The Montreal Conference and International Aviation Liability Limitations

John E. Stephen
THE MONTREAL CONFERENCE
AND INTERNATIONAL AVIATION LIABILITY LIMITATIONS

BY JOHN E. STEPHEN†

I. INTRODUCTION

THE UNITED STATES denunciation of the Warsaw Convention in late 1965 came abruptly and with little cause. Although the United States had long objected to the $8,300 Warsaw liability limit as too low, until shortly before its notice of intention to denounce, it had led its Warsaw partners to believe that the United States did support the doubled $16,600 limit fixed by the Hague Protocol of 1955, and in fact would ratify Hague.

A. Withdrawal Symptoms

During 1964, however, the United States agencies first began to use a $50,000 figure as their goal for a new limit. Thus, in September 1964, the IGIA agencies informally proposed to the United States carriers a voluntary side “waiver” of the treaty limit up to $50,000.¹

The amount of $50,000 was advanced, without further explanation or justification, as “an adequate amount.” However, despite later claims of “extensive study,” it is clear that the $50,000 figure did not rest on any economic analysis, but was purely arbitrary. The Department of State’s witness in the later Senate Hague Hearings so acknowledged,

The figure of $50,000 is, of course, arbitrary—as any such figure must be. But it does represent a substantial amount of money and if an arbitrary figure is to be chosen, it certainly seems far more in keeping with the economic realities in the United States than $8,300 or $16,600.²

It was in connection with this $50,000 proposal (to apply to United States air carriers only) that United States withdrawal from Warsaw (i.e., “denunciation”) was first threatened. Within less than a year, the threat to denounce had become the prime United States weapon in a worldwide campaign to force an increase in the liability limit to $100,000.

B. Inflation By Diplomacy

When the United States promoted the Hague Conference of 1955, its objective was to raise Warsaw limits to $25,000. The great majority of

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States strongly denounced the United States goal as unreasonably high for most of the world. Nevertheless, as a compromise, Hague conferees finally agreed to double Warsaw limits to $16,600, and to award on top of that amount the expenses of litigation. The United States government viewed this result as the equivalent of its goal of $25,000 (sans award of litigation expenses).  

Having essentially attained its $25,000 objective, however, the United States did not then proceed to ratify the Protocol. On the contrary, before it had yet consolidated its Hague concessions, it was seeking a $50,000 limit. Before international agreement could be reached on $50,000—as it was among world carriers approximately a year later—the United States was proposing a $100,000 limit, which became the leitmotiv for all United States discussions of Warsaw limits until very recently, when the United States raised it goal again.

The $100,000 figure was first proposed by the Department of State on 2 August 1965 for "voluntary" acceptance by United States airlines as the price for the Government's not denouncing the Warsaw Convention. It was clearly apparent that the figure was arbitrary. In fact, no economic justification whatever was given for any such amount. The only rationale even suggested in the State Department presentation was that a United States claimant would have to "gross" an award of $100,000, in order to provide for a "customary" attorney fee of 50 percent, and still leave a "net" award of $50,000.

The $50,000 figure was itself arbitrary, as previously seen. The proposed doubling of that amount to $100,000 was challenged by the United States carriers as unsupportable within the awards experience and prevailing indemnification practices in the United States. In a memorandum filed with the IGIA agencies, the Air Transport Association of America, on behalf of the United States airlines, submitted extensive evidence to show that $100,000 is not supportable as a reasonable award under: (1) recent United States death and injury awards (which ranged from midpoint verdicts of $13,000 to a high of only $23,000); (2) economic characteris-

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3 Air Coordinating Committee, ACC 11/22.28 (Revised), as amended, ACC 51/22.28A, 20 June 1917, Exec. H., 86th Cong., 1st Sess. 5-8. The ACC evaluation has recently been challenged by a former State Department official, Lowenfeld & Mendelsohn, supra note 1, at 497. But there can be no doubt that this was the Government's evaluation, concurred in by the Dep't of St. In the 1965 Hague Hearings, the Administration witness confirmed the official U. S. view that Hague's allowance of expenses of litigation "could in fact be equivalent to more than $25,000." N. E. Halaby, Administrator, Federal Aviation Agency, 1965 Senate Hague Hearings 19.


5 For a full account, see Stephen, supra note 1, at 721-25.

6 This premise was challenged by the U. S. carriers in a reply memorandum distributed to the IGIA agencies on 24 Aug. 1965, entitled, "The Proposed Amount of $100,000 As a Waiver of International Liability Limits Cannot Be Justified." The airlines' memorandum demonstrated that a 50% attorney-fee is not "customary," and, in any event, should not be given Federal sanction under the proposed $100,000 interim agreement. It is clear that the U. S. airlines' rejection of the $100,000 proposal was, in substantial part, because of the stated objective of accommodating a 50% attorney fee. Recent semi-official inferences that the Government's proposal was not actually premised on an assumed 50% attorney-fee are dispelled by the opposing memorandum filed by the carriers at the time.

7 The $50,000 amount had been proposed in unsuccessful Administration legislation as an automatic accident award to international passengers by U. S. air carriers; cf. 1965 Senate Hague Hearings.

8 The Air Transport Association of America is the national association of the 36 scheduled, certificated airlines of the United States. It also includes the two principal Canadian carriers as associate members.
tics of the United States passengers in international air transportation, one-half of whom are unemployed or clerical employees (including a large percentage of students, females, infants, and aged persons); (3) existing indemnity provisions of both government and industry in the field of air transportation (which establish requirements of only $40,000 to a maximum of $50,000 per person, including persons on the ground, as adequate); (4) Congressional policy in private relief bills for aircraft accident compensation (which have ranged from only $20,000 to $25,000 per person); or (5) existing statutory liability limitations of the Federal Government and of fourteen United States states (which range from $10,000 to $50,000, and average only $25,000). None of this evidence was disputed by the IGIA agencies.  

C. Credibility Gap And Whirligig

When the carriers declined the $100,000 proposal, the United States gave notice of its intent to denounce Warsaw. However, it simultaneously announced that if the world's airlines would agree within three weeks to a $75,000 "interim" limit (pending a new treaty limit), the United States would withhold or withdraw its denunciation. The United States agencies declared that $75,000 "would afford adequate protection to international travelers." It had been only a matter of days since the same United States agencies had seriously maintained that $100,000 was the minimum necessary limit to protect international passengers.

The United States "credibility gap" with respect to its liability limit proposals widened immediately and noticeably, and was to take on added importance in the forthcoming Montreal Conference, as the United States began to present its "economic case" for a $100,000 limit.

II. THE MONTREAL CONFERENCE

Under the threat of United States denunciation of Warsaw, the International Civil Aviation Organization convened an urgent conference of ICAO States in Montreal to explore possible higher treaty limits. A concurrent

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9 An abstract of the airlines' presentation is found in Stephen, supra note 1, at 722-24.
10 On the contrary, it seems to have been acknowledged that the $100,000 figure was arrived at in substantial disregard of such evidence, on the premise that such "mathematical" factors should not be allowed "to limit the recoveries of the survivors of husbands and fathers." For this reason, a U. S. official has acknowledged, the evidence had "little or no effect on the final outcome." Mendelsohn, Another View of the Adequate Award in International Aviation Accidents, 1967 Ins. L. J., 197, 200.
11 Dept't of St. Mem., 19 Oct. 1965. Similar memoranda were handed to foreign civil air attaches in Washington and mailed directly to foreign governments. While there are certain discrepancies between the two memoranda, both indicated that the "interim" $75,000 limit might be expected to prevail as long as eight years.
12 Doubts of the bona fides of the U. S. proposal were also created by the unrealistic three-week deadline. With slow communications, language barriers, and necessary coordination between carriers and governments, it was manifestly impossible to meet the 15 Nov. 1965 deadline. Many governments were convinced that the U. S. did not really intend the proposed interim arrangement to be affected at that time. This belief seemed confirmed when the U. S. later added new conditions to the proposed $75,000 interim limit, e.g., absolute liability.
13 The ICAO "Special Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol" was held in Montreal, Canada, from 1-15 Feb. 1966. Like the Hague Conference of 1915, it was essentially convened for the accommodation of the U. S. interest in higher Warsaw limits, and this was recognized by all participants, including the United States. The full Report of the Special Meeting has been published in two volumes, ICAO Doc. 8584-LC/114-1 and ICAO Doc. 8584-LC/114-2 (hereafter cited, respectively, as 1 Montreal Proceedings and 2 Montreal Proceedings).
ICAO Council resolution implored States, in the interim, not to take action (such as denunciation) "which might prejudice the successful outcome of the meeting." The resolution was plainly aimed at the United States.

But the United States spurned the ICAO entreaties, and on 15 November 1965 filed its notice of denunciation, to take effect (under Article 39) on 15 May 1966. Because of the arbitrary and precipitate character of the United States denunciation, there was widespread conviction among foreign governments that the action was a tactical ploy to put pressure on the Montreal Conference to accept the United States proposed $100,000 limit.

If this was the United States strategy for Montreal, it must be concluded that it failed, at least insofar as achieving acceptance by the Conference of the United States proposal of a new $100,000 international liability limit.

A. The Montreal Agreement

The Montreal Conference rejected the United States proposal for a $100,000 limit. But to prevent the United States denunciation from taking effect, the world's air carriers accepted the United States $75,000 interim proposal. The Montreal Agreement has now been in effect for more than a year, and there is no sign of urgency on the part of the United States to see it replaced by a treaty amendment. In fact, there is substantial suspicion among foreign governments and carriers that it is the United States strategy to let the carrier side-agreement continue for a considerable term, so that the higher accident awards which will surely result under a $75,000 absolute liability scheme will acclimate foreign interests to the rarefied atmosphere of a near-$100,000 limit.

B. Moving Target

Having approached this close to their $100,000 goal so easily, however, the United States agencies have now raised their sights again. In June of this year the United States notified ICAO that, while it would prefer an even "higher limit," it would consider a proposal of $108,000.

And so it appears that, while our Warsaw partners are still catching their breath at the United States demand for a $100,000 limit, the price has been raised another $8,000. To many foreign governments, this latest

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14 By then altered by the U. S. to require in addition waiver of carrier defenses, viz., "absolute liability," supra note 12.
15 Reference is to the private agreement of 13 May 1966, between 11 United States and 17 foreign air carriers, pursuant to the U. S. Dept' of St. "Proposal for Interim Agreement Among Carriers," 14 Mar. 1966. The CAB approved the agreement by CAB Docket No. 17325, CAB Order No. E-23680, 13 May 1966. A CAB press release of 9 June 1966 referred to the agreement as The Warsaw Convention Liability Agreement. The International Air Transport Association (IATA), which was active in coordinating international carrier negotiations leading to the arrangement, has called it The Montreal Agreement; cf. 1 L. Kreindler, Aviation Accident Law, § 12A.01 (1963), who calls it The Warsaw Convention and the Washington Compromise, 70 J. Royal Aero. Soc'y 1061, who calls it The Washington Compromise. The latter term is more descriptive of the political realities of the agreement than the popular Montreal Agreement.
16 Actually, the Montreal Agreement's $75,000 with absolute liability has consistently been regarded by the U. S. as the equivalent of $100,000 with only presumed liability. In this sense, the U. S. has already achieved its goal—in the framework of a private agreement.
United States action merely confirms their long-felt suspicion that it would have settled nothing to have accepted the United States demand for $100,000—the amount would simply have been raised again by the United States, just as it did after attaining its Hague demands.

In little more than two years, then, the United States proposed limit has been escalated from $16,600 to $50,000 to $75,000 to $100,000, to the present $108,000. How did the United States agencies arrive at these amounts? Are they reasonable and necessary to provide an adequate award to claimants? Can they be justified as a world standard?

It is useful to an appraisal of the United States proposed limits to examine the arguments which have been advanced by the United States agencies in their support, particularly against the backdrop of the Montreal Conference.

C. Rationale By Metaphor

Looking back on the period preceding the Montreal Conference, it is evident that the United States proposed $100,000 limit was devoid of any rational basis. In a recent post-mortem, a United States official has offered this purported justification for the United States proposal:

"[T]he $100,000 limit did not appear to be at all out of line with the over-all needs and circumstances of the American public traveling on international journeys in the 1960's."18

What those "over-all needs and circumstances" might be has never been explained. The statement is reminiscent of the justification given by the Government's witness for its earlier proposed $50,000 automatic-liability proposal—viz., that "it may be arbitrary, but it is substantial."19

After-the-fact rationalization of the $100,000 figure has also been attempted in terms of hypothetical cases involving imaginary decedents and damages. Thus, the former United States Chairman at Montreal has tried retroactively to rationalize a $100,000 limit, by putting the case of a hypothetical United States wage earner:

"But whatever the method, it was clear that a 35-year-old man earning, say $10,000 per year and with a wife and minor children could well be "worth" (in the phrase of the personal injury bar) at least $75,000-$100,000.20"

Apart from the obvious fallacy of claiming validity for a limit based on hypothetical situations, this mixing of fact and metaphor created misunderstanding and lack of confidence in the United States position. For example, a $100,000 limit was defended at Montreal by putting the hypothetical case of an American male, aged 40, "with earnings of $10,000 a year," and an assumed 20-years of remaining useful activity, as being "worth" $200,000. The example was not only unpersuasive to the nations present, but was misunderstood as being a factual presentation of concrete United States data. Thus, in the ensuing debates, not only were doubts voiced as to the accuracy of these United States "statistics," but one nation actually argued against the United States case in the belief that

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18 Mendelsohn, supra note 10, p. 199.
19 Supra note 2.
20 Lowenfeld, supra note 15, at 1061.
the United States spokesman was claiming the “figure of $10,000 as being the average salary” in the United States.\footnote{1 Montreal Proceedings 47.}

D. A Matter Of Intuition

If these attempted hypothetical justifications of the $100,000 limit have been difficult to accept, the alternate rationalization which has been put forward by the official United States commentators is no less than confounding.

In another post-mortem attempt to rationalize a $100,000 limit, a United States official has deprecated the importance of objective economic data to support the necessity or reasonableness of the figure as an adequate award. Admitting that the United States agencies’ “statistical data” to justify the amount were developed only after the fact, the official acknowledged with frankness,

Thus, the statistics served only to confirm the instincts and attitudes of the decision makers that a $100,000 limit was by no means unreasonable [Emphasis added.].\footnote{22 Mendelsohn, \textit{supra} note 10, at 201.}

The widespread suspicion among carriers and governments that the $100,000 figure had been cut from whole cloth by “the decision-makers” and then sought to be justified retroactively is thus apparently confirmed. What is not explained is how the “instincts and attitudes” of the United States decision makers were judged to have greater validity than the combined contrary instincts and attitudes of virtually every other nation. Nor has it been explained how the United States decision makers could make such an immutable decision long prior to even hearing the presentations of the sixty other nations at the Montreal Conference, which was called for the very purpose of open discussion among nations to decide these questions.

III. The United States Accident Data Studies

It appears at least to have been recognized that the United States could not secure acceptance of a $100,000 limit at the Montreal Conference on the basis of hypothetical illustrations and intuitive attitudes. On 10 November 1965, the Civil Aeronautics Board accordingly began a statistical survey and study of passenger recoveries (including both judgements and settlements) for serious injury and death in air transport accidents involving United States air carriers, in both Warsaw and non-Warsaw cases.\footnote{23 Studies in justification of a $100,000 limit came after the fact. The $100,000 figure was first proposed on 2 Aug. 1965, \textit{supra} note 5. It was reiterated in the U. S. notice of intention to denounce on 19 Oct. 1965, before the CAB’s studies were even begun, \textit{supra} note 11.} Studies were also undertaken of the trend in settlements and judgements generally in the United States, resulting from accidents of all kinds, and of the availability and cost of air trip and passenger and public liability insurance. These studies were filed with ICAO in January 1966, shortly before the convening of the Montreal Conference.

The CAB studies were very revealing. First, contrary to the inference long sought to be left by the United States agencies that the average United States death award (in a non-Warsaw situation) would be in the
neighborhood of $50,000, the average-award actually turned out to be
only $38,000.24 ICAO has estimated that, for the world as a whole (in-
cluding the United States), the average non-Warsaw case death settle-
ment (i.e., award or settlement) is about $15,000. Thus, the United
States average award is approximately two and one-half times the world
average.

On this basis, to determine a fair limit to meet United States standards,
it would appear reasonable to apply a “correction factor” of two and
one-half to the widely-accepted Hague limit of $16,600, yielding a
figure of about $40,000 as an adequate award by American standards.25
This would be a true reflection of the actual differences in United States
and world awards, absent the artificial limitation imposed by the Con-
vention.

If there were added to this $40,000, the approximately $8,000 calcu-
lated by the United States as the equivalent-value of the legal expenses
allowed by Hague, the total would be $48,000—very close to the $50,000
which was the highest limit accepted by a majority of the States partici-
pating in the Montreal Conference. However, the government’s working
group apparently eschewed any such analysis, because it did not fit with
the predetermined United States objective of a $100,000 limit.

The nominal level of the average United States recovery disclosed by
the CAB study nevertheless has been acknowledged by members of the
government’s working group. Referring to the results as tabulated in
United States Table 1, it has been conceded: “On the other hand, the av-
erage recovery was by no means as astronomical as some had feared.”26

As expressed, the observation is anomalous. The carriers had never be-
thieved that the average recovery would prove to be high, and had said so.
Any envisioned “astronomical” average recovery would have had to be on
the part of the United States agencies. But it would hardly seem that the
agencies would have “feared” that outcome. On the contrary, an extra-
ordinarily high average recovery was virtually essential to prove reason-
ableness of their proposed $100,000 limit.

The CAB study was revealing in another way. In 1961, the CAB had
performed a similar study for the period 1950 through 1960.27 The earlier
study had shown an average non-Warsaw recovery of $26,000. Compar-
ing this with the $53,000 average for 1958-1964, it is seen that the in-

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24 CAB Statistical Survey of Death and Personal Injury Awards in Air Transport Accidents In-
volving United States Air Carriers, Table 1, 2 Montreal Proceedings 123.
25 This value is very close to the two and one-third increase factor proposed to be applied to
the existing maritime liability limits for death and injury, under S. 2314; cf. Address by Thurman,
Federal Bar Association Seminar, Water Transportation Committee, John Marshall Law School,
26 Significantly, $40,000 is the approximate mid-range of the $33,200 (two times Hague) to
$50,000 (three times Hague) amounts accepted by most nations at the Montreal Conference.
Whether or not based on the above kind of analysis, these nations’ “instinctive” position is borne
out by actual economic data on awards.
27 Lowenfeld & Mendelsohn, supra note 1, at 553, referring to Table 1 of the CAB Study, 2
Montreal Proceedings 126.
28 A fact apparently unfamiliar to some. For example, in 1962 one commentator remarked, “A
thorough study of the range of recoveries in aviation accident cases covered by the Warsaw Con-
vention, as well as in those not so covered, might be enlightening, but no such study appears to
have been made.” Lissitzyn, “The Warsaw Convention Today,” Proceedings of the American So-
ciety of International Law 116 (1962). The 1961 CAB Study is reproduced in the record of the
crease in the level of recovery was $27,000, or 104 percent. Applying the 104 percent increase-factor to the $16,600 Hague limit which the United States had supported, would yield a figure of $34,000 as a realistic limit. Even adding to this amount the $8,000 equivalent-value of Hague-allowed litigation expenses would give a total of $42,000, which is the approximate amount accepted by most states at the Montreal Conference. But this analysis was likewise overlooked or disregarded by the United States working group.

The fact appears to be that the United States agencies did not develop the various United States liability limit proposals from either study. If the 1961 CAB study was the basis for the proposed $50,000 automatic liability in the Senate Hague Hearings in May 1965, then it had to be the basis as well for the proposed $100,000 limit in August 1965—less than three months later—because no new studies were made in the interim. How two such diverse limit proposals could have been based on the same statistical study has never been explained. It is fairly apparent that neither proposal was based on the 1961 study. Clearly the $100,000 proposal was not based on the 1966 CAB Study, since that study was not even begun until after the $100,000 proposal had been made.

A. Deficiencies Of The United States Accident Award Studies

In all events, the economic and statistical validity of the government’s studies was suspect. It was brought out in the Senate Hearings on the Hague Protocol, for example, that the Government’s study of award experience purported to show the economic impact of Warsaw (and Hague) accidents. But when the Government’s witness was questioned on the scope of the data on which the conclusions of the study were based, it was admitted that accidents occurring on "purely domestic flights" were included.

Senator Fulbright, Chairman of the Senate Foreign Relations Committee, commented,

To be significant, or have any meaning, it seems to me that it would have to be the same class of cases to make a comparison . . . . It doesn’t seem to be very meaningful to compare those cases which would not be covered either by the Warsaw Convention or the Hague Protocol.29

To the surprise of the Committee, as well as participants, the Government’s witness acknowledged, “That is right.”30

The significance of this exchange is that, after admitting the lack of meaning in the comparative data, the Government proceeded to repeat the identical process in its 1966 Study for the Montreal Conference, making the same invalid comparisons. The 1966 Study was nevertheless forwarded to ICAO and the participating Montreal Conference nations without correction or change, thus perpetuating and compounding the errors of the 1961 Study.

The fallacious base for the United States accident data was quickly noted at Montreal, and exception was taken to including accident awards from purely United States domestic operations, with the observation that,

29 1965 Senate Hague Hearings 24, 25.
30 Id.
United States domestic experience had very little resemblance to international traffic to and from the United States.31

These clearly fallacious assumptions and methods in the United States accident-award study did little to earn the United States a sympathetic hearing by the Montreal Conference participants.

The study was limited to awards data for only the thirteen United States scheduled international and domestic trunkline carriers. This arbitrarily excluded relevant award data for foreign air carriers operating to and from the United States and for local service and other nontrunkline United States carriers which carry passengers in international air transportation.32 Such data would not only have been relevant to the scope of the study, but would have been material to the results, since it appears that the average recoveries against foreign and United States nontrunkline carriers would be lower than those against United States trunklines.

B. Errors And Distortions In The United States Exhibits

Apart from the questionable validity of data and methods in the United States accident-recovery study, the United States exhibits setting forth the results of the study contain basic errors, distortions and omissions. This is particularly true of United States “Table 3,”33 which was the key element in the United States “economic case” at Montreal.

Table 3 purports to show the number of actual awards34 for death at various money levels from zero to $200,000 plus. Purportedly, Table 3 was derived from the preceding Table 2, which shows an annual breakdown of non-Warsaw death recoveries for the same years and for the same monetary levels.35

But Tables 2 and 3 do not agree. The number of “claims involved” at the settlement-levels $8,292, $16,583, $33,000, and $50,000 in Table 3 do not correspond to the totals for those levels reflected by Table 2:

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Table 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>8,293—$16,583 . . . (566)</td>
<td>Over $ 8,292 576</td>
</tr>
<tr>
<td>16,584—33,000 . . . (407)</td>
<td>Over 16,583 417</td>
</tr>
<tr>
<td>33,001—50,000 . . . (292)</td>
<td>Over 33,000 302</td>
</tr>
<tr>
<td>50,001—75,000 . . . (238)</td>
<td>Over 50,000 248</td>
</tr>
</tbody>
</table>

One or the other of these tables is in error. Since the grand total of claims at each settlement-level in Table 2 is based on the yearly figures tabulated therein for each such level, Table 2 is apparently correct, and

32 Inclusion of U. S. nontrunkline carriers would have been particularly appropriate in light of the standard anti-Warsaw complaint that the treaty discriminates against through-ticketed international passengers on the domestic U. S. leg of their flight.
33 2 Montreal Proceedings 126. See Table 3, following, “Percent of Non-Warsaw Death Judgments and Settlements Which Exceed Various Monetary Levels.”
34 Viz., judgments and settlements. The second column of Table 3 is titled, “Number of Claims Involved,” but it is apparent that the term “claims” must mean awards, since Table 3 does not reflect the 256 “claims pending” shown in preceding Table 2.
36 The non-Warsaw death totals in Table 2 are not cumulative, as in Table 3, and must be added together for such a running total, as shown in parentheses. (Also, since Table 3 inverts the order, and reads from $200,000 to zero, top to bottom, the cumulative totalling in Table 2 must be performed in the same order.)
it is Table 3 which is in error. The "percentage" column of Table 3 would, of course, be correspondingly in error, apparently by more than a full percentage point in each instance.

Errors aside, the critical defects of Table 3 are in its concept and construction. First, it is incomplete in the data displayed. Table 2 shows complete figures for the seven-year period, 1958 through 1964, inclusive, for fatalities and serious injuries. But Table 3, while purporting to be based upon Table 2, does not include the data for non-Warsaw serious injuries. The omission is crucial and grossly misleading. By leaving out the figures for recoveries for non-Warsaw serious injuries, United States Table 3 completely distorts the actual results of non-Warsaw judgments and settlements in the United States.

On its face, it is clear that the great bulk of recoveries for non-Warsaw serious injuries has been at the lower "settlement-levels." In fact, the overwhelming majority of recoveries for non-Warsaw serious injuries would be covered by the Hague limit. The data in Table 2 (2) for non-Warsaw serious injury recoveries show that more than 86 percent of all awards have been for less than $16,600. Stated conversely, only 14 percent of non-Warsaw serious injury awards have been for amounts higher than $16,600. But United States Table 3 would make it appear that nearly 50 percent of all non-Warsaw recoveries are in excess of $16,600. This would be true only if no notice were taken of injury awards.

At the higher settlement-levels, the distortion is even greater. Thus, the data in Table 2 (2) for non-Warsaw serious injury awards over $100,000 show that only 2 percent of such awards are in that range. But United States Table 3 would make it appear that 18 percent of all non-Warsaw awards—nearly one out of five—are over $100,000.

In this instance, the distortion resulting from disregarding injury awards amounts to nearly 20 percent. This is hardly inconsequential when, as will be seen, the main United States defense of a $100,000 limit has been based on the percentage of United States claimants at that level who would receive a normal nonlimited award.

The percentage of claimants thus selected by the United States agencies as the acceptable minimum was approximately 80 percent. Under United States Table 3 as constructed—viz., omitting injury awards—the settlement-level at which 80 percent of claimants would receive a nonlimited award would be $100,000. The $100,000 figure as a proposed limit was ostensibly selected from Table 3 on that basis. However, as seen, United States Table 3 distorts these levels and percentages by omitting injury awards. If injury awards are included in United States Table 3, as they should be, the result would be to alter significantly the claims-percentages to which the various settlement-levels correspond. Thus, the settlement-level at which approximately 80 percent of claimants would receive a full nonlimited award would become $75,000 rather than $100,000.

This is illustrated by the following comparison of official United States

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37 Cf. U. S. Table 2(2), 2 Montreal Proceedings 125.
38 1 Montreal Proceedings 31, 39. Precisely, it was the reciprocal of the 17.9% figure for claims over $100,000, as shown in U. S. Table 3, or approximately 82%.
Table 3, which omits injury awards, and a "Corrected Table 3" which includes the non-Warsaw serious injury recoveries:

<table>
<thead>
<tr>
<th>UNITED STATES TABLE 3</th>
<th>&quot;CORRECTED TABLE 3&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Percent of Non-Warsaw Death Judgments and Settlements Which Exceed Various Monetary Levels</strong></td>
<td><strong>Percent of Non-Warsaw Deaths and Injury Judgments and Settlements Which Exceed Various Monetary Levels</strong></td>
</tr>
<tr>
<td>Settlement Level</td>
<td>No. of Claims Involved</td>
</tr>
<tr>
<td>Over $200,000</td>
<td>36</td>
</tr>
<tr>
<td>Over 100,000</td>
<td>146</td>
</tr>
<tr>
<td>Over 75,000</td>
<td>191</td>
</tr>
<tr>
<td>Over 50,000</td>
<td>*248</td>
</tr>
<tr>
<td>Over 33,000</td>
<td>*302</td>
</tr>
<tr>
<td>Over 16,583</td>
<td>*417</td>
</tr>
<tr>
<td>Over 8,292</td>
<td>*376</td>
</tr>
<tr>
<td>$1 to 8,292</td>
<td>760</td>
</tr>
<tr>
<td>Zero</td>
<td>813</td>
</tr>
</tbody>
</table>

Looking at the "Corrected Table," it is seen that the level at which 80 percent of claimants would receive nonlimited recovery (i.e., above which 20 percent would not) is actually $75,000, not $100,000, as indicated by the incomplete and erroneous United States Table 3.

The true magnitude and significance of these defects becomes impressive when one recognizes the extent to which the United States case at Montreal was rested on its statistical study of recoveries. Throughout the United States arguments for a $100,000 limit, stress was repeatedly laid on the "compelling evidence" of the United States statistical surveys and tables. In fact, it was stated by the United States spokesman that the reason $100,000 was not "excessive" was that United States Table 3 demonstrated that this was the level at which approximately 80 percent of claimants would receive a nonlimited award, this being an acceptable and reasonable percentage.

The United States reliance on its accident-recovery studies as the basis for its $100,000 "target figure" has been affirmed by the Chairman and another member of the United States delegation, subsequently reporting on the Montreal Conference:

And a limit of 100,000 dollars per passenger seemed to the United States to make sense, both in economic terms and in terms of adequate protection. At that figure, according to the statistics, 82 percent of American claimants would have received the compensation that they would get without a limit . . . [Emphasis added.], citations omitted.

Describing how the United States case was presented at Montreal, the same officials state,

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40 The values designated by asterisks are apparently erroneous, as previously discussed. Correct values would appear to be:

<table>
<thead>
<tr>
<th>Settlement Level</th>
<th>No. of Claims Involved</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over $50,000</td>
<td>238</td>
<td>29.2%</td>
</tr>
<tr>
<td>&quot; 33,000</td>
<td>292</td>
<td>35.9</td>
</tr>
<tr>
<td>&quot; 16,583</td>
<td>407</td>
<td>50.1</td>
</tr>
<tr>
<td>&quot; 8,292</td>
<td>566</td>
<td>69.6</td>
</tr>
</tbody>
</table>

41 Specifically, 19.4% in the "Corrected Table 3."


43 Lowenfeld & Mendelsohn, supra note 1, at 564.
This example plus the careful elaboration on statistics of recoveries and settlements in the non-Warsaw aviation cases in the United States demonstrated that the target figure put forward by the United States was by no means unrealistic [Emphasis added.].

One of these officials, in fact, has since stated that the ultimate factor in the process by which the United States fixed upon the $100,000 limit "was the persuasive element of statistical data," citing United States Table 3 for its showing that at $100,000 only 18 percent of claimants would be prejudiced in a full recovery of their damages.

It can hardly be contended, as some have suggested, that non-Warsaw injury recoveries can be disregarded merely because there are a greater number of death awards. Serious injury judgments and settlements make up 21 percent of the total non-Warsaw accident recoveries and are equal to 27 percent of the number of non-Warsaw death recoveries.

It says enough as to the importance of these data, that their omission from the Government's key statistical chart resulted in an incorrect figure of $100,000 as a proposed limit, rather than $75,000. The correct level being $75,000 on the basis of complete recoveries data, the United States agencies thus made a 33 1/3 percent error at the outset, through disregard of essential and existing serious injury data.

Added to this critical shortcoming of Table 3 is another, viz., the failure to have included recoveries for the full period 1950 through 1964, consistently with basic United States Table 1. Table 1, which is the underlying statistical display for the entire study, shows total death and total injury settlements for each year of the 15-year period, 1950 through 1964. But, inexplicably, Table 3 is limited to recovery data for only the 7-year period of 1958 through 1964.

Quite apart, therefore, from the omission from Table 3 of serious injury data, it appears beyond question that if Table 3 had included complete death recoveries data, the result would have been to show a greater number of claims in the lower settlement-levels. This is because the level of death recoveries for the period 1950-1958 is significantly lower than for

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44 Id. at 166. The original citation to n. 235 reads as follows: 235. See Tables 554-56 supra. See also 2 Montreal Proceedings 123-26.
45 Mendelsohn, supra note 10, at 200.
46 This is especially true with respect to the U. S. agencies, which have strenuously maintained that injury cases, if anything, are of more concern to the limitation issue—at least potentially—than death cases. Their position in this respect is reflected by the survey questionnaire's having placed at least equal emphasis on data as to serious injury recoveries.
47 Cf. U. S. Table 2, 2 Montreal Proceedings 124-25.
48 Cf. Table 1, following, "Passenger Recoveries (Including Both Judgments and Settlements) in Warsaw and Non-Warsaw Cases, U. S. Carriers," 2 Montreal Proceedings 123.
49 Table 3 was derived from Table 2 (cf. 1 Montreal Proceedings 31). Thus, it is the basic data of Table 2 which was limited to the 7-year period, 1958 through 1964. The three-year overlap of the 1961 and the 1966 studies (i.e., 1958-1960, inclusive) was apparently intended to allow, in the 1966 survey, for resolution of claims shown as "claims pending" in the 1961 study. Thus the 1966 Table 1 figures for 1958-1959-1960 are not the same as those in Table 1 of the 1961 study; cf. 1965 Senate Hague Hearings 35.
51 It does not explain this deficiency of Table 3 merely to observe that the 1950-1958 figures in Table 1 were drawn from the earlier 1961 CAB study, which had made no breakdown into "settlement-levels" (e.g., $1 - 8,292; $8,293 - 16,583, etc.), as in the 1966 study. The CAB in its 1965 questionnaire could have, and should have, called for that breakdown of the 1950-1958 figures. Otherwise, the two studies are not parallel. No significant difficulty would have attached to procuring such a breakdown of the earlier figures, since the 1965 questionnaire resurveyed three of the earlier years in any event (viz., 1958-1959-1960). See note 49, supra.
51 Cf. Table 1 of the 1966 study, 2 Montreal Proceedings 123, and Table 1 of the 1961 study, 1965 Senate Hague Hearings 35.
the period 1958-1964, as the United States agencies have pointed out. Had the figures for all years been included in Table 3, the settlement-level at which an optimum 80 percent of claims would receive the desired non-limited recovery would doubtlessly have been at an even lower level than the $75,000 figure developed in the preceding discussion.

That there was awareness by the United States spokesmen of these defects of the studies is apparent from later unofficial alteration of the tables. In a recent article by the former United States Chairman and one of the Members of the United States Delegation appear statistical tables purportedly "condensed from the full tables presented to the Conference, appearing in 2 Montreal Proceedings 123-26." An examination of the authors' tables in the article discloses that they are not merely "condensed" versions of the United States tables, but are reworked tables which attempt to correct at least some of the errors of the official tables. Nowhere in the article, however, is this disclosed.

A comparison of the actual United States Table 3 with the authors' version confirms this conclusion:

<table>
<thead>
<tr>
<th>Official United States Table</th>
<th>Authors' Version &quot;Table II&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement Level</td>
<td>No. of Claims</td>
</tr>
<tr>
<td></td>
<td>Involved</td>
</tr>
<tr>
<td>Over $200,000</td>
<td>36</td>
</tr>
<tr>
<td>Over $100,000</td>
<td>146</td>
</tr>
<tr>
<td>Over $75,000</td>
<td>191</td>
</tr>
<tr>
<td>Over $50,000</td>
<td>302</td>
</tr>
<tr>
<td>Over $33,000</td>
<td>302</td>
</tr>
<tr>
<td>Over $16,583</td>
<td>417</td>
</tr>
<tr>
<td>Over $8,292</td>
<td>760</td>
</tr>
<tr>
<td>$1 to $8,292</td>
<td>813</td>
</tr>
<tr>
<td>Zero</td>
<td>813</td>
</tr>
</tbody>
</table>

Plainly, the authors' "Table II" is not "condensed from" the official table. It is a different table. Why was the table reconstructed in this way? A principal purpose appears to have been to correct the errors of computation in United States Table 3 heretofore discussed. For if the claims at each settlement-level in the authors' "Table II" are reconverted to the original format of official United States Table 3, it is evident that the altered table does affect a correction of those errors.

Such "condensation" as was made of the official United States tables consisted of leaving out United States Table 2 in its entirety and completely omitting from Table 1 all data as to non-Warsaw serious-injury recoveries. This attempted retroactive harmonizing of the format of the tables so as to show only death recoveries in all tables is an ill-concealed effort to hide the incompatibility of Table 3 with underlying Tables 1 and 2. But it fails to cure the critical failing of the key table in having disregarded injury recoveries in the first place.

The United States case at Montreal for a $100,000 limit was based in substantial degree on its alleged "careful elaboration on statistics of re-

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53 Lowenfeld & Mendelsohn, supra note 1, at 553 (emphasis supplied).
54 Supra, notes 36, 40.
coveries and settlements in non-Warsaw aviation cases in the United States." The United States Chairman has stated,

What did make an impression on the Conference was the presentation by the United States of the American theory of compensation for accident damage, of statistics showing the United States experience with aviation accident claims not covered by the Warsaw Convention, and of estimates of incremental insurance costs to cover various limits of liability.

The Chairman added that, while the American presentation was not accepted in toto, "following the American presentation it could no longer be said that the United States had pulled figures out of the air." Viewing the reaction of other Conferees, it must be said that this evaluation is highly optimistic. In fact, it contrasts sharply with the official Report by the same authors, which described the Montreal Conferees' reaction to the United States analysis as "almost totally negative."

The later description more accurately states the foreign reaction to the United States presentation. There was open mistrust of the United States statistical data, expressed on several occasions. Indeed, in the ultimate test of credibility, the failure of the United States studies and arguments to persuade either industry or the Montreal Conferees of the reasonableness of a $100,000 limit, was all but complete. Other than its own vote, the United States proposal of a $100,000 limit received only a single supporting vote at Montreal.

C. Blind Bargain And Hull-Gull

Added to the open mistrust of the United States statistical data presented at Montreal, was the feeling among many of the Conferees that the United States was playing a numbers game. Unfortunately this reaction in substantial part was attributable to the ambiguities and evasions of the United States presentation.

A singular example was the persistent refusal of the United States spokesmen to state whether the United States proposals of a $100,000 permanent limit and a $75,000 interim limit included expenses of litigation (e.g., attorney fees). This was a simple question, permitting of a direct answer. An intelligent evaluation of the United States proposals could not be made without it. But it proved all but impossible to get an answer from the United States spokesman at Montreal, at least until long after positions of other states had become obviously frozen.

The United States refusal to be explicit on the issue of attorney fees was more than mere uncertainty, and in fact began even before the Conference. When the United States first released its terms for the United

84 Lowenfeld & Mendelsohn, supra note 1, at 566.
85 Id. In still another account, one of the collaborators has similarly assessed the U. S. statistical presentation as "persuasive." Mendelsohn, supra note 10, at 208. However, the reactions of both carriers and governments suggest that the U. S. statistical presentation was persuasive only to the U. S. agencies.
87 See, e.g., 1 Montreal Proceedings 46; Id. at 9; Id. at 28.
88 U. S. Delegation Report, Attachment D-1. The lone supporter was the Philippines. The U. S. Chairman has suggested that Sweden also supported the U. S. presentation. Lowenfeld & Mendelsohn, supra note 1, at 565. If so, it was lip service only. Sweden did not register its vote in support of the U. S. position. U. S. Delegation Report, Attachment D-3.
States withdrawal of its denunciation of Warsaw, the notice was silent as to whether the proposed $75,000 interim limit was meant to include attorney fees. The omission was significant, and appeared to be more than mere oversight, since the earlier $100,000 interim-proposal had expressly been stated to include attorney fees.

The carriers naturally at once inquired whether the $75,000 proposal also included attorney fees. But the Department of State would not say. In fact, the State Department spokesman expressly declined to answer, saying that the Government "preferred to remain flexible" on the matter. The question was never answered.

At the Montreal Conference, the United States was aware that its bare $100,000 proposal could not be evaluated by foreign governments until fully elucidated in a formal United States presentation. The United States was also aware that, consistently with Hague Article 22 and the United States position at the Hague Conference (i.e., that attorney fees should be additive to the amount of any award), the Montreal Conferees would assume that the United States $100,000 proposal was similarly intended to have attorney fees added (thus making the actual gross amount of the proposal on the order of $130,000 to $150,000).

Despite this foreknowledge, and the fact that the United States was the proponent (for whom the Conference had actually been called), the United States put off presenting its concrete proposal for a $100,000 limit until the Fifth Meeting of the Conference. Even then, the United States proposals were not offered until after the President of ICAO had called for it on the record, and other delegations had expressed annoyance that the United States had promised specific and concrete proposals but had avoided anything but general statements.

Not until the United States made its concrete proposal was it made clear that the $100,000 proposal was deemed to be inclusive of attorney fees, and not, as widely supposed, a figure to which attorney fees of from $30,000 to $50,000 were to be added. The United States Chairman has since acknowledged that this came to the "surprise of a number of the delegates."

Why, when the United States agencies fully realized that foreign governments would be thus misled by the $100,000 proposal, did they allow this widespread misunderstanding to continue? Clearly it was not because

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59 Viz., an interim carrier arrangement of $75,000 per passenger and reasonable prospect of a $100,000 treaty limit. Dept's of St. Mem., 19 Oct. 1965, supra note 11.
60 The answer was crucial to a carrier decision on the proposal. For if the $75,000 figure did not include attorney fees, the proposal was actually no different from the $100,000 proposal (including attorney fees) already rejected by the carriers. The Government's refusal to answer made it impossible for the carriers to arrive at a decision to accept. cf. Stephen, supra note 1, at 727.
61 Article 22, paragraph 4, of The Hague Protocol, providing for the adding on of expenses of litigation (including attorney fees) where permitted by local law, was adopted as an accommodation to the U.S. That the other Montreal Conferees had assumed that its effect would make the U.S. $100,000 proposal actually amount to $130,000, was evinced by the Swedish statement of 3 Feb. 1966, acknowledged by the United States. 1 Montreal Proceedings 32.
62 The U.S. spokesman had promised to present a concrete proposal on the opening of the second day's session. 1 Montreal Proceedings 11.
63 Cf. 1 Montreal Proceedings 11.
64 Cf. statement of Belgium, 1 Montreal Proceedings 11; statement of the Netherlands, Id. at 29.
65 1 Montreal Proceedings 10. The U.S. Proposal, "LIM-13," did indicate that attorney fees were included, 2 Montreal Proceedings 184.
66 Lowenfeld & Mendelsohn, supra note 1, at 568.
the question of attorney fees was untimely or unimportant. On the contrary, as the United States Chairman has stated, the issue of attorney fees was "immediately and continuously relevant." The only explanation suggested for the maneuver is that the United States delegation—by leaving the question dangling, and then finally including attorney fees in its figure—would be thought by the press and foreign delegations to be making a concession, thereby perhaps influencing more favorable consideration of the United States proposal. While this may have been the impression received by the press, any assessment that this was the reaction of the Montreal Conferees seems badly misplaced.

In all events, although finally having spoken up as to its position on attorney fees under the $100,000 treaty proposal, it was only a short time until the United States was again refusing to declare its position on the attorney fees issue as applied to its $75,000 interim carrier proposal. This time the United States never did elucidate. The question arose when the United States was asked whether, in light of its preceding explanation, the proposed $75,000 interim carrier proposal was also deemed to be inclusive of attorney fees. The United States spokesman declined to answer, stating that the question was "premature." In the same vein, the United States representative also declined to state whether the $75,000 United States interim proposal was to apply universally to all international Warsaw-Hague traffic, or solely to that originating or terminating in the United States.

When it is realized that a great many, if not most, of the foreign carriers involved are nationally owned or operated instrumentalities, and that their flag countries would have a great deal to do with any decision of such carriers to enter into the United States proposed $75,000 interim agreement, it is not surprising that many of the Conferees thought they were being toyed with by the United States.

IV. THE CASE OF THE OPTIMUM CLAIMANT

Apart from the failure of the United States statistical presentation, the underlying theory of the $100,000 proposed limitation was untenable. The stated basis for $100,000 to compensate American claimants was that this was the level at which approximately 80 percent of claimants would receive the same award as with no limitations.

Of course, this premise was not self-sufficient. The obvious question was: why should the limitation be established so as to satisfy 80 percent of claimants? Why not 50 percent, or 75 percent? In answer, the United States spokesman explained that the proposed $100,000 limit was not keyed to "average compensation," but rather:

By "limit" the United States meant a figure that would permit most people,
in most countries to establish, in accordance with whatever legal system applied in the country where they resided with their families, a monetary value for the loss they had suffered as the result of injuries. The United States hoped that this limit would be realistic and clearly above average [Emphasis added.].

This statement of purpose raised more questions than it answered. First, “most people” literally would mean something over half, or as few as 51 percent. Second, a figure actually based on “injuries” would have resulted as previously seen, in a figure of $75,000, rather than the United States figure of $100,000 (based solely on death recoveries). Thus, either the United States figure of $100,000 was wrong, or the statement of United States intention was inaccurate.

In any event, it was made clear that the United States was pressing for a figure substantially above average compensation. In this, the United States proposal represented a departure from the principles of international aviation liability limitation to which the United States itself had theretofore subscribed, since both Warsaw and Hague contemplated average recoveries.

Two justifications were advanced for this change in United States policy. First, it was stated that setting a limit based on assuring a nonlimited recovery to at least 80 percent of American claimants would “permit the variation in recoveries that is called for by a system of just compensation.” No one was clear as to exactly what was meant by this curious statement. If it was intended to say that “just compensation” demands full recovery, the statement was anomalous as applied to a discussion of limiting liability. Yet, there is some reason to think that something of the kind was intended. For example, the United States Chairman in later referring to the United States analysis, stated:

These figures seemed to show clearly that any limit of liability would have an inhibiting effect on a substantial portion of American victims.

Naturally, a liability limit—by definition—has an “inhibiting effect” on full recovery. On the other hand, if the emphasis of the quoted statement was meant to be on the number of claimants who would be so limited, it is equally enigmatic, since that number is very small, indeed, as will be seen.

Thus, it appeared from the United States recoveries study itself that the average level of recoveries in non-Warsaw (death) situations is approximately the same as Hague limits, viz., about $16,600. The number of claims which would receive nonlimited recoveries at that average level is, of course, roughly one-half of the total number of 813 claims, or 407. An equal number of claims would experience varying degrees of limita-

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75 Montreal Proceedings 185.
76 Lowenfeld & Mendelsohn, supra note 1, at 553.
77 Cf. U. S. Table 3. This result confirms the aptness of the choice of limit in Hague. It also tends to discredit the U.S. thesis at Montreal that, “Only when the limit has been very low, as under Warsaw, has the limit tended to be the average—in fact generally the automatic—sum at which claims are settled.” 2 Montreal Proceedings 177. The U.S. recoveries study itself discredits the U.S. statement; e.g., over 98% of Warsaw injury recoveries were in excess of the Warsaw limit (Table 2(2)). Even in Warsaw death cases, nearly 25% of recoveries were in excess of the Warsaw limit (Table 2(1)).
tion." As the proposed $100,000 settlement level, 667 of the total 813 claims (i.e., approximately 80 percent, would receive nonlimited recoveries and 146 would be limited in some degree.

But these totals are for a seven-year period, 1958 through 1964, inclusive. In any one year, only approximately one-seventh of such claims would fall within the stated levels. In short, under the United States proposed 80 percent optimum limit, 95 United States claims each year would receive nonlimited recovery, as compared to 58 United States claims under the average level of settlement. This means that only 37 more United States claimants a year would be benefited by setting the limitation at $100,000 than by setting it at the $16,600 Hague level.

The supposed benefits of a $100,000 limit become even more inappreciable in comparison to a $50,000 limit, such as was embraced by most of the nations at Montreal. Under the $50,000 recovery-level as a limit, 82 American claimants each year would receive nonlimited recoveries" in comparison with 95 such claims at the proposed $100,000 level. In other words, only 13 more United States claimants each year would be benefited by setting the limit at the $100,000 level than at the $50,000 level.

It was astounding to the nations at Montreal that the United States should be attempting to force a $100,000 limit on the rest of the world for the special benefit of only 13 American claims a year by claimants in the upper income brackets.

Apart from the obvious disparity of the proposal in comparison to other nations' experience, it could not even be reconciled with the purported needs of other United States claimants. Thus, while ensuring a difference in the outcome of the accident claims of only 13 more United States claimants a year, the $100,000 proposal would leave 21 high-income United States claimants a year subject to a limitation.80 Under the strict logic of the United States argument, moreover, these 21 claims would actually experience a greater "disadvantage" proportionately than deprived claimants at the lower recovery levels, since they would include the claims which range far above the limit.81

Confronted by this apparent illogic, the United States rationalized,

In the view of the United States, persons who could expect recoveries in excess of $100,000 need not be provided for with respect to such excess in a convention. They can be asked to make other provisions for their families, such as by life insurance or the like, but such a requirement should not, in the United States view, be placed on members of the travelling public whose anticipated recoveries are in the relatively common range of $50,000-$100,-000.82

The statement is anomalous. It says that it is unacceptable to require

80 Viz., 146 of the total 813 claims which are over $100,000, or 21 each year; cf. Table 3.
81 Viz., 175 out of the total 813 claims for the 7-year period, or 82 per year; cf. Table 3.
82 Montreal Proceedings 181.
those in the $50,000 to $100,000 recovery brackets to protect themselves by insurance, because this is a “relatively common range” of recoveries. The inference is that recoveries over $100,000 are not a “relatively common range.” But neither statement is correct. Relatively, recoveries in the range over $100,000 are more common than in the $50,000 to $100,000 range. According to the United States recoveries study, Table 3, there are 21 recoveries yearly above $100,000, but only 13 in the $50,000 to $100,000 range. The United States statement can hardly be rested, therefore, on the incidence of recoveries shown in its own study. Similarly, the United States replied that “persons who relied on an indemnification in excess of $100,000 would protect themselves by taking out trip insurance for that additional amount” [Emphasis added.].

But this sweeping statement was not supported by any economic evidence as to the actual incidence of trip insurance coverage in the various income or recovery brackets. For all that appears, as many travellers relying on “indemnification in excess of” $50,000 take out trip insurance as do those above $100,000. In fact, neither of these generalizations was ever supported by either evidence or argument.

At the same time, little difference is seen, in principle, between looking to the limited number of high-income persons with potential $50,000 to $100,000 claims to provide for their extraordinary personal requirements by individual insurance, as opposed to such persons in the bracket $100,000 and above. Particularly is this the case when considering that the experience of virtually no other nation in the world supports such an extraordinarily high limit.

Plainly, the first of the United States' arguments for fixing limits at an optimum level of potential recovery, rather than the average, was not supported by the facts. On the contrary, a limit of liability established at the average of United States recoveries clearly would not have an “inhibiting effect” on a “substantial” number of United States claimants. The number would be extremely small.

The second United States argument for an optimum recovery level was that such an increase in limits would not “have great effect on the average recovery.” Again, the United States produced no evidence to support its contention, but asked the Montreal Conferees to accept its assurances “on faith.”

Other nations declined to accept this United States representation on faith, and replied that in their own experience the establishment of higher limits did tend to increase the average of awards. Even the United States spokesman conceded that, in the case of an increased limit, with absolute liability, there would tend to be greater average compensation up to the limit than without the limitation, particularly in the case of out of court settlements, as opposed to litigated awards.

In all events, the United States rationale for an optimum standard rather than one based on average claims and recoveries was admittedly based on

83 1 Montreal Proceedings 35.
84 2 Montreal Proceedings 183.
85 1 Montreal Proceedings 43.
86 Cf. Intervention of Italy, 1 Montreal Proceedings 46; New Zealand, Id. at 23; Argentina, Brazil and Colombia, 2 Montreal Proceedings 195.
87 1 Montreal Proceedings 90; cf. confirmation of that conclusion as to increased average awards under the Montreal Agreement. Lowenfeld, supra note 15, at 1061.
United States data, experience and objectives. This hardly conformed to the underlying theory of Warsaw-Hague as an international agreement, nor to the premise of the Montreal Conference as defined by President Binaghi of the International Civil Aviation Organization in his opening address:

As to the amount, it should be established by considering the average income of the average air traveler that flies internationally. He is a person with an income which is not low, but which is not very high either. It would not be possible to legislate for the high-income individual [emphasis added].

The true significance of the United States arguments was not lost on the Montreal Conferees. The United Kingdom quickly pointed out that—even if the United States premise were accepted, that an optimum limit should be adopted, and even if the optimum percentage of claimants to be accommodated was agreed to be 80 percent—this would not yield a worldwide figure of $100,000 as an optimum limit, but something considerably less. The reason, of course, was that $100,000 as the amount required to accommodate an optimum 80 percent of claims would be the figure only in the case of United States recovery data.

For example, such an optimum for the United Kingdom would be satisfied by a limit of only $25,000 to $30,000. In fact, as noted by the distinguished Delegate of Jamaica, Sir Neville Ashenheim, no country but the United States claims any such limit as $100,000 as necessary to satisfy such an optimum number of claims. Jamaica accordingly proposed that the United States, being unique in this respect, assume national responsibility for its very few high-income passengers who require special protection, and individually indemnify them. No one was surprised when the United States representative demurred to this proposal.

Thus did it become evident at Montreal that what the United States was really demanding was a worldwide liability limit to assure recovery of full damages by 80 percent of claimants, based on United States recovery experience. And that this limit was to govern the claims of the nationals of all countries, regardless of the actual awards experience of those countries. This was the thrust of the United States proposal as revealed in the United States opening statement at Montreal:

We would expect a realistic limit of liability not to be near the average recovery for the world, or indeed, near the average recovery in the United States. We would expect the limit, rather, to be well above the average.

One difficulty with this theory, as foreign nations were quick to point

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89 Montreal Proceedings 2.

For the reasons previously discussed, it would not even be the figure resulting from U.S. recovery data, if complete and correct data had been used.

91 Montreal Proceedings 40; cf. Canada, at $35,000, Id. at 58. For some, e.g., Norway, the maximum aviation award did not exceed $30,000. Id. at 21.
92 Montreal Proceedings 41; cf. concurrences of France, Id. at 34; Czechoslovakia, Id. at 35; Niger, Id. at 48.
93 Actually, the U.S. promised "to study" the proposal. 1 Montreal Proceedings 32. But there is no evidence that it ever did.
94 2 Montreal Proceedings 177.
out, was that even the United States average recovery, which was shown by the United States studies to be $38,000, is not only well above the world average recovery of $15,000, but would exceed the world optimum recovery.95

This topsy-turvy situation caused foreign governments to make diplomatic protests to the United States even in advance of the Montreal Conference. The United States Opening Statement acknowledged that the communications it had received from foreign governments had “said that the United States is seeking to impose its standards of living upon all the countries of the world.”96

At Montreal this foreign protest was restated and given added emphasis. The unilateral and provincial nature of the United States proposal and rationale shocked and affronted other nations. Despite United States attempts to minimize the economic impact of its proposal on other nations, virtually “every delegate at the Meeting”97 joined in the protest against the resultant inequities.

V. DISRUPTIVE PAROCHIALISM

“Who sits in a well sees little of the sky.”

Mexican proverb.

In the public hearings by the United States agencies on the issues of United States policy on Warsaw, the proposal of United States denunciation was termed “an act of disruptive parochialism.”98 The phrase proved an apt one, and came to characterize the foreign reaction to the United States position.

In the opening statement of the United States at Montreal, after having acknowledged the need for international cooperation in a world legal regime of aviation accident liability, the United States Chairman said,

The principal concern of my government now is to safeguard and protect our citizens ... [Emphasis added.].99

In the discussions and public exchanges on the issue of Warsaw limits, the reiterated emphasis of the United States statements has been in terms of the interests and requirements of “American travelers,” the “United States courts,” and “the United States traveling public.”100 Throughout the Montreal Conference, and the subsequent exchanges which culminated in the Montreal Agreement, the repeated rationale of the United States position was “the high standard of living” of United States citizens. It was even asserted that the abrupt action of the United States in summarily denouncing Warsaw rather than invoking the conciliatory and consultative procedures of Article 41 of the Convention was because of United States “impatience.”101

Not surprisingly, other countries reacted vigorously to the notion that

95 Supra note 91.
96 2 Montreal Proceedings 177.
97 1 Montreal Proceedings 42.
98 Lowenfeld & Mendelsohn, supra note 1, at 534.
100 See, e.g., Dep't of St. Press Rel. No. 110, 13 May 1966, announcing withdrawal of the U.S. denunciation of Warsaw; cf. Lowenfeld, supra note 15, at 1061, referring to “American travelers,” “American survivors” and “the American view.”
101 1 Montreal Proceedings 141.
United States travelers are somehow more valuable than their own nationals. Many nations did not even yield in debate as to relative "high standard of living." Canada, for example, pointed out that it too, is a North American country with a "high standard of living." Nevertheless, Canada has found no justification for a liability level of $100,000 as a means of providing adequate protection for Canadian air travelers.

On the contrary, as stated by the Canadian delegate,

The Canadian experience showed that the figure of $35,000 as an upward limit of liability would go well beyond all but a very few of the claims which had been settled in the past six years.102

The Canadian statement was a direct repudiation of the United States contention that:

In the United States, and it is believed in a number of other countries, a low limit has the effect of depriving a substantial percentage of accident victims (or their survivors) of the compensation to which they would otherwise be entitled.103

The countries referred to were later specifically identified as Canada and Australia.104 But Australia joined with Canada in repudiating the United States inference that, because of a comparatively high standard of living, it would support the United States position. The Australian Delegation expressly rejected the proposed $100,000 limit as unnecessary and undesirable.105

On a purely statistical comparison of recoveries, by countries, it is true that American claimants at least appear to be worth more than other nationals. The question is, however, what do such statistics really show? Perhaps they demonstrate only that United States juries give higher awards than foreign courts.106

Data as to American awards are understandably viewed balefully by other nationals.107 Even those countries with living standards the equal of our own may be forgiven their skepticism of the interpretations which the United States has sought to place on such award comparisons.108 Well might they flinch at comparative tabulations of recoveries, such as the Montreal exhibit which showed that one American nose "banged on a table" actually received a higher money award than fatal injuries suffered by a British national.

The Minutes of the Montreal Conference manifest the vexation of other nations at the suggestion that aviation liability limits for the rest of the world be fixed on the basis of claimed United States statistical justifications. Nor do our ICAO partners as a matter of philosophy concede, as asserted by the Administration witness in the Senate Hearings on the

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102 1 Montreal Proceedings 18.
103 2 Montreal Proceedings 184.
104 1 Montreal Proceedings 35.
105 1 Montreal Proceedings 25.
106 Or that many foreign nations have domestic statutory liability limitations which keep their awards moderate. Fifty-four nations have domestic limitations which are as low or lower than Hague limits and thirty-five as low or lower than Warsaw. 1965 Senate Hague Hearings, 15-16.
107 See, e.g., the intervention of Kenya, 1 Montreal Proceedings 46.
108 Cf. the United Kingdom statement that a level of "one-third or one-fourth of that proposed by the United States" (viz., $25,000 to $30,000) would provide adequate protection for British claimants in U.K. experience. 1 Montreal Proceedings 39.
109 2 Montreal Proceedings 121.
Hague Protocol, that the radical increase in international limits proposed by the United States is justified, "Because in our culture we value the human life greater than in some others."\(^{110}\)

**VI. OF PEASANTS AND KINGS**

To bring such special liability advantages to a mere handful of high-income United States passengers,\(^{111}\) a $100,000 limit would require virtually every other nation and the bulk of international passengers to pay for the resultant increased liability-insurance costs. Australia cautioned that,

> It was essential to avoid raising the limits of liability to such a figure that a great majority of the air travelers would be paying for a very small minority of high income-earning travelers, most of whom, in any event, would have made adequate provisions in the case of their death or injury in an aircraft accident. The proposed United States figure of $100,000 would bring about this undesirable situation.\(^{112}\)

Added to this objection was the protest that the burden of such increased costs would fall the heaviest on those countries, airlines, and international passengers who would benefit the least—or not at all—from increased limits. A joint presentation by the governments of Argentina, Brazil and Colombia stated that the air transport users of the world would be paying for liability coverage from which they would "derive no benefit."\(^{113}\) Other nations concurred.\(^{114}\)

The keynote objection to this concept was stated by the Delegation from Nigeria, which—while expressing willingness to compromise—counselled:

> But such a compromise solution should be one in which the peasant is not made to pay for the comfort of the king [Emphasis added.].\(^{115}\)

Even the United States Chairman has acknowledged that the "peasant versus king" theme thereafter dominated the Conference, and with good humor, has conceded: "It was difficult to answer questions of this kind . . . ."\(^{116}\) The fact is that the question was never answered. The United States representative attempted to rebut the argument by saying,

> In the first place, the peasant would not have to pay the costs, since insurance rates were on the whole based on experience, and the carriers who

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\(^{110}\) 1965 Senate Hague Hearings 15.

\(^{111}\) Viz., only 13 more than at $50,000, and only 37 more than at $16,600, *supra* notes 78 & 79. The latter figure squares with the International Air Transport Association (IATA) studies showing approximately 35 American fatalities (out of the worldwide total of 90 each year involving incomes in excess of $15,000), which might require compensation above $50,000. 1 Montreal Proceedings 19-20; cf. the Canadian assertion that only "approximately 88" U.S. passengers per year would thus benefit from a $100,000 limit, 1 Montreal Proceedings 42. It is not apparent how the Canadian figure was arrived at.

\(^{112}\) 1 Montreal Proceedings 26.

\(^{113}\) 2 Montreal Proceedings 195.

\(^{114}\) Cf. Greece, 1 Montreal Proceedings 46; United Kingdom, 1 Id. at 10; Mali, 1 Id. at 21; Jamaica, 1 Id. at 40; Congo (Brazzaville), 1 Id. at 40; Canada, 1 Id. at 42; Niger, 1 Id. at 48; cf. U.S.S.R., 1 Id. at 14.

\(^{115}\) 1 Montreal Proceedings 9.

\(^{116}\) Lowenfeld & Mendelsohn, *supra* note 1, at 565.
carried only peasants would not have increased risks as a result of the higher limit.\footnote{1}

The fallacy of the United States reply is obvious. First, it erroneously assumes that some airlines carry only “peasants.” But no airline carries only passengers in the low-income bracket.\footnote{2} In nearly every accident there are at least some large claims.

The argument equally erroneously assumes that “peasants” fly principally international carriers of the less-developed nations and that “kings” fly only the large airlines of the wealthier nations. These are highly dubious assumptions. The fact is that approximately as many American passengers fly on foreign airlines in international air transportation as on United States-flag carriers.\footnote{3} Moreover, not even the upper-bracket United States passengers, who are the cause for concern, fly on just the bigger and wealthier foreign carriers. For example, the most-celebrated United States passenger claim arose out of an accident on a comparatively small South American carrier.\footnote{4}

Contrariwise, a large number of low-income foreign nationals fly on United States-flag airlines. Thus, it was pointed out at Montreal that the United States-flag airlines carry significant numbers of seasonal migratory workers from the Caribbean and Latin American area to the United States.\footnote{5}

The principal fallacy of the United States reply is in the assumption that the underwriting of liability insurance, and fixing of premiums, rests on an analysis of the composition of passenger traffic by flights. Any such notion is unreal. While traffic makeup may receive broad and general consideration in planning liability insurance coverage, it is a serious overstatement to suggest that liability insurance premiums are fixed with any such micro-precision. Moreover, liability insurance premiums for even United States-flag carriers are established on the basis of “world-passenger fatality experience, rather than on United States carrier experience.”\footnote{6}

In all events, the United States Chairman acknowledged with candor that the United States response to the “peasants versus kings” attack on the United States proposal “never really got across.”\footnote{7}

VII. THE FIFTY-CENT MYTH

In every forum, including Montreal, the United States position has been that increasing Warsaw-Hague limits to $100,000\footnote{8} will not have any

\footnote{1}{Montreal Proceedings 27, 43.}
\footnote{2}{If this were so, the ICAO reports on insurance-premium experience under the Montreal Agreement would be expected to show little or no increase for the smaller carriers and the carriers of the less-developed countries. But such is not the case. It is understood that some of the largest premium increases have been experienced by these carriers.}
\footnote{3}{Air Transport Association, Air Transport Facts & Figures 41 (1967). The distribution averages about half and half. In 1966, 51.3\% of passenger travel between the U.S. and foreign countries was on U.S. flag airlines. In 1961, 51\% of such travel was on foreign airlines.}
\footnote{4}{Reference is to the quarter-million dollar claim involving the interests of former Senator Homer Capehart. See Capehart v. Aerovias Nacionales de Colombia, S. A. (AVIANCA) (unreported), Doc. No. 10,315-M-Civil E. C. (1963); cf. Lowenfeld & Mendelsohn, supra note 1, at 535.}
\footnote{5}{Id. at 565.}
\footnote{7}{Lowenfeld \& Mendelsohn, supra note 1, at 566.}
\footnote{8}{Or to $75,000 with absolute liability as under the interim Montreal Agreement.}
appreciable economic effects. Resulting increases in air carriers’ insurance rates have been painted as minimal. Two favorite United States methods of stating this proposition most advantageously have been to express the resulting premium increases as: (a) a percentage of air carriers’ gross operating expense (e.g., “on the order of one-half of one percent”), or (b) assuming that the costs would be passed to the passenger, as a small addition to a “typical” international air ticket (e.g., “less than a dollar”).

At Montreal, the United States estimated a 50 percent increase in insurance costs on the North Atlantic, as the result of raising limits to $100,000. This was said to equal an increase of “roughly” 1 to 1½ percent of gross operating expense, or an increase of “roughly” 50-cents per passenger on a “typical one-way trip between New York and London,” for which the economy fare was estimated at $250.

This hypothetical United States proposition, based on a series of assumptions and suppositions of questionable validity quickly came to be known by the Montreal Conferences as “The fifty-cent myth.”

It was noted first that the United States illustrative case was not only fictitious, but was not even—as described—“typical;” viz., a typical international air passage originating in the United States would not be one-way. But for a round-trip passage, the assumed distributed insurance costs would be effectually doubled, making the costs in the hypothetical case one-dollar rather than “fifty-cents,” from the very outset.

Furthermore, as pointed out by the distinguished Observer for the International Air Transport Association, Dr. Gazdik, the attempted minimizing of actual increased costs by reducing such amounts to a “unit-charge” per-ticket is not only misleading, but prone to huge errors of calculation. Under the fifty-cent hypothetical case, an error of calculation of only two-cents on each ticket would result in an actual cost to international carriers of one million dollars.

A fundamental misconception of “the fifty-cent myth” was the assumption that the total increase in liability insurance costs from a high liability limit would fall ratably among the world’s airlines. But, as pointed out by numerous countries at Montreal, this would not be the case. Again, it would be the smaller countries and airlines who would feel the greater impact, and who would bear a disproportionate burden.

The grand sophistry of “the fifty-cent myth,” of course, was its concept: viz., that—if added carrier operating costs, when expressed on a per-ticket basis, constitute an apparently nominal amount—the increased costs “would not greatly affect the economics of international air transportation.”

Even accepting the United States insurance statistics, which postulate...
a rise of only 50 percent in insurance costs from a $100,000 limit,\textsuperscript{123} the total amount of increased insurance cost falling on international air transport would be twenty-five million dollars.\textsuperscript{124} Since insurance costs are a non revenue-producing item of air carrier operating expense, there is no off-setting enhancement of operating revenue from the adding of such an expense. This means that added air carrier costs from such non revenue-producing items as insurance have a singularly adverse impact on earnings. ICAO has concluded with respect to the insurance rise from an increased liability limit:

The main economic effect to the air transport industry would fall on U.S. international airlines.\textsuperscript{125}

Based on United States-flag airlines' carriage of approximately 52 percent of the international traffic to and from the United States,\textsuperscript{126} the United States-flag airlines' share of such a $25 million additional insurance cost would approximate $13 million—which is nearly 10 percent of the total net-profit of the United States international airlines industry.\textsuperscript{127} Even for the United States-flag carriers, such a result is neither minimal nor insignificant. For carriers of small nations, many of which are profitless or marginal, the impact of such increased insurance costs would drastically affect their national subsidy-financing and developmental fares designed to expand the benefit of air transportation to the public.\textsuperscript{128}

Nowhere has disregard for international air transport effects been more disdainfully, or more errantly, stated than by the United States claimant-lawyer group, which under the contingent-fee system stands to profit most from high limits:

The international air carriers of the U. S. have now matured to a position of economic stability. In 1964, Pan American and Trans World Airlines each earned net profits of $37 million. It is, therefore, apparent that the Warsaw Convention has outlived its usefulness.\textsuperscript{129}

This neat paralogism simply takes no notice of the existence of the 257 foreign air carriers, which carry as many United States passengers in international air transportation as do the United States-flag carriers.\textsuperscript{130} Four times as many international fatalities occur on foreign airlines (and

\textsuperscript{123}Replies of ICAO member states to the 1966 ICAO Insurance Questionnaire estimated their insurance increases at from 50% to 275%; 2 Montreal Proceedings 73. The U.S. presentation adopted the lowest estimate. It is understood that actual increased insurance costs from the later Montreal Agreement exposure range up to 275% for U.S. carriers and up to 800% for foreign carriers.

\textsuperscript{124}Id. at 35. There would, of course, be a tax offset which would reduce the effect on earnings to some extent.

\textsuperscript{125}See intervention of Mexico, 1 Montreal Proceedings 10; Congo (Brazzaville), 1 Id. at 16, 22; Tunisia, 1 Id. at 24; Zambia, 1 Id. at 33, 41; Trinidad-Tobago, 1 Id. at 25; Cameroon, 1 Id. at 26; Mauritania, 1 Id. at 46; Senegal, 1 Id. at 14; Kenya, 1 Id. at 47; Australia, 1 Id. at 25; Morocco, 2 Montreal Proceedings 210.

\textsuperscript{126}TRIAL 4 (Oct./Nov. 1965), the organ of the American Society of Trial Lawyers (formerly the National Association of Claimants' Compensation Attorneys).

\textsuperscript{127}Supra, note 118. Moreover, one of the cited U.S. carriers had no fatal accidents in 1964, and the other had only one; cf. CAB, "A Statistical Review and Resume of U.S. Air Carrier Accidents, 1964" at 10. In 1966, and 1967 to date, U.S. flag international air carriers have had no international accidents involving passenger fatalities; cf. Accident Data, National Transportation Safety Board (1967).
on international flights not starting or ending in the United States) as on
the United States-flag international airlines. All or most of these acci-
dents were covered by the Warsaw Convention (or Hague Protocol).

But foreign air carriers do not have earnings comparable to the United
States carriers. On the contrary, in the year given, only six foreign air
lines had earnings of as much as $5 million. Many more had losses. Of
the 59 foreign airlines of the ICAO states whose financial data is reported
by ICAO, 16 showed either a net loss for the stated year or a net accumu-
lated loss. In other words, more than one of four foreign air carriers
operates at a loss, based even on the most favorable current earnings data.

Even BOAC, the foreign air carrier showing the highest profit for the
cited year, viz., $23 million, must be viewed as actually operating at a his-
torical loss, since its opening previous-year balance of "negative retained
earnings" equalled $253 million, leaving BOAC's 1964 year-end result
at a cumulative loss of $230 million. And while BOAC did have the
highest foreign-carrier earnings in 1964, it had the biggest loss in the
preceding year, 1963 (viz., $31 million).

Many of the recent foreign-carrier loss operations have been by the
smaller carriers, e.g., Austrian Airlines, British West Indian Airways,
CAT (Civil Air Transport—Republic of China), LAV (Linea Aeropostal
Venezolana—Venezuela), Ecuatoriana Airlines (Ecuador), Ethiopian
Airlines, El Al Israel, Ghana Airways, United Arab Airlines, Varig Air-
lines (Brazil), Peruana Airlines, Cubana Airlines, TAI (Transports Aeri-
ens Intercontinentaux—France), Aer Lingus (Ireland), Kuwait Airways,
Polynesian Airways (New Zealand), and Polish Airlines "LOT." The
smaller carrier losses have not been minor, ranging from nearly $1 million
to over $9 million annually. Many of the named carriers have had fatal
accidents in the past five years.

But loss operations are not confined to the smaller countries and car-
rriers. A majority of the big foreign carriers have operated at a loss in
given recent years, or historically, e.g., BOAC (United Kingdom), Cana-
dian Pacific Air Lines, KLM (the Netherlands), Japan Airlines, Qantas
Empire Airways, Ltd. (Australia), and SAS (Scandinavian Airlines Sys-

tem, Scandinavia). In fact, KLM has shown net losses for each of the
ICAO reporting-years since 1961, ranging from $2.4 million in 1964 to
a high of $26 million in 1965. Its cumulative historical loss is $42 mil-

ion. Although showing a profit in some of those years, Canadian Pacific
has a cumulative historical loss of $12 million.

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141 ICAO, Statistical Data Concerning Passenger Liability Limits Under the Warsaw Convention
(LIM-1), 1 Feb. 1966, Table 2, data for international flights for the most recent 5-year period,
2 Montreal Proceedings 27; cf. testimony of Najeeb Halaby, Administrator, Federal Aviation
 to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention,
143 ICAO, Digest of Statistics No. 115, Financial Data 35 (1964), covering the 98 carriers of
60 reporting ICAO member states.
144 Id.
145 Id.
146 Id. at 35 (1963).
148 IATA, Accident Data, for scheduled and non-scheduled carrier members.
149 ICAO, supra note 146; infra note 170.
150 Id.
151 Id. at 35 (1965).
Foreign governments and carriers at Montreal had good cause to be concerned with the economic consequences of a $100,000 limit. Other nations joined Australia in its refusal to accept the United States argument that increased costs "would be of little significance."2

VIII. INFANCY AND MATURITY

The other notion expressed in the claimant-lawyer comment, viz., that the international air transport industry has now "matured," and therefore no treaty liability limitations are needed, has received considerable mention3 but apparently little serious analysis. In the United States opening statement at Montreal, it was similarly stated that, in contrast to the Warsaw period, when international air transport "had to be protected from the risk of catastrophic accidents," there is no longer the same concern "about the serious economic consequences one single air disaster might have for aviation."4

These statements from the negligence bar were not unexpected. Coming from the United States aeronautical agencies, however, which were supposedly the most familiar with the onset of revolutionary new aircraft commitments for the world's airlines, the cliches of "infancy" and "maturity" were an anti-climax and a disappointment.

In 1967, capital outlays for new flight equipment and related facilities by United States airlines alone will reach an all time high of more than $2 billion. In the period 1966-1970 planned new equipment expenditures will reach over $8 billion, and for the ten year period 1966-1975 will be more than $18 billion.5 This rate of capital expenditure will be nearly 2 1/2 times the rate of the previous years.6 A very substantial part of this new investment is represented by early commitments on the Boeing 747 aircraft, on which deliveries are scheduled to begin in 1969.7

The unit of aircraft investment will increase within two years from the $5 to $7 million investment for the Boeing 727 and 707 jets to more than $20 million for the Boeing 747 "jumbo jet."8 The additional billions of dollars to finance SST acquisition and service will then follow closely during the next five-year period. Apart from SST development, however, during the next six years the size of the air transport industry will double. There is growing concern by carriers and governments alike as to the financial strains which will be placed on the world's airlines during the next ten years by new aircraft alone.

Added to these massive capital investment costs confronting the world's carriers will be anticipated major increases in taxes, landing fees, communications costs, user charges, delay costs, interest rates, and fuel costs, amounting to nearly $3 billion for the United States carriers alone.9

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1 Montreal Proceedings 25.
7ATA, supra note 155.
8 Id.
Even greater are the probable costs to carriers of meeting social problems such as noise and air pollution and of industry participation in measures for the relief of traffic congestion on the ground, at airports and in the air.

At the same time that these staggering capital and operating costs are having to be met, the current economic picture for international air transportation is increasingly disturbing, with falling rate of traffic growth, declining profit margins, reduced investment turnover, lowered rate of return, and falling stock indexes. The magnitude of this deterioration began to be apparent at mid-year, and has now become the source of wide concern by air carriers, investors and governments.

Aside from the possible higher treaty limits, what will be the effects of these great changes in international air transportation on accident rates, risk of loss, per-accident exposure, insurance "accumulation," and insurance market capacity for liability cover?

First, as a matter of pure statistical probabilities, it is apparent that there will be a significant increase in the number of accidents and losses. The 1,525 world airline jet fleet in existence at the beginning of 1967 is expected to more than double, to approximately 3,500 jets, by 1972. True, as the United States pointed out at Montreal, the accident rate is the lowest in history today; but even at the same rate, the risk exposure will be substantially increased because of the greater number of larger aircraft operating. Likewise, the per-accident exposure will be increased by reason of increased passenger seating, e.g., a probable 362 to 490 (economy) seats in the Boeing 747 jumbo jet as compared to approximately 150 seats in the present Boeing 707.

In 1966, fifteen of the 1,500 world airline jet aircraft became total losses in accidents, a loss rate of one-percent. In 1971-1972, more than 100 of the new jumbo jets will be operating. At a one-percent loss rate, there could be at least one total loss of a jumbo-aircraft. The estimated nominal loss on such a fully-loaded aircraft ranges from $70 million to more than $82 million. The maximum loss on a Boeing 747 jumbo jet with 100 percent load and 360-seat configuration, however, is estimated at $154 million. However, this figure does not allow for life, accident  

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160 Possible engine retrofitting for noise abatement by U.S. carriers alone has been estimated at $3 billion for the existing 1,000 jet aircraft fleet. Jet Aircraft Noise Panel, Office of Science and Technology, Executive Office of the President, Alleviation of Jet Aircraft Noise Near Airports (March 1966).

161 ATA, supra note 155, e.g., the fiscal year report as of 31 March 1967, for Qantas (the Australian national airline) showed a net loss of $1.7 million.

162 Excepting, of course, the existing $75,000 absolute liability limit of the Montreal Agreement, which may be assumed to continue as an interim standard until a new treaty limit is developed. The U.S. position is that this could be as long as eight years (supra note 11).

163 Sykes, Big Jets Need Big Insurance, AMER. AV. 93 (June 1967).

164 There is a recognized historical basis for assuming that the accident rate will increase, at least during the "teething period," or introductory years, of a new aircraft type; cf. Sykes, supra note 163, at 94; infra, note 167.

165 Sykes, supra note 163, at 93.

166 British Insurance Association (BIA), as reported in Travel Management Newsletter 7 (12 June 1967), estimating $140 million passenger liabilities in a collision between B-747s.

167 Sykes, supra note 163, at 94. The estimate is at the rate of $20 million for hull loss and $62 million for passenger liability alone, disregarding third party claims.

168 Swiss Reinsurance Company and North American Reinsurance Corporation, 3 EXPERIODICA 1 (1967). The estimate includes hull (without loss of use), passenger liability, freight and baggage liability, third party liability and crew liability. N.B., the estimate is based on a conservative 360-seat configuration. However, it is anticipated that jumbo jet passenger capacities will tend to in-
and property insurance held by passengers, shippers and crew; when these are added, the estimated loss on a single fully-loaded jumbo jet rises to $184 million. For a collision of two such aircraft, the loss estimate becomes $368 million.

On an industry basis, even if accident rates proved to be better than those of current jets, with an average of 200 jumbo jets over a five-year period (viz., 1,000 jumbo jet “airplane years”), and a five-year average load factor of 500 passengers, the “probable loss” predictions are in excess of $1 billion. Furthermore, this increased probable-loss underwriting capacity by the insurance market must be developed in less than three years. By contrast, the insurance industry had nearly ten years to develop the $25 million per aircraft capacity increase to cover the present probable-loss potential of the current jets. The insurance market capacity per jet aircraft upon introduction was at a maximum of $2.5 million per aircraft. Figuring a maximum 105-passenger load, the total probable-loss was nevertheless underestimated at $5 million per aircraft. This figure shortly increased to slightly over $10 million per aircraft for the earliest subsonic jets, climbed steadily to $28 million, and by the end of this year, with “stretched” DC-8’s carrying 250 passengers, will reach $35 million per aircraft.

At Montreal, the United States spokesman declared,

The fears of 1929 are certainly over today . . . Thus despite the great increase in the size of aircraft and the prospective further substantial increase, we can hardly be concerned, as we were 35 years ago, about the serious economic consequences for the industry of a single air disaster.

To contend that the loss from a single accident within the next four years of $154 million to $368 million is of no serious economic consequence or concern is contrary to reason. Such an accident—by no means unthinkable—would be actuarially, and literally, a catastrophe. In fact, it would apparently be, with the possible exception of the Texas City disaster, the costliest single man-connected accident in United States history.

crease to 500 passengers or more, with responsible estimators predicting capacities on the order of 1,000. Fortuna, “Aviation Insurance For Jumbo Jets, Airbuses And SSTs,” a paper prepared for the Connecticut General Flight Forum, 9 December 1966. Even this amount does not include possible liability claims against traffic control organizations. Many are public organizations, either immune or without private insurance coverage.

As of 1 August 1967, even with the present 2,000 U.S. airlines aircraft and 104,000 U.S. general aircraft, the collision rate is increasing. By 1971 it is estimated that there will be 3,500 U.S. airlines aircraft and 116,000 U.S. private aircraft. Since 1 January 1956, there have been 102 mid-air collisions in the U.S., with 669 fatalities. Six of the collisions have involved carrier aircraft. In eight of the eleven years the number of collisions ranged between 10 and 14. There were 19 in 1960, 20 in 1961, and 27 in 1965. Records, National Transportation Safety Board.

In eight of the eleven years the number of collisions ranged between 10 and 14. There were 19 in 1960, 20 in 1961, and 27 in 1965. Records, National Transportation Safety Board.

Fortuna, supra note 168. Hurricane Betsy of 1965 is regarded as the most costly natural disaster in U.S. history, with losses of $715 million. Next worst was the San Francisco earthquake at $225 million. This compares with recent riot damage losses of $38 million in Watts, $13 million in Newark and estimates of more than $100 million in Detroit; cf. quoted reports of National Association of Insurance Commissioners, Wall Street Journal 22 (28 July 1967). By comparison to natural disasters, the largest maritime accident loss in history apparently will be the shipwreck of the tanker Torrey Canyon earlier this year, estimated at $20 million. The second largest maritime loss is reportedly the collision-sinking of the Italian passenger liner Andrea Doria in 1956, with an insured loss of $16 million; cf. the Wall Street Journal. Enormous as they are, these maritime losses are minor in comparison to the loss of a single transport jumbo jet aircraft.

Fortuna, supra note 168.

Cf. House Rep. No. 1305, to accompany S. 1077, reporting over 750 fatalities and 3,100 injuries, with property damage in the millions, from the Texas City explosions.
The United States agencies acknowledge that the objective of international liability limitation is to "prevent the growth of international aviation from being choked off by one or more catastrophic accidents." But they assert that, "We are over the infant industry stage. Equally important, the techniques, equipment, and experience of our current international air transportation are such that the hazards of flying have been very much reduced and are actuarially predictable."175

Even in the abstract, there is a certain speciousness in the infant-industry/mature-industry hypothesis. Viewed retrospectively, the international air transport industry, of course, is not literally the "infant industry" that it was in 1929. But, in context, the awesome 1967-1975 commitments and exposures of the world's carriers render them fully as dependent today on reasonable protection in the long-run public interest.

Whether these staggering liabilities are really "actuarially predictable" is itself questionable. The loss of even a single Boeing 747 jumbo jet would equal about half the present total losses on hulls and liabilities for the scheduled airlines.177 A leading aviation insurance authority states that four or five accidents involving total loss with one type of aircraft, "would upset completely the insurance market if each accident involved a payment of from $40 to $60 million."178 From the analysis already stated, a risk of exposure of this magnitude by 1971 is very real.

At the least, even assuming the availability of a private insurance market for such catastrophic exposure, the market could become academic following such a loss. For example, the insured property losses from Hurricane Betsy in 1965 were $715 million.179 Although the insurance market was able to absorb these enormous claims, the market capacity for new coverage at existing rates disappeared—immediately and completely. Any renewals or new cover, if available at all, demanded up to a ten-fold premium increase.

Analyzed from another standpoint, the relatively commonplace exposure of the air transport industry to a jumbo jet probable loss of $70 to $82 million per aircraft, which has been "actuarially predicted," exceeds the $60 million single-incident liability limit granted to atomic energy plans under the Atomic Energy Act.180 In fact, under the noted "no recourse" subsection of that Act, the aggregate liability from a single nuclear incident is limited to $560 million, of which $500 million is indemnification furnished by the United States.

In light of the enormous potential damages from a nuclear accident, the $60 million liability limitation (per nuclear-incident) established by Congress for private atomic energy operators far surpasses the immunity benefits which would be afforded by Warsaw—or, for that matter, Hague

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175 2 Montreal Proceedings 176.
176 Id.
177 Sykes, supra note 163, at 94.
178 Id.; cf. Fortuna, supra note 168, which states that the excess insurance now available to aviation—$60 to $80 million per occurrence—will not be adequate for B-747 jumbo jet operation.
181 The Brookhaven Report, Atomic Energy Commission "WASH-740," estimated from three assumed types of accidents a range of personal injury of zero to 3,400 killed and 43,000 injured, and property damage of one-half million dollars to $7 billion; cf. Collier, "Are the 'No Recourse' Provisions of the Price-Anderson Act Valid or Unconstitutional?" (Sept. 1965).
—limits, even as applied to a collision of two fully-loaded Boeing 747 jumbo jets.

The reaction of the Montreal Conferees to attempted United States assurances with respect to the world insurance market capacity and to inconsequential economic effects was summarized by the Delegate from Senegal.182

In our view, it is erroneous to reason on a world-wide basis as if the insurance market was institutionalized or as if insurance was taken out by the States or was guaranteed by them as is done in the case of workmen's compensation. On the contrary, nothing guarantees that the present conditions of the insurance market will be permanent if tomorrow the limits are established as too high a figure. No compensation between companies—as is the case of workmen's compensation between industries—is available to guarantee that the small or average-size companies will not bear very much more than their proportion of, and, perhaps, will be unable to bear, the consequences of a modification of the international regime.183

Recognizing that even a $25 million increase in the operating costs of international air transportation would raise serious problems of finance for many smaller carriers, New Zealand pointed out further that there was no assurance that smaller carriers would be allowed to pass such costs on to passengers, as mentioned in the United States presentation, since under the existing international fare machinery, the United States (through CAB disapproval of the IATA fare involved) could prevent the adoption of any such increase.184 The New Zealand Delegate specifically questioned whether the United States government would request United States-flag airlines to support such fare increase resolutions in IATA, and whether the United States would then approve any such IATA increased fares (or deferment of new lower fares) for that purpose.185

The United States Chairman affirmed that it would be the policy of the United States government to urge United States member airlines of IATA to support fare increases (or the maintenance of a fare that might otherwise be reduced) commensurate with any increased insurance costs.186 Likewise, he affirmed that the United States authorities would approve any such resolutions adopted by IATA to increase fares (or defer the introduction of new types of cheap fares) to meet such increased insurance costs.187

It would be interesting to observe whether the Civil Aeronautics Board would stand by this commitment of the United States if increased IATA

182 2 Montreal Proceedings 186.
183 An added objection was that such insurance burdens on all carriers transporting any international passengers would give competitive control to large carriers on "air routes on which competition is practically non-existent;" cf. Pourcelet, Denunciation of the Warsaw Convention by the United States, Le Duvoir (Montreal, P. Q.) (1965) (Department of State Translation LS No. 40708).
184 1 Montreal Proceedings 42.
185 Id.
186 1 Montreal Proceedings 43. The Government has not yet so urged the U. S. carriers to seek IATA fare increases, despite reported increased airlines' insurance costs of from 50% to 275% under the $75,000 absolute liability limit of the Montreal Agreement, supra note 132.
187 1 Montreal Proceedings 42-43. Later comment suggests that the U. S. Chairman has either reconsidered or forgotten this commitment; viz., he now states that whether costs are passed on to the passenger by increased fares is a "detail" with which governments need not concern themselves. Lowenfeld, supra note 15, at 1061.
fares were filed for approval, based on higher insurance costs from the interim Montreal Agreement of $75,000-absolute liability.

In any event, the United States argument was that the onus of specially protecting high-income United States passengers should rest with the air carriers, and not with such passengers themselves or the United States government:

In short, it seems to us that whether they absorb the cost, pass it on indirectly in the fare, or make a special charge, the airlines as a group are the best locus of responsibility. It is the airlines, therefore, who ought to have the primary burden of taking out insurance for air accidents.  

The opposite view was stated by nearly every other nation, holding that the key issue was whether those few upper-bracket United States passengers needing special protection should pay for it, or whether the cost of their special protection should be shared by all the world's passengers, including the great majority who do not need it. As stated by the Delegate of Trinidad and Tobago, the individual traveler has "both the freedom and the responsibility" to select his own required level of insurance, and there is no need or equity of a system "which would impose a high level of insurance protection on the passenger regardless of the passenger's needs or wishes."  

As with the peasant versus king issue, this second major issue at Montreal was not met by the United States presentation, unless it can be said that by its effectual withdrawal from the Meeting on 14 February 1966, the United States forced an eventual "solution" in the form of the "interim" Montreal Agreement among the world's air carriers for a $75,000 absolute liability limit.

IX. QUIDDITIES AND QUILLETS

"When the lawyers have finished, no rice field remains to divide among the litigants."

Chinese Proverb

The announcement of United States denunciation of Warsaw was hailed by the claimant-lawyer group as a "Great Victory" by the American Trial Lawyers Association.

Now the Administration—after learning from the American Trial Lawyers Association the realities of the need for even a greater amount—wants an interim limit of $75,000 and a permanent limit of $100,000.

The American Trial Lawyers were cited by both the New York Times and the New York Herald Tribune, as well as news associates, as being the leading exponent for the protection of the international air traveler through eliminating the Warsaw Convention.

Through its Aviation Section and its Chairman Lee S. Kreindler of New York, tremendous research and support was furnished U.S. senators and State Department officials on the public's side of the liability limit question, pointing out the unfairness of the Convention and the Hague Protocol.

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198 2 Montreal Proceedings 176.
199 Cf. the intervention of Trinidad-Tobago, 1 Montreal Proceedings 25.
180 See the consolatory final speech of the U.S. Chairman, 1 Montreal Proceedings 140.
199 Id.
In preparing its case for Montreal, the United States working group gave consideration to the interests of "the plaintiffs' bar" and made allowance in the proposed $100,000 limit for including attorney fees. In fact, as seen, the proposed $100,000 limit was rested at the very outset on the rationale of allowing for a 50 percent attorney-fee. The United States working group accepted that contingent fees are the "almost exclusive means" of paying attorneys in United States accident litigation, generally at a level of one-third of the award or settlement, ranging up to one-half, and acknowledged that such "lawyers' fees add significantly to the overall cost of accident settlements." Nevertheless, it was concluded that such fees were "worthwhile," and the United States proposal at Montreal was stated to be inclusive of attorney fees.

Other nations protested strongly. Sweden stated that not only was the system different elsewhere, but in certain countries "the system used by the attorneys in the United States was prohibited." In this light, it was pointed out, to delete Article 22 of the Hague (authorizing the addition of attorney fees according to local law) as the United States proposed to do, would now necessitate adopting a prohibition against adding attorney fees to the award.

Sweden pointed out that the United States proposal of a $100,000 limit to include attorney fees, accompanied by abolishment of Hague Article 22, would, in fact, "ask the majority of other states for 100,000 United States dollars, while they themselves were prepared to pay only 70,000-75,000 United States dollars, in accordance with the fees of attorneys in the United States."

France joined in challenging the validity of the United States "two-level" proposed liability limits, where the higher level (including attorney fees) was for the sole accommodation of attorneys, rather than victims. Spain objected that the international issue of accident compensation was altogether separate from the strictly domestic issue of legal fees, and that the two should not be mixed together in a treaty. The Spanish Delegation also considered the $25,000 which the United States proposal allocated to attorney fees as "far too large," representing "50 percent of what the claimant would receive... and could easily be interpreted as an attempt by men of the legal profession to ensure a substantial fee to themselves."

Finally, asked Spain, what justification is there for fixing a high limit based on allowing for attorney fees, in those cases where no litigation is involved?

Argentina, Brazil and Colombia objected that the inclusion of attorney fees in a proposed high limit,

[O]n the basis of American experience, besides causing many legal problems in various countries, would require the establishment for the rest of the world of American standards which are not appropriate for other coun-

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103 Lowenfeld & Mendelsohn, supra note 1, at 561-62; cf. Mendelsohn, supra note 10, at 201.
104 Supra, note 6. Although this 50% figure, as well as the concept, was challenged by the U. S. carriers, it is still being adhered to by the U. S. spokesmen as the prevailing amount "in some cases;" cf. Lowenfeld & Mendelsohn, supra note 1, at 561.
105 Lowenfeld & Mendelsohn, supra note 1, at 561-62.
106 1 Montreal Proceedings 32.
107 Id. at 85.
108 Id.
tries. The limit of liability would be raised again on unreal bases due to the contingent fees which is (sic) peculiar to American life ...  

For its part, the United States at least purported to have the objective of reducing litigation, and claimed that its proposal at least would not increase delay and litigation. But virtually every other interest represented at Montreal agreed that the end result of the United States proposal would be to increase and delay litigation.

This view was affirmed even by the Chairman of the American Society of Trial Lawyers' Aviation Committee, himself a leading claimants' lawyer and the author of a recognized treatise on aviation accident law, who stated with respect to the interim Montreal Agreement,

With the opportunity to recover $75,000 and proceed for more, the new concord seems likely to inspire additional litigation, in Warsaw Convention cases, where there may very well not have been litigation before. The $75,000 payments will also serve to finance efforts to prove negligence on the part of manufacturers, air traffic control facilities, and other third parties who may be responsible for a given accident.

X. THE OVERPRICED SPLIT-LEVEL

Having failed at Montreal to persuade other nations of the reasonableness of a proposal based on allowance of attorney fees, the United States is nevertheless now seeking to raise its $100,000 proposal to $108,000, on the basis that this is the only way to "net" the claimant $75,000 (as in the Montreal Agreement) after allowing for attorney fees of $33,000 (viz., one-third of a $100,000 award).

As an alternative election, the United States proposal would sanction a lower level—ridiculed as the "split level" plan—of $75,000 exclusive of attorney fees. It is clear that the United States itself would elect the higher level which includes attorney fees.

The latest United States proposal assumes: (1) that the Convention itself should recognize expenses of litigation, including attorneys' fees, as an element of damages; (2) that it is acceptable and proper to limit claimants' awards, but not attorneys' fees; (3) that the higher level should be based on the scale of fees charged by claimants' lawyers in the United States; and (4) that in most, if not all, cases the amount of such attorney fees should be at least 30 percent of the award.

These assumptions clearly are not justified. In fact, the United States proposal of an express "alternative" limit to include attorney fees would upset the plan of the Convention. The money amount in Hague Article 22 is a limitation on damages. Under the Warsaw-Hague system, this limitation on damages is expressly stated in money, and it is left to local law to determine how much, if anything, to award as costs and attorney fees.

190 2 Montreal Proceedings 197.
199 1 Montreal Proceedings 90.
198 1 Id. at 27.
197 See, e.g., International Union of Aviation Underwriters, ICAO Working Paper 9-3, 9 September 1966; International Air Transport Association, 1 Montreal Proceedings 19; cf. United Kingdom, 1 Id. at 9; France, 1 Id. at 93; Congo (Brazzaville), 1 Id. at 22; Poland, 1 Id. at 84.
194 Sagra, note 17.
193 Article 22 was amended by The Hague Protocol, paragraph 4, to permit the award (under local law) of legal costs and expenses, in addition to damages.
fees. The United States proposal would invert the treaty scheme by having the higher liability limitation be an arbitrary money amount which would include an assumed 30 percent attorney fee, based on United States standards.

From nearly any point of view, the treaty method is preferable. Fixing the amount of an “alternative” limit on the basis of arbitrarily assumed attorney fees of 30 percent could operate even against the attorney’s interest, in those situations where he might charge more than 30 percent. On the other hand, where the legal fees actually amounted to less than 30 percent there is no justification for the Convention in effect exacting a higher amount. In fact, such a provision would tend to raise attorneys’ fees to 30 percent, in those situations where they might otherwise be less.

Worse, by providing an option under which the higher total award goes to a claimant with legal expenses and court costs, an incentive is created for the incurring of attorney expenses. Apart from promoting litigation, or needless attorney fees, such a scheme would almost inevitably precipitate a shift to such all-inclusive awards by those jurisdictions where attorney fees are less than 30 percent (i.e., to take advantage of the higher “alternative” limit). Yet no greater recovery would be had by the claimants themselves. The “alternative” award would thus contribute nothing to the injured party, while disrupting the simplicity and uniformity of the treaty.

The inference in the United States $108,000 proposal that countries which do not allow legal expenses as part of the award can be accommodated only by fixing the actual money amount of an all-inclusive award in the treaty, is not well-founded. Since the purpose would be merely to sanction an award of attorney fees in addition to damages, this could be accomplished directly by so stating in the treaty. Even if the United States does not ratify Hague, any future amendment raising the Warsaw limit could simply include such language. There is plainly no need for a “split-level” system. It is far more practical to leave it to local judicial process to determine how much additional award should be made for legal expenses and attorney fees.

The treaty should not undertake in any case to say how much attorney fees should be. Least of all should it attempt to do so on the basis of what claimant lawyers charge in the United States. However, if the treaty is to be used effectually to safeguard attorney fees, no ground appears for not establishing reasonable limits in the treaty on the percentage of the award to go to lawyers.

It would be particularly appropriate to prescribe reasonable limits on claimants’ attorney fees in Warsaw claims, in light of the treaty’s presumption of defendant liability, which lightens the claimant lawyer’s task and benefits him in this respect equally as it benefits the claimant.

There is nothing novel or unconventional in so limiting attorney fees where required by the overriding public interest. The percentage of award for attorney fees is now limited in several United States statutes.

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206 This is exactly what Article 22, paragraph 4, of The Hague Protocol provides.
207 See, e.g., the International Claims Settlement Act (which limits attorneys’ fees to 10%) and the Federal Tort Claims Act (which limits attorneys’ fees to 20%). Because of this fee limitation, one negligence-commentator advises “bothered” claimant-attorneys not to handle claims which involve joinder of the U. S. as a necessary defendant. 2 L. KREINDLER, supra note 203, at 127.
gress itself, in passing private bills to compensate claimants in aviation death cases, has not only limited attorney fees to 10 percent, but has provided that any pre-existing arrangement with a lawyer for a higher percentage would be unlawful. It is thus consonant with public policy in the United States to limit attorney fees in this very context.

XI. AN APPRAISAL

There would appear to be no more likelihood of other nations being persuaded of the new United States proposal of a $108,000 treaty limit, than they were at Montreal of a $100,000 limit, particularly where the principal justification advanced for the additional increase is the implied treaty assurance of a one-third contingent fee for United States claimant lawyers.

The reiterated United States preoccupation with the assumed special needs of a small handful of high-income American passengers and the United States claimant-lawyers who litigate this class of claims has prejudiced the attainment of a desirable and rational treaty solution of the problem of international liability limitations.

From this point, serious effort should be devoted to solving the issue of international treaty liability limitations in its proper context, as our ICAO partners have reminded us, *viz.*, not just as a carrier-passenger relationship, but "as a matter of high international value and interest."

APPENDIX

RECOVERIES FOR DEATH AND PERSONAL INJURY RESULTING FROM AIR TRANSPORT ACCIDENTS INVOLVING UNITED STATES AIR CARRIERS

This is a statistical survey prepared by a staff unit of the Civil Aeronautics Board relative to the special meeting convened by the Civil International Aviation Organization to be held in Montreal on February 1, 1966 to consider the questions of the limits of liability for passengers under the Warsaw Convention and the Hague Protocol.

The study is based primarily on existing records of the Board and on responses to two successive questionnaires circulated to air carriers, covering a fifteen year period from 1950 to 1964, inclusive, involving passenger death and injury settlements.
### Table 1

**Passenger Recoveries (Including Both Judgments and Settlements) in Warsaw and Non-Warsaw Cases**

**U.S. Carriers**

<table>
<thead>
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<th>Year</th>
<th>Applicable No. of Settlements</th>
<th>Total Settlements</th>
<th>Average Per Pasgr. Fatality</th>
<th>Serious Injuries</th>
<th>Amount of Settlements</th>
<th>Average Per Pasgr. Injury</th>
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### Table 2 (1)

**Levels Of Passenger Recoveries**
*(including both judgments and settlements)*

**U. S. Carriers*^**

**Fatalities**

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* Includes 13 U.S. carriers operating scheduled international and/or domestic trunkline services, as follows:

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Source: Replies of Carriers to CAB Questionnaire-11/10/65
### Table 2(2)

**Serious Injuries**

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### Table 3

**Percent Of Non-Warsaw Death Judgments And Settlements Which Exceed Various Monetary Levels**

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Source: Carrier replies to CAB questionnaire covering years 1958-1964.