

## RECENT DEVELOPMENT

### FRANKLIN MINT CORPORATION v. TRANS WORLD AIRLINES, INC.: LIMITING AIR CARRIER LIABILITY UNDER THE WARSAW CONVENTION

#### I. INTRODUCTION

On April 17, 1984 the Supreme Court delivered its opinion in *Franklin Mint Corporation v. Trans World Airlines, Inc.*<sup>1</sup> Holding that the Civil Aeronautics Board (CAB) was acting in a manner consistent with the Warsaw Convention,<sup>2</sup> the Court approved a limitation of liability for air carriers of \$9.07 per pound of cargo.

The opinion's significance is threefold. First, the \$9.07 per pound limitation was the lowest amount feasible under the strictures of the Warsaw Convention.<sup>3</sup> In essence, the low level limits the responsibility of air carriers while placing the risk on the consumers of shipping and passenger services.<sup>3a</sup>

The second critical aspect of the case is that the Court justifies the CAB's limited liability level in part because that level is close<sup>4</sup> to limitation levels set using Special Drawing Rights (SDR).<sup>5</sup> While

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1. 104 S. Ct. 1776 (1984).

2. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* Oct. 12, 1929, 49 Stat. 3014, T.S. No. 876. (effective Feb. 18, 1933) [hereinafter cited as Convention].

3. Article 22(4) of the Convention relates the limitation of liability to an amount equal to 65 1/2 milligrams of gold per franc, with a limit of 250 francs per delogram of cargo. *Id.* art. 22(4). Using the market price of gold at the time of the suit the possible liability equals approximately \$560 per pound. Alternatively, if the SDR unit currently adopted by the Warsaw Convention, but not ratified by the United States, were to be used the liability would be limited to \$7,100. or \$9.94 per pound. The CAB's \$9.04 per pound limit is obviously the lowest.

3a. The low liability level may affect liability for passenger injury as well as cargo limitations. Article 22(1) of the Convention applies the gold standard of Article 22(4) to passenger liability, *id.* art. 22(1), thus *Franklin Mint* can affect passenger liability. However, the 1966 Montreal Agreement established a higher limit to passenger liability; \$75,000 per person to be precise. The agreement is an inter-carrier agreement, not a governmental agreement. Accordingly, only those carriers participating in the agreement are bound by it. Further, the agreement only addresses flights into and out of the United States. Therefore, while *Franklin Mint* may limit passenger liability under Article 22(1), the use of 22(1) has been limited by the Montreal Agreement.

4. *See supra* note 3.

5. The Special Drawing Rights (SDR) are lines of credit against which banks may borrow. The value of one SDR unit is derived from a basket of five currencies. "The amount

the SDR has been adopted by the Warsaw Convention as part of the Montreal Protocols,<sup>6</sup> the Protocols have not been ratified by the U.S. Senate. Accordingly, the Court's reliance on the SDR appears as a judicial approval of the Protocols, or at the very least, encouragement for Senate ratification of the Protocols. Either interpretation indicates judicial willingness for involvement with traditional legislative functions.

Thirdly, the opinion is significant because the Court recognized that the 1978 repeal of the Par Value Modification Act (1978 Act),<sup>7</sup> removing U.S. currency from a gold standard, did not prevent application of the Warsaw Convention.<sup>8</sup> This holding implies that other gold base limitations of liability have not been rendered inapplicable by the 1978 Act and that the appropriate agencies can still administer gold to dollar conversions.

This article will describe the facts of *Franklin Mint*, and the relevant background. The district court, circuit court and Supreme Court opinions will be reviewed, with particular attention and analysis given to the Supreme Court opinion. This analysis will highlight the significant implications of the case.

## II. BACKGROUND

### A. Facts

In March of 1979 Franklin Mint Corporation shipped 714 pounds of numismatic materials from Philadelphia to London using Trans World Airlines (TWA) as the carrier. Franklin's goods were lost in transit, thereby rendering Trans World liable for the goods under Article 18 of the Warsaw Convention.<sup>9</sup> Because Franklin had failed

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of each currency in one SDR is a function of the percentage weights, which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the dollar values of each currency component based on daily market exchange rates." 690 F.2d at 310 (quoting Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 J. MAR. L. & COM. 2, 3 (1981)).

6. Montreal Protocol No. 4, done Sept. 25, 1975.

7. The Par Value Modification Act, 31 U.S.C. § 449 (1976) had devalued the worth of the dollar in terms of gold. The 1978 Act, Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1976), repealed this and removed the United States from a gold based currency.

8. The Warsaw Convention appears to require a gold based currency to function. No other conversion factor from gold to currency other than the official price of gold was apparent. However, the Court did not read the Warsaw Convention in a restrictive manner, but instead allowed a CAB determined conversion factor.

9. Article 18(1) states that "[t]he carrier shall be liable for damage sustained in the

to declare that the goods were of special value, TWA sought to limit its liability by invoking Article 22.<sup>10</sup>

### B. *The Legal Facts*

The main issue of *Franklin Mint* was whether Article 22(4) was applicable after the 1978 Act repealed the U.S. gold standard. This broke down into three subissues: (1) whether the 1978 Act had amended the Warsaw Convention; (2) whether the Warsaw Convention specifically required that the official price of gold be used in converting gold to currency; and (3) whether the conversion factor used by the CAB was correct.

To comprehend the emergence of these issues it is important to understand the historical background of the 1979 Act and the Warsaw Convention. During the 1960's world usage of a gold standard began deteriorating. In the United States this was evidenced by the Par Value Modification Acts of 1972<sup>11</sup> and 1973.<sup>12</sup> Responding to the deterioration of the world gold standard, the International Monetary Fund (IMF) met in 1975 and substituted the SDR for gold based currency.<sup>13</sup> The United States responded in 1976 by adopting the SDR.<sup>14</sup> This adoption went into effect in 1978 and is referred to as the 1978 Act.<sup>15</sup> Thus, the issue is whether the 1978 Act renders Article 22(4) of the Warsaw Convention inapplicable

event of the destruction or loss of, or damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." Convention, *supra* note 2, art. 19(1).

10. Article 22(2) of the Convention specifically states that "[i]n the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the actual value of the consignor at delivery." *Id.* art. 22(2). Article 22(4) goes on to add that "[t]he sums mentioned above shall be deemed to refer to the French franc consisting of 65.5 milligrams of gold at the standard fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures." *Id.* art. 22(4).

11. Par Value Modification Act, 31 U.S.C. § 449 (1982).

12. Par Value Modification Act, 31 U.S.C. § 449 (repealed 1978).

13. Second Amendment of the Articles of Agreement of the International Monetary Fund, *done* Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (effective May 1, 1978). Also known as the Jamaica Accords.

14. *See supra* note 7.

15. *See also* Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. INT'L L. & ECON. 323 (1981), for further historical background.

due to Article 22(4)'s apparent reliance on a gold based currency.

Resolution of this issue was somewhat complicated by the fact that the 1975 Montreal Protocols<sup>16</sup> to the Warsaw Convention adopted the SDR in place of the gold standard. While the United States signed the Montreal Protocols, they were never ratified by the Senate.<sup>17</sup> Thus, it should not affect the United States' interpretation of the Convention.

In sum, the demise of the gold standard has apparently affected application of the Warsaw Convention. It was into this factual and historical background that the district court was placed by *Franklin Mint*.

### III. COURT DECISIONS

#### A. District Court

The district court<sup>18</sup> was faced with the following dilemma: [i]f it recognized that the 1978 Act had altered the Warsaw Convention, the Convention would become unworkable.<sup>18a</sup> On the other hand if it refused to acknowledge the impact of the 1978 Act, the court would apparently be acting contrary to valid legislation.

To resolve this problem the court refused to explicitly acknowledge the dilemma. Instead, the court deferred to the government's interpretation of the Warsaw Convention and the 1978 Act, an interpretation exemplified by the CAB's<sup>19</sup> choice of \$9.07 per pound as the converted liability limit. In addition, the court noted that Franklin Mint and TWA had agreed to this limit since TWA had this limitation printed on its tickets. Accordingly, the court limited Franklin Mint's recovery to \$6,475.98.<sup>20</sup>

It is interesting to observe that the court used TWA's brief as its opinion, noting that it would save time for the appeal. Obviously, the court realized it had left much to be resolved by the circuit court.

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16. See *supra* note 6.

17. See also Hollings, *Defeat of the Montreal Protocols: Victory for Airline Passengers*, 18 TRIAL 69-70 (May 1982).

18. *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288 (S.D.N.Y. 1981).

18a. *Id.* Denial of the gold standard would preclude application of the gold standard by the Convention. The CAB was considered to represent the government in application of the Convention.

19. *Id.* at 1289.

20. While not discussing them, the court did note the four possible conversion rates. These included the SDR, the last official price of gold as used by the CAB, the exchange value of the current French franc, and the free market price of gold. *Id.*

### B. Circuit Court

The Court of Appeals for the Second Circuit heard the appeal on April 22, 1982.<sup>21</sup> The circuit court reversed the district court and held that the Warsaw Convention's limitation of liability, while applicable to Franklin Mint, would be unenforceable 60 days hence. This decision has been the topic of considerable debate<sup>22</sup> due to the practical consequences, and the possible legal implications for other gold based treaties.<sup>23</sup>

The court based its decision on the fact that the 1978 Act had directly affected the Convention and had "undermined the Convention's unit of conversion."<sup>24</sup> Additionally, the court found that there was "no United States legislation specifying a (conversion) unit to be used by . . . United States Courts."<sup>25</sup>

Having explicitly acknowledged a conflict between the 1978 Act and the Warsaw Convention, the court outlined three controlling facts in the case. First, the Warsaw Convention required some conversion unit to convert judgments into domestic currency. Second, there was no longer any internationally agreed upon conversion unit. Thirdly, no United States legislation had established a conversion unit to be used by the courts.<sup>26</sup>

The first two facts were considered self-evident from the history of international monetary turmoil as well as the diversity of conversion units used by various countries.<sup>27</sup> The third fact was, however, more troublesome. The court found that the CAB, who the district court had deferred to as the government's spokesman,<sup>28</sup>

21. *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982).

22. See also Note, *Article 22 of the Warsaw Convention and Franklin Mint v. TWA: A Conflict Between Treaty and Municipality Statute*, 16 CORNELL INT'L L.J. 397 (1983). Recent Development, *Aviation: Enforceability of Warsaw Convention Limits on Liability in the United States. Franklin Mint v. Trans World Airlines, Inc.*, 24 HARV. INT'L L.J. 183 (1983).

23. Practically, the decision limited Franklin Mint's recovery, but prospectively it abolished airline liability limits because the Warsaw Convention was considered unworkable. This caused great uncertainty in the airline industry. Further, the invalidation of the Warsaw Convention's use of a gold standard might infer that all other treaties using a gold standard will not be enforced by the United States courts.

24. 690 F.2d at 308.

25. *Id.* at 309.

26. *Id.* at 309.

27. Sweden, Britain, Italy and the Netherlands had used SDR's as conversion factors. The French had used the current French franc, and the United States, Greece and India had used the free market price of gold. In addition one United States court as well as the CAB relied on the last official price of gold. *Id.* at 308-09 n.14-19.

28. The CAB was considered to be an arm of the government and therefore, providing

was acting in a manner inconsistent with the actions of Congress. Specifically, the court found that Congress had repealed the last official price of gold by the 1978 Act. Accordingly, "[t]he case for continuing to use the now repealed price of gold . . . finds no support in law or logic."<sup>29</sup> Thus, the CAB's use of the previous gold standard was inappropriate.

Next the court disapproved the use of SDRs, the French franc, and the free market price of gold. The latter two were rejected because they were considered unstable and would thus undermine the purposes of the Warsaw Convention. SDRs were rejected by the court because the Senate had not ratified the Montreal Protocols. Use of SDRs in the Warsaw Convention would, therefore, have been contrary to the will of Congress.

Thus, the circuit court found that the 1978 Act had directly affected the Warsaw Convention. In so doing, the court found that the Warsaw Convention's Article 22 limitation of liability was inoperable. Franklin Mint appealed this decision.

### C. Supreme Court

On appeal, the Supreme Court affirmed the \$9.07 limitation of liability and the resultant \$6,475.98 judgment for Franklin Mint.<sup>30</sup> However, the Court reversed the circuit court's prospective invalidation of the Warsaw Convention. In particular, the Court held that the 1978 Act did not alter Article 22 of the Warsaw Convention, and that the CAB could make the gold to currency conversion using any conversion factor that was reasonable to the purposes of the Convention.

The Court addressed two issues: [f]irst, whether the 1978 Act had altered the Warsaw Convention; and second, whether the CAB has selected an appropriate conversion factor. Similar to the Second Circuit's analysis, the Court reviewed the history of the Warsaw Convention and the demise of the world gold standard, noting the Jamaica Accords<sup>30a</sup> and the Montreal Protocols. In addition, the Court reviewed the administration of Article 22 of the Convention in the

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governmental support to a particular unit of conversion. In this case, the last official price of gold.

29. *Id.* at 309.

30. 104 S. Ct. at 1776.

30a. *See supra* note 13.

United States. The Court observed that "[i]n the United States the task of converting the Convention's liability limit into 'any national currency' falls within rule making authority which was . . . delegated to the CAB under the Federal Aviation Act of 1958."<sup>31</sup> Moreover, the Court noted that "CAB powers are to be exercised '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 or foreign countries.'"<sup>32</sup> Initially then, the Court recognized that some administrative discretion was proper in the application of the Warsaw Convention.

Having reviewed the history and defined the role of the CAB, the Court addressed the threshold issue of whether "the 1978 repeal of the Par Value Modification Act rendered the Convention's cargo liability limit unenforceable in the United States."<sup>33</sup> In direct opposition to the Second Circuit's holding the Supreme Court determined that the 1978 Act had not undermined Article 22 of the Warsaw Convention.

Four reasons were cited for refuting any change in the Convention as a result of the 1978 Act. First, the Court, citing *Cook v. United States*,<sup>34</sup> determined that "'a treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'"<sup>35</sup> Because the 1978 Act made no mention of the Warsaw Convention, the Court found that the 1978 Act did not alter the Convention.<sup>36</sup>

Second, the Court recognized the Convention as a self-executing treaty and thus independent of purely domestic legislation.<sup>37</sup> Accordingly, the 1978 Act could not implicitly abrogate the Convention.

Third, the Court noted that any signatory nation wishing to withdraw from the Warsaw Convention was required to give six months notice.<sup>38</sup> No such notice was given in relation to the 1978

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31. *Id.* at 1780.

32. *Id.* at 1781, citing 49 U.S.C. § 1502 (1982).

33. *Id.* at 1782.

34. 288 U.S. 102 (1933).

35. 104 S. Ct. at 1783, (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)).

36. 104 S. Ct. at 1783.

37. *Id.*

38. *Id.*

Act. Thus, the Court reasoned that the 1978 act did not nullify application of the Warsaw Convention to the United States.<sup>39</sup>

Finally, the Court refused to adopt Franklin Mint's argument that the treaty was abrogated due to a substantial change in circumstances brought about through the 1978 Act. The Court rejected Franklin's argument because the change in circumstances doctrine<sup>40</sup> is only applicable when a party to the treaty asserts the change in circumstances. In the present case, the parties to the treaty continued to assert the vitality of the treaty. Because Franklin had no power to assert the doctrine, the Convention was still viable.

After determining that the 1978 Act had not abrogated the Convention, the Court next addressed the proper application of the Convention.<sup>41</sup> As noted previously, the Court recognized the CAB as the appropriate administering agency. In addition, it also observed that the CAB had, since the initial demise of the gold standard in 1968,<sup>42</sup> been administering Article 22 liabilities independently from an official price of gold. The last CAB review of its conversion rate occurred in 1978 and it affirmed the \$9.07 per pound limitation. This limitation was codified by CAB order 74-1-16 at 14 CFR § 221.176, and was in effect when Franklin Mint's goods were lost.

During the period the United States used a gold based currency, the appropriate conversion factor was simply the dollar equivalent of gold. However, once gold was abolished as the basis of the currency, the CAB's discretion determined the conversion factor. The issue before the Court then became whether the CAB had properly exercised its discretion. The CAB's discretion would be upheld only if its conversion rate was consistent with the Convention.<sup>43</sup>

A crucial preliminary issue arose as to whether it was possible for the CAB to act in a manner consistent with the Convention while setting a conversion factor independently from an official price of gold.<sup>44</sup> The Court found that while Article 22(4) states that "[t]he

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39. *Id.*

40. The doctrine of *rebus sic stantibus*.

41. While the Court addressed itself to the impact of the 1978 Act on the Convention, it did not analyze the implications of the Montreal Protocols. Technically these Protocols have not been ratified by the United States, nevertheless they were signed by the United States.

42. See *supra* text accompanying notes 10-17.

43. 49 U.S.C. § 1502 requires that the CAB act in a manner consistent with any treaties currently in force.

44. *Id.*



sums mentioned above shall be deemed to refer to the French franc consisting of 65.5 milligrams of gold . . . *These sums may be converted into any national currency in round figures.*"<sup>45</sup> This was merely a permissive conversion according to the Court and it was domestic legislation that required and controlled this conversion.<sup>46</sup> Conversion was therefore not controlled by the reference to gold in the Convention, and the CAB could legitimately set a conversion factor independent from the price of gold.

Even though the CAB could independently establish the conversion factor it was still required to act in a manner consistent with the Convention. To determine whether the CAB was acting appropriately, the Court evaluated the CAB's action in relation to the purposes of the Warsaw Convention. The Court determined that the Convention's most obvious purpose was to set some limit on liability. Since any conversion factor would serve this purpose the CAB's \$9.07 per pound limit was proper.

The court defined the second purpose as setting a "stable, predictable and internationally uniform limit."<sup>47</sup> Finding that the \$9.07 limit was stable and predictable, the Court nevertheless noted that international uniformity would prove more troublesome. To compensate for this perceived lack of uniformity, the Court noted that uniformity "might require periodic adjustment by the CAB of the dollar based limit to account both for the dollars changing value relative to other western currencies, and, if necessary, for changes in the conversion rates adopted by other Convention signatories."<sup>48</sup> Regardless of the necessity of these adjustments the CAB conversion factor based on the last official price of gold was judged to be consistent with the purposes of the Convention.

Another factor contributing to the CAB's consistency with the Convention was the similarity of the \$9.07 limitation to the limita-

45. 104 S. Ct. at 1780 (emphasis added).

46. The conversion was required by the tariffs of § 1373(a) of the Federal Aviation Act, 49 U.S.C. § 1301 *et seq.* Specifically, in note 25 the Court stated that "the Convention specifies liability limits in terms of gold francs and provides no unit of conversion whatsoever. . . . The Convention invites signatories to make the conversion into national currencies for themselves. In the United States the CAB has been delegated the power to make the conversion. . . ." 104 S. Ct. at 1784 n.25.

47. 104 S. Ct. at 1785.

48. *Id.*

tion that would have been imposed had the U.S. ratified the Montreal Protocols and adopted SDR's as the conversion factor. This limit would have been more than nine dollars per pound.

A third and final purpose of the Convention highlighted by the Court was that the liability limitation was to reflect a constant value that would accurately reflect inflation and thus remain equitable to both carriers and customers. The Court admitted that a set dollar amount of \$9.07 per pound would not serve this purpose. However, between 1934 and 1978 the signatories had allowed the liability limit to diverge from the value of shipped goods. In light of this practice the Court interpreted the treaty as a contract to be defined by the conduct of the parties. Thus, because the parties had allowed the liability limit to diverge from the value of the shipped goods, a CAB limit that also allowed divergence was considered consistent with the Convention.

In sum, the Court found that the 1978 Act did not change the Convention. The Convention, however, did not control the gold to currency conversion factor. That was within the control of each signatory. In the United States that power was delegated to the CAB, and in this instance the CAB had acted properly in setting a conversion factor and liability limit consistent with the Convention.

The dissent disagreed with the majority's analysis and instead focused on what it perceived as the plain meaning of the Convention. The dissent agreed that the Convention was not altered by the 1978 Act, but read Article 22(4) to require a gold to currency conversion based on the current market price of gold, regardless of that price's independence from any official price of gold.

The dissent quoted *De Geofrey v. Riggs*,<sup>49</sup> which stated that "[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning. . . ." <sup>50</sup>

According to the dissent, the ordinary meaning of Article 22(4) required the conversion factor be the current price of gold.<sup>51</sup> The

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49. *Id.* at 1788 (quoting *De Geofroy v. Ziggs*, 133 U.S. 258, 271 (1890)).

50. *Id.* at 1790-91.

51. *Id.*

dissent found that the ordinary meaning of the Convention was determined by its intent.<sup>52</sup> The Convention's intent was interpreted by the dissent to be international uniformity of liability value.<sup>53</sup> The dissent reasoned that a conversion rate and liability limitation established unilaterally by an agency of one nation would not be uniform.<sup>54</sup> In addition, the dissent noted that unilateral limits were specifically rejected by the framers of the Convention.<sup>55</sup> Thus, in recognizing that the Convention was still in full force following the 1978 Act, the dissent narrowly interpreted the Convention's intent and meaning. Accordingly, it found the proper conversion rate to be the current market price of gold.

#### IV. ANALYSIS

In addition to *Franklin Mint's* limitation of liability for cargo and passenger liability,<sup>55a</sup> the case has potential significance for the interpretation of other gold based treaties. Had the Court adopted the reasoning of the circuit court and nullified the Warsaw Convention, other gold based treaties<sup>56</sup> could also have been legitimately disregarded resulting in great confusion for the commercial and diplomatic worlds.<sup>57</sup>

While the Court's opinion appears to preclude this possibility, the opinion does leave open a means whereby a gold based standard could be inoperable. The Court makes it clear that the 1978

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

55a. See *supra* note 3a and accompanying text.

56. At the time the Warsaw Convention was signed gold clauses were contained in the Treaty of Versailles, the Treaty of St. Germain, the Treaty of Triavon and other international agreements. Additionally, gold clauses are contained in a number of transportation treaties. These include the International Convention relating to the Limitation of Liability of Owners of Seagoing Vessels June 2, 1930, 120 L.N.T.S. 123, the International Convention on the contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189, the International Convention for the Clarification of Certain Rules of Law relating to Bills of Lading for the Carriage of Goods by Sea, *done* Aug. 22, 1924, [1937], 51 Stat. 233, T.S. 931, 120 L.N.T.S. 155 (effective Dec. 29, 1937). The U.S. has adopted this last Convention and is bound by it. Thus, *Franklin Mint* is directly applicable. While the other Conventions have not been adopted by the U.S. it is conceivable that the U.S. courts would be forced to apply these Conventions. Accordingly, the courts could be confronted with a problem similar to *Franklin Mint*, and they could proceed using *Franklin Mint's* analysis. See *infra* note 57.

57. See *supra* note 22. See also Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COMM. 645 (1973).

Act did not directly alter the Warsaw Convention. Then, reading the unaffected language of Article 22(4),<sup>58</sup> the Court found that it did not specify a conversion factor for the voluntary translation of gold into national currencies.<sup>59</sup> The court thus severed the conversion factor from an official price of gold. Had the language of Article 22(4) specified that the conversion factor was to be based on an official price of gold, severance would have been impossible. Accordingly, the absence of an official price of gold would have prevented application of the Warsaw Convention.

The Court's analysis might additionally allow other gold based treaties to be inoperable by an invalidation of the administering agency's actions. In *Franklin Mint*, the CAB's use of the pre-1978 official price of gold as a conversion factor was upheld because it was consistent with the purposes of the Warsaw Convention.<sup>60</sup> However, it is conceivable that the actions of the agency would be inconsistent with the purposes of the treaty and thus invalid.

Accordingly, to secure the applicability of a gold based treaty in light of the 1978 Act, *Franklin Mint* requires that: (1) the conversion of gold to currency be accomplished using a conversion factor severable from the official price of gold; (2) the purposes of the treaty be accurately identified and; (3) the actions of the administering agency in setting a conversion factor be shown consistent with these purposes.

Another significant aspect of the case is highlighted by the Court's analysis of the CAB-set-conversion rate. As noted previously, the Court required that rate to be consistent with the purposes of the Warsaw Convention. In finding that the CAB's rate was proper, it was noted that this rate was very similar to the SDR rate. Inasmuch as the SDR rate was adopted by the Montreal Protocols, but was not ratified by the U.S. Senate, the Court's use of the SDR places it at odds with the Senate. The Court's use of the SDR must then be regarded as either judicial ratification of the Montreal Protocols, or as a recommendation for ratification of those Protocols. Regardless which view is adopted, the Court has apparently entered into treaty politics.

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58. See *supra* note 10.

59. See *supra* note 46.

60. See *supra*, text accompanying notes 30-55.

## V. CONCLUSION

In *Franklin Mint* the Court has provided a means whereby gold based treaties can continue to be operable even after repeal of a gold standard currency. Of necessity the CAB, as the administering agency, was given discretion to operate the treaty after the 1978 Act. However, the CAB's actions could still be held inconsistent with the treaty.

A possible path around this problem and one hinted at by the Court, would be the adoption by the United States of the SDR. The SDR has been recognized as a legitimate substitute for a gold based currency, one consistent with the purpose of the treaty.<sup>61</sup> Thus, legislation that required administering agencies to employ the SDR as a conversion factor instead of the non-official price of gold would serve both the purpose of the treaty and provide for consistent administration of gold based treaties by the United States.

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61. The Jamaica Accords and the Montreal Protocol both substitute the SDR for gold based currency.