

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

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INTERNATIONAL AIR TRANSPORT
ASSOCIATION:
AGREEMENT RELATING TO LIABILITY
LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-95-232
OST-95-232-44

AIR TRANSPORT ASSOCIATION OF AMERICA:
AGREEMENT RELATING TO LIABILITY
LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-96-1607 - 15

OBJECTIONS OF THE INTERNATIONAL
AIR TRANSPORT ASSOCIATION

Communications with respect to
this document should be sent to:

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Director External Relations-
United States
Attorney-in-Fact
International Air Transport
Association
1001 Pennsylvania Avenue, N.W.
Suite 285 North
Washington, D.C. 20004
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Dated: October 24, 1996

IATA-10/24/96

119 pgs.

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DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

INTERNATIONAL AIR TRANSPORT
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**OBJECTIONS OF THE INTERNATIONAL
AIR TRANSPORT ASSOCIATION**

The International Air Transport Association ("IATA"), on behalf of the non-U.S. carrier signatories to the IIA and MIA, objects to the conditions the Department of Transportation ("DOT") proposes to impose on the IIA and MIA and, on behalf of all of its non-U.S. members, also objects to the foreign air carrier permit amendments proposed by 96-10-7.^{1/} Because the

^{1/} The Department has been separately advised in this Docket of the non-U.S. carrier signatories to the IIA and MIA. The U.S. carrier members of IATA are parties to the agreement filed in Docket OST 96-1607 as well as the agreements filed in Docket OST-95-232. As U.S. flag carriers operating under certificate, they are subject to a legal regime different from the regime applicable to non-U.S. carriers. Thus, U.S. flag

proposed conditions would effect fundamental and substantial changes in the IIA and MIA, prior consents to the IIA and MIA would be "null and void" with respect to the conditioned agreements. Moreover, no non-U.S. carrier signatory is prepared to subscribe to the conditioned agreements proposed in Order 96-10-7. (See Annex A, attached.) The absence of such consent would leave DOT with no rational basis for rewriting foreign air carrier permits to conform to its version of the IIA and MIA. Indeed, any such effort by DOT to modify the Warsaw regime by permit amendment would be entirely prescriptive and contrary to international law, the U.S. Transportation Code and sound public policy.

IATA's July 31, 1996 application pointed out that approval and immunization of the IIA and MIA could provide significant passenger benefits commencing November 1, 1996 while preserving, and indeed enhancing, the international goodwill necessary to negotiate additional benefits through the intergovernmental treaty-making process at ICAO. IATA urges the DOT to bear fully in mind the superiority of international cooperation to needless confrontation, to withdraw the proposed conditions and permit amendments, and to proceed immediately with final approval and immunization of the IIA and MIA.

carrier members of IATA are expressing their views directly to DOT through the Air Transport Association of America (ATA). IATA understand, however, that its U.S. carrier members are equally unwilling to accept the sweeping conditions proposed in Order 96-10-7.

In IATA's view, the DOT has correctly acknowledged that the proposed "world-wide waiver of the Warsaw passenger liability limits" was nothing short of "a gigantic step" in protecting passengers, obviating wasteful litigation and avoiding the costs and complexities of previously-considered supplemental compensation plans. Order 96-10-7 at 8-9. The Department also agreed "to accept the 100,000 SDR limitation on strict liability." Id. at 12, and correctly understood that no reduction in the 100,000 SDR level was contemplated on U.S. routes. Id. at 4, n.5. Moreover, the DOT identified no element of either the IIA or MIA that was anti-competitive or otherwise adverse to the public interest, and publicly acknowledged that the IATA agreements "provide a resolution of the more than forty-year effort to provide reasonable liability recoveries for passengers killed or injured in international transportation by air." Id. at 16. These findings clearly suffice to warrant immediate approval and immunization of the IIA and MIA, as filed.

Notwithstanding the findings of Order 96-10-7, and the express mandate of 49 U.S.C. 41309, the DOT has proposed to circumvent the appropriate grant of unconditional approval to the IIA and MIA by adding "conditions" the Department erroneously believes will enhance the position of U.S. passengers. In addition, Order 96-10-7 proposes, sub silentio, to amend Part 203 of the Department's regulations by substituting the "conditioned" version of the IIA/MIA/IPA for Agreement CAB 18900 (the 1966 Montreal Agreement), as a permit condition applicable to all non-

U.S. air carriers operating to and from the United States, including those that have not yet subscribed to the IIA or MIA. IATA believes that both of these proposed actions are unlawful, as well as unwise.

First, as noted above, Order 96-10-7 provides no basis for finding the IIA and/or MIA anti-competitive or adverse to the public interest. Moreover, the tariffs which necessarily would result from adherence to the IIA/MIA regime have already been approved in Orders 92-12-43; 93-2-30 and 94-7-5 as being in the public interest. Thus, a failure to approve the IIA and MIA in contradiction of DOT's own present and prior public interest findings, would be arbitrary and capricious.

Second, the additional provisions Order 96-10-7 proposes to add to the IIA and MIA by condition, and to impose on all "foreign air carriers" by permit amendment, are in direct conflict with Articles 24 (Convention as governing law), 28 (jurisdiction), 30 (successive carriage) and 32 of the Warsaw Convention,^{2/} and could conflict with other Warsaw Convention provisions if the purported "most-favored-passengers" condition of Order 96-10-7 were to be imposed.^{3/} These conflicts, as set out in detail in Annex B attached hereto, would cause the U.S.

^{2/} If applied by permit conditions to carriers not consenting to the IIA and MIA, the proposed permit amendments also would violate Articles 20(1) and 22.

^{3/} This would occur because the proposed condition would mandate the application to non-U.S. flag carriers of conditions which other nations would apply only to their own flag carriers. The flag carrier relationship is not governed by Warsaw.

Government to be in violation of its obligations under international law, under existing bilateral aviation agreements and under Section 40105 of the Transportation Code (FAA § 1102).

Third, the use of a "show cause" procedure in an attempt to impose sweeping, and in some cases wholly undefined, conditions on all non-U.S. air carrier permits is in clear derogation of Section 41304(a) of the Transportation Code (FAA § 402(f)), the Administrative Procedure Act and Executive Orders governing rulemaking. These violations are explained in detail in Annex C attached hereto.

Fourth, an apparent principal objective of the Department's efforts -- the use of coercive alternatives to induce non-U.S. carriers to create a so-called "fifth jurisdiction" to permit Article 28 access to U.S. courts by U.S. passengers -- is fatally flawed, both under international law and basic U.S. constitutional principles governing subject matter jurisdiction. Annex D attached hereto sets forth in detail the absence of any legal foundation for a "fifth jurisdiction."

Fifth, the Department's proposal to require the first carrier on departure from the U.S. to assume liability for an entire interline journey, in clear violation of Article 30, threatens the continuation of essential interlining. Warsaw correctly rejects such mandatory liability and recognizes that disincentives to interlining would have a very important adverse effect on the passenger, leading to higher costs and serious inconvenience.

Sixth, as noted above, the imposition of the conditions proposed in Order 96-10-7 would result in all non-U.S. carrier signatories to the IIA and MIA renouncing their prior consent to the agreements. As depositary, IATA has polled all non-U.S. signatories to determine whether they would be prepared to continue their adherence to the agreements if the agreements were to be amended by the conditions set out in Order 96-10-7. Not a single carrier advised its readiness to do so. This reaction by the carriers emphatically demonstrates that, should the DOT persist in its endeavors to impose a unilateral comprehensive liability regime on the entire non-U.S. air carrier community - in derogation of its obligations under the Warsaw Convention - there will in fact be no non-U.S. carriers party to the IIA and MIA.

It would be remarkable, to say the least, for the Department to have invited and immunized a massive voluntary reform effort by the international airline community, to have formally recognized that effort as having produced a "gigantic step" forward, and then to nullify this momentous achievement by repudiating it in favor of a legally unsupportable attempted exercise of prescriptive regulatory power (which the order implies could have been undertaken at any time since 1966).

At a minimum, the Department, if it had such powers, would bear a very heavy burden in explaining to U.S. victims of recent air tragedies why it waited so long to exercise them. More realistically, the DOT will have to explain to future claimants

under the Warsaw Convention that it foreclosed the entry into force of a global intercarrier liability system providing for full compensatory damages. Indeed, the clear failure of policy represented by an ill-advised attempt to take unsustainable peremptory action will inevitably fail in the courts. Passengers throughout the world will thus be denied the benefits of the IIA and MIA, and future claimants will find themselves ensnarled in years of contentious litigation and the subject of international friction, and will very likely be restricted to the liability limitations of the original Warsaw Convention, or the Convention as amended at The Hague, in many jurisdictions.

For these reasons, and to protect the interests of the vast majority of U.S. passengers whose needs would be met fully by the IIA/MIA regime, IATA urges the Department to withdraw its proposed conditions on the IIA and MIA and with respect to foreign air carrier permits, and to grant immediate approval to the agreements as submitted. This will allow early entry into force of the new unlimited liability system, preserve the benefits of the agreements for the traveling public, including

citizens and permanent residents of the United States, and lay a solid foundation for future amendment of the Warsaw Convention.

Respectfully submitted,



David M. O'Connor, Esq.
Director External Relations-
United States
Attorney-in-Fact
International Air Transport
Association
1001 Pennsylvania Avenue, N.W.
Suite 285 North
Washington, D.C. 20004
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Of Counsel:
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WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Dated: October 24, 1996



International Air Transport Association

IATA Building
2000 Peel Street
Montreal, Quebec
Canada H3A 2R4

**SHOULD THE U. S. DOT CONDITION THE IIA/MIA, THE
SIGNATURES ON THE ATTACHED WILL BE RENDERED
NULL AND VOID UNLESS FINAL CONDITIONS ARE
SPECIFICALLY ACCEPTED BY THE CARRIERS
CONCERNED.**

ANNEX A



International Air Transport Association

IATA Building
2000 Peel Street
Montreal, Quebec
Canada H3A 2R4



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

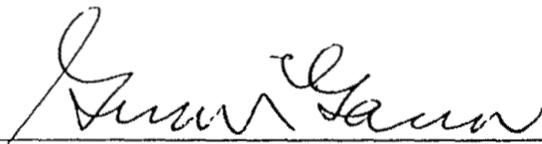
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 9th day of December 1995

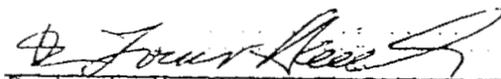


Aer Lingus plc

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Aer Lingus plc on 9 December 1995.


Dr Louis Haecq
Notary for the Province of Quebec
in the Judicial District of Montreal

08/02/96



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

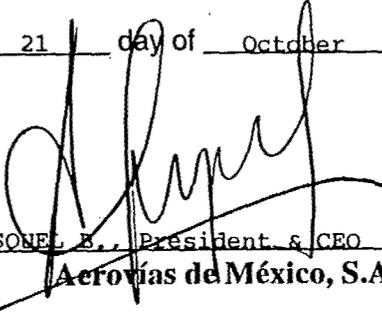
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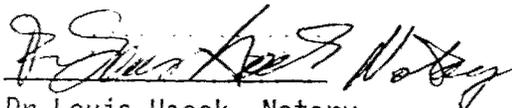
Signed this 21 day of October 19996.


ALFONSO PASOQUEL, B., President & CEO
Aerovías de México, S.A. de C.V.

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Aerovías de México, S. A. de C.V. on 21 October 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

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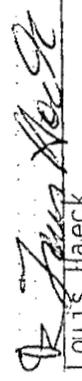
Signed this 11 day of DECEMBER 1995


Aeromexpress, S.A. de C.V.

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Aeromexpress, S.A. de C.V. on 11 December 1995.


Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 14 day of December 1995



M. Kolaud Billaut

Air Afrique



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CERTIFICATION

This is to certify that this is a true copy of the original signed by Air Afrique on 14 December 1995.

Louis Haeck 15/01/96

Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

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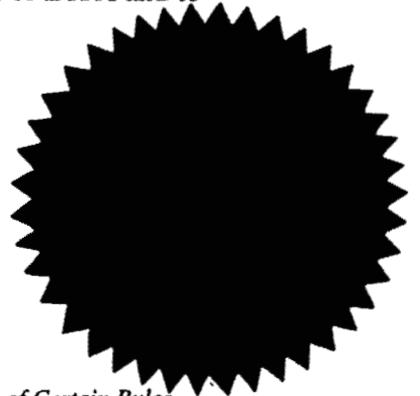
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 16 day of September 1996

Mr. P. Look-Hong
President

Air Aruba



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CERTIFICATION

This is to certify that this is a true copy of the Original Agreement signed by Air Aruba on 16 September 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

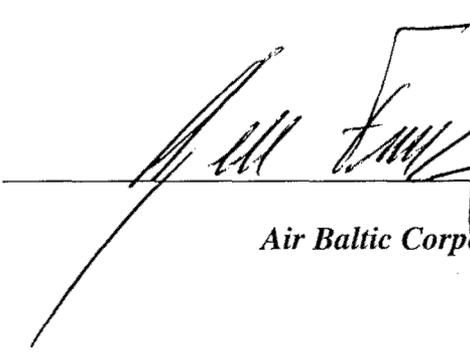
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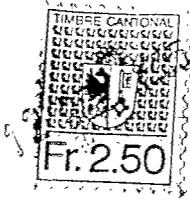
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 18 day of JULY 1996


Air Baltic Corporation



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INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

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Signed this 31st day of October 1995

Holli J. Harris
Air Canada

[Signature]
Air Mauritius Ltd

[Signature]
Egyptair

[Signature]
Japan Airlines Company Limited

[Signature]
KLM Royal Dutch Airlines

[Signature]
Saudi Arabian Airlines

[Signature]
TACA International Airlines

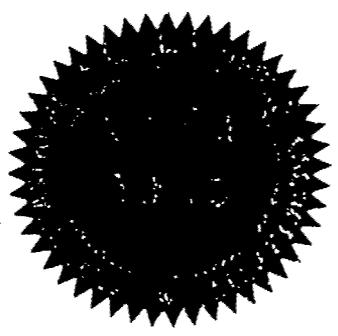
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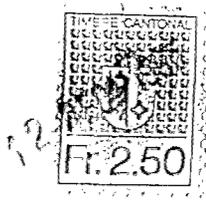
Le notaire soussigné certifie que la présente photocopie est conforme à l'original.

Genève, le 12 décembre 1995.



[Signature]





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

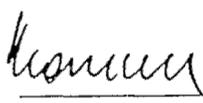
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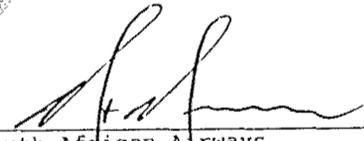
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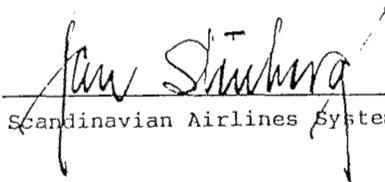
The undersigned carriers agree

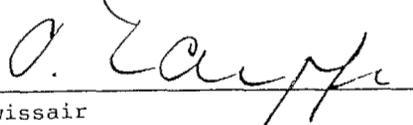
1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 31st day of October 1995

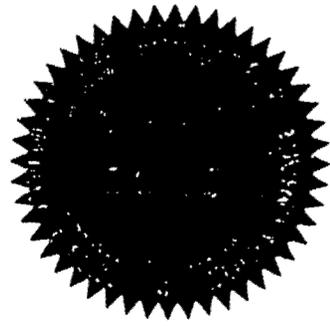

Austrian Airlines


South African Airways


Scandinavian Airlines System

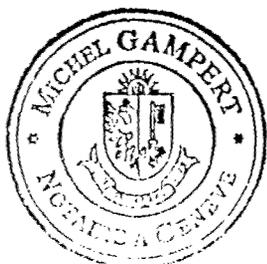

Swissair

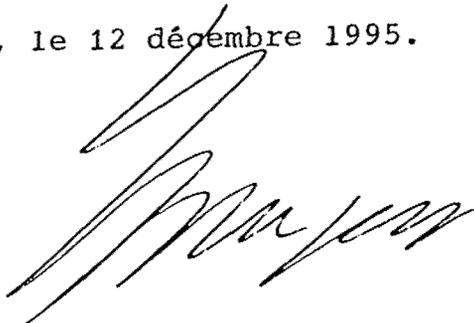
* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.



Le notaire soussigné certifie que la présente photocopie est conforme à l'original.

Genève, le 12 décembre 1995.







INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to International air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement **no later than 1 November 1996** or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 14th day of October 1996

Marc VERON

President and Chief Executive Officer.
(Air France)

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Air France on 14 October 1996.

Dr Louis Haeck
Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

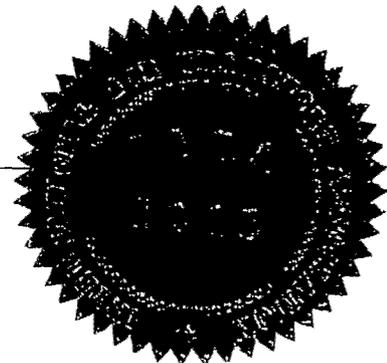
The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
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5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 24th day of June 1996

 R. ST. NOIA

AIR EXEL COMMUTER



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Air Exel Commuter on 24 June 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 26th day of July 1996


AIR NEW ZEALAND LIMITED

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by AIR NEW ZEALAND LIMITED on 26 July 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

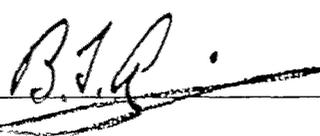
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

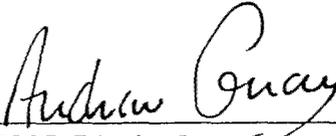
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

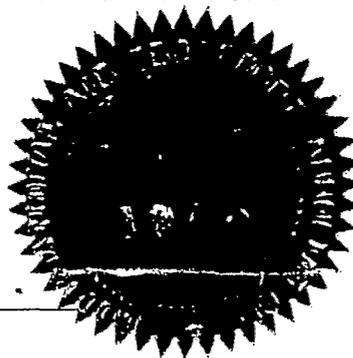
The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 11 day of January 1996




Air U.K. Limited



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Air U.K. Limited on 11 January 1996.

 08/02/96
Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

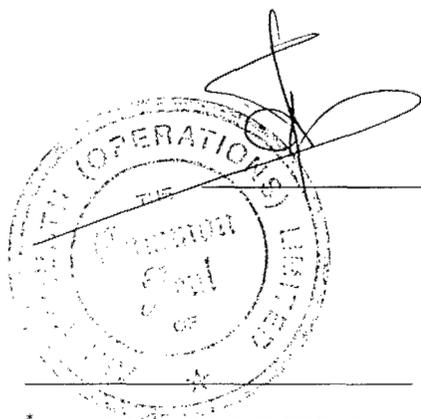
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

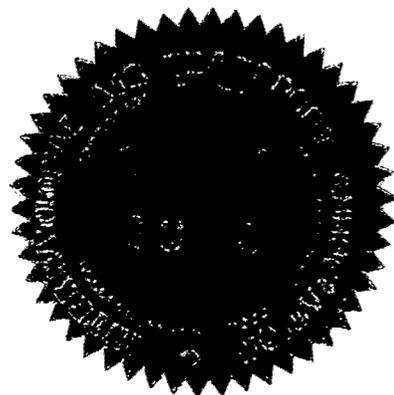
1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 19 day of August 1996



Air Vanuatu

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

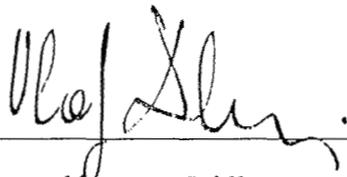
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
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4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 3rd day of June 1996



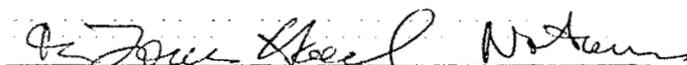
Augsburg Airways GmbH



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a copy of the original agreement signed by Augsburg Airways GmbH on 3 July 1996.



Dr Louis Haecck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 28th day of May 1996

Rome Agnani

BRITISH AIRWAYS P.L.C.

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Btiyidh Airways P.L.C. on 28 May 1996.

Dr Louis Haeck
Dr Louis Haeck, Notary

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

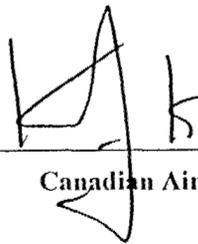
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 31st day of October 1995



Canadian Airlines International

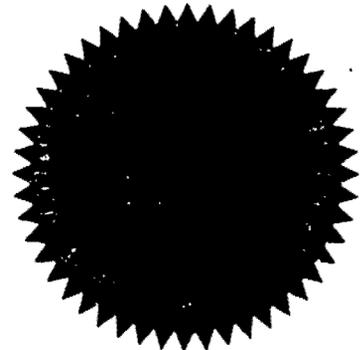
* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Canadian Airlines International on 31 October 1995.



Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

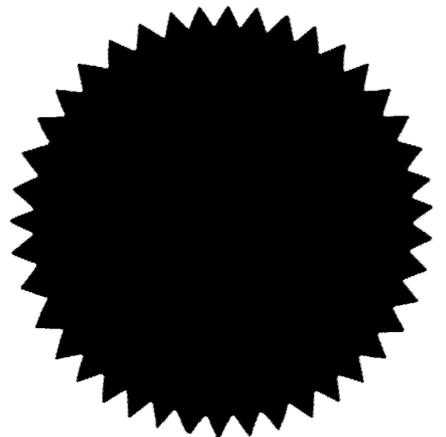
1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 12th day of July, 1996

R. F. Fobling

Cathay Pacific Airways Ltd

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

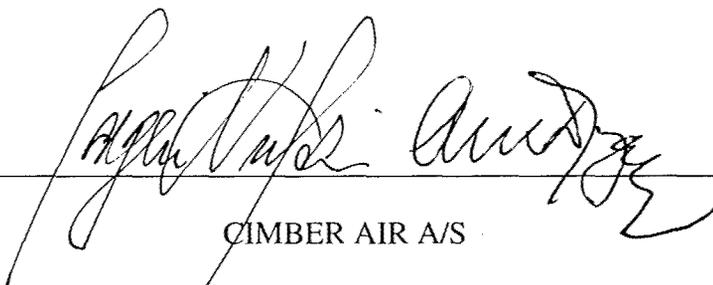
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

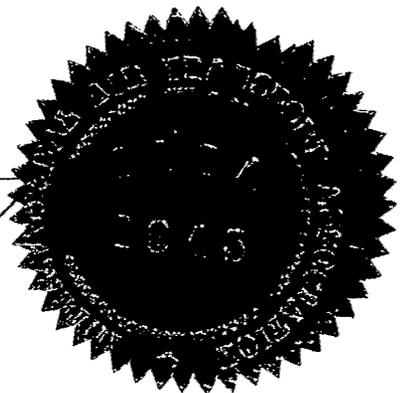
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 16 day of July 1996


CIMBER AIR A/S



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

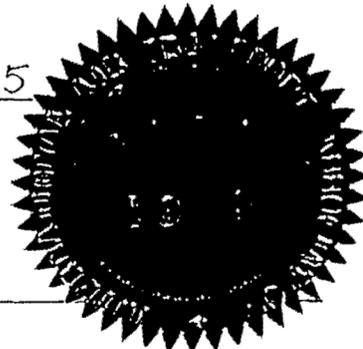
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6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 15 day of December 1995



Ueli

Croatia Airlines



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Croatia Airlines on 15 December 1995.

Dr Louis Haeck 19/1/96

Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

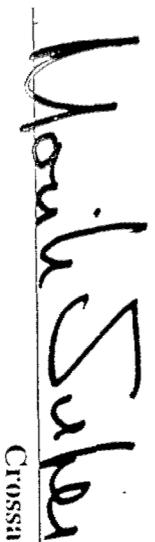
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

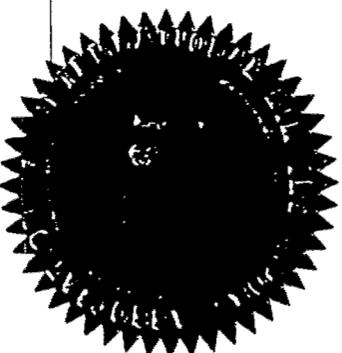
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 8 day of MARCH 1996


Crossair Ltd. Co.



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Crossair Ltd. Co. on 8 March 1996.


Dr. Louis Haack
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 01 day of August 1996

Deutsche BA Luftfahrtgesellschaft mbH
Richard Heideker
General Manager

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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Deutsche BA Luftfahrtgesellschaft mbH on 1 August 1996.

Dr. Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 9th day of August 1996

(ppa. Weber)

Deutsche Lufthansa AG

(ppa. Dr. Sacher)

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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Deutsche Lufthansa AG on 9 August 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

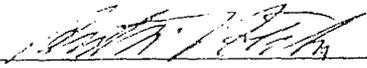
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

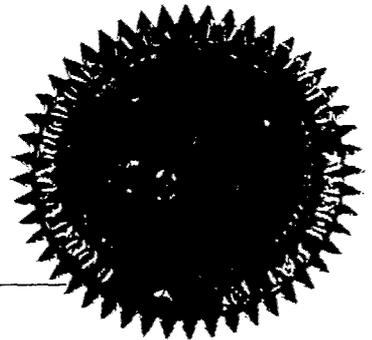
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 11 day of December 1995

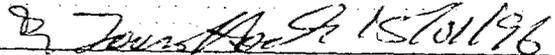

Finnair OY



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Finnair OY on 11 December 1995.


Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

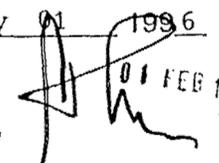
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

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Signed this _____ day of February 01 1996

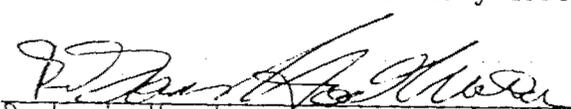

SOEPANDI
President

Garuda Indonesia 000134

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Garuda Indonesia on 1 February 1996.


Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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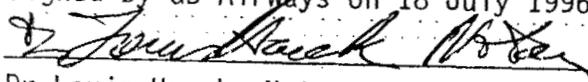
Signed this 18 day of JULY 1996


GB Airways

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by GB Airways on 18 July 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

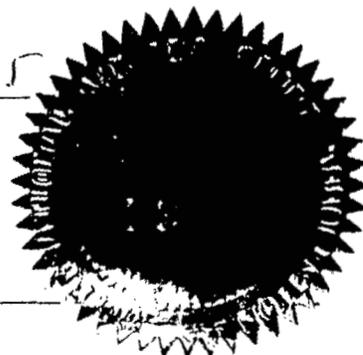
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 11th day of December 1995



President & CEO Icelandair



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CERTIFICATION

This is to certify that this is a true copy of the original signed by Icelandair on 11th December 1995.


Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

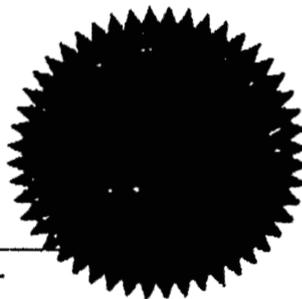
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 18 day of October 1996

IBERIA Líneas Aéreas de España, S.A.



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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by IBERIA on 18 October 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

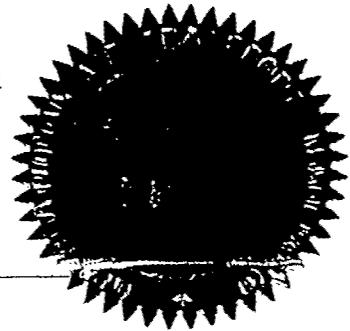
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Signed this 18th day of December 1995

Jet Airways (India) Pvt. Ltd.



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CERTIFICATION

This is to certify that this is a true copy of the original signed by Jet Airways (India) Pvt. Ltd. on 18 December 1995.

Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

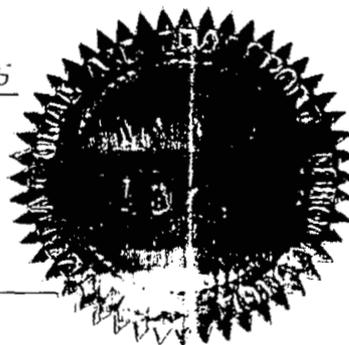
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 13th day of December 1995

MAWAACIWC

DIRECTOR
Kenya Airways Ltd.



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CERTIFICATION

This is to certify that this is a true copy of the original signed by Kenya Airways Ltd. on 13 December 1995.

Louis Haeck 15/12/95

Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

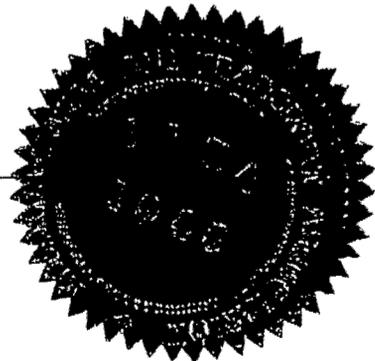
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 24 day of June 1996.

KLM CITYHOPPER BV



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CERTIFICATION

This is to certify that this a true copy of the original agreement signed by KLM Cityhopper BV on 24 June 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

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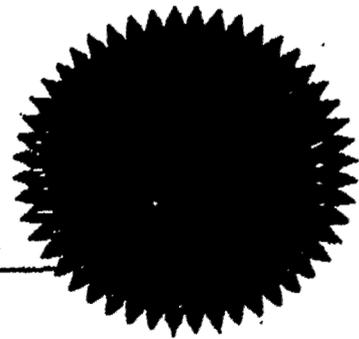
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7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 22 day of OCT 1996

Korean Air Lines Co., Ltd.



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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Korean Air Lines Co., Ltd. on 22 October 1996.

Dr Louis Haecck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

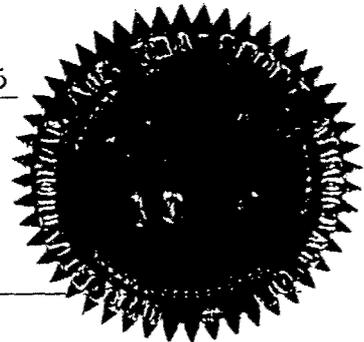
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 12 day of DECEMBER 1995

Líneas Aéreas Paraguayas (L.A.P.)



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by Líneas Aéreas Paraguayas (L.A.P.) on 12 December 1995.

Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

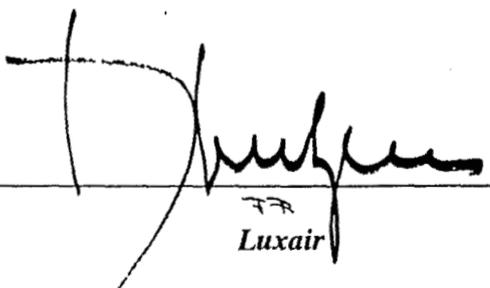
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

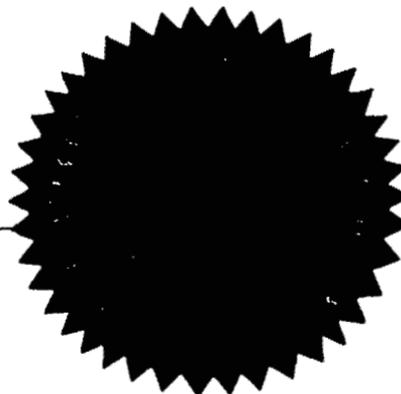
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 10 day of September 1996


Luxair



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Luxair on 10 September 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 28th day of JULY 1996

Malaysian Airline System Berhad

TAN SRI DATO' TAJUDIN RAMLI

Chairman

Malaysia Airlines

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Malaysian Airline System Berhad on 28 July 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 16 day of APRIL 1996

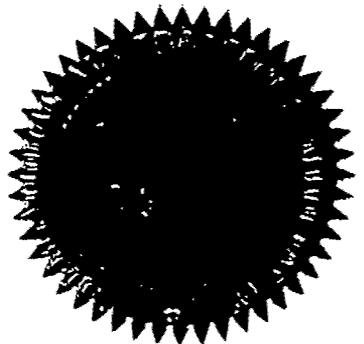
Pakistan International Airlines Corporation

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Pakistan International Airlines Corporation on 16 April 1996.

Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

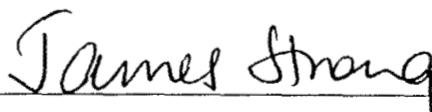
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

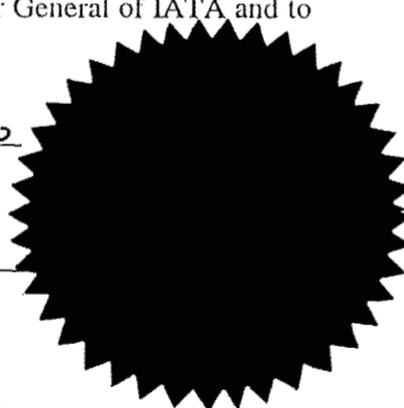
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 2nd day of JULY 1996

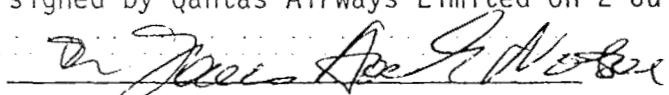

James Strong
Qantas Airways Limited



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Qantas Airways Limited on 2 July 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

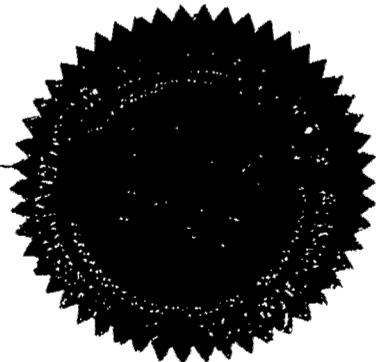
1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 10th day of May 1996

REGIONAL AIRLINES
Aéroport Nantes-Atlantique
44340 BOUGUENAIS FRANCE
Tél. 40 13 53 00
Fax 40 13 53 08

Philippe CHEVALIER

REGIONAL AIRLINES



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Regional Airlines on 10 May 1996.

Dr. Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 28th day of February 1996



Royal Air Maroc

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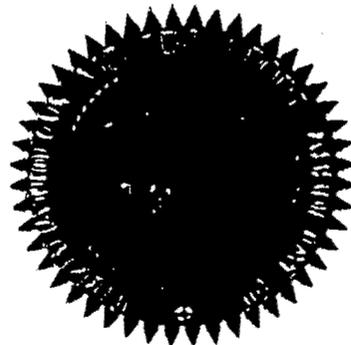
CERTIFICATION

This is to certify that this is a true copy of the original agreement signed by Royal Air Maroc on 28 February 1996.



Dr Louis Haeck

Notary for the Province of Quebec
in the Judicial District of Montreal





INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

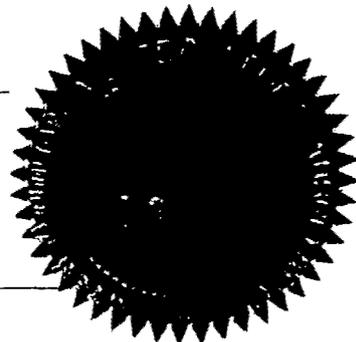
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 31st day of July 1996

Singapore Airlines Ltd.



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Singapore Airlines Ltd. on 31 July 1996.

Dr Louis Haecq, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

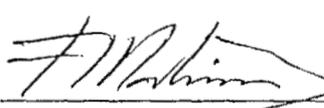
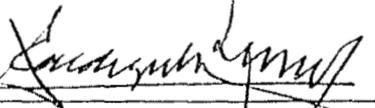
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

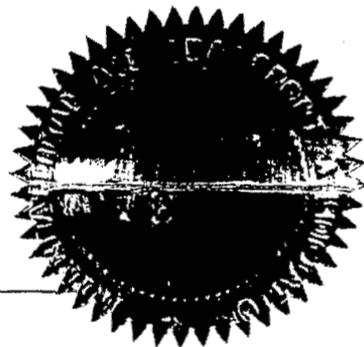
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this _____ day of _____ 1995 199__



TAP - Air Portugal



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by TAP-Air Portugal on 28 December 1995.


Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

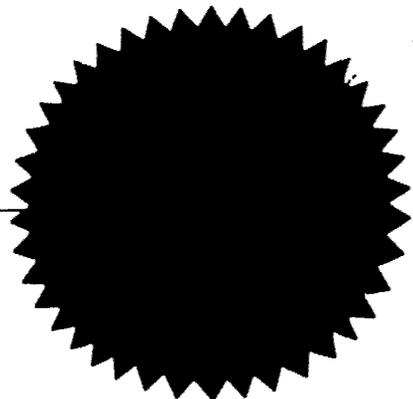
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 2nd day of September 1996.

TAT European Airlines



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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by TAT European Airlines on 2 September 1996.

Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

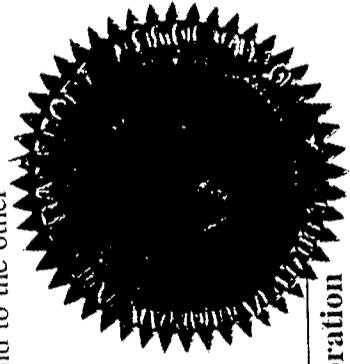
WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 15TH day of DECEMBER 1995


Edward Wignall (PRESIDENT)
Trinidad and Tobago (BWIA International) Airways Corporation

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CERTIFICATION

This is to certify that this is a true copy of the original signed by Trinidad and Tobago (BWIA International) Airways Corporation on 15 December 1995.

Dr Louis Haecck
Notary for the Province of Quebec
in the Judicial District of Montreal



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

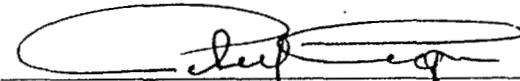
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

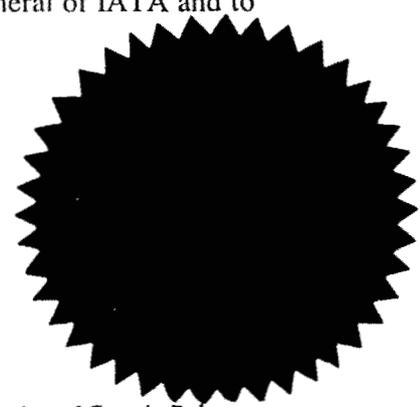
The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
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8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 28 day of August 1996

Transavia airlines C.V.


Peter J. Legro
President & C.E.O.



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CERTIFICATION

This is to certify that this is a true copy of the original Agreement signed by Transavia airlines C.V. on 28 August 1996.


Dr Louis Haeck, Notary



INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

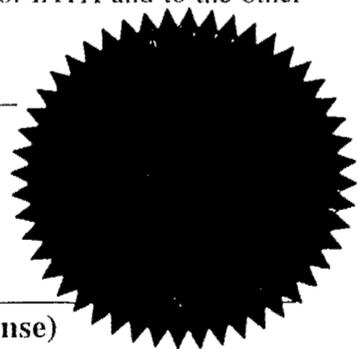
NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this 19 day of december 1995

VARIG S.A. (Viaçao Aérea Rio-Grandense)



* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

CERTIFICATION

This is to certify that this is a true copy of the original signed by VARIG S.A. (Viaçao Aérea Rio-Grandense) on 19 December 1995.

Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal



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Signed this 17th day of January 1996


Venezolana Internacional de Aviación S.A. (VIASA)

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CERTIFICATION

This is to certify that this is a true copy of the original signed by VIASA on 17 January 1996.


Dr Louis Haeck
Notary for the Province of Quebec
in the Judicial District of Montreal

ANNEX B

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The Department's Proposed Conditions and Permit Amendments Would Violate International Law, U.S. Bilateral Agreements and Section 4105 of the Transportation Code.

I. INTRODUCTION

In Order 96-10-7 the Department proposes to attach several conditions to the IIA and MIA (the "Agreements"), and to impose the modified Agreements plus the IPA as conditions on all non-U.S. air carriers operating to, from or within the United States by means of permit amendment. Order at 8-17. The proposed conditions, if adopted in final, would be in derogation of Articles 24 (Convention as governing law), 28 (jurisdiction), 30 (successive carriage), and 32 of the Warsaw Convention, among others. Such actions would cause the United States to be in violation of its obligations under international law, under U.S. bilateral aviation agreements, and under Section 40105 of the Transportation Code (FAA § 1102).

II. THE CONDITIONS PROPOSED IN ORDER 96-10-7 WOULD CONTRAVENE U.S. OBLIGATIONS UNDER THE WARSAW CONVENTION AND INTERNATIONAL LAW

The Warsaw Convention is a binding multilateral treaty that imposes duties upon its Parties under international law. As a Party, the United States is obligated to abide by the terms of the treaty in good faith. The Department's ill-conceived attempt to impose a unilateral comprehensive liability regime on the entire non-U.S. air carrier community -- in derogation of the provisions of the Warsaw Convention -- is not sustainable under

fundamental principles of international law. Under the Convention, such changes in the Warsaw liability regime can only be achieved through amendment to the Warsaw Convention which is not contemplated in the Department's proposed action.

A. The United States Is Bound By The Warsaw Convention and Fundamental Principles of International Law

For more than 60 years the United States has been a Party to the Warsaw Convention of 1929^{1/} and has committed itself to the international air passenger liability regime established thereunder. The Warsaw Convention creates binding international treaty obligations on the United States in the realm of liability for damages sustained in international air accidents and is governed by international law.^{2/}

One of the bedrock principles of international treaty law jurisprudence holds that nations must abide in good faith by their treaty obligations. This principle on the observance of treaties, or pacta sunt servanda, is expressed in Article 26 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in

^{1/} Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929, entered into force for the United States, October 29, 1934, 49 Stat 3000. (1934), T.S. No. 876, 137 L.T.N.S. 11, reprinted in 49 U.S.C. § 1502 (1976) (note).

^{2/} The Warsaw Convention has been interpreted by Federal courts as "the supreme law of the land." Swaminathan v. Swiss Air Transport Co., Ltd., 962 F.2d 387, 390 (5th Cir. 1990); see also Zicherman v. Korean Air Line Co., Ltd., 116 S.Ct. 629, 634 (1995).

good faith." U.N. Doc. A/Conf.39/27, 8 I.L.M. 679 (1969). Although not specifically applicable to the Warsaw Convention,^{3/} the Vienna Convention is widely considered the best evidence of customary international law on treaties.^{4/} As such, the Vienna Convention, and the principle of pacta sunt servanda, are binding on the United States vis-a-vis its obligations under the Warsaw Convention.^{5/}

Indeed, this longstanding principle of international law is explicitly recognized and adopted in Article 32 of the Warsaw Convention which prohibits the carrier and the passenger, by contract or special agreement, from infringing the rules set forth in the treaty:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be

^{3/} Although the United States is a signatory to the Vienna Convention, Article 4 limits the Convention's applicability to treaties concluded after its entry into force on January 27, 1980. The Warsaw Convention entered into force on October 29, 1934.

^{4/} Upon submission of the Vienna Convention to the Senate for ratification, the U.S. Department of State recognized that the Convention, including Article 26, "is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st sess., at 1 (1971). See also Restatement (Third) of Foreign Relations, § 321 cmt. a (1987).

^{5/} See Husserl v. Swiss Air Transp. Co., 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972) (applying Vienna Convention prior to entry into force to interpret Warsaw Convention); see also Nuclear Tests cases (Australia & New Zealand v. France), 1974 I.C.J. 253, 267, 382 (December 1974) (recognizing that every international legal obligation inherently includes the principle of good faith and pacta sunt servanda).

applied, or by altering the rules as to jurisdiction, shall be null and void.

As detailed below, the Department's proposed conditions conflict with several provisions of the Warsaw Convention and, therefore, violate U.S. international legal obligations and are specifically unenforceable under Article 32 of the treaty.

B. The Proposed Conditions Infringe, Inter Alia, Articles 24, 28, 30 And 32 Of The Warsaw Convention In Derogation Of U.S. Obligations Under International Law

The conditions set out in Order 96-10-7, as to the Agreements and with respect to foreign air carrier permits, impermissibly infringe upon the jurisdictional rule of Article 28 and the successive carrier liability rule of Article 30, among others.^{5/} These conditions will be "null and void" as to non-U.S. carriers under Article 32 of the Warsaw Convention and, ultimately, unenforceable by U.S. passenger claimants in national courts. In such an event, future claimants will likely be restricted to the limitations of the original Warsaw Convention or the Convention amended at the Hague, in many jurisdictions.

^{5/} As to those non-U.S. carriers that have not subscribed to the IIA and MIA, the Department's proposal to apply the Agreements as conditioned by amending foreign air carrier permits would also be in derogation of the liability limit of Article 22 (as modified by the 1966 Intercarrier Agreement) and the defense of proof of non-negligence in Article 20(1) of the Warsaw Convention. These carriers did not agree to waive the passenger liability limits nor to accept strict liability for damages up to 100,000 SDRs. The Department cannot unilaterally dictate these conditions in contravention of U.S. obligations under the Warsaw Convention.

1. Article 28

Article 28(1) of the Warsaw Convention limits the jurisdiction in which Article 17 damages claims can be brought to the domicile or principal place of business of the carrier, the place where the ticket was purchased, or the place of destination. There is no provision allowing for a derogation from these four jurisdictional bases by contract, by agreement of the carrier and the passenger, or otherwise.^{2/} U.S. courts have uniformly held that Article 28 establishes the exclusive means of achieving jurisdiction for claims within the scope of the Convention. See Swaminathan, 962 F.2d at 389; Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798, 800 (2d Cir. 1971).

Nevertheless, an apparent principal objective of the Department is to impose on all carriers a "fifth jurisdiction" based on the domicile or permanent residence of the passenger. As the Order elaborates:

Our guidelines also provide that U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States should be subject to a measure of damages consistent with those available in cases arising in U.S. domestic air transportation. This can be accomplished only if claimants on behalf of U.S. citizen or permanent resident passengers have access to U.S. courts.

Order at 13. Disappointed at the absence of a fifth jurisdiction arrangement in the IIA/MIA, the Department now evidently aims to

^{2/} In contrast, Article 22(1) permits the parties to waive the stated Warsaw liability limit in the contract of carriage.

coerce non-U.S. carriers by proposing to condition their air carrier permits on one or more onerous and unworkable "alternative" measures.^{8/} Order at 14-16.

This coercive effort to compel non-U.S. carriers to submit to a non-Warsaw Convention sanctioned jurisdictional scheme is in violation of international legal obligations as embodied in the Vienna Convention and Article 32 of the Warsaw Convention. Carriers may not, at the direction of the Department or on their own accord, supplement the four choices of jurisdiction provided in Article 28. Any contract or agreement purporting to "alter the rules as to jurisdiction" would be in direct conflict with Articles 28 and 32, and would have no legally binding effect.^{2/}

^{8/} With respect to U.S. carriers, the Order proposes to include an explicit condition to require that U.S. carriers submit to a fifth jurisdiction based on the domicile or permanent residence of the passenger. Order at 14. The ostensible "alternatives" proposed for non-U.S. carriers clearly are designed to be coercive. Alternative a, *id.* at 14, would create a pre-accident right to claim damages in a non-Article 28 forum and thus fail under Article 32. Moreover, it would require actions to be split unworkably between liability determinations (presumably in an Article 28 forum), and damage determinations in U.S. arbitration. Alternative b, *id.* at 15, is an addition and thus not meaningful. Alternative c, *id.*, involves an unavailable, potentially duplicative (*e.g.*, frequent travelers would have multiple policies) and high cost insurance policy which would force the ticketing carrier to insure against the negligence of unknown other carriers. Alternative d, *id.*, appears to be a variant of proposed condition d, *id.* at 10, and thus (to the extent it is intelligible) violates Article 30 and imposes upon the "first carrier" the burden of insuring other carriers' obligations.

^{2/} See Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 126 n. 2 (1989) (recognizing that the Executive Branch does not have the authority to bring about changes to a treaty unilaterally).

2. Article 30

Article 30 of the Warsaw Convention establishes the rule of liability where transportation is performed by various successive carriers. Under Article 30(2), the passenger can take action only against the carrier performing the transportation during which the accident occurred.^{10/} Article 30(2) permits the first carrier, "by express agreement," to assume liability for the entire journey. This is a right reserved exclusively to the first carrier to adopt or not, as that carrier sees fit.

The Department proposes to require the first carrier, in certain instances where successive carriage is involved, to assume liability for the entire journey. Specifically, the Order proposes to condition the Agreements and permit authority to require that:

the carrier ticketing the passenger, or, if that carrier is not a party to the Agreements, the carrier operating to or from the United States, would have the obligation either to ensure that all interlining carriers were parties to the Agreements, as conditioned, or to itself assume liability for the entire journey.

Order at 10. The proposed condition infringes Article 30 by mandating assumption of liability by the first carrier. It would be improper for the Department to use its governmental powers to compel carriers to exercise what is clearly a permissive right

^{10/} See, e.g., Pflug v. Egyptair Corp., 961 F.2d 26, 31-32 (2d Cir. 1992); Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1103-04 (D.C. Cir. 1988).

under the Convention. The Department's action would be a derogation of its obligation to adhere to Article 30 in good faith, and would be invalid under Article 32 of the treaty.

C. The U.S. Government Cannot Unilaterally Amend The Warsaw Convention

The Department's proposed conditions, which are in direct conflict with various Articles of the Warsaw Convention, may only be implemented through amendment of the treaty. In the Order, the Department stated "to the extent that our objectives will be realized by these agreements, as conditioned, . . . the untimely process of seeking new amendments to the Convention [does] not provide [a] reasonable alternative[]." Order at 16. The Department evidently wishes to effectuate an amendment of the Warsaw Convention without conforming to the procedural requirements.

Amendment of a multilateral treaty is governed by principles of international law as codified by the Vienna Convention. Under these principles, Parties must amend treaty obligations in accordance with the terms of the treaty.^{11/} If the treaty fails to provide means for amendment, norms of international law

^{11/} See Vienna Convention, Art. 40(1).

provide several alternatives.^{12/} These norms do not permit a Party to amend a treaty unilaterally.^{13/}

The Warsaw Convention sets forth the procedures for amending the treaty. Parties may "call for the assembling of a new international conference in order to consider any improvements which may be made in this convention." Warsaw Convention, Art. 41. The United States has not called for an amendment under the rule prescribed in Article 41. Therefore, the Department's proposed Order can only be viewed as a unilateral attempt to amend a multilateral treaty in contravention of both the terms of the Warsaw Convention and the norms of international law.

III. THE ADOPTION OF PERMIT CONDITIONS FOR NON-U.S. CARRIERS AS PROPOSED IN ORDER 96-10-7 WOULD VIOLATE U.S. OBLIGATIONS UNDER EXISTING BILATERAL AIR TRANSPORT AGREEMENTS

The Department's proposal to amend all non-U.S. air carrier permits and other operating authority to apply the Agreements, as conditioned, to the entire international aviation community would violate U.S. obligations under existing bilateral Air Transport Agreements ("bilateral agreements"). Permit conditions which endeavor to establish the global liability scheme favored by the United States are not within the scope of air carrier regulation contemplated or permitted under the bilateral agreements.

^{12/} See Vienna Convention, Arts. 39-41 (amendment); Restatement Foreign Relations, § 334 (amendment).

^{13/} See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252-53 (1984) (holding that no Party has the power unilaterally to amend directly or indirectly any of the provisions of the Warsaw Convention).

Enforcement of these conditions against non-U.S. air carriers not voluntarily amending their conditions of carriage would inevitably result in resistance and possible retaliatory action from U.S. international aviation partners.

A. Bilateral Air Transport Agreements

The United States has over the years entered into numerous bilateral aviation agreements with other nations, including other Parties to the Warsaw Convention. The President of the United States has congressional authority to negotiate these executive agreements,^{14/} which constitute binding international agreements imposing all the rights and obligations of a treaty.^{15/} As a party to these bilateral agreements, the United States must abide by the principle of pacta sunt servanda and refrain from acting in contravention of the terms of the documents.

The bilateral agreements establish the reciprocal right for each Party's air carriers to arrive in, depart from, and fly across the other party's territory. The clear intent of the bilateral agreements is to provide designated carriers assurance of obtaining and retaining a foreign air carrier permit. Under these agreements, the United States is obligated to grant

^{14/} See generally 49 U.S.C. § 40101, et seq.

^{15/} See United States v. Pink, 315 U.S. 203, 230 (1942) (executive agreements are of "a similar dignity" to treaties); United States v. Belmont, 301 U.S. 324, 331 (1937) (executive agreements may be considered supreme law of the land). See also Restatement (Third) of Foreign Relations, § 301 cmt. a (noting that international agreements and exchange of notes have the same legal status as treaties under international law).

permission to its partners' designated air carriers provided, in relevant part:

the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air service by the [United States].^{16/}

The agreements further provide, in relevant part, that the United States may not revoke, suspend or limit the operating authorizations or technical permissions of an airline designated by the other party unless

the other party's airline fails to abide by [U.S.] laws and regulations relating to the operation of aircraft while entering, within or leaving the territory of [the United States].

Id., Arts. 4-5. Consistent with these treaty obligations, the Department routinely attaches "Conditions of Authority" to foreign air carrier permits.

As explained below, the changes to the Warsaw liability provisions advanced in Order 96-10-7 are beyond the scope of the Department's conditioning authority under the bilateral agreements and therefore such conditioning would be without international legal affect. In addition, any effort to enforce the proposed conditions against foreign air carriers would directly conflict with the intent of the bilateral agreements.

^{16/} See, e.g., Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Philippines, September 16, 1982, T.I.A.S. No. 10443, Art. 3(b).

**B. Imposition of the Proposed Conditions Would Violate
The Bilateral Agreements And International Law**

The conditions presented in Order 96-10-7 constitute neither laws and regulations relating to the operation of aircraft in the United States, nor laws and regulations normally applied to the operation of international air transport. As a result, there is no basis under the bilateral agreements to impose such conditions on non-U.S. air carrier permits.

The proposed permit conditions are not "laws and regulations relating to the operations of aircraft." Instead, these conditions would govern lawsuits arising only after an aircraft accident.^{17/} Further, the proposed liability provisions would apply to non-U.S. air carriers while operating outside the United States. Accordingly, these conditions cannot be considered a valid regulation of aircraft operations within the United States.

Similarly, the proposed permit conditions do not constitute "laws and regulations normally applied in international air transport." The fifth jurisdiction and first carrier liability provisions violate the Warsaw Convention, and, consequently,

^{17/} The Warsaw Convention was signed by all parties and thought to be controlling on the issue of lawsuits arising from aircraft accidents. The parties to the bilateral agreements could not have understood the phrase "laws and regulations relating to the operation of aircraft," to include laws and regulations relating to lawsuits. Defining the Order as a law regulating aircraft operations would defeat the reasonable expectations of the bilateral agreement signatories and import an unforeseen and unconscionable interpretation into the quoted phrase.

cannot be deemed to be "normally applied."^{18/} Further, the conditions are a significant departure from the Department's existing permit requirements.^{19/} Therefore, enforcement action against a non-U.S. carrier based on non-compliance with Order 96-10-7 would violate the bilateral agreement under which that carrier's permit was issued.

Importantly, the Department cannot rely on its previous regulatory action adopting the 1966 Intercarrier Agreement ("Montreal Agreement") as authority for imposing permit conditions affecting changes in the Warsaw liability rules. Part 203 of the Department's regulations, promulgated in 1983, universalized the broadly accepted Montreal Agreement waiving the Warsaw liability limit of Article 22(1) up to \$75,000 and waiving the defense of carrier proof of non-negligence under Article

^{18/} The negotiations of the bilateral agreements were conducted and concluded after the effective date of the Warsaw Convention. All bilateral signatories had a right to rely on the assumption that the United States would remain committed to the Warsaw Convention, or properly denounce the treaty. Thus, parties to the bilateral agreements could not have anticipated that the United States, while still a member of the Warsaw Convention, would impose conditions on the certification process that violate the treaty. Therefore, imposition of such conditions would now defeat the reasonable expectations of the other bilateral agreement parties.

^{19/} Under 14 C.F.R. Part 211, the Department may demand from foreign air carrier certificate applicants information regarding ownership and residency of the carrier, insurance data, financial data, scheduling and traffic patterns, the foreign country's policy with respect to U.S. carriers, accident reports for the last five years and the carrier's waiver of the Warsaw liability limit pursuant to the Montreal Agreement. See 14 C.F.R. § 211.20 (1996). Thus, conditioning certification based on compliance to the conditions of Order 96-10-7 represents a significant departure from the Department's past practices.

20(1).^{20/} See 14 C.F.R. 203. The Department issued this rule after more than 16 years of widespread adherence to the Montreal Agreement by U.S. and non-U.S. carriers alike,^{21/} and only after the U.S. Government was able to forge an international intergovernmental consensus on the Agreement's applicability to carriers operating to and from the United States. In addition, Part 203 focused only on provisions of the Warsaw Convention properly subject to waiver by carriers under the rules of the treaty and not mandatory provisions like Article 28. Thus, by the time Part 203 was promulgated, it arguably reflected generally accepted liability principles "normally applied to the operation of international air service."

No such foundation of widespread acceptance and customary international practice yet exists with respect to the IIA and MIA. As noted in Annex A, there is not a single non-U.S. carrier willing to subscribe to the Agreements if amended by the conditions set out in Order 96-10-7. Nor are these carriers likely to file conforming tariffs in response to a unilaterally prescribed condition to non-U.S. air carrier permits. Under these circumstances, future passenger claimants under the Warsaw

^{20/} The Department also included conditions in non-U.S. air carrier permits requiring such carriers to become and remain parties to the Montreal Agreement.

^{21/} As the Department recognized in the preamble to the Notice of Proposed Rulemaking for Part 203, the Montreal Agreement had the participation of all carriers serving the United States at that time. Indeed, the motivation for the regulatory action was to ensure adherence by new U.S. carriers that were forming in the wake of industry deregulation. See 47 Fed. Reg. 25019 (June 9, 1982).

regime will be bereft of the significant benefits of the IIA and MIA as there will be no special contract or agreement waiving the liability limits and carrier defense of non-negligence.^{22/}

Without the widespread participation of the international aviation industry -- which will not ensue if the Department persists in conditioning the Agreements -- there will be no customary norm under which the Department can lawfully implement the proposed conditions to non-U.S. air carrier permits.

Moreover, in the face of carriers refusal to incorporate the proposed conditions into their tariffs, the Department cannot simply dictate a special agreement to exist by means of a "deeming clause" such as that found in 14 C.F.R. § 203.5.^{23/} When it promulgated Part 203, the Department acknowledged the practical possibility that airlines could neglect to file a signed counterpart of the Montreal Agreement or properly conform their tariffs. It originated the deeming provision to ensure passengers would be protected in such an event. However, the Department adopted the provision without any regard to its

^{22/} As set forth in Section II above, the Department cannot under any set of circumstances prescribe changes to the mandatory provisions of the Warsaw Convention, such as Article 28. The terms of the treaty do not allow for alteration of these provisions by contract, special agreement, or otherwise, and any clause that purports to do so is null and void.

^{23/} Section 203.5 provides: "Notwithstanding any failure to file that counterpart and such tariff, any such air carrier or foreign air carrier issued license authority . . . by the Department or operating in air transportation shall be deemed to have agreed to the provisions of Agreement 18900" 14 C.F.R. § 203.5.

legality under the Warsaw Convention or domestic law.^{24/} In fact, the Department lacks legal authority to mandate acceptance of the conditions or "deem" a tariff to exist. As a consequence, even U.S. courts are unlikely to enforce the conditions proposed in Order 96-10-7 vis-a-vis future claimants even if the Department "deemed" them to be incorporated in tariffs.

Indeed, approval of the Agreements as submitted affords the best chance of attaining universal participation in a global inter-carrier liability system providing for full compensatory damages. Notably, the IIA incorporates an "encouragement clause" calling on signatory carriers to induce other airlines involved in interlining to apply the terms of the IIA to such carriage.^{25/} The broad industry backing for the IIA/MIA that currently exists will also promote consensus at the governmental level. In time, given approval of the IIA and MIA as presented, the Department may be in a position to consider a conforming amendment to Part 203.

In sum, denying or revoking non-U.S. carriers certificates or improperly interfering with non-U.S. carrier operations based on the carriers' failure to adopt the conditions of Order 96-10-7 would violate U.S. obligations under the bilateral aviation

^{24/} See U.S. and Foreign Air Carriers; Waiver of Warsaw Convention Liability Limits and Defenses, Notice of Proposed Rulemaking, 47 C.F.R. 25019, 25020 (June 9, 1982).

^{25/} In this regard, signatory carriers will have substantial leverage with non-participating carriers through the interline system.

agreements. Also, the Department cannot "deem" carriers to consent to these conditions. Therefore, any enforcement action based on the Order would be in contravention of the agreements as well as a violation of U.S. obligations under international law and could prompt and justify retaliation by other sovereigns.

C. The Department's Unilateral Action May Enable Other Countries, With Whom The United States Has Bilateral Air Transport Agreements, To Retaliate Against U.S. Carriers

The imposition and enforcement of Order 96-10-7 also would have serious repercussions for U.S. airlines operating internationally. By violating the bilateral agreements, the Department invites other parties to retaliate against U.S. carriers operating to/from those foreign nations. One potential result of this counteraction would be a serious disruption in international air transportation and the suspension or termination of many U.S. bilateral agreements.

The Department's own regulatory scheme recognizes a right of retaliation under the bilateral agreements. Under 14 C.F.R. Part 213, the Department has the authority to retaliate against any country in violation of its bilateral agreement with the United States. Part 213 states:

- (c) [i]n the case of any foreign air carrier permit . . . which is the subject of an air transport agreement . . . the [Department] may with or without hearing issue an order [requiring carrier to file with the Department all existing and proposed schedules of service] if it . . . finds that the government or aeronautical authorities of the

government of the [license] holder, over the objections of the U.S. Government, have: (1) Taken action which impairs, limits, terminates or denies operating rights, or (2) otherwise denied or failed to prevent the denial of, in whole or in part, the fair and equal opportunity to exercise the operating rights . . . of any U.S. air carrier . . . with respect to flight operations to, from, through, or over the territory of such foreign government.

14 C.F.R. § 213.3(c). Pursuant to this regulation, once the carrier submits all existing and proposed schedules, the Department may order the carrier to cease operations on the grounds that the carrier's operations either violate U.S. law or adversely affect the public interest.

If the Department attempts to impose and enforce the permit conditions in Order 96-10-7, it will very likely result in the exclusion of some foreign carriers from the United States. Such an action, as detailed above, would be a clear violation of the bilateral agreements. Foreign nations then would be legally empowered to retaliate against such illegal, unilateral action by prohibiting U.S. carriers from entering their territory.

Consequently, U.S. bilateral partners could increase the regulatory and administrative burdens on U.S. carriers applying for permits under their laws. Alternatively, other nations might simply consider the bilateral agreements substantially breached by the United States and, in turn, refuse to abide by the terms, thus defeating years of negotiation and jeopardizing the U.S. "open skies" initiative. In particular, the ultimate result of

the Department's enforcement of Order 96-10-7 might be a crippling suspension of international air transportation between the United States and other Warsaw Parties.

IV. THE DEPARTMENT'S PROPOSED ORDER VIOLATES SECTION 40105 OF THE TRANSPORTATION CODE

The Department's attempt to impose sweeping conditions on all non-U.S. air carrier permits is, finally, a clear violation of U.S. law. The Department's statutory grant of authority clearly prohibits the Secretary of Transportation from acting in contravention of international obligations of the United States. The statute has been interpreted strictly to prohibit the Department from infringing on any U.S. obligations under international agreements, regardless of whether the Secretary determines such infringement to be in the public interest. The proposed permit conditions are inconsistent with U.S. obligations under the Warsaw Convention and existing bilateral agreements and, therefore, would constitute unlawful administrative action.

A. The Secretary Of Transportation Is Statutorily Prohibited From Taking Any Action In Violation Of An International Treaty Obligation

The Secretary of Transportation "shall act consistently with the obligations of the United States Government under an international agreement." 49 U.S.C. § 40105.^{26/} (Supp. 1996). The Secretary also has the discretionary authority to "impose

^{26/} Formerly Section 1502 of the Federal Aviation Act, 49 U.S.C. § 1502 (1976).

terms for providing foreign air transportation under the permit that the Secretary finds may be required in the public interest." 49 U.S.C. § 41305. Nonetheless, the discretionary authority of the Secretary is specifically limited by U.S. obligations under international agreements. See British Caledonian Airways v. Bond, 665 F.2d 1153 (D.C. Cir. 1981).

The Warsaw Convention and all existing bilateral aviation agreements unquestionably constitute "obligations of the United States Government under an international agreement." As demonstrated above, the Department's proposed conditions on non-U.S. air carrier permits would violate Articles 28, 30, and 32 of the Warsaw Convention and U.S. obligations under the bilateral agreements. Therefore, the Department's proposed action would, ipso facto, violate 49 U.S.C. § 40105.

B. The Department's Action Violates Binding Case Law

In the case of British Caledonian Airways v. Bond, the United States Court of Appeals for the District of Columbia interpreted language substantially similar to § 40105^{27/} and struck down a Federal Aviation Administration ("FAA") special regulation that was in violation of the Convention on International Civil Aviation ("Chicago Convention") and existing

^{27/} The court in Bond interpreted the predecessor statute, Section 1502 of the Federal Aviation Act, which provided: "In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country." Id. at 1162.

bilateral agreements. 665 F.2d 1153 (D.C. Cir. 1981) ("Bond"). In Bond, the FAA, responding to the crash of American Airlines DC-10 Flight 191 and the ensuing investigation, attempted to prohibit the entry of DC-10 aircraft from Chicago Convention Parties,^{28/} even though the government concerned certified the DC-10s as safe and airworthy.^{29/} Id. at 1155-1156. The Administrator of the FAA determined that such action was in the interest of public safety. Id. at 1155. British Caledonian Airways challenged SFAR 40 as a violation of the Chicago Convention and the U.S. bilateral agreement with the United Kingdom and, hence, a violation of Section 1102. Id. at 1163.

The Bond court agreed with British Caledonian Airways and overturned the FAA action. The Court held that because the FAA did not challenge the other Chicago Convention Parties' minimum standards of airworthiness, it had no authority, under the Chicago Convention, to prohibit the entry of the DC-10s. Id. at

^{28/} Special Federal Aviation Regulation No. 40 ("SFAR 40") prohibited the operation within U.S. airspace of all foreign-registered DC-10 aircraft.

^{29/} Article 33 of the Chicago Convention stated:

Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

Id. at 1160.

1162. Further, the court held that the FAA violated the bilateral agreements because it denied entry of non-U.S. registered aircraft for reasons other than those specified in the bilateral agreements.^{30/} Therefore, the court held that the FAA had violated its statutory obligation to act "consistently with any obligation assumed by the United States in any treaty, convention or agreement." Id. at 1168.

The Bond precedent reinforces the futility of the Department's unilateral effort to alter the liability regime of the Warsaw Convention. The Department cannot lawfully take action, by regulation or otherwise, which would violate the international obligations of the United States. Any such action is destined to be struck down in the courts.

^{30/} Id. at 1164. The court noted that the bilateral agreements allowed the United States to revoke certification of a signatory's aircraft for one of the three reasons stated in the Agreement. The FAA violated the bilateral agreements because it did not specifically state which existing U.S. law the foreign carrier violated or which minimum safety standard the signatory party failed to meet.

ANNEX C

ANNEX C

THE DEPARTMENT'S ATTEMPT TO UNILATERALLY ENGRAFT ITS OWN CONDITIONS ONTO THESE AGREEMENTS IS IN VIOLATION OF LAW

I. INTRODUCTION

Through Order 96-10-7, the Department seeks to bootstrap a series of tentative, voluntary agreements among United States and foreign air carriers that would provide air travellers with significant relief from the unconscionably low liability protections provided by the Warsaw Convention into a rule of general applicability whose scope and effect is far beyond that contemplated by the parties who negotiated those agreements. In addition to endangering the "gigantic step" these agreements represent in achieving voluntarily the important policy goals the United States has been unable to achieve diplomatically, the Department's Order disregards the language of its own authorizing statute, 49 U.S.C. § 41301, et seq., violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq., and ignores a host of additional procedural protections required by Congress where, as here, an agency seeks to promulgate rules of general applicability and future effect. IATA therefore believes that the Department should withdraw its ill-conceived conditions, approve and immunize the IIA and MIA as not adverse to the public interest, and undertake or encourage the appropriate governmental entities to undertake such administrative, legislative or diplomatic action as it deems necessary to enhance the security provided to international air travelers by these agreements.

II. THE DEPARTMENT'S PROPOSED CONDITIONS ON THE IATA AGREEMENTS CONSTITUTE AN ARBITRARY AND CAPRICIOUS ABUSE OF ITS AGREEMENT APPROVAL AUTHORITY.

A. Under The Code's Deregulatory Mandate, The DOT Must Approve As Filed Air Carrier Agreements That It Finds Not To Be Adverse To The Public Interest.

Congress has clearly defined -- and confined -- the scope of the DOT's authority in reviewing air carrier agreements:

The Secretary of Transportation shall approve an agreement . . . referred to in subsection (a) of this Section when the Secretary finds it is not adverse to the public interest and is not in violation of this part.

49 U.S.C. § 41309(b) (emphasis added).^{1/} By so limiting the DOT's agreement approval authority, Congress pays appropriate deference to, and encourages, air carrier cooperative initiatives that respond to changing market and other economic and social circumstances. It has thus recognized that solutions to matters of common concern to U.S. and foreign air carriers and to the passengers they serve may best be developed and implemented by industry participants, rather than through government regulation. See, e.g., Code Section 40101.

The instant IIA and MIA Agreements are singular examples of air carrier initiatives responsive to important concerns affecting the traveling public and the industry, and demonstrate

^{1/} The statute also instructs as to particular circumstances where the Secretary must disapprove an agreement or request for discussion authority. 49 U.S.C. 41309(b)(1)&(2). In approving IATA's initial request for discussion authority leading to the instant agreements, the Department acknowledged the important public benefits to be achieved from the uniform regime expected to arise from those discussions. Order 95-2-44 at 1-2 (Feb. 22, 1995).

the merit of the approach reflected in Section 41309(b). That Section makes no provision for conditioning authority where the Department has found that agreements, as submitted, are in the public interest. Such conditioning, as will be discussed below, would constitute nothing more than "back door" regulation in violation of the APA, other statutory procedural protections, and various Executive Orders applicable to rulemaking. Most fundamentally, the very threat of such agency regulatory "conditioning" -- if it were lawful -- would have a chilling effect on air carrier cooperative initiatives and would undermine the deregulatory policy reflected in the Code which looks to the industry for effective, efficient solutions to industry problems wherever possible.

B. The DOT's Finding That The IIA And MIA Are Not Adverse To The Public Interest Requires Approval Of The Agreements As Filed.

Order 96-10-7 explicitly -- and in glowing terms -- finds that the IIA and MIA, as filed, are not adverse to the public interest:

With their provision of the worldwide waiver of the Warsaw passenger liability limits, the agreements have made a gigantic step toward creating an international liability regime under which carriers properly accept liability for death or injuries of passengers utilizing their services. No longer must passengers suffer decades of litigation in efforts to establish the "wilful misconduct" which was required under the Warsaw Convention for passengers to recover reasonable damages. Moreover, by providing for coverage of this liability under the carriers' liability insurance, the costly double coverage of the previously considered supplemental compensation plan will be

avoided. Clearly, therefore, these agreements are not adverse to the public interest.

Order 96-10-7 at 8-9 (Oct. 7, 1996). With such a finding, the plain language of Code Section 41309(b) mandates that the Department approve the agreements without conditions.^{2/}

However, despite the finding and the clear statutory command, the Department attempts to use its approval power to alter dramatically substantive terms of the agreements^{3/} and to

^{2/} If the DOT had found that the agreements were not consistent with the public interest, it would have been compelled to disapprove them. In that situation, it would have been appropriate for the DOT to propose "conditions" by way of guidance to the submitting carriers on the changes and terms which would make the agreements acceptable to the DOT under the public interest criteria. Thus, to this extent, some courts have recognized agency "conditioning" authority under Section 412 of the Federal Aviation Act ("FAA"), 49 U.S.C. App. 1382, the predecessor to Code Section 41309(b). However, as one court has noted, even those instances have primarily been limited to situations where "the Board exercised a line item veto over the provisions of the agreement and left the parties with the choice of accepting the Board's decision, redrafting and resubmitting the agreements for Board approval, or appealing the Board's decision." Republic Airlines, Inc. v. CAB, 756 F.2d 1304, 1315 (8th Cir. 1985) (upholding right of Civil Aeronautics Board to sever certain anticompetitive provisions from marketing agreements); see also National Air Carrier Ass'n v. CAB, 436 F.2d 185, 190 (D.C. Cir. 1970) (upholding right of CAB to grant limited, interim approval to fare agreements pending further investigation); McManus v. CAB, 286 F.2d 414, 419 (2d Cir.), cert. denied, 366 U.S. 928, 978 (1961) (upholding right of CAB to "condition its approval on the incorporation of certain amendments"). In none of those instances, however, did the "conditions" approach the fundamental changes to a voluntary agreement contemplated by Order 96-7-10.

^{3/} Thus, the Department would amend the Agreements to require that carriers operating to or from the United States act as de facto insurers by assuming liability for any interline carriers who remain beyond the reach of the Department's broad order. Order 96-10-7 at 9-10. The Department also seeks to impose unilaterally a fifth basis for Warsaw jurisdiction by
(continued...)

make the requirements of the agreements (as rewritten by the Department) legally binding on all U.S. and foreign air carriers operating to and from the United States.^{4/} Thus, rather than tentatively approving agreements found to be in the public interest as required by law, Order 96-10-7 reflects an abuse of the Department's agreement approval authority by refusing approvals unless the agreements are amended to incorporate Department initiatives which properly should be addressed in general rulemaking.

The Department's failure to comprehend that the IIA and MIA actually do embody the best -- and only realistic -- opportunity to effect significant, long-awaited changes to the Warsaw liability regime can only be regretted. Unless the proposed conditions are withdrawn and the consensus previously achieved among the air carrier signatories is restored, the Department will have destroyed this remarkable cooperative effort by the industry.^{5/}

^{3/}(...continued)
proposing a series of alternatives intended to guarantee access to U.S. courts or to penalize those carriers who refuse to submit. Id. at 13-17.

^{4/} The Department tentatively finds that "it is in the public interest to adopt the conditions outlined in this order to be attached to all U.S. air carrier certificates, foreign air carrier permits, and all other outstanding, or future, authority to operate in air transportation (including exemption authority)." Order 96-10-7 at 16.

^{5/} The Department itself recognized the practical limits of the United States' ability to unilaterally impose a worldwide alteration of the Warsaw Convention's liability limits in its orders granting antitrust immunity to IATA: "A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to
(continued...)

III. ORDER 96-10-7 VIOLATES THE ADMINISTRATIVE PROCEDURE ACT AND THE LEGISLATIVE RULEMAKING PRECEDENT ESTABLISHED TO ENSURE COMPLIANCE WITH THE MONTREAL AGREEMENT.

The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy" 5 U.S.C. § 551(4). The Department's Show Cause Order, imposing dramatic revisions to a liability regime previously settled by agreement, clearly falls within the definition of a "rule" under the APA. As such, the Department is required to comply with the procedures set forth in 5 U.S.C. § 553, including publication of general notice of proposed rulemaking in the Federal Register, and providing opportunity to participate in the rulemaking. 5 U.S.C. § 553(b) & (c). The Department's failure to provide such a full and fair notice to interested parties outside the Department's service list, and the inadequate opportunity to participate afforded by the

^{5/}(...continued)

abide by. This approach, however, could engender such significant opposition from our trading partners that our ability to implement the plan unilaterally could very well be jeopardized." Order 95-2-44 (Feb. 22, 1995). See also Order 96-1-25 (Jan. 23, 1996) ("We recognize, although regretfully, that it may not be possible to reach unanimity on an agreement for worldwide application. The absence of unanimity, or even a large worldwide consensus for areas other than to or from the U.S., should not, however, deter the efforts to achieve the maximum U.S. and foreign carrier participation in the development of a single liability regime that conforms to the Department's guidelines to be applicable to and from the United States."). The Department's abrupt decision to abandon its earlier recognition of the limitations inherent in proceeding through negotiated agreement will destroy the progress made through the IIA and MIA and result in the very failure the Department predicted.

Department's abrupt conversion of approval of these voluntary air carrier agreements into an affirmative exercise of rulemaking power, render the Order invalid.

While an agency is afforded considerable discretion in determining whether to proceed by rulemaking or adjudication, failure to provide the procedural protections required by the APA may constitute an abuse of discretion or a violation of the Act. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 295, 94 S. Ct. 1157, 40 L. Ed.2d 137 (1974); see also NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764, 89 S. Ct. 1426, 22 L. Ed.2d 709 (1969) ("The rule-making provisions of the Act . . . were designed to assure fairness and mature consideration of rules of general applicability.") (plurality opinion). Courts have not hesitated to overturn agency orders that constituted substantive rulemaking without the due process protections afforded by Section 553 of the APA. In Alaska v. DOT, 868 F.2d 441 (D.C. Cir. 1989), for example, twenty-seven states challenged two Department orders exempting certain air travel surcharges from validly-promulgated regulations requiring all advertising for air travel to state the full price for the trip. The D.C. Circuit determined that the Department's exemptions were unlawful because they amounted to legislative or substantive, rather than adjudicative or interpretive, rules, and failed to comply with the notice-and-comment procedures of Section 553. Id. at 445.

Here, the DOT's Show Cause Order would, inter alia, amend regulations now published in 14 C.F.R. Part 203 relating to

adherence to the Montreal Agreement by requiring mandatory adherence by all U.S. and foreign carriers serving the U.S. to the IIA/MIA as conditioned. Opinion, at 10-11. This act alone demonstrates that the Order unlawfully intrudes on substantive, legislative rules. Any amendments to those rules must be subject to the same procedures used to adopt those rules. "'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first and, of course, an amendment to a legislative rule must itself be legislative.'" National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (citation omitted). See also American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993); Alaska v. DOT, 868 F.2d at 446-47; Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987).

The CAB promulgated Part 203 16 years after its FAA Section 412 approval of the Montreal Agreement, primarily to ensure that new carriers formed in the wake of the Airline Deregulation Act of 1978 would adhere to the increased limits of liability provided by the Agreement.^{6/} Prior to deregulation, all

^{6/} See 47 Fed. Reg. 25019 (June 9, 1982) (notice of proposed rulemaking); 48 Fed. Reg. 8042 (Feb. 25, 1983) (final rule). The CAB first signalled its intention to promulgate a rule requiring adherence to the Montreal Agreement when it issued its final rule requiring carriers to maintain minimum accident liability insurance coverage, 46 Fed. Reg. 52572, 52577 (Oct. 27, 1981). In addressing objections to the accident insurance rule, the Board noted that "in the past [the Board] has used informal rulemaking procedures to amend foreign air carriers' permits when adopting a rule of general applicability. The Board
(continued...)

carriers operating to or from the United States abided by the Montreal Agreement either as voluntary signatories or as a condition of their permits issued in accordance with FAA Section 402.^{7/} Yet, despite the fact that virtually all affected persons were already abiding by the Agreement (and, therefore, the proposed rule), the CAB provided full notice and comment proceedings, including publication of notice in the Federal Register and a two-month period for comments. In light of this history, the Department's decision to bootstrap amendment of Part 203 into approval of the IIA/MIA Agreements, without proper published notice, and with a comment period less than half the length of that provided when Part 203 was originally promulgated, constitutes a serious abuse of discretion and a clear violation of the APA.

Further, Order 96-10-7 improperly purports to accept compliance with its terms as compliance with a host of other regulations promulgated after notice and comment.^{8/} "[A]n

^{5/}(...continued)
thus has the authority to use rulemaking procedures to adopt this rule and to apply it to foreign air carriers." 46 Fed. Reg. at 52576.

^{7/} 47 Fed. Reg. 25019 (June 9, 1982).

^{8/} See 14 C.F.R. § 201.7(e), 57 Fed. Reg. 38765 (Aug. 27, 1992) (requiring adherence to Montreal Agreement as general certificate condition); 14 C.F.R. § 204.3(u), 57 Fed. Reg. 38766 (Aug. 27, 1992) (requiring signed counterpart of Agreement as part of application for new certificate or commuter air carrier authority); 14 C.F.R. § 205.6, 57 Fed. Reg. 40100, 40101 (Sept. 2, 1992) (prohibiting insurance policy exclusion of liability assumed by carrier under Montreal Agreement); 14 C.F.R. 208.11, 48 Fed. Reg. 8048 (Feb. 25, 1983) (filing requirements (continued...))

agency issuing a legislative rule is bound by the rule until that rule is amended or revoked." National Family Planning, 979 F.2d at 234. The Department's intention to "amend" all these rules through an implicit, across-the-board exemption provides a strong signal that it has chosen inadequate procedures for implementing the changes proposed by Order 96-10-7. See American Mining Congress, 995 F.2d at 1109; Alaska v. DOT, 868 F.2d at 446-47.

In addition, the Department's sub silentio amendment of these rules without proper published notice has denied other interested persons who may be adversely affected the opportunity

^{8/}(...continued)

for adherence to Montreal Agreement); 14 C.F.R. § 211.20(t), 49 Fed. Reg. 33439 (Aug. 23, 1984) (three executed copies of Agreement required for application for foreign air carrier permit or transfer); 14 C.F.R. § 212.11, 48 Fed. Reg. 8049 (Feb. 25, 1983) (requiring adherence to Agreement as condition for foreign air charter permit); 14 C.F.R. § 213.7, 48 Fed. Reg. 8050 (Feb. 25, 1983) (requiring adherence to Agreement as condition for foreign scheduled air travel permit); 14 C.F.R. § 215.4(b), 53 Fed. Reg. 17923 (May 19, 1988) (requiring copy of Agreement executed in proposed name with each application for change or name or use of trade name); 14 C.F.R. § 221.38 (h) & (j), 30 Fed. Reg. 9439 (July 29, 1965) (requiring statement in all tariffs of whether carrier has elected to waive limits of Warsaw convention); 14 C.F.R. § 221.175, 36 Fed. Reg. 22229 (Nov. 23, 1971) (prescribing notice of limited liability on passenger tickets); 14 C.F.R. § 221.176, 36 Fed. Reg. 22229 (Nov. 23, 1971) (prescribing alternative consolidated notice); 14 C.F.R. § 294.3(d), 46 Fed. Reg. 52591 (Oct. 27, 1981) (requiring signed Agreement of Canadian charter air taxi operators), 14 C.F.R. § 294.22(a)(2), 46 Fed. Reg. 52591 (Oct. 27, 1981) (requiring filing of signed Agreement where Canadian charter air taxi operators seeks change of name); 14 C.F.R. § 298.3(a)(5), 48 Fed. Reg. 8051 (Feb. 25, 1983) (requiring signed Agreement for classification as "air taxi operator"); 14 C.F.R. § 298.11(b), 40 Fed. Reg. 42888 (Sept. 18, 1975) (excepting requirement of compliance with Agreement from exemptions for air taxi operators and commuter air carriers); 14 C.F.R. § 298.21(c)(4), 48 Fed. Reg. 25023 (Feb. 25, 1983) (requiring signed Agreement in registration filing for certain air taxi operators).

to participate in these proceedings. See Mobile Exploration & Producing N. Am., Inc. v FERC, 881 F.2d 193, 199 (5th Cir. 1989) (failure to publish Federal Register notice denied non-parties opportunity to participate). For example, the Department's mandatory requirement of waiver of the limits of the Warsaw Convention, as modified by the Montreal Agreement, is likely to impact the market for aviation accident insurance. Yet, insurance companies and other interested persons, who actively participated in the Department's initial promulgation of minimum insurance requirements, see 46 Fed. Reg. 52572 ("Numerous well-reasoned and helpful comments were received from the insurance industry, U.S. and foreign air carriers, many air taxi operators, Congressmen, other parts of the Federal government, and several State government agencies."), will be denied a fair opportunity to participate in the most far-reaching revision of the aviation liability regime since the Warsaw Convention. The Department's failure to provide that notice and opportunity to be heard is in clear violation of Section 553 of the APA.

The Department also proposes to force all carriers operating to, from and within the United States to participate in the agreements as conditioned. Order at 10. This action would compel air carriers in foreign air transportation to amend their tariffs to comply with the DOT's directive. In other words, this DOT action constitutes a form of tariff prescription that exceeds the Department's statutory authority.

Unless issues of discrimination are properly raised, the Department's authority over tariffs in foreign air transportation is limited to suspension, cancellation or rejection and does not include the power of prescription. See Code Sections 41507 and 41509. And even the Department's limited authority over foreign air carrier tariffs is subject to Presidential review in recognition of the inherent foreign relations sensitivity of any actions taken in this area, particularly in light of the numerous and differing undertakings entered into by the United States on the scope of governmental authority over tariffs filed by designated carriers in the various bilateral air transport agreements.^{2/} See Code Section 41509(f).

To the extent that the Department has relied upon its authority to order changes in foreign air tariffs to address discriminatory practices, it has focused only on the prospect of meeting possible changes in foreign liability laws on a "most favored passenger" basis. See Order at 11. Thus, Order 96-10-7 "tentatively" proposes to "require that all tariffs, contracts of carriage or other, similar provisions applied by any carrier, in any jurisdiction, to the extent any such provision would be more favorable to its passengers with respect to recoveries would be more favorable to its passengers with respect to recoveries for passenger deaths and injuries under the Warsaw Convention system

^{2/} For example, under bilateral air transport agreements having "country of origin" or "double disapproval" tariff provisions, the DOT's Order could not lawfully be implemented without the prior consent of the designated foreign air carrier's government.

than the provisions of the IATA and ATA agreements, as conditioned by the Department's approval order, shall apply equally to all passengers on services to and from the United States." Order at 11. But even here the Order fails to comply with the requirements of Code.

Under Code Section 41507, the Department may change a classification, rule or practice affecting the price or value of the transportation provided upon a finding that the classification, rule or practice "is or will be unreasonably discriminatory." 49 U.S.C. § 41507(a). However, the Secretary must provide notice and an opportunity for a hearing. 49 U.S.C. § 41507(b). As explained supra the notice and opportunity provided by the Order are plainly inadequate.

Further, under Code Section 41310, which is relied upon by the Department in justifying its proposed rewriting of tariffs, see Order at 11, prior to undertaking any action against alleged discriminatory activity, the Department is required not only to provide "reasonable notice" and an opportunity to be heard, but also to solicit the views of the Secretary of Commerce, Secretary of State and the United States Trade Representative. 49 U.S.C. § 41310(d)(2). The Code also contemplates that the primary focus of complaints of discriminatory practice will be on anti-competitive measures. For example, Code Section 41310(c) authorizes the Secretary to take action against an "unjustifiable or unreasonable discriminatory, predatory or anti-competitive practice against an air carrier" or an "unjustifiable or

unreasonable restriction on access of an air carrier to a foreign market." None of these statutory provisions contemplates the broad rewriting of tariffs to achieve public policy goals undertaken by the Order. Even if they did, the Department has failed to provide reasonable notice and opportunity to be heard, and to solicit the views of the Secretary of Commerce and United States Trade Representative as required by statute.

Lastly, Code Section 41310(b) contemplates that the primary method to avoid discrimination is through diplomatic channels. Under that Section, in addressing a discriminatory charge imposed by a foreign entity, the first course of action required by statute is for the Secretaries of Transportation and State "to begin negotiations with the appropriate government to end the discrimination." The Department, however, has taken it upon itself to forego diplomatic resolution of the problems inherent in the current liability scheme and to take unilateral action. In so doing, the Department violates the letter and the spirit of the statute and fails to heed its own prior recognition of the foreign relations implications of its actions. See supra, note 5.

**IV. ORDER 96-10-7 IGNORES OTHER RULEMAKING REQUIREMENTS
REQUIRED BY EXECUTIVE ORDERS AND CONGRESSIONAL
ENACTMENTS.**

In ignoring the requirements of Section 553 of the APA, the Department also improperly bypasses a number of requirements mandated by statute or Executive Order to ensure the appropriate exercise of the Department's rulemaking authority, including:

- Executive Order 12,866, 3 C.F.R. § 199 (1993), which requires the Department to (i) make a "reasoned determination" that the benefits of the proposed rule justify its costs, id. 1(b)(6); (ii) "identify and assess available alternatives" to the proposed rule, id. 1(b)(3); (iii) base the proposed rule on "the best reasonably obtainable scientific, technical [and] economic" information," id. 1(b)(7); and (iv) "tailor" the proposed rule "to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives" id. 1(b)(11).
- Executive Order 12,630, 3 C.F.R. § 554 (1988 Comp.), which directs agencies to anticipate the obligations imposed by the Just Compensation Clause of the Fifth Amendment;
- The Regulatory Flexibility Act, 5 U.S.C. § 601 et seq., which requires the Department to prepare an initial regulatory flexibility analysis that contains "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. § 603(c).
- The Paperwork Reduction Act, 44 U.S.C. § 3501, et seq., requires the Department to review the information-collection requirements in a proposed rule and submit those requirements to OMB for comment and approval.

The Department's use of Order 96-10-7 to impose broad rules on carriers impermissibly evades these important requirements, including full public scrutiny of the ramifications of its actions.

V. **ORDER 96-10-7 FAILS TO COMPLY WITH THE PROCEDURAL REQUIREMENTS FOR MODIFICATION OF FOREIGN AIR CARRIER PERMITS.**

Transportation Code Section 41301 requires a foreign air carrier operating to or from the United States to hold a permit issued by the Department. Under Code Section 41304(a), "[a]fter

notice and an opportunity for a hearing, the Secretary may amend, modify, suspend or revoke the permit if the Secretary finds the action to be in the public interest." Notwithstanding these Congressionally-mandated procedural requirements, the Department apparently seeks to turn the instant Section 41309 agreement approval proceeding into a Section 41304 permit modification proceeding impacting every carrier that currently holds, or may hold in the future, a foreign air carrier permit. See Order at 10-11, 16.

IATA submits that the de facto initiation of permit modification proceedings in response to IATA's application does not satisfy the notice and hearing requirements of Section 41304(a). No foreign air carrier has filed an application under Rule 1701(c) to initiate a permit modification proceeding. Thus, the Department's use of Order 96-10-7 to initiate a modification proceeding affecting every carrier holding a foreign air carrier permit, regardless of whether or to what degree the carrier participated in the IATA agreement discussions or concurs in the agreements, creates a level of surprise that suggests that the Department's actions are fundamentally unfair. See, e.g., Northwest Tissue Ctr. v. Shalala, 1 F.3d 522, 530 n.8 (7th Cir. 1993) ("Before any litigant reasonably can be expected to present a petition for review of an agency rule, he first must be put on fair notice that the rule in question is applicable to him."). Such carriers have been placed in the position of having to familiarize themselves with the complex and important issues

presented by IATA's proposed agreements and the Department's Order in a relatively short period of time or risk foregoing any opportunity to be heard at all.

Further, the Department's approach appears to have foreclosed a number of other procedural protections generally available in a permit modification proceeding, including the right to petition for an oral presentation, Rule 1712; the twenty-eight day period usually provided for filing answers, Rule 1740(c); and the consideration by the Department of alternative procedural mechanisms leading to the issuance of an order establishing further procedures, Rule 1750.

The Department's approach to permit modification is similar to that rejected by the United States Supreme Court in CAB v. Delta Air Lines, Inc., 367 U.S. 316, 81 S. Ct. 1611, 6 L. Ed. 869 (1961). There, the CAB sought to modify a certificate of public necessity issued under FAA Section 401 after that certificate had gone into effect based upon the Board's general reservation of the right to consider issues raised in pending petitions for reconsideration after issuance of the certificate. The Court, noting "that Congress was vitally concerned" with providing carriers with certainty in their operations once commenced, stated that

to the extent there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certificated carrier and that the specific instructions set out in the statute should not be modified by resort to such generalities as

"administrative flexibility" and "implied powers."

367 U.S. at 325.

The Department's effort to undertake wholesale amendment of foreign air carrier permits under the guise of a Section 41309 agreement approval similarly cannot pass muster. The approach undertaken by the Department is in conflict with the statute and its own procedural rules. And, as has been demonstrated above, the Department's approach is also in conflict with the APA and the rulemaking procedures used in the past to secure full carrier compliance with voluntary efforts to overcome the limitations of the Warsaw Convention.

CONCLUSION

The members of IATA and the Department share the same goal: to achieve significant reform of the current worldwide aviation liability system that will provide critical relief to air disaster victims and their families while retaining the substantial benefits of the Warsaw Convention. To achieve that goal, IATA has undertaken many months of negotiations resulting in the "gigantic step" of a voluntary worldwide waiver of the Convention's passenger liability limits. The Department has a number of options available to it in forwarding this important public policy objective: it can approve the agreements before it and encourage continued reform through voluntary agreements and intergovernmental channels, or it can attempt to apply the benefits of the agreements to non-signatory carriers through procedures in accordance with law. What it cannot do is take a

procedure designated by statute to encourage voluntary cooperation and agreement and turn it into a rulemaking imposing binding rules of law. Order 96-10-7 does just that, in violation of the Code, the APA, other statutes and Executive Orders, and the Department's own precedent.

ANNEX D

ANNEX D

THE DEPARTMENT'S ATTEMPT TO CREATE OR COERCE CARRIERS TO CREATE A "FIFTH JURISDICTION" IS DOOMED TO FAILURE IN THE COURTS

I. INTRODUCTION

In Order 96-10-7, the Department proposes to condition all foreign air carrier permits to require a "fifth jurisdiction" or equivalent benefit. Order 96-10-7 at 14.^{1/} This condition is presumably intended to equalize the positions of non-U.S. and U.S. carriers since the Order would impose the "fifth jurisdiction" on U.S. carriers. Id.

The International Air Transport Association ("IATA"), on behalf of its foreign air carrier Members, objects to these proposed conditions. IATA believes that courts will refuse to recognize an additional basis of jurisdiction in Article 17 cases unless and until an additional jurisdiction is expressly added by an amendment to the Convention itself and will dismiss any claims grounded on a "fifth" jurisdictional basis for lack of subject matter jurisdiction. Accordingly, the Department's ultra vires efforts to alter the jurisdictional requirements of the Warsaw Convention with

^{1/} The Department's Show Cause Order proposes a condition requiring non-U.S. carriers to submit to a fifth basis of jurisdiction or to adopt one of four other alternatives aimed at providing redress for U.S. citizens and permanent residents under circumstances where the Convention does not confer jurisdiction. Order No. 96-10-7 at 13-16. The other four alternatives are even more burdensome than the proposed fifth basis of jurisdiction. If the Department chose to impose any of these alternatives, the carriers will object to such conditions as well.

respect to U.S. carriers would be futile, and the foundation for imposing alternative conditions on foreign air carriers is illusory. If the Department insists on this condition, not only will passengers who rely on the fifth jurisdictional basis be denied any redress in court, but the vast majority of U.S. passengers whose concerns would be addressed fully by the proffered waivers of liability limits and defenses under the IIA and MIA will lose that admittedly "gigantic" benefit as carriers refuse to accept the DOT-revised agreement.

II. BACKGROUND

The Warsaw Convention limits jurisdiction over actions for damages that fall within the scope of the Convention.

Article 28(1) of the Convention provides:

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 place of business through which the contract has been made, or before the court at the place of destination.

These four bases of jurisdiction under the Convention operate as substantive limitations on a U.S. court's power to adjudicate a case. Smith v. Canadian Pacific Airways, Ltd., 452 F.2d 798 (2d Cir. 1971). Thus, it is universally accepted by the U.S. courts that if a plaintiff's claim does not fall within one of these four categories, it will be

dismissed. See, e.g., Gayda v. LOT Polish Airlines, 702 F.2d 424, 425 (2d Cir. 1983).

As the Department notes, the restrictions in Article 28 have occasionally barred U.S. citizens who are injured while travelling internationally from bringing suit in U.S. courts. For example, if a U.S. citizen purchases a ticket overseas from a foreign carrier, and has an ultimate destination outside the United States, no U.S. court may adjudicate her claim for redress. Order 96-10-7 at 13 & n.16.

In an effort to provide U.S. citizens resort to U.S. courts in such circumstances, there have been, in fact, several unsuccessful attempts to amend the Convention by adding a fifth basis of jurisdiction that would allow suit in the courts of the domicile or permanent residence of the passenger. Id. The group of carriers negotiating the Agreements currently before the Department (the IIA and MIA) decided against a fifth basis of jurisdiction -- in part on the ground that the matter was one for governments because Article 32 of the Convention specifically precludes any expansion of jurisdiction by agreement.^{2/} Proposals to add

^{2/} Article 32 provides:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void (emphasis added).

the fifth basis of jurisdiction have been the subject of extensive negotiations concerning possible comprehensive amendments to the Convention itself, most notably in the Guatemala/Montreal Protocols. See Guatemala City Protocol Art. XII (1971).^{3/} Those negotiations have never borne fruit, largely because the U.S. never became a party to the Protocols and they never became effective. Absent further successful inter-governmental negotiations, the Department's wish to protect U.S. citizens' access to U.S. courts through a "fifth jurisdiction," whether imposed by agreement or permit condition, cannot be realized.

III. ANALYSIS

The Department now proposes to accomplish by fiat what it has failed to achieve through negotiation or persuasion. In its Show Cause Order, the Department has instructed the carriers to accept a condition adding a fifth basis of jurisdiction permitting suit in the domicile or permanent residence of the passenger or an equivalent alternative, without amending the Convention itself. Order 96-10-7 at 13-16. Whether this proposed additional basis of jurisdiction is viewed as a new head of jurisdiction or as a broader interpretation of Article 28's third basis of jurisdiction (the place of business where the contract of carriage was

^{3/} Addition of the fifth basis of jurisdiction was in the context of an unbreakable, relatively low, limit of carrier liability.

made), it is in derogation of Articles 28 and 32 and, it is submitted, will not be accepted by the U.S. courts.

This unavoidable conclusion derives from either of two related, but independently sufficient, legal principles. First, in order to entertain a claim under Article 17, a court must have both domestic subject matter jurisdiction and "international jurisdiction." Under the latter principle, a court -- even if otherwise possessed of the power to hear a claim under a state or federal law -- may not do so if it would be inconsistent with United States' treaty obligations. As courts have repeatedly recognized, this principle categorically precludes adjudicating claims that do not conform with one of the four heads of jurisdiction recognized in Article 28. Starkly put, any other result would violate the Convention itself -- a result that cannot be avoided by "consent."

Second, a cause of action for injury or property loss occurring on an international flight necessarily "arises out of" the Warsaw Convention. Stated differently, the Convention occupies the field defined by Articles 17-19 and provides the sole basis on which claims arising out of this aspect of foreign commerce can be adjudicated. Because, under universally accepted principles, litigants' purported consent to the expansion of subject matter jurisdiction is of no force or effect, the Department's proposed condition or a

coerced commitment to the fifth jurisdiction would be a legal nullity.

Nor, it is submitted, can these fundamental principles be evaded by a creative construction of the four existing bases of jurisdiction provided in Article 28. To the contrary, courts have repeatedly and uniformly rejected all such efforts to expand jurisdiction contrary to the plain terms of Article 28 -- including such fictions as "deeming" a ticket to have been issued by a ticket office within the domicile of the affected passenger.

A. THE PROPOSED "FIFTH" BASIS OF JURISDICTION CANNOT CONFER INTERNATIONAL JURISDICTION IN U.S. COURTS.

Suits against foreign carriers brought pursuant to the Department's proposed fifth basis of jurisdiction would inevitably be dismissed in U.S. courts because they are barred by the terms of the Convention itself. Article 28 operates as a limitation on the ability of any court in the United States, as a matter of international law, to exercise jurisdiction over a foreign carrier. Under the established principle of "treaty" or "international" jurisdiction, any claim -- whether filed in state or federal court -- that did not satisfy one of the four heads of jurisdiction would be dismissed at the threshold.

The Second Circuit Court of Appeals has succinctly explained the nature of this jurisdictional barrier:

[I]n a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether suit may be maintained. The first level, on which this opinion turns, is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case -- jurisdiction in the domestic law sense.

Smith, 452 F.2d at 800. If a plaintiff cannot satisfy one of the "four clearly delineated forums [set forth in Article 28] as the only places in which suit may be brought," a case must be dismissed. Id. Because a contrary result would violate the terms of an international treaty, this principle "operates as an absolute bar to federal jurisdiction in cases falling outside [Article 28's] terms." Gayda, 702 F.2d at 425 (citing Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 102 S. Ct. 2099, 2104 (1982)).

Significantly, this principle would require dismissal: (1) regardless whether the suit is brought in state or federal court and (2) whether or not, in some theoretical sense, the court considers the cause of action itself to have "arisen" under the Warsaw Convention or some other font of positive law, such as a state wrongful death action. If treaty jurisdiction cannot be established, the court's inquiry is concluded:

Only if [the Convention] does apply so as to permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under

the Convention does not lie, federal jurisdiction under 28 U.S.C. § 1331(a) . . . clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332(a)(2); in other words, treaty provisions, being of equal constitutional status, may operate under article VI of the Federal Constitution as limitations on diversity jurisdiction. . . .

Smith, 452 F.2d at 802. Moreover, suit is barred in both federal and state courts if international jurisdiction is lacking. Id. at 800 n.3.^{4/}

The origins of this determinative principle are straightforward.^{5/} Pursuant to the constitutionally-prescribed treaty process, the United States agreed that any suit arising out of an otherwise covered international aviation incident could only be filed in one of four places -- and then went on to agree in Article 32 that such jurisdictional requirements would not be altered by pre-accident agreement. Self evidently, U.S. courts must honor

^{4/} See also Carl E. B. McKenry, Jr., "Judicial Jurisdiction Under the Warsaw Convention" 29 J. Air L. & Com. 205, 216-17 (1963) ("If a case controlled by the Warsaw Convention were presented to a Warsaw Convention forum not falling within the contacts of Article 28, it appears that such court would refuse to consider the action because of a lack of jurisdiction. The effect of Article 28 limiting the jurisdiction to four specific jurisdictional contacts, all of them within the territories of High Contracting Parties, has been generally regarded as exclusive.").

^{5/} The concept of "international" or "treaty" jurisdiction is a long-established canon of international law that is clearly established in Warsaw Convention precedent, but not necessarily limited to this context.

these terms -- which, like any other U.S. treaty provisions, operate as the "supreme law of the land." For the same reasons, parties may not circumvent this principle by agreement or consent. Unless and until the Convention itself is amended to add an additional head of jurisdiction, a court simply has no power to disregard the limitations of Article 28.

B. THE PROPOSED FIFTH BASIS OF JURISDICTION CANNOT CONFER SUBJECT MATTER JURISDICTION ON U.S. COURTS.

While the concept of "international jurisdiction" is independently dispositive, any effort to impose a fifth basis of jurisdiction would encounter a second problem as well. To the extent a party seeks to adjudicate an otherwise cognizable federal claim in federal court, IATA believes that the cause of action "arises" exclusively under the Convention. Because, in these circumstances, the treaty defines the scope of the court's subject matter jurisdiction, the scope of that jurisdiction may not, under black letter principles, be expanded by consent or agreement. That principle applies with equal force to the extent the litigant purports to rely on a state-law cause of action, either in state court or pursuant to a federal court's diversity jurisdiction. While a minority of authority recognizes the theoretical possibility of an "independent" state cause of action, the better-reasoned view rejects that position. In any event, the debate is largely academic, as all courts

acknowledge that the substantive limitations imposed by the Convention's provisions -- including Article 28 -- would bar any suit that did not conform with one of the four recognized heads of jurisdiction.

1. Because any Federal Claim Arises Under the Convention, a Federal Court's Subject Matter Jurisdiction Is Limited by Article 28 and May Not be Expanded by Agreement.

A cause of action seeking redress in federal court for injury or damages within the scope of the Warsaw Convention "arises" exclusively under the Convention itself. Benjamins v. British European Airways, 572 F.2d 913, 916-19 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979). Although the text of the Convention does not speak directly to this point, the minutes and documents of the Convention make clear that the central goal of the Convention was to formulate a uniform set of rules governing international air transportation. See id. at 917-18; In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 411 (9th Cir. 1983). Requiring a plaintiff to identify a cause of action in the domestic law of the nation where suit is brought is "inconsistent with [that] spirit." In re Mexico City Aircrash, 708 F.2d at 410. Consistent with this objective, other signatories to the Convention considered and endorsed the view that it creates a cause of action. See Benjamins, 572 F.2d at 918-19.

To be sure, some controversy initially attended this understanding. Although some early decisions had assumed

that the Convention created a cause of action, see id. at 916, the Second Circuit subsequently retreated from that position in two decisions during the 1950s.^{6/} That detour, however, was short lived. In Benjamins, 572 F.2d at 916-19, the Second Circuit held definitively that any federal cause of action derives from the Convention itself -- a view that also has been explicitly endorsed by the Fifth Circuit, Boehringer-Mannheim Diagnostics, Inc. v. Pan Am World Airways, Inc., 737 F.2d 456, 459 (5th Cir. 1984), cert. denied, 469 U.S. 1186 (1985), and the Ninth Circuit, In re Mexico City Aircrash, 708 F.2d at 412-16. See also In re Air Crash Disaster at Gander, Newfoundland on Dec. 12, 1985, 660 F.Supp. 1202, 1216-17 (W.D. Ky 1987). Indeed, no court that has considered this question since Benjamins has held to the contrary.

The conclusion that a federal cause of action has no independent basis outside of the Convention is fatal to any suggestion that parties can somehow consent to a fifth base of jurisdiction. Because the Convention is the sine qua non of a court's authority to entertain the claim, Article 28's requirements define and restrict the scope of a federal court's subject matter jurisdiction. See, e.g., Gayda, 702

^{6/} See Komlos v. Compagnie Nationale Air France, 209 F.2d 436 (2d Cir. 1953), cert. denied, 348 U.S. 820 (1954); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), cert. denied, 355 U.S. 907 (1957); see also Maignie v. Compagnie Nationale Air France, 549 F.2d 1256, 1258 (9th Cir.), cert. denied, 431 U.S. 974 (1977).

F.2d at 425 ("Because Article 28 speaks to subject matter jurisdiction, it operates as an absolute bar to federal jurisdiction in cases falling outside its terms." (internal quotation omitted)). It is beyond argument that parties are unable to establish subject matter jurisdiction by consent or waive a subject matter jurisdiction objection to an action. See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant." (citing California v. LaRue, 409 U.S. 109 (1972))).

For related reasons, it is equally well established that plaintiffs may not evade Article 28's jurisdictional limitations by bringing suit under another federal statute, e.g., the Death on the High Seas Act, 46 App. § 761 et seq. "The Convention's liability limitation provisions would be too easily circumvented if a passenger could avoid the forum-restrictions of Article 28(1) simply by bringing a separate action under [another federal law]." Kapar v. Kuwait Airways Corp., 845 F.2d 1100, 1104-05 (D.C. Cir. 1988). Given the overarching objective of uniformity, the United States and other signatories clearly contemplated one, and only one, means of invoking the jurisdiction of federal courts for suits alleging a covered event. To the extent a claimant's action falls outside of the four corners of Article 28, he or

she has no other means of asserting a federal claim or maintaining jurisdiction in a state court. Cortes v. Delta Air Lines, Inc., 638 So. 2d 108 (Fla. Dist. Ct. App. 1994). A Government demand that carriers "consent" to another basis of jurisdiction would be an act of complete futility.

2. The Same Principles Preclude Any Purported Consent to Bypass Article 28 in a State Court Action.

For precisely the same reasons, courts will nullify carriers' voluntary or coerced consent to a new basis of jurisdiction with respect to actions filed in state court or in federal court pursuant to its diversity jurisdiction. As three Circuits have expressly held, the Warsaw Convention preempts any state law in areas covered by the Convention. See Boehringer-Mannheim Diagnostics, 737 F.2d at 459 ("Any state law in conflict with a treaty is invalid." (citing Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978))); Abramson v. Japan Airlines Co., 739 F.2d 130, 134 (3d Cir. 1984), cert. denied, 470 U.S. 1059 (1985); Benjamins, 572 F.2d at 919; see also Jack v. Trans World Airlines, Inc., 820 F. Supp. 1218 (N.D. Cal. 1993); Stanford v. Kuwait Airlines Corp., 705 F. Supp. 142, 143 (S.D.N.Y. 1989); In re Air Crash Disaster at Warsaw, Poland on Mar. 14, 1980, 535 F. Supp. 833, 844-45

(E.D.N.Y. 1982), cert. denied sub nom. LOT Polish Airlines v. Robles, 464 U.S. 845 (1983).^{2/}

Indeed, it would be illogical to reach any other conclusion. If the language of the Convention and the concern for uniformity compel the conclusion that it is the sole basis for asserting jurisdiction under federal law -- in other words, that it is preemptive -- surely the same result must obtain with respect to state court and diversity actions as well. Boehringer-Mannheim, 737 F.2d at 459 (citing Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963)).

C. THESE PRINCIPLES MAY NOT BE EVADED BY STRETCHING THE LANGUAGE OF ARTICLE 28 BEYOND ITS CLEAR MEANING.

These dispositive principles may not be evaded in the guise of an expansive interpretation of the existing jurisdictional bases set out in Article 28. Just as the Convention may not be amended de facto by an agreement to

^{2/} While the D.C. Circuit claims to have reserved judgment on this question, see In re Korean Airlines Disaster of Sept. 1, 1983, 932 F.2d 1475, 1488 (D.C. Cir.), cert. denied sub nom. Dooley v. Korean Airlines, Ltd., 502 U.S. 994 (1991), that court has indicated in a prior case that diversity claims -- which, of course, rest on state law causes of action -- are also precluded by the Convention. Kapar, 845 F.2d at 1105 n.16. A handful of courts have suggested that the Convention does not, in and of itself, exclude claims against carriers arising under state law. See, e.g., Johnson v. American Airlines, Inc., 834 F.2d 721, 723 (9th Cir. 1987); In re Air Crash at Gander, Newfoundland, 660 F.Supp. 1202, 1221 (W.D. Ky. 1987); Rhymes v. Arrow Air, Inc., 636 F.Supp. 737, 740 (S.D. Fla. 1986). The distinction is largely theoretical, however, as even these courts agree that the substantive restrictions imposed by the Convention -- including Article 28 -- limit a state law cause of action.

expressly add a fifth jurisdictional basis, carriers may not accomplish the same result through such fictions as an agreement "deeming" a contract made elsewhere to be made in the place of the passenger's domicile or permanent residence.

Indeed, U.S. courts have repeatedly and uniformly rejected efforts to contort the plain language of Article 28 in this manner, dismissing such efforts for lack of subject matter jurisdiction. To the contrary -- faithful to the language and intent of the Convention as well as to the sanctity of the treaty process itself -- courts historically have construed Article 28's jurisdictional requirements narrowly, even if the result is to deny a U.S. citizen or permanent resident a cause of action in U.S. courts for an injury sustained in international air travel.

Thus, for example, in Kapar v. Kuwait Airways Corporation, a U.S. plaintiff injured in the hijacking of a Kuwait Airways plane sought redress from Kuwait Airways, as well as Pan Am, which had issued plaintiff the ticket. 663 F. Supp. 1065 (D.D.C. 1987), aff'd in relev. part, 845 F.2d 1100 (D.C. Cir. 1988). As to the claim against Kuwait Airways, the district court dismissed for lack of subject matter jurisdiction, rejecting plaintiff's "complicated theory" that he satisfied the third basis of jurisdiction (authorizing suit where the carrier "has a place of business through which the contract was made") because his ticket was electronically confirmed in New York and as a U.S. federal

employee, he was obligated to buy his ticket from a U.S. carrier. Id. at 1067.^{2/} Similarly, the Second Circuit has held that even when a carrier has a place of business in the United States, the third basis of jurisdiction is not satisfied if the ticket is not actually purchased in the United States or the ticketing or booking arrangements were not actually made in the U.S. office. Smith, 452 F.2d at 803.^{2/}

CONCLUSION

Because U.S. and foreign courts quite properly have applied the Convention as written, the Department's proposed condition stands or falls on the question whether carriers can agree to expand Article 28 by agreement. The short answer is that they may not and that any effort to ignore that reality would be rejected by the courts out of hand.

^{2/} Because plaintiffs abandoned their claims against Kuwait Airways on appeal, the D.C. Circuit Court of Appeals addressed only plaintiff's claim against Pan Am, ruling that an airline issuing a ticket, but not providing carriage, is not liable as a "carrier" in the event of an accident. Kapar, 845 F.2d at 1103; see also Stanford, 705 F.Supp. at 143-44 (same).

^{2/} In the same vein, courts also repeatedly have rejected efforts to expand the meaning of the term "destination," as used in the fourth basis of jurisdiction. See, e.g., In re Alleged Food Poisoning Incident, March, 1984, 770 F.2d 3 (2d Cir. 1985); Gayda, 702 F.2d at 425; Sopcak v. Northern Mtn. Helicopter Svcs., 859 F. Supp. 1270 (D. Alaska 1992), aff'd, 52 F.3d 817 (9th Cir. 1995); In re Air Crash Disaster at Malaga, Spain on Sept. 13, 1982, 577 F.Supp. 1013 (E.D.N.Y. 1984).

The Parties to the Warsaw Convention agreed that a claimant could file suit in four, and only four, places. Requiring carriers to proceed as if that were not the law would be both futile and inappropriate.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objections of the International Air Transport Association has been served by courier or first class mail, postage-prepaid, upon the persons listed below, this 24th day of October, 1996.

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