No. 00-720

In the Supreme Court of the United States

CHUBB & SON, INC., PETITIONER

v.

ASIANA AIRLINES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in 1995, the United States and the Republic of Korea were in a treaty relationship under the Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. 40105 note).

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw October 12, 1929 (Original Warsaw Convention), 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. 40105 note, has two basic purposes: to "foster uniformity in the law of international air travel," *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 230 (1996), and to "limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry," *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 546 (1991). See also *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 169-170 (1999). To those ends, the Convention prescribes an extensive set of legal principles

generally applicable "to all international transportation of persons, baggage, or goods performed by aircraft." Original Warsaw Convention, art. 1(1). See generally Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

At the core of the Convention is a series of provisions governing the nature and scope of a carrier's liability for harms occurring in the course of international air travel. The Convention divides such harms into three categories: personal injury (Art. 17), damaged or lost baggage or cargo (Art. 18), and damage due to delay (Art. 19). Article 22(2) limits an air carrier's liability to $20 per kilogram of cargo lost. Article 9 of the Convention, however, precludes an air carrier from availing itself of Article 22(2)'s liability limitation if "the air waybill does not contain all the particulars set out in article 8(*a*) to (*i*), inclusive, and (*q*)." Original Warsaw Convention, art. 9. Article 8(c) requires that the air waybill contain, among other things, "[t]he agreed stopping places" for the shipment. Original Warsaw Convention, art. 8(c).

On July 31, 1934, the United States deposited its adherence to the Original Warsaw Convention as provided in its Article 38, which permits any State to adhere to the Convention after it has come into force by notifying the Government of Poland, the depositary for the Convention. The Convention entered into force for the United States on October 29, 1934. See U.S. Dep't of State, *Treaties in Force* 344 (2000); 49 Stat. at 3013. The Republic of Korea (South Korea) was not in existence when the Original Warsaw Convention was signed and concluded, and South Korea has never adhered to the Original Convention in accordance with Article 38.

b. As the airline industry and the world economy grew, the liability limitations in the Original Convention became increasingly unpopular in the United States and other countries. In 1955, a conference convened at the Hague to resolve the question whether those limits should be changed

or eliminated. Pet. App. 11a. The result of the conference was the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 (Hague Protocol or Protocol), 478 U.N.T.S. 371.

The Hague Protocol changed some outdated language in the Original Warsaw Convention, doubled the per-passenger liability limitation to $16,600, and removed most of the exceptions to limited liability for shippers of goods. Pet. App. 11a. As relevant here, the Protocol amended Article 8(c) of the Original Warsaw Convention to eliminate the requirement that the waybill list not just the place of departure and ultimate destination but also all the agreed stopping places. Hague Protocol, art. VI.

The final clauses of the Hague Protocol prescribe the mechanism by which the Protocol comes into force and address the relationship between the Protocol and the Original Warsaw Convention. Of relevance to this case, Article XIX provides that:

> As between the Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*.

Hague Protocol, art. XIX. Another of the final clauses, Article XXIII, provides (as Article 38 does for the Original Convention) that States may adhere to the Protocol after it has come into force by depositing an instrument of adherence with the Government of Poland, which is also the depositary for the Protocol. Article XXIII(2) provides that:

> Adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXIII(2).[1]

Although the United States signed the Hague Protocol on June 28, 1956, the United States did not ratify it and has not adhered to it as provided in Article XXIII. See *Treaties in Force*, *supra*, at 344 n.1; *Reed* v. *Wiser*, 555 F.2d 1079, 1083-1088 (2d Cir.), cert. denied, 434 U.S. 922 (1977). On July 13, 1967, South Korea deposited with the Government of Poland notification of its adherence to the Hague Protocol. The Hague Protocol entered into force for South Korea on October 11, 1967.[2]

2. In 1995, Samsung Electronics Co., Ltd., contracted with respondent Asiana Airlines to ship 17 parcels of computer chips from Seoul, South Korea, to San Francisco, California. The waybill for the 17 parcels provided for shipment on August 10, 1995, on Asiana Flight 214 from Seoul to

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[1] Article XXI, which governs initial ratification of the Protocol, contains a provision similar to Article XXIII(2) that applies to the States that signed and ratified the Protocol to bring it into force. That provision states that:

> Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXI(2).

[2] There have been further protocols to amend the Warsaw Convention as amended at the Hague, only one of which has entered into force for the United States. On March 4, 1999, Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975 (Montreal Protocol No. 4), entered into force for the United States. Because this dispute arose in 1995, however, Montreal Protocol No. 4 is not at issue in this case. See Pet. App. 13a; Restatement (Third) of the Foreign Relations Law of the United States § 322(1), at 191 (1987); *El Al*, 525 U.S. at 160 (noting that the question before the Court in that case had been settled "prospectively" by Montreal Protocol No. 4, which was ratified after the dispute in the case arose); see also note 15, *infra*.

San Francisco, with no other scheduled stops. However, Asiana instead transported the parcels on Asiana Flight 202 from Seoul to Los Angeles, California, and thereafter trucked the parcels to San Francisco. Upon delivery in San Francisco, two parcels, which contained $583,000 worth of chips and together weighed 35.3 kilograms, were missing. Pet. App. 4a.

Samsung Semiconductor, the intended recipient of the computer chips, filed an insurance claim with petitioner Chubb & Son, Inc. Petitioner paid Samsung Semiconductor $583,000 plus an additional amount based on the terms of Samsung's cargo insurance policy. Pet. App. 4a.

3. Petitioner, as subrogee of Samsung Semiconductor, then brought suit against respondent in the United States District Court for the Southern District of New York, to recover the value of the lost computer chips plus the additional amount paid under the terms of the insurance policy. The parties filed cross-motions for summary judgment on the issue whether respondent could invoke the air carrier liability limitation in Article 22(2) of the Warsaw Convention to limit its liability to a maximum of $20 per kilogram of cargo lost or damaged. Pet. App. 5a. The motions were referred to a magistrate judge, who recommended that petitioner's motion be granted because respondent had failed to comply with the waybill requirements in Article 8(c). *Id.* at 48a-61a.

4. Before the district court ruled on the magistrate's report, respondent filed a supplemental motion for summary judgment, questioning the court's subject matter jurisdiction under 28 U.S.C. 1331. Pet. App. 6a. On September 22, 1998, the district court granted partial summary judgment for respondent. *Id.* at 32a-47a. The district court recognized that "the United States has ratified the [Original Warsaw] Convention but not the [Hague] Protocol, while [South] Korea has ratified the [Hague] Protocol but not the [Original Warsaw] Convention." *Id.* at 38a. Relying on *In re Korean*

Air Lines Disaster of September 1, 1983, 664 F. Supp. 1463 (D.D.C. 1985), aff'd, 829 F.2d 1171 (D.C. Cir. 1987), aff'd *sub nom. Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), and *Hyosung (America), Inc.* v. *Japan Air Lines Co.*, 624 F. Supp. 727 (S.D.N.Y. 1985), however, the court held that the United States and South Korea were both parties to a treaty composed of those articles common to the Original Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol. Pet. App. 38a-43a. Because the waybill requirement of Article 8(c) of the Original Warsaw Convention was amended by the Hague Protocol, the court concluded that Article 8(c) did not constitute part of that hybrid treaty agreement between the United States and South Korea. *Id.* at 44a. Because, however, the Hague Protocol retained without amendment the liability limitation in Article 22(2) of the Original Convention, the court concluded that limitation was part of the agreement. *Id.* at 46a-47a. The court accordingly held that respondent's liability is limited to $706. *Id.* at 47a.

5. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 1a-31a. The court noted that, "in 1995 when this dispute arose, the United States had ratified the Original Warsaw Convention but not the Hague Protocol, while South Korea had adhered to the Hague Protocol but not the Original Warsaw Convention." *Id.* at 12a. Relying on Article XXIII(2) of the Protocol, the court concluded that "[t]hose States that adhered to the Hague Protocol specifically adhered to the Warsaw Convention as amended at the Hague, not the Original Warsaw Convention." *Id.* at 19a. Although South Korea could have adhered separately to the Original Warsaw Convention, the court reasoned, South Korea "never exercised that option," and thus was not in a treaty relationship with the United States pursuant to the Original Warsaw Convention. *Id.* at 19a-20a.

The court of appeals also rejected the district court's conclusion that the United States and South Korea were in treaty relations with respect to the unamended portions of the Original Convention. Pet. App. 22a. The court reasoned that, "[e]ven if it could be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention." *Id.* at 23a-24a. The court also explained that holding the United States bound by the unamended portion of the Warsaw Convention would violate the doctrine of separation of powers by impermissibly encroaching on the treaty-making powers of the political Branches. *Id.* at 25a-26a. Holding the United States thus bound would place it in a treaty providing limited liability despite the carrier's failure to include the particulars on the waybill—"a fundamental alteration of the Original Warsaw Convention resulting in an entirely different outcome." *Id.* at 28a. The court concluded that "no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to two different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States." *Id.* at 30a. Because the court held that there was no treaty relationship between the United States and South Korea on the subject, it concluded that the case does not arise under a treaty of the United States for purposes of federal question jurisdiction under 28 U.S.C. 1331. The court of appeals remanded to the district court "for further proceedings to determine whether there exists some other ground for subject matter jurisdiction." Pet. App. 31a.

DISCUSSION

The court of appeals correctly resolved the question presented by the petition for a writ of certiorari. At the time

that the dispute in this case arose, there was no treaty relationship between the United States and South Korea under the Original Warsaw Convention, the Hague Protocol, or a treaty consisting of those provisions of the Original Convention that were not amended by the Protocol. There is no conflict among the courts of appeals on that question. Moreover, the ruling of the court of appeals should have limited effects and is interlocutory. Further, the decision of the court of appeals actually favors petitioner on the merits because the consequence of the court's ruling is that petitioner's claim against respondent is not subject to the liability limitation in the Warsaw Convention. Accordingly, this Court should deny the petition.[3]

1. The court of appeals correctly concluded that, at the time the dispute in this case arose, the United States and South Korea were not in a treaty relationship with each other under any of the treaties in the Warsaw Convention system. At that time, the United States and South Korea were party to two separate international agreements. The

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[3] The court of appeals viewed its conclusion that there was no treaty relationship between the United States and South Korea as depriving the district court of subject matter jurisdiction under 28 U.S.C. 1331. Although the conclusion that there was no treaty relationship means that petitioner has no cause of action under Article 18 of the Warsaw Convention, it is not clear that the absence of a treaty relationship means that the federal courts lack subject matter jurisdiction over the claim. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (noting that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case"). The question whether the court of appeals erred in viewing the lack of a treaty relationship as a jurisdictional question is not, however, of sufficient importance to warrant this Court's review. Moreover, the court of appeals remanded to the district court for a determination whether there is diversity jurisdiction, Pet. App. 31a, and a finding of diversity jurisdiction would render the jurisdictional aspect of the court of appeals' holding irrelevant to the outcome of the case. See also Pet. 8 (asserting that diversity jurisdiction exists).

United States was a party to the Original Warsaw Convention.[4] The United States was not, however, a party to the Hague Protocol.[5] South Korea, on the other hand, was a party to the Hague Protocol.[6] South Korea was not, however, a party to the Original Warsaw Convention.[7]

a. The court of appeals correctly rejected petitioner's contention (Pet. App. 18a) that, by adhering to the Hague Protocol, South Korea necessarily also became a party to the Original Warsaw Convention. Interpretation of a treaty begins with its text. See *El Al*, 525 U.S. at 167. Article XIX of the Hague Protocol provides that, "[a]s between Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*." Hague Protocol, art. XIX. That provision

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[4] In accordance with Article 38 of the Convention, which provides that any State may adhere to the Convention after it has come into force by notifying the Government of Poland, the United States deposited its adherence on July 31, 1934. The Convention entered into force for the United States on October 29, 1934. See *Treaties in Force*, *supra*, at 344; 49 Stat. at 3013.

[5] The United States signed the Hague Protocol on June 28, 1956, but never ratified it. The Senate had not given its advice and consent by 1967, at which time the Administration withdrew the Protocol from Senate consideration. See S. Exec. Rep. No. 20, 105th Cong., 2d Sess. 48 (1998). The Administration considered the increase in liability limits for claims involving death or bodily injury insufficient without legislation providing for supplemental accident insurance for passengers, and Congress failed to adopt that legislation. *Ibid.*

[6] On July 13, 1967, South Korea adhered to the Hague Protocol in accordance with its Article XXIII, which provides that any State may adhere to the Protocol after it has come into force by depositing an instrument of adherence with the Government of Poland. The Protocol entered into force for South Korea on October 11, 1967.

[7] South Korea was not in existence at the time that the Original Warsaw Convention was signed and concluded, and South Korea has never adhered to the Original Warsaw Convention as provided in its Article 38.

incorporates into the Protocol those provisions of the Warsaw Convention that were not amended by the Protocol in order to create a single, separate agreement that stands on its own. See Richard Gardiner, *Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract*, 47 Int'l & Comp. L.Q. 278, 280 (1998) (explaining that "the Protocols do not simply introduce amendments to the original treaty. In effect * * * they each produce a new composite version"). Article XXIII(2) of the Protocol provides that "[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol." Hague Protocol, art. XXIII(2).[8] That provision clearly provides that, by adhering to the Protocol, a State becomes a party to the new stand-alone agreement, the Warsaw Convention as amended at The Hague, 1955.[9]

The text of Article XXIII(2) does not in terms exclude the possibility that a State, by becoming a party to the new

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[8] Article XXI contains a parallel provision that applies to the States that signed and ratified the Protocol to bring it into force. That provision states that:

> Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol.

Hague Protocol, art. XXI(2).

[9] "[M]ultilateral treaties such as the Warsaw Convention, * * * frequently are modified—but not thereby terminated—by 'amend[ing] agreements binding only those parties that were willing to accept the amendment while leaving the original or earlier amended agreement still in force to govern relations between the other parties, as well as between the other parties and the amending group. As a result, it has become fairly common for several versions of a multilateral treaty to exist simultaneously, with different sets of provisions operating between various groups of States.'" *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433-434 (2d Cir. 2001) (quoting Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int'l L. 281, 361-362 (1988)).

stand-alone agreement, also becomes a party to the Original Warsaw Convention with respect to States that are parties only to the Original Convention. The most natural reading of that Article, however, is that a State that is not independently a party to the Original Convention and adheres to the Protocol (such as South Korea) "become[s] party only to the Convention as amended, *not* to the unamended version as well." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 283. See also Richard Gardiner, *Carriage by Air in the U.S. Court of Appeals*, 1988 Lloyd's Mar. & Com. L.Q. 151; Bin Cheng, *What is Wrong with the 1975 Montreal Additional Protocol No.3?*, 14 Air Law 220, 223 & n.4 (1989). That is the most natural reading, in our view, because it gives force to the words "as amended by this Protocol." Hague Protocol, art. XXIII(2); see Gardiner, *supra*, 47 Int'l and Comp. L.Q. at 286. The express reference to the Convention "as amended by this Protocol" and the absence of any reference to the unamended Convention together support reading Article XXIII(2) to mean that a State that adheres to the Protocol does not on that basis alone become a party to the unamended Convention. Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Under that reading, South Korea does not have a treaty relationship with the United States under the Original Convention.

We are not prepared to say that the reading that we advance is the only possible one. Some commentators have given Article XXIII(2) a different reading, under which adherence to the Hague Protocol puts a State that has not adhered independently to the Original Warsaw Convention on the same footing as a State that has adhered to both the Original Convention and the Protocol. If Article XXIII(2) had that meaning, then a State that has adhered to the Protocol (such as South Korea) would have a treaty relationship under the Original Convention with a State (such as the United States) that has adhered only to the Original Convention. See, *e.g.*, Elmar Giemulla et al., *Warsaw Con-*

vention 24 (1992); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 12 (1988); Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier* 3 (1981).

This Court's precedent, however, establishes that courts must give effect to the most natural reading of a treaty unless secondary indicia (such as the drafting history) clearly establish that an alternative reading is a correct one. See *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) ("Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history."). That approach to treaty interpretation is mandated by the separation of powers: "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on [the courts'] part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).[10]

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[10] In the court of appeals, petitioner argued (Pet. App. 18a-19a) that South Korea should be deemed a party to the Original Warsaw Convention by virtue of Article 40(5)(b) of the Vienna Convention on the Law of Treaties, May 23, 1969 (Vienna Convention), 1155 U.N.T.S. 331. That provision states that "[a]ny State which becomes a party to [a] treaty after the entry into force of [an] amending agreement shall, failing an expression of a different intention by that State, * * * be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement." Vienna Convention, art. 40(5)(b). Petitioner's argument is incorrect for several reasons. First, the Vienna Convention (to which South Korea is a party but the United States is not) does not govern interpretation of the Hague Protocol. The Vienna Convention did not enter into force until 1980, and it provides that the rules it contains, unless they would apply under international law independently of the Convention, apply only to treaties concluded after the Convention's entry into force. Vienna Convention, art. 4. The rule in Article 40(5)(b) would not apply independently because it was a newly-formulated rule and thus was not existing law at the time that the Hague Protocol was adopted. See Report of the International Law Commission on its Eight-

We have found nothing in the drafting history of the Hague Protocol that suggests that Article XXIII(2) was intended to mean that a State that adheres only to the Protocol necessarily also becomes a party to the Original Warsaw Convention. Nor does the "postratification understanding of the contracting parties" (*El Al*, 525 U.S. at 167) support such a reading of Article XXIII(2). Rather, it suggests that the contrary, more natural reading is the correct one.

It has been the understanding of the Executive Branch of the United States that a State's adherence to the Hague Protocol does not make the adhering State a party to the Original Warsaw Convention. See *Hyosung*, 624 F. Supp. at 729 (noting State Department's view that South "Korea has not adhered to the Convention in its unamended form"); Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 512 n.2 (1974) (stating that the "United States is *not* in treaty relations under the Convention with any [States that have adhered only to the Hague Protocol (such as South] Korea), since they are parties to the Convention *only as amended*").[11] The State Department's annual

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eenth Session 4 May-19 July 1966, part IV, commentary (13). Second, Article 40(5)(b) applies only when the treaty itself does not address the status of States that join after amendment. See *ibid.*; Vienna Convention, art. 40(5)(b) ("failing an expression of a different intention"). And, as we have explained, Article XXIII(2) of the Hague Protocol, read most naturally, provides that such States will be bound only by the Convention as amended by the Protocol.

[11] A 1991 letter signed by the Department of State's Assistant Legal Adviser for Treaty Affairs noted that "Singapore is a party to the Warsaw Convention by reason of its adherence on November 6, 1967 to the Hague Protocol of 1955, which amends the Convention." Letter from Robert E. Dalton to David M. Salentine (Oct. 10, 1991). The letter went on to state that "Article XXI of the Hague Protocol states that ratification of the Protocol by any state which is not a party to the Convention shall have the effect of adherence to the Convention, *as amended by the Protocol*." *Ibid.* (emphasis added). (In fact, according to status lists prepared by the

publication *Treaties in Force* has consistently indicated that South Korea is not a party to the Original Warsaw Convention.[12] Although *Treaties in Force* is not intended to be a statement of the Executive Branch's official position on treaty interpretation, see *Treaties in Force*, *supra*, at i, the Executive Branch agrees that the United States is not in treaty relations under the Original Warsaw Convention with States that have adhered only to the Hague Protocol. That view is entitled to "great weight" and "respect." *El Al*, 525 U.S. at 168; *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).[13]

International Civil Aviation Organization (ICAO) based on information provided by the Government of Poland, Singapore was a party to the Original Warsaw Convention in 1991 because it had independently adhered to that Convention on April 9, 1971.) To the extent the view in the 1991 letter is inconsistent with the view described in the text above, the State Department no longer adheres to the view in the letter.

[12] Before 1986, *Treaties in Force* did not list South Korea in any fashion among the countries that are party to the Warsaw Convention. See, *e.g.*, U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Beginning in 1986, in acknowledgment of the decisions in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, the annual *Treaties in Force* reports have listed South Korea in a footnote to the list of parties to the Warsaw Convention. That footnote, however, makes clear the State Department's view that South Korea and other countries that have adhered only to the Hague Protocol "are parties to the [Warsaw] convention *as amended*; the United States is *not* a party to the amending protocol." *Treaties in Force*, *supra*, at 344 n.1.

[13] That view is apparently shared by the Government of Poland, the official depositary for both the Original Warsaw Convention and the Hague Protocol, as well as by the Legal Bureau of ICAO. See Letter from Dr. Ludwig Weber, Director, Legal Bureau, ICAO, to David Shapiro, Alternate Representative of the United States on the Council of ICAO (May 17, 2001). Although the views of the Legal Bureau of ICAO are not dispositive, the International Conference on Air Law at which the Hague Protocol was adopted was convened under the auspices of the ICAO, the international organization charged with oversight of the development of international civil aviation. See generally Convention on International

South Korea also does not consider itself to be a party to the Original Warsaw Convention. To our knowledge, South Korea expressed no understanding when it adhered to the Hague Protocol or at any time thereafter that its adherence to the Protocol made it a party to the Original Convention in its unamended form. To the contrary, in 1984, South Korea issued a letter indicating that this was not its understanding of its status. Br. in Opp. App. 2a-3a.[14]

b. In 1986, the South Korean Supreme Court held that the United States and South Korea were in a treaty relationship under the Hague Protocol (rather than the Original Warsaw Convention). See *Hyundai Marine & Fire Ins.* v. *Korean Air Lines* (Korea S. Ct. July 22, 1986) (described in Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries*, 11 Air Law 242, 243 (1986)). The Korean Supreme Court relied on the theory that a "State which is a party only to the [Original] Warsaw Convention can be regarded also as a party to the Hague Protocol considering the statement in Article 19 of the Protocol that the Convention and the Protocol should be read and interpreted together as one single instrument." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *supra*, 11 Air Law at 243.

Civil Aviation, 7 Dec. 1944. The same view was endorsed by Lord Jauncey of Tullichettle in *Holmes* v. *Bangladesh Bimani Corp.*, 87 I.L.R. 365, 387 (Eng. H.L. 1989) ("carriage from the territory of a state which is a party only to one Convention to the territory of a state which is a party only to the other is not covered by the rules of either Convention").

[14] The letter takes the position, adopted by the district courts in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, that South Korea and the United States are in treaty relations under a truncated version of the Original Warsaw Convention that includes only those provisions of the Original Convention that were not amended by the Hague Protocol. Br. in Opp. App. 3a. As we explain at pp. 16-17, *infra*, that view is untenable.

That theory is plainly incorrect. It is not supported by the text of Article XIX of the Hague Protocol, which, by its terms, applies only "[a]s between the Parties to this Protocol." Hague Protocol, art. XIX. Article XIX thus does not bind a State that has not adhered to the Protocol to the terms of the Protocol. Indeed, Article XIX could not be read to make a State that has not ratified or otherwise adhered to the Protocol a party to the Protocol because that would "infringe[] the principle that States are bound only by treaties to which they have consented." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287.

c. The court of appeals also properly rejected respondent's contention (Br. in Opp. 7), which was accepted by the district court, that the United States and South Korea were both parties to a "Truncated Warsaw Convention"—a supposed agreement comprised of those provisions of the Original Warsaw Convention that were not amended by the Hague Protocol. See Pet. App. 20a-30a. Although two other district courts have also reached that conclusion, *Hyosung*, 624 F. Supp. at 727; *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. at 1469, it is incorrect.

As the court of appeals explained, "[e]ven if it could be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention." Pet. App. 23a-24a. "The Original Warsaw Convention does not provide for partial adherence and the United States has not consented to partial adherence by any State, including South Korea." *Id.* at 24a. The Original Convention was a "compromise between the interests of air carriers and their customers worldwide." *El Al*, 525 U.S. at 170. Holding the United States bound to a judicially-created treaty that contains some features of that compromise (such as the limited liability in Article 22(2)) without other features (such as the detailed disclosure re-

quirements in Article 8) would improperly rewrite the compromise to which the United States agreed. That course cannot be squared with the Constitution's requirements for treaty-making. See Pet. App. 30a ("[I]t is not for the judiciary to alter, amend, or create an agreement between the United States and other States.").

2. The question whether a country that has adhered only to the Original Warsaw Convention (such as the United States as of 1995) has a treaty relationship with a country that has adhered only to the Hague Protocol (such as South Korea) does not warrant this Court's review. There is no conflict among the courts of appeals on that question. Moreover, the issue is not likely to recur frequently. According to status lists prepared on May 17, 2001, by the International Civil Aviation Organization (ICAO) from information provided by the Government of Poland, only six States have adhered only to the Hague Protocol—El Salvador, Grenada, Lithuania, Monaco, South Korea, and Swaziland. Moreover, the United States is no longer a party only to the Original Warsaw Convention. After the dispute in this case arose, the United States also ratified Montreal Protocol No. 4, which incorporates and amends the provisions of the Warsaw Convention as amended by the Hague Protocol. See note 2, *supra*; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 Oct. 1929 as Amended by the Protocol Done at The Hague on 28 Sept. 1955, Signed at Montreal on 25 Sept. 1975, art. XV.

A substantial number of air travel liability disputes will now be governed by Montreal Protocol No. 4, to which 51 States have adhered, as of May 17, 2001, according to ICAO's status list. The terms of Montreal Protocol No. 4 apply when "the places of departure and destination * * * are situated either in the territories of two Parties to th[at] Protocol or within the territory of a single Party to th[at] Protocol with an agreed stopping place in the territory of another State."

Montreal Protocol No. 4, art. XIV. "[T]he places of departure and destination" for round trips—a very common form of international air travel for passengers—are considered to be the same place. Thus, if a passenger buys a round-trip ticket to any country from the United States or one of the 50 other States that have adhered to Montreal Protocol No. 4, that protocol will govern liability arising from that trip whether or not the other country has adhered to that protocol.[15]

The Original Warsaw Convention and the Hague Protocol each contains provisions parallel to Article XIV of Montreal Protocol No. 4. See Original Warsaw Convention, art. 1(2); Hague Protocol, art. I. Thus, even for disputes arising before Montreal Protocol No. 4 came into force, the question of the existence of bilateral treaty relations affects the applicability of the Original Warsaw Convention and the Hague Protocol only in the case of one-way travel. See, *e.g.*,

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[15] Article XIX(2) of Montreal Protocol No. 4 contains similar language to Article XXIII(2) of the Hague Protocol. The meaning of Article XXIII(2) therefore may have some bearing on whether Article XIX(2) means that the United States, by ratifying Montreal Protocol No. 4, became a party to the Hague Protocol even though the United States has never independently adhered to the Hague Protocol. The meaning accorded Article XXIII(2) does not resolve that question, however, because the text of Article XIX(2) of Montreal Protocol No. 4 (like that of Article XXIII(2) of the Hague Protocol) does not in terms exclude the possibility that a State that adheres to the protocol thereby becomes a party to earlier agreements amended by the protocol. Interpretation of Article XIX(2) must therefore take into account the negotiating and drafting history of *that* provision, and other appropriate indicia of *its* meaning, such as the understanding of the contracting parties. The question whether Article XIX(2) makes the United States a party to the Hague Protocol was not considered by the Second Circuit in this case. See Pet. App. 13a (explaining that Montreal Protocol No. 4 has no bearing on this case because the instant dispute arose before that Protocol came into force for the United States). This case is therefore not an appropriate vehicle to address that question, which the court of appeals subsequently discussed in *Fujitsu*. See 247 F.3d at 431.

Alexander v. *Pan American World Airways, Inc.*, 757 F.2d 362, 363 (D.C. Cir. 1985); see also Br. in Opp. 9.

Moreover, a new stand-alone agreement that would replace the *entire* Warsaw liability regime was concluded in 1999 and is currently before the United States Senate for its advice and consent. See Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999 (1999 Montreal Convention), S. Treaty Doc. No. 45, 106th Cong., 2d Sess. (2000). The 1999 Montreal Convention, would, if it becomes applicable, prevail over the rules established under the Original Warsaw Convention and all amending protocols, and become the unified liability regime for all international civil air transportation.

Finally, even if the question presented by the petition might warrant review by this Court at some point, this case is not an appropriate vehicle to address it. The case is interlocutory: the court of appeals remanded for the district court to consider whether there is diversity jurisdiction. See p. 7 & note 3, *supra*. Moreover, acceptance of petitioner's theory that the United States and South Korea were in a treaty relationship under the Original Warsaw Convention would not affect the ultimate issue of respondent's liability. Respondent would face unlimited liability whether (as we and the court of appeals believe) no treaty applies or (as petitioner contends) the Original Warsaw Convention applies, because respondent did not comply with Article 8(c) of the Original Convention, which is a prerequisite to application of the liability limitation in Article 22(2). Original Warsaw Convention, art. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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