2016-2389, 2402

THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AVIATION & GENERAL INSURANCE COMPANY, LTD., *ET AL.*,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in
case no. 14-687, Judge Wheeler

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of this Court's rules, counsel for defendant-appellee states that he is unaware of any other appeal from this civil action that previously has been before this Court or any other appellate court under the same or similar title. We are aware of two cases in the Court of Federal Claims that may be affected by this Court's decision in this appeal: *Alimanestianu v. United States*, No. 14-0704, and *Benard v. United States*, No. 15-0926. On December 29, 2016, the Court of Federal Claims granted our motion for summary judgment in *Alimanestianu*. *Alimanestianu v. United States*, No. 14-0704, 2016 WL 7488355 (Fed. Cl. Dec. 29, 2016). The court has stayed *Benard* pending the resolution of this appeal.

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Plaintiffs-Appellants,	)	No. 2016-2389, 2402
v.	)	
THE UNITED STATES,	)	
Defendant-Appellee.	)	

BRIEF OF DEFENDANT-APPELLEE

Plaintiffs-appellants (collectively, Aviation) are, with one exception, foreign insurance companies that insured air planes destroyed during terrorist attacks undertaken or sponsored by Libya outside of the United States in the 1980s. At the time of the attacks, Libya was treated like other foreign states for purposes of whether it would enjoy sovereign immunity from suit in United States courts for these types of actions. In early 2008, Congress passed a law allowing companies like Aviation to sue state sponsors of terrorism, including Libya, for certain terrorism-related conduct. Aviation sued Libya in district court but, later in 2008, Congress passed the Libyan Claims Resolution Act, which (upon a certification by the Secretary of State), reinstated Libya's sovereign immunity for these terrorism-related acts. Aviation's district court lawsuits were then dismissed. It then brought

this lawsuit alleging that the United States engaged in a Fifth Amendment taking of its legal claims.

STATEMENT OF THE ISSUES

1. Whether Aviation possesses a vested property interest for Fifth Amendment takings purposes in a jurisdictional rule of sovereign immunity.

2. Whether, if Aviation possesses a vested property interest, the trial court correctly held that the Government did not engage in a Fifth Amendment taking when it reinstated Libya's sovereign immunity for certain acts of state-sponsored terrorism.

3. Whether this case is justiciable given that Aviation challenges the terms and implementation of an international claims settlement agreement between the United States and Libya.

STATEMENT OF THE CASE SETTING OUT THE RELEVANT FACTS

Aviation appeals from a decision of the Court of Federal Claims in *Aviation & General Insurance Company, Ltd. v. United States*, 127 Fed. Cl. 316 (2016), Appx1-7, in which the court granted our motion for summary judgment and held that the Government did not engage in a Fifth Amendment taking when it reinstated Libya's sovereign immunity for certain acts of state-sponsored terrorism.

I. Statement Of Facts And Course Of Proceedings Below

Plaintiffs-appellants are insurance companies and an asset management entity. Appx238. All but one of the plaintiffs-appellants assert that they are foreign companies. *Id.*

In 1985 and 1988, the government of Libya sponsored or was involved in two terrorist attacks relevant to this case: the hijacking of Egypt Air Flight 648 and the bombing of Pan Am Flight 103. Appx238-41. Aviation alleges to have claims against Libya as a result of these attacks. *Id.*

At the time of the attacks, Libya was treated like other foreign states for purposes of whether it enjoyed sovereign immunity from suit in the United States under the Foreign Sovereign Immunities Act (FSIA). *See* 28 U.S.C. § 1604 (providing for the immunity of foreign states); *id.* §§ 1605–1607 (providing for exceptions to foreign sovereign immunity); Appx240-41. This changed in 1996 when Congress amended the FSIA, stripping designated state sponsors of terrorism, including Libya, of sovereign immunity for certain acts affecting United States victims. 28 U.S.C. § 1605(a)(7) (1996).

Aviation sued Libya in two lawsuits for damages resulting from the bombings. Appx241-242. These lawsuits were brought in district court and asserted that the district court possessed jurisdiction to hear Aviation's claims

pursuant to the "State Sponsor of Terrorism" exception to the FSIA – section 1605(a)(7) of title 28, United States Code. Appx242.

On July 9, 2007, the district court in one of the cases dismissed Aviation's complaint for lack of jurisdiction. Appx242. In its decision, the court rejected the argument "that Congress intended to provide supplemental jurisdiction under Section 1605(a)(7) for property damage claims when acts of terrorism that resulted in personal injury and death to American nationals also caused the property damage in question." Appx242 (quoting *Certain Underwriters at Lloyds London v. Socialist People's Libyan Arab Jamahiriya*, No. 06-731, 2007 WL 2007573, at *3 (D.D.C. July 9, 2007)).

On January 28, 2008, the President signed the National Defense Authorization Act of 2008. National Defense Authorization Act for Fiscal Year 2008, Public L. No. 110-181, § 1083 (2008). Appx242. This Act replaced section 1607(a)(7) with 28 U.S.C. § 1605A. Appx242-43. Section 1605A provides, among other things, that "[a]fter an action has been brought under subsection (c) [for personal injury and death], actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based." *Id.* (quoting 28 U.S.C. § 1605A).

In March and April 2008, respectively, Aviation filed amended complaints in their two district court cases, asserting claims against Libya pursuant to section 1605A. Appx243.

In August 2008, while Aviation's lawsuits were pending, Congress enacted the Libyan Claims Resolution Act. *Id.* (citing Pub. L. No. 110-301, 122 Stat. 2999 (2008) (LCRA)). Section 5(a)(1)(A) of the LCRA provides that, upon certification by the Secretary of State, Libya shall no longer be subject to the exceptions to immunity from terrorism-related lawsuits provided in sections 1605(a)(7) and 1605A. The LCRA conditioned the Secretary of State's certification on the receipt of sufficient funds under an international claims settlement agreement between the United States and Libya to insure payment of certain specified settlements with Libya as well as "fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya arising under section 1605A . . . ." Appx245 (citing LCRA, Section 5(a)(2)). Shortly thereafter, the United States entered into a claims settlement agreement with Libya (Claims Settlement Agreement). Appx890-93. In October 2008, the Secretary made the certification under the LCRA. Appx245-46.

Also in October 2008, President Bush issued Executive Order Number 13,477, providing that "[a]ny pending suit in any court, domestic or foreign, by

United States nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of [the settlement agreement with Libya] shall be terminated" and "[a]ny pending suit in any court in the United States by foreign nationals (including any suit with a judgment that is still subject to appeal or other forms of direct judicial review) coming within the terms of [the settlement agreement with Libya] shall be terminated." Appx244 (quoting 73 Fed. Reg. 65,965, 65,965-66 (Oct. 31, 2008) (Executive Order)).

These actions restored Libya's sovereign immunity from lawsuits brought under the State Sponsor of Terrorism FSIA exception and, consequently, abrogated United States courts' jurisdiction over Aviation's lawsuits. *Cf. Republic of Iraq v. Beaty*, 556 U.S. 848, 866 (2009) (holding that courts lost jurisdiction over claims against Iraq when State Sponsor of Terrorism exception "became inoperative as against Iraq").

In March 2009, the United States filed Statements of Interest in Aviation's district court cases. Appx244-45. In those Statements of Interest, we explained that, pursuant to the LCRA, the Claims Settlement Agreement, and the Executive Order, the court did not possess jurisdiction to adjudicate Aviation's claims. *Id.*

On January 7, 2010, and July 6, 2010, respectively, the district court dismissed the two cases because the court did not possess subject-matter jurisdiction. Appx245; *see also* Appx423-434; Appx435.

The Claims Settlement Agreement with Libya required the establishment of a humanitarian settlement fund which included $1.5 billion to be distributed by the United States. Appx890-93. It provides that "[e]ach Party shall accept the resources for distribution as a full and final settlement of its claims and suits and those of its nationals. . . ." Appx891.

Under the LCRA, the Secretary of State was permitted to designate one or more entities "to assist in providing compensation to nationals of the United States, pursuant to a claims agreement." LCRA, 4(a). The designation is not subject to judicial review. *Id.*

Certain claims were referred by the Secretary of State to the Foreign Claims Settlement Commission (Commission) for consideration. Appx246-47. The Commission is "a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments, under specific jurisdiction conferred by Congress, pursuant to international claims settlement agreements, or at the request of the Secretary of State." https://www.justice.gov/fcsc/about-commission (last visited Jan. 4, 2017).

One of the plaintiffs-appellants, New York Marine, submitted a claim to the Commission, in which it asserted that it was a United States national. Appx247. Under the "continuous nationality rule," the Commission concluded that it lacked jurisdiction to entertain the claim submitted by (or on behalf of) New York Marine because that claim was not "held by a 'national of the United States' continuously from the date it arose until the date of the Claims Settlement Agreement." Appx247 (citing Appx456-465).

Aviation then filed this action in the Court of Federal Claims, alleging that the United States has "taken" its property in violation of the Constitution's Takings Clause. Appx969-1000.

We moved to dismiss the complaint, explaining that Aviation lacks a cognizable property interest under the Takings Clause; that, even if it possesses a cognizable interest, the United States did not "take" that interest; and that the case is not justiciable.

The trial court denied our motion to dismiss, holding that Aviation possesses a cognizable property interest and that the case is justiciable, but deferring a decision on whether the Government has taken any of Aviation's property. Appx225-237.

The parties filed cross-motions for summary judgment. We argued, again, that Aviation lacks a cognizable property interest and that, in any event, the Government has not engaged in a taking.

The trial court again rejected our argument that Aviation lacks a cognizable property interest but agreed that no taking occurred. Appx1-7. With respect to the property interest, the court held that Aviation's interest in insurance contracts that it sought to protect through its legal claims against Libya was a cognizable property interest for takings purposes. Appx3-4.

The trial court then held that no taking occurred. The court agreed with the parties that, although the case did not fit neatly into the traditional regulatory taking analysis, the principal factors (the *Penn Central* factors) in that analysis are relevant – that is, the character of the Government action, the extent to which the Government conduct has interfered with distinct investment-backed expectations, and the economic impact of the Government action on the plaintiffs. Appx4.

The court found that Aviation did not possess a reasonable investment-backed expectation for two reasons. Appx4-5. First, the court concluded that "[w]here, as here, the relations between governments become strained, the possibility that the President will intervene is properly recognized as both a shared benefit and a shared risk of those who trade abroad." Appx5. Second, the court held that Aviation's legal claims had been affected by the restoration of "the

default rule of sovereign immunity." *Id.* In other words, the President merely reinstated the rule of sovereign immunity that existed when Libya sponsored or was involved in the acts of terrorism that formed the basis of Aviation's district court suits. "Foreign sovereign immunity 'reflects current political realities and relationships' and its availability, or lack thereof, 'generally is not something on which parties can rely in shaping their primary conduct." Appx5 (quoting *Beaty*, 556 U.S. at 864-65). As a result, the President's settlement of claims against Libya cannot constitute a novel interference with any investment-backed expectation.

The trial court also emphasized the long-standing nature of the President's authority to settle claims against foreign nations. "Our Presidents have exercised the power to settle international claims filed in U.S. courts since at least 1799." Appx5 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). As the court explained, "[t]he President's power to eliminate sources of friction between sovereigns is a long-standing and integral aspect of the President's authority to conduct foreign relations." *Id.* (citing *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 245 (1983), *aff'd without opinion*, 765 F. 2d. 159, *cert. denied*, 474 U.S. 909, 106 S. Ct. 279 (1985)).

Finally, the court held that, although the Government did not provide an alternative forum for Aviation to bring its claims, this is not sufficient to establish a taking. Appx5. The court explained that the Government is not obligated to act as

a collection agent on Aviation's behalf. *Id.* at 5-6. The court also expressed concern that "the value of Plaintiffs' loss of its causes of action does not have a definite value and thus is speculative." Appx6. The court was particularly skeptical that plaintiffs would have been able to collect on any judgment against Libya. As a result, "Plaintiffs' economic injury is not one that fairness and justice require be shifted to the public at large." Appx6.

This appeal followed.

SUMMARY OF THE ARGUMENT

Aviation has asserted that its legal claims against Libya constitute a property interest that was taken by the United States. Those claims were dismissed by the district court because Libya enjoyed sovereign immunity and, therefore, the district court did not possess jurisdiction to entertain the claims. Aviation does not possess any property interest in jurisdictional rules, such as a rule of sovereign immunity. And Aviation's purported property interest does not fall within the exception to this Court's general rule that legal claims are not cognizable property for takings purposes.

Further, even assuming that Aviation possesses a cognizable property interest, the United States has not taken that interest. As the trial court correctly held, Aviation had no reasonable expectation in recovering on its claims because (1) at the time of the bombings, Libya enjoyed sovereign immunity in United

States courts from claims of this nature; and (2) foreign sovereign immunity rules are inherently subject to current political realities and relationships, and Aviation could not have reasonably relied upon such rules remaining static with respect to Libya. This lack of a reasonable expectation alone defeats Aviation's takings claim.

Moreover, the conduct complained of – the dismissal of Aviation's district court lawsuits – occurred in furtherance of normalizing relations between Libya and the United States. Foreign affairs has always been an area in which the political branches have broad authority and discretion to act in the public's interest. Indeed, within that realm, the Government's power to define the scope of foreign sovereign immunity, taking into account principles of international law, and to establish and to promote amiable relations with other countries constitute core functions.

The trial court also rightly emphasized that the economic impact of the Government's actions is speculative. Whether Aviation could have pursued a claim against Libya to final judgment and actually collected on the judgment is inherently unknowable. And nothing the United States did affects Aviation's ability to seek compensation from its home country from any settlement agreement that country reaches with Libya. As the Supreme Court has explained, "[t]here is

no Constitutional reason why this Government need act as the collection agent for nationals of other countries . . . ." *United States v. Pink*, 315 U.S. 203, 228 (1942).

Finally, this case is not justiciable. This Court has made clear that a judicial inquiry into whether the President could have extracted a more favorable settlement with a foreign nation would seriously interfere with the President's ability to conduct foreign relations. As a result, cases like this present issues not meant for judicial review.

ARGUMENT

I. Jurisdiction And Standard Of Review

This Court reviews a grant of summary judgment by the Court of Federal Claims *de novo*. *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001). This Court reapplies the same standard as the trial court. *Palahnuk v. United States*, 475 F.3d 1380, 1382 (Fed. Cir. 2007).

Under this standard, summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Rules of the United States Court of Federal Claims.

This Court also reviews a decision whether to dismiss a case under Rule 12(b)(6) *de novo*, taking the facts alleged in the complaint as true. *Adair v. United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007).

II. Aviation Does Not Possess A Cognizable Property Interest

Courts apply a two-part test when evaluating whether governmental action constitutes a taking without just compensation. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Insurance Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). In doing so, courts "do not reach this second step without first identifying a cognizable property interest." *Id.* (quoting *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005)). "If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *See Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

In addition, the Supreme Court has explained that property rights must be "vested" to be protected by the Takings Clause. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature . . . from depriving private persons of *vested* property rights [without just compensation]." (Emphasis added)); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).

As explained below, settled law in this and other circuits excludes the form of "private property" that Aviation alleges was taken – its legal claims against Libya – from the kinds of property interests that are cognizable under the Takings Clause.

A. Aviation's Legal Claims Were Affected By A Jurisdictional Rule

In its decisions denying our motions to dismiss, the trial court held that Aviation's legal claims qualify as property under the Takings Clause. *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206, 210-13 (2015), and *Aviation & General Insurance Co. v. United States*, 121 Fed. Cl. 357, 362-66 (2015).

Aviation's legal claims were affected through the alteration of a jurisdictional rule – that is, its claims were dismissed because the district court lacked jurisdiction to hear those claims under the provision of United States law stripping designated state sponsors of terrorism of sovereign immunity. Aviation does not possess any cognizable property interest in jurisdictional rules, such as rules of sovereign immunity. The Supreme Court has recognized that the governmental actions about which Aviation complains merely altered a jurisdictional rule of sovereign immunity, rather than any of Aviation's substantive rights. *Landgraf*, 511 U.S at 274 ("Application of a new jurisdictional rule usually takes away no substantive right. . . ." (citation and quotation marks omitted)). In

other words, Aviation's claims were not actually "taken" by the Government – all that was "taken" was the power of United States courts to adjudicate their claims. Aviation can have no property right in such rules because they "speak to the power of the court rather than to the rights or obligations of the parties," *id.* (citation and quotation marks omitted), and because recognizing such a right would violate the settled principle that no person has a vested interest in any rule of law. *Branch ex. rel. Maine Nat'l Bank v. United States*, 69 F.3d 1571, 1577-78 (Fed. Cir. 1995) ("As a general matter, a legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property.").

B. Aviation Does Not Possess A Property Interest In Its Legal Claims

Regardless, to the extent that the Government has directly affected Aviation's legal claims through some action other than the reinstitution of Libya's sovereign immunity, courts repeatedly have recognized that causes of action do not constitute cognizable or "vested" property. *See, e.g., Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1321 (Fed. Cir. 2014) (holding that plaintiff had no vested rights in its lawsuit); *Rogers v. Tristar* Prods., Inc., 559 Fed. Appx. 1042, 1045 (Fed. Cir. May 2, 2012) (rejecting takings claim because plaintiff did not possess a vested right in his lawsuit); *Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004) (rejecting takings claim and holding that property rights

from legal claims do not exist unless the causes of action themselves protect a "legally-recognized property interest."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) (holding no property interest in a cause of action); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 180-82 (D.C. 2008), *cert. denied*, 556 U.S. 1104, 129 S.Ct. 1579 (2009) (same); *Hammond v. United States*, 786 F.2d 8, 12-13, 15 (1st Cir. 1986) ("Congress abridged no vested rights . . . by . . . retroactively abolishing [plaintiff's] cause of action in tort;" dicta that valid taking claim therefore "very unlikely"). *See also, e.g., Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (a cause of action "affords no definite or enforceable property right" (citations and internal quotation marks omitted)); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("a pending tort claim does not constitute a vested right" with respect to due process claim); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (holding that legal claims afford no definite or enforceable property rights); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (same); *Grimesy v. Huff*, 876 F.2d 738, 743-44 (9th Cir. 1989) (denying taking claim for lost causes of action); *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (no property right in consent decree); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments . . . are final for Fifth Amendment . . . purposes. Rather, a case remains 'pending' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse.");

Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc., 960 F.2d 1339, 1345-47 (7th Cir. 1992) (same); *Tonya K. v. Bd. of Educ. of the City of Chicago*, 847 F.2d 1243, 1247-48 (7th Cir. 1988) (same); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1137-38 (11th Cir. 1983) (no enforceable property right in non-final judgment); *Marks v. United States*, 15 Cl. Ct. 609, 612 (1988) (finding that, because plaintiffs had not completed domestic recognition of a foreign judgment, they "did not have a property interest in the Iranian judgment in itself that entitled it to fifth amendment protection").[1]

Thus, numerous courts, including this Court, have rejected claims similar to Aviation's. *See, e.g.*, *Rogers*, 559 Fed. Appx. at 1045; *Central States*, 960 F.2d at 1345-47; *Ileto*, 565 F.3d at 1141; *Beretta*, 940 A.2d at 180-82. And in *Adams*, this Court held that there was no cognizable property interest for takings purposes in a statutory-based claim. The Court then indicated that legal claims that seek to protect a "legally recognized property interest" may, under certain circumstances, be cognizable under the Fifth Amendment. *Adams*, 391 F.3d at 1225-26. *Adams* explained that legally recognized property interests are "real property, physical property, or intellectual property." *Id.* at 1225-26. This holding supports our argument. In this case, Aviation's lawsuits against Libya were not seeking to

[1] Courts have held that even a final unreviewable judgment may not create cognizable property rights for takings purposes. *Marks*, 15 Cl. Ct. at 612.

protect real property, physical property, or intellectual property. Rather, they were tort claims based, much like in *Adams*, upon a federal statute – section 1605A of the FSIA.[2]

Aviation cites three cases from this Court that, it contends, stand for the proposition that claims that are extinguished pursuant to a claims settlement agreement constitute cognizable property interests for takings purposes. As an initial matter, none of those cases deals with a situation similar to this case – that is, when plaintiffs' legal claims were affected through the reinstitution of a rule of sovereign immunity.

The first case cited by Aviation – *Alliance of Descendants of Texas Land Grants v. United States*, 37 F. 3d 1478, 1481 (Fed. Cir. 1994) – is readily distinguishable because it concerned land. One need not stretch the common understanding of the word "property" to view the right to sue for compensation for the loss of land as an incident of ownership of the land itself. *Alliance* stands for nothing more remarkable than that and plainly falls within the *Adams* exception.

[2] The trial court held that plaintiffs possessed a property interest "in the insurance contracts they sought to protect with a legal claim against Libya." Appx4. But Aviation's lawsuits were not seeking to *protect* their insurance contracts. Indeed, under the trial court's view (a view that would allow the exception to swallow the rule that legal claims are generally not cognizable property), insurance companies would seem to have greater property rights by virtue of their insurance contracts than would those individuals (and their family members) who were victims of the attacks.

Second, in *Abrahim-Youri v. United States*, 139 F.3d 1462 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951, *reh'g denied*, 524 U.S. 970 (1998), this Court *rejected* a takings claim predicated upon the Government's espousal of claims against Iran. The Court stated: "We agree with plaintiffs that their property rights - their choses in action against Iran - were extinguished when the Government espoused and settled their claims." *Id.* at 1465.[3] Of course in this case, Aviation's claims were not espoused by the Government – rather, they were affected when Congress reinstated Libya's sovereign immunity for this type of conduct. Further, the *Abrahim-Youri* Court did not discuss the nature of the underlying interests that were the subject of the claims involved, nor did it specifically address whether the referenced "choses in action" constituted property within the meaning of the Takings Clause. Nor is it clear whether the Court was agreeing with the plaintiffs' characterization of the choses in action as property, or merely agreeing that what the plaintiffs had identified as property rights were extinguished. In any event,

[3] "In international law the doctrine of 'espousal' describes the mechanism whereby one government adopts or 'espouses' and settles the claim of its nationals against another government." *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989). As foreign companies, plaintiffs-appellants retained the right to seek redress through their home country. Appx244; *see also* Appx385 ("[a]lthough claims may not proceed in U.S. courts, the President's actions do not affect foreign nationals' ability to pursue their claims in foreign courts or through the efforts of foreign governments." (citing Executive Order § 1(b)(iii))).

because the Court held that the Government's actions did not constitute a compensable taking, the quoted statement is at most only dictum.[4]

Third, *Shanghai Power* is not helpful to Aviation's argument. For one, the property interest at issue in *Shanghai Power* was a legal claim seeking to protect property falling within the *Adams* exception – that is, a power plant actually owned by the plaintiff. 4 Cl. Ct. 237, 239 (1983). Moreover, in that case, the Claims Court held that no taking occurred when the United States espoused and settled the claims of United States nationals against China. *Id.* at 239-40. Again, the Government did not espouse Aviation's claims. And in rejecting the claims in *Shanghai Power*, the Court emphasized that the plaintiffs could not have had a reasonable expectation of recovery given the foreign relations aspects of the case and the inherent authority of the President to espouse and settle claims. *Id.* at 245. ("The rights of nationals trading or traveling abroad are bound up in another, perhaps more fundamental, aspect of a nation's foreign relations."). The Court also concluded that the case was not justiciable, because a "judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations." *Id.* at 248.

[4] In *Belk*, this Court "[a]ssume[d] without deciding" that appellants' claims against Iran constituted property for takings purposes. *Belk v. United States*, 858 F.2d 706, 708 (Fed. Cir. 1988).

Accordingly, Aviation does not possess a cognizable property interest in its claims.

Finally, Aviation asserts that we cannot challenge the trial court's holding that plaintiffs possess a property interest in their claims because we waived the right to challenge that holding when we did not file a cross-appeal.

Aviation is mistaken. "As a general proposition, an appellate court may affirm a judgment of a district court on any ground the law and the record will support so long as that ground would not expand the relief granted." *Glaxo, Inc. v. TorPharm, Inc.*, 153 F.3d 1366, 1371–72 (Fed. Cir. 1998). *See also Bailey v. Dart Container Corp. of Michigan*, 292 F.3d 1360, 1362 (Fed. Cir. 2002) (*citing Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 822 n. 1 (Fed. Cir. 1989)). Indeed, this Court has held multiple times that a cross-appeal is improper to offer arguments in support of the judgment, and a party can, on appeal, assert any alternative grounds for affirming the judgment that are supported by the record. *Datascope Corp.*, 879 F.2d at 822 n.1.; *Glaxo*, 153 F. 3d at 1371-72 (court may adopt ground advanced by party that was rejected by the trial court on summary judgment); *see also United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924) (party can raise "any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.").

The cases Aviation cites are not to the contrary. In *Granite Management*, this Court held that a cross-appeal is necessary if the appellee is trying to modify the judgment, rather than just affirm it. *Granite Mgmt. Corp. v. United States*, 416 F.3d 1373, 1378 (Fed. Cir. 2005). In that case, the Government was seeking to reverse the trial court's judgment on liability. *Id.* Indeed, that case makes clear that "an appellee may rely upon any ground supported by the record for affirmance of the judgment, whether or not the lower court relied on that ground." *Id.* Accordingly, in cases when the Government's argument is made as an alternative ground of affirmance, a cross appeal is not necessary. *Id.*

We explained in our motion to dismiss and our motion for summary judgment that Aviation does not have a cognizable property interest in jurisdictional rules of sovereign immunity or in its causes of action. This argument is, therefore, supported by the record, and, accordingly, we have not waived it and may rely on it as an alternative ground for this Court to affirm the judgment of the trial court.

III. No Taking Occurred

A. The *Penn Central* Analysis Applies

Even if the Court were to find that Aviation possesses a cognizable property interest, that interest was not "taken" by the United States. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Penn Central identified three factors to be considered: (1) the extent to which the Government's action interferes with investment-backed expectations; (2) the character of the Government's action; and (3) the economic impact of that action on the claimants. *Id.*; *Abrahim-Youri*, 139 F.3d at 1465.

As an initial matter, Aviation suggests that there are different factors that may apply in the context of this case. Aviation Br. at 23 ("Plaintiffs prevail under either set of factors."). Aviation, however, then goes on to state that it "agree[s] the three *Penn Central* factors apply." *Id.* at 42. Aviation is correct that *Penn Central* applies – in *Abrahim-Youri*, this Court expressly rejected the argument that the *Penn Central* factors did not apply in the context of the settlement of international claims. *Abrahim-Youri*, 139 F. 3d at 1465-66. And in any event, the additional considerations suggested by Aviation are simply an "explication" of the *Penn Central* factors. *Belk v. United States*, 858 F.2d 706, 709 (Fed. Cir. 1988).

As explained below, under the *Penn Central* factors, no taking occurred when Congress reinstated Libya's sovereign immunity for certain terrorism claims under section 1605A.

B. The Lack Of Any Reasonable Investment-Backed Expectation Alone Defeats Aviation's Takings Claim

1. Aviation Lacked Any Reasonable Investment-Backed Expectation

First and foremost, the United States' restoration of Libya's sovereign immunity for certain terrorism-related claims did not interfere with Aviation's investment-backed expectations. By providing that the State Sponsor of Terrorism exception no longer applies with respect to Libya, the United States simply restored the default rules of sovereign immunity that typically apply under the FSIA in lawsuits against foreign states for actions taken outside of the United States, like those at issue in Aviation's district court cases. Aviation could not have had an expectation to be able to sue Libya in the United States at the time its claims against Libya accrued because the State Sponsor of Terrorism exception did not exist in the FSIA then. *Beaty*, 556 U.S. at 864-65.

Nor, as the trial court correctly held, Appx5, can Aviation have had an investment-backed expectation in a jurisdictional rule stripping state sponsors of terrorism of sovereign immunity; these rules are inherently subject to "current political realities and relationships," and are generally not rules upon which parties can rely in shaping their conduct. *Id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). *Cf. Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (possibility of changing world circumstances and a corresponding response

by the United States Government "can never be completely discounted" in foreign affairs); *Branch ex. rel. Maine Nat'l. Bank v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995) (investment-backed expectations are greatly reduced in a highly regulated field). That is particularly so in the case of the State Sponsor of Terrorism exception, which requires that the Executive Branch have designated the state as a state sponsor of terrorism and presumes a non-friendly relationship between the United States and a foreign state at a given time.

Not surprisingly, the Supreme Court has recognized that the availability of foreign sovereign immunity or an exception to sovereign immunity generally is not something upon which parties can rely in shaping their conduct. *Beaty*, 556 U.S. at 864-65 ("Foreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" (*quoting Altmann*, 541 U.S. at 696)). The Supreme Court's reasoning is especially apt here: (1) both the jurisdictional rules abrogating and restoring Libya's sovereign immunity were enacted after the conduct giving rise to Aviation's legal claims; and (2) the rule in question (the State Sponsor of Terrorism exception) was aimed specifically at rogue nations whose orientation toward the United States might change.

As the Supreme Court explained, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation

they held at the time of their injury that they would be able to sue Iraq in United States courts." *Beaty*, 556 U.S. at 865 (emphasis in original); *see also Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed expectation." (internal quotation and citations omitted)); *Alimanestianu v. United States*, No. 14-704C, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) ("Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time."). Aviation thus could not have reasonably relied upon the rules of foreign sovereign immunity remaining static with respect to Libya. *Beaty*, 556 U.S. at 857 (observing that it was "entirely unremarkable" that Congress would give the President some flexibility in unique circumstances such as those pertaining to post-war Iraq); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner's attachment of foreign state's assets was not

property under Takings Clause because it was subordinate to presidential power over the assets).

In addition, Aviation cannot have had reasonable investment-backed expectations in still-pending causes of action. *See District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 181 (D.C. 2008), *cert. denied*, 556 U.S. 1104 (2009) ("Since even 'settled expectations' may be disturbed by Congress without effecting a taking . . . the expectancy the plaintiffs have of a successful outcome to their suit is not an interest the government is obliged to pay for as the price of eliminating it." (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)); *cf. Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215-16 (Fed. Cir. 2005) (frustration of business expectations does not constitute a compensable taking).

Moreover, Aviation's claims against Libya could be brought in United States courts for only approximately six months. In 2007, one of Aviation's district court cases was dismissed for lack of subject matter jurisdiction. Congress then amended the FSIA, allowing insurance companies, like Aviation, to bring suit under certain circumstances. 28 U.S.C. § 1605A. Aviation then filed amended complaints in both its district court lawsuits asserting claims pursuant to section 1605A. Appx243, Appx253-273, Appx347-369. That statutory section (1605A), however, applied to Libya for only approximately six months – from the end of

January 2008, when it was enacted, until later in 2008, when Libya's sovereign immunity was restored with respect to claims of this nature. Thus, Aviation's taking claim now seeks to hold the United States liable for Libya's acts of terrorism simply because, by enacting 1605A, the Government, for a brief period of time, allowed Aviation to sue Libya, and then reinstated Libya's sovereign immunity some six months later.

That plaintiffs-appellants (with one apparent exception) are foreign companies further supports that they cannot have any expectation that the United States would include them in any settlement, or that they would be entitled to bring claims before the Foreign Claims Settlement Commission. For one, the Supreme Court has made clear that "the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors . . . . There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts." *United States v. Pink*, 315 U.S. 203, 228 (1942). Moreover, Aviation could not have any expectation of obtaining a portion of the settlement proceeds through the Foreign Claims Settlement Commission. "The Foreign Claims Settlement Commission . . . has the duty of distributing a governmentally created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the

Commission has made an award." *American & European Agencies v. Gillilland*, 247 F.2d 95, 97-98 (D.C. Cir. 1957). Indeed, the Commission lacks jurisdiction to consider claims brought by foreign entities such as Aviation. *See* 22 U.S.C. § 1623(a) ("The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of *the Government of the United States or of any national of the United States*. . . ." (emphasis added)).

The speculative nature of Aviation's claims is illustrated by a Foreign Claims Settlement Commission decision concerning claims brought by one of plaintiffs-appellants. Appx506-71. In that decision, the Commission explained that, with respect to the claimant's district court case, "the claimants were never able to convince the court that there was a viable legal theory under which they would in fact prevail. In short, at no point did any court rule that claimants had a valid cause of action or that claimants were entitled to damages, and there is no evidence that a court ever would have." [5] Appx515. Thus, Aviation's taking claim

[5] Indeed, in Claim No. LIB-II-170, Decision No. LIB-II-165, the Foreign Claims Settlement Commission concluded that, "even if the Commission had jurisdiction, the claimants would still have failed to prove the legal merits of their claim." Appx525. In particular, the Commission, after thoroughly reviewing the claims before it, stated that "even if the Commission were to adjudicate the . . . claim under general principles of U.S. insurance law, the claimants failed to meet their burden of proof as to the validity of any of their theories of the claim, including their theories of subrogation to the Pan Am 103 victims, indemnity, restitution, and contribution." *Id.* *See also* Appx546-71.

is based upon three unfounded assumptions: (1) that they possessed a valid cause of action against Libya; (2) that they would have succeeded on that cause of action; and (3) that they would have been able to collect on a final judgment against Libya. As one district court explained in the context of claims brought against Iran, "[a] number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments . . . ." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009).

Aviation's claims against Libya were particularly speculative given that they were claims brought by insurance companies seeking to recover for payments made to third parties. Insurance contracts are designed to protect against a situation when the damaged party may not be able to recover for the loss incurred – thus, the damaged party seeks to insure against that loss because, otherwise, recovery may be unlikely. Indeed, insurance companies themselves use reinsurance – that is, multiple layers of insurance – to protect themselves against loss or liability. Appx975-76; Appx990-91. Thus, the very nature of insurance is that insurance companies recognize the possibility that they may never recover for the loss incurred – if recovery were likely, there would be no need for insurance. In this case, the nature of the loss is even more uncertain and unpredictable because it results from unanticipated acts of state-sponsored terrorism.

Accordingly, Aviation lacked any investment-backed expectation in being able to pursue claims against Libya. The Supreme Court has held that the lack of any such expectation, by itself, is cause for rejecting a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) ("It is to the last of these three factors that we now direct our attention, for we find that the force of this [reasonable expectations factor] is so overwhelming . . . that it disposes of the taking question," when the plaintiff "could not have had a reasonable investment-backed expectation."); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) (quoting *Monsanto*).

2. Aviation's Arguments Are Unavailing

In response to the trial court's decision, Aviation contends that, even if it knew with certainty that a settlement agreement would occur and Libya's sovereign immunity would be restored, it would have been surprised to learn it would receive nothing from the settlement proceeds. App. Br. at 27-34. Aviation is incorrect for many reasons.

As an initial matter, this Court has held that even United States nationals cannot state a takings claim simply because they are disappointed in the amount, or lack thereof, they received from the settlement. *Abrahim-Youri*, 139 F. 3d at 1468 ("the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United

States."). This alone undermines any argument that Aviation believed that it would receive compensation from the settlement with Libya.

Further, Aviation now challenges the fact that it did not receive a portion of the settlement proceeds, not that its claims were dismissed as a result of the reinstatement of Libya's sovereign immunity. But the property interest that Aviation has repeatedly cited is its legal claims. The question before the Court is whether the United States engaged in a taking when it affected those claims – that is, when those claims were dismissed by the district court. As explained above, Aviation could not have any expectation in pursuing those claims.

To avoid that holding, Aviation focuses on the settlement fund that was created by the settlement with Libya. But Aviation has no property interest in the settlement fund. As discussed above, "[t]he Foreign Claims Settlement Commission . . . has the duty of distributing a governmentally created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the Commission has made an award." *American & European Agencies v. Gillilland*, 247 F.2d 95, 97-98 (D.C. Cir. 1957).

And again, Aviation could not have been surprised that the Commission lacked jurisdiction to entertain any claims by foreign corporations. As explained, the Commission's long-standing jurisdictional statute provides that it "shall have jurisdiction to . . . render a final decision with respect to any claim of *the*

Government of the United States or of any national of the United States. . . ." (emphasis added). *See* 22 U.S.C. § 1623.

And the Commission's decision that, pursuant to the "continuous nationality rule," the lone United States corporation among the plaintiffs-appellants was not entitled to receive compensation from the settlement, should have come as no surprise. As the Commission explained, "the continuous nationality requirement is a matter of customary international law and [] the United States recognizes it as such." Appx516-17. Aviation acknowledges that this result was expected "[g]iven the Commissions' guidelines regarding the 'continuous nationality rule' and its numerous and unambiguous rejection of claims by foreign applicants." Appx997-98.

Moreover, Aviation's purported expectation in receiving compensation from the settlement is at odds with the plain language of the LCRA, which contains numerous references to the settlement being designed to address the claims of United States nationals. For example, the LCRA provides that "Congress supports the President in his efforts to provide fair compensation to all nationals of the United States who have terrorism-related claims against Libya through a comprehensive settlement of claims by such nationals against Libya . . . ." LCRA, Appx886. And the settlement agreement itself provides that "[e]ach Party shall

accept the resources for distribution as a full and final settlement of its claims and suits *and those of its nationals*." Appx891 (emphasis added).

Further, "the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors . . . . There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts." *Pink*, 315 U.S. at 228. More generally, "governments have traditionally espoused and settled claims without the consent of the individuals holding the claims and 'usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.'" *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 244 (1983) (quoting *Dames & Moore*, 453 U.S. at 680). And when the Government has provided an alternative forum to provide compensation for claims, it is generally for United States citizens. *Id.* at 241 ("much of our government's efforts in espousing claims *of its citizens* has been devoted to establishing fora for such rights, generally in the nature of international commissions or tribunals." (emphasis added)); *see also* 22 U.S.C. § 1623(a) (setting forth the Commission's jurisdiction).

Imposing liability on the United States when it declines to include foreign entities in a settlement process would force the Government to act as a collection agent for foreign entities – a proposition that the Supreme Court has expressly

rejected. Moreover, Aviation's assertion that the United States paid certain foreign nationals out of the settlement fails to recognize that the LCRA expressly provided for payment of certain settlements that had *already* been reached with Libya (and which included foreign nationals). Sec. 5(a)(2)(B)(i) of Pub. L. No. 110-301, 122 Stat. 2999 (2008). Aviation does not fall within that provision.

Aviation also cites examples of United States citizens or corporations receiving compensation as a result of the espousal of claims against foreign nations. But there is no authority for the proposition that the Government, when it settles claims against a foreign nation, is *required* to pay anyone, even its own nationals. Put another way, any payment is by grace, not by right. "[I]t is frequently entirely fortuitous who will benefit and who will suffer" from the President's decision to settle claims. *Shanghai*, 4 Cl. Ct. at 244-45. Indeed, in *Belk*, this Court held that no taking occurred when United States nationals who were held hostage were entirely precluded from bringing suit against their captor, Iran, and were not afforded any alternative forum to pursue their claims. *Belk*, 858 F. 2d 706. It would be odd if the United States can, consistent with the Takings Clause, deny recovery to those hostages—American citizens—but it cannot prevent foreign insurance companies from bringing suit against a foreign country without risking takings liability.

Aviation attempts to distinguish three cases cited by the trial court. First, it asserts that the Supreme Court's decision in *Pink*, 315 U.S. 552, is distinguishable because, in that case, the United States did not extinguish any claims against a foreign country. App. Br. at 28-29.

In *Pink*, assets of a Russian insurance company were held by the Superintendent of New York. *Id.* at 556. Claims by domestic creditors of the insurance company had been paid but funds remained. The New York Court of Appeals directed the Superintendent to pay the remaining balance to foreign creditors. The United States brought suit, seeking possession of the remaining funds. The foreign creditors argued that "their rights to these funds have vested by virtue of the New York decree; that to deprive them of the property would violate the Fifth Amendment which extends its protection to aliens as well as to citizens." *Id.* at 564. The Supreme Court explained that the United States was attempting to "protect not only claims which it holds but also claims of its nationals." *Id.* It concluded that "the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors." *Id.* The Court held that "[t]here is no Constitutional reason why this Government need act as a collection agent for nationals of other countries when it takes steps to protect itself or its own nationals. . . ." *Id.*

Given that, pursuant to *Pink*, the United States can, without engaging in a taking, acquire possession of assets that a foreign creditor is entitled to receive pursuant to a court decree, then certainly it can preclude Aviation from bringing claims against Libya in United States courts. Indeed, the property interest in *Pink* (a final decree from the New York Court of Appeals) was more certain than the purported property interest in this case – claims that may or may not have ultimately reached a final (and collectible) judgment. And contrary to Aviation's assertion that its claims against Libya have been entirely extinguished, nothing the United States did affects its ability to seek redress against Libya in other countries, including its home country.

Aviation next discounts the trial court's citation to the Supreme Court's decision in *Beaty* because, it asserts, *Beaty* did not involve a takings claim. App. Br. at 30-31. In *Beaty*, the Supreme Court explained that "[f]oreign sovereign immunity 'reflects current political realities and relationships,' and its availability (or lack thereof) generally is not something on which parties can rely 'in shaping their primary conduct.'" 556 U.S. at 864-65 (quoting *Altmann*, 541 U.S. at 696 (2004)). The Supreme Court also concluded that "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Id.* at 865 (emphasis in original). Aviation never

adequately addresses the substance of the Supreme Court's holding – that is, Aviation never explains why it was entitled to rely on the elimination of Libya's sovereign immunity or how the later elimination of Libya's subjection to suit deprived it of any expectation that it would be able to sue Libya in United States courts. Further, the broad language of the Supreme Court's holding – that is, that plaintiffs were not deprived of *any* expectation – plainly encompasses the more limited "investment-backed expectations" considered in the takings analysis.

Aviation also attempts to distinguish *Shanghai Power* because, it asserts, the United States did not terminate any litigation in that case because the foreign country – China – was immune from suit at the time. App. Br. at 29-30. But that fact only hurts Aviation's argument – it demonstrates once again that rules of sovereign immunity may change. Moreover, in *Shanghai Power*, the United States settled the claims of plaintiff, a United States corporation, against China. *Shanghai*, 4 Cl. Ct. at 239. Plaintiff was referred to the Commission but received only a fraction of the value of its claim. The court held that no taking occurred, focusing on the fact that even the claims of United States nationals may be extinguished, "'usually without exclusive regard for their interests, as distinguished from those of the nation as a whole'" and that, "it is frequently entirely fortuitous who will benefit and who will suffer from any such presidential action." *Id.* at 244

(quoting *Dames & Moore*, 453 U.S. at 680). The court also concluded that the case was not justiciable. *Id.* at 247-49.

Accordingly, Aviation did not possess a reasonable expectation that Libya's sovereign immunity would remain static or that it would be able to pursue its claims. This alone warrants affirming the trial court's decision.

C. The Character Of The Government's Actions Supports That No Taking Occurred

With respect to the character of the Government's actions, courts have repeatedly recognized that the President has indisputable power to settle or to extinguish claims against foreign states and nationals without effecting a taking. *See, e.g.*, *Chang*, 859 F.2d at 896-98. *Cf. Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same).

Indeed, it is difficult to imagine an area in which the political branches of the United States have broader authority and discretion to act in the public's interest than the realm of foreign relations. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs."); *Alimanestianu v. United States*, No. 14-0704, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) (holding

that plaintiffs' interest in pursuing action against foreign government is "necessarily constrained by their own Government's paramount right to conduct foreign affairs and concomitant right to compromise its nationals' claims in the process."). Within that realm, the Government's power to define the scope of foreign sovereign immunity, taking into account principles of international law, and to establish and to promote amiable relations between two countries (here, the United States and Libya) constitute core functions. Given that, in this case, Congress and the President exercised those core functions in connection with the United States' efforts to normalize relations with Libya, it is self-evident that the Government acted in furtherance of a legitimate governmental interest. *See Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (observing that *Lingle* did not diminish the importance of the *Penn Central* character prong with respect to public health and safety regulations and that those regulations afford the government the "greatest leeway to act" without paying compensation).[6]

The foreign relations context of this case further illustrates why the character of the Government's actions supports that no taking occurred. Courts recognize that the Constitution soundly commits foreign relations matters, including rules

[6] In *Lingle*, the Supreme Court disapproved of courts inquiring into whether governmental actions "substantially advanced" a legitimate interest. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540-45 (2005).

governing sovereign immunity, to the Government's political branches. *See Oetjen*, 246 U.S. at 302; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (presidential power is at its maximum when exerted pursuant to authorization of Congress). The FSIA itself is widely regarded as a statute that "directly addresses sensitive matters of foreign relations, which . . . are inherently subject to 'current political realities and relationships.'"[7] *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d at 80-81 (quoting *Altmann*, 541 U.S. at 696). *See also Dames & Moore*, 453 U.S. at 679 ("[N]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." (quoting *Pink*, 315 U.S. at 225)); *cf. Abrahim-Youri*, 139 F.3d at 1468 (recognizing that those who "engage in international commerce" do so pursuant to a type of implied license and that certain "sticks in the bundle of rights" are subject to "constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights."). The calculation of whether, and under what terms, to resolve claims and

[7] Prior to the FSIA's 1976 enactment, for example, courts faced with questions of foreign sovereign immunity routinely deferred to the decisions of the political branches about whether to take jurisdiction. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983); *Beaty*, 556 U.S. at 857 ("[T]he granting or denial of [foreign sovereign] immunity was historically the case-by-case prerogative of the Executive Branch.").

to normalize relations with Libya cannot be disentangled from the President's settlement authority. Thus, the foreign-relations context supports that the Government's actions did not result in a taking.

Further, the Government's actions affected Aviation's claims against Libya through alteration of a rule of sovereign immunity. *See Lingle*, 544 U.S. at 539 (contrasting a "physical invasion" of property with a program "adjusting the benefits and burdens of economic life to promote the common good"). Similar to *Belk*, "[h]ere there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims against Iran." *Belk*, 858 F. 2d at 709. Indeed, nothing the United States did affects Aviation's ability to pursue relief against Libya through its home country. *See* Appx385 ("[a]lthough claims may not proceed in U.S. courts, the President's actions do not affect foreign nationals' ability to pursue their claims in foreign courts or through the efforts of foreign governments.") (citing Executive Order § 1(b)(iii)). It thus would be odd if the President were able to extinguish claims altogether but unable to exercise the lesser power of restoring sovereign immunity with respect to a foreign state without engaging in a taking.

The Supreme Court specifically recognized in *Beaty* that the type of governmental actions about which Aviation complains only altered a jurisdictional rule of sovereign immunity, rather than any substantive rights. 556 U.S. at 864-65.

Aviation can have no property right in such rules because they "speak to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274 (citation and quotation marks omitted), and because recognizing such a right would violate the settled principle that no person has a vested interest in any rule of law. *Branch ex. rel. Maine Nat'l. Bank v. United States*, 69 F.3d 1571, 1578 (Fed. Cir. 1995) ("[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (quoting *New York Central R. R. Co. v. White*, 243 U.S. 188, 198 (1917)).

For all of these reasons, the "character" factor weighs strongly against finding a taking in this case.

In its brief, Aviation first contends that "the trial court overlooked the relevant history when it stated Plaintiffs cannot 'characterize the Government's action as novel or unexpected.'" App. Br. at 35 (quoting Appx4-5). As explained above, however, the trial court's holding that Aviation lacked any reasonable investment-backed expectation is correct and amply supported by this Court's precedent.

Aviation next asserts that the trial court erred by not considering how the burden of the Government's conduct is distributed among property owners and whether Aviation was singled out to bear a disproportionate share of the burden. *Id.*

The argument that the Court should not consider the character of the Government conduct is based on a misunderstanding of the Supreme Court's decision in *Lingle*, and this Court's subsequent analysis of that decision. In *Rose Acre Farms, Inc. v. United States*, 559 F. 3d 1260, 1281 (Fed. Cir. 2009), this Court held that *Lingle* "leaves unchanged a substantial body of case law concerning the character prong." *Id.* at 1279. Specifically, the Court concluded that "[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis." *Id.* at 1281. After reviewing the lengthy history of food regulations, the Court then emphasized that the regulation at issue in *Rose Acre* – a regulation restricting egg sales from farms – "is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Id.* at 1281.

The very same is true here. In *Abrahim-Youri*, this Court concluded that those who "engage in international commerce" do so pursuant to a type of implied license and that certain "sticks in the bundle of rights" are subject to "constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights." 139 F.3d at 1468. Again, the United States has "repeatedly exercised its sovereign authority" to settle claims

against foreign governments, *Belk*, 858 F. 2d 706, "[a]t least since 1799." *Dames & Moore*, 453 U.S. at 678-79. Thus, "[w]hen tensions arise between our nation and another, those caught in the middle must rely on the President to safeguard their lives and property to the greatest extent possible. This may mean that others who have claims against the foreign sovereign may be blocked from seeking to collect their debts so that international tensions will not be exacerbated." *Shanghai Power*, 4 Cl. Ct. at 244. And "in times of emergency, it is frequently fortuitous who will benefit and who will suffer from any such presidential action. The possibility that the President will intervene in this manner is properly recognized as both a shared benefit and shared risk of those who trade and travel abroad." *Id.* *Lingle* does not overturn these cases.

In any event, Aviation was not singled out by the settlement with Libya – the actions that it complains of applied universally to all individuals and corporations. After the LCRA was enacted (and the certification by the Secretary of State was made), no individual or corporation could sue Libya in the United States for terrorism-related conduct. Similarly, the actions of the Commission cannot be said to have singled out Aviation. Aviation fails to cite *any* foreign corporation that received compensation through the Commission. That is not surprising given the Commission's limited jurisdiction over claims "of the Government of the United States *or of any national of the United States*. . . ." 22 U.S.C. § 1623(1). This

statute applies equally to all individuals and corporation – it does not single out Aviation.

And as explained above, even with respect to United States companies, the Commission has applied a long-standing rule of international law requiring that any company seeking compensation demonstrate continuous nationality. Indeed, "generally accepted principles of international law and practice require that a claim be continually owned from the date the claim arose and at least to the date of presentation by nationals of the state asserting them." *Juda, et al. v. United States*, 13 Cl. Ct. 667, 685 (1987) (citing 8 M. Whiteman, Digest of International Law, 1234, 1241 (1970)); *see also* Appx458-61. Again, Aviation acknowledges that this result was expected. Appx997-98. This rule applies to all claims before the Commission – not only Aviation's claims.[8]

This analysis parallels *Rose Acre*, in which this Court held that egg producers were not singled out by regulations that restricted egg sales and caused the loss of egg-laying chickens that tested positive for salmonella bacteria. 559 F. 3d 1260. The Court concluded that "the undisputed facts indicate that the . . . regulations did not single out Rose Acre. Instead, the enacted rules broadly

[8] Aviation's view – that they are entitled to judicial relief because they did not receive compensation from the Commission – would also allow parties to circumvent the fact that decisions of the Commission are not subject to judicial review. 22 U.S.C. § 1623(h).

applied to almost any egg producer in the United States." *Id.* As explained above, the very same is true here. The LCRA, the Commission's jurisdictional statute, and the Commission's application of the continuous nationality rule applied equally to all entities seeking compensation.

D. The Economic Impact Of the Government's Actions Is Speculative

With respect to the economic impact of the Government's actions, the claims themselves do not have any definite value. Thus, any economic value Aviation allegedly lost in its legal claims is speculative. *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) ("[A]ny economic impact based on the loss of causes of action is somewhat speculative . . . [and thus] the projected economic impact on [the plaintiff] is not sufficiently concrete to establish a taking.").

The trial court rightly emphasized that "the value of Plaintiffs' loss of its causes of action does not have a definite value and thus is speculative." Appx6. The court also explained that it was "skeptical" that Aviation could have collected on any judgment. *Id.*

The trial court is right. Whether Aviation could have pursued a claim against Libya to final judgment and actually collected on the judgment is purely speculative. *See Sperry v. United States*, 493 U.S. 52, 63 (1989) ("Had the President not agreed to the establishment of the [Iran-U.S. Claims] Tribunal and the Security Account, Sperry would have had no assurance that it could have

pursued its action against Iran to judgment or that a judgment would have been readily collectible."); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d at 49 ("[a] number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments . . . ."); *Shanghai Power*, 4 Cl. Ct. at 244 ("It is frequently very difficult to obtain justice from foreign nations, even when the claim is a strong one."); *Alimanestianu*, 2016 WL 7488355, at *8 ("It is speculative whether Plaintiffs would have secured any recovery from Libya absent the Government's espousal and settlement of their claims."). Moreover, as explained above, nothing the United States did affects Aviation's ability to pursue its claims in foreign countries or seek resolution of its claims through foreign governments.

In response to the trial court's holding, Aviation argues that Congress passed certain legislation that would have increased the likelihood of it recovering on any judgment. App. Br. at 44-49. But Aviation focuses on recent developments – it even acknowledges that "obstacles" to recovery of judgments against foreign states existed as late as 2008, when the LCRA was enacted and its claims were dismissed, and that, in response, Congress passed legislation to assist with recovery. *Id.* at 45-46. And Aviation's argument is premised on the fact that it obtained a default judgment against Libya's co-defendant, Syria – who did not actively participate in the district court litigation. Appx250, Appx572-575.

Aviation also contends that the central inquiry is the reduction in the value of its property – that is, it asserts that the Government reduced the value of its claims to zero so it does not matter what the actual value of its claims is. As an initial matter, Aviation is incorrect that the Government has eliminated the entire value of its claims against Libya. Because the Government did not espouse its claims and because Aviation may still seek relief through its home country, it still may obtain compensation from Libya.

Moreover, inherent in an analysis of the economic impact of the Government's actions is the nature of the property at issue. As explained above, Aviation's purported property – its legal claims – is inherently speculative. Evaluating the impact of the Government's actions on that property must account for that fact. Put another way, the economic effect of the Government's actions must consider the underlying value of the property interest.

Aviation next challenges the trial court's citation to *Pink* and S*hanghai Power* for the proposition that "the Government has no constitutional obligation to act as a collection agent on Plaintiffs' behalf." Appx6 (citing *Pink*, 315 U.S. at 228, and *Shanghai Power*, 4 Cl. Ct. at 244). Aviation asserts that the trial court ignored the fact that it was "pursuing the wrongful death claims of U.S. nationals in which [it] has a subrogation interest." App. Br. at 39. Aviation, however, ignores that those nationals were presumably eligible for (and received payment

from) the settlement proceeds. Thus, Aviation was not pursuing the interests of United States nationals when it sued Libya – it was attempting to recover on its own behalf. Aviation also asserts that, unlike here, in *Pink*, the claims of foreign nationals were not terminated. App. Br. at 40. But Aviation would require that, if the United States revokes a foreign country's sovereign immunity, even for a short period of time, it then bears full responsibility for paying any claims against that country, even if brought by a foreign entity, should that immunity be reinstated. Such a result is plainly untenable. And again, it would be irrational if the Fifth Amendment were construed to allow the President to espouse the claims of United States nationals held hostage by Iran, but prohibit him from taking the lesser step of precluding foreign insurance companies from pursuing legal claims in United States courts. Thus, the Supreme Court in *Pink* concluded that "[t]here is no Constitutional reason why this Government need act as the collection agent for nationals of other countries . . . ." 315 U.S. at 228.

Similarly, Aviation's attempt to distinguish *Shanghai Power* because the plaintiffs in that case "were paid millions of dollars through the settlement process, even though no court had jurisdiction over those claims in the United States," is unavailing. App. Br. at 41. Again, the plaintiffs in *Shanghai Power* were United States corporations and received only a small fraction of the value of their claims. 4 Cl. Ct. at 239. But still no taking was found. *Id.* at 249.

Aviation also claims that the trial court assigned "virtually no weight" to the fact that it was not provided an alternative forum to bring its claims. But the trial court rightly cited this Court's holding in *Belk* that the fact that a settlement with a foreign country does not provide an alternative forum "is not sufficient to establish a taking." Appx5 (citing *Belk*, 858 F. 2d at 709). Moreover, under Aviation's logic, so long as the Government provides access to an alternative forum, even if that forum provides minimal payment (even one dollar), then no taking can occur. This makes little sense as a practical matter.

Finally, policy considerations and equity and justice weigh heavily in favor of the conclusion that no taking occurred. A contrary ruling would effectively mean that, to settle claims against a foreign country, the United States would be required to pay for any claim brought in United States courts against that country – even claims of foreign nationals or corporations. "The American government should not be held as a surrogate for [another country's] unjustifiable actions." *Belk v. United States*, 12 Cl. Ct. 732 (1987); *see also Abrahim-Youri v. United States*, 36 Fed. Cl. 482 (1996) ("The property losses that plaintiffs suffered were occasioned by Iran, not the United States."). And holding that a taking occurred might significantly alter the judgment of the President in reinstituting relations with a foreign country.

Accordingly, the United States did not "take" Aviation's purported property interest.[9]

IV. This Case Is Not Justiciable

"Even if a court possesses jurisdiction to hear a claim, when that claim presents a nonjusticiable controversy, the court may nevertheless be prevented from asserting its jurisdiction." *Roth v. United States*, 378 F.3d 1371, 1385 (Fed. Cir. 2004). Aviation's attempt to second-guess the President's authority to settle its claims invokes non-justiciable political questions. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

The President's authority for the settlement agreement with Libya is beyond question and is a quintessential example of the exercise of the President's broad constitutional powers in foreign affairs. *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same). Indeed, the Supreme Court has long acknowledged the President's

[9] Aviation contends in the last three pages of its brief that whether the United States taxpayer or Libya should be required to compensate it is irrelevant. Of course, the very question before this Court is whether the United States should be required to compensate Aviation. The trial court's questions concerning the status of the settlement fund were certainly reasonable, but they did not form the basis of its decision. Regardless, Aviation's suggestion that a new settlement fund be created and that its claims be sent to the Commission is not before this Court. The Commission would lack jurisdiction over those claims anyway.

authority specifically with respect to espousal of the claims of United States nationals against foreign states. *Dames & Moore*, 453 U.S. at 679-80 ("the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries . . . . [T]here has also been a longstanding practice of settling such claims by executive agreement. . . ."); *see also Shanghai Power*, 4 Cl. Ct. at 244 ("Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799.").

This Court's decision in *Belk* – that cases like this are not justiciable – parallels this case. There, former hostages sued the United States for a taking of their claims against Iran. Plaintiffs' complaint in that case was with the "implementation of the Algiers Accords." *Belk*, 858 F. 2d at 710. This Court concluded that the case was not justiciable because "[t]he determination whether and upon what terms to settle the dispute with [another country] . . . necessarily was for the President to make in his foreign relations role." *Belk*, 858 F.2d at 710.

The same is true here – Aviation challenges the Executive Branch's implementation of the settlement with Libya – that is, the decision not to make provision for them under that settlement. Moreover, in *Belk*, the plaintiffs were seeking compensation for a taking – the President had already espoused and settled their claims – yet this Court concluded that the case was not justiciable.

This rationale applies with equal force in this case, because Aviation's claims would involve inquiry into the heart of the President's conduct of foreign relations in resolving disputes with Libya through the settlement agreement. *See*, e.g., Appx994 ("[B]eginning in and around 2007, the United States, in furtherance of its stated public policy of 'normalizing' relations between the United States and Libya . . . began a coordinated effort to take Plaintiffs' claims.").

In its complaint, Aviation asserts that the President's Executive Order required the "Secretary of State to establish procedures to compensate those United States nationals for their terminated claims" but "provided no such parallel procedure for the claims of foreign nationals." Appx995. Thus, an inquiry into the jurisdiction of the Commission in these circumstances would directly implicate the settlement agreement with Libya and the President's decision regarding provision for the claims under that agreement. And by focusing on prior settlement agreements with foreign countries, Aviation's brief to this Court makes perfectly clear that it is challenging the structure of the settlement with Libya.

Further, the *Belk* Court cited *Shanghai Power* as support for its holding. There, the court explained:

> A judicial inquiry into whether the President could have extracted a more generous settlement from another country would seriously interfere with his ability to carry on diplomatic relations. As the Supreme Court has recognized, secrecy lies at the very heart of the President's ability to conduct foreign relations. *Curtiss-*

> *Wright*, 299 U.S. at 320 . . . . Recognition of a cause of action for a fifth amendment taking on the basis of the President's settlement of a private claim would implicate many of these [secrecy and foreign relations] concerns. Any party dissatisfied with the settlement of its claim by the President would then seek to probe into the thought-processes of our negotiators, perhaps even of the President, to establish what they had in mind when they struck the deal. At issue in such a lawsuit would be the entire spectrum of dealings between our country and another to determine whether a concession in the settlement agreement resulted in some collateral benefit to the United States. It is difficult to imagine a less appropriate or more intrusive exercise of judicial power.

4 Cl. Ct. at 248-49; *see also Belk v. United States*, 12 Cl. Ct. 732, 735-36 (1987) (holding that plaintiffs' claim, which alleged that a taking occurred when the United States entered into the Algiers Accords with Iran and extinguished plaintiffs' claims, was not susceptible to judicial review).

Further, a determination that the United States engaged in a taking in this case may have the effect of requiring the United States, in any future claims settlement agreement with a foreign sovereign, to pay compensation to persons who were engaging in litigation against that sovereign but who were excluded from the settlement. This prospect might discourage the United States from making future settlements, even when they are in its foreign policy interests, or may effectively require the United States to negotiate larger settlements, which could prove impossible or politically costly. Such a determination would also, in a sense, have the effect of making the United States indirectly responsible for

Libya's conduct. "The American government should not be held as a surrogate for [another country's] unjustifiable actions." *Belk*, 12 Cl. Ct. at 735; *see also Abrahim-Youri*, 36 Fed. Cl. at 487 ("The property losses that plaintiffs suffered were occasioned by Iran, not the United States."). In other words, the rule Aviation seeks could have serious consequences in matters of foreign policy for which there are no judicially manageable standards.

The trial court disagreed with us with respect to justiciability. In denying our motion to dismiss, it distinguished *Shanghai Power* because, it asserted, Aviation does not dispute the amount negotiated by the Government in its settlement with Libya. Appx236. But again, a holding that a taking occurred would require the Government to include claims, like Aviation's, in any settlement, or to provide less payment to United States nationals from the settlement. The trial court also held that, "[i]f the Government had included them in the [Commission's] jurisdiction, Plaintiffs may have been forced to accept reduced value for their claims, and any claim for a better deal would likely be non-justiciable." Appx236. But the considerations cited in *Belk* and in *Shanghai Power* apply regardless of whether a party is included in the Commission's jurisdiction. Indeed, in *Belk*, no alternative forum was provided. With respect to justiciability, Aviation's claim is no different from those in *Belk* and *Shanghai* – it believes that the United States should have extracted a more generous settlement

with Libya, which may have resulted in Aviation receiving compensation from the settlement.

Accordingly, this case is not justiciable.

CONCLUSION

For these reasons, the Court should affirm the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Defendant-Appellee's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This Brief was printed in Times New Roman font at 14 points. According to the word-count calculated by Microsoft Word, this brief contains a total of 13,223 words, which is within the 14,000 word limit.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 5th day of January, 2017, a copy of the foregoing Brief

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