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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
DOCKET SECTION

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International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention)
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Docket OST-95-232 - 45

Air Transport Association of America: Agreement Relating to Liability Limitations of the Warsaw Convention)
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Docket OST-96-1607 - 15

COMMENTS OF DR. MICHAEL MILDE

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October 24, 1996

5 pgs.



McGill

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21 October 1996

Patrick V. Murphy
Deputy Assistant Secretary
for Aviation and International Affairs
Department of Transportation
Washington, D.C.

FAX 202 493 2005

Sir:

**subject: Order 96-10-7 (Show Cause) of 3 October 1996 -
comments/objections**

I was closely involved in the ICAO work on the "Warsaw system" from 1966 to 1991 and now am teaching international air law at the Institute of Air and Space Law, McGill University, Montreal. With this background and acting strictly in my personal capacity I offer the following comments/objections to the Order to Show Cause dated 3 October 1996:

1. The IIA/MIA and the IPA in their present form (without additional conditions) would provide to international passengers a better level of protection than is currently available to victims in domestic US carriage (strict liability up to SDR 100,000 and reversed burden of proof with respect to unlimited liability). By their approval the Executive Branch of the USA achieves a result which for domestic transport would require complex legislative changes and for International carriage would call for a new International instrument subject to the international law of treaties. The Agreements should be approved without additional conditions if they are to be perceived as agreements voluntarily accepted by the industry rather than imposed by an action of the DOT - perhaps even beyond the framework of its law-making mandate.

2. The IIA/MIA and the IPA are coextensive in their impact with the 1992 "Japanese Initiative" which was approved by the DOT and was granted antitrust immunity without the additional conditions which are now being contemplated by the DOT; the same treatment should be accorded to IIA/MIA and IPA to assure consistency and international credibility of DOT positions.

3. The condition that the "optional application of the law of the domicile provision would be made mandatory for operations to, from, or with a connection or stopping place in the United States" appears to be in conflict with the imperative provision of Article 32 of the Warsaw Convention since it amounts to choice of law

before the damage occurred. The purpose of this condition could be met if the carriers agree to offer this option to the passengers/claimants after the occurrence of damage. Again, this condition may overlook that the application of the law of domicile need not be in all cases beneficial for the passenger or claimant.

4. The condition which would impose the "fifth" jurisdiction or any suggested alternatives thereto is unwarranted. Article 28 (2) of the Guatemala City Protocol/MAP 3 cannot justify this condition since the Guatemala City concession to the US 1971 proposal was part of a package which included an unbreakable limit of liability. Moreover, even that instrument provided for the "fifth" jurisdiction only "before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party". The contemplated DOT condition would refer to the passenger's domicile (rather than place of establishment of the carrier) and, moreover, would appear to apply such jurisdiction with sweeping extraterritoriality even with respect to interlining carriers who may not have any establishment in the USA. The foreign policy and comity interests with respect to the trading partners of the USA are not well served by the statement that "claimants can anticipate full and fair recoveries only if the standard of damages is assessed by U.S. courts".

5. The "fifth" jurisdiction is questionable also in the light of the imperative Article 32 of the Warsaw Convention. Until this Article is duly amended in accordance with the international law of treaties (or until the Convention is formally denounced), an inconsistent condition would appear to be an infringement of the Convention, of the principle pacta sunt servanda and of the joint expectations of all High Contracting Parties.

6. The IIA/MIA and the IPA should be approved without further conditions as a temporary measure (as stated in Order 95-2-44 - which still considered as the "best alternative" an international agreement such as the Montreal Protocols and Supplemental Compensation Plan and which is in harmony with the unanimously adopted 1995 ICAO Assembly Resolution A31-15, Appendix C). The USA is a signatory of MAP 3 and, under the general international law of treaties, must refrain from any action which would defeat the object and purpose of MAP 3 until it shall have made its intentions clear not to become party to MAP 3 (Article 18, Vienna Convention on the Law of Treaties). In any case, it is not correct to refer (page 16, second para) to "untimely process of seeking new amendment to the Convention" when ICAO - an organization of 184 sovereign States - is actively working, with prominent US participation, on the preparation of a new instrument to amend/replace the Warsaw Convention, broadly along the lines of the Japanese Initiative, IIA/MIA and IPA. Any special wishes and interests of the USA should be negotiated in this international forum rather than unilaterally imposed on the international community.

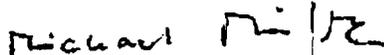
7. It should be noted that the IIA/MIA and IPA do not represent a modernization of the unified private air law - they just attach strict liability to the claim up to SDR 100,000 and remove the limit for passenger's death or injury from an outdated instrument of 1929. The vast modernization achieved by the Guatemala City Protocol is still not implemented after more than 25 years; it includes liberalization of the documentation requirements and enabling electronic ticketing (airlines spent some 20% of their operating costs on distribution!), solve the contentious issue of "accident"

versus "event", by reference to "personal" (rather than "bodily") injury encompass mental trauma not accompanied by a physical injury, provide for a "settlement inducement", etc. Only the ratification of MAP 3 with a SCP or adoption of a new instrument using the best elements of Guatemala City Protocol/MAP 3 and MAP 4 will bring these positive provisions to life. The USA should provide leadership in the development of international air law within the framework of ICAO rather than trying to patch up an antiquated instrument of 1929 with the reluctant cooperation of airlines forced to comply facing otherwise the loss of the foreign carrier permit.

8. The speedy adoption of a new instrument appears to be the only way how to bring into force the much needed development and modernization of unified law with respect of cargo. MAP 4 is an instrument encompassing rules of liability with respect to passengers (Warsaw Convention of 1929 as amended at The Hague in 1955) and the new rules relating to the carriage of cargo. Since MAP 4 does not permit any reservations (e.g., with respect to passengers), many states - including the USA - will find it impossible to ratify MAP 4 and a new comprehensive instrument is urgently needed and its preparation should be supported as a matter of high priority.

9. The attempt to impose a condition that the "most favourable" treatment must be accorded to all services to and from the USA is a reaction to the tentative draft legislation within the EU which would, *inter alia*, provide for "up-front" payment to the victims; rather than resorting to "extraterritorial" application of conditions imposed by the Executive Branch it would appear preferable to negotiate an international instrument within ICAO which would clarify such issues in a mutually agreed legal text. In any case, it is not convincing to refer to "unjustifiable and unreasonable discrimination" with respect to a proposed legislative provision if no such benefits are available under the current US laws in domestic carriage.

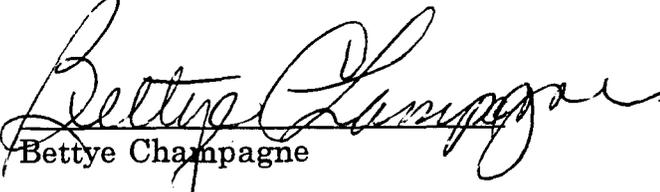
Respectfully submitted.



Professor Dr Michael Milde
Director

CERTIFICATE OF SERVICE

I hereby certify that on this 24th date of October, 1996, I caused copies of the foregoing Comments to be delivered via first-class mail, postage prepaid, to the Applicants and to each commenting party in Dockets OST 95-232 and OST 96-1607.


Bettye Champagne