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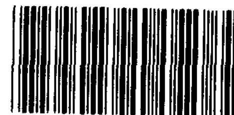

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International Aviation: Implications of Ratifying the Montreal Aviation Protocols

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Mr. Chairman and Members of the Committee:

We appreciate the opportunity to testify on how the Montreal Protocols would affect the level and timeliness of compensation for victims of international aviation accidents and whether the Protocols might also affect the safety of international air travel.[1] The U.S. government has long been dissatisfied with the low levels of compensation permitted under international agreements, and the Montreal Protocols are designed to address these deficiencies. Our work has shown the following:

-- The Montreal Protocols would more fully compensate Americans for economic and non-economic losses because the Protocols increase the current limit on an airline liability to about $130,000 per passenger, and provide for a plan to supplement compensation above this limit.[2]

-- They would provide for more timely restitution by not requiring claimants to prove the fault of the airlines and by furnishing incentives for airlines to settle claims quickly.

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[1]The Montreal Aviation Protocols were transmitted to the Senate in 1977.

[2]Economic losses include, for example, lost income and the imputed value of household services. Non-economic losses are based on such considerations as mental anguish, pain and suffering, and loss of companionship.

-- The Protocols would increase the likelihood that Americans will be able to bring suits in U.S. courts, if compensation offers are unsatisfactory, because they add the country where the passenger resides as a new basis of jurisdiction.

-- It is unlikely that ratification of the Protocols would adversely affect airline safety. Although the Protocols would eliminate the civil litigation of fault, the available evidence indicates that litigation has not had an effect on airline safety.

The Montreal Protocols raise the liability limits of the airlines and provide a mechanism for getting compensation to claimants more in line with that received in domestic aviation accidents and in a less expensive and more expeditious manner. The Protocols represent a marked improvement over the current international agreements that govern compensation of claimants, and offer better chances of recovering damages to Americans traveling abroad. They also offer a foundation upon which to increase the liability of the airlines and to amend the liability rules as necessary.

After briefly recounting the chronology of events that led up to the Montreal Protocols, we will describe the principal elements of the Protocols and their likely effect on the level and

timeliness of compensation for U.S. victims of international aviation accidents.

HISTORICAL DEVELOPMENT OF THE WARSAW CONVENTION[3]

In 1929, delegates from 22 nations meeting in Warsaw, Poland, signed an agreement, the Warsaw Convention, creating a global set of rules governing the international air transportation of passengers, baggage, and cargo. A uniform set of rules was needed because the nations of the world had different legal systems and customs. The Warsaw Convention, among other things, established the bases for determining jurisdiction in the case of an accident and set limits on the liability of airlines. The drafters of the Convention wanted to protect the infant aviation industry at a time when a single catastrophic accident could have financially devastated an airline. The United States ratified the Convention in 1934, and over the years 124 countries have adopted the Convention.

In the event of an accident, under the Warsaw Convention, an airline is presumed to be responsible for a passenger's death or injury unless the airline can prove otherwise. However, the airline's liability is limited to about $10,000 per passenger. Victims or their survivors can obtain additional compensation only

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[3]Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, October 12, 1929.

if they can show willful misconduct on the part of the airline or if the airline failed to deliver a ticket that, among other things, included a notice of the airline's limited liability. Since the Convention went into effect in 1933, claimants have obtained in U.S. courts verdicts of willful misconduct for the death and injury of passengers in only nine cases.[4] In one case resulting from an aviation accident in 1974, the courts took 15 years to find willful misconduct.[5] Another case resulting from an aviation incident in 1983 is still in litigation after more than 6 years, with the willful misconduct verdict currently under appeal.[6]

CHANGES TO THE 1929 WARSAW CONVENTION

In 1955, a number of nations adopted the Hague Protocol, which increased the limit on an airline's liability from $10,000 to $20,000 per passenger. This amendment has been ratified by 109 countries but was not ratified by the United States because the Congress believed the liability limit was too low to fully

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[4]See American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949); KLM v. Tuller, 292 F.2d 775 (D.C. Cir. 1961); Leroy v. Sabena Belgian World Airlines, 344 F.2d 266 (2nd Cir. 1965); Reiner v. Alitalia Airlines, 9 Av. Cas. 18228 (CCH) (1966); In Re Pago-Pago Aircrash of January 30, 1974, (unreported decision) (9th Cir. 1982); Tarar v. Pakistan International Airlines, 554 F. #Supp. 471, (S.D. Tex. 1982); Butler v. Aeromexico, 774 F.2d 429 (11th Cir. 1985); In Re Korean AirLines Disaster of September 1, 1983, 829 F.2d 1171 (D.C. Cir. 1989); and In Re Aircrash in Bali, Indonesia, 871 F.2d 812 (9th Cir. 1989).

[5]See In Re Aircrash in Bali, Indonesia, supra.

[6]See In Re Korean AirLines Disaster of September 1, 1983, supra.

compensate for the loss of American lives. Since most foreign countries ratified the Hague Protocol, Americans traveling between two foreign points are usually subject to the limit it defines for compensation even though the United States has not ratified this Protocol. For example, a flight between France and Spain is subject to the $20,000 liability limit of the Hague Protocol.

Dissatisfaction with the low liability limits of the Warsaw Convention and the Hague Protocol led the United States to announce in 1965 its intention to withdraw from the Convention. On the eve of the withdrawal, air carriers serving the United States signed the 1966 Montreal Agreement, whereby they accepted a liability of up to $75,000 per passenger for death or injuries, regardless of their fault. As a result, the United States agreed to remain a party to the Convention. The Montreal Agreement applies to air travel to, from, or through the United States on both foreign and domestic airlines. For example, a flight from the United States to France is subject to the 1966 Montreal Agreement limit of $75,000. Compensation beyond $75,000 still requires claimants to prove willful misconduct by the airline. A few countries--including Italy, West Germany, and the United Kingdom--have required airlines to accept higher liability limits, the highest of these being $130,000.

THE MONTREAL PROTOCOLS

At a meeting of member states of the International Civil Aviation Organization (ICAO) in Montreal in 1975, four amendments (protocols) to update the Warsaw Convention were introduced. Protocols No. 1 and 2 make the special drawing rights (SDRs) of the International Monetary Fund the currency of the Warsaw Convention and the Hague Protocol, respectively. The special drawing right is an international reserve asset whose value is based on the average worth of the world's five major currencies (U.S. dollar, British pound sterling, French franc, West German mark, and Japanese yen). Protocol No. 3 is concerned with an airline's liability for passengers and baggage. Protocol No. 4 changes the rules governing liability for cargo. Since only Protocol No. 3 is controversial, our testimony will concentrate on its provisions for passengers.[7]

Montreal Protocol No. 3 increases an airline's liability limit to 100,000 SDRs, about $130,000, and establishes a policy of strict liability, under which claimants have to prove only that damages resulted from an accident, not that the airline involved was at fault. However, Protocol No. 3 deletes the provisions of the Warsaw Convention that allow claimants to recover additional amounts from the airlines, including the willful misconduct provision.

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[7]Montreal Protocol No. 3 sets an airline liability limit for loss, damage, or delay of baggage at 1,000 SDRs, about $1,300.

In recognizing that the 100,000 SDR liability limit would not fully compensate the citizens of some nations, Protocol No. 3 allows nations to set up supplemental compensation programs. Accordingly, the airline industry is developing a supplemental compensation plan following guidelines prepared by the U.S. Department of Transportation to ensure that Americans traveling abroad can be more fully compensated for loss of life or injury. The plan will cover both economic and non-economic losses and will provide for total compensation of up to $500 million per aircraft for each accident. By providing higher compensation for economic and non-economic damages, the proposed supplemental compensation plan addresses the main objection raised in the past regarding the level of compensation provided by the two previous versions of the plan. The first version of the plan provided for up to $200,000 in compensation, while the second version provided for unlimited compensation, but for economic damages only.

The supplemental compensation plan will be funded through a surcharge on tickets sold in the United States for international flights originating here. All airlines, both American and foreign, selling these tickets must collect the surcharge. The plan will cover all U.S. citizens and permanent residents on international flights whether or not they pay the surcharge, as well as foreigners who pay the surcharge when leaving the United States. Americans on domestic flights in foreign countries would not be

covered. The amount of the surcharge will be determined by competitive bids from potential plan contractors. The plan and the contractor of the plan must be approved by the U.S. Secretary of Transportation.

Both the Protocol and the U.S. plan contain provisions to induce prompt settlement of claims. If no settlement is reached with an airline or the contractor of the plan, claimants can bring lawsuits against the airline or the contractor to obtain compensation for damages. Under the settlement inducement provisions of the Protocol and the plan, the courts may impose all or part of the claimant's costs of litigation on the airline or the contractor.[8] After settling a claim, the contractor has the right to recover damages from potentially liable parties, other than the airline, to the extent of their culpability.

Under the Warsaw Convention, claimants could elect to bring lawsuits against an airline in any of four jurisdictions--the place the ticket was bought, the destination, the nation of the carrier, or the nation where the airline has its principal place of

[8]The Protocol requires that an airline pay the legal expenses of a claimant if, within six months of receiving written notice of the claim, the airline does not make a settlement offer that is at least equal to the final compensation awarded by a court. The plan requires that the contractor pay the legal expenses of the claimant if the contractor does not make a reasonable settlement offer within 90 days of whichever of the following occur later: (1) the contractor receiving a notice of the claim or (2) the airline making payment equal to its limit of liability.

business. Protocol No. 3 adds a fifth choice--the country of the victim if the airline has an establishment there. This provision will ensure that most Americans will have access to U.S. courts and U.S. law if they are dissatisfied with the compensation offers and choose to litigate damages.

MONTREAL PROTOCOL NO. 3 COMPARED WITH THE ALTERNATIVES

Senate action on the Montreal Protocols may lead to one of the following outcomes:

-- The Protocols can be ratified;

-- The Protocols can be rejected, leaving in place the current Warsaw Convention system; or

-- The Protocols can be rejected and the President can denounce the Warsaw Convention.

EXTENT OF COMPENSATION

We believe that Montreal Protocol No. 3, in combination with a satisfactory supplemental compensation plan, would compensate victims of airline crashes more fully than the other alternatives we considered.

If no international agreement governed an airline's liability, many airlines might be sued for full damages in U.S. courts. But U.S. courts have not fully compensated victims of airline crashes in the past. According to the RAND Corporation, compensation was generally only 39 percent of the actual economic losses.[9] The amount of compensation for economic losses governed by the Warsaw Convention was even lower. While American claimants under the Warsaw Convention received on average about $200,000 in total compensation for aviation accidents between 1970 and 1982, American claimants under the domestic system of compensation received on average about $490,000. As the study concluded, the uncertainty of the results of litigation was one factor encouraging victims or their survivors to accept compensation that was less than the value of their true losses.

Protocol No. 3 and the proposed supplemental compensation plan should improve the level of compensation for three reasons. First, in comparison with the Warsaw Convention and the Montreal Agreement, the Protocol raises an airline's liability limit from $10,000 and $75,000, respectively, to about $130,000. Second, the supplemental compensation plan provides a maximum of $500 million per aircraft for each accident to compensate claimants. This $500 million limit exceeds the largest payout for airline disasters

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[9] King, Elizabeth M., and Smith, James P., Economic Loss and Compensation in Aviation Accidents, RAND Corporation, The Institute for Civil Justice, 1988.

involving a single aircraft to date.[10] Third, unlike the Warsaw Convention or the legal system that would govern compensation if the United States were to denounce the Convention, the Protocol eliminates the need to show willful misconduct or fault on the part of the airline, thus reducing both the costs and the uncertainty of litigation.

TIMELINESS OF COMPENSATION

Settling airline accident cases can take a long time. According to the RAND Corporation, the average case required more than 2 years to settle and cases that went to trial averaged 4.5 years.[11] Lawsuits were filed in almost two-thirds of the cases. Some cases take considerably longer. Litigation for willful misconduct cases that have gone to trial in U.S. courts has taken on the average about 7 years. For example, the case resulting from the shootdown of KAL Flight 007 has been in litigation for more than 6 years. A representative of the plaintiffs in this case estimated it may take about 10 years to recover damages.

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[10]Japan Air Lines and Boeing paid $400 million in total compensation for the 500 victims of a Boeing 747 crash in Japan. Northwest Airlines paid about $200 million in total compensation for an airplane crash in Detroit.

[11]Kakalik, James S.; King, Elizabeth M.; Traynor, Michael; Ebener, Patricia A.; and Picus, Larry, Costs and Compensation Paid in Aviation Accident Litigation, RAND Corporation, The Institute for Civil Justice, 1988.

The Protocol and the proposed plan would provide compensation more expeditiously because people claiming damages will be required to prove only losses that they suffered. They will not have to prove that the airline was at fault. In contrast, under either the current Warsaw Convention or the legal system that would prevail if we denounced the Convention, litigation of fault and damages would still be necessary in many cases. In addition, because the settlement inducement provisions force the airline and the contractor of the supplemental compensation plan to pay the claimant's legal expenses if they do not make settlement offers that are prompt and reasonable, they have an incentive to settle claims quickly.

COSTS OF SECURING COMPENSATION

Under the Protocol and the supplemental compensation plan, the costs of securing compensation would be lower than they are under the Warsaw Convention and lower than they would be if no international agreement were in effect. The drafters of the plan recently estimated that the surcharge would be around $3 per ticket. This is considerably less than the $10 travelers can pay today for the more limited coverage of $300,000 under an individual flight insurance policy that can be purchased at U.S. airports.

Because victims and their survivors would not have to prove airline fault under Protocol No. 3, they would not incur the

financial costs associated with the civil litigation of fault. According to the research by the RAND Corporation, about 20 percent of the compensation paid to victims of airline accidents was absorbed by the costs of litigation; the most common attorney's contingency fee is about 15 to 25 percent of total compensation. Under the Protocol and the supplemental compensation plan, litigation for damages would still be necessary if the parties cannot agree on the amount of compensation.

LIKELIHOOD OF GAINING JURISDICTION IN A U.S. COURT

When plaintiffs are dissatisfied with the compensation offered by the airline or the contractor of the supplemental compensation plan, they can file suit to win more acceptable compensation. Legal experts argue that Americans are usually better off if their cases are tried in U.S. courts applying U.S. domestic law. Under the current Warsaw Convention rules, Americans flying between two foreign countries on a foreign airline might be unable to secure U.S. jurisdiction because the Convention limits the options where a suit for damages can be filed. That is, Americans might find it difficult to gain U.S. jurisdiction if the accident involving a foreign airline occurred abroad because the requisite contacts between the foreign airline and the United States upon which jurisdiction is established may be absent. If the United States withdrew from the Warsaw Convention, most, but not all, Americans would be able to gain access to U.S. courts and law.

Because Protocol No. 3 gives claimants the right to bring suits in the courts of their countries if the airline has an establishment there, most, but not all, Americans will be able to gain access to U.S. courts and have their damage awards decided under U.S. law. If Americans file suit against the contractor of the plan, the plan guarantees all of them access to U.S. courts and law.

AIRLINE SAFETY

Airline safety is of paramount importance to passengers. Opponents of Protocol No. 3 have contended that removing the litigation of fault from the compensation process would reduce the incentive for airlines to operate safely. Opponents have also suggested that eliminating the civil litigation of fault would remove a major mechanism for uncovering facts about airline safety practices.

The domestic tort system of compensation has not affected airline safety because it has not provided a financial incentive to affect airline safety practices, according to the RAND Corporation. The compensation paid by airlines has been covered by liability insurance, the premiums for which represent an insignificant portion of an airline's operating costs. According to an International Chamber of Commerce study of the Warsaw

Convention, liability insurance costs were only about two-tenths of 1 percent of airlines' operating revenues over a recent 10-year period.[12] Changes in premiums due to changes in liability limits would likely be too small to affect airline safety practices.

A number of parties are involved in promoting aviation safety, including the airlines themselves. According to the RAND Corporation, market forces and government regulatory agencies are the important determinants of airline safety. Market forces have a major impact on airline safety because an accident can significantly hurt airline revenues. A recent study by researchers at the Center for Policy Studies at Clemson University found that an airline suffers significantly lower stock prices following a serious accident in which the initial investigations of safety officials indicate that the airline is at fault.[13] The Clemson researchers traced the fall in stock prices to the expectation that airline profits would decline due to a drop in consumer demand and to higher insurance costs. The expected changes in demand were found to be a greater factor than the increase in insurance costs. According to the chairman of Pan Am, the destruction of Pan Am Flight 103 in December 1988 was the principal cause of a $248 million increase in Pan Am Corporation's operating loss in 1989.

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[12] Brise, S., Study on the Status and Future of the Warsaw System, International Chamber of Commerce, 1988.

[13] Mitchell, M.L., and Maloney, M.T., "Crises in the Cockpit? The Role of Market Forces in Promoting Air Travel Safety." Journal of Law and Economics, Vol. 32 (Oct. 1989), pp.329-355.

Throughout the world, government agencies have primary responsibility for regulating and overseeing airline operations and safety practices. In the United States, the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB) have considerable influence over an airline's safety practices through their regulations, oversight, and investigations. FAA has a variety of ways to enforce its safety regulations. FAA can amend, suspend, and revoke certificates; levy civil and criminal penalties; and seize aircraft. The combination of safety regulations, oversight, investigations, and sanctions provides a major incentive for an airline to operate safely. Moreover, government agencies that investigate aviation accidents not only uncover most of the facts revealed during the civil litigation of fault but they also make them public. In some cases, facts uncovered through the discovery process during the civil litigation of fault are not made public because, as part of the agreements settling cases before trial, the records are sealed.

According to the Presidential Commission on Aviation Security and Terrorism, which recently supported the ratification of Protocol No. 3, the U.S. government should strengthen current regulatory enforcement mechanisms to ensure airline accountability for safety violations, notwithstanding the powerful market forces

that ought to deter unsafe or reckless conduct by the airlines.[14] We believe that the Commission is right to emphasize that government agencies be responsible for ensuring aviation safety. We do not believe that victims of aviation accidents should bear this burden while trying to secure compensation.

LIABILITY LIMIT DOES NOT JUSTIFY REJECTING PROTOCOL NO. 3

Although Protocol No. 3 limits an airline's liability, we do not believe that this situation by itself justifies rejecting Protocol No. 3 and the supplemental compensation plan, given the benefits that they would provide to Americans claiming damages in international aviation accidents. If the United States does not ratify the Protocol and continues to be a party to the Warsaw Convention, the Convention will continue to impose a heavy burden in terms of cost and time on American claimants. Furthermore, if the Protocol goes into effect without the United States' participation, many Americans traveling on foreign airlines between countries that have ratified the Protocol would be subject to an unbreakable limit on liability. In the absence of adequate foreign plans for supplemental compensation, this limit would usually provide considerably less compensation to American victims of an aviation accident.

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[14] Report to the President by the President's Commission on Aviation Security and Terrorism, Washington, D.C., May 15, 1990.

If the United States withdraws from the Warsaw Convention altogether, some Americans flying on foreign airlines between two foreign countries might not secure full compensation because they might be unable to obtain jurisdiction in U.S. courts or the application of U.S. law. If Americans were to secure jurisdiction and the application of U.S. law, they would still have to prove fault before litigating for damages. Proving fault can be a lengthy, difficult, and expensive process, particularly when the accident site is overseas or little evidence exists. In international aviation accidents that are the result of terrorist acts or unknown causes, proving an airline's fault may not even be possible.

Protocol No. 3 raises an airline's liability limit to 100,000 SDRs per passenger, but because this limit was set in 1975, its value has been eroded by inflation. To avoid complicating the ratification process, ICAO policy holds that this limit should be increased after the Protocol enters into force. We believe that this limit should be raised to reflect its loss of value due to inflation, as well as to increase the real value of airlines' liability. Raising the limit would not affect the total compensation paid to claimants in the aggregate; it would increase only the relative amount of compensation paid by the airlines. Thus, the government should immediately seek to negotiate an increase in the liability limit. This objective could be

accomplished by calling for an international conference under the auspices of ICAO. The Presidential Commission on Aviation Security and Terrorism has also stated that, following ratification of Protocol No. 3, the U.S. government should commence a diplomatic initiative to increase the limit on airline liability.

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In summary, we believe that Protocol No. 3 and the proposed supplemental compensation plan offer a reasonable solution for Americans seeking full compensation for damages suffered in international air travel. The proposed supplemental compensation plan addresses the main objections raised in the past regarding the level of compensation provided by previous versions of the plan. The Protocol and the plan also provide a framework within which to increase the liability of the airlines and to amend liability rules as necessary. Finally, the Protocol is unlikely to affect adversely the safety of international air travel.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions you might have.