

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-1186 & 82-1465

**TITLE** TRANSWORLD AIRLINES, INC., Petitioner v. FRANKLIN MINT  
CORPORATION, ET AL., and  
**PLACE** FRANKLIN MINT CORPORATION, ET AL., Petitioners v. TRANSWORLD  
AIRLINES, INC.  
Washington, D. C.

**DATE** November 30, 1983

**PAGES** 1 thru 50



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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   TRANSWORLD AIRLINES, INC.,                   :

4                                   Petitioner,                   :

5                   v.   :   No. 82-1186

6   FRANKLIN MINT CORPORATION, ET AL.,                   :

7   and   :

8   FRANKLIN MINT CORPORATION, ET. AL.,                   :

9                                   Petitioners,                   :

10                   v.   :   No. 82-1465

11   TRANSWORLD AIRLINES, INC.                   :

12   - - - - -x

13   Washington, D.C.

14   Wednesday, November 30, 1983

15                   The above-entitled matters came on for oral

16   argument before the Supreme Court of the United States

17   at 10:02 o'clock a.m.

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1 APPEARANCES:

2 JOHN N. ROMANS, ESQ., New York, New York; on behalf of  
3 Transworld Airlines, Inc.

4 JOSHUA I. SCHWARTZ, ESQ., Office of the Solicitor  
5 General, Department of Justice, Washington, D.C.; on  
6 behalf of the United States as amicus curiae.

7 JOHN R. FOSTER, ESQ., New York, New York; on behalf of  
8 Franklin Mint Corporation.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Transworld Airlines, Inc., against Franklin Mint and the consolidated case.

Mr. Romans, you may proceed.

ORAL ARGUMENT OF JOHN R. ROMANS, ESQ.,  
ON BEHALF OF TRANSWORLD AIRLINES, INC.

MR. ROMANS: Thank you, Mr. Chief Justice, and may it please the Court.

The issue to be decided in this case is whether the United States courts are dutybound to enforce the limitations of liability of the Warsaw Convention, and if so, how the Warsaw gold franc, which is the unit used to express that limitation of liability, is to be converted into present U.S. dollars.

The facts are agreed and quickly stated. Franklin Mint delivered four cartons to TWA in Philadelphia for shipment to London, England.

QUESTION: When?

MR. ROMANS: In March of 1979, Your Honor.

QUESTION: I don't believe the briefs put it out, but I am curious.

MR. ROMANS: That is when -- March of 1979.

QUESTION: And will you tell us how they were lost as you go along?

1           MR. ROMANS: Your Honor, if I knew how they  
2 were lost, we might not be here today. All we know is  
3 that they were not delivered in London, and we could not  
4 find them anywhere in the system. We do know that the  
5 four cartons weighed 714 pounds, that the entire fee to  
6 carry them to London was less than \$550, and we do know  
7 that Franklin Mint told TWA that one carton contained  
8 "metal stamping dies, metal stampings, numismatic,  
9 articles of adornment," and that the three other  
10 packages contained "metal stampings, numismatic."

11           Now, when the packages did not arrive in  
12 London, Franklin Mint made a claim, and it claimed that  
13 it was entitled to \$250,000 because it turned out that  
14 metal stampings, numismatic, meant gold coins.

15           Now, Franklin Mint knew that TWA's limitation  
16 of liability was \$20 per kilogram, and that its overall  
17 liability was \$6,500, based on the weight of 714  
18 pounds. Franklin Mint could easily have avoided this  
19 limit of liability if it chose to do so. It could have  
20 declared an excess value. It could have said, look,  
21 TWA, we have gold coins here, and they are worth  
22 \$250,000. In that case, TWA would have said, yes, you  
23 have declared an excess value, and now we are going to  
24 charge an excess charge for this high value shipment.

25           But Franklin Mint chose not to do that.

1           QUESTION: The procedure you just described is  
2 permissible under the Warsaw Convention?

3           MR. ROMANS: Absolutely right, Your Honor.

4           No value was declared, and in the box for  
5 declared value, Franklin Mint typed in the initials  
6 "NVD," which mean no value declared, and the gold, of  
7 course, never showed up.

8           Now, on oral argument before Judge Napp of the  
9 District Court, he commented that Franklin Mint knew  
10 that there was gold in those cartons. Evidently the  
11 thief knew that there was gold in those cartons. Only  
12 TWA was left in ignorance.

13           Now, we moved for partial summary judgment in  
14 the District Court to reduce our liability to our limit  
15 of \$6,500, and the question before the District Court,  
16 as is here today, is, how do you convert these Warsaw  
17 gold francs into U.S. currency? And we suggested two  
18 alternative conversion factors, one the last official  
19 price of gold, which would lead to the \$20 per kilogram  
20 limitation. Our second one was the special drawing  
21 right, a unit of account of the International Monetary  
22 Fund. That would lead to a limitation of liability  
23 substantially the same..

24           Franklin Mint countered and suggested that the  
25 market price of gold be used as the conversion factor.

1 That would have led to a limit of liability  
2 approximately ten times higher, because the market price  
3 of gold at that time was roughly \$420 per ounce.

4 The District Court held that the last official  
5 price should apply because that was the conversion  
6 factor that the Civil Aeronautics Board ordered the  
7 airlines to use in their current and effective order.  
8 That was the conversion factor that all of the airlines  
9 listed in their tariffs, which are filed. And that  
10 conversion factor constituted as close as anything the  
11 government's interpretation of how this treaty should be  
12 construed.

13 Now, the Court of Appeals affirmed, and after  
14 affirming it said, each choice has a powerful argument  
15 against it. Enforcement by a court is impossible, so 60  
16 days from the issuance of the Court of Appeals mandate,  
17 the limitations of liability of this treaty will be  
18 unenforceable in United States courts.

19 Now, I would like to briefly discuss the  
20 abrogation issue. The Court of Appeals correctly stated  
21 that U.S. courts do not have the power, absent a  
22 Constitutional infirmity, to abrogate U.S. treaties, put  
23 that in a very succinct footnote, Number 26, and you are  
24 absolutely right. Then it went ahead to hold that  
25 courts don't have the power under these facts to



1    construe the Warsaw Convention in order to effectuate  
2    the intent of the drafters.

3               Here, I feel the Court of Appeals was in  
4    error. They lost sight, in my view, of the primary  
5    purpose of this treaty, and that is, it sets a  
6    limitation on liability and also a floor. What is not  
7    always so readily recognized in the United States is  
8    that the laws of many countries, and there are over 120  
9    which adhere to this treaty, the laws of many countries  
10   require limitations of liability which are much lower  
11   than the Warsaw Convention, and the Warsaw Convention  
12   says that the limit will be no higher than \$20 per kilo,  
13   but it also says any agreement entered into prior to the  
14   loss which would result in a limit lower than \$20 a kilo  
15   is void, so, the convention establishes both a floor and  
16   a ceiling.

17              The Court of Appeals based its opinion on the  
18   fact that one section of the Par Value Modification Act  
19   had been repealed, and that is when the world went off  
20   the gold standard and adopted special drawing rights.  
21   They felt that it was impossible to select any  
22   conversion factor, and that therefore they were unable  
23   to construe this convention.

24              We submit that neither the Repeal Act nor the  
25   legislative history mentions the Warsaw Convention, and

1 that in order for a court to find that a later past  
2 statute has abrogated a U.S. treaty, there must be clear  
3 intent on the part of Congress to abrogate that treaty,  
4 and there is no clear intent.

5 In fact, Judge Winter, writing for the Second  
6 Circuit, acknowledged that fact. He said, "Congress may  
7 not have focused explicitly on the convention in  
8 repealing the Par Value Modification Act." Well, we  
9 have researched the legislative history, and there is no  
10 mention whatsoever.

11 Now, he must have then decided that  
12 legislative silence was sufficient to abrogate a treaty,  
13 and pursuant to the cases in this Court, Weinberger v.  
14 Rossi, for example, in 1982, legislative silence cannot  
15 satisfy the requirement of the clear expression to  
16 abrogate a treaty.

17 Furthermore, the legislative history indicates  
18 that the Congress knew very well that there would be  
19 uses for the last official price of gold after the  
20 repeal of this one section of the Par Value Modification  
21 Act. In the Senate Foreign Relations Committee report  
22 they stated, "While it is the express intent of the  
23 IMF," the International Monetary Fund, "to move gold out  
24 of the international monetary system, there are vast  
25 numbers of legal and psychological mechanisms that will

1 perpetuate some role for gold."

2 And it is our position that there are several  
3 roles of gold which are perpetuated today. The  
4 preferred conversion rate is the last official price of  
5 gold, and the most important reason for, or the basis  
6 for approving that conversion rate is that it is the  
7 conversion rate favored by the United States.

8 The Solicitor General in his brief, and he is  
9 here to tell you today, favors the last official price  
10 of gold.

11 QUESTION: Why should that be favored simply  
12 because the United States as a party litigant favors it?

13 MR. ROMANS: Your Honor, the United States is  
14 here amicus curiae. They are here to inform this Court  
15 of the views of the State Department, the Department of  
16 the Treasury, the Department of Transportation, and  
17 perhaps other units of this government, and they are  
18 here to tell you that the United States interprets this  
19 treaty --

20 QUESTION: Do any of those units of the  
21 government have the power to abrogate or modify  
22 treaties?

23 MR. ROMANS: Yes, Your Honor, they do. The  
24 executive does have the power, as does the legislature,  
25 but courts do not absent a clear Congressional intent.

1 QUESTION: The executive by himself could  
2 modify this treaty?  
3 MR. ROMANS: To abrogate the treaty. I am  
4 sorry. Did you say modify?  
5 QUESTION: Well, really, you are not  
6 contending it is no longer in force.  
7 MR. ROMANS: No, Your Honor, I am not, but --  
8 QUESTION: You are arguing it is in force.  
9 MR. ROMANS: I am contending that for all  
10 practical purposes it has been abrogated, that the  
11 United States promised all of its treaty partners to  
12 enforce a certain limit and a floor, and that is not  
13 being done.  
14 QUESTION: Well, if it has been abrogated,  
15 what is the source of a limit of liability, any limit,  
16 now?  
17 QUESTION: Well, you mean it has been  
18 abrogated by the Second Circuit decision.  
19 MR. ROMANS: Correct.  
20 QUESTION: Well -- it, and the United States  
21 MR. ROMANS: That's -- yes. Yes, Your Honor.  
22 QUESTION: But you are referring to all these  
23 other branches of the United States government. I am  
24 asking you, do any of those branches have the authority  
25 to redefine the terms of this treaty?



1           MR. ROMANS: No, Your Honor. That has to be  
2 done in a convention, with all the treaty partners  
3 present.

4           QUESTION: So why are the views of the  
5 Solicitor General any more persuasive than those of any  
6 other litigant?

7           MR. ROMANS: Because it seems to me that when  
8 this Court interprets a treaty, it is very helpful to  
9 understand how the government, which is more experienced  
10 in the delicate areas of foreign relations, views the  
11 treaty.

12           QUESTION: Well, it isn't just their  
13 experience, is it? Isn't it their concern? The  
14 government has a responsibility. The government's  
15 relations with other countries can be affected by how a  
16 treaty is construed.

17           MR. ROMANS: Absolutely right, Your Honor, and  
18 as the government has said in its brief, several treaty  
19 partners have communicated their displeasure with the  
20 decision of the Second Circuit, and the United States  
21 informs this Court that our foreign relations with those  
22 countries in the aviation area will be seriously  
23 affected, and this is a way, Mr. Justice Stevens, that  
24 the United States can assist this Court, bringing this  
25 kind of information to it.

1           QUESTION: I suppose, counsel, that even  
2 before the repeal of the Par Value Modification Act, the  
3 free market price of gold had fluctuated and might have  
4 been above that value, so people were well aware of that  
5 before the repeal, weren't they?

6           MR. ROMANS: Yes, Your Honor. They were very  
7 well aware that there was a two-tier system since 1968  
8 until 1978.

9           QUESTION: And I guess no one then questioned  
10 whether it should be the official price that was  
11 followed under the Warsaw Convention.

12          MR. ROMANS: Not in the United States, Your  
13 Honor, because the law was very clear.

14          QUESTION: Right, I am talking about this  
15 country.

16          MR. ROMANS: That the Civil Aeronautics Board  
17 had issued an order, and that order is still in effect.  
18 We are commanded to make this conversion according to  
19 the last official price of gold. Moreover --

20          QUESTION: So, in the absence of any  
21 indication by Congress that it intended to alter the  
22 Warsaw Convention, there would be no reason to alter the  
23 formula that we follow, would there?

24          MR. ROMANS: Precisely.

25          QUESTION: Mr. Romans, is there any room here

1 for an interpretation that the parties intended to take  
2 the dollar value of gold, which I gather is what you are  
3 suggesting, of the gold franc just before we went off  
4 the gold standard and inflating it by some appropriate  
5 index of inflation of the dollar since that time?

6 MR. ROMANS: No, Your Honor. Not precisely.

7 QUESTION: Well, wouldn't that come closer to  
8 effectuating the signatories in fact?

9 MR. ROMANS: Well, actually, this question has  
10 been studied as late as 1975. There have been several  
11 conventions of the treaty partners, and in 1975, the  
12 Montreal Protocols to the Warsaw Convention were drafted  
13 and signed by the United States. Those protocols  
14 increased significantly the limits of liability for  
15 death and personal injury. However, it was determined  
16 that the limit of liability for cargo should remain at  
17 the same level.

18 Now, that was expressed in terms of special  
19 drawing rights, 17 special drawing rights, but 17  
20 special drawing rights amount to approximately \$20 per  
21 kilogram, so that the parties felt that the limit for  
22 purposes of cargo should remain at that level, which is  
23 \$20 per kilogram. Now, you wonder why, after all these  
24 years, and I submit to you it is because of the advent,  
25 really, of the jet engine. Planes today can carry

1 efficiently much heavier cargo, and because the limit is  
2 based on weight, the weight of a heavy shipment will  
3 give that shipper sufficient protection.

4           So that if -- For example, Italians ship shoes  
5 from Italy to the United States, and the Warsaw limit is  
6 almost always in excess of the value of the cargo of  
7 those shoes. The feeling is that if you are shipping a  
8 very high value shipment, gold or diamonds, that all  
9 other shippers everywhere should not have to participate  
10 in the payment to ensure that extra risk. If you are  
11 shipping very valuable cargo, you should pay an extra  
12 premium, and you can do that by declaring an excess  
13 value to the airline and paying the extra charge, or you  
14 can buy your own insurance.

15           QUESTION: Could TWA by contract, by its  
16 contract, given all the limitations of the treaty and  
17 the statutes, have provided that liability should not be  
18 beyond the declared value of the shipment?

19           MR. ROMANS: No, Your Honor, because the  
20 Warsaw Convention includes in its provisions an Article  
21 23, which says any agreement leading to a lower price is  
22 void. That is part of the floor. You see, you can't  
23 say to a shipper, we are going to make your limit less,  
24 either.

25           QUESTION: Did you say what the declared value



1 was here, or was there one?

2 MR. ROMANS: There was no declared value.

3 There is just one other main point that I  
4 would like to say, and that is that the last official  
5 price of gold is being used today by the United States  
6 when it makes payments to the World Bank. The United  
7 States is obligated to make its payments to the World  
8 Bank in United States gold dollars, but those gold  
9 dollars for all practical purposes of this argument are  
10 the same as the French gold francs.

11 They are a unit of liability, and the United  
12 States as late as December 1, 1982, made payments to the  
13 World Bank and it used the last official price of gold  
14 to make that conversion, so that the last official price  
15 of gold is very much in effect today. It is being used  
16 by the United States. They support its use for purposes  
17 of the Warsaw Convention, and I submit to you that that  
18 is the preferred conversion factor.

19 If I may, I would like to reserve the rest of  
20 my time for rebuttal.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Schwartz.

23 ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.,  
24 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

25 MR. SCHWARTZ: Thank you, Mr. Chief Justice,

1 and may it please the Court.

2           The United States has appeared in this case to  
3 urge rejection of the Court of Appeals' conclusion that  
4 the Warsaw Convention liability limitation for cargo is  
5 henceforth unenforceable. The overriding reason for the  
6 United States' concern about the decision below is that  
7 by judicial fiat it destroys the United States'  
8 commitment to an important treaty regime to which this  
9 nation has subscribed by the Constitutionally prescribed  
10 procedure of negotiation by the executive and advice and  
11 consent by the Senate.

12           Contrary to the Court of Appeals' view, this  
13 untoward result was not required by any Act of Congress,  
14 and we do not believe that it is compelled by any  
15 Article 3 limitation upon the power of United States  
16 courts. Rather, we believe that the ordinary process of  
17 interpretation and construction of agreements, and  
18 treaties are in a sense an agreement, enables United  
19 States courts to give effect to the intention of the  
20 treaty parties that liability for carriers be limited.

21           The Court of Appeals purported to recognize  
22 that it is not the province of the courts to abrogate  
23 treaties, but I don't think there is really any basis  
24 for disputing that the result of this decision is to  
25 destroy the United States' commitment that liability of

1 carriers will be limited. The carrier in this case  
2 happens to be a domestic corporation, but perhaps this  
3 would be even clearer if you thought about a case  
4 involving a foreign carrier, perhaps even a foreign  
5 state carrier. The international conflict potential is  
6 clear.

7           In light of the potential foreign relations  
8 repercussions of this decision and also the explicit  
9 Constitutional commitment of the treaty-making function  
10 to the executive, we submit that there simply was no  
11 sufficient justification for the Court of Appeals'  
12 pronouncement that the Warsaw Convention liability  
13 limitation cannot operate in the future.

14           In treaty interpretation, the overriding  
15 imperative for the courts is to give effect to the  
16 intention of the parties, and in doing so it is  
17 necessary to take a liberal and, one might say,  
18 sympathetic approach to discerning the intent of the  
19 parties. The intent may not always be perfectly clear,  
20 yet the Court should go the last mile to discern that  
21 intent and to give it reasonable effect.

22           In this case, we would submit that the Court  
23 of Appeals in its concern with the technical issue of  
24 which of the proffered standards of conversion was the  
25 technically ideal one lost sight of the fundamental

1 point of the Warsaw Convention. The purpose of the  
2 contracting nations was to limit liability. That much  
3 we are certain of.

4 Various choices confronted the Court of  
5 Appeals. The choice may not have been totally clear,  
6 but we do know this. The option it selected, no limit  
7 of liability, was the one choice that we can be certain  
8 was not intended by the contracting nations. And for  
9 that reason, we submit that it was an impermissible  
10 interpretation of the treaty.

11 We don't find any basis in the repeal of  
12 Section 2 of the Par Value Modification Act for the  
13 Court of Appeals' conclusion that Congress intended to  
14 render a standard of conversion unavailable. The  
15 reasons for that are detailed in our brief, and rather  
16 than dwell on that somewhat technical issue, I thought  
17 it would be more pertinent to spend the time I have to  
18 address what seemed to underlie the Court of Appeals'  
19 concern about what it was asked to do in this case.

20 The Court of Appeals seemed to believe that in  
21 this case it was asked to make a policy decision that  
22 lies beyond judicial competence, presumably because it  
23 was a non-Article 3 responsibility, but we submit that  
24 the kind of decision that the Court of Appeals was asked  
25 to make here was not of that nature.



1           The relevant policy determinations are to be  
2 extracted from the Warsaw Convention and the negotiating  
3 history of that convention. The convention is an  
4 agreement, as I have said before. Courts are frequently  
5 called upon in an analogous context to make the kind of  
6 determination the Second Circuit was asked to make here.

7           For instance, in an ordinary private contract  
8 case which may come into a federal court in a diversity  
9 matter, if there is a clear agreement between the  
10 parties, and even if its terms are not perfectly clear,  
11 the court may be called upon to interpret it, and I  
12 don't believe it has ever been suggested that a court --  
13 that simply because the right answer, the right  
14 interpretation is not perfectly clear, that a court can  
15 throw up its hands and say, we are not sure if it was  
16 right. We can't decide this case. It is  
17 non-justiciable.

18           There are other contexts in which courts  
19 engage in similar determinations. We have mentioned  
20 some in our brief. I thought another --

21           QUESTION: Of course, Mr. Schwartz, there are  
22 cases under the law of contracts and contract remedies,  
23 aren't there, where the courts won't say that a  
24 particular contract is non-justiciable, but they will  
25 say that the contract is simply unenforceable, or that

1 impossibility has arisen. There is a whole law of  
2 contract remedy.

3 MR. SCHWARTZ: Yes, but if I could pursue that  
4 analogy, we would simply submit that while an analogous  
5 factor might operate here, in fact it does not, because  
6 it was not impossible to give effect to this contract,  
7 and the events that intervened were not of a kind that  
8 in light of the purpose of the liability limitation  
9 should be regarded as requiring a regime of unbounded  
10 liability.

11 So, I can accept that analogy and not accept  
12 the result that the Second Circuit pointed to. If -- In  
13 addition to the --

14 QUESTION: Mr. Schwartz, could I ask you one  
15 question? Of the four alternatives that the Court of  
16 Appeals considered, which in the view of the government  
17 most closely approximates the language of the  
18 convention?

19 MR. SCHWARTZ: The government's view is that  
20 the \$42.22 per troy ounce most closely approximates the  
21 intent of the framers of the Convention. I don't --

22 QUESTION: I understand that. I am curious to  
23 have an answer to my question.

24 MR. SCHWARTZ: I don't -- I am about to  
25 acknowledge that. It seems to us that there is no

1 reason to look at the language apart from the --

2 QUESTION: Do you prefer not to answer my  
3 question? Or don't you have an answer?

4 MR. SCHWARTZ: I don't really think I have an  
5 answer that would be useful.

6 If I could give one other example of  
7 situations in which the federal courts --

8 QUESTION: I take it, though, you do not  
9 contend the position that you advocate most closely  
10 approximates the language of the agreement. You don't  
11 make that argument?

12 MR. SCHWARTZ: I guess if forced to answer the  
13 question, I would contend that our alternative does, but  
14 the overriding government contention in this case is  
15 that that choice must be made whether it is perfect or  
16 not.

17 QUESTION: But you would only refer to the  
18 plain language if forced to do so?

19 MR. SCHWARTZ: No, we would read the plain --  
20 we would read the language together with the history. I  
21 think no one in this case has disputed that the language  
22 on its face is opaque enough in light of modern  
23 circumstances to require elucidation, and the idea of  
24 courts filling in blanks or gaps or ambiguities in  
25 federal law, and the treaty in this case is a federal

1 law, is really not such an anomalous one as the Court of  
2 Appeals seemed to believe. The examples are legion.

3 In the case, for instance, of Section 301 of  
4 the Labor Management Relations Act, this Court held in  
5 Textile Workers against Lincoln Mills that Congress  
6 unambiguously intended federal courts to decide these  
7 cases, cases concerning -- that is, cases concerning  
8 collective bargaining agreements, and that the  
9 substantive law should be fashioned by the courts from  
10 the policies of the National Labor Relations statutes.

11 So, too, here, if there is a gap in the  
12 substantive law relating to the conversion rate, the  
13 courts are provided with ample authority to discern an  
14 adequate conversion standard.

15 One more point that I think is useful in  
16 closing. The Court of Appeals saw this as a policy  
17 judgment, and it might well be a policy judgment if the  
18 question were, what standard of liability shall  
19 henceforth govern for this treaty regime in some  
20 abstract sense, but the court's task was not to  
21 legislate.

22 The court in a sense put itself in the bind  
23 that it perceived. The court's task was to decide the  
24 case before it, to determine an amount of money to be  
25 awarded, and in determining that a particular amount of



1 money, \$6,500 in this case, for instance, adequately  
2 comports with the intentions of the framers of the  
3 Warsaw Convention. We see that as something quite -- to  
4 the traditional functions of the courts.

5 Accordingly, we submit that while the judgment  
6 of the Court of Appeals may be affirmed because it is  
7 consistent with our position, the court's declaration  
8 that the Warsaw Convention is henceforth unenforceable  
9 should be rejected.

10 Thank you.

11 CHIEF JUSTICE BURGER: Very well.

12 Mr. Foster?

13 ORAL ARGUMENT OF JOHN R. FOSTER, ESQ.,

14 ON BEHALF OF FRANKLIN MINT CORPORATION

15 MR. FOSTER: Mr. Chief Justice, may it please  
16 the Court.

17 This case is a perfect example of an issue  
18 which should be resolved by the other branches, but  
19 which by default has become a judicial problem, and a  
20 consequence of that fact is that no matter what this  
21 Court decides, the decision is going to be to some  
22 extent unsatisfactory.

23 Now, before the Circuit Court, four possible  
24 ways of interpreting Article 22 were presented. The  
25 Circuit Court held that as to each possibility, there

1 were powerful, devastating arguments against each. The  
2 Second Circuit's resolution of the problem was to choose  
3 a fifth course of action, and the government and TWA  
4 have been quick to point out the problems with that  
5 solution to the problem.

6           Franklin Mint's position is that the gold  
7 franc in Article 22 can best be converted into United  
8 States dollars by reference to the free market value of  
9 gold at the time when the contract of carriage was  
10 breached.

11           If the Court is unable to accept that  
12 conversion interpretation, the second best option is to  
13 adopt the conclusion reached by the Second Circuit,  
14 namely, that a political question is involved in making  
15 a decision as to the proper conversion factor, and that  
16 that decision really belongs to the other branches and  
17 not the judiciary.

18           Now, Franklin Mint's position that the free  
19 market price should be used really rests on three  
20 grounds. The first is, going back to what Mr. Justice  
21 Stevens was pointing out, the text of the treaty. The  
22 treaty says 65 and a half milligrams of gold, and what  
23 Franklin Mint says is that in this case the cargo should  
24 have been delivered on March 26th, 1979.

25           You look in the Wall Street Journal, the New

1    York Times, the Journal of Commerce, you find out what  
2    the price of gold is, and that gives you a limitation.

3                QUESTION: Well, the treaty also expressly  
4    refers, does it not, to conversion to a national  
5    currency?

6                MR. FOSTER: Yes, Your Honor.

7                QUESTION: And at the time the treaty was  
8    adopted, that was clearly thought in this country to  
9    refer to the official rate of gold, was it not?

10               MR. FOSTER: Well, yes, Your Honor. The issue  
11    is --

12               QUESTION: You are just unhappy because the  
13    free market has changed so much and the Par Value  
14    Modification Act was repealed, but I don't see how that  
15    alters the intent of the drafters of the treaty at the  
16    time it was done.

17               MR. FOSTER: Well, at the time that the treaty  
18    was drafted, Your Honor, there really wasn't a conflict  
19    between an official price and a free market price,  
20    because they were for all intents and purposes one and  
21    the same.

22               QUESTION: All right, but there certainly was,  
23    before the repeal of the Par Value Modification Act,  
24    there was quite a disparity, and nobody was objecting to  
25    the Warsaw Convention official rate price.

1                   MR. FOSTER: Well, yes and no, Your Honor.  
2   What happened is that following 1968, when they went  
3   into this two-tier system, and there was a divergency  
4   between the official price and the free market price,  
5   starting in the early seventies, people started to say,  
6   how do we resolve this problem, and the Montreal  
7   Protocols that Mr. Romans mentioned was one way of  
8   resolving this problem.

9                   So, yes, you are entirely correct in saying  
10   that when the Par Value Modification Act was passed, the  
11   problem was well known, but it was also something that,  
12   although not raised in the context of the Par Value  
13   Modification Act, was felt to be a major problem that  
14   should be resolved, and was being resolved through  
15   negotiation of treaties.

16                  QUESTION: Let me ask you why Franklin Mint  
17   didn't declare the value of these items --

18                  MR. FOSTER: Well, two --

19                  QUESTION: -- when it shipped them.

20                  MR. FOSTER: Well, two points on that, Your  
21   Honor. First of all, on the standard form of a way  
22   bill, which is set by the International Air Transport  
23   Association, there are two boxes. One is the declared  
24   value for the purposes of carriage, and that was the box  
25   that Mr. Romans was referring to that was filled in with



1 no value declared.

2           There is another box for declaration of the  
3 value for Customs purposes, and that was filled in  
4 showing -- I believe the value was something like  
5 \$67,000. So TWA knew that they had a valuable cargo.

6           The second point is, to answer your question --

7           QUESTION: A valuable cargo for which the  
8 Franklin Mint didn't want to pay anything but the base  
9 rate.

10           MR. FOSTER: Yes, Your Honor, and going back  
11 to Justice O'Connor's reason, the reason for that is  
12 that most at least sophisticated international shippers  
13 cover the problem by insurance. There is no reason for  
14 them to pay an insurance --

15           QUESTION: And I suppose -- And Franklin got  
16 independent insurance coverage for these things?

17           MR. FOSTER: Yes, Your Honor, and there is no  
18 reason why they should pay an insurance premium and also  
19 increased freight rate when the increased freight rate  
20 is solely for the benefit of the insurance underwriter  
21 and subrogation --

22           QUESTION: Well, if that is the case, why do  
23 you care? Is it really a quarrel with the insurance  
24 carrier that is at issue here, wanting something back?

25           MR. FOSTER: Yes and no, Your Honor. Yes in

1 the case -- in the context of cargo, because this case  
2 comes down to basically a dispute between the insurance  
3 companies. No in the context of passengers, because in  
4 international transportation, the only person that isn't  
5 insured by and large are passengers, and that also has  
6 to be seen in the context of the history of the  
7 convention, because when the convention was drafted in  
8 1929 -- well, Lindberg crossed the Atlantic in 1927,  
9 Earhart did it in 1928.

10           Anyone who was flying planes had to be crazy,  
11 and certainly knew what the risk was, and one of the  
12 changes that has occurred since 1929 is, people  
13 willy-nilly hop on a plane to Montreal and don't know  
14 that the liability regime is drastically different than  
15 if they hop on a plane to go skiing in Colorado.

16           So, the really -- the real party with exposure  
17 in this situation are the passengers, and they are bound  
18 by the same gold franc unit, although the limits are  
19 different than cargo.

20           In addition to the text of the treaty, the  
21 Franklin Mint's argument in favor of the free market  
22 value is also supported by the intent of the drafters.  
23 Now, the drafting minutes for the Warsaw Conference of  
24 1929 are reproduced, the pertinent parts, in the Joint  
25 Appendix starting at Page 158.

1                   And what that shows is that going into the  
2 final conference, the drafters had a limit based on a  
3 gold franc, and that has to be also seen in the context  
4 of the time, because prior to World War One, most of the  
5 major currencies were on a gold standard. They went off  
6 during World War One, and following World War One, there  
7 was a great deal of economic instability, the classic  
8 example being the German hyperinflation of 1920-23,  
9 where people had to have a bushelful of Reichsmarks just  
10 to buy a loaf of bread.

11                  So, during the twenties, when the conference  
12 was being drafted, they knew the currencies could be  
13 radically devalued in a brief, short period of time, so  
14 what they took was international value. Going into the  
15 conference, they had this gold franc. France, which had  
16 just a short time previously stabilized its currency by  
17 going back on the gold standard, raised the suggestion  
18 that instead of having the gold franc, why don't we just  
19 have the regular French franc?

20                  The Swiss delegates' response was, what  
21 happens if you redefine the French franc? The French  
22 delegates said, in essence, what difference does it  
23 make? The convention is only for a couple of years  
24 anyway. The response to that was, I don't care if we  
25 take a gold dollar or a gold franc, but let's take a

1 gold value. So, it was recognized then that the limit  
2 has to be based on a gold value.

3 In the mid-1950's, there were a series of  
4 conferences to revise the Warsaw Convention, and in the  
5 Hague Protocol in 1955, the fact that a gold value was  
6 intended was retained in Article 22 of that protocol,  
7 which the United States did not adhere to, although they  
8 were one of the prime movers of the conference, and in  
9 that Article 22, the present Article 22 and the Warsaw  
10 Convention was kept, but there was a sentence added  
11 which said, "Conversion of the sums into national  
12 currencies other than gold shall in case of judicial  
13 proceedings be made according to the gold value of such  
14 currencies at the date of the judgment."

15 So, it was recognized in the mid-fifties that  
16 we are talking about gold, and in fact when the  
17 discussions leading up to the Hague Protocol were being  
18 made, the airlines themselves were offering as an  
19 argument for why they didn't have to increase the limit  
20 of liability the fact that the limits on gold had  
21 increased, and that therefore there was no reason to  
22 increase the number of gold francs because the increase  
23 in the value of gold had taken care of the problem.

24 So, the text of the treaty, the intent of the  
25 drafters supports the use of a gold value.



1           And the final point is the practice in the  
2 United States. From 1934, when the United States  
3 adhered to the convention, until the present time, there  
4 has been no question that a gold value has to be used.  
5 What has happened is that the price between the free  
6 market value and the official price has -- there has  
7 been a wide divergence, and the official price has now  
8 disappeared.

9           The airlines were given a subsidy in 1929 in  
10 order to protect an infant industry. The fear in 1929  
11 was that with these new companies, a single crash could  
12 wipe out the company. They would have problems in  
13 attracting capital. They would have problems in  
14 obtaining liability insurance. That has radically  
15 changed now, and in fact, as the Solicitor General's  
16 office pointed out, there are foreign air carriers that  
17 are agencies of foreign governments.

18           TWA itself is a big company and a subsidiary  
19 of an even bigger company. Just as Franklin Mint has  
20 its cargo insurance, TWA and the other air carriers have  
21 their liability insurance. So, that initial concern  
22 back in 1929 no longer exists, but what the carriers are  
23 trying to do is to keep that subsidy that they got in  
24 1929.

25           Now, one way of resolving the problem is by

1 adopting the free market price of gold. The convention  
2 says gold, and by adopting the free market value, you  
3 adhere to the text and the spirit. The limit will  
4 increase, but it still exists. If the Court feels,  
5 though, that --

6 QUESTION: Mr. Foster, before you leave that,  
7 under your proposal that they take the date of the --  
8 due date of delivery, what would the limit have been in  
9 this case?

10 MR. FOSTER: In this particular case, Your  
11 Honor, as I recall, the limit would have been  
12 approximately around \$80,000. Now, the declared value  
13 of the cargo was, as I said, I think about \$67,000.  
14 That was based on the Customs value. The amount stated  
15 in the complaint, which was \$250,000, was based on the  
16 fair market value of the goods at the time and place of  
17 destination, which is a different standard than the  
18 Customs value.

19 Now, the Second Circuit's decision --

20 QUESTION: Why is there that great difference  
21 between 67 and 200?

22 MR. FOSTER: Well, because, Your Honor, the  
23 Customs value was based on the sale by Franklin Mint  
24 Company in Pennsylvania to Franklin Mint, Limited, in  
25 England. What they were was not actually gold coins.

1 They were, as the way bill said, they were metal  
2 stamping dies used to produce the silver coins,  
3 actually, that would be used to market, for example, art  
4 treasures of the Vatican, things of that sort.

5 And those dies being used to produce silver  
6 coins would have resulted in a fair market value of the  
7 goods at the time of delivery of about \$250,000.

8 QUESTION: The cargo really had three  
9 different values, then, the real value, the Customs  
10 value, and the declared value of TWA.

11 MR. FOSTER: Yes, Your Honor.

12 QUESTION: I am bothered by the way these  
13 different values are tossed around as though they are  
14 completely insignificant, that there is a virtue in  
15 inconsistency.

16 MR. FOSTER: Yes, Your Honor. Now, the  
17 government and TWA have, I think, somewhat misstated the  
18 problem by presenting the Second Circuit's decision as  
19 being one of abrogation. This isn't a situation where  
20 you have, for example, the normal way in which it has  
21 arisen is some sort of revenue or tariff provision being  
22 in conflict with a U.S. treaty.

23 The conflict here involving the Par Value  
24 Modification Act and the treaty is much deeper, more  
25 fundamental, because what was being done by the Congress

1 is removing an assumption on which Article 22 had been  
2 interpreted for the past 45 years. In other words, an  
3 official price of gold.

4 Now, the Article 22 as it now stands is a gold  
5 clause. If you take special drawing rights or \$42.22  
6 per gold, what you are doing is changing that gold  
7 clause into a currency clause, and that is most clearly  
8 the case in the special drawing rights, because a  
9 special drawing right is just an average of five  
10 currencies, and what happens then is, a claimant's  
11 recovery rises or falls based on what happens to those  
12 currencies.

13 What the drafters of the convention intended  
14 was that the recovery be tied to gold. Less clearly,  
15 although still the case, is the situation if you use  
16 \$42.22. That was the last official price of gold, and  
17 by taking a price, fixing it in time, what that means  
18 is, from here on in, a claimant's recovery rises or  
19 falls based on the value of \$42.22, and not anything  
20 dealing with gold, and it was again, as I said, the  
21 drafters' intention to have it tied to gold.

22 Now, Franklin Mint's position is that Article  
23 22 can be interpreted consistently with the text and the  
24 intent of the convention's drafters by using the free  
25 market price of gold.



1 QUESTION: Mr. Foster, you don't support the  
2 Second Circuit's conclusion that the convention is  
3 unenforceable for the future?

4 MR. FOSTER: Well, I think, Your Honor, that  
5 the best way of avoiding the whole problem --

6 QUESTION: Well, do you support it?

7 MR. FOSTER: Yes, Your Honor, although not as  
8 a first option.

9 QUESTION: As I read your -- you ask us to  
10 reverse and direct the entry of a judgment for the  
11 actual amount of Franklin Mint's damages.

12 MR. FOSTER: Yes, sir.

13 QUESTION: Or alternatively to enter a  
14 judgment for Franklin Mint for the lower of the two  
15 amounts.

16 MR. FOSTER: Based on --

17 QUESTION: How does that support --

18 MR. FOSTER: Well, Your Honor, it is based on  
19 Franklin Mint's preferred resolution of the problem --

20 QUESTION: I know, but that is by  
21 interpretation of the convention, isn't it?

22 MR. FOSTER: Yes, Your Honor, taking --

23 QUESTION: So you are not asking us to say, as  
24 the Second Circuit said --

25 MR. FOSTER: Well, Your Honor --

1 QUESTION: -- that the convention is  
2 unenforceable for the future, are you?

3 MR. FOSTER: Well, if the Court is unable to  
4 take the free market value, then I think the only  
5 alternative is to adopt the Second Circuit's rationale.

6 QUESTION: I don't reach your conclusion.

7 MR. FOSTER: Well, the conclusion, Your Honor,  
8 is based on when the case is remanded to the District  
9 Court, there will be a trial or a finding on damages.  
10 The District Court should enter judgment for either the  
11 market value of the goods or the limit based on free  
12 market value, whichever is lower.

13 QUESTION: Well, you say, enter a judgment for  
14 the actual amount of Franklin Mint's damages. What are  
15 they?

16 MR. FOSTER: Well, that's -- I mean, the  
17 theoretical possibility that, say, Franklin Mint is  
18 bound by the amounts stated for Customs purposes, which  
19 could be lower than the amount of the limit using the  
20 free market value, but -- in other words, if the free  
21 market value limit is \$80,000, and Franklin Mint's  
22 damages are \$67,000 because of the Customs value, then  
23 the Court would have to take the lower amount.

24 Now, the reason why I say that the Second  
25 Circuit's decision is the second best option is because

1 you an avoid the whole problem by taking the free market  
2 price of gold. The problem with not taking the free  
3 market price of gold is that you then get into these  
4 options that have been proposed by the government and by  
5 TWA.

6           And the interesting point is that in the lower  
7 court -- well, in the District Court and the Second  
8 Circuit, TWA was also pressing for the current French  
9 franc, and in this Court that has sort of dropped by the  
10 wayside, and in the District Court the preferred measure  
11 was the special drawing right, and in the Second Circuit  
12 and in this Court it has become the last official price  
13 of gold, so --

14           QUESTION: Mr. Foster, these arguments sound  
15 very much like arguments that might well be addressed to  
16 the Congress rather than the courts, and I wonder  
17 whether the Congress is presently considering any  
18 legislation to correct --

19           MR. FOSTER: Well, Your Honor, in March the  
20 Senate had before it the Montreal Protocols, and that  
21 set of protocols would do -- would resolve the whole  
22 problem. Namely, it would change the gold franc unit to  
23 a special drawing right. The problem is that the Senate  
24 soundly rejected that treaty. Apparently, it was the  
25 first time since about 1960 that the Senate had rejected

1 a treaty.

2 Now, either the Senate by adopting -- giving  
3 its advice and consent to a treaty, or both Houses of  
4 Congress through domestic legislation could do exactly  
5 what Your Honor is suggesting. The problem is, they  
6 haven't done so, and there is no -- there is nothing as  
7 far as I am aware of, proposals to do exactly the same.

8 As you point out, what is done in other  
9 countries is exactly that. There is domestic  
10 legislation that resolves the whole problem. For  
11 example, in England, they have statutory instruments  
12 which are similar to administrative regulations,  
13 although of somewhat stronger effect, and they say, this  
14 is how you resolve the problem. We don't have anything  
15 of that sort here, which is, as I said at the beginning,  
16 it has become a judicial problem.

17 QUESTION: Perhaps I don't understand you, Mr.  
18 Foster, but you just told me that if we don't adopt your  
19 suggestion of the free market value price of gold, that  
20 then we should, what, affirm the Court of Appeals? That  
21 is your alternative?

22 MR. FOSTER: Yes, Your Honor.

23 QUESTION: And affirm including the \$42.22,  
24 whatever that price is?

25 MR. FOSTER: No, Your Honor. The one point



1 where Franklin Mint disagrees with the Second Circuit --

2 QUESTION: Well, I didn't think so.

3 MR. FOSTER: -- is that if --

4 QUESTION: Well, what are we going to replace  
5 that with, if we reject your free market value of gold?

6 MR. FOSTER: Then what the Court should do is  
7 say -- and take it a step further than the Second  
8 Circuit did, that as of April 1st, 1978, given the  
9 changes in the nature of gold in our system, the Article  
10 22 limit is unenforceable, and it is up to the other  
11 branches to resolve the problem, because the problem  
12 here is, if you take SDR's, if you take \$42.22 an ounce,  
13 you are changing the basic nature of Article 22 from a  
14 gold clause into a currency clause, and that isn't  
15 interpretation. It is modification of a treaty. And  
16 that is a political question that should be done by the  
17 other branches.

18 QUESTION: So what you are saying is, that  
19 applies as much to the portion of the District Court  
20 judgment to fix \$42.22 insofar as it did --

21 MR. FOSTER: Yes, Your Honor.

22 QUESTION: -- as it does to the rest of it.

23 MR. FOSTER: Yes, Your Honor, because --

24 QUESTION: And we should just say that this is  
25 something beyond judicial competence to handle, and --

1           MR. FOSTER: Yes, Your Honor.

2           QUESTION: -- toss the whole problem to the  
3 Congress.

4           MR. FOSTER: It goes back to Baker v. Carr,  
5 Your Honor. In other words, is --

6           QUESTION: Well --

7           MR. FOSTER: In other words, is this an issue  
8 that has been delegated by the Constitution to the other  
9 branch? Making treaties is. Is it a subject in which  
10 the other branches have expertise? It certainly is. If  
11 you are going to change Article 22 from what it  
12 presently is, a gold clause, to a currency clause, that  
13 is a political question. It is not interpreting a  
14 treaty.

15           A clear example of interpreting the treaty is  
16 one of Mr. Romans' earlier cases, Day v. TWA. That  
17 involved people who were standing in line, waiting to  
18 get on the plane, and they were -- some terrorists threw  
19 a bomb, and the question was, people standing in line,  
20 are they covered by the convention or not, and that is  
21 the typical problem in interpreting a treaty having  
22 general language referring to specific facts.

23           QUESTION: May I ask you a question, Mr.  
24 Foster? You have indicated that another branch of the  
25 government should take care of the problem, and in other

1 countries something approaching legislation, not  
2 necessary the statute in England has done, but why then  
3 isn't the CAB order the sort of thing that has answered  
4 the question for this country?

5 MR. FOSTER: Well, Your Honor, because --

6 QUESTION: You haven't really talked about  
7 that.

8 MR. FOSTER: -- first of all, the CAB order  
9 that Mr. Romans referred to was promulgated during the  
10 time when there was an official price of gold, and what  
11 happened was, as the official price of gold would  
12 periodically change, the CAB would come out with an  
13 order saying, this is what the new limits are.

14 The CAB itself has really been -- there are  
15 internal memoranda discussing what they should do with  
16 the problem, and one of the documents in the Joint  
17 Appendix which was originally presented by Mr. Romans  
18 was a memorandum in which the writer said, "The board  
19 has for the past five years been engaging in a legal  
20 fiction, namely, the \$42 figure," and that is at Page  
21 JA-40, and going on, saying, "Use of the last official  
22 rate of gold, however, may at times prevent passengers  
23 from recovering the full extent of damages caused by the  
24 carriers. Carriers may no longer need the protection of  
25 these low limits, given the maturation of the aviation

1 industry since 1929."

2           It goes on to say that the best thing to do is  
3 get together with State, with Treasury, with  
4 Transportation, and let them worry about it, because the  
5 CAB is going out of business, and it will be up to them  
6 to resolve the matter in the future.

7           In a later order, and that is CAB Order  
8 81-3-143, which is in the Joint Appendix before the  
9 Second Circuit, the CAB in an order dealing with SDR's  
10 dropped a footnote and said, and this order was in 1981,  
11 "We don't indicate by this order any views as to what  
12 the value of the gold franc in the convention is."

13           So, there is really, as the Second Circuit  
14 said, the CAB order has really been retained more by the  
15 law of inertia as opposed to any concrete policy  
16 decision, just simply because they recognize that the  
17 CAB is going out of business, in essence, and other  
18 people are going to have to worry about it, and quite  
19 frankly, if the Senate approved the Montreal Protocols,  
20 that would take care of the problem. If the Congress  
21 passed legislation, that would take care of the problem  
22 as well.

23           So, going back to the whole problem of the  
24 Second Circuit's decision, which is one of the principal  
25 issues, the problem is, what is the nature of Article



1 22. Franklin Mint contends it is a gold clause, and  
2 that the only way you can interpret it as a gold  
3 clause --

4 QUESTION: Mr. Foster, above all, isn't it a  
5 limitation of liability clause more than anything else?

6 MR. FOSTER: Yes, Your Honor. That was the  
7 whole point back in 1929, to protect the infant airline  
8 industries.

9 QUESTION: Well, but if it should be decided  
10 that the infant airline industries are no longer infants  
11 and don't deserve protection any more, that is for  
12 Congress, isn't it?

13 MR. FOSTER: Yes, Your Honor, and in fact in  
14 the Airline Deregulation Act, they said -- they  
15 expressed a strong policy argument in favor of free  
16 competition, but that doesn't resolve the Court's  
17 problem in saying how you convert those gold francs into  
18 dollars, and Franklin Mint says, use the gold franc --  
19 use the free market value of gold. That still gives the  
20 airline its limit, albeit at a higher level.

21 Now, if you want to change it into a currency  
22 clause, though, that is for the other branches to do,  
23 and that can be done through the Montreal Protocols  
24 using SDR's.

25 QUESTION: Mr. Foster, I gather it is not a

1 political question case outside of judicial competence  
2 if we adopt your interpretation of free market price of  
3 gold. Is that right?

4 MR. FOSTER: I think that is the only way it  
5 can be put, Your Honor.

6 QUESTION: But it is a political question case  
7 if we reject your suggestion?

8 MR. FOSTER: Yes, sir. The one point, though,  
9 where I would disagree with the Second Circuit is the  
10 question that the Second Circuit only applied its ruling  
11 prospectively. That type of ruling has traditionally  
12 been done in the context of criminal cases or this  
13 Court's decision on the Bankruptcy Code, and there is no  
14 reason that if the nature of gold changed as of April  
15 1st, 1978, that that date should be used for the purpose  
16 of the Court's decision.

17 Just to conclude, I would point out that the  
18 problem here is the fact that you have a convention  
19 drafted in 1929 for a different world, and the problem  
20 is trying to cram 1929 language into the realities of  
21 the 1980's. It can be done with a bit of bootstrapping,  
22 but by and large it involves problems that should really  
23 be handled by the other branches. The only way of doing  
24 it consistently is to take the free market value.  
25 Otherwise, the Second Circuit decision should be upheld

1 but made retroactive as of April 1st, 1978.

2 Thank you.

3 CHIEF JUSTICE BURGER: You have four minutes  
4 remaining.

5 ORAL ARGUMENT OF JOHN N. ROMANS, ESQ.,

6 ON BEHALF OF TRANSWORLD AIRLINES, INC. - REBUTTAL

7 MR. ROMANS: Thank you, Mr. Chief Justice.

8 In response to Justice Stevens' question about  
9 the words in the treaty, I would just like to save 1,000  
10 words and refer you to Page 29 of the Joint Appendix.  
11 This is the market price of gold, this jagged mountain  
12 range. As discussed by Professor Lowenfeld, an expert  
13 in monetary -- international monetary transactions, gold  
14 is now "a volatile commodity, not related to a price  
15 index or to the rate of inflation, or indeed to any  
16 meaningful economic measure other than the views of  
17 whoever made up the market about all the terrible things  
18 going on in the unpredictable world."

19 This is what you will do to a businessman if  
20 you choose the market price of gold.

21 QUESTION: Mr. Romans, may I ask you a  
22 question?

23 MR. ROMANS: Yes, sir.

24 QUESTION: Supposing the treaty had been  
25 drafted in the plainest of language, which said, we want

1 to use the price of gold. We understand and expect for  
2 the next 50 years that is the most stable point of  
3 reference we can find. We don't anticipate any change.  
4 They spelled it out perfectly clearly. And then the  
5 market developed the way it is now. What would we have  
6 to do?

7 MR. ROMANS: Well, Your Honor, I contend  
8 that --

9 QUESTION: The language clearly picked gold.  
10 Would it become unforceable, or would we substitute  
11 something else?

12 MR. ROMANS: The language says gold, but --  
13 can I suggest that the language also says, to be  
14 converted into national currency.

15 QUESTION: Well, I understand. Your argument  
16 is, it is not all that plain, and there is a lot of  
17 force to your argument.

18 MR. ROMANS: But the words in the treaty, the  
19 words in that Article 22 say, to be converted into  
20 national currency.

21 QUESTION: I understand that. I am asking --  
22 My question is, supposing the language of the treaty  
23 were different, and unambiguously said, we want the  
24 point of reference to be the free market price of gold,  
25 and the legislative history shows nobody dreamed this



1 would happen to the free market price. What would our  
2 duty be in those circumstances?

3 MR. ROMANS: Your Honor, that would be a more  
4 difficult case, obviously.

5 (General laughter.)

6 QUESTION: Nobody wants to answer my question.

7 MR. ROMANS: However -- no, no, no. The duty  
8 of a court, it seems to me, in the treaty area  
9 particularly, is to effectuate the intent of the  
10 drafters, and as Judge Kaufman said in the Day case --

11 QUESTION: Well, but I have given you all the  
12 facts. What would our duty be on that hypothetical?

13 MR. ROMANS: What would my argument be?

14 QUESTION: What would our duty be on that  
15 hypothetical? Assuming plain language and this highly  
16 unanticipated development and undesirable development.

17 MR. ROMANS: All right. In my view, in order  
18 to effectuate the intent of the drafters, which has been  
19 restated as late as 1975 at the Montreal Conference,  
20 this Court should use the last official price of gold,  
21 because that would effectuate the intent of the  
22 drafters, just as in the Constitutional sense Judge  
23 Kaufman has said that we should not freeze the  
24 Constitution in 1787, I think, we should not freeze the  
25 Warsaw Convention. The duty of this Court is to

1 effectuate the intent of the treaty's drafters in the  
2 light of changing circumstances and in the light of the  
3 subsequent conduct.

4           The subsequent conduct of the parties to me is  
5 very clear, Your Honor. They have stated that the limit  
6 should be in the area of \$20 per kilogram. I should  
7 think it is the duty of this Court to effectuate that  
8 intent.

9           QUESTION: Well, Mr. Romans, if for some  
10 reason the free market price of gold were the conversion  
11 factor, I suppose businessmen could protect themselves  
12 by buying gold futures or something of that sort.

13           MR. ROMANS: Well, I suppose that everybody  
14 could become a very sophisticated person, and I suppose  
15 we would have to adopt these kinds of things, buy and  
16 sell gold futures. I would suggest that that would add  
17 to the price of everything, but yes, that would be a way  
18 out. You could hedge every single transaction you made  
19 by buying gold futures.

20           But I think, Justice O'Connor, you correctly  
21 stated that we are -- a court's duty is not to decide  
22 what value should be made. That is the job of the  
23 legislature and treaty partners. And this Court is, of  
24 course, duty bound to effectuate the intent of the  
25 drafters.

1                   Thank you very much.

2                   CHIEF JUSTICE BURGER: Thank you, gentlemen.

3   The case is submitted.

4                   (Whereupon, at 11:03 o'clock a.m., the case in  
5   the above-entitled matters was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: #82-1186-TRANSWORLD AIRLINES, INC., Petitioner v. FRANKLIN MINT CORPORATION, ET AL.; and #82-1465-FRANKLIN MINT CORPORATION, ET AL., Petitioners v. TRANSWORLD AIRLINES, INC.

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