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Louis Robert Martinez

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NOTES

ARTICLE 22 OF THE WARSAW CONVENTION AND FRANKLIN MINT V. TWA: A CONFLICT BETWEEN TREATY AND MUNICIPAL STATUTE*

INTRODUCTION

The Warsaw Convention\(^1\) (the Convention) was established in

\(^1\) The author wrote this Note while a second year student at the Cornell Law School. During the Summer of 1983, he worked at Haight, Gardner, Poor & Havens, New York, a law firm that submitted an amicus curiae brief to the United States Supreme Court. During that time, he revised the Note, and used sources made available through the firm. This Note represents the personal views of the author; his conclusions have not changed since he first submitted the Note for publication.

1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. The Warsaw Convention was the result of two conferences held in Paris in 1925 and Warsaw in 1929. Although the United States was not one of the original parties to the Convention, President Roosevelt proclaimed America's intention to adhere to the Convention in 1934. Proclamation of President Franklin D. Roosevelt, 49 Stat. 3000 (1934). After Senate approval, the Convention assumed the status of a treaty, "equal in stature and force to the domestic laws of the United States." Smith v.Canadian Pacific Airways, Ltd., 452 F.2d 798, 801 (2d Cir. 1971) (dismissing suit under Warsaw Convention for lack of treaty jurisdiction over Canadian air carrier). Next to the United Nations Charter, it is the most widely adopted international treaty. A. LOWENFELD, AVIATION LAW, 7-98 (2d ed. 1981) [hereinafter cited as AVIATION LAW]. There have been four subsequent modifications to the Convention. The first was accomplished at the Hague, Netherlands and came to be known as the Hague Protocol of 1955. The United States never ratified the amendment, in large part because of dissatisfaction with the liability limitations. See Lowenfeld & Mendelsonn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497, 512-14 (1967). For the text of the Hague Protocol of 1955, see CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIAL 324-66 (1983). Opposition to the Warsaw Convention and the Hague Protocol developed into pressure for the United States to withdraw from the Convention. On November 15, 1965, the United States filed a Notice of Denunciation. Lowenfeld & Mandelson, supra at 551. The State Department, however, indicated that it would withdraw the notice, which was to take effect in six months, if there was indication that an international agreement would be reached addressing the concerns of the United States. Id. at 551-52. A conference was held at Montreal in 1966 and—despite the threat of withdrawal—members failed to reach agreement on a proposal satisfactory to all parties. Prior to the denunciation taking effect, however, an interim arrangement called the Montreal Agreement was reached among international air carriers. This was the second modification to the Warsaw Convention. The Montreal Agreement is a "special contract" under Article 22(1) of the Warsaw Convention, which provides that carriers and passengers "may agree to a higher limit of liability." The agreement increased the personal injury limits from $8,300 to $75,000 per injury. See Protocol Relating to Certain Amendments to the Convention on International Civilavi...
1929 to limit international air carrier liability and to provide a
degree of uniformity to the fledgling aviation industry. The Conven-
tion created a system of rules to govern the carriage of passengers,
baggage, and cargo in international flights and set uniform standards
applicable to documents and the determination of air carrier liabil-
ity. In Franklin Mint Corp. v. Trans World Airlines, Inc., the Second
Circuit Court of Appeals held that the Warsaw Convention's limits
on liability for loss of cargo are unenforceable in United States
courts. The decision is significant because it is the first case in which
a court has declined to enforce the Convention's liability limits.
Franklin Mint not only abolishes limits on liability for loss of
cargo—it implicitly casts serious doubt on the Convention's limits
for personal injury. The court's holding has a tremendous impact
upon the international aviation community because virtually all
international air carriers are subject to the jurisdiction of the Second
Circuit.

The Convention adopted gold as its unit of conversion for trans-

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2. 690 F.2d 303 (2d Cir. 1982), cert. granted, 103 S.Ct. 3084 (1983).
3. The Second Circuit includes New York City, a major port of entry for interna-
tional air carriers. Under the Warsaw Convention, domestic and foreign international
air carriers are subject to suit in one of four fora. Article 28 provides in part:

(1) An action for damages must be brought at the option of the plaintiff, in
the territory of one of the High Contracting Parties, either before the court of the
domicile of the carrier or of his principal place of business, or where he has a
lating judgments into domestic currencies. Subsequent events in the international monetary system, however, led Congress to rescind the official price of gold in the United States by repeal of the Par Value Modification Act. It was through this official price that awards under the Convention had been calculated by United States courts. The conflict between the treaty and this Congressional action generated confusion and uncertainty as to international air carrier liability limits. Domestic courts, in their efforts to reconcile the conflict, applied different units of conversion in place of gold. In Franklin Mint, the Second Circuit refused to adopt a new conversion standard, and held that the Convention's liability limits for loss of cargo are no longer enforceable in the United States.

This Note first describes the history of the current problem. Second, it discusses the procedural aspects of Franklin Mint. Third, the Note addresses the failure of the Second Circuit to exercise its constitutional obligation to give effect to the Warsaw Convention. Finally, the Note surveys four possible alternatives that could have been used by the court to reconcile the two statutes. It concludes that the court should have adopted the International Monetary Fund's Special Drawing Right as the appropriate unit of conversion.

I

HISTORICAL PERSPECTIVE

The parties to the Warsaw Convention drafted the document in the late 1920s to ensure uniformity and to protect the infant aviation industry from ruinous damage suits and high insurance premiums. Uniformity was thought essential to the industry because the myriad of domestic laws throughout the world created uncertainty about a carrier's potential liability and, ultimately, its operating costs. The place of business through which the contract has been made, or before the court at the place of destination.

Warsaw Convention, supra note 1, art. 28. If any of the above fall within the Second Circuit, the carrier is subject to suit there and the precedent set in Franklin Mint.

4. See infra notes 12-18 and accompanying text.

5. See infra notes 24-30 and accompanying text.

6. See Lowenfeld & Mendelsonn, supra note 1, at 498-99; see also Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), cert. denied, 443 U.S. 922 (1977) (plaintiffs could not recover from air carrier's employees, or from the carrier and its employees together, a sum greater than that recoverable in suit against carrier itself as limited by the Warsaw Convention).

7. Reed, 555 F.2d at 1090. It appears that there was fear of discouraging capital investment in the industry. In a sense, it did not matter what domestic limit was placed upon carrier liability. The absence of a uniform standard induced forum shopping. Thus, an investor could not be sure of the maximum potential liability he would incur or of the costs necessary to comply with the different domestic standards. See Lowenfeld & Mendelsonn, supra note 1, at 499-500.
Convention created a rebuttable presumption of carrier liability in cases of personal injury and damage to or loss of property. Articles 17, 18, and 19 set forth a carrier's liability for personal injury, damage or loss of baggage, and damage caused by delay. Articles 20 and 21 established lack of fault and contributory negligence as affirmative defenses to rebut the presumption of liability. Finally, Article 22 delineated carriers' liability limits both in cases of personal injury and loss or damage to goods.

From its inception, the Convention has used gold as a unit of conversion for calculating the maximum liability of carriers. The drafters agreed to use gold as the standard because, at the time, it provided stability and uniformity, and permitted conversion of awards into national currencies apart from the vagaries of currency fluctuations. The uniform system of conversion aided the international aviation industry by providing carriers and insurance compa-

8. Lowenfeld & Mendelsonn, supra note 1, at 500.
9. Warsaw Convention, supra note 1, arts. 17, 18, 19.
10. Id., arts. 20, 21. The Convention maintained carrier liability on the basis of negligence, but Article 20 shifted the burden of proof to the carrier and required it to show that it had taken all necessary measures to avoid injury or damage. See Lowenfeld & Mendelsonn, supra note 1, at 500.
11. Article 22 of the Convention provides:
   (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 had 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 the 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 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Warsaw Convention, supra note 1, art. 22.
12. A "unit of conversion" or "unit of account" is the method by which international conventions specify, and make fungible, liability limits. Although a ceiling is set on liability in terms of the "unit of conversion," compensation is actually received in national currencies. The Warsaw Convention's unit of conversion enables courts to convert liability limits into domestic currencies and to determine how much a claimant is entitled to recover. See Ward, The SDR in Transport Liability Conversions: Some Clarifications, 13 J. MAR. L. & COM. 1 (1981).
13. Id. at 2.
14. McGilchrist, Carriage by Air: What is a Poincare Gold Franc Worth? 2 LLOYD'S MAR. & COM. L. Q. 164 (1982); see also H. DRION, LIMITATIONS OF LIABILITIES IN INTERNATIONAL AIR LAW 183 (1954); see generally Asser, Golden Limitations of Liability
nies with an accurate measure of their potential liability. Moreover, the system removed the undesirable incentive to "forum shop" for the jurisdiction with the most favorable liability limits. The Convention achieved uniformity by employing the French gold franc\(^7\) (\textit{Poincaré} franc).\(^8\) It thereby ensured that liability limits would be tied to the value of gold.

From 1934—the beginning of United States adherence to the Convention\(^9\)—until 1978, domestic and foreign courts encountered few problems setting liability limits and converting awards into domestic currencies. Congress first set the value of gold at thirty-five dollars per troy ounce.\(^20\) In 1945, the United States became a mem-

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15. In conveying the Warsaw Convention to the Senate in 1934, Secretary of State Cordell Hull remarked:

   *It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to transportation charges.*

16. The Brussels Convention illustrates the problems encountered when a Convention does not specify liability limits in terms of a stable unit of account. See \textit{International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924}, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 [hereinafter cited as Brussels Convention]. The Brussels Convention set its liability limits in monetary units based on their gold value converted by pounds sterling. The signatories were permitted, however, to provide in their municipal legislation an amount in domestic currency equivalent to the sterling amount at the time of legislation. Subsequent changes in the exchange rates between the domestic currencies and the pound sterling destroyed the equality of liability limits among the signatories. Thus, when an injured party found that his bill of lading was governed by the laws of more than one signatory, he had an incentive to litigate in the country having the highest liability limits. See \textit{Asser, supra} note 14, at 647-48.

17. The Convention established that liability limits mentioned within the article "shall be deemed to refer to the FRENCH FRANC consisting of 65 1/2 milligrams of gold at a standard of fineness of nine hundred thousandths." \textit{Warsaw Convention, supra} note 1, art. 22, § 4.

18. The \textit{Poincaré} franc was named for the French Prime Minister under whose administration the franc was defined as "65.5 milligrams of gold of millesimal fineness nine hundred." \textit{Asser, supra} note 14, at 645. It has been employed in "all gold clause limitations of liability provided for in multilateral conventions concerning transportation by sea or by air, concluded after 1924." \textit{Id.} at 645-46. \textit{See generally McGilchrist, supra} note 14.


ber of the International Monetary Fund (IMF), and, under the Bretton Woods Agreements, promised to maintain the value of U.S. dollars in gold. The pronouncement reaffirmed the stability of gold and, thus, its appropriateness as a unit of conversion, because the dollar was the primary international reserve currency.

By the early 1960s, a chronic balance-of-payments deficit emerged in the United States and the attractiveness of the dollar waned. Distrustful of the international monetary situation, speculators exchanged dollars for gold at an ever increasing rate, thereby depleting world gold reserves. In 1968, the central banks of the United States, the United Kingdom, the Federal Republic of Germany, Belgium, Italy, Switzerland, and the Netherlands agreed to discontinue the supply of gold to private markets. In effect, this action established a two-tier system of gold pricing: one set by market forces, the other set by the official price formula of the Bretton Woods Agreements. Despite these efforts, United States gold reserves spiralled downward while the balance-of-payments deficit soared. In 1971, the United States informed the IMF that it was withdrawing its commitment to maintain the value of dollars in gold.


22. At the Bretton Woods Conference the participants adopted a system whereby each country would express the par value of its currency "in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944." G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 177 (1977). In the Articles of Agreement of the IMF, each member assumed an obligation to "maintain the value of its currency within a margin of one per cent of its par value." Id. The United States achieved this objective by agreeing to buy and sell gold freely at the par value; the other members met their commitment by ensuring that transactions in their currencies were effected within one per cent of their par value in terms of the U.S. dollar. Thus, the system depended greatly upon the United States freely buying and selling gold at its par value. See id.; see also Gold, Gold in International Monetary Law: Change, Uncertainty, and Ambiguity, 15 J. INT'L L. & ECON. 323, 326-27 (1981).

23. See P. SAMUELSON, supra note 21, at 670.


25. See Asser, supra note 14, at 650.

26. See P. SAMUELSON, supra note 24, at 721.

27. See Asser, supra note 14, at 650; see also G. MILLER, supra note 22, at 178.

28. G. MILLER, supra note 22, at 178. For a discussion of the resultant two-tier system, see Gold, supra note 22, at 340-44.

29. See Asser, supra note 14, at 651.

30. See Gold, supra note 22, at 348. This action led to the demise of the par value system which had been established pursuant to the IMF Articles. See supra note 22. Soon afterwards, other industrialized nations followed suit and suspended their obligation to maintain the par value of their currencies. See Asser, supra note 14, at 651.
The dollar crisis created serious doubts about the suitability of gold as a stable and uniform monetary standard. This led the IMF in 1978 to abolish the official price of gold and to substitute the Special Drawing Right (SDR) as the Fund's reserve asset and unit of conversion. The United States took similar action and abolished gold's official price through the repeal of the Par Value Modification Act. Gold thus became a commodity subject to a fluctuating market price.

Although Congress did not specifically focus upon the Warsaw Convention in repealing the official price of gold, its action plainly affected the status of the treaty's unit of conversion. With the dramatic change in the international monetary system, problems with the Convention's liability limits soon became apparent. Gold could no longer provide the stability and uniformity required of a unit of conversion. Floating exchange rates and the fluctuating free market price of gold presented courts with difficult choices when called upon to convert the Convention's liability limits into national currencies.

Before the abandonment of the official price of gold, the Convention's signatories met in Montreal to discuss the future role of gold and its potential impact on the treaty. From that meeting emerged the Montreal Protocols (Protocols), in which the parties agreed to substitute the IMF's SDR as the Convention's new unit.

31. The Special Drawing Right is an international unit of account established by the IMF in 1969 to facilitate transactions among its members. The value of one SDR is determined by a basket of five currencies. For a discussion of the SDR, see infra notes 158-83 and accompanying text.

32. Under the Jamaica Accords of 1976, the IMF formulated a plan to introduce the SDR as the Fund's reserve asset. The plan was approved by the members and became effective April 1, 1978. See International Monetary Fund, Proposed Second Amendment to the Articles of Agreement of the International Monetary Fund: A Report by the Executive Directors to the Board of Governors (1976), reprinted in 15 INT'L LEGAL MATERIALS 501 (1976); Franklin Mint, 690 F.2d at 308; see generally, Edwards, The Currency Exchange Rate Provisions of the Proposed Amended Articles of the Agreement of the International Monetary Fund, 70 AM. J. INT'L L. 722 (1976).


34. For a discussion of the official price of gold as a unit of conversion and arguments in favor of its use notwithstanding its repeal, see infra notes 137-57 and accompanying text.

35. See generally Fitzgerald, supra note 1; AVIATION LAW, supra note 1.

36. For a discussion of the use of the SDR within the Warsaw Convention, see infra notes 158-83 and accompanying text.
of conversion.\footnote{37} That measure was adopted because the SDR seemed to adhere most closely to the intent of the drafters. The Protocols were first submitted to the Senate in 1977,\footnote{38} but to this date they have not been ratified.\footnote{39} It is important to note, however, that rejection of the Protocols has been based upon the issue of liability limits for personal injury, not upon the SDR issue.\footnote{40}

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37. In Montreal, the United States took the lead in proposing the adoption of the SDR and signed Protocols Nos. 3 and 4. \textit{See} \textit{Aviation Law}, supra note 1, at 7-171. Protocol No. 3 raised the liability limits for personal injury or death to approximately $120,000, regardless of airline fault. Responding to the strong resistance to liability limits that exist in some circles, the Protocol permits each nation to establish a supplemental compensation plan to augment the basic limit. Pursuant to this provision, in the United States the Civil Aeronautics Board approved a plan providing an additional $200,000 of recovery for loss of life. Passengers pay a two dollar per ticket surcharge for the additional coverage. Protocol No. 4 amends and updates the cargo provisions of the Convention and adopts the most recent rules on cargo documentation and liability limits in cargo cases. Moreover, it sets the liability limits at 17 SDRs (approximately $20 per kilogram of cargo). \textit{See} Leigh, \textit{The Montreal Protocols to the Warsaw Convention on International Carriage by Air}, 76 Am. J. Int'l L. 412, 413 (1982). One commentator observed that "the new Warsaw limit, [using the SDR, was] intended to be as faithful a translation as possible of... Poincaré francs at the 'old' official price of gold." McGilchrist, \textit{Four New Protocols to the Warsaw Convention}, L. Mar. & COM. L. Q. 186, 187 (1976).


40. The liability limit for injury or loss of life presently is $75,000 per passenger, pursuant to the Montreal Agreement. Under the agreement there is no limitation on liability if the airline is guilty of willful misconduct. Thus, injured parties or heirs may recover awards in excess of the $75,000 limit if they can prove willful misconduct on the part of the carrier. Montreal Agreement, supra note 1. In contrast, the Montreal Protocols raise liability limits to approximately $317,000 ($117,000 of basic coverage plus $200,000 from the supplemental plan) but eliminate the willful misconduct exception. \textit{See} Leigh, supra note 37, at 413-17; \textit{See also} Wall St. J., Mar. 9, 1983, at 5, col. 1. Proponents of the Protocols argue that they would bring airline liability up to an acceptable minimum level of compensation for loss of life. Moreover, the Protocols would ensure quick and reliable recoveries through a settlement inducement clause designed to force airlines to settle claims within six months. Finally, advocates contend that 85% of all judgments would be covered by the $317,000 ceiling. Individuals who desire greater coverage would be expected to provide for it with private insurance. Accordingly, the Montreal Protocols are a worthwhile trade-off for participating in the Warsaw Convention. \textit{See} Leigh, supra note 37, at 414-15.

Opponents level a variety of criticisms at the proposed change. For example, Senator Ernest F. Hollings observes that under the Protocols, airline gross negligence or even willful or blatant culpability would not matter in recovering damages. Furthermore, American passengers on international flights would receive inadequate awards because a wage earner's lifetime earnings would far exceed his potential recovery. Hollings argues that establishing liability limits in favor of the airlines encourages suits against the government for air traffic control negligence and suits against aircraft manufacturers. Finally, the Senator notes that removing the willful misconduct exception does violence to the fundamental principle of tort law "that a wrongdoer pay for all the damages caused by his deliberate and knowing actions." Hollings, \textit{The Montreal Protocols: A
Not surprisingly, foreign municipal courts faced with this problem have reached divergent results. Some have taken the view that the treaty's unit of conversion should be the modern French franc. Others have held that the SDR will be the unit of conversion. Still others have utilized the free market price of gold, or the official

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41. See, e.g., Judgment of Jan. 31, 1980, Cour D'appel, Paris, 1980, Recueil Periodique et critique II, remanded March 7, 1983, Cour de cassation, Recueil Periodique et Critique I, 23 (Chamie v. Egyptian) (Translation on file at the offices of the Cornell International Law Journal). In Chamie the plaintiff sought to recover the value of three pieces of baggage lost on a flight between Paris and Damascus, via Cairo. She estimated the loss at 9,517 Lebanese pounds, but could not obtain payment. The airline offered to settle the claim at $20 per kilogram, invoking Article 22 of the Warsaw Convention. In determining what conversion factor to apply to the claim, the appellate court considered an array of alternatives and concluded that the new franc in current use could be regarded as equivalent in value to the French franc of 1926 without reference to gold. The court felt that the current franc, as the successor to the Poincaré franc, must be used as the new unit of conversion. For a discussion of the case, see McGilchrist, supra note 14, at 167.

42. In Judgment of November 14, 1978, Corte de cassazione, (Rome) (Court of Last Appeal) (Linee Aeree Italiane v. Riccioli) (translation on file at the offices of the Cornell International Law Journal), the Italian court considered the question of which conversion factor to apply in construing the Warsaw Convention. Plaintiff brought an action to recover compensation for personal injuries sustained during a crash-landing. The court found that it was no longer possible to determine the ratio between the gold content of the lira and that of other currencies. This presumably was because gold no longer has an official value on the world market. The court, however, was able to convert easily the value of the Poincaré franc into Italian lira using the SDR as the conversion factor. The court felt that this method best reflects the intention underlying the Warsaw Convention. Similarly, in Judgment of May 1, 1981, Hoge Raad de Nederlanden, Rechtspraak van de Week 321 (May 30, 1981) (Sup. Ct. of the Netherlands) (The Netherlands v. Giant Shipping Corp.) (Translation on file at the offices of the Cornell International Law Journal), the court found the SDR to be the most acceptable conversion factor. The court construed the Brussels Convention, supra note 16, which expresses maritime liability limits in Poincaré francs. The Brussels Convention establishes uniform rules governing the liability of maritime carriers engaged in international transportation. In finding the SDR the proper unit of conversion, the court felt that the suitability of the franc as a generally accepted calculation unit for the determination of international uniform liability limits has been lost. The court found the SDR to be the clear successor to gold as the international unit of conversion and consequently adopted it for purposes of the Brussels Convention. For a discussion of this case, see McGilchrist, supra note 14, at 166.

Recently, two Austrian lower courts also have applied the SDR as the proper conversion factor in construing the liability limits of the Warsaw Convention. See Judgment of June 30, 1983, District Court of Linz, Austria, 1983 (Breitlinger Gmbb v.Austrian Airlines); Judgment of June 27, 1983, District Court of Vienna, Austria, 1983 (Kislinger v. Austrian Airtransport) (Translations on file at the offices of the Cornell International Law Journal).

43. A case cited frequently in support of the free market price of gold is Judgment of Feb. 15, 1974, Court of Appeals, 3rd Dept., Athens, 1974 (Zakoupolos v. Olympic Airways) (Translation on file at the offices of the Cornell International Law Journal). In Zakoupolos, an appeal was taken against the court of first instance which had converted the Warsaw liability limits into the domestic currency using the free market price of gold. The appellate court upheld the decision, based on the debates at the Hague Conference, concluding that the parties intended to use the market price of gold since the official price of gold cannot vary. Commentators argue that the minutes of the Hague Conference do not support the court's conclusion. See Barlow, supra note 1, at 21. For a discussion of
price of gold.\footnote{44} Similar confusion has arisen in the United States. Despite the Civil Aeronautics Board's espousal of the use of the "last official price of gold,"\footnote{45} American courts have differed in their selection of a unit of conversion. The United States District Court for the Southern District of Texas recently adopted the free market price of gold as the unit of conversion.\footnote{46} The Southern District of New York has employed the French franc,\footnote{47} while other courts in New York and Illinois have selected the last official price of gold.\footnote{48}

\section{FRANKLIN MINT CORP. v. TRANS WORLD AIRLINES, INC.}

Franklin Mint Corporation filed suit in federal district court against Trans World Airlines (TWA) to recover the value of cargo which was delivered to the carrier but which never arrived at its destination.\footnote{49} Although the shipment contained a large quantity of valu-

\footnote{44} For a discussion of court decisions in India and France which upheld use of the official price of gold as the Warsaw Convention's conversion factor, see Barlow, \textit{supra} note 1, at 22-23; McGilchrist, \textit{supra} note 14, at 166; Asser, \textit{supra} note 14, at 652.


\footnote{46} In Boehringer Manheim Diagnostics, Inc. v. Pan American World Airways, 531 F. Supp. 344, 349 (S.D. Tex. 1981), \textit{appeal docketed}, No. 81-2519 (5th Cir. 1982), plaintiff sought to recover against defendant airline under the Warsaw Convention for damage to personal property that allegedly occurred during shipment. The court concluded that the free market price of gold is the proper unit of conversion. "Allowing defendant to limit its liability under the Convention based on the now-abolished 'official' gold price of $42.22 an ounce would perpetrate a legal fiction of the purest kind." The Fifth Circuit will likely reserve judgment on the appeal, pending the Supreme Court's resolution of the conversion factor issue in Franklin Mint.

\footnote{47} Kinney Shoe Corp. v. Alitalia Airlines, 15 Av.Cas. (CCH) ¶ 18,509, 18,513 n.9 (S.D.N.Y. 1980) (The court took judicial notice of the valuation of the current French franc at $.24 on October 2, 1980 and, without explanation, applied this as the conversion unit).

\footnote{48} Some courts have followed the current CAB interpretive orders, see \textit{supra} note 45, and have applied the last official price of gold as the conversion unit. See \textit{In re Aircrash Disaster at Warsaw, Poland}, 535 F. Supp. 833 (E.D.N.Y. 1982), \textit{aff'd on other grounds}, 705 F.2d 85 (2d Cir. 1982); Deere & Co. v. Duetsche Luftansa, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982); Maschinenfabrik Kern v. Northwest Airlines Inc., 17 Av. Cas. (CCH) ¶ 18,340 (N.D. Ill. 1983).

able coins. Franklin Mint made no special declaration of value at the time of delivery. The parties agreed that the action was covered by the Warsaw Convention and that TWA was liable under Article 18. Because there had been no special declaration of value, TWA sought to limit its liability under Article 22. Difficulty arose, however, in establishing a basis for converting the damage award into U.S. dollars. Franklin Mint urged the court to convert the recovery into dollars using the free market price of gold. TWA argued that the court should adopt one of three other conversion units: (1) the Special Drawing Right of the International Monetary Fund; (2) the last official price of gold in the United States; or (3) the exchange value of the modern French franc.

The district court held that although it found the arguments in favor of the SDR persuasive, it was compelled to adopt the last official price of gold in the United States as the conversion unit. The court's brief opinion deferred to the expertise of the Civil Aeronautics Board, which espouses this method.

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50. Id. at 1289. Franklin Mint fixed the full value of the cargo at $250,000.
51. Id. For transporting the cargo, TWA charged $544.96.
52. Id. Article 18 of the Convention provides:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of or damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery, or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Warsaw Convention, supra note 1, art. 18.
53. 535 F. Supp. at 1289. For the provisions of Article 22 see supra note 11.
54. 535 F. Supp. at 1289. For a discussion of the four proposed alternatives, see infra notes 121-83 and accompanying text.
55. 535 F. Supp. at 1289.
56. Id. The court reasoned:

TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Id. For a discussion of the official price of gold, see infra notes 137-57 and accompanying text.
57. See supra note 45 and infra notes 141-42 and accompanying text.
The Court of Appeals for the Second Circuit upheld the district court's use of the last official price of gold as a basis for conversion in the instant case.\(^5\) Notwithstanding the disposition of the case at hand, the court found the Warsaw Convention's limits on liability for loss of cargo unenforceable in United States courts.\(^5\) The ruling was prospective and applied to events creating liability sixty days after the decision.\(^6\)

Franklin Mint presented the court with the opportunity to establish a unit of conversion for claims arising under the Warsaw Convention within the Second Circuit. The court could have prospectively affirmed the standard set by the district court, chosen one of the alternatives proffered by the parties, or devised a new standard. Instead, it held invalid the liability limits of the Convention.

In its analysis, the Second Circuit focused on the inadequacies of the suggested alternatives and on its perceived inability to make a selection even if an appropriate unit of conversion were available.\(^6\) The court concluded that adoption of any one of the alternatives would be inappropriate and against the express purpose of the Convention.\(^6\) The court noted that for almost two generations liability limits had been easily ascertainable through a simple formula using the official price of gold. But "[a]n essential ingredient of that formula [had], as a consequence of international action followed by domestic legislation, ceased to exist."\(^6\) The court next considered its power to select, as a matter of policy, a new unit of conversion. It reasoned that because Congress explicitly abandoned the gold standard and had not substituted another standard, United States courts could not assume a legislative role and impose a new unit of conversion.\(^6\)

\(^{58}\) 690 F.2d at 312.
\(^{59}\) Id. at 311.
\(^{60}\) Id. at 311-12.
\(^{61}\) See id. at 308-11.
\(^{62}\) See id. at 305-06. In rejecting each of the four proffered alternatives, the court stated:

[T]here are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by Congress. [citations omitted]. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by the body and having no basis in the convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

\(^{63}\) Id. at 305-06.
\(^{64}\) Id. at 311.

\(^{64}\) According to the court's analysis, "treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United
A critical factor in the decision is the court's awareness of the confusion plaguing the Warsaw Convention's liability limits. The court noted that the lack of an internationally agreed upon unit of conversion has caused disarray among foreign and domestic courts. The court refused to add to the existing confusion by introducing yet another conversion standard for the Second Circuit. By finding that it had no authority, from either the Convention or domestic law, to select a new unit of conversion, the Second Circuit highlighted the seriousness of the problem and attempted to set the stage for prompt congressional action.

III
ANALYSIS

Four factors undermine the Second Circuit's holding and analysis in *Franklin Mint*. First, the conflict between the Warsaw Convention, a treaty of the United States, and the repeal of the Par Value Modification Act did not constitute an irreconcilable difference between two statutes of the United States. Consequently, the court had a duty to construe them consistently and thereby to give effect to both laws. Second, the court lacked the power to declare the Convention's liability limits unenforceable in United States courts. Treaty abrogation and modification are within the exclusive domain of the executive and legislative branches of government. Third, the Second Circuit failed to give effect to the intent of the Convention's drafters. Finally, the court's decision undermines a system that is vital to the international aviation industry and to international commerce in general.

A. DUTY TO GIVE EFFECT TO BOTH STATUTES

The Second Circuit violated its duty to interpret two statutes of the United States consistently. As a treaty of the United States, the Warsaw Convention is part of the law of the land, equivalent to an

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65. 609 F.2d at 309.

66. At the time *Franklin Mint* came before the Court of Appeals for the Second Circuit, the Montreal Protocols were scheduled for debate on the Senate floor. The Second Circuit's decision appears, in part, to have been a prelude to the subsequent Senate vote; a plea to the legislative branch to adopt the Protocols which have been languishing since 1977. Adoption of the Montreal Protocols would have ended the confusion because they substitute the SDR as the unit of conversion. As subsequent events revealed, the attempt to influence the vote, if indeed such was the court's intent, failed because the Senate did not adopt the Protocols. For a discussion of the Montreal Protocols, see supra note 40.
When Congress enacts a law that conflicts with an existing treaty, a problem of enforcement arises. The primary difficulty is encountered within municipal courts when the issue becomes which law to apply. The Supreme Court addressed this problem in *Whitney v. Robertson* and held that courts must strive to give effect to both laws. Only if the two are totally inconsistent will the more recent control.

In *Franklin Mint*, the Second Circuit faced such a conflict. The court was confronted with two seemingly inconsistent statutes: (1) the Warsaw Convention; and (2) the repeal of the Par Value Modification Act. While the abolition of the official price of gold conflicted with the operation and language of the Convention, the Second Circuit could have construed the statutes consistently and given effect to both. In fact, under *Whitney*, the court had a duty to see that both mandates were fulfilled. There was no irreconcilable conflict between the treaty and the municipal legislative act. In repealing the Par Value Modification Act, Congress did not give any indication that it sought to make the liability limits of the Warsaw Convention unenforceable in United States courts. Two conclusions can be drawn: (1) that Congress intended to repeal the use of the official price of gold; and (2) that Congress intended that the United States continue to fulfill its treaty obligations under the Warsaw Convention. Thus, the court, pursuant to *Whitney*, was obli-

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67. Generally, a treaty is a contract between two or more states which is executed by the sovereign power of the parties. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (upholding validity of treaty between Spain and the United States). In the United States, treaties are part of domestic law. The Constitution states that “all Treaties made... under the Authority of the United States, shall be the Supreme Law of the Land.” U.S. Const. art. VI, cl. 2. They are considered equivalent to acts of the legislature when their provisions require no legislation to make them operative. *Foster*, 27 U.S. (2 Pet.) at 314. Treaties with such provisions are called “self-executing.” For a discussion of self-executing treaties, see L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION, 156-61 (1972). The Warsaw Convention is a self-executing treaty. It required no legislative action to become effective in 1934. Thus, it became part of the law of the land on adoption. See *Indemnity Insurance Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944) (Warsaw Convention found to be self-executing based on its terms).

68. 124 U.S. 190 (1888) (Court construed provisions of the treaty of 1867 with the Dominican Republic in an action to recover duties alleged to have been exacted illegally).

69. *Id.* at 194.

70. *Id.*

71. See *supra* notes 33-34 and accompanying text.

72. See *infra* notes 144-49 and accompanying text. An express indication to the contrary clearly would have made the statute and the Warsaw Convention irreconcilable and would have required the application of rule that the more recent law is controlling. See *supra* text accompanying note 70.

73. See *infra* notes 148-49 and accompanying text.

74. The Department of State still regards the Warsaw Convention as a binding international agreement. See U.S. DEP'T OF STATE, TREATIES IN FORCE 207-08 (1982) there-
gated to select an alternative unit of conversion that would give effect to both statutes.\textsuperscript{75}

The court's decision was also inconsistent with other precedents requiring that the intent to modify or abrogate a treaty be clearly expressed on the face of the statute. In \textit{Lem Moon Sing v. United States},\textsuperscript{76} the Supreme Court declared that "it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction."\textsuperscript{77} The Court reiterated this doctrine in \textit{Cook v. United States},\textsuperscript{78} when it stated that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."\textsuperscript{79}

In the light of these principles, the Second Circuit violated its duty to interpret the repeal of the Par Value Modification Act consistently with the Warsaw Convention. If Congress had intended to render the liability limits of the Convention unenforceable, it could have stated its intention expressly. "[T]he intention to abrogate or modify a treaty is not . . . lightly imputed to the Congress."\textsuperscript{80} The Second Circuit had an available alternative that would have been consistent with the purposes of both statutes and would have prevented the confusion that its decision engendered.\textsuperscript{81}

\section*{B. Power to Declare the Treaty Unenforceable}

The Second Circuit does not have the power to declare the Warsaw Convention’s liability provisions unenforceable. The United States Constitution reserves to the executive and legislative branches the power to make treaties,\textsuperscript{82} but it does not indicate how they may be terminated. In \textit{The Amiable Isabella},\textsuperscript{83} however, Justice Story set forth the principle that "the obligations of [a] treaty [cannot] be changed or varied but by the same formalities with which they were

\textsuperscript{75} The parties in the suit offered three alternatives to the last official price of gold. For discussion of each, see \textit{infra} notes 122-83 and accompanying text.

\textsuperscript{76} 158 U.S. 538 (1895).

\textsuperscript{77} \textit{Id.} at 549.

\textsuperscript{78} 288 U.S. 102 (1933).

\textsuperscript{79} \textit{Id.} at 120.

\textsuperscript{80} Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934) (holding that, whenever possible, subsequent acts of Congress are to be construed consistently with treaty provisions to avoid abrogating or modifying a treaty).

\textsuperscript{81} See \textit{infra} notes 158-83 and accompanying text.

\textsuperscript{82} U.S. CONST. art. II, § 2, cl. 2 provides:

"[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur. . . ." \textit{Id.}

\textsuperscript{83} 19 U.S. (6 Wheat.) 1 (1821).
introduced; or at least by some act of as high an import, and of as unequivocal an authority." In another instance, the Supreme Court held that "courts of justice have no right to annul or disregard . . . [treaty] provisions, unless they violate the Constitution . . . ." Accordingly, it is the judiciary's duty to interpret and administer treaties in conformity with their terms.

Subsequent decisions have expanded upon this doctrine and have established a degree of flexibility in courts' powers to interpret and apply treaties. Some have held that a treaty's purpose should not be thwarted by a change in circumstances. "For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787." Others have stressed that the provisions of a treaty "should never become a 'verbal prison'." They should be "liberally construed so as to effect the apparent intention of the parties."

The principles enunciated by these authorities establish that, absent a violation of the Constitution or an irreconcilable conflict between a treaty and a subsequent statute, courts should not declare a treaty provision unenforceable. Even when there has been a violation of treaty obligations by another signatory, it is the prerogative of the executive and legislative branches to determine when a treaty is no longer binding on the United States.

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84. Id. at 75.
85. Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (annex to treaty held as valid provision of treaty, absent constitutional infirmity, where both sides ratified the treaty including the annex); see also Whitney, 124 U.S. at 194-95; Terlinden v. Ames, 184 U.S. 270 (1902) (holding that question of whether power remains in foreign state to carry out its treaty obligations is for the political departments to decide, not the courts).
88. Id.
89. Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966) (construing venue provision relating to airline's place of business to include airlines which confirm through foreign offices but maintain offices in the United States).
90. Nielsen v. Johnson, 279 U.S. 47, 51-52 (1929) (treaty construction by courts need not be as liberal when treaty conflicts with state, as opposed to federal, statute).
91. See supra note 85 and accompanying text.
92. See supra notes 68-70 and accompanying text.
93. For example, in Charlton v. Kelly, 229 U.S. 447 (1913), petitioner appealed from a judgment dismissing a petition for a writ of habeas corpus and remanding for extradition to Italy. The petitioner sought to block the extradition on the grounds that Italy had refused to surrender its nationals to United States authorities pursuant to an extradition treaty signed by both countries. The Court held that although Italy's actions might render the treaty denounceable by the United States, they did not render it void and of no effect. It found that where the Executive elects to waive any right to free itself from the obligations of a treaty, it is the duty of the courts to give effect to the Executive's will.
In *Franklin Mint*, the Second Circuit did not address the constitutionality of the Warsaw Convention. Nor was the court confronted with an irreconcilable conflict between a treaty and a municipal statute. The court, therefore, was obliged to enforce the Convention and to find a suitable unit of conversion that would give effect to both mandates.

In its attempt to avoid infringing on the legislature, the Second Circuit did precisely what it sought not to do. By holding that the Convention liability limits for loss of cargo are unenforceable in the United States, the court made a pronouncement which falls squarely within the domain of Congress. The court failed to recognize that it had the power to select a suitable unit of conversion. Such a selection would not have violated the separation of powers doctrine; rather, it would have been in conformity with the judiciary's role of reconciling statutory differences and with well-settled principles of treaty interpretation.

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95. See *supra* notes 67-81 and accompanying text.

96. The United States has not expressed a desire to abandon its obligations under the Warsaw Convention. See *infra* note 106 and accompanying text.

97. In a footnote, the Second Circuit explained its position as follows:

Given the lack of an internationally agreed upon standard of conversion, it might be argued that the convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for 'judicial cognizance' (quoting *Whitney v. Robertson*, 124 U.S. at 194). They belong to the executive and legislative departments because they are more properly the domain of 'diplomacy and legislation, . . . not . . . the administration of laws' (quoting *Whitney*, 124 U.S. at 195).

690 F.2d at 311 n.26.

98. In addition to the cases already mentioned where courts have applied a conversion standard, *supra* notes 41-44 & 46-48 and accompanying text, opinions have been rendered on numerous other issues not addressed specifically by the treaty. For example, in *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the Court of Appeals for the Fifth Circuit considered the issue of whether a charter flight was governed by the provisions of the Warsaw Convention. The plaintiff argued that because the Convention was silent on the matter, the drafters must have intended to exclude charter flights from its coverage. In rejecting this argument and recognizing the broad purpose of the Convention to limit air carrier liability, the court reasoned: "[i]f the Warsaw framers intended to create an exception for charter flights it is difficult to see why they did not include a specific provision in the Convention. . . ." *Id.* at 329.

In *Reed*, 555 F.2d at 1089, the Second Circuit faced the issue of whether plaintiffs could recover, from the air carrier's employees, a sum greater than that permitted by the Convention. In construing the purpose of the treaty, the court concluded that the liability limitation of $75,000 per passenger applied to employees as well as to carriers and
C. Duty to Interpret the Convention Consistent with the Intent of the Parties

The Second Circuit failed to interpret the Warsaw Convention in accordance with the intent of its drafters. The decision in Franklin Mint disregarded the established principle that treaties are to be construed liberally to give effect to the intention of the parties. It also gave little consideration to the conduct of the signatories subsequent to the ratification of the treaty.

The drafters sought to establish a uniform system of rules which would govern international air commerce. They wanted to limit air carrier liability and formulated Article 22 for that very purpose. Subsequent amendments to the Convention reveal that although there has been some discontent, the parties have consistently supported liability limits. In addition, present international

that the limit was absolute. The court stated: "[t]o permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine [the] purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits." Id. at 1089.

The court's reasoning in Franklin Mint endangers not only the Warsaw Convention but also all international agreements. It is unreasonable to expect the drafters of treaties to expressly state all possible permutations that may become troublesome in the future. Moreover, to require that the legislature make a pronouncement on every change that occurs subsequent to treaty ratification is equally unreasonable. The legislative process often is too slow to respond to the vicissitudes of international law. To require this of Congress would virtually paralyze the United States' ability to meet its international obligations.

99. One of the earliest pronouncements of this principle was made by Justice Story in The Amiable Isabella, 19 U.S. (6 Wheat.) at 71:

"This 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, anymore 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 stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

See also Neilson v. Johnson, 279 U.S. at 51-52 (1929); Valentine v. United States, 299 U.S. 5, 10 (1936) (finding that it was not the intention of the drafters of an extradition treaty between the United States and France to give the executive branch broad discretion to extradite United States citizens); Sumitomo Shoji of America v. Avagliano, 475 U.S. 176, 185 (1982) (friendship, commerce and navigation treaty between Japan and the United States held not intended to include wholly owned local subsidiaries of foreign companies).

100. In Day, 528 F.2d at 35, the court observed: "The conduct of the parties subsequent to ratification of a treaty may . . . be relevant in ascertaining the proper construction to accord the treaty's various provisions." See also Pigeon River Improvement, Slide & Boom Co., 291 U.S. at 158-63.

101. See supra notes 6-7 and accompanying text.

102. See supra note 11.

103. See supra notes 1 & 40.
commitment to the Warsaw system remains steadfast. Foreign decisions demonstrate that all foreign municipal courts to date have enforced the Convention. While there has been disagreement on the proper unit of conversion, foreign courts have always selected and applied one of the available alternatives.\textsuperscript{104} Many foreign governments also have passed domestic legislation to resolve the conversion problem.\textsuperscript{105}

United States support for the Convention is equally strong. Neither the Executive nor Congress has indicated that the United States no longer supports the Convention.\textsuperscript{106} Moreover, the legislative history of the statute repealing the Par Value Modification Act does not reveal any congressional dissatisfaction with the Warsaw system.\textsuperscript{107}

It is perplexing that the Second Circuit chose to overlook the past and present intentions of the parties to limit air carrier liability. The court had a duty to give effect to those intentions.\textsuperscript{108} The realm of foreign affairs is traditionally reserved to the Executive and to Congress, not to the courts.

\textsuperscript{104} See \textit{supra} notes 41-44 and accompanying text.

\textsuperscript{105} For a list of statutes enacted by Denmark, Finland, the Federal Republic of Germany, Israel, New Zealand, Norway, the United Kingdom, and the Netherlands to establish a local currency equivalent of the \textit{Poincaré} franc, see Barlow, \textit{supra} note 1, at 3-4 n.12.

\textsuperscript{106} See \textit{Dep't of State}, \textit{supra} note 74. In addition, the report of the United States delegation to the Montreal Conference in 1975 reveals that the United States was a chief proponent of the SDR in the Montreal Protocols. See \textit{Detailed Report of the U.S. Delegation on the International Conference on Air Law}, (Montreal Sept. 1975) (copy of report available at offices of the Cornell International Law Journal). Recently, a report of the International Civil Aviation Organization (ICAO) Legal Committee acknowledged that the Reagan Administration supports ratification of the Montreal Protocols. ICAO Legal Committee, \textit{Report of Agenda Item 6}, (Montreal), ICAO Doc. 9397-LC/185 (April 12-25, 1983) [hereinafter cited as ICAO Report]. Evidence of this commitment also may be found in the United States Solicitor General's filing of an amicus curiae brief urging the United States Supreme Court to grant a writ of certiorari in the \textit{Franklin Mint} case. The government takes the position that the treaty should not have been held unenforceable and that either the official price of gold or the SDR should have been adopted as the unit of conversion. See Brief for the United States as Amicus Curiae In Support Of Writ Of Certiorari, \textit{Franklin Mint Corp. v. Trans World Airlines, Inc.}, 690 F.2d 303 (2d Cir. 1982), \textit{cert. granted}, 103 S.Ct. 3084 (1983), at 14-17 [hereinafter cited as U.S. Brief]. Although the United States Senate withheld its consent to the Montreal Protocols by a vote of 50-42, the Majority Leader moved for reconsideration, and the matter remains on the Senate Calendar. See \textit{supra} note 39. 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983).

\textsuperscript{107} See S. REP. No. 1295, 94th Cong., 2d Sess. 18, reprinted in [1976] \textit{U.S. CODE CONG. & AD. NEWS} 5935. See also \textit{infra} notes 144-49 and accompanying text.

\textsuperscript{108} See \textit{supra} notes 99-100 and accompanying text.
D. IMPLICATIONS

The court's decision in *Franklin Mint*, if upheld, will have a serious impact upon the international aviation community and upon the United States' future ability to honor its international commitments. Judicial disruption of the Warsaw Convention, without express authority from the Executive and Congress, will have consequences beyond those perceived by the Second Circuit.

First, the decision, in effect, abolishes the limits on liability for loss or damage to cargo. Because all other parties have consistently enforced the Convention, future plaintiffs will be encouraged to bring suit in the United States, where liability limits will not be enforced. Article 28 of the Convention facilitates forum shopping by providing litigants with a number of fora in which to bring claims. United States courts may be confronted with cases that might have been instituted elsewhere. The potential increase in litigation cannot be dismissed lightly given the volume of international air traffic that flows to and from the United States.

Second, although *Franklin Mint* only involved loss of cargo, the court's decision casts serious doubt upon the Convention's liability limits for personal injury. If limits for loss of cargo are unenforceable because a suitable unit of conversion no longer exists, then all other limits converted in the same manner must also be unenforceable. In fact, the District Court for the Central District of California took this position in *In re Aircrash at Kimpo International Airport Korea*. Relying exclusively on *Franklin Mint*, the district court held that without an internationally agreed upon unit of conversion, a rational limit on liability for personal injury or death cannot exist.

109. See supra notes 41-44 and accompanying text; see also supra note 105.

110. See supra note 3.

111. See ICAO Report, supra note 106, at 6-2. This is not to deny that courts may dismiss suits on *forum non conveniens* grounds. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (upholding dismissal of suit brought for damages arising out of air crash that took place in Scotland). Nevertheless, removal of the Convention's liability limits will undoubtedly increase the attractiveness of U.S. courts.

112. 17 Av. Cas. (CCH) ¶ 18,097 (C.D. Cal. 1983). *Kimpo* involved claims for the death of several passengers on a Korean Air Lines flight from the United States to Korea. The issues before the court were: (1) whether the Warsaw Convention limits the damages recoverable for death of a passenger in an accident involving an international air carrier; and (2) the proper method of calculating damages if the Convention was applied. For a discussion of the case, see McGillchrist, *Limitation of Liability Under the Warsaw Convention—Further Developments in the U.S.*, Lloyd's Mar. & Com. L. Q. 308, 311 (1983).

113. The district court reasoned:

It is clearly established that the airlines knew that "a rational limit on liability cannot exist" without an internationally agreed upon unit and "the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated." Therefore, airlines, including Korean, presumptively
Third, the court's decision subjects the United States Government to potential retaliation from other parties to the treaty. By adopting the Warsaw Convention, the parties agreed to enforce its provisions within their respective municipal courts. Part of that agreement was to limit the liability of air carriers engaged in international transport. The failure of United States courts to enforce the agreement constitutes a breach of an international covenant, which other parties may invoke as grounds for terminating or suspending their own treaty obligations. Indeed, the ramifications of upholding Franklin Mint may be even more severe. Because the power to modify, terminate, or abrogate a treaty rests exclusively with the executive and the legislature, the decision of the Second Circuit in no way alters the United States' international obligations under the

knew that this "international disarray" would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this "international disarray" and the "recognition by the Warsaw parties that the Convention's unit had been eliminated by events," contrary to the holding in Franklin Mint, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention.

558 F. Supp. 72, 75 (C.D. Cal. 1983), 17 Av. Cas. (CCH) at ¶ 18,100.

114. Article 60(2) of the Vienna Convention on the Law of Treaties provides:

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting state; or

(ii) as between all the parties.


Under Article 60(3) a material breach of a treaty is defined as:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Id.

The Vienna Convention was adopted at the U.N. Conference on the Law of Treaties in 1969. It came into effect on January 27, 1980 upon ratification by the 35th country. Although the Convention has not been ratified by the United States, the Department of State has acknowledged that, "the Convention is already generally recognized as the authoritative guide to current treaty law and practice." See Letter from Secretary of State William P. Rogers to the President, (October 18, 1971), Sen. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971). The reference was only to the substantive provisions of the Convention. The final provisions dealing with procedures for dispute resolution are only binding on the parties to the Convention. See Restatement (Second) of Foreign Relations Law of the United States § 122 (1962).

The Solicitor General indicated in his amicus curiae brief to the Supreme Court that several foreign governments have expressed the view that the decision of the Second Circuit will seriously affect United States relations in international aviation. See U.S. Brief, supra note 106, at 2.

115. See supra notes 82-98 and accompanying text.
The Convention will remain in force until the United States government complies with proper procedure to withdraw. In the meantime, the government of the United States may be held liable at international law for a recovery from a foreign international air carrier in excess of the Convention's limits.

116. In a communication regarding expropriation, Secretary of State Hughes declared in 1922:

It is, of course, true that a Nation may by its Constitution and its laws override treaties, but by such domestic acts, however sanctioned nationally, it cannot escape its international duties and obligations. The fact that a Nation exerts its power through its organs of government to commit a breach of a treaty engagement in no way permits it to avoid the international consequences of such a breach.


The Restatement (Second) of the Foreign Relations Laws of the United States incorporates this basic principle. Section 145 provides:

Effect of Subsequent Act of Congress on International Agreement

1. An act of Congress enacted after an international agreement of the United States becomes effective, that is inconsistent with the agreement, supersedes it as domestic law of the United States, if the purpose of Congress to supersede the agreement is clearly expressed.

2. The superseding of the agreement as domestic law of the United States by subsequent act of Congress does not affect the international obligations of the United States under the agreement.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 (1962); see also _id._ at § 140.

117. The procedures for formally denouncing the Warsaw Convention are stipulated in Article 39 as follows:

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 1, art. 39. The United States Government used these procedures in 1965 when it sought to denounce the treaty. For a discussion of these events, see Kreindler, _Denunciation of the Warsaw Convention_, 31 J. AIR L. & COM. 219 (1965); see also Lowenfeld & Mendelsohn, _supra_ note 1, at 551.

118. Violation of a treaty gives rise to a duty to make reparations. In 1934, the Permanent Court of International Justice (the predecessor to the International Court of Justice) stated:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is an indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Case Concerning the Factory at Chorzów (jurisdiction) (Ger. v. Pol.) 1927 P.C.I.J., Ser. A, No. 8 at 21 (Judgment of July 26).

In addition, commentary to the Restatement (Second) of Foreign Relations Law of the United States provides that, "[t]he satisfaction of a claim for a violation of international law, or "reparation," as this satisfaction is usually called, may take many forms. The most common form of reparations is the payment of damages." _Restatement (Second) of Foreign Relations Law of the United States_, § 3, comment (I), at 11 (1962). Many foreign airlines are either partially or wholly owned by their governments.
Finally, the *Franklin Mint* holding will heighten international confusion if the decision stands. The certainty and uniformity sought by the drafters and parties will be undermined if the Convention's provisions are no longer enforced. In addition, air carriers and investors will be exposed to a multitude of domestic laws throughout the world, inevitably increasing risks and operating costs which will then be passed to consumers. American passengers traveling abroad on foreign carriers may also encounter a panoply of foreign air carrier liability laws which may not adequately protect their interests. These implications should be of substantial interest to the United States because of its volume of international air traffic and the number of its citizens that travel abroad.

IV

THE FOUR ALTERNATIVES

The parties in *Franklin Mint* presented the court with four alternative units of conversion that could have been used to give effect to both the Convention and the repeal of the Par Value Modification Act. These were: (1) the market value of gold; (2) the modern French franc; (3) the last official price of gold in the United States; and (4) the IMF's SDR. Although the Second Circuit rejected these as incapable of fulfilling the objectives of the Convention, a closer analysis reveals that the court should have adopted the SDR.

A. THE MARKET VALUE OF GOLD

Gold was selected in 1929 as the Convention's standard because it was the existing international unit of conversion. Defining recovery judgments in terms of gold provided the stability and uniformity desired by the drafters. Because gold has become a volatile commodity, it can no longer serve its intended function under the Convention. For example, the price of gold on the open market rose in January 1980 to $850 per ounce. By the following April, it had plunged below $500, only to rise again to $700 per ounce by Septem-

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A recovery against a foreign international air carrier in excess of the Convention's liability limits may be equivalent to a recovery against the foreign government itself. For example, should other countries denounce the Convention, the advantage of shipping on a single airway bill anywhere in the world may be lost. See *Warsaw Convention*, supra note 1, at § 3.

119. The decision in *Franklin Mint* is inconsistent with the general objectives set by Congress for the American aviation industry. See generally 49 U.S.C. § 1502(b) (Supp. V 1981) (formulation of broad goals for encouragement and development of international air carrier industry).

121. *See supra* note 54 and accompanying text.

122. *See supra* note 14 and accompanying text.

123. *See supra* notes 24-33 and accompanying text.
ber 1980. Between January 5 and January 29, 1981, the market price of gold fell from $600 to less than $500 per ounce. Such dramatic fluctuations demonstrate that the market price of gold cannot provide the stability and uniformity contemplated by the drafters of the Convention. Moreover, use of this standard would result in recoveries far in excess of those envisioned by the parties.

Numerous commentators have concluded that the market value of gold must be rejected. International organizations addressing the issue have reached the same conclusion. Finally, and perhaps most significantly, leading foreign courts have expressly discarded the market value of gold, finding it devoid of any significance as an international unit of conversion. Thus, if deference is to be given to the intent of the drafters, the market value of gold should be rejected as the standard for converting the liability limits of the Warsaw Convention.

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125. One authority comments:

[T]here is one substantial argument against the use of the free market price of gold. It is submitted that the purpose of Article 22 would not be served by using this price because it is clear from the proceedings of the Warsaw conference that the delegates wanted to protect the compromise they had reached from uncontrolled variations which would have emptied it of all substance. At the time, they were particularly concerned about the risk of seeing the limits of liability, originally expressed in French francs, without any other precision, being altered by a mere change in the definition of the currency unilaterally decided by the French Government for reasons totally unrelated to air carriers' liability. This is why the draft was altered and the definitive text made to specify that the franc used in the Convention consisted 65-1/2 milligrams gold of millesimal fineness 900, that is, the French franc as it had just been officially defined in 1929. The purpose of the drafters would be thwarted if the free market price of gold were to be used, since it would introduce wide and uncontrolled variations into the whole scheme.

G. MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 179 (1977) [footnote omitted]; see also J. Gold, Floating Currencies, SDRs and Gold, 22 IMF PAMPHLET SERIES 56 (1977); Asser, supra note 14, at 663. For a discussion of the views of commentators favoring the use of the market value of gold, see Barlow, supra note 1, at 15. Barlow herself observes, however, that the argument in favor of the market value of gold may be based on a false premise. Id. at 17.

126. For example, a resolution issued by the ICAO Legal Committee, see supra note 106, opposes the use of the commodity price of gold as a unit of conversion for purposes of the Warsaw Convention. See ICAO Doc. 9131-LC/173-1, at 2 (1976).

127. See Judgment of May 1, 1981 (Giant Shipping Corp.), supra note 42. The Dutch court held that as a result of dramatic changes in the international monetary system, gold could no longer be utilized to set uniform liability limits under the Brussels Convention. See also Judgment of Jan. 31, 1980 (Chamie), supra note 41 (French court, in determining what conversion factor to apply to a claim under the Warsaw Convention, adopted the current French franc); Judgment of Nov. 14, 1978 (Pakistan International Airlines), supra note 44 (French court applied the official price of gold as the conversion unit in a suit under the Warsaw Convention).

128. Settled principles of treaty interpretation require this. See supra notes 99-100 and accompanying text.
B. THE MODERN FRENCH FRANC

Because the Warsaw Convention relies on the Poincaré franc, litigants have proffered its successor, the modern French franc, as an alternative for converting the Convention’s liability limits. Proponents of this view argue that, as a conversion medium, the modern franc is superior to the market value of gold. Moreover, decisions in both United States and foreign courts have adopted the franc as a unit of conversion.

The major flaw in using the modern French franc, however, is that it is a national currency subject to unpredictable unilateral readjustments. In essence, adoption of the franc as a unit of conversion leaves the Convention’s liability limits subject to the will of the French government. A similar proposal made during the second drafting conference was rejected by Switzerland on these grounds. Thus, like the market value of gold, the modern French franc does not comport with the intent of the Warsaw parties to establish a stable and uniform system to limit the liability of international air carriers. If the judiciary is to give effect to the intentions of the parties, the French franc should also be rejected as a unit of conversion.

C. THE LAST OFFICIAL PRICE OF GOLD IN THE UNITED STATES

The existing legislative conflict also has led parties to propose the “last official price of gold” as a unit of conversion. This value was set at $42.22 per troy ounce and was the accepted unit of conversion in Warsaw Convention cases prior to the repeal of thePara...
Value Modification Act. 137

Proponents marshal three arguments in favor of this standard. First, the last official price of gold comports with the intention of the Warsaw parties. It offers stability and uniformity, characteristics desired of a unit of conversion. 138 Second, neither the Par Value Modification Act nor the legislative history of its repealing statute specifically addressed the Warsaw Convention. 139 There is no indication that Congress intended to hold the liability limits of the Convention unenforceable. Therefore, proponents of this standard argue that if courts are to abide by the principle that treaty abrogation or modification is not lightly imputed to Congress, 140 the last official price of gold must be used to give force to the Convention. Finally, the Civil Aeronautics Board (CAB), 141 the federal agency charged with the regulation of the airline industry, espouses the use of the last official price of gold. In a currently effective order dealing with this issue, the CAB requires airlines to file international tariffs with liability limits based upon a gold value of $42.22 per troy ounce. 142 Proponents assert that courts should defer to the expertise of this federal agency. 143

137. See supra note 33.
138. See generally Asser, supra note 14.
139. See supra notes 147-51 and accompanying text.
140. See supra notes 80 & 99 and accompanying text.
141. See supra note 45.
142. See CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974). Although this order was issued prior to the repeal of the Par Value Modification Act, the CAB's position on the issue was affirmed in a recent staff memorandum:

[T]he Board's current course of action [use of the last official U.S. price of gold as a unit of conversion] is superior to any of the alternatives currently available. . . . Pending resolution of this issue by the three agencies [CAB, Department of Transportation and Department of State] we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the [CAB] regulation [14 C.F.R. §§ 221.175 and 221.176 (1983)].


Earlier, the CAB stated, with respect to the International Air Transport Association's Conditions of Cargo Carriage: "At the present time a carrier's liability for Warsaw Traffic . . . is $20 per kilogram. . . ." CAB Order 7-8-10 (1978). This value was based on the official price of gold. It is significant, however, that in a recent order, the CAB has authorized the filing of liability limits based on the SDR. See infra note 157 and accompanying text.

143. See Franklin Mint Corp., 525 F. Supp. at 1289.

The CAB's orders have been given deference in several United States courts. See supra note 48. The district court in Maschinenfabrik Kern, A.G., 17 Av. Cas. (CCH) at ¶ 18,345, expressed its view as follows:

[T]his Court believes it should enforce the position taken by the CAB, the governmental agency most intimately concerned with the transactions at hand, and recognize the last official price of gold in the United States as the basis for conversion and liability limitation. That price, resulting in a liability limitation of
While the last official price of gold may provide the stability and uniformity that the drafters envisioned, its application to the Warsaw Convention is troublesome. The legislative history of the repealing statute indicates that Congress wanted to rid itself of the official price formula. One purpose of the repealing statute was to authorize the United States, as a member of the IMF, to accept amendments to the IMF Articles of Agreement. 144 The member nations reached a compromise in which they agreed to remove gold from the international monetary system. 145 Under the proposed amendments, gold's official price would be abolished and the SDR would be substituted in all transactions with the Fund. 146 These actions were taken in recognition of gold having become an outmoded international monetary standard.

Because the legislative history of the repealing statute makes no mention of the Warsaw Convention, the repeal of the official price of gold in the United States cannot be interpreted as expressing Congressional intent to render the treaty unenforceable. 147 However, legislative history does indicate Congress' intent to abolish use of the official price of gold for practically all purposes. This conclusion is buttressed by language in a Senate Report which states: "[t]he only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold is the issuance of gold certificates." 148 In another report, the Senate expressed its position as

$9.07 per pound of damaged goods, also was relied upon in In re Air Crash Disaster at Warsaw Poland on March 14, 1980, 535 F. Supp. 833 (E.D.N.Y. 1982) and by the lower court in Franklin Mint Corp., 525 F. Supp. 1288. Any change from this base should be determined by the executive and legislature. Air carriers, at least in this country, have relied upon the last official price of gold and have filed tariffs based on that rate. Thus, the public had notice of the liability limitations. Parties, such as the commercial entities in this case, may protect themselves through insurance. They are not made victims of hardships or injustice by the maintenance of the CAB rule.

146. See S. Rep. No. 1295, supra note 144, at 3. In addition to facilitating the Fund's divestiture of its gold holdings, the amendments were designed to liberalize the use of the SDR. Id.
147. Treaty abrogation or modification is not imputed to Congress lightly. See supra note 99 and accompanying text.
148. See S. Rep. No. 1295, supra note 144, at 18. While it may be argued that this language implies that there are "international" purposes for which the official price formula may be used, a more plausible interpretation is that Congress here expressed its intent with respect to the use of gold generally. In addition, no special meaning may be ascribed to the word "domestic." A close review of the Senate Report reveals that prior sections were devoted to discussions of United States "international" obligations. The word "domestic" only was used in the new subsection to change the reader's focus, not to limit the scope of the repealing Act.
follows:

While it is the expressed intent of the IMF to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will perpetuate some role for gold. By ending the practice of having a percentage of IMF quotas paid in gold and eliminating gold transactions between the Fund and central banks, the Fund has taken direct actions to eliminate gold from the system. However, as with most institutional acts, it is the concurrence and sincerity of the daily actions of members which will determine the success of the effort.  

This language indicates that when Congress repealed gold's official price, it sought to give maximum effect to the actions of the IMF. Congress recognized that there would be some resistance to the change but sought to cooperate with the IMF in abolishing the gold standard. The conclusion that Congress intended to apply the official price of gold to the Warsaw Convention, even after the official price was repealed, is without support in the legislative history and goes against the overall objective of Congress and the IMF. In addition, no great significance should be attached to the fact that some mechanisms still employ the last official price of gold as a conversion factor. Use of the standard in these cases has been expressly authorized by Congress in either the legislative history of the repealing Act or in subsequent legislation. The existence of express

150. In the United States' amicus curiae brief in support of a writ of certiorari, the Solicitor General points out that the last official price of gold has been used by the United States even subsequent to its repeal:

1. to govern issuance of gold certificates by the United States Treasury;
2. to value gold reserves of the United States; and
3. to determine the dollar amount of United States subscription obligations to the capital stock of four major international financial institutions.

The Solicitor General concludes that this demonstrates a Congressional intent not to repeal the official price of gold for all purposes. See Brief for the United States, supra note 106, at 13-14.


The United States determines the dollar amounts of its subscription obligations to the capital stock of four international financial institutions based upon 31 U.S.C. § 449a (1976) which provides:

The Secretary of the Treasury shall maintain the value in terms of gold of the holdings of United States money of the International Bank for Reconstruction and Development, the Inter-American Development Bank, the International Development Association, and the Asian Development Bank to the extent provided in the articles of agreement of those institutions. Amounts necessary to maintain the value may be appropriated. Amounts appropriated under this section remain available until expended.

The Articles of Agreement of the respective organizations calculate member contributions by the last official price of gold. See Articles of Agreement of the International Bank for Reconstruction and Development, done December 27, 1945, art. II, § 2(a), 60 Stat. 1440, 1441, T.I.A.S. No. 1502, U.N.T.S. 134, 136; Agreement Establishing the Inter-
exceptions underscores Congressional intent to abolish the last official price of gold except where Congress has expressly provided for its use. Absent this intent there would have been little need for a blanket repeal of gold's official price.

Legislative history indicates that Congress intended to abolish the general use of the official price of gold and to continue to enforce the Warsaw Convention. Therefore, courts should not apply the last official price of gold for converting the liability limits of the Convention. Whitney requires that both the Convention and the repealing Act be given full effect. The judiciary should accomplish this objective by applying the SDR, the international monetary standard adopted by Congress as gold's substitute in the repealing Act.

The final argument, addressing the CAB order which requires the filing of tariffs using the official price of gold, is without force if the above legislative interpretation is accepted. While the judiciary accords great weight to policy decisions made by administrative agencies in their field of expertise, this doctrine of deference is limited. The judiciary must ensure that the agency's underlying standards and procedures are in conformity with statutory law. Congressional intent to abolish the official price of gold cannot be overridden by the CAB's unilateral determinations. A contrary conclusion is inconsistent with the statutory mandate. Moreover, the CAB has expressly recognized use of the SDR for purposes of filing tariff liability limits. In a recent order, the CAB authorized British Caledonian Airways Limited to increase its Warsaw liability limit

152. See supra note 68 and accompanying text.
153. See infra notes 158-83 and accompanying text.
154. See supra note 142 and accompanying text.
155. See supra note 143.
156. In Labor Board v. Brown, 380 U.S. 278, 291 (1965) (overturning administrative decision by the National Labor Relations Board), the Court stated that "[r]eviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Mr. Justice Jackson expressed a similar view in his dissenting opinion in Securities Comm'n v. Chenery Corp., 332 U.S. 194, 215 (1947) (majority opinion upheld administrative decision by the SEC) as follows:

[A]dministrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself. . . .
for personal injury to 100,000 SDRs.\textsuperscript{157}

It is unlikely that Congress, recognizing the demise of the gold standard and acting swiftly to abolish its official price in 1976, intended to perpetuate its general use in future years. To resolve the issue of the proper Warsaw standard, the judiciary should interpret the legislative history in the light of the realities surrounding the international monetary system. Courts should recognize that gold has lost its significance as an international unit of conversion. Moreover, Congress and the international community have acknowledged this fact by repealing gold’s official price. Therefore, adoption of the last official price of gold as the Warsaw conversion factor would constitute the use of an arbitrary standard that has no basis in law and no reference to a recognized unit of conversion.

D. The International Monetary Fund's Special Drawing Right

The best alternative proposed by the parties to translate the liability limits of the Warsaw Convention is the SDR. Established by the International Monetary Fund in 1969 to replace gold as an international reserve asset, the SDR is related to a basket of currencies from five IMF members.\textsuperscript{158} One SDR is a composite of the percentage weight assigned to each currency. The weights, reflecting the relative importance of each currency in world trade, are assigned as follows: the U.S. dollar forty-two percent, the Deutschemark nineteen percent, and thirteen percent each for the French franc, the Japanese yen and the pound sterling.\textsuperscript{159} As a result, the effect of a component currency’s fluctuations on the SDR is directly proportionate to that currency’s weight in the basket.\textsuperscript{160} The SDR’s value in U.S. dollars is determined by the total dollar value of each component currency.\textsuperscript{161}

While the composite valuation does not guarantee absolute stability, the SDR offers maximum benefits and minimum drawbacks. Its use in translating the limitation provisions of the Warsaw Con-

\textsuperscript{157} CAB Order 81-3-143 (Mar. 24, 1981).
\textsuperscript{158} See Ward, The SDR in Transport Liability Conventions: Some Clarifications, 13 J. MAR. L. & COM. 1, 2-3 (1981). In essence, SDRs are lines of credit against which member states may borrow. Each member is allocated a number of SDRs which can be sold to another IMF member for convertible currency to settle accounts.
\textsuperscript{159} Id. at 3.
\textsuperscript{160} Id.
\textsuperscript{161} For example, the U.S. value of one SDR on April 30, 1981 was $1.198579, computed as follows:
vention would result in fairly stable limits at realistic values.\textsuperscript{162} Because it is composed of five strong currencies, the SDR is not affected dramatically by fluctuations of any one currency. Moreover, in some instances such fluctuations may cancel one another.\textsuperscript{163}

Opposition to the SDR takes several forms. Some argue that it is "a creature of the IMF,"\textsuperscript{164} subject to the will of that body.\textsuperscript{164} Others point out that some of the Convention's signatories are not members of the IMF and as such do not officially recognize the SDR.\textsuperscript{165} Still others are concerned that the SDR is tied too closely to the U.S. dollar, which accounts for forty-two percent of its value.\textsuperscript{166}

Despite these concerns, there are compelling reasons why the Second Circuit should have applied the SDR. Because of its relative stability, the SDR fully comports with the intent of the Convention's drafters.\textsuperscript{167} The parties to the Convention recognized the advantages of the SDR and incorporated its use in the Montreal Protocols.\textsuperscript{168} Even the legislative history of the statute repealing the Par Value Modification Act expresses Congress' intent to promote this unit of conversion.\textsuperscript{169} In addition, the repealing statute itself authorized use of the SDR for determining United States obligations to the IMF with the primary objective of making the SDR the principal reserve asset in the international monetary system.\textsuperscript{170} By repealing gold's official price and openly promoting the SDR as a substitute, Con-

<table>
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<th>Currency</th>
<th>Unit Amount</th>
<th>Exchange Rate</th>
<th>US$ Equivalent</th>
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<tr>
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<td>1.0000</td>
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<tr>
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<td>0.151968</td>
</tr>
<tr>
<td>SDR 1.00</td>
<td>= 1.198579</td>
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162. The SDR is not subject to tremendous fluctuations in value as is the market price of gold, and it also is not dependent upon a single government to give it a value, as is the French franc and the official United States price of gold.

163. See Merren, \textit{supra} note 161, at 512; see also Ward, \textit{supra} note 158, at 4.

164. A 75\% majority of the total IMF voting constituents is required to determine the method of SDR valuation. Further, a "high majority" of 85\% is required to change the principle of valuation in effect. See Merren, \textit{supra} note 161, at 510.

165. See Ward, \textit{supra} note 158, at 8.

166. \textit{Id.} at 4 n.6.

167. See \textit{supra} notes 101-07 and accompanying text.

168. See \textit{supra} note 40 and accompanying text.

169. See \textit{supra} note 146.

gress implicitly adopted the SDR as the Warsaw unit of conversion. Adoption of the SDR is consistent with fundamental principles of treaty interpretation. The SDR complies with the intent of the drafters under changed circumstances and gives effect to the subsequent conduct of the parties.

Furthermore, the SDR is widely recognized as an international unit of conversion. It has been adopted in fifteen international conventions and is being considered for use in four other international agreements. At least seventeen international organizations use the SDR. In addition, the World Bank, the International Development Association, the Arab Monetary Fund, the Bank for International Settlements and other institutions have been authorized to buy or sell SDRs and to receive or use them in loans, pledges, and grants. Commercial banks, in response to these developments, have acted to facilitate a secondary market for SDR instruments. Commentators predict that there will be an increase in the private use of the SDR as a unit of conversion, and that the IMF and major commercial banks “seem ready to promote the SDR as an ‘all-weather instrument’ for worldwide use.”

Many foreign governments also have recognized the emerging role of the SDR as an international unit of conversion. Great Britain, Sweden, and Canada are among those that have adopted the SDR for purposes of the Convention. Recently, in *Netherlands v. Giant Shipping Corp.*, the Supreme Court of the Netherlands held in favor of the SDR in construing the Brussels Convention on maritime liability.

Finally, to serve the purposes of the Convention, the unit of conversion selected should have several characteristics: (1) it should

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171. See supra note 99 and accompanying text.
172. See supra note 100 and accompanying text.
173. See Merren, supra note 161, at 505.
174. Id.
175. Id.
176. Id. at 506-07.
177. Id. at 520.
179. Judgment of May 1, 1981 (*Giant Shipping Corp.*), supra note 42. Faced with the problem of converting liability limits originally based upon the Poincaré franc, the court rejected the market price of gold as a substitute for the outmoded gold standard and adopted the SDR. The court reasoned that because the SDR had replaced gold in the international monetary system, its use was in consonance with “the adjustment of international treaties and national laws to the changed monetary situation.” The *Giant Shipping* court rendered its decision even though an amendment substituting the SDR as the Convention’s unit of account was not yet in force. For further discussion of this case and other foreign decisions applying the SDR, see supra note 42.
be universally recognized or as widely accepted as possible; exchange rates based on the unit should be available daily to afford conversion into domestic currencies; (3) it should be stable; and (4) it should ensure uniformity in the valuation of currencies so that the value limits of liability will be equal at any time, regardless of the currency of payment. Employing the SDR as the unit of conversion would most closely comport with these essential characteristics. It is the most logical alternative to give force to the Warsaw Convention, to comply with the intent of its drafters, and to effect congressional intent to discard an outmoded international monetary standard.

180. The SDR has become "the cornerstone of the new international system of finance." P. Samuelson, supra note 21, at 612. See supra notes 173-79 and accompanying text.

181. SDR rates are posted by the IMF for each business day and are carried by several wire services, financial periodicals and major newspapers. They also are published twice monthly in the IMF Survey, and monthly with a two-month data lag in the IMF's International Financial Statistics. Information also may be obtained from IMF headquarters in Washington, D.C., at the Federal Reserve Bank of New York and at the Central Banks of several IMF members. See Merren, supra note 161, at 151.

182. See supra notes 158-63 and accompanying text.

183. See Ward, supra note 158, at 1-2. TWA illustrates conversion of liability limits using the SDR:

1 Poincare franc (90% fine gold) = 0.655 gram of fine gold

1 Poincare franc (100% fine gold) = 0.05895 gram of fine gold

1 SDR (gold value of March 31, 1978) = 0.888671 gram of fine gold

The number of francs in one SDR = \( \frac{0.888671}{0.05895} \) = 15.075 rounded to 15

The Warsaw limit of 250 francs per kilogram converted to SDRs = \( \frac{250}{15} \) = 16.67 SDRs per kilogram, rounded to 17 SDRs

Dollar value of 1 SDR on March 23, 1979 = 1.28626

17 SDRs per kilogram times 1.28626 = $21.87 per kilogram

See Appellant's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982), cert. granted, 51 U.S.L.W. 3883 (U.S. June 13, 1983) 20 n.34 (copy on file at the offices of the Cornell International Law Journal). The figure derived is approximately equivalent to that derived when using the official price of gold as the comparison unit.
CONCLUSION

In *Franklin Mint Corp. v. Trans World Airlines, Inc.*, the Second Circuit exceeded the scope of its constitutional powers in holding that the Warsaw Convention's limits on liability for loss of cargo are unenforceable in United States courts. Well-established principles of treaty interpretation require a contrary holding. In repealing the official price of gold, Congress implicitly adopted the International Monetary Fund's Special Drawing Right as the new unit of conversion applicable to the Warsaw Convention. The Second Circuit should have applied the Special Drawing Right and given force to the Convention.

*Louis Robert Martinez*