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CHAPTER 8

International Claims and State Responsibility

A. CUBA CLAIMS TALKS

On January 12, 2017, the United States and Cuba continued discussions regarding bilateral claims. See January 12, 2017 State Department media note, available at https://2009-2017.state.gov/r/pa/prs/ps/2017/01/266891.htm; see also *Digest 2016* at 331-33; and *Digest 2015* at 305 regarding previous claims discussions. State Department Legal Adviser Brian Egan led the U.S. delegation to the discussions held in Cuba. As summarized in the media note:

> Outstanding U.S. claims include claims of U.S. nationals that were certified by the Foreign Claims Settlement Commission, claims related to unsatisfied U.S. court judgments against Cuba, and claims held by the United States Government. The United States continues to view the resolution of these claims as a top priority.

B. IRAN CLAIMS

In June 2017, the Iran-U.S. Claims Tribunal announced the schedule for hearings in Case B/1 (Claims 2 & 3), pertaining to Iran's former Foreign Military Sales program. The hearings are scheduled to begin in February 2018 and continue through April 2019.

Also in June, the President of the Tribunal, Hans van Houtte, informed the Tribunal of his intention to resign from the Tribunal, effective December 31, 2017, or on such a later date as his successor should become available. Pursuant to the Tribunal Rules of Procedure, the Tribunal's Appointing Authority was charged with appointing a replacement, after the party-appointed arbitrators failed to agree on a replacement within 30 days. In December, the Tribunal's Appointing Authority announced the appointment of Professor Nicolas Michel of the University of Fribourg as a Member of the Tribunal to succeed President van Houtte, effective January 1, 2018. Pursuant to the

Tribunal Rules, President van Houtte will continue to deliberate Case A/15(IIA) until an award is issued in that case.

In August, the United States filed its Response to Iran's Brief and Evidence in Case A/11, pertaining to the United States' obligations pursuant to Paragraphs 12-15 of the General Declaration of the Algiers Accords in connection with the return of the assets of the family of the former Shah.

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 May 29, 2018, the total value of awards issued was $94,975,000. 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 2017.

1. Claim No. IRQ-II-069, Decision No. IRQ-II-045 (Proposed Decision)

Claim No. IRQ-II-069 was denied on January 26, 2017 because the claimant failed to establish that she was a U.S. national at the time of the alleged hostage-taking. The decision's discussion of the continuous nationality rule and the evidence required to establish such nationality is excerpted below.

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This claim fails to satisfy the first requirement—that it be brought by a "U.S. national." The term "U.S. national" has a specific legal meaning in this context. When the Commission interprets terms such as "U.S. national," Congress has directed us to look first to "the provisions of the applicable claims agreement." Here, that means we must turn first to the Claims Settlement Agreement. That Agreement expressly provides a definition of "U.S. nationals." Article I of the 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." As the Commission has recognized in its previous decisions, the U.S. nationality requirement thus means that a claimant must have been a national of the United States when the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force.

Claimant has failed to show that she was a U.S. national in 1990, when her claim arose. Indeed, the documents Claimant has submitted seem to establish conclusively that she was *not* a U.S. national when her claim arose. Claimant has submitted a Travel Document for Palestinian Refugees, issued by Lebanon (the date of issuance is unclear), which indicates that her nationality was Palestinian. Similarly, in her sworn statement, Claimant states that, at the time of

the invasion of Kuwait, she was a "stateless Palestinian." Thus, the evidence establishes that Claimant was not a U.S. citizen when the claim arose and is thus not a "U.S. national" within the meaning of the Claims Settlement Agreement and 2014 Referral.

In support of her claim to U.S. nationality, Claimant argues that she was "considered [to be] an American Citizen" by the U.S. Department of State on two occasions: first, when the State Department submitted a claim on her behalf against Iraq before the United Nations Compensation Commission (UNCC); and, second, when she received a "Hostage Relief Payment" pursuant to Public Law 101-513.

Even assuming both facts are true, neither establishes that Claimant was a U.S. national. First, the claims the State Department submitted to the UNCC were not just on behalf of United States nationals. The State Department also submitted claims on behalf of non-nationals, including those who were merely "residents of the United States." Thus, just because the State Department submitted a claim to the UNCC on Claimant's behalf does not mean that she was a United States national. Second, the hostage benefits afforded by Public Law No. 101-513 were also not limited to those who were U.S. nationals. The law provided benefits not only to U.S. nationals but also "family members" of U.S. nationals, including "any individuals who are members of the households of United States hostages." Thus, nothing the State Department has done establishes that Claimant was a U.S. national.

Just as importantly, it would not have mattered even if, as Claimant puts it, she was "considered [to be] an American national" by the State Department. As the Commission has previously recognized, U.S. nationality can be acquired "only by birth or by naturalization under the process set by Congress." Claimant was not a U.S. national at birth, and there is no evidence that she ever acquired U.S. nationality under the naturalization process established by Congress. Thus, even if, by 1990, Claimant had received certain assistance from the State Department (such as the receipt of statutory benefits under Public Law 101-513 or the submission of her claim before the UNCC), this would still not have made her a U.S. national at the time.

Finally, we find no merit in Claimant's assertion that she obtained U.S. nationality by demonstrating "permanent allegiance" to the United States. Although she does not say so explicitly, Claimant appears to base this argument on the Commission's authorizing statute, which defines the term "nationals of the United States" as "(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens." However, the phrase "persons who, though not citizens of the United States, owe permanent allegiance to the United States" applies only to an extremely small class of individuals who were born in certain outlying possessions of the United States—at this point, only American Samoa and Swains lsland—or born of such parentage. Claimant has not demonstrated, or even alleged, that she falls within that classification.

Therefore, the Commission is constrained to conclude that it has no jurisdiction to decide the present claim under the 2014 Referral. In other words, the Commission has no authority or power to decide the merits of this claim. Accordingly, this claim must be and is hereby denied for lack of jurisdiction. The Commission makes no determinations about any other aspect of this claim.

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2. Claim No. IRQ-II-352, Decision No. IRQ-II-178 (Proposed Decision)

Claim No. IRQ-II-352 was also denied because the claimant was not a U.S. national at the time of her hostage experience. Specifically, she did not become a U.S. citizen until 1993—some three years after she claims she was held hostage by Iraq. Claimant argued, however, that she only began to suffer emotional injuries resulting from her hostage experience in 1994, after she had been naturalized as a U.S. citizen, and that her nationality should be measured from that date, not from when she was originally held hostage. The Commission rejected this argument, citing decisions from several of its earlier programs, and held that, "[t]o ascertain when a claim arose for the purpose of determining whether the claim satisfies the continuous nationality requirement, the relevant date is the date of the commission of the act that gave rise to the claimant's injuries."

D. LIBYA CLAIMS

1. Foreign Claims Settlement Commission

As discussed in *Digest 2013* at 242-43, the U.S. Department of State made a third referral of Libya claims to the FCSC on November 27, 2013. As of January 19, 2018, the FCSC had issued final decisions on all claims received. The total value of awards as of January 19, 2018 was $37.7 million. See http://www.justice.gov/fcsc/current-programs. The following discussion focuses on some of the more noteworthy decisions under the Third Libya Referral. All decisions are available in full at https://www.justice.gov/fcsc/final-opinions-and-orders-5.

a. Claim No. LIB-III-020, Decision No. LIB-III-028

This Commission decided this case under the "special circumstances" category (Category D) of the Third Libya Referral. The decision explains that the Commission's standard for additional compensation does not encompass a right to a chosen career where claimant can work in other fields. In the Proposed Decision, the Commission denied the claim on the basis that the severity of claimant's injuries was not a special circumstance warranting more than the $3 million she had already been awarded. Nevertheless, claimant argued on objection that she was entitled to additional compensation. In the Final Decision, the Commission affirmed its denial of the claim. At one point, the claimant argued that her injuries impacted her "major life functions" (one of the factors in the Commission's standard for additional compensation) because she was unable to pursue a modeling career. However, the Commission concluded, citing a decision from its Second Libya Program, that "'[t]he reference to "major life functions" in [our standard for additional compensation] does not include a specific chosen career where, as here, the claimant has the capability to work in a variety of other fields.'"

b. Claim No. LIB-III-018, Decision No. LIB-III-039

The Final Decision in this case made an important point in dicta, namely, that the Commission may revisit any issue on objection, including reducing or eliminating an award made in the Proposed Decision. The claimant was awarded additional compensation under Category D of the Third Libya Referral due to the severity of his injuries. However, on objection, he asserted that he was entitled to greater compensation. The Commission agreed and withdrew its award in the Proposed Decision to award him greater compensation. Most of the decision consists of the factual analysis of the severity of the injury, but in footnote 14, the Final Decision makes the important point that, on objection, the Commission is empowered to revisit any issue that arises from the claim, which may include reducing or even eliminating an award made in the Proposed Decision. The claimant had argued that, "since the Commission made this inference on behalf of the Claimant in the Proposed Decision, it is precluded from revisiting this issue on objection."

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, filed on January 5, 2017, argues that Aviation does not possess a cognizable property interest; that no taking occurred; and that the case is not justiciable. Excerpts follow from the section of the brief on the takings analysis. The brief in its entirety is available at https://www.state.gov/s/l/c8183.htm.

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A. The *Penn Central* Analysis Applies

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

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

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

1. Aviation Lacked Any Reasonable Investment-Backed Expectation

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

Nor, as the trial court correctly held, …can Aviation have had an investment-backed expectation in a jurisdictional rule stripping state sponsors of terrorism of sovereign immunity; these rules are inherently subject to "current political realities and relationships," and are generally not rules upon which parties can rely in shaping their conduct. *Id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). *Cf. Chang v. United States*, 859 F.2d 893, 897 (Fed. Cir. 1988) (possibility of changing world circumstances and a corresponding response by the United States Government "can never be completely discounted" in foreign affairs); *Branch ex. rel. Maine Nat'l. Bank v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995) (investment-backed expectations are greatly reduced in a highly regulated field). That is particularly so in the case of the State Sponsor of Terrorism exception, which requires that the Executive Branch have designated the state as a state sponsor of terrorism and presumes a non-friendly relationship between the United States and a foreign state at a given time.

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

As the Supreme Court explained, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Beaty*, 556 U.S. at 865 (emphasis in original); *see also Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed expectation." (internal quotation and citations omitted)); *Alimanestianu v. United States*, No. 14-

704C, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) ("Because the jurisdictional rules abrogating Libya's sovereign immunity were enacted after Libya's terrorist act, Plaintiffs could not have sued Libya at the time of the injury or have had any expectation of monetary relief from Libya at that time."). Aviation thus could not have reasonably relied upon the rules of foreign sovereign immunity remaining static with respect to Libya. *Beaty*, 556 U.S. at 857 (observing that it was "entirely unremarkable" that Congress would give the President some flexibility in unique circumstances such as those pertaining to post-war Iraq); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner's attachment of foreign state's assets was not property under Takings Clause because it was subordinate to presidential power over the assets).

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

Moreover, Aviation's claims against Libya could be brought in United States courts for only approximately six months. In 2007, one of Aviation's district court cases was dismissed for lack of subject matter jurisdiction. Congress then amended the FSIA, allowing insurance companies, like Aviation, to bring suit under certain circumstances. 28 U.S.C. § 1605A. Aviation then filed amended complaints in both its district court lawsuits asserting claims pursuant to section 1605A. Appx243, Appx253-273, Appx347-369. That statutory section (1605A), however, applied to Libya for only approximately six months—from the end of January 2008, when it was enacted, until later in 2008, when Libya's sovereign immunity was restored with respect to claims of this nature. Thus, Aviation's taking claim now seeks to hold the United States liable for Libya's acts of terrorism simply because, by enacting 1605A, the Government, for a brief period of time, allowed Aviation to sue Libya, and then reinstated Libya's sovereign immunity some six months later.

That plaintiffs-appellants (with one apparent exception) are foreign companies further supports that they cannot have any expectation that the United States would include them in any settlement, or that they would be entitled to bring claims before the Foreign Claims Settlement Commission. For one, the Supreme Court has made clear that "the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors…. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts." *United States v. Pink*, 315 U.S. 203, 228 (1942). Moreover, Aviation could not have any expectation of obtaining a portion of the settlement proceeds through the Foreign Claims Settlement Commission. "The Foreign Claims Settlement Commission . . . has the duty of distributing a governmentally created fund among a class. No claimant, including the appellant, has a right to participate in any amount until the Commission has made an award." *American & European Agencies v. Gillilland*, 247 F.2d 95, 97-98 (D.C. Cir. 1957). Indeed, the Commission lacks jurisdiction to consider claims brought by foreign entities such as Aviation. *See* 22 U.S.C. § 1623(a) ("The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of *the Government of the United States or of any national of the United States*…." (emphasis added)).

The speculative nature of Aviation's claims is illustrated by a Foreign Claims Settlement Commission decision concerning claims brought by one of plaintiffs-appellants. Appx506-71. In that decision, the Commission explained that, with respect to the claimant's district court case, "the claimants were never able to convince the court that there was a viable legal theory under which they would in fact prevail. In short, at no point did any court rule that claimants had a valid cause of action or that claimants were entitled to damages, and there is no evidence that a court ever would have." Appx515. Thus, Aviation's taking claim is based upon three unfounded assumptions: (1) that they possessed a valid cause of action against Libya; (2) that they would have succeeded on that cause of action; and (3) that they would have been able to collect on a final judgment against Libya. As one district court explained in the context of claims brought against Iran, "[a] number of practical, legal and political obstacles have made it all but impossible for plaintiffs in these FSIA terrorism cases to enforce their default judgments…." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009).

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

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

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C. <u>The Character Of The Government's Actions Supports That No Taking Occurred</u>

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

Indeed, it is difficult to imagine an area in which the political branches of the United States have broader authority and discretion to act in the public's interest than the realm of foreign relations. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("[T]he federal power over external affairs [is] in origin and essential character different from that over internal affairs.");

Alimanestianu v. United States, No. 14-0704, 2016 WL 7488355, at *7 (Fed. Cl. Dec. 29, 2016) … Within that realm, the Government's power to define the scope of foreign sovereign immunity, taking into account principles of international law, and to establish and to promote amiable relations between two countries (here, the United States and Libya) constitute core functions. Given that, in this case, Congress and the President exercised those core functions in connection with the United States' efforts to normalize relations with Libya, it is self-evident that the Government acted in furtherance of a legitimate governmental interest. *See Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) …

The foreign relations context of this case further illustrates why the character of the Government's actions supports that no taking occurred. Courts recognize that the Constitution soundly commits foreign relations matters, including rules governing sovereign immunity, to the Government's political branches. *See Oetjen*, 246 U.S. at 302; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (presidential power is at its maximum when exerted pursuant to authorization of Congress). The FSIA itself is widely regarded as a statute that "directly addresses sensitive matters of foreign relations, which . . . are inherently subject to 'current political realities and relationships.'" *In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d at 80-81 (quoting *Altmann*, 541 U.S. at 696). *See also Dames & Moore*, 453 U.S. at 679 ("[N]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." (quoting *Pink*, 315 U.S. at 225)); *cf. Abrahim-Youri*, 139 F.3d at 1468 (recognizing that those who "engage in international commerce" do so pursuant to a type of implied license and that certain "sticks in the bundle of rights" are subject to "constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights."). The calculation of whether, and under what terms, to resolve claims and to normalize relations with Libya cannot be disentangled from the President's settlement authority. Thus, the foreign-relations context supports that the Government's actions did not result in a taking.

Further, the Government's actions affected Aviation's claims against Libya through alteration of a rule of sovereign immunity. *See Lingle*, 544 U.S. at 539 (contrasting a "physical invasion" of property with a program "adjusting the benefits and burdens of economic life to promote the common good"). Similar to *Belk*, "[h]ere there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims against Iran." *Belk*, 858 F. 2d at 709. Indeed, nothing the United States did affects Aviation's ability to pursue relief against Libya through its home country. … It thus would be odd if the President were able to extinguish claims altogether but unable to exercise the lesser power of restoring sovereign immunity with respect to a foreign state without engaging in a taking.

The Supreme Court specifically recognized in *Beaty* that the type of governmental actions about which Aviation complains only altered a jurisdictional rule of sovereign immunity, rather than any substantive rights. 556 U.S. at 864-65. Aviation can have no property right in such rules because they "speak to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274 (citation and quotation marks omitted), and because recognizing such a right would violate the settled principle that no person has a vested interest in any rule of law. *Branch ex. rel. Maine Nat'l. Bank v. United States*, 69 F.3d 1571, 1578 (Fed. Cir. 1995) ("[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." (quoting *New York Central R. R. Co. v. White*, 243 U.S. 188, 198 (1917)).

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

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

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

The trial court is right. Whether Aviation could have pursued a claim against Libya to final judgment and actually collected on the judgment is purely speculative. ...Moreover, as explained above, nothing the United States did affects Aviation's ability to pursue its claims in foreign countries or seek resolution of its claims through foreign governments.

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

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

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

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

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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. Excerpts follow from the U.S. brief filed in the Court of Appeals for the Federal Circuit on August 10, 2017. Portions of the brief, such as discussion of application of the *Penn Central* factors, that are similar to the discussion in *Aviation, supra*, are not included below.

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II. The Alimanestianu Plaintiffs Lack A Cognizable Property Interest

In determining whether governmental action constitutes a taking for Fifth Amendment purposes, the Court applies a two-part test. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). When the claimant fails to establish the existence of a protected property interest, "the court's task is at an end" and the action must be dismissed. *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

As demonstrated below, the Alimanestianu plaintiffs have failed to establish the existence of a cognizable property interest under settled law.

A. The Alimanestianu Plaintiffs Lack Any Cognizable Property Interest In The FSIA's Jurisdictional Rule

The Alimanestianu plaintiffs' alleged property interests—their non-final tort claims against Libya—were dismissed because the district court no longer possessed jurisdiction to hear them under the provision of United States law permitting courts to hear terrorism claims against certain designated state sponsors of terrorism. In other words, all that was "taken" was the power of United States courts to adjudicate their pending claims. The Alimanestianu plaintiffs had no vested property right in the jurisdiction of United States courts over their claims in the face of Congress's modification of that jurisdiction through legislation. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("Application of a new jurisdictional rule usually takes away no substantive right…."). To hold otherwise would run contrary to the well-settled proposition that no person has a vested right in any rule of law. *Branch v. United States*, 69 F.3d 1571, 1577-879 (Fed. Cir. 1995) ("As a general matter, a legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property.").

B. The Alimanestianu Plaintiffs' Non-Final Tort Claims Are Not Vested Property Interests

In any event, to the extent that the Alimanestianu plaintiffs assert that their tort claims were taken through some action other than the reinstatement of Libya's sovereign immunity, the Supreme Court has explained that property rights must be "vested" to be protected by the Takings Clause. *See Landgraf*, 511 U.S. at 266 ("The Fifth Amendment's Takings Clause prevents the Legislature…from depriving private persons of *vested* property rights [without just compensation]." (emphasis added)); *see also Hodges v. Snyder*, 261 U.S. 600, 603 (1923). As this Court has held, a "plaintiff has no vested rights in a lawsuit…" *Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1321 (Fed. Cir. 2014) (citation omitted).

In *Rogers v. Tristar Prods., Inc.*, 559 Fed. App'x. 1042 (Fed. Cir. 2012) (non-precedential), this Court rejected the argument that, "by initiating a lawsuit it has become property" for purposes of the Takings Clause, and explained that because "no 'vested' right attaches" to legal claims, "it is of no moment that [the plaintiff] expended effort and resources in filing and pursuing the complaint." *Id.* at 1045. The *Rogers* Court recognized that, "under most circumstances, Congress can change the rules in the middle of the suit…, or even eliminate the cause of action entirely after the case has been filed." *Id.* (citations omitted).

Numerous other circuits have likewise recognized that causes of action or non-final judgments do not constitute cognizable or "vested" property for constitutional purposes. *See, e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) (holding no property interest in a cause of action); *Hines v. Anderson*, 547 F.3d 915, 919 (8th Cir. 2008) (finding no property right in a consent decree); *Plyler v. Moore*, 100 F.3d 365, 374 (4th Cir. 1996) (same); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments… are final for Fifth Amendment…purposes. Rather, a case remains 'pending' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse." (citations omitted)); *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345-47 (7th Cir. 1992) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) ("Congress abridged no vested rights…by…retroactively abolishing [plaintiff's] cause of action in tort;" *dicta* that valid taking claim therefore "very unlikely"); *Memorial Hospital v. Heckler*, 706 F.2d 1130, 1137-38 (11th Cir. 1983) (no enforceable property right in non-final judgment); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 176 (D.C. 2008) (no vested property interest in cause of action), *cert. denied*, 556 U.S. 1104 (2009). Because the Alimanestianu plaintiffs had only non-final legal claims against Libya, they did not have any "vested" property, and thus cannot prevail on their takings claim.

The trial court found that the "lack of finality" of the Alimanestianu plaintiffs' claims was not dispositive of whether a taking had occurred, because the Government's "conduct prevented Plaintiffs' judgment from becoming final" and because "what was taken was Plaintiffs' right to complete the appellate process to attain a final judgment." Appx141. This reasoning is flawed in two respects. First, it incorrectly conflates the threshold question of whether a property interest exists with whether it has been taken. *Acceptance*, 583 F.3d at 854. That the Alimanestianu plaintiffs' tort claims against Libya were terminated upon the United States' restoration of Libya's sovereign immunity has no bearing on whether those claims constituted cognizable property protected by the Takings Clause.

Second, the purported "right to complete the appellate process," Appx141, is not among the vested property rights protected by the Takings Clause. *Landgraf*, 511 U.S. at 266. Also, procedural rights protected under the Due Process Clause are not the same as the property

protected by the Takings Clause. *See Adams v. United States*, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) (noting that "entitlements are often referred to as 'property interests' within the meaning of the Due Process Clause…but such references have no relevance to whether they are 'property' under the Takings Clause."). Thus, it "is of no moment that [the Alimanestianu plaintiffs] expended effort and resources in filing and pursuing" their claims against Libya before a vested right attached. *Rogers*, 559 Fed. App'x at 1045.

By the trial court's logic, a prospective homebuyer could sue under the Takings Clause if the Government seized the property before the time of closing, and thus before the buyer acquired any rights in the property. That cannot be the rule. *See CRV Enterprises, Inc. v. United States*, 626 F.3d 1241, 1249 (Fed. Cir. 2010) (holding that "plaintiffs did not own the property at the time of the alleged regulatory taking and therefore lacked standing"); *see also Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation.").

This conclusion is reinforced by case law in other jurisdictions rejecting claims similar to the Alimanestianu plaintiffs'. *See Ileto*, 565 F.3d at 1141; *Beretta*, 940 A.2d at 180-82; *Hammond*, 786 F.2d at 12-13, 15; *see also, e.g., Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (a cause of action "affords no definite or enforceable property right until reduced to a final judgment." (citations and internal quotation marks omitted)); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("a pending tort claim does not constitute a vested right"); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (a tort claim affords no definite or enforceable property right until reduced to final judgment).

III. No Taking Occurred

A. There Is No Categorical Duty To Pay Just Compensation Here

1. This Court's Precedent Holds That Additional Considerations Are Relevant With Respect To Takings Claims Based On Espousal

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

The Alimanestianu plaintiffs contend that the Government has engaged in a *per se* taking of their property. As a result, they assert, the Court must find that a taking occurred without any further analysis.

The Alimanestianu plaintiffs are incorrect. Their extreme position is based upon a misunderstanding of Supreme Court case law and fails to recognize this Court's binding precedent.

As an initial matter, this Court has, on two occasions, addressed takings claims in the context of the Government's espousal of legal claims. *See Belk*, 858 F. 2d at 709; *Abrahim-Youri*, 139 F.3d at 1465; *cf. Chang v. United States*, 859 F. 2d 893, 894-98 (Fed. Cir. 1988) (applying *Penn Central* factors to claim that United States engaged in taking of plaintiffs' contracts when it imposed sanctions on Libya). In *Abrahim-Youri*, this Court expressly rejected the argument that a *per se* takings claim is automatically compensable and that the Court may not consider other factors in its analysis. *Abrahim-Youri*, 139 F. 3d at 1465-66. In other words, *per se* takings do not automatically require compensation, even when the property at issue is allegedly seized, destroyed, or entirely extinguished. *See, e.g., id.* (no *per se* taking even when property rights were "not simply regulated in some manner, but were terminated"); *Paradissiotis v. United States*, 304 F.3d 1271, 1274-75 (Fed. Cir. 2002) (no taking when value of stock options was completely "destroyed").

Thus, this Court has made clear that, when claims are espoused, that does not mean that a taking has occurred. In *Belk*, the Court concluded that, even though plaintiffs' claims were "extinguished," pursuant to the *Penn Central* factors, no taking occurred. *Id.* at 708. And in *Abrahim-Youri*, this Court concluded that an espousal of claims meant that the parties' "choses in action were not simply regulated in some manner, but were terminated." 139 F.3d at 1465. The Court nonetheless emphasized that "[t]o say that, however does not say . . . that the considerations identified by the trial court [under *Penn Central*] are not relevant to the proper outcome of the case." *Id.* at 1466. The Court proceeded to focus on the unique circumstances present when the Government espouses claims of its citizens: "Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights. As the trial court correctly observed, 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." *Id.* at 1468; *see also id.* at 1468 (Clevenger, J. concurring) ("This case is significant in that it affords us the opportunity to recognize that the familiar per se taking and regulatory taking categories are not rigid and that certain "per se" takings . . . do not automatically result under the Fifth Amendment in compensation to the ousted property owner.").

Indeed, the Supreme Court has recognized the particular circumstances that surround the espousal of claims: "[a]t least since the case of the 'Wilmington Packet' in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement. In fact, during the period of 1817-1917, 'no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens." *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981) (citations omitted). And more recently, the Supreme Court found that, "[t]he President's elimination of Iraq's *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts." *Republic of Iraq v. Beaty*, 556 U.S. 848, 865 (2009) (emphasis in original); *see also Abrahim-Youri*, 139 F. 3d at 1469 (Clevenger, J. concurring) ("One who obtains, in the pursuit of international commerce, a claim against a foreign government knows that our government may deem it necessary to espouse that claim."); *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987) (holding that no taking occurred when the United States entered into the Algiers Accords with Iran, which extinguished plaintiffs' claims, because "[t]he actions of the President should have been no surprise. The possibility that the President will intervene in this matter is properly recognized as both a shared benefit and a shared risk of those who trade and travel abroad. The compromise of plaintiffs' claims cannot constitute a drastic or novel interference with any investment-backed expectation." (internal quotation and citations omitted)).

2. *Horne* Is Inapposite

In response to this precedent, the Alimanestianu plaintiffs rely on the Supreme Court's decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), which they assert stands for the proposition that whenever private property is transferred to the Government, a *per se* taking has occurred and the Government must pay just compensation. App. Br. at 34-48.

In *Horne*, the Supreme Court held that a Government requirement that raisin growers set aside a certain percentage of their crop for the Government, free of charge, was a *per se* taking. The Court explained that in that context, personal property is subject to the same rules that apply

to real property. *Id.* at 2426. The Court concluded that, as a result, the Government must compensate the raisin growers for the market value of the raisins.

Horne is easily distinguishable and the Alimanestianu plaintiffs' reliance on this case is based on a misunderstanding of property (assuming that the claims and non-final judgment here are vested property). In particular, as explained, the Alimanestianu plaintiffs fail to understand that their claims (and subsequent non-final judgment) were claims against a foreign government which, by their very nature, come with limitations that preclude a takings claim.

As explained above, the Supreme Court held in *Beaty*, 556 U.S. at 865, that the subsequent elimination of a country's subjection to suit cannot be said to have deprived a party of any expectation that they held at the time of their injury that they would be able to sue in United States courts. *Beaty* makes clear that the statement in *Horne* that, "[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away," 135 S. Ct. 2427, has no application in the context of claims against a foreign country, especially when the foreign country enjoyed immunity from suit at the time of the injury at issue. *Beaty*, 556 U.S. at 865.

Put another way, regardless of the type of property or the type of government action, "[e]xisting rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Acceptance*, 583 F.3d at 857; *see also California Hous. Sec., Inc. v. United States*, 959 F.2d 955 (Fed. Cir. 1992) (no conceivable expectation by the plaintiffs that their property would not be occupied in the event circumstances compelled the regulators to close the facility because the license to engage in domestic banking was subject to the condition of potential occupation of the private property by the Government.). As this Court has held, in this context, those background rules include the fact that international relations may become strained and that the United States Government at times espouses the claims of its nationals against a foreign government. *Abrahim-Youri*, 139 F3d at 1468. And, pursuant to the Supreme Court's decision in *Beaty*, they also include the fact that no party could have any reasonable expectation in pursuing their terrorism-related claims against Libya when, at the time the injury arose, Libya enjoyed sovereign immunity with respect to those claims. 556 U.S. at 865.

Thus, the holding in *Horne* that "[r]aisin growers subject to the reserve requirement lose the entire 'bundle' of property rights in the appropriated raisins," 135 S. Ct. at 2428, is not applicable to international claims. Instead, as this Court held in *Abrahim-Youri*, the sticks in the bundle of rights that make up a claim against a foreign nation come with an important and inherent limitation: that the claim may be espoused by the United States. *Abrahim-Youri*, 139 F. 3d at 1468.

Moreover, a hypothetical demonstrates that even when a *per se* taking has occurred, property may nonetheless be subject to certain constraints: The Government gives a citizen an item of property while reserving the right to take back the property at any time without payment. Under the Alimanestianu plaintiffs' view, when the Government does take back the property, it has engaged in a *per se* taking—the entire property has been taken by the Government. In other words, under their view of *Horne*, notwithstanding that the property came with certain conditions, a *per se* taking occurred and the Government would need to compensate the owner for the property. That view is plainly incorrect. The bundle of rights that came with the property was "subject to constraint by government as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights." *Abrahim-Youri*, 135 F.

3d at 1468. Thus, under this hypothetical, no taking occurred because, even though the entire property was taken, the use of that property was always subject to certain constraints—the right of the Government to take it back at some future date. Put differently, the property-holder's interest was contingent, not absolute. As this Court held in *Abrahim-Youri*, the same is true with respect to claims against foreign governments. 139 F. 3d at 1468.

Indeed, the Supreme Court has made clear that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). And again, this Court has held that these rules apply in this very context—espousal. *Abrahim-Youri*, 135 F 3d at 1468. Put another way, property subject to pervasive regulation and Government control, such as claims against foreign states, is not protected by the Takings Clause under these circumstances. *See, e.g., Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012) ("Where a citizen voluntarily enters into an area which from the start is subject to pervasive Government control, a property interest is likely lacking."); *cf. Dames & Moore*, 453 U.S. 654, 674 n.6 (1981) (petitioner's attachment of foreign state's assets was not property under Takings Clause because it was subordinate to presidential power over the assets). Thus, even assuming that the Alimanestianu plaintiffs' legal claims could constitute cognizable property interests, inherent within those claims is the limitation that they could be espoused and that statutory rules of sovereign immunity might change.

Finally, the Alimanestianu plaintiffs make two additional arguments in support of their assertion that compensation must be paid because a *per se* taking has occurred. First, they contend that the fact that many of them received compensation from the settlement fund may not be considered. App. Br. at 45. As explained above, however, this Court has rejected the argument that a *per se* taking automatically entitles one to compensation. And in so holding, the Court in *Abrahim-Youri* emphasized that "the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." 139 F.3d at 1468. In any event, this Court has held that one proper consideration is the economic impact of the Government's action on the claimants. *Id.* at 1465, 1468. The Government's action in this case resulted in the Alimanestianu plaintiffs collectively receiving nearly $11 million.

Second, the Alimanestianu plaintiffs cite to a case from 1886—*Gray v. United States*, 21 Ct. Cl. 340 (1888)—which, they assert, supports their theory that a taking occurred. But this Court was faced with the same argument in *Abrahim-Youri*. The Court concluded that *Gray* was an "advisory opinion to Congress," that the language cited is *dicta*, and that even if *Gray* correctly stated propositions of law applicable to the circumstances of that case at that time, "the evolution of takings law in the last 100 years brings additional considerations to light." *Abrahim-Youri*, 139 F.3d at 1467; *see also Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970) ("All that really needs to be said about the *Gray* case is that the opinion…was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the 'French Spoliation' claims which were later granted by Congress following the *Gray* opinion, the Supreme Court remarked: 'We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.'" (*quoting Blagge v. Balch*, 162 U.S. 439, 457 (1896)).

Accordingly, *Horne* has no application to this case. The Court must follow *Belk* and consider the constraints on any identifiable property interest, as in *Abrahim-Youri*.

* * * *

E. The Alimanestianu Plaintiffs' Arguments Are Unavailing

The Alimanestianu plaintiffs do not dispute most of the foregoing. Rather, they contend that the Commission did not provide them with sufficient compensation and that it was "not a true alternative forum." Pet. Br. at 49-55. They also contend that the trial court erred in valuing their claims. *Id.* at 55-56.

The Alimanestianu plaintiffs are incorrect. With respect to their challenge to the amount that they received under the settlement, "the fact that plaintiffs are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States." *Abrahim-Youri*, 139 F.3d at 1468.

Moreover, parties may not challenge in court the award provided by the Commission because decisions of the Commission are not subject to judicial review. 22 U.S.C. § 1623(h).

Even though the Government was not required to provide an alternative forum, the Commission is an alternative forum. Section 1623(a)(1)(C) of Title 22, United States Code, provides, "The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States…included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State." The International Claims Settlement Act of 1949 (ICSA), 22 U.S.C. § 1621 *et seq.*, established the International Claims Commission, which in 1954 merged with the War Claims Commission to become the Foreign Claims Settlement Commission, and provided the Commission with jurisdiction to "make final and binding decisions with respect to claims by United States nationals against settlement funds." *Dames & Moore* 453 U.S. at 680 (citing 22 U.S.C. § 1623(a)). And in rendering decisions upon claims, the Commission does not, as the Alimanestianu plaintiffs contend, mechanically implement the will of third parties (such as the State Department) but, rather, is required to make independent decisions. *See* 22 U.S.C. § 1622g ("Nothing in this Act shall be construed to diminish the independence of the Commission in making its determinations on claims in programs that it is authorized to administer pursuant to [the ICSA and the War Claims Act]. The decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise.").

With respect to the Alimanestianu plaintiffs' claims against Libya, by letter dated January 15, 2009, the State Department's Legal Adviser referred certain categories of claims for "adjudication and certification" by the Commission. Appx127-133. The referral letter did not predetermine award amounts, and instead simply declared that the State Department "believe[d] and recommend[ed]" certain amounts for different categories of claimants. *Id.* On July 7, 2009, the Commission published a notice announcing the commencement of adjudication of claims under this portion of the Libya Claims Program. *See* Notice of Commencement of Claims Adjudication Program, 74 Fed. Reg. 32,193 (July 7, 2009). The Commission adjudicated and issued a number of decisions on these claims. *See* Index of Claims under the January 2009 Referral from the Department of State Ordered by Decision Number, available at http://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/claims- january-referral_by_decision.pdf. These decisions make clear that, in fact, the Commission fulfilled its

obligations and adjudicated these claims independently. *See* Appx156-211 (proposed and final decisions from the Commission).

Thus, the Government did provide an alternative forum for many of the Alimanestianu plaintiffs' claims—and, in fact, the majority of the Alimanestianu plaintiffs received considerable compensation from the settlement proceeds. In any event, even if the Government had not provided an alternative forum, "that fact is not sufficient to establish a taking." *Belk*, 858 F.2d at 709.

* * * *

The President's authority to enter into the claims settlement agreement with Libya is beyond question and is a quintessential example of the exercise of the President's broad constitutional powers in foreign affairs. *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Dames & Moore*, 453 U.S. at 679-80 (same). Indeed, the Supreme Court has long acknowledged the President's authority specifically with respect to espousal of the claims of United States' nationals against foreign states. *Dames & Moore*, 453 U.S. at 679-80 ("the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries…. [T]here has also been a longstanding practice of settling such claims by executive agreement…"); *see also Shanghai Power*, 4 Cl. Ct. at 244 ("Our Presidents have exercised the power to settle international claims of U.S. nationals at least since 1799.").

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

The same is true in this case—the Alimanestianu plaintiffs challenge the Executive Branch's espousal of their claims pursuant to Congress's enactment of the LCRA, which premised the restoration of Libya's sovereign immunity on the settlement of terrorism-related claims of United States nationals against Libya. Shortly after the enactment of the LCRA, the Executive Branch espoused the claims of the Alimanestianu plaintiffs in accordance with that legislation and entered into the claims settlement agreement with Libya. The settlement agreement required the Secretary of State to certify that the funds received were sufficient to compensate the victims of Libya's state-sponsored terror. *See* Appx78-82. The funds were then distributed to claimants by the State Department and the Commission, in amounts that the Alimanestianu plaintiffs now challenge. By challenging the amounts they received under the settlement agreement, they are challenging the merits of that agreement. This situation parallels the *Belk* plaintiff's challenge to the implementation of the Algiers Accords and, like that challenge, is nonjusticiable.

The trial court disagreed with us with respect to justiciability. In denying our motion to dismiss, it held that the Alimanestianu plaintiffs are not challenging the merits of the settlement agreement or the President's settlement authority. Appx144.

We continue to respectfully disagree. The Alimanestianu plaintiffs allege that the Government compromised their claims "for pennies on the dollar," and that they received either "nothing in exchange for the espoused Judgment or a fraction of the value of the Judgment." Appx21. In describing "the taking" that they allege occurred, they assert that the settlement

agreement resulted in the establishment of a fund of 1.5 billion dollars but that "[t]he amount of the Fund was a small fraction of the value of the claims that U.S. citizens held against Libya." Appx25. They assert that "the Executive branch espoused the valuable claims and judgments of its citizens against Libya and used them as a bargaining chip in its efforts to restore diplomatic relations with the state of Libya." Appx25. And they again emphasize that, because the fund was not sufficient to cover the amount of their non-final judgment, they believe that a taking occurred. Appx27. Indeed, in their brief to this Court, they repeatedly challenge the amount they received from the settlement. App. Br. at 50-56 ("The Commission did not provide reasonable compensation for the plaintiffs"). Moreover, before the trial court, they even asserted that the property interest that they allege was taken is "the proceeds from the settlement of the claims." Appx220. These statements reveal that the core of the Alimanestianu plaintiffs' argument relates to the President's exercise of his authority to espouse and to settle claims, in the context of conducting the United States' foreign relations with Libya.

The reasons that the President's exercise of claims settlement authority is insulated from judicial review become evident if one imagines what would happen if this Court were to adopt the Alimanestianu plaintiffs' theory. A determination that the United States engaged in a taking in this case could have the effect of requiring the United States, in any future claims settlement agreement with a foreign sovereign, to pay compensation to persons who were engaged in litigation against that sovereign in an amount determined by a trial court or simply by the plaintiff's claimed damages. Those damages amounts can be significant and are not always tested in the courts through adversarial proceedings; indeed, in many terrorism cases, plaintiffs have obtained substantial default judgments against foreign states who do not appear. *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1121 (9th Cir. 2010) (resolving issues related to enforcement of plaintiffs' $2.6 billion default judgment against Iran arising out of the 1983 bombing of United States Marine barracks in Lebanon); *Volloldo v. Ruz*, 2016 WL 84192, at *1 (N.D.N.Y. Jan. 1, 2016) (citing state-court $2.79 billion default judgment against Cuba arising out of alleged acts of torture).

This prospect might inhibit the United States from making future settlements, even when they are in its foreign policy interests, or may effectively require the United States to negotiate larger settlements, which could prove impossible or politically costly. Such a determination would also, as courts have suggested, have the effect of making the United States indirectly responsible for Libya's conduct. "The American government should not be held as a surrogate for [another country's] unjustifiable actions." *Belk*, 12 Cl. Ct. at 735; *see also Abrahim-Youri*, 36 Fed. Cl. at 487 ("The property losses that plaintiffs suffered were occasioned by Iran, not the United States."). In other words, the rule that the Alimanestianu plaintiffs seek could have serious unintended consequences in matters of foreign policy that are committed to the political branches.

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Cross References

International Criminal Tribunals, **Ch. 3.B.**
TEPCO *case regarding compensation for Fukushima nuclear accident*, **Ch. 5.C.4.**
IACHR cases, **Ch. 7.E.**
Relations with Cuba, **Ch. 9.A.2.**
Expropriation Exception to Immunity, **Ch. 10.A.3.**
ICAO Dispute with Brazil (Chicago Convention), **Ch. 11.A.4.**
Investment Disputes, **Ch. 11.B.**
WTO Dispute Settlement, **Ch. 11.C.**
Litigation regarding arbitration, **Ch. 15.C.2**