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CHAPTER 8

International Claims and State Responsibility

A. HOLOCAUST-ERA CLAIMS

The United States filed a statement of interest in *Scalin et al. v. SNCF*, No. 15-cv-3362 (N.D. Ill.), in 2015. See *Digest 2015* at 311-18. On March 23, 2018, the court issued its opinion, dismissing all claims. The court’s opinion is excerpted below. The court found that the plaintiffs could pursue remedies in France, through the Commission for the Compensation of Victims of Spoliations Resulting from the Anti-Semitic Legislation in Force During the Occupation (“CIVS”) and therefore had not exhausted their domestic remedies.

* * * *

In addition to the papers filed by the parties, the United States has submitted a statement of interest pursuant to 28 U.S.C. § 517, supporting dismissal of this lawsuit on the following grounds: (1) *forum non conveniens*, (2) principles of international comity, (3) failure to exhaust domestic remedies, and (4) lack of subject-matter jurisdiction (due to Plaintiffs’ failure to plead adequately the nexus required by the FSIA’s expropriation exception). In general, the United States has supported the dismissal of Holocaust-related claims in U.S. courts in favor of resolution of those claims through mechanisms established through dialogue, negotiation, and cooperation. The statement notes that the United States is supportive of the programs established by France to “provide a redress process and compensation for victims in a manner that serves the vital interest of compensating Holocaust victims more quickly and efficiently than the litigation process.” (U.S. Stmt. of Interest at 13, Dkt. No. 63.)

At the end of 2014, the United States and France signed an executive agreement (the “2014 Executive Agreement”) designed to expand upon a French pension program pursuant to

which pensions are paid to surviving Holocaust deportees and their spouses. While not directly relevant to the claims at issue here,⁶ the United States notes that:

The objectives and obligations set forth in the 2014 Executive Agreement underscore the continuing commitment of France to provide compensation for and resolve Holocaust-related claims, the United States' interest in seeking a resolution of such claims outside of judicial proceedings in the United States, as well as the recognition by both countries that the CIVS, the French deportation compensation programs, and the program for Americans created by the Agreement are the exclusive mechanisms through which Holocaust deportation claims against France can best be resolved.

(*Id.* at 7.) The United States takes the position that CIVS provides Plaintiffs and other similarly-situated individuals with an adequate remedy for takings claims against SNCF. The statement of interest generally supports SNCF's portrayal of CIVS as a fair program that provides comprehensive relief to a broader class of victims than would be possible in U.S. judicial proceedings. Overall, it is the position of the United States that CIVS is an available and adequate alternative forum and that both public and private interests weigh in favor of Plaintiffs utilizing that forum.

Plaintiffs argue that the U.S. government's statement of interest does not merit deference, in part, because it suggests four legal (as opposed to policy-driven) grounds for dismissal and does not argue that U.S. policy interests provide an independent basis for dismissal. According to Plaintiffs, no cognizable interest of the executive branch would be adversely affected by the continuation of this litigation, nor would proceeding with this lawsuit interfere with the 2014 Executive Agreement between the United States and France. In addition, Plaintiffs contend that in its endorsement of CIVS, the United States adds no new information, no direct evidence, no independent verification, and no relevant declarations to strengthen its position. SNCF, on the other hand, argues that the United States'[] long-standing policy of recognizing French compensation programs as the exclusive fora for the resolution of claims such as those at issue here warrants particular weight.

Finally, an amicus brief in support of SNCF's motion to dismiss has been filed by the Conseil Représentatif des Institutions Juives de France ("CRIF"), an umbrella organization consisting of over 60 institutions representing the Jewish community of France. According to its motion to intervene, CRIF has played a prominent role in advancing the interests of Holocaust victims and survivors as well as their descendants. CRIF's brief notes that a fundamental principle of the French compensation programs is that "the French Republic is responsible for reparation for the consequences of the atrocities committed on French Territory" during the Nazi occupation. (CRIF Am. Br. at 2, Dkt. No. 20-1.) CRIF takes the position that the programs implemented by France are quite satisfactory and are actually broader and more generous than those established by other European countries. With respect to CIVS, CRIF asserts that compensation is available for any theft effectively perpetrated on French territory irrespective of the people involved and the methods used. CRIF views the Commission as suitable, fair, and effective and believes that it has consistently provided just and benevolent compensation. CRIF's brief reiterates that that CIVS considers claims without any statute of limitations and irrespective of the nationality of the Holocaust deportees or their descendants.

⁶ It is undisputed that the 2014 Executive Agreement does not cover Plaintiffs' claims.

Taking all of the above into consideration, the Court sees no “legally compelling reason for [P]laintiffs’ failure to exhaust [French] remedies, such that the domestic exhaustion rule should not bar their claims.” *Abelesz*, 692 F.3d at 682. The Court will assume that French courts are closed to Plaintiffs’ claims, as SNCF has not presented any convincing argument to the contrary. With respect to CIVS, however, Plaintiffs have failed “to show convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged.” *Id.* at 681 (citing Restatement (Third) of Foreign Relations Law § 713 cmt. f).

First, Plaintiffs’ contention that their claims are not eligible for CIVS compensation has been flatly refuted by the Chairman of the Commission. In his supplemental declaration, Jeannoutot unequivocally states that if the property of Plaintiffs’ relatives was seized during the boarding of, or while aboard, SNCF trains in French territory, CIVS is willing and competent to hear the claims and recommend compensation. The statement of interest submitted by the United States and the amicus brief submitted by CRIF both support Jeannoutot’s position. And while CIVS’s 2014 annual report does not list property taken during deportations as a category of damages for which the Commission may provide compensation, there is no indication that the listed categories are exhaustive or that Plaintiffs’ claims could not be considered to fall within the “confiscation of money during internment at a camp” category.

While it appears that the Commission has not awarded compensation for any SNCF-related claims to date, there is no evidence to suggest that such is the case for jurisdictional or eligibility, as opposed to factual, reasons. The lack of such claims may be because there is no evidence (in the possession of potential claimants or in the archives consulted by CIVS) that SNCF expropriated deportees’ property—not because if SNCF did so, CIVS would not compensate claimants appropriately. That claims against SNCF may be novel does not necessarily lead to the conclusion that they are ineligible for compensation. And the fact that others have not submitted similar claims does not excuse Plaintiffs from having to exhaust available domestic remedies themselves. However, if Plaintiffs attempt to seek compensation from CIVS “and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims.” *Fischer*, 777 F.3d at 865–66.

Second, that CIVS is a non-judicial forum and does not operate exactly as a U.S. court—with rules of evidence, subpoena powers, etc.—does not mean that it is inadequate. The Seventh Circuit has held that Plaintiffs must exhaust domestic remedies; nowhere has the court stated that such remedies must be judicial in nature. *See Abelesz*, 692 F.3d at 684 (“[T]here is no reason for U.S. courts to take up these claims without a persuasive showing that Hungarian law is unresponsive.”) (emphasis added). *See also Fischer*, 777 F.3d at 855 (“[I]nternational law favors giving a state accused of taking property in violation of international law an opportunity to redress it by its own means, within the framework of its own legal system before the same alleged taking may be aired in federal courts.”) (internal citation and quotation marks omitted). As the Seventh Circuit has explained:

An alternative forum is adequate if it provides the plaintiff with a fair hearing to obtain some remedy for the alleged wrong. It is not necessary that the forum’s legal remedies be as comprehensive or as favorable as the claims a plaintiff might bring in an American court. Instead, the test is whether the forum provides some potential avenue for redress for the subject matter of the dispute.

Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund, 589 F.3d 417, 421 (7th Cir. 2009) (in the related context of *forum non conveniens*) (internal citations omitted). That is exactly what CIVS does: it provides a potential avenue for redress for Plaintiffs' claims. Actual redress need not be guaranteed; there are obvious reasons that cannot be the standard. Plaintiffs' assertions suggesting otherwise—for example, that 15% of claims are rejected—are unpersuasive.

Moreover, none of the asserted procedural obstacles deny relief to the extent that plaintiffs can claim that France provides no remedy at all. *See Fischer*, 777 F.3d at 861. The *Abelesz* court, after holding that exhaustion of domestic remedies is required before a plaintiff may assert a claim for expropriation in violation of international law, remanded the case to the district court with instructions that the plaintiffs either exhaust any available Hungarian remedies or present a legally compelling reason for their failure to do so. On remand, “the district court held that [certain] non-judicial remedies ‘were not truly available to Plaintiffs due to the time and circumstances surrounding the application for such remedies and certain limitations placed on recoveries under such remedies.’” *Id.* at 860 (quoting *Fischer v. Magyar Allamvasutak Zrt.*, No. 10-cv-00868, 2013 WL 4525408, at *1 (N.D. Ill. Aug. 20, 2013)). Whether those non-judicial remedies were adequate was not an issue on appeal. *See id.* With respect to judicial remedies, the Seventh Circuit noted that the plaintiffs had “not established that procedural rules would arbitrarily or unreasonably bar their claims” or “that structural or political circumstances would prevent Hungarian courts from providing a fair and impartial hearing for th[o]se claims.” *Id.* at 860. Here, Plaintiffs have not shown that CIVS remedies are not truly available to them, that the Commission's rules would arbitrarily or unreasonably bar their claims, or that structural or political circumstances would prevent them from receiving a fair hearing.

With respect to the time and circumstances surrounding the application for CIVS compensation, Plaintiffs submit that it takes approximately three to five years to obtain a decision from the Commission, and approximately eight months after that to receive payment. Fraenkel's declaration states that it is not unusual for certain claimants to wait eight years to be indemnified. There is no doubt that eight, or even five, years is a long time, especially in this context where, as Plaintiffs' highlight, many claimants are elderly. But litigation in U.S. courts can drag on for just as long, if not longer. Moreover, CIVS was established in 1999. Plaintiffs waited over fifteen years to bring their claims, which undermines any assertion that the CIVS process is unreasonably prolonged. *See Abelesz*, 692 F.3d at 683 (rejecting plaintiffs' argument that any presently available Hungarian remedy was unreasonably prolonged, and noting that plaintiffs waited until 2010 to file their complaints in the United States.).

Nor do the purported limitations on recoveries cited by Plaintiffs show CIVS compensation to be “so clearly inadequate so as to provide no remedy at all.” *Fischer*, 777 F.3d at 867. *See also Abelesz*, 692 F.3d at 685 (“[D]omestic Hungarian remedies need not be perfectly congruent with those available in the United States to be deemed adequate.”) First, as noted above, there are no actual limitations on the amount of compensation the Commission may award. Second, Plaintiffs have failed to provide convincing support for their contention that the Commission's awards are arbitrary and subjective. Indeed, they point only to one example in which the panel did not follow the recommendation of the rapporteur. Moreover, the same might be said of jury awards in the U.S. judicial system. Jury verdicts are certainly not predictable, and the parties do not get complete transparency into the jury's decision-making with respect to damages awards. That does not mean the system is broken. Finally, Plaintiffs assert that the compensation awarded is often substantially below current market value. Again, there is little evidence in the record to support that statement. And, as noted above, in at least one case, the

Commission awarded compensation above and beyond what the claimant sought. An adequate alternative forum does not mean that recovery is guaranteed, much less that *full* recovery is guaranteed. In sum, “Plaintiffs have not shown that the remedies identified by [SNCF] are illusory.” *Fischer*, 777 F.3d at 861.

Nor have Plaintiffs identified any procedural rule that would unfairly bar their claims. There is no statute of limitations or deadline for the submission of claims. With respect to the parties’ dispute over good faith versus detailed and specific proof, even if it is true that some element of archival or other proof is required, that falls short of the preponderance of the evidence standard that would be applied here. In that respect, CIVS does apply relaxed evidentiary standards that would inure to Plaintiffs’ benefit. Finally, there is no indication that structural or political circumstances in France would prevent the Commission from giving Plaintiffs a fair hearing. Plaintiffs note that American claimants “do not have any faith in a quasi-independent commission in a country that let them and their relatives to be sent to the gas chambers.” (Pls.’ Resp. to U.S. Stmt. of Interest at 11, Dkt. No. 70.) The Court certainly understands that sentiment, but the Seventh Circuit has held that similar concerns “are too speculative to override the norm of requiring exhaustion of domestic remedies before resorting to foreign courts.” *Fischer*, 777 F.3d at 847. *See also id.* at 860 (“[P]laintiffs have offered explanations for their understandable doubts about the ability of Hungarian courts to treat them fairly. We believe, however, that in the face of uncertainty, international comity requires that those courts be given the first opportunity to hear the claims rather than have foreign courts assume the worst about them.”)

The Court’s decision here is consistent with that of the district court in *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff’d sub nom. Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App’x 939 (2d Cir. 2010). In *Freund*, which addressed claims virtually identical to those brought here, the court found that the FSIA’s expropriation exception was inapplicable (and that SNCF was therefore entitled to sovereign immunity) because the plaintiffs had not adequately alleged that the expropriated property (or any property exchanged for such property) was owned or operated by SNCF. *Id.* at 561.9 However, the court held that even if it had subject-matter jurisdiction pursuant to that exception, “the circumstances of the case would make abstention on justiciability grounds appropriate.” *Id.* at 564. In its discussion of principles of international comity, the *Freund* court explicitly concluded that the reparations programs in France, including CIVS, were “appropriate and adequate alternative fora for the pursuit of the eligible Plaintiffs’ claims.” *Id.* at 576. In so finding, the court rejected the plaintiffs’ objections based on the administration of CIVS—in which they pointed to instances of arbitrary or biased decision-making, denials of representation, delays in claims processing, erroneous compensation calculations, and the futility of appellate review—finding that those objections were based more on anecdotes than systemic defects. *Id.* The court noted that, “while the CIVS process unquestionably diverges from United States litigation procedures,” “such was the intention of its creators, who wished to focus on flexible and expedient recovery for as broad a class of victims as possible.” *Id.* at 577–78. Plaintiffs here have failed to differentiate this case from *Freund* or to convince the Court that it should hold differently.

Finally, the United States has made clear its position that CIVS is not only an available and adequate alternative forum, but that it is meant to provide the exclusive remedy for claims such as Plaintiffs’ claims. Regardless of whether the executive branch’s views merit special deference, they are certainly entitled to some consideration. *Cf. id.* at 576 (“The Executive’s

views are entitled to particular deference where, as here, it chooses ‘to express its opinion on the implications of exercising jurisdiction over particular [parties] in connection with their alleged conduct ...’”) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004)). Moreover, this Court agrees that the government’s position is “bolstered by the fact that the United States [] continues to engage in diplomatic efforts aimed at supporting and improving these alternative fora.” *Id.* at 569. While the 2014 Executive Agreement has no direct impact on Plaintiffs’ claims, the fact that the United States and France continue to work together to enhance the French compensation programs suggests that to allow these claims to proceed in this forum would undermine, or potentially interfere with, the two countries’ efforts to create programs that are more effective and efficient than litigation.

In sum, based on the record, the Court finds that Plaintiffs’ concerns about CIVS are based more on speculation and anecdotal evidence than any true structural or procedural defect that makes the process clearly inadequate. Many of the complaints about CIVS voiced by Plaintiffs might also be directed toward the U.S. judicial system. In fact, there appear to be many aspects of the Commission’s framework that arguably make it a more favorable forum for Plaintiffs’ claims than this Court. The basic argument put forth by Plaintiffs is that the recommendations of CIVS are not always equitable and the indemnification that it provides is not always adequate. That very well may be true. But if that were the applicable standard, what alternative forum would meet it? CIVS may not be perfect, but that does rise to a legally compelling reason for Plaintiffs’ failure to exhaust its remedies.

...Because CIVS is the appropriate forum for Plaintiffs’ claims, at least in the first instance, SNCF’s motion to dismiss is granted and Plaintiffs’ complaint is dismissed without prejudice. *See Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 701 (7th Cir. 2015) (“A dismissal for lack of subject[-]matter jurisdiction is not a decision on the merits, and thus cannot be a dismissal with prejudice.”) (internal citation omitted).

* * * *

On April 24, 2018, plaintiffs in *Scalin* filed a notice of appeal to the U.S. Court of Appeals for the Seventh Circuit. The U.S. brief in the court of appeals is discussed in Chapters 5 and 10 of this *Digest*.

B. IRAN CLAIMS

On January 1, 2018, Professor Nicolai Michel of the University of Fribourg was appointed as a Member of the Iran-United States Claims Tribunal (“Tribunal”), and assumed the role of President. Professor Michel replaced President Hans van Houtte, who submitted his resignation in June 2017.

On February 20, 2018, U.S.-appointed Tribunal Judge David Caron died. To replace Judge Caron, the United States appointed Sir Christopher Greenwood, QC. Judge Greenwood previously served as a judge on the International Court of Justice, as an arbitrator on numerous arbitration panels, and as a professor of international law at the London School of Economics.

In February 2018, the Tribunal began a series of hearings on Case B/1 (Claims 2 and 3), pertaining to Iran's former Foreign Military Sales program. Hearings in Case B/1 were scheduled to continue through June 2019.

C. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC

The Foreign Claims Settlement Commission ("FCSC") began issuing decisions in 2016 in the Second Iraq Claims program, which was established by a referral dated October 7, 2014, from the State Department's Legal Adviser under a 2010 claims settlement agreement between the United States and Iraq. As of December 31, 2018, the total value of awards issued was \$109,145,000. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16. The following discussion focuses on some of the more noteworthy decisions in 2018.

1. Claim No. IRQ-II-066, Decision No. IRQ-II-230 (2018) (Proposed Decision)

This claim under Category A of the Referral was denied on the basis that the claimant failed to provide sufficient evidence that he was "seized or detained" as required under the Commission's hostage-taking standard. The Commission's analysis of this issue includes a discussion of the weight given to written statements under international law. The Commission also concluded that claimant had failed to provide any evidence that Iraq detained him "in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release[,]" a required element of the Commission's standard for hostage-taking under international law. Excerpts follow from the decision.

* * * *

(2) Hostage-taking: To satisfy the hostage-taking requirement ..., Claimant must show that Iraq (a) seized or detained him and (b) threatened him with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for his release. Claimant fails to satisfy this standard for two reasons: (i) the evidence he has submitted is insufficient to meet his burden to show that he was in fact seized or detained on January 13, 1991, as he alleges; and (ii) Claimant has failed even to allege, let alone establish, that the reason for any alleged seizure or detention by Iraq was "to compel a third party ... to do or abstain from doing any act as a condition for his release."

(i) Claimant's failure to meet his burden to prove the facts he alleges.

The Commission's regulations place the burden to establish the facts on the Claimant who makes the allegations. Here, the only evidence Claimant has submitted all comes either directly from Claimant's own recent statements (all but one of which appear to have been unsworn) or from descriptions in medical records that also appear to have been based solely on Claimant's own narration of the events. In short, Claimant's evidence appears to consist solely of Claimant's own statements.

This evidence is insufficient to establish that Claimant was in fact seized or detained at the Baghdad airport as he alleges. Where, as here, a claim relies heavily on written statements, the Commission considers certain factors in determining how much weight to place on them. These may include, for example, the length of time between the incident and the statement and whether the declarant is a party interested in the outcome of the proceedings. Unsworn statements will generally carry very little weight, and sworn statements will not carry much weight unless there has been an opportunity for cross-examination. In such cases, live, compelling testimony by the claimant under oath can do much to support a claim. The clarity and detail of the declarations should also be considered, as should the existence of corroborating declarations and other evidence.

Based on these factors, Claimant's assertions are insufficient to prove that he was in fact seized or detained. For one, the Claimant is clearly a party interested in the outcome of the proceedings, and at this stage, the Commission has not had the benefit of cross-examination. Moreover, Claimant's statements contain very little detail and are not entirely consistent. In his own sworn statement, he indicates that he escaped with the help of a relative after his Baath Party interrogators "left the room for [some] reason...." However, in a 2014 report on Claimant's medical conditions, Dr. Mohammed Ali Al-Bayati makes reference to the Iraqi secret agents "allowing him to [board] the plane to fly to Jordan[.]" This very different version of events—with the Iraqi officials "allowing him" to leave—appears to be based on the story as recounted to the doctor by Claimant himself. Claimant's own statements are therefore unclear as to whether he escaped from his alleged interrogators or whether they let him go. This inconsistency clearly undermines the reliability of Claimant's assertions.

Moreover, Claimant has not submitted *any* independent evidence, such as his then-valid U.S. passport containing entry and exit stamps, government records, newspaper articles, or relevant statements from non-interested third parties. To be sure, he does claim to have sought additional evidence, but even so, his claim rests solely on his own assertions. These statements are insufficient to prove that Claimant was in fact seized and detained by Iraq. Claimant has therefore failed to satisfy his burden of proving that he was held hostage by Iraq in violation of international law.

(ii) Claimant's failure to allege or establish that Iraq acted in order to compel a third party to act or abstain from acting as a condition of his release.

Even if all of Claimant's allegations were true, Claimant would still have failed to establish that Iraq took him hostage. Claimant's allegations amount only to a potential claim of improper detention, not a claim of hostage taking. The standard for hostage taking under Category A requires that Claimant show not just that Iraq seized or detained him, but also that Iraq did so "in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release." Claimant has made no such allegation here.

* * * *

2. Claim No. IRQ-II-069, Decision No. IRQ-II-045 (2018) (Final Decision)

This claim under Category A of the Referral was denied on the basis that the claimant failed to prove that she was a U.S. national from the time of the alleged incident through the date of entry into force of the U.S.-Iraq Claims Settlement Agreement of

2010. The decision emphasizes that, under the International Claims Settlement Act, the U.S.-Iraq Settlement Agreement's requirement of continuous U.S. nationality is controlling. The claim was denied even though, under a separate U.S. law, the claimant was considered in hostage status and was eligible for U.S. government benefits because her daughter, who was also considered a hostage for purposes of that statute, was a U.S. citizen. Excerpts follow from the decision.

* * * *

Because Claimant has not requested an oral hearing, her objection relies entirely on her May 11, 2017 letter. In that letter, Claimant asks the Commission to reconsider its Proposed Decision, which was based on the fact that Claimant was not a U.S. national at the time of the alleged hostage taking. Claimant does not dispute, however, that she was not a U.S. national at the time of the alleged hostage taking and has not provided any evidence that she was a U.S. national at the time. In fact, she has not provided any new documentary evidence at all.

Claimant argues that the Commission failed to consider the benefits she claims were available to “Parents of American Minor Citizens” under Public Law No. 101-513, a 1990 statute that provided certain benefits to, among others, “United States nationals, or family members of United States nationals, who are in a hostage status in Iraq or Kuwait during the period beginning on August 2, 1990, and terminating on the date on which United States economic sanctions against Iraq are lifted....” Claimant further suggests that the Commission should not have relied on the Claims Settlement Agreement because it “contradicts” U.S. law by not taking into account the benefits available to her under Public Law No. 101-513. Claimant also points to a letter from the U.S. Department of State in which the Department allegedly “acknowledged” that she and her family were hostages. The letter, dated April 7, 1993, states that Claimant and other members of her family “were in hostage status beginning August 2, 1990,” and, further, that Claimant and her husband received hostage benefits under Public Law No. 101-513.^[1]^[SEP]

The argument Claimant appears to be making about Public Law No. 101-513 is incorrect. Public Law No. 101-513 does not affect this Commission's jurisdiction in any way. Rather, as we explained in the Proposed Decision, the Commission's jurisdiction in this program comes from the Secretary of State, who has statutory authority under the International Claims Settlement Act of 1949 (“ICSA”) to refer “a category of claims against a foreign government” to this Commission. The Secretary delegated that authority to the State Department's Legal Adviser, who then referred the category of claims at issue here to the Commission via the 2014 Referral. One of the threshold requirements for hostage-taking claims in this program is that the claim be brought by a “U.S. national.” As we noted in the Proposed Decision, the term “U.S. national” has a specific legal meaning that the Commission is bound to apply in deciding claims under the 2014 Referral. The ICSA requires the Commission first to “apply the ... provisions of the applicable claims agreement....” Here, the “applicable claims agreement” is the U.S.-Iraq Claims Settlement Agreement. That agreement states that “[r]eference to ‘U.S. nationals’ shall mean natural and juridical persons who were U.S. nationals *at the time their claim arose* and through the date of entry into force of this agreement.” Thus, applying the applicable provisions of the ICSA, the Commission's authorizing statute, the Commission must interpret the term “U.S. national” to mean a person who was a U.S. national at the time the claim arose. In this

case, the claim arose in August 1990. It is undisputed that Claimant was not a U.S. national at that time. She therefore does not meet the jurisdictional requirement under Category A of the 2014 Referral that the claim be brought by a U.S. national.^[1]^{SEP}

Public Law No. 101-513 is not relevant to the Commission's jurisdiction or the requirement that a claimant have been a U.S. national at the time the claim arose. The beneficiaries of Public Law No. 101-513 included "family members of United States nationals" who were not themselves "United States nationals." Therefore, even though a "family member[]" of [a] United States national[]" may have been eligible for benefits under Public Law No. 101-513, such a family member would not be eligible for compensation in the Commission's Iraq Claims Program unless he or she were also a "United States national" within the meaning of the Claims Settlement Agreement. In short, the relevant U.S. law is the Commission's own authorizing statute, the ICSA, which requires that a claimant in this program be a "United States national." Nothing in the Claims Settlement Agreement "contradict[s]" Public Law No. 101-513. The Claims Settlement Agreement defines "U.S. nationals," while Public Law No. 101-513, in contrast, provides benefits for a different group of individuals, including "family members of United States nationals." The fact that Public Law No. 101-513 granted benefits to family members of U.S. nationals has no bearing on *this* claims program, which is based on the 2014 Referral, which is in turn based on the Claims Settlement Agreement.

Finally, Claimant also appears to assert that the Commission should reconsider its decision because she experienced hardship during her ordeal in Kuwait and Iraq in 1990. Whatever hardship Claimant and her family faced during the Iraqi invasion and occupation of Kuwait, this does not give the Commission legal authority to decide the claim. Because the relevant law requires that Claimant have been a U.S. national at the time of the alleged hostage-taking, the degree of hardship Claimant suffered plays no role in the Commission's decision: The decision is based solely on the fact that Claimant was not a U.S. national at the time of the alleged hostage taking.

* * * *

3. Claim No. IRQ-II-318, Decision No. IRQ-II-027 (2018) (Final Decision)

This claim under Category A of the Referral was also denied on the basis that the claimant was not a U.S. national at the time of the alleged hostage-taking. Claimant argued that he should be treated as a U.S. national because, *inter alia*, he was eligible to become a U.S. national at the time; put his life at risk to rescue his U.S. national wife and children; and would otherwise be deprived of his right to bring a claim against Iraq. The Commission rejected all these arguments, citing its holding in earlier programs that U.S. nationality can be acquired "only by birth or by naturalization under the process set by Congress." Because claimant was not yet a naturalized U.S. citizen at the time of his alleged hostage-taking, the Commission had no jurisdiction over his claim.

* * * *

Even assuming that Claimant was eligible to become a U.S. citizen at the time of the alleged hostage-taking (August 1990), this would not be sufficient to establish U.S. nationality for our purposes here. It is a well-settled principle in the Commission's jurisprudence that U.S. nationality can be acquired "only by birth or by naturalization under the process set by Congress." We have previously recognized that this principle precludes a claimant from qualifying as a U.S. national merely because he has taken steps towards becoming a U.S. citizen or is otherwise eligible for U.S. citizenship. Thus, even assuming Claimant was eligible to become a U.S. citizen at the time of the alleged hostage-taking (August 1990), he would not qualify as a U.S. national for the purposes of the 2014 Referral.

Claimant's claim that he saved the lives of U.S. national family members who were escaping from Kuwait and Iraq is also insufficient to make him a U.S. national. To support this argument, Claimant cites the U.S. government practice of offering U.S. citizenship "to Iraqi citizens who...saved American lives during the Iraqi war." Yet, while there is evidence that shows the U.S. government offered Iraqi nationals who assisted the U.S. during the Second Gulf War special immigrant status that permitted them to apply for permanent residence, there is no evidence that these individuals were directly offered U.S. nationality for their efforts. More importantly, even if Congress had enacted a law offering U.S. nationality in that context, this would not be sufficient to establish that Claimant was a U.S. national for our purposes here. As we noted above, the only factor relevant in determining whether a claimant who was not a U.S. national at birth has acquired such nationality for the purpose of the 2014 Referral is the date of his "naturalization under the process set by Congress." Thus, because Claimant was not naturalized as a U.S. citizen in August 1990, he does not qualify as a U.S. national for our purposes here regardless of any assistance that he offered his U.S. citizen family members at that time.^[1] Claimant also appears to argue that, as the spouse of a U.S. national who suffered in captivity in Iraq, he is eligible for compensation in this program even though he was not a national of the United States at the time of the alleged hostage-taking. To support this argument, Claimant looks to the Commission's decisions in claims brought by the spouses of non-U.S. nationals. This jurisprudence, however, is unavailing. Claimant has not identified any claim in which the Commission has exercised jurisdiction over a non-U.S. national in a program such as this one that is governed by an international agreement or statute that requires the application of the continuous nationality principle. In such circumstances, the Commission has consistently maintained that it does not have the authority to make awards to those who fail to satisfy the continuous-nationality requirement.

Claimant contends that the Commission should nevertheless make an exception to the continuous nationality rule and treat him as a U.S. national because the Claims Settlement Agreement deprives him of his right to bring suit against Iraq. While Article V of the Agreement did require the U.S. government to "secure...the termination of any claim, suit or action, regardless of claimants' nationality, in U.S. federal or state court...and preclude any new claim, suit or action in any U.S. federal or state court," that provision applies only to courts in the United States; nothing in the agreement indicates that the U.S. government settled, espoused, or otherwise extinguished Claimant's claim. Moreover, any difficulty Claimant might face in obtaining compensation from Iraq because of his inability to bring suit in U.S. courts has no bearing on our determination of whether Claimant is a U.S. national within the meaning of the 2014 Referral and the Claims Settlement Agreement. As we have previously recognized in a claim brought by a non- U.S. national who similarly invoked the lack of a "future forum to press

its claim,” “the relevant...law is clear, and the Commission has no authority to change the law for policy reasons.”

* * * *

4. **Claim No. IRQ-II-081, Decision No. IRQ-II-238 (2018) (Final Decision)**

The Category A claimant in this case was a U.S. diplomat stationed at the U.S. Embassy in Kuwait City during the 1990 invasion and occupation by Iraq. In its decision, the Commission, citing the jurisprudence of various international tribunals and other sources, held that “diplomatic personnel may bring claims for hostage-taking under international law standards applicable during an armed conflict.” Excerpts follow from the Commission’s final decision.

* * * *

Claimant’s hostage-taking claim is based on the Iraqi government’s treatment of U.S. diplomats and other U.S. nationals employed by the U.S. government at the U.S. Embassy in Kuwait, and their dependents. Claimant’s allegations involve the period after Iraq invaded Kuwait on August 2, 1990, but before a U.S.-led coalition force joined with Kuwaiti forces in January 1991 to expel Iraq from Kuwait.

During the first few days after the invasion, the Iraqi government began seizing and detaining foreign nationals (including U.S. nationals) in Kuwait and relocating many of them to Baghdad against their will. When doing so, Iraq gave no indication that it intended to treat U.S. diplomatic personnel in Kuwait and their dependents any differently from U.S. nationals without official status. ...

On August 23, 1990, over 100 members of the embassy staff and their dependents left Kuwait in a diplomatic convoy, traveling for approximately 19 hours from Kuwait to Baghdad. As the convoy prepared to leave Baghdad early in the morning on August 24, 1990, Iraq informed State Department officials that a new regulation prohibiting the departure of embassy personnel from countries that had refused to close their embassies in Kuwait was in effect and that, as a result, the staff from the U.S. Embassy in Kuwait and their family members—who were now in Baghdad—would not be permitted to depart. Later that morning, Iraqi soldiers surrounded the U.S. Embassy in Kuwait and blocked access to the entrance and exit, preventing those remaining in the embassy from leaving.

Immediately after the diplomatic convoy was prevented from leaving Baghdad, State Department officials asked Iraq to release the Kuwait Embassy staff members and their dependents, but Iraq’s Foreign Minister at the time, Tariq Aziz, rejected this request. On the very next day, August 25, 1990, however, Iraq’s Ministry of Foreign Affairs informed State Department officials that the *dependents* of Kuwait Embassy staffers could leave. The following day, August 26, 1990, 55 dependents departed Baghdad for Turkey in another convoy. Three of the male dependents in this group, however, were not allowed to cross the Iraqi-Turkish border because they were not minors; these three were forced to return to the U.S. Embassy in Baghdad, where those Kuwaiti Embassy personnel who had not been allowed on the convoy to Turkey remained confined.

The State Department continued to raise concerns about Kuwait Embassy personnel and dependents who were confined in the U.S. embassies in Kuwait and Baghdad in meetings with Iraqi officials in September and October of 1990. ...

Despite these conditions, State Department officials consistently maintained that the U.S. would not close its embassy in Kuwait in response to Iraqi threats and illegal orders concerning, among other things, the departure of its embassy staff. Other countries whose diplomats Iraqi authorities also prohibited from leaving Kuwait adopted a similar policy, and, in late October 1990, the U.N. Security Council passed a resolution that called on Iraq to allow diplomatic and consular personnel to leave Kuwait and to rescind orders for the closure of foreign missions in Kuwait. Yet, Iraq continued to refuse to allow Kuwait Embassy staff members who were confined in the Baghdad and Kuwait embassies to depart, and most were not able to leave until after December 6, 1990, when Iraq authorized all foreign nationals remaining in Kuwait and Iraq to leave.

Claimant states that Iraq held her hostage from August 2, 1990, until December 13, 1990, a total of 134 days. Claimant asserts that she was one of the U.S. diplomats stationed at the U.S. Embassy in Kuwait when Iraq invaded ... on August 2, 1990. She claims that immediately after the invasion, she reported to her office at the U.S. Embassy. Claimant further states that she was not among those in the convoy of staff and dependents that traveled from Kuwait to Baghdad on August 23, 1990, and that she was on the Embassy's premises when Iraqi soldiers surrounded the compound the following day. Claimant contends that she remained confined in the U.S. Embassy in Kuwait until December 7, 1990, which she asserts was the date on which Iraq released all remaining foreign nationals in Iraq and Kuwait. Claimant flew out of Kuwait (via Baghdad, Iraq) on an evacuation flight chartered by the U.S. government on December 13, 1990.

Supporting Evidence

Claimant has supported her claim with, among other things, her sworn Statement of Claim, a copy of her U.S. passport, which contains an Iraqi exit stamp dated December 13, 1990, a declaration that describes the circumstances of her alleged detention and ultimate departure from Kuwait, a certificate of recognition that she received from an organization for her service in Kuwait from February 1990 to December 1990, a form signed on April 30, 1991, nominating her for a State Department award for her service in Kuwait, a certificate identifying her as a recipient of a different State Department award for her service after Iraq invaded Kuwait on August 2, 1990, and an article published in an undated and unidentified publication that does the same.

Claimant has also submitted a number of documents that provide background about the broader geopolitical situation during the First Gulf War in 1990-91, including some that relate specifically to the circumstances faced by U.S. nationals in Iraq and Kuwait at the time. These documents include statements from U.S. and Iraqi officials, resolutions of the United Nations Security Council, newspaper articles, a report from Amnesty International on human rights violations committed by Iraq in 1990, unclassified cables and a memorandum from the U.S. Department of State, and affidavits submitted in two lawsuits brought by other U.S. nationals who were also in Kuwait or Iraq during the First Gulf War.

Additionally, the Commission takes notice of Federal News Service transcriptions of press briefings by U.S. government officials, news articles, and publically available unclassified State Department documents that provide further information about Iraq's treatment of U.S. diplomatic personnel accredited to the U.S. Embassy in Kuwait and their dependents after the August 2, 1990 invasion.

* * * *

Legal Standard

To make out a substantive claim under Category A of the 2014 Referral, a claimant must show that (1) Iraq was engaged in an armed conflict and (2) during that conflict, Iraq took the claimant hostage. The Commission has previously held that, to establish a hostage-taking claim under international law in this program, a claimant must show that Iraq (a) seized or detained the claimant and (b) threatened the claimant with death, injury, or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release. A claimant can establish the first element of this standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. The legal standard we apply in this program applies equally to diplomatic personnel and their families.³⁷

Application of Standard to this Claim

(1) Armed Conflict: Claimant alleges that Iraq took her hostage in Kuwait on August 2, 1990, and held her hostage for 134 days, until December 13, 1990, when Iraqi officials allowed her to leave Kuwait. In its first decision awarding compensation for hostage-taking under the 2014 Referral, the Commission held that during this entire period, Iraq was engaged in an armed conflict with Kuwait. Thus, Claimant satisfies this element of the standard.

(2) Hostage-taking: ...

(a) Detention/deprivation of freedom: ...

Under this standard, Claimant remained under Iraq's control until December 13, 1990. The Commission has previously held that Iraq imposed conditions on air travel that limited the ability of foreign nationals, including U.S. nationals, to leave Iraq and/or Kuwait in December 1990. Indeed, the available evidence indicates that Claimant left Iraq at the first reasonable opportunity after the December 6th announcement, on the U.S. government-chartered flight that left Iraq on December 13, 1990. We thus conclude that she was under Iraq's control and thus detained from December 6, 1990, to December 13, 1990.^[L SEP] In sum, Iraq thus detained Claimant from August 2, 1990, until December 13, 1990.

(b) Threat: The Iraqi government threatened Kuwait Embassy staff members, diplomats, and dependents with continued detention. This included Claimant. ...

³⁷ The jurisprudence of international tribunals establishes that diplomatic personnel may bring claims for hostage-taking under international law standards applicable during an armed conflict. See *Eritrea-Ethiopia Claims Commission: Diplomatic Claim – Eritrea's Claim* 20, Partial Award, 26 R.I.A.A. 381, 399-400, ¶¶ 48-50, (Dec. 19, 2005); *Eritrea-Ethiopia Claims Commission: Diplomatic Claim - Ethiopia's Claim* 8, Partial Award, 26 R.I.A.A. 407, 415, 420, ¶¶ 11, 31 (Dec. 19, 2005). The United Nations Compensation Commission ("UNCC") also allowed the employees of foreign ministries to submit claims for injuries, which could include "hostage-taking or other illegal detention." See Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992, ¶¶ 7, 22, U.N. Doc. S/AC.26/1991/7/Rev.1, Mar. 17, 1992; Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Claims by Governments and International Organizations (Category "F" Claims), ¶ 9, 30 n.8, U.N. Doc. S/AC.26/1997/6, Dec. 18, 1997. Relevant documents in the Commission's files also support the conclusion that U.S. diplomatic personnel were eligible to submit claims for injuries arising out of "hostage-taking and other illegal detention" before the UNCC. See also 4 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (1958) (observing that all diplomatic representatives on enemy territory during armed conflict enjoy at minimum the standards of protection codified in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War).

In short, the Iraqi government made an unequivocal threat to continue to detain Kuwait Embassy staff members in Kuwait and Iraq. Claimant was a U.S. diplomat accredited to Kuwait at the time. Claimant has thus established that Iraq threatened to continue to detain her.

(c) Third party coercion: The reason Iraq detained Claimant and threatened her with continued detention was to compel the United States government to act in a certain way as an explicit and/or implicit condition for their release. Iraqi authorities informed the U.S. that before it would release detained diplomats, embassy personnel, and their dependents, it wanted the United States to close its embassy in Kuwait. Indeed, at the time, the U.S. government itself understood Iraq's actions to be hostage-taking.

In sum, this claim meets the standard for hostage-taking within the meaning of the 2014 Referral. Iraq held Claimant hostage in violation of international law for a period of 134 days, and Claimant is thus entitled to compensation.

* * * *

D. LIBYA CLAIMS

1. Referrals to FCSC

The Commission's Third Libya Claims Program concluded in 2018. See *Digest 2013* at 242-43 for background on the referral of these categories of claims to the FCSC.

Information on the Libya programs is available at <https://www.justice.gov/fcsc/claims-libya-december-2008-referral-and-january-2009-referral>, and decisions are available at <https://www.justice.gov/fcsc/index-claims-under-november-2013-referral-department-state>. One noteworthy decision, excerpted below (with footnotes omitted), considered claims of a group of former pilots of Pan American Airways. Claim No. LIB-III-036 *et al.*, Decision No. LIB-III-045 (2018) (Final Decision). See *Digest 2016* at 343-46 for discussion of the Commission's proposed decision on the claims. The Commission's January 16, 2018 final decision reaffirmed the proposed decision in denying the claims for failure to prove that Libya's bombing of Pan Am Flight 103 caused the claimants' job losses. The final decision reversed one aspect of the proposed decision, concluding that the 2005 settlement agreement between Libya and Pan Am did not extinguish these claims.

* * * *

Under the international law of state responsibility, a State committing an internationally wrongful act is “under an obligation to make full reparation for the injury caused by the internationally wrongful act.” And since “the mid-air destruction of an aircraft by terrorists in such circumstances as are present here is an internationally wrongful act,” Libya must ‘make full reparation’ for any injury ‘caused by’ the downing of Pan Am Flight 103.” To establish that a claimant’s injury was “caused by” an internationally wrongful act under international law, the claimant must prove two things. First, the claimant must establish factual causation, also known as but-for causation. Second, the claimant must establish legal causation, also known as proximate causation. Thus, in order to demonstrate that the Lockerbie bombing caused their injury, Claimants must show, under the applicable international-law principles, *both* but for

(“factual”) and proximate (“legal”) causation. In other words, they must show both that, as a factual matter, if not for the Lockerbie bombing, they would not have lost their jobs with Pan Am, and that, as a legal matter, their job losses were directly connected to, and not too remote from, the bombing.

Relying largely on our earlier analysis in the Initial Proposed Decision, the Consolidated Proposed Decision found that Claimants had failed to meet their burden to show that the bombing of Pan Am Flight 103 was either a but-for cause of their injury or a proximate cause of their injury. The Commission therefore concluded that, under the applicable legal principles, Claimants had failed to prove the necessary causal connection between Libya’s actions and their injury, and that Libya was thus not liable for Claimants’ injury.

On objection, Claimants contend that the Proposed Decisions’ causation analysis was flawed. In their Consolidated Notice of Objection and Hearing Brief, Claimants make numerous overlapping arguments. During the oral hearing, Claimants’ counsel consolidated those arguments, framing them around five points: 1) The Proposed Decisions failed to understand the importance of cash to an airline’s ability to operate; 2) The airline industry is unique in its need to forecast future performance based on recent past performance; 3) Nothing broke the causal chain connecting the Lockerbie bombing in December 1988 to Pan Am’s closure in December 1991; 4) Under international law, proximate cause was established because Libya’s attack was intentional and it was foreseeable that Pan Am would go out of business; and 5) Claimants’ claims are unique and will not create any future precedent.

Having reviewed the newly submitted evidence along with all of the evidence Claimants previously submitted, we conclude that none of Claimants’ arguments undermine the Consolidated Proposed Decision’s determinations on causation. The Commission therefore affirms its holding that, under the applicable legal principles, Claimants have failed to establish that Libya’s actions caused their injury. For that reason, we affirm our denial of their claims.

2. Claimants Have Not Shown That Cash Lost Due to Lockerbie Caused Pan Am’s Demise

On objection, Claimants argue that, “but for Lockerbie, Pan Am *would have had enough cash assets to remain viable and pursue strategic alternatives* regardless of whether it sought Chapter 11 protection and notwithstanding the geopolitical events experienced by the entire industry beginning in July 1990.” Claimants’ principal objection to the Proposed Decisions on this point is their argument that the Proposed Decisions failed to “[u]nderstand the [c]ritical [i]mportance of [c]ash to an [a]irline’s [a]bility to [o]perate.”

In support of this argument, Claimants have submitted several different estimates of the amount of cash Pan Am would allegedly have had if not for Lockerbie. ...

Each of these witnesses put forward different estimates of cash lost due to Lockerbie. ...

Claimants argue that the Proposed Decisions erred in concluding that their witnesses’ forecasts of lost cash were speculative. They argue that those forecasts were fully justified. In particular, they argue that the Proposed Decisions failed to understand that the airline industry is unique in its need to forecast future performance based on “recent past performance and projected growth.” Claimants thus argue that the Commission should limit its consideration of Pan Am’s financial performance to a single profitable quarter just before Lockerbie, rather than the several years preceding the attack, when Pan Am’s finances were much worse and fluctuated dramatically. Claimants contend that the improved 1988 third-quarter performance was the result of a turnaround plan that Pan Am’s then-new CEO, Mr. Plaskett, implemented and that Pan Am’s finances would have continued to improve if not for the Lockerbie bombing.

Claimants contend that the uniqueness of the airline industry justifies using projections of future performance based on immediate past performance and assumptions about future growth ...

There are several problems with Claimants' projections about how much cash Pan Am would have had if not for Lockerbie: (a) Claimants' estimates are not based on consistent past performance; (b) Claimants' projections rely on methodologies not shown to be reliable predictors of actual performance; and (c) Claimants' witnesses' estimates are not consistent and are not supported by contemporaneous evidence.

* * * *

3. Claimants Have Not Shown That Cash Lost Due to Lockerbie Prevented Pan Am from Acquiring Northwest Airlines

Claimants have failed to show that they can prevail based on a claim that Pan Am would have purchased Northwest Airlines. Claimants argue that, if not for Lockerbie, Pan Am would have acquired Northwest Airlines in 1989 and that this purchase would have prevented Pan Am from going out of business (thus preserving their jobs). Before the Consolidated Proposed Decision, Claimants had submitted two pieces of evidence to support this claim: (1) an affidavit from Mr. Plaskett, Pan Am's CEO at the time, that contained one paragraph that alluded to a possible purchase of Northwest; and (2) a statement from Mr. Rederer, an economist, who opined that, but for the cash lost due to the Lockerbie bombing, Pan Am could have acquired Northwest. Both Proposed Decisions concluded that this evidence was insufficient to establish that, but for Lockerbie, Pan Am would have purchased Northwest and that, in any event, any hypothetical purchase of Northwest was too speculative to satisfy the law of proximate causation.

On objection, Claimants introduced new evidence to support their claim that, if not for Lockerbie, Pan Am would have purchased Northwest. In particular, Claimants rely on the testimony of three former Pan Am executives: Mr. Plaskett, Mr. Punwani, and Mr. Pappas. All three testified at the hearing, and Mr. Punwani reiterated in his unsworn post-hearing statement, that, if not for the Lockerbie bombing, Pan Am would have had enough cash to leverage a higher bid for Northwest and that Pan Am ultimately would have prevailed in what was in effect a competitive bidding process at the time. Mr. Punwani and Mr. Pappas also claimed that, but for the security concerns related to Lockerbie, KLM, a Dutch airline that helped finance the deal for the Checchi Group (Northwest's purchaser), would have helped Pan Am, rather than the Checchi Group, finance an acquisition of Northwest. Finally, Mr. Pappas testified that, had Pan Am acquired Northwest, it would have avoided Chapter 11 bankruptcy altogether.

This evidence is insufficient to establish that, but for Lockerbie, Pan Am would have acquired Northwest and, on that basis, avoided liquidation. Even with Claimants' new evidence, they have still failed to show as a factual matter that, but for Lockerbie, Pan Am would have purchased Northwest. Although the contemporaneous evidence does indicate that Pan Am bid for Northwest in 1989, it does not support Claimants' contention that, but for the Lockerbie bombing, Pan Am would have acquired Northwest.

First, Claimants have failed to show the amount of cash Pan Am lost due to the Lockerbie bombing and have thus failed to show that the additional cash if not for Lockerbie would have been enough for Pan Am to leverage into an offer to match or exceed the purchase price the Checchi Group ultimately paid for Northwest at the time (*i.e.*, in mid-1989).

Second, even if Pan Am's cash position had been sufficient for it to be able to match or outbid the Checchi Group's offer, Claimants have not shown that the Checchi Group (or any other bidder) would not have raised its bid and offered more. ...

Third, contemporaneous evidence also suggests that factors other than insufficient funding led Northwest to reject Pan Am as a suitor. In particular, Northwest's labor unions opposed a Pan Am acquisition, and there were potential antitrust concerns that could have derailed the deal as well.

Finally, Claimants failed to provide sufficient evidence to support their contention that, if not for Lockerbie, KLM would have helped Pan Am acquire Northwest. Both Mr. Punwani and Mr. Pappas maintained that, but for the security concerns related to Lockerbie, KLM would have helped Pan Am, rather than the Checchi Group, finance a Northwest acquisition. However, Claimants' witnesses' testimony is insufficient to establish what KLM would or would not have done. Claimants have not submitted any independent evidence, contemporaneous or otherwise, describing the reasons KLM decided to invest in the Checchi Group bid, rather than Pan Am. The only evidence they have submitted—the written and oral testimony of Mr. Pappas and Mr. Punwani—is hearsay and unsupported by any independent, contemporaneous documentation.

The evidence is thus insufficient to prove as a factual matter that, but for the bombing of Flight 103, Pan Am would have acquired Northwest Airlines. It is thus also insufficient to establish that any putative purchase of Northwest would have prevented Pan Am from liquidating.

Moreover, Claimants' theory that, if not for Lockerbie, Pan Am would have acquired Northwest and thus staved off liquidation runs counter to international law jurisprudence drawing a distinction between business opportunities lost as a direct result of a wrongdoer's action and downstream opportunities lost because of the subsequent consequences of such action. Importantly, Claimants' theory requires that they establish not simply that Pan Am would have acquired Northwest but also that the acquisition would have in turn prevented Pan Am's liquidation. But analogous claims before the UNCC make clear that the link between the Lockerbie bombing and the loss of any future financial benefit from a putative purchase of Northwest is too speculative and remote to permit recovery. Such claims are simply not connected directly enough to the Lockerbie bombing to hold Libya liable for them.

When addressing claims for lost profits, the UNCC made a clear distinction between, on the one hand, losses that were a *direct* result of Iraq's violation of international law—its invasion and occupation of Kuwait—and, on the other hand, those that arose secondarily because of a company's inability to secure a business opportunity the company might otherwise have been able to secure if not for the invasion and occupation. Only losses in the first category—direct losses—were recoverable.

For example, in one case, a construction company, Continental Construction, Ltd. ("CCL"), sought recovery for profits from a contract that it allegedly would have concluded if not for Iraq's invasion and occupation of Kuwait. CCL alleged that it was unable to submit a bid for the contract because of "its inability to secure the necessary bid bonds, which itself resulted from the economic losses it suffered in Iraq during the relevant period." A UNCC panel rejected CCL's claim because the failure to bid on the contract did not result from "the acts of the invasion and occupation themselves." That is, the losses were not sufficiently connected to Iraq's actions to meet the law's direct loss requirement.

Also on point was a claim involving a company that went bankrupt during the Iraqi occupation of Kuwait. That company, NRM, claimed that, just before the Iraqi invasion, it was “in the final stages of an initial public offering (‘IPO’) of its common stock[,]” and that because of the invasion, NRM lost contracts in Iraq, which in turn “caused the failure of the IPO and led to [its] subsequent bankruptcy.” Even though the bankruptcy occurred while the occupation was still in place and a mere four months after the Iraqi invasion, and even though NRM submitted a contemporaneous news report attributing the IPO’s failure to the “uncertainty caused by Iraq’s invasion and occupation of Kuwait,” the UNCC panel rejected NRM’s claim. Among the reasons the panel gave was that “[t]he actual loss to NRM is from future profits which could have been generated by the company if funds from the IPO had been received[]” and that “such a loss [could not] be said to be a direct result of Iraq’s invasion and occupation of Kuwait.”

Here, that distinction is the difference between the cash losses Pan Am suffered directly because of Lockerbie and any hypothetical financial benefit Pan Am would have received if it had used the Lockerbie-related losses to purchase Northwest. While Libya can be held accountable for cash lost directly because of Lockerbie, it cannot be held responsible for any financial gains that Pan Am might hypothetically have obtained from a Northwest acquisition. Claimants thus cannot recover against Libya based on a theory that a Pan Am acquisition of Northwest would have prevented Pan Am’s liquidation.

4. Claimants Have Failed to Show That, But for the Lockerbie Bombing, Pan Am Would Have Reorganized and Survived the 1990 Recession and First Gulf War in 1990-91

Claimants have also failed to show that they can prevail based on the theory that, but for Lockerbie, Pan Am would have had enough cash to create Pan Am II (*i.e.* consummate the deal Pan Am struck with Delta Air Lines in July 1991—after its Chapter 11 bankruptcy filing—to reorganize the carrier) and thereby avoid liquidation in December 1991. Both the Initial Proposed Decision and the Consolidated Proposed Decision concluded that this claim was too speculative.

On objection, Claimants argue that the Proposed Decisions failed to realize that the impact of the 1988 Lockerbie bombing lasted throughout the three-year period until Pan Am’s liquidation in December 1991 and that nothing subsequent to Lockerbie broke the causal chain. The thrust of this argument is that the Proposed Decisions erred by overemphasizing the role played by the First Gulf War, recession, and other events of 1990-91, rather than attributing Pan Am’s December 1991 liquidation to the cash lost due to the 1988 Lockerbie bombing. ...

But-for Causation

As a factual matter, Claimants have failed to prove that the impact of the Lockerbie bombing on Pan Am’s operations or its cash position was significant enough that Pan Am would otherwise not have gone out of business in 1991, *i.e.*, they have not proven that, but for the Lockerbie bombing, Pan Am would have weathered the challenges of the Gulf War, recession, and oil price spike in 1990-91.

Claimants’ core factual claim about the connection between the Lockerbie bombing and Pan Am’s liquidation three years later is that Lockerbie led to Pan Am having less cash than it otherwise would have had and that that additional cash would have prevented Pan Am from liquidating. But even assuming the cash lost due to the 1988 Lockerbie bombing would have been available to Pan Am in December 1991, Claimants have not shown that the amount of cash lost was enough to prevent Pan Am from liquidating.

Moreover, as the Consolidated Proposed Decision explained, insufficient cash was by no means the only factor in the breakdown of the 1991 deal with Delta Airlines to create a “Pan Am II.” Other factors included acts that Delta itself allegedly took to undermine the deal, Delta’s own financial problems, and labor relations issues. ...

Indeed, after Pan Am shut down in December 1991, the airline placed much of the blame squarely on Delta. In its court filings against Delta, Pan Am detailed Delta’s allegedly wrongful conduct at length. ...

Moreover, as we noted in the Consolidated Proposed Decision, Delta had problems of its own: it was having trouble absorbing Pan Am’s assets, its “bond ratings were sliding[,] and it was contemplating an economy that didn’t show many signs of recovery.”

In addition, as noted in the Consolidated Proposed Decision, there is evidence that labor disputes also played a role in Pan Am’s closure. ...

Finally, Claimants have failed to establish that, if not for Lockerbie, Pan Am would have been similarly situated to Continental Airlines or any other carrier that survived the 1990 recession and 1990-91 Gulf War. In their Hearing Brief, Claimants maintain that TWA and Continental “were very comparable to Pan Am, and endured the impact of the Gulf Crisis and the 1990-1991 Recession. ... However, there is no reason to think that the only relevant difference between the two airlines was their cash positions, and Claimants have provided no other detailed analysis of other factors (such as revenues or other aspects of financial performance) that might explain why Continental (or any other airline) did not liquidate. There could thus easily have been numerous material differences between Continental and Pan Am other than Lockerbie. Therefore, Claimants have failed to meet their burden to establish that, if not for Lockerbie, Pan Am would have, like Continental, emerged from Chapter 11 and not liquidated.

Proximate Causation

In addition, as a legal matter, any injury based on hypothetical lost cash due to the 1988 Lockerbie bombing—cash that might have helped Pan Am three years later—is too speculative, depending as it does on far too many unknowns and imponderables.

Under international law, proximate causation requires that Claimants’ injury not be too remote from the tortious act, either factually or temporally. Even where an act is intentional, the law of proximate causation limits a State’s liability to consequences that are sufficiently close in time. Indeed, the UNCC has denied requests for damages based on insufficient temporal proximity in cases very similar to these claims. In one set of claims before the UNCC, former employees of a bank sought damages because they had been “made redundant” as a result of Iraq’s intentional violation of international law—its invasion and occupation of Kuwait. The UNCC only allowed recovery for damages incurred within 17 months of the invasion (and within 11 months of the end of the occupation) because any losses incurred after that period “were too remote and did not meet direct causal requirements ...” Here, Pan Am’s liquidation was nearly three years after the Lockerbie bombing and is thus far too long after the bombing to hold Libya liable.

A 1903 international arbitration on which Claimants rely, the *Dix* case, does not undermine this crucial principle that a claimant’s injury may not be too remote from the tortious act. Claimants cite *Dix* to support their argument that when a state actor commits an intentionally wrongful act, it is responsible for the damages even if it did not foresee the *specific* damage. They quote *Dix* as articulating the “longstanding principle under international law that compensation for remote consequences of a wrongful act will be denied only ‘in the absence of

evidence of deliberate intention to injure.” The point, presumably, is that, because Libya had a “deliberate intention to injure,” it should be held liable even though it did not foresee Pan Am’s liquidation or Claimants’ job losses.

Claimants fail, however, to put the language they quote from *Dix* in context. In *Dix*, the American-Venezuelan Commission *denied* the relevant portion of the claim. The claimant, an American cattle rancher in Venezuela, sought to prevent the revolutionary Venezuelan army from confiscating some of his cattle by selling the cattle at a loss after the army had already taken some of his other cattle without providing any compensation. Yet, the commission denied his claim for the difference between the true value of the cattle and the sale price because the army did not “compel him to sell his remaining cattle to third parties at an inadequate price.” This holding therefore provides no basis to argue that *all* damages are compensable when a wrongful act is deliberate. Even under the broadest reading of *Dix*, the wrongdoing state still must have possessed an intent to cause the specific harm in question. Here, Claimants have presented no evidence that Libya’s intent was to put Pan Am out of business, much less to cause Claimants to lose their future wages and benefits. Thus, *Dix* does not help Claimants’ proximate causation argument.

Claimants also cite *Amco Asia Corporation v. Republic of Indonesia* for the proposition that “under international law, when there is an intentional attack the precise nature of the damage does not need to be specifically foreseeable.” However, Claimants misstate this decision too. The arbitral panel in *Amco Asia* stated that “foreseeability goes to causation and damages, and normally not the quantum of profit[,]” and that the “principle of foreseeability does not require that the party causing the loss [be] at that moment of time able to foresee the precise *quantum* of the loss actually sustained.” Thus, under *Amco Asia*, the party causing the loss—here, Libya—still needs to have been able to foresee the loss itself—here, that Claimants would lose their jobs—just not the precise quantum of the loss—here, the precise amount of wages and benefits lost. Since Claimants have presented no evidence that, at the time of the Lockerbie bombing in December 1988, Libya (or anyone else) could have foreseen Pan Am’s liquidation—let alone Claimants’ losing their jobs—three years later, Claimants’ injury is too remote to be viewed as proximately caused by the bombing.

Claimants further argue that several specific events that clearly had a significant impact on Pan Am’s finances in 1990 and 1991 should not be considered in the Commission’s proximate cause analysis, citing a 1928 arbitral decision, the *Angola* case. Claimants quote the case as stating that “only another more significant proximate cause should preclude an award.” They argue that the post-Lockerbie events did not break the chain of causation because, as they characterize it, the 1990-91 events were not as significant as the Lockerbie bombing.

There are two problems with this argument. First, it is factually wrong: Pan Am’s immediate losses from the Gulf War and recession were far closer in time and thus more proximately related to the company’s liquidation. Second, the *Angola* decision also holds that “the arbitrators...have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by [the wrongdoing state], also resulted from other and more proximate causes.” Because Pan Am was harmed by significant events that were temporally “more proximate” than, and unrelated to, the destruction of Flight 103—namely, the 1990 recession and the First Gulf War in 1990-91—the *Angola* decision undermines, rather than helps, Claimants’ argument. Here, Claimants have failed to show that the Lockerbie-related losses suffered by Pan Am were more significantly related to Pan Am’s liquidation than the more temporally proximate losses arising from the 1990-91 events.

In sum, while the existence of multiple links in the causal chain is not dispositive in determining proximate cause, the wrongful act must still not be too remote in both a temporal and factual sense, and here it is too remote in both senses. Claimants have therefore failed to prove that the bombing of Pan Am Flight 103 was the proximate cause of Pan Am's liquidation (and thus of their injury).

* * * *

2. Litigation

a. Aviation v. United States

As discussed in *Digest 2016* at 347-50, the United States prevailed on summary judgment in the U.S. Court of Federal Claims in *Aviation v. United States*. Plaintiffs appealed to the U.S. Court of Appeals for the Federal Circuit. Plaintiff-appellants are foreign insurance companies that insured planes destroyed in terrorist attacks, including the hijacking of Egypt Air Flight 648 and the bombing of Pan Am Flight 103. They sued in federal court, but legislative and executive actions regarding Libya's sovereign immunity and a claims settlement with Libya occurred during the pendency of their suits. The U.S. brief on appeal is discussed in *Digest 2017* at 347-50. Excerpts follow from the appeals court's decision, affirming the dismissal of the claims. See *Aviation & General Insurance Company, LTD., v. United States*, 882 F.3d 1088, 1098 (Fed. Cir. 2018), available at <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-2389.Opinion.2-9-2018.1.PDF>.

* * * *

We hold, however, that to the extent Appellants seek judicial review of the President's decision to exclude them from the settlement's proceeds, Appellants raise a nonjusticiable political question. We have identified similar questions as nonjusticiable political questions. In *Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988), we addressed claims brought by the released victims of the Iranian hostage crisis. The United States had settled their claims by signing agreements (the Algiers Accords) with Iran. See *id.* at 707. The victims sued the Government, alleging a taking in violation of the Fifth Amendment and seeking the full amount of damages they would have recovered against Iran had their claims not been settled. *Id.* There, we found the case presented a nonjusticiable question because the appellants questioned whether the President should have sought better terms in the settlement agreement. We held that "[t]he determination whether and upon what terms to settle the dispute with Iran...necessarily was for the President to make in his foreign relations role." *Id.* at 710. We concluded that the appellants' claims were not appropriate for judicial resolution because "judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign relations." *Id.*

We hold that Appellants' claims directed to their exclusion from the distribution of proceeds arising from the Libya Claims Settlement Agreement present a similar nonjusticiable political question. As Appellants concede, *see* Appellants' Reply Br. 26, foreign relations and settlements to resolve foreign conflicts are soundly committed to the President's discretion. *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government...." (citation omitted)). It follows that the President had complete discretion and authority to implement the settlement with Libya and to decide to whom the settlement funds would be distributed. Appellants' argument that they should have been included in the distribution of settlement funds questions the President's policy decision to exclude them. The President's policy decision regarding the settlement proceeds is not a determination for judicial resolution. It is a question "of a kind clearly for nonjudicial discretion," and there are no 'judicially discoverable and manageable standards' for reviewing such a Presidential decision." *Belk*, 858 F.2d at 710 (quoting *Baker*, 369 U.S. at 217). "The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Thus, we do not reach Appellants' arguments regarding their exclusion from the settlement proceeds. We only address their alleged claims that termination of their lawsuits against Libya constituted a taking under the Fifth Amendment.

II.

The Fifth Amendment states that private property shall not be taken "for public use, without just compensation." U.S. Const. amend. V. To state a claim for a taking, Appellants must establish that they had a cognizable property interest and that their property was taken by the United States for a public purpose. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). We assume, without deciding, that Appellants' lawsuits against Libya constituted a cognizable property interest for purposes of a takings claim. We hold, however, that even if Appellants had a property interest in their lawsuits, no taking occurred under the Fifth Amendment.

The parties agree that, under the circumstances in this case, whether a taking occurred requires analysis of the factors set forth in *Penn Central*. The *Penn Central* factors query: (1) "the character of the governmental action"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "[t]he economic impact of the regulation on the claimant." *Penn Central*, 438 U.S. at 124. In *Belk*, under facts similar to this case, we provided an explication of these factors to reflect the unusual circumstances of these types of cases, including:

the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed.

Belk, 858 F.2d at 709. All relevant factors must be weighed to decide whether a compensable taking has occurred. *Id.* In the end, we must determine whether “‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Penn Central*, 438 U.S. at 124.

We start with the first *Penn Central* factor—the character of the Government’s action. “In deciding whether a particular governmental action has effected a taking, this Court focuses...both on the character of the action and on the nature and extent of the interference with rights...as a whole.” *Penn Central*, 438 U.S. at 130–31. As we noted in *Belk*, “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Belk*, 858 F.2d at 709 (quoting *Penn Central*, 438 U.S. at 124). The character of governmental action in this case is the Government’s authority to settle and espouse claims and reinstate Libya’s sovereign immunity. While we recognize the significant degree to which the Appellants’ rights in maintaining their lawsuits were impaired—indeed, their lawsuits were terminated—the Government’s action nonetheless was not a physical invasion of Appellants’ property rights. Rather, the Government reinstated Libya’s sovereign immunity for the common good, reflecting the “current political realities and relationship[]” between the United States and Libya. *Republic of Iraq v. Beatty*, 556 U.S. 848, 864 (2009) (citation omitted); see also *Belk*, 858 F.2d at 709 (“Here there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims....”).

Turning to the second *Penn Central* factor—interference with investment-backed expectations—Appellants argue that they “had reasonable investment backed expectations, at the time of their investment, in receiving some compensation for the termination of their claims....” Appellants’ Br. 34. Appellants assert that in “looking back” at all historical examples of foreign claims settlements, claimants either received compensation upon termination of their lawsuits or otherwise directly benefited from the settlement itself. *Id.* at 32–33. Appellants note that, in contrast, they received no such compensation or benefit. Appellants further assert that the Government “failed to provide an alternative remedy to Plaintiffs *specifically* to gain a government benefit at their expense, the ability to pay more to” United States citizens. *Id.* at 34 (emphasis in original).

After considering Appellants’ arguments, we agree with the Court of Federal Claims that the Government’s action in changing the status of Libya’s sovereign immunity was neither novel nor unexpected and thus could not have interfered with Appellants’ reasonable investment-backed expectations. As the court recognized, since at least 1799, the United States, as a matter of foreign relations, has settled claims against foreign sovereigns as such litigious activity is a “source[] of friction” in our international relations. See *Summary Judgment Order*, 127 Fed. Cl. at 320 (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942)). “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.’” *Beatty*, 556 U.S. at 864–65 (citation omitted). “[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries...by executive agreement[s]... [u]nder [which] the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures.” *Belk*, 858 F.2d at 709 (alterations in original) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). We conclude that Appellants could not

have reasonably expected that their lawsuits against Libya would be free from governmental interference. Indeed, even Appellants concede that “there was always a possibility [the Government] would interfere in [their] litigation against Libya...” Appellants’ Br. 23.

Appellants’ argument that they nonetheless held a reasonable expectation of compensation following the Government’s termination of their claims based on historical examples is of no moment. As we have held, the President’s decision to exclude Appellants from the distribution of proceeds from this particular settlement is not a justiciable issue that this court can address. Moreover, we disagree that at the time Appellants invested in their insurance contracts or at the time of the terrorist attacks—the time at which Appellants’ claims accrued—Appellants had an expectation of being compensated for the claims they paid as a result of the attacks. At those times, Libya had sovereign immunity from suit in the United States. Thus, the Government’s *ex post facto* abrogation of Libya’s sovereign immunity could not have interfered with any reasonable expectation that Appellants could sue Libya at the time their claims accrued. *Cf. Beatty*, 556 U.S. at 865 (emphasis in original) (“Iraq was immune from suit at the time it is alleged to have harmed respondents. The 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.”). Indeed, Appellants’ ability to file a lawsuit against Libya was only made possible years after the attacks in 1996, when Congress temporarily lifted Libya’s sovereign immunity pursuant to the Terrorism Exception to FSIA.

Moreover, even if, as Appellants argue, they held a reasonable investment-backed expectation at the time Congress lifted Libya’s sovereign immunity, they could not have reasonably expected that the Government would not eventually change its position and interfere in their lawsuits. Surely, if Congress giveth, so too can it taketh away. After Congress fortuitously lifted Libya’s immunity from suit, permitting Appellants’ lawsuits in the first instance, Appellants should have reasonably foreseen that Congress could also reinstate Libya’s sovereign immunity. As occurred here, Congress altered the jurisdictional rule of sovereign immunity with respect to Libya *after* Libya’s conduct giving rise to Appellants’ claims. After the President exercised his authority to settle claims against Libya, Congress again altered the rules of sovereign immunity reinstating Libya’s sovereign immunity. Given the evident changing political climate between the United States and Libya during this time, it was unreasonable for Appellants to have expected that the waiver of Libya’s sovereign immunity would have remained static while their lawsuits were pending. Thus, we agree that the Government’s action did not constitute a novel interference with Appellants’ investment-backed expectations.

Additionally, we disagree with Appellants’ characterization that the Government failed to provide an alternative forum to litigate their claims against Libya. While the settlement and consequent legislation did not provide Appellants (as foreign nationals) a forum in the United States, the President’s Executive Order expressly provided that with respect to suits by foreign nationals “[n]either the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I [of the Libya Claims Settlement Agreement] in foreign courts or through the efforts of foreign governments.” Executive Order No. 13,477, 73 Fed. Reg. 65,965. Thus, Appellants could have sought relief in foreign courts but chose not to do so. Appellants’ failure to seek relief in a foreign forum should not be a cost shouldered by the American public.

Regarding the third *Penn Central* factor—economic impact—we agree with the Court of Federal Claims that the economic impact is speculative and uncertain. As with any litigation, there was no guarantee that Appellants would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya. ...

* * * *

Finally, though not dispositive, we emphasize the importance of the public interest and policy considerations served by the Government’s action. The President’s action in settling claims against Libya was designed to normalize relations between the United States and Libya, restore international comity, and promote international commerce. Moreover, the President’s decision to espouse these claims implicates important policy decisions soundly committed to the President. To find that a taking occurred under these circumstances would interfere with the President’s authority to enter into foreign claims settlements for the benefit of United States foreign relations and may interfere with the structure of future settlements.

After balancing the pertinent considerations under *Penn Central*, we conclude that, on the undisputed facts of this case, Appellants have not stated a cause of action for a taking based on the United States’ termination of their lawsuits pursuant to the Libya Claims Settlement Agreement. The Court of Federal Claims did not err in granting summary judgment.

* * * *

After the United States prevailed in the court of appeals, plaintiffs filed a petition for certiorari in the U.S. Supreme Court. Excerpts follow from the September 14, 2018 U.S. brief opposing the petition. The Supreme Court denied the petition on October 29, 2018. *Aviation & General Insurance Company, LTD*, 882 F.3d 1088 (Fed. Cir. 2018), *cert. denied*, 139 S.Ct. 412 (2018).

* * * *

Petitioners renew their argument (Pet. 10-24) that the court of appeals misapplied *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), when it held that the reinstatement of Libya’s sovereign immunity did not effect a compensable taking under the Fifth Amendment. Petitioners also argue (Pet. 24-27) that claims regarding their exclusion from the settlement fund are justiciable. The court of appeals correctly rejected petitioners’ arguments, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for addressing the questions presented. Further review is unwarranted.

1. The court of appeals correctly held that the Libyan Claims Resolution Act did not effect a taking of petitioners’ property requiring compensation under the Fifth Amendment when it reinstated Libya’s sovereign immunity in U.S. courts. Petitioners do not assert any conflict among the courts of appeals, arguing instead (Pet. 28) merely that the court below “disregarded or misapplied” longstanding principles of takings law. Petitioners’ argument based on the circumstances of this case is unpersuasive.

a. As an initial matter, the reinstatement of Libya's sovereign immunity did not interfere with any cognizable property right possessed by petitioners. During the course of this litigation, petitioners have "shifted their argument" concerning the supposed property rights at issue. Pet. App. 10a. In the Court of Federal Claims, petitioners argued that the government "took" their property "in the form of their legally cognizable claims against the government of Libya." *Ibid.* (citation, ellipsis, and emphasis omitted). On appeal, however, petitioners stated "that they 'do not allege that the sale of their claims to Libya was a taking, but are challenging the Government's decision to exclude them from the distribution of the Libya Claims Settlement Agreement proceeds.' " *Ibid.* (quoting Pet. C.A. Br. 26) (brackets omitted). Now before this Court, petitioners seem to be reverting to the argument they made in the Court of Federal Claims. See Pet. 21 ("Petitioners' property, their claims against Libya, were terminated.").

Regardless of how petitioners' takings argument is conceived, however, petitioners have not identified any cognizable form of constitutionally protected property. Petitioners assert (Pet. 15) that, under the LCRA, their claims were "sold to Libya for a cash payment." That assertion is incorrect. The LCRA reinstated Libya's sovereign immunity in suits in U.S. courts, thereby imposing "one particular barrier" to recovery in that venue. *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981). But the United States did not terminate petitioners' legal claims, much less did it take them or "sell" them (Pet. 21) to Libya. To the contrary, the Executive Order implementing the LCRA specified that, although the claims of foreign nationals could no longer be maintained in U.S. courts in light of the reinstatement of Libya's sovereign immunity, "[n]either the dismissal of the lawsuit, nor anything in th[e] order, shall affect the ability of any foreign national to pursue other available remedies for claims * * * in foreign courts or through the efforts of foreign governments." E.O. 13,477 § 1(b)(iii). Petitioners thus "could have sought relief in foreign courts," or could have sought relief through the efforts of foreign governments, including those governments in a position to espouse their claims, but they "chose not to do so." Pet. App. 20a.

Even if the United States could plausibly be described as in some sense having terminated claims by foreign nationals based on conduct occurring abroad, moreover, petitioner has identified no authority supporting the notion that a potential tort claim, of the sort that petitioners seek to pursue against Libya, is a form of constitutionally protected property. To the contrary, courts have consistently held that "a pending tort claim does not constitute a vested right." *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (citing cases), cert. denied, 519 U.S. 1077 (1997); ... Nor can petitioners reasonably assert a property interest in the legal regime that existed at any point in time—for instance, during the six-month period between January and August 2008 in which Libya was unable to invoke a sovereign immunity defense against petitioners' claims. See *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); cf. *Republic of Iraq v. Beatty*, 556 U.S. 848, 864 (2009) ("Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases.").

Finally, petitioners are wrong in arguing (Pet. 13) that their property rights were implicated by the President's decision to "exclude" them from access to proceeds from the \$1.5 billion settlement with Libya. Access to the settlement proceeds, by means of seeking compensation through the Commission, was afforded only to U.S. nationals whose claims were "espoused" (*i.e.*, adopted) by the United States. E.O. 13,477 § 1(a)(ii); see *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("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.”). Petitioners are ineligible to receive proceeds from the settlement because their claims were not espoused by the United States. In complaining (Pet. 11) that the government “exclude[d] Petitioners” from the settlement agreement, therefore, petitioners are actually objecting to the government’s *refusal* to espouse their claims. Needless to say, petitioners do not possess any cognizable property interest in having their claims, based on injuries to foreign nationals, espoused and settled by the United States. See *American & European Agencies, Inc. v. Gilliland*, 247 F.2d 95, 97-98 (D.C. Cir.) (“No claimant * * * has a right to participate” in distribution of Commission funds “in any amount until the Commission has made an award.”), cert. denied, 355 U.S. 884 (1957); see also 22 U.S.C. 1623(h) (no judicial review for decisions by the Commission about the distribution of settlement proceeds).

b. Even if petitioners could identify a cognizable property interest that was impaired by the LCRA, the court of appeals correctly applied the *Penn Central* test to determine that “no taking occurred under the Fifth Amendment.” Pet. App. 15a.

i. The court of appeals properly concluded that the reinstatement of Libya’s sovereign immunity did not interfere with petitioners’ “reasonable investment-backed expectations.” Pet. App. 17a. The availability or unavailability of a legal defense, much less a jurisdictional bar to suit like sovereign immunity, is not the type of interest on which a person may reasonably rely. As this Court has explained, a legislature “[o]f course * * * remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); see *Martinez v. California*, 444 U.S. 277, 281-283 (1980) (upholding California statute granting officials immunity for certain types of tort claims and rejecting litigant’s argument that the statute was “an invalid deprivation of property”).

Nor could petitioners have reasonably expected that the status of Libya’s sovereign immunity would remain stable. As this Court explained in *Beatty*, “[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 864-865 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). That reasoning is particularly apt here, for several reasons. (1) At the time that petitioners’ claims accrued, “Libya had sovereign immunity from suit in the United States.” Pet. App. 19a. (2) Libya’s immunity was not lifted at all until 1996, and was not fully lifted against petitioners’ claims until January 2008. *Id.* at 19a-20a. (3) The jurisdictional rule on which petitioners seek to rely (the Terrorism Exception) targeted rogue nations whose orientation toward the United States was likely to change; indeed the rule was *intended* to change the behavior of those nations. *Id.* at 20a. (4) Libya’s immunity against suits like petitioners’ was revoked fully only for a period of about six months. *Id.* at 5a-6a.

Petitioners also could not reasonably have developed or relied on an expectation that the government would permit the continued litigation of their claims in U.S. courts. As a matter of foreign policy, Presidents have settled and terminated claims against foreign sovereigns “since at least 1799.” Pet. App. 17a; see *Dames & Moore*, 453 U.S. at 679 (“[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.”). Petitioners argue (Pet. 18) that never before has “the government terminated claims as part of a foreign claims settlement agreement with a foreign sovereign without also providing access to an alternative remedy, forum, or specific benefit.” ... Although petitioners’ claims may no longer proceed in U.S. courts, absent an abrogation by Congress or a voluntary waiver of

sovereign immunity by Libya, those claims have not been resolved on the merits. Petitioners thus remain free “to pursue other available remedies for [the] claims * * * in foreign courts or through the efforts of foreign governments.” E.O. 13,477 § 1(b)(iii).

Petitioners could not reasonably have expected to share in the settlement proceeds, moreover, because petitioners are foreign nationals or are otherwise unable to satisfy the Commission’s “continuous nationality” rule. Pet. App. 7a. As this Court has observed, “[t]here 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). Thus, since its establishment, the Foreign Claims Settlement Commission has lacked jurisdiction to consider claims brought by foreign nationals. See International Claims Settlement Act of 1949, ch. 54, § 4(a), 64 Stat. 13-14 (22 U.S.C. 1623(a)(1)).

In any event, petitioners are incorrect (Pet. 22) that their exclusion from the settlement proceeds was “unprecedented.” The Iranian hostage crisis led to the signing of the Algiers Accords, which “prohibit[ed] United States nationals from prosecuting claims related to” the crisis in any forum, foreign or domestic. *Belk v. United States*, 858 F.2d 706, 707 (Fed. Cir. 1988). Despite the hostage victims’ argument that their release was “not sufficient compensation for the extinguishment of [their] rights” against Iran, the Federal Circuit concluded that the Algiers Accords did not interfere with any investment-backed expectations. *Id.* at 710. Petitioners’ argument here is even less persuasive, given that they are foreign nationals who still retain the right to seek relief in foreign courts or through the efforts of foreign governments.

ii. The court of appeals also correctly determined that “[t]he character of governmental action in this case,” the reinstatement of Libya’s sovereign immunity, further demonstrates that no taking occurred. Pet. App. 16a. Petitioners argue (Pet. 14-16) that the court erred by focusing on the absence here of any physical invasion of petitioners’ property. Petitioners assert that the inquiry should have focused instead on the “severity of the burden” imposed on petitioners’ asserted property rights, and on whether petitioners were “ ‘singled out to bear a particularly severe regulatory burden.’ ” Pet. 14, 16 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 544 (2005)) (brackets omitted). Petitioners’ argument is based on a misreading of *Lingle*.

In *Lingle*, the Court explained that “[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion.” 544 U.S. at 537. Although the Court has also “recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster,” *id.* at 537, the Court’s regulatory takings jurisprudence “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain,” *id.* at 539. On the other end of the spectrum are governmental actions, like the reinstatement of sovereign immunity in this case, that “merely affect[] property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’ ” *Id.* at 538 (quoting *Penn Central*, 438 U.S. at 124). As the court of appeals explained, “the Government reinstated Libya’s sovereign immunity for the common good, reflecting the ‘current political realities and relationship’ between the United States and Libya.” Pet. App. 16a (quoting *Beatty*, 556 U.S. at 864) (brackets omitted); see *id.* at 21a (“The President’s action in settling claims against Libya was designed to normalize relations between the United States and Libya, restore international comity, and promote international commerce.”). Indeed, the governmental action involved here—the adjustment of sovereign

immunity and court jurisdiction in domestic legal proceedings—is especially *unlike* a physical invasion of property.

In any event, petitioners were not “singled out to bear any particularly severe regulatory burden.” *Lingle*, 544 U.S. at 544. By reinstating Libya’s sovereign immunity in U.S. courts to what it was at the time of the conduct that is the basis of the suit, the LCRA did not resolve petitioners’ claims against Libya on the merits, but instead left petitioners free “to seek relief in a foreign forum.” Pet. App. 20a. The restoration of Libya’s immunity was also applied universally, to all individuals and corporations of any nationality, *id.* at 106a, and the Executive Order treated petitioners identically to other foreign nationals, *id.* at 5a-6a.

iii. Finally, the economic impact on petitioners of the LCRA was “speculative and uncertain.” Pet. App. 21. As the court of appeals explained, had petitioners’ suits been permitted to continue in U.S. courts, “there was no guarantee that [petitioners] would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya.” *Ibid.*; see *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989) (rejecting takings claim based on Algiers Accords where claimant “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”). That is particularly so here because the Commission had already determined that, even if it could consider the merits of petitioners’ compensation claims, petitioners “failed to meet their burden of proof as to the validity of any of their theories of the claim[s].” C.A. App. 525.

Petitioners argue (Pet. 19) that the court of appeals failed to “account for th[e] 100% diminution in [the] value” of petitioners’ legal claims against Libya. But the economic impact of a governmental action on a property interest is inherently speculative if the value (and indeed the existence) of the property interest itself is speculative. See, e.g., *Tennessee Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995). Here, petitioners’ claims—even assuming they constitute a cognizable property interest—were of uncertain value given the real possibility that they would have failed in court, or would have been uncollectable even if successful. The value of petitioners’ claims also would have fluctuated with the existence or nonexistence of Libya’s sovereign immunity: Libya’s immunity was a barrier to suit when the claims accrued; was subsequently eliminated as a barrier; but was reinstated as a barrier in August 2008. See Pet. App. 19a. Petitioners are also incorrect (Pet. 21) that the value of their legal claims against Libya “is now zero.” Because the Executive Order expressly preserved the right of foreign nationals to seek relief against Libya “in foreign courts or through the efforts of foreign governments,” E.O. 13,477 § 1(b)(iii), petitioners may yet receive compensation from Libya for their claims.

c. Petitioners argue (Pet. 22) that the court of appeals’ decision leaves the government with “virtually unbridled discretion to appropriate and redistribute property so long as it is incident to a foreign claims settlement.” That argument mischaracterizes the court’s decision, which was appropriately based on the “ad hoc, factual inquiries” required by *Penn Central*. 438 U.S. at 124. The decision thus turned on case-specific factors, such as the particular nature of the governmental action at issue (reinstatement of sovereign immunity), Pet. App., 16a-17a; Libya’s long history of immunity in U.S. courts, which remained intact at the time that petitioners’ claims accrued, was lifted for a time, and was then reinstated, *id.* at 18a-19a; and the Executive Order’s preservation of petitioners’ right to seek relief in foreign courts, *id.* at 20a. Petitioners have identified no other case that shares those features.

2. Petitioners argue (Pet. 24-27) that the court of appeals erred in holding that, “to the extent [petitioners] seek judicial review of the President’s decision to exclude them from the settlement’s proceeds, [petitioners] raise a nonjusticiable political question.” Pet. App. 12a-13a. Petitioners acknowledge (Pet. 26) that “the President enjoys broad foreign policy powers, including the authority to terminate claims pursuant to a foreign claims settlement agreement,” but nevertheless contend that “the subsequent domestic decision of how to allocate the settlement proceeds among claimants” is subject to “constitutional constraints” that may be enforced by the judiciary. But the *distribution* of claims-settlement proceeds is intertwined with the settlement itself. See Pet. App. 14a (“[Petitioners’] argument that they should have been included in the distribution of settlement funds questions the President’s policy decision to exclude them.”). Petitioners essentially ask this Court to second-guess the President’s “policy decision” about which victims of international terrorist incidents most merit compensation, *ibid.*, and his decision to exclude from the monetary settlement and award distribution of settlement funds for the claims of foreign nationals. A judicial determination that the government took petitioners’ property by excluding them from settlement proceeds, moreover, could force the government to insist upon larger or differently tailored settlements, or even discourage the government from making future settlements altogether. see *Belk*, 858 F.2d at 710 (“A judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President’s ability to conduct foreign relations.”).

In any event, even if petitioners’ objection to being excluded from the settlement were justiciable, it would fail. Petitioners had no cognizable property interest in having their claims “espoused” and settled by the United States. E.O. 13,477 § 1(a)(ii); see pp. 13-14, *supra*. And any takings claim based on exclusion from the settlement would fail under the *Penn Central* test for the same reasons described above. See pp. 14-19, *supra*; see Pet. App. 18a-19a (rejecting argument “that at the time [petitioners] invested in their insurance contracts or at the time of the terrorist attacks * * * [petitioners] had an expectation of being compensated for the claims they paid as a result of the attacks”).

* * * *

b. Alimanestianu v. United States

As discussed in *Digest 2016* at 350-56, the United States also prevailed on summary judgment in another case related to claims against Libya before the U.S. Court of Federal Claims, *Alimanestianu v. United States*. The Alimanestianu plaintiffs brought a federal suit against Libya, but their lawsuit was dismissed after the United States reached a claims settlement agreement with Libya. Although the Alimanestianu estate and family received nearly \$11 million from the settlement fund, they claimed the lost opportunity to pursue their suit in federal court constituted a taking. The U.S. brief filed in the Court of Appeals for the Federal Circuit in 2017 is discussed in *Digest 2017* at 350-56. The decision of the Court of Appeals affirming is excerpted below. *Alimanestianu v.*

United States, 888 F.3d 1374 (Fed. Cir. 2018), available at <http://www.ca9.uscourts.gov/node/23372>. *

* * * *

We now consider the *Penn Central* factors to see if Appellants suffered a compensable taking. Looking to the character of the governmental action, Appellants provided no evidence that this factor should weigh in their favor. As the trial court noted, the Executive has an overwhelming interest in conducting foreign affairs. *Alimanestianu*, 130 Fed. Cl. at 145. “Not 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 ... [where] nations have often entered into agreements settling the claims of their respective nationals.” *Dames & Moore*, 453 U.S. at 679. “[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries,” whether it be by treaty or through executive action, and “Congress has implicitly approved th[is] practice.” *Id.* at 679–80. Thus, the trial court correctly observed that the Government was working well within its Constitutional prerogative in conducting foreign affairs when it espoused and settled Appellants’ claims.

As for the extent to which the regulation has interfered with distinct investment-backed expectations, Appellants have provided no evidence that they had an investment-backed expectation in their claims and non-final judgment. First, as *Abraham-Youri* points out, “those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.” 139 F.3d at 1468. Further, the claims at issue were based on a “tenuous jurisdictional grant,” *Alimanestianu*, 130 Fed. Cl. at 145—the State Sponsor of Terrorism exception to FSIA and the government’s designation of Libya as a state-sponsor of terrorism—which was always subject to the ever-evolving relationship between the two nations, ... Furthermore, any recovery by Appellants of their judgment would depend on a cooperative Libyan court ordering its government to pay the judgment, or failing such cooperation, a coercive act against Libya by some other governmental body to compel Libyan satisfaction of the judgment. However, Appellants do not provide any evidence that such efforts have been successful in the past, or would have been successful in this case. Thus, the trial court did not err by concluding that such recovery was speculative, and that espousal did not interfere overall with any investment-backed expectation in Appellants’ claims and non-final judgment.

Finally, addressing the economic impact of the regulation on the claimant, the only evidence Appellants provide is that the Commission’s award was less than their non-final judgment. But this evidence in no way disputes the trial court’s observation that Appellants still received more than they would have without the Government’s action. *Alimanestianu*, 130 Fed. Cl. at 145–46. As noted by the trial court, Mihai’s estate received \$10 million, and each of Mihai’s children received \$200,000 through the Commission, which is likely more than could have been expected had Appellants attempted to enforce any U.S. judgment themselves. *Id.*

* Plaintiffs filed a petition for certiorari in the Supreme Court in 2018. *Alimanestianu v. United States*, No. 18-295. The U.S. brief in opposition will be discussed in *Digest 2019*. The Supreme Court denied the petition on February 19, 2019.

Instead, “the Government provided an alternative [adjudicatory forum] tailored to the circumstances which produced a result as favorable to the [Appellants] as could reasonably be expected.” *Abrahim-Youri*, 139 F.3d at 1468. Thus, “[w]here, as here, the private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public.” *Belk*, 858 F.2d at 709 (internal quotations omitted). “[T]he fact that [Appellants] are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.” *Abrahim-Youri*, 139 F.3d at 1468. Upon considering the *Penn Central* factors, Appellants have failed to show any evidence to demonstrate that they suffered a compensable taking. Therefore, the trial court did not err by granting summary judgment in favor of the Government.

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Cross References

Scalin v. SNCF, **Ch. 5.C.1.b**

ICJ, **Ch. 7.B**

Expropriation under the FSIA, **Ch. 10.A.2**

Scalin v. SNCF, **Ch. 10.A.2**

Investment dispute resolution under free trade agreements, **Ch. 11.B**