clause. A protocol containing all these provisions would likely be acceptable to the U.S. Senate. After the Senate ratifies such a protocol, the United States could then exert its influence to encourage other nations to follow suit. Only then would true uniformity in the law of international air carrier liability be restored.

VII. CONCLUSION

The KAL aerial incident serves as a useful case study by which to examine the multi-faceted issues involved in the law of international air carrier liability and the inadequacies of the current state of the law. There is a need for a uniform standard of air carrier liability on international flights, not to protect the airline industry, but rather to protect the U.S. traveling public. Since U.S. citizens constitute the majority of passengers on international flights, it is the responsibility of the U.S. government to take the lead in developing a new international agreement.

While U.S. tort law allows recovery to the extent that a passenger is injured, most of the world does not function under a similarly generous legal system. Therefore, to protect U.S. citizens traveling abroad from receiving unconscionably low recoveries, the United States must press for a new international protocol modifying the Warsaw Convention. Such a protocol should restore the willful misconduct clause and significantly increase liability limits. It should also permit nations, at their option, to supplement recoveries with a system of insurance not unlike that envisioned by the Montreal Protocols' SCP. Armed with such provisions, the new protocol would guarantee that every plaintiff is compensated to a degree not significantly different than in domestic air crash litigation.

Certainly any limitation of liability is not ideal. An updated international agreement with substantially increased liability limitations, however, would be a significant improvement over the existing law of international air carrier liability.

Steven N. Avruch