FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claims of	}	
INTERLEASE, INC.	}	Claim No. LIB-II-023
	}	Decision No. LIB-II-163
Against the Great Socialist People's Libyan Arab Jamahiriya	}	

Counsel for Claimant: Stuart H. Newberger, Esq.
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") submitted by INTERLEASE, INC. (claimant) is for losses arising from the destruction of a 1973 McDonnell Douglas DC-10-30 aircraft by the mid-air bombing of Union de Transports Ariens ("UTA") Flight 772 over the Sahara Desert in Niger on September 19, 1989.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

> receive, examine, adjudicate, and render a final decision with respect to any claim 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.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication

six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("January Referral").

The present claim is made under Category F. According to the January Referral, Category F consists of

> commercial claims of U.S. nationals provided that (1) the claim was set forth by the claimant named in the Pending Litigation; (2) the Commission determines that the claim would be compensable under the applicable legal principles; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 8. Attachment 1 to the January Referral lists the suits comprising the Pending Litigation.

The January Referral, as well as a December 11, 2008 referral letter ("December Referral") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures

governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF CLAIM

On September 9, 2009, the Commission received from claimant a completed Statement of Claim, in which it asserted a claim under Category F of the January Referral, along with accompanying exhibits supporting the elements of its claim. The submission included evidence of the U.S ownership of the claim; inclusion of the claimant as a named party in a Pending Litigation case referred to in Attachment 1 of the January Referral, in which the claimant asserted a claim for property and business losses; the dismissal of the Pending Litigation against Libya; and the nature of the property and business losses allegedly suffered.

In its initial submission, the claimant sought $41 million plus interest for the destruction of the aircraft, based on its asserted value on September 19, 1989, the date of the bombing. The claimant subsequently changed its theory of damages, arguing that it was entitled to the loss of its post-September 19, 1989 lease income plus the residual value of the aircraft at the end of the lease period. As a result, claimant revised its claim downward to a total of $33,509,158.00 (including interest).

In support of its claim, the claimant has submitted evidence of the U.S. nationality of each person and/or entity who has held an interest in this claim with the exception of La

Reunion Aerienne ("LRA"), a French corporation; the value of the aircraft; the loan and lease agreements associated with the aircraft; and the ongoing value of the income generated by the aircraft.

DISCUSSION

I. Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under Category F of the January Referral; namely, claims of: (1) U.S. nationals; (2) named as parties in a Pending Litigation case in which they set forth a commercial claim; (3) which would be compensable under the applicable legal principles; and (4) where the Pending Litigation has been dismissed. January Referral, *supra* ¶ 8.

A. Nationality

In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that to meet the nationality requirement, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement.[1] In the case of a claim filed by a corporation or other legal entity, the claimant qualifies as a U.S. national if it is incorporated in a state or territory of the

[1] *See, e.g., Claim of THE ESTATE OF JOSEPH KREN, DECEASED against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of PETER KERNAST*, Claim No. W-9801, Decision No. W-2107 (1965); *Claim of RALPH F. GASSMAN and URSULA ZANDMER against the German Democratic Republic*, Claim No. G-2154, Decision No. G-1955 (1981); *Claim of ELISAVETA BELLO, et. al. against Albania*, Claim No. ALB-338, Decision No. ALB-321 (2008).

United States or the District of Columbia and at least 50% of its stock is owned at all pertinent times by natural persons who are citizens of the United States.[2]

The Commission finds that the claimant has submitted evidence sufficient to establish that: (1) on the date this claim arose, September 19, 1989, the claim was owned by Interlease, Inc.—a U.S. corporation incorporated in the State of Georgia in 1988—(hereinafter ILG); (2) on October 4, 1989, LRA—a French corporation and insurer of the aircraft—paid $34 million to ILG pursuant to its hull insurance contract, for which it received a subrogated interest in this claim; (3) on May 14, 1990, ILG assigned to its sole shareholder, Douglas G. Matthews, a U.S. national since birth, individually, "all of [its] right, title and interest in and to any claim to or action against any parties that may ultimately be determined as responsible for the suspected act of terrorism that resulted in the loss of the Aircraft;" (4) on May 16, 1990, ILG merged into Intercredit Corporation (a Florida corporation, hereinafter ICC), with ICC as the surviving corporation, which was then administratively dissolved in 1997; (5) on March 27, 2002, Interlease, Inc. (hereinafter ILG II) was "re-incorporated" under the laws of the State of Georgia, effective April 1, 2002, which, at all times relevant hereto, had as its sole shareholder Douglas G. Matthews; (6) on April 5, 2002, Mr. Matthews assigned to ILG II all rights assigned to him pursuant to the May 14, 1990 assignment referenced above; (7) on November 2, 2007, INTERLEASE, INC., the claimant herein, was incorporated under the laws of the State of Florida, which, at all times relevant hereto, had as its sole shareholder Mr. Matthews; and (8) on November 29, 2007, ILG II merged into claimant.

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[2] *See e.g. Claim of JOINT VENTURE OF PECTIN VIETNAM COMPANY AND VIETNAM CITIES SERVICE, INCORPORATED*, Claim No. V-0522, Decision No. V-0425 (1985).

Based on this and other evidence in the record, the Commission finds that LRA became subrogated to ILG's interest in this claim to the extent of the $34 million payment it made under its contract of insurance. Accordingly, the Commission determines that because, as noted above, LRA is not a national of the United States, the portion of this claim corresponding to its interest must be and is hereby denied. The Commission also finds that, to the extent that any portion of the present claim was not previously compensated by LRA, such portion has been held by U.S. nationals continuously since the date of loss.

B. Commercial Claim in a Pending Litigation Case

As noted above, to fall within the category of claims referred to the Commission, the claimant must be a named party in one of the Pending Litigation cases listed in Attachment 1 to the January Referral in which it has asserted a claim for commercial loss. January Referral, *supra*, ¶ 8. The claimant has provided a copy of the complaint in *Pugh, et al. v. Socialist People's Libyan Arab Jamahiriya*, filed in the United States District Court for the District of Columbia, in which it is a named party, and in which it asserted a cause of action for, *inter alia*, tortious interference with its "contracts, business relations, leases, and other business operations and opportunities" under Count VIII of the complaint. Accordingly, the Commission finds that the claimant was a named party in a Pending Litigation case and that it set forth a commercial claim in that action.

C. Compensable under Applicable Legal Principles

By its terms, Category F of the January Referral limits the Commission's jurisdiction to claims that "would be compensable under the applicable legal principles." January Referral, *supra*, ¶ 8. While the Commission will assess the merits of the present

claim below, this provision of Category F requires that the Commission first determine whether the claim is cognizable under the applicable legal principles. In other words, claims that are not cognizable under the "applicable legal principles" do not fall within the Commission's jurisdiction.

The January Referral does not define "applicable legal principles." However, because the law the Commission is required to apply is mandated by its controlling statute, the Commission interprets the reference in Category F to the "applicable legal principles" to mean the Commission's statutorily mandated law.

Under subsection 4(a) of the ICSA the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity" in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006). The "applicable claims agreement" here is the Claims Settlement Agreement. By its provisions, the Claims Settlement Agreement covers claims that arise from injury, death and property loss. However, it does not specify which legal principles to apply in determining the compensability of commercial claims as Category F requires. The LCRA and the relevant Executive Order, E.O. 13,477, are similarly silent. Therefore, pursuant to the ICSA, since "the provisions of the applicable claims agreement" do not define the "applicable legal principles" to be applied in this Category F case, the Commission must turn to "the applicable principles of international law, justice and equity" to determine whether the present claim would be compensable in principle.

In the trio of "international law, justice and equity," the Commission turns first to international law. Under international law, "an unlawful act implies an obligation to make

reparations to the injured party...."[3] In the present claim, as plead, the claimant asserts that its predecessor in interest suffered a property loss arising out of the destruction of a 1973 McDonnell Douglas DC-10-30 aircraft as a result of the mid-air bombing of UTA Flight 772 over the Sahara Desert in Niger on September 19, 1989. It is axiomatic that the mid-air destruction of an aircraft by terrorists in such circumstances as are present here is an internationally wrongful act. Given these facts, the Commission determines, for purposes of this jurisdictional requirement of Category F only, that the claim asserted is compensable in principle. Accordingly, the Commission finds that the claimant has satisfied this element of its claim.

D. Dismissal of the Pending Litigation

As noted, Category F also requires that the claimant have submitted evidence that the Pending Litigation was dismissed. To meet this jurisdictional requirement, the claimant has provided a copy of an Order of Dismissal, dated March 6, 2009, dismissing the Pending Litigation. Based on this evidence, the Commission finds that the Pending Litigation has been properly dismissed.

In summary, the Commission concludes that this claim is within the Commission's jurisdiction pursuant to Category F of the January Referral and is entitled to adjudication on the merits.

II. Merits

A. Eligibility for compensation

The Commission finds that Libya's liability for the unlawful destruction of UTA Flight 772 over the Sahara Desert on September 19, 1989 is established by the terms of the Claims Settlement Agreement, which covers, *inter alia,* claims that arise from "...property

[3] *See Bin Cheng, General Principles of Law as applied by International Courts and Tribunals* 234 (1993).

loss caused by...an act of...aircraft sabotage..." and the terms of the January Referral, which identifies the federal litigation arising out of that unlawful act as a Pending Litigation falling within the terms of the referral. In addition, as noted above, under fundamental principles of international law, the intentional, mid-air bombing of a civilian aircraft is universally recognized as an internationally wrongful act[4] that places the responsible State "under an obligation to make full reparation for the injury caused."[5] The claimant, owner of the aircraft that was destroyed, is consequently eligible for compensation for its losses arising out of that unlawful act. What remains for the Commission is to determine the value of its claim for compensation.

B. Compensation

1. Background

The aircraft that was destroyed in the bombing was the subject of a "sale-leaseback" arrangement common to the airline industry. According to the claimant, on March 17, 1988, ILG and Security Pacific Financing Services, Limited (SPFS) entered into a Purchase Agreement pursuant to which ILG purchased the aircraft from SPFS for $35,750,000. Concurrent with the closing of this purchase agreement, the following transactions were also entered into: (1) Security Pacific National Bank (SPNB) lent ILG $30,500,000 of the purchase price pursuant to a "Loan Agreement"; (2) ILG leased the aircraft to SPFS pursuant to a "Headlease Agreement"; (3) SPFS in turn subleased the aircraft to UTA pursuant to a "Sublease Agreement"; and (4) ILG entered into a "Supplemental Rental Agreement" with both SPFS and UTA.

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[4] *See, e.g., Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir. 1997) ("Libya concedes, for purposes of this appeal, that its alleged participation in the bombing of Pan Am Flight 103 would be a violation of *jus cogens...* .").

[5] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 31 (2001).

Pursuant to these agreements, ILG agreed to lease the aircraft to SPFS, and SPFS agreed to sublease the aircraft to UTA. In exchange, UTA agreed to pay approximately $1,500,000 per quarter, consisting of monthly installments of $166,666 paid to ILG (bypassing SPFS) as a so-called "supplemental rental payment" and separate quarterly payments of $1 million to SPFS, which in turn agreed to pay that amount to ILG.[6] Finally, under the terms of the Loan Agreement, ILG was obligated to pay $1,001,380 per quarter to SPNB.[7] According to the claimant, as of September 19, 1989, the date of the destruction of the aircraft, a total of seventeen (17) supplemental rental payments (April 1988 through August 1989) and five (5) quarterly rental payments (March 21, 1988 – June 21, 1989) had been made. However, the Commission notes that the sections of the Headlease and Sublease Agreements relating to a "total loss" of the aircraft provide that "the obligation of the Lessee to make Rental Payments shall continue following the date of the Total Loss" until insurance proceeds are received by the Lessor.

Furthermore, the Supplemental Rental Agreement provided that supplemental rental payments were to be paid "during the Sublease Period" which, as previously noted, ran until the receipt of insurance proceeds. On this point, the Proof of Loss and Release and Discharge document provided by claimant indicates that the insurance proceeds were provided on or after October 4, 1989. Therefore, on September 21, 1989, SPFS and UTA were obligated under the Headlease and Sublease Agreements, respectively, to make Rental Payments; UTA was obligated under the Supplemental Rental Agreement to make supplemental rental payments; and ILG was obligated under the Loan Agreement to make

[6] Strictly speaking, because the lease was for 64 months, the lease actually provided for 21 quarterly payments of $1,000,000 each (covering 63 months), and then a final payment of $333,333 for the 64th and final month.
[7] Again, strictly speaking, the Loan Agreement required 21 quarterly payments of $1,001,380 and a final payment of $333,793 for the 64th month of the loan.

an installment payment. The claimant has not provided any evidence that these payments did not occur. Therefore, the Commission finds that a total of eighteen (18) supplemental rental payments (April 1988 through September 1989) and six (6) quarterly rental payments (March 21, 1988 – September 21, 1989) were made pursuant to the various rental agreements. Accordingly, based on the amortization schedule for the loan, the outstanding balance on the date of payment of the insurance proceeds was $28,838,667.

2. Claimant's Asserted Loss

As noted above, the claimant initially submitted a claim for $41 million plus interest, based on the asserted fair market value of the aircraft in 1989. Subsequently, claimant submitted an alternate theory of damages, seeking $33,509,158 in total (including interest), calculated as the value of the Headlease Agreement between ILG and SPFS and the Supplemental Rental Agreement between ILG and UTA for the term of those agreements (alleged to have been 10 years), plus the residual value of the aircraft at the end of the term, less the insurance proceeds received by ILG.

3. Valuation

As a threshold matter, the Commission determines, consistent with its applicable law, that the claimant is entitled to the fair market value of the asset in question—the 1973 McDonnell Douglas DC-10-30 that was destroyed over the Sahara Desert—as of the date of its destruction. There are three generally accepted approaches to fair market valuation—the income approach, the cost approach and the market approach. Given that the claimant was generating income from the asset during the lease period, and given that the asset would have had a measurable residual value at the end of the lease period, the Commission concludes that the approach to fair market value that is "most appropriate to

the property taken, and equitable to the claimant" is a combination of the income approach (which measures the profitability of the underlying lease) and the market approach (which adds the residual value of the aircraft at the end of the lease period).[8] As discussed below, this approach to valuation conforms to the claimant's own theory of damages.

In arriving at its claimed amount, the claimant has submitted the opinion of a Bruce Dubinsky—a Certified Valuation Analyst. As the basis for his opinion, Mr. Dubinsky relies upon the contractual terms of the Headlease Agreement, the Sublease Agreement, the Supplemental Rental Agreement, and the Loan Agreement as well as a letter dated March 25, 1988 from a Mr. Steve Rimmer of SPNB, one of the lenders under the Loan Agreement. In calculating the loss suffered by ILG, Mr. Dubinsky makes the following assumptions: the term of the lease would have extended to 124 months, of which 17 months had elapsed; at the end of the lease term there would have been an outstanding balance on the loan of $7,650,000; the loan would have had an interest rate fixed at 9.69% for the term of the 124-month lease; ILG would not have incurred any additional costs associated with the lease; and ILG received $4,056,160[9] in insurance proceeds after the satisfaction of the loan.

Since the losses all occurred after the act giving rise to the loss—the destruction of the aircraft—Mr. Dubinsky reduced the nominal dollar amounts to their present value as of

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[8] *See*, 22 USC 1623(a)(2)(b); *see also, e.g., Claim of USM PAN AMERICAN, LTD.*, Claim No. CU-932, Decision No. CU-3842 (1969).

[9] As the basis for determining the net amount of insurance proceeds received by ILG, claimant relies on assertions made in the "Assignment of Rights" dated May 14, 1990—wherein ILG assigned its rights in this claim to Douglas G. Mathews—and a document entitled "Interlease, Inc. Consent of Sole Director and Shareholder in lieu of Resolution and Meeting Approving Assignment of Rights" also dated May 14, 1990, indicating that the net insurance proceeds totaled $4,056,160.59. However, Schedule 3 of the Loan Agreement states that on September 21, 1989—the date of the last payment before the insurance proceeds were paid—the outstanding balance was $28,838,667, hence netting $5,161,333 to ILG. The Commission finds the evidence submitted by claimant on this point to be unpersuasive and, therefore, relies instead on the terms of the Agreements.

September 19, 1989. In his calculation of the present value of the loss, Mr. Dubinsky determined that the appropriate discount rate to be applied to these losses should be 5.68% based on 1) "the average annual market yield on 10-year U.S. Treasury bonds for the period 1980-1989"—10.59%—and 2) "the compound annual growth rate of the Consumer Price Index over the corresponding period"—4.65%. Based upon these assumptions, Mr. Dubinsky concluded that claimant had suffered losses in the principal amounts of approximately $14.1 million based on ILG's loss of rental income ($166,666 for 107 months reduced to present value) and approximately $6.6 million based on the present value—in 1989—of the aircraft at the end of the lease ($24.6 million) less the outstanding balance on the loan ($7.65 million) and the receipt of insurance proceeds ($4 million). These are addressed and discussed in turn below.

i. Compensable Period

Claimant bases its calculation on the assumption that the lease would have been extended to 124 months. However, it failed to provide sufficient evidence to establish that fact. On the contrary, both the Headlease Agreement and the Sublease Agreement define the lease period as 64 months with an option to renew for a period or periods not exceeding, in the aggregate, 24 months. The option to renew, in both agreements, is exercisable only by the lessee (SPFS and UTA respectively), and ILG has no power to extend the lease at all. Further, the Loan Agreement specifically defines the lease period, referencing the applicable provisions of the Headlease and Sublease Agreements. Moreover, even if the agreements had been extended, there is no evidence that the extension would have been for another 60 months. The only reference to 60 months in the agreements is found in the Supplemental Rental Agreement, which requires a renewal

period of "not less than 60 months," but only if SPFS exercises *its* option to renew the agreement. At the same time, the Supplemental Rental Agreement seems to be contradictory, as it also requires that the renewal period "correspond to the period...by which the Sublease has been extended in accordance with its terms," which according to the Sublease Agreement is 24 months. It simply cannot be both 24 months and "not less than 60 months."

In any event, the only evidence the claimant has submitted to establish that the initial term of the lease would have been extended at all, let alone for an additional 60 months, is the letter from Mr. Steve Rimmer of SPNB, in which he states:

> the repayment schedule incorporated in the loan documentation...only specifically identifies the repayments under the initial term of the UTA lease...[f]or the sake of good order, I wish to clarify that it was always the intention to pay the loan down to a balloon of 25% at the end of the 10 year term of the loan.

The Commission notes that this letter comes from ILG's creditor, SPNB, and *not* from either of the two parties (UTA and SPFS) that had the power to exercise the option to extend the lease terms. While the letter might suggest an agreement between ILG and SPNB about the terms of the Loan Agreement, there is no indication in this letter that SPFS would renew the Headlease Agreement or that UTA would renew the Sublease, both of which would have been necessary to extend the lease. Moreover, it is not clear that Mr. Rimmer's letter is a credible source even for understanding the Loan Agreement. The figures representing the profile of the outstanding balance at the end of each year used by Mr. Rimmer do not appear to comport with the amortization of the loan as set forth on Schedule 3 of the Loan Agreement, or, for that matter, any amortized payment schedule at all.

In short, the Commission is not persuaded, based on the evidence submitted and described above, that there was a sufficient likelihood that the Headlease Agreement would have been extended for any period beyond the initial 64-month term. While the Commission is persuaded that the full 64-month lease period should be included in the compensable period, it finds any putative extensions—whether 24 months or 60 or anything else—based on options exercisable by parties other than the claimant sometime in the future, to be too speculative to include in calculating claimant's losses. When the aircraft was destroyed, there was simply too much time remaining in the initial lease period—almost four years—during which any number of factors and events could have occurred impacting the decision of whether to extend the lease. The Commission is not prepared to predict that far into the future in a business that is as volatile as the aircraft leasing business. Accordingly, the Commission determines the compensable lease period to have been 64 months and that 46 months of the lease period remained unpaid.

ii. Discount Rate

Claimant rightly reduces its damages request to the present value of its claim on September 19, 1989. For two reasons, however, the Commission determines that the appropriate discount rate should be different from the rate determined by claimant's consultant, Mr. Dubinsky.

First, the discount rate should be based on the relevant time period—as determined by the Commission—which runs from the date of the bombing of the aircraft on September 19, 1989 to the end of the initial lease approximately 46 months later—September 1989 to July 1993. The Commission determines that under these circumstances the 5-year Treasury bond should be used rather than the 10-year Treasury bond, since the

5-year bond best approximates the 4-year period for which the Commission has determined that ILG suffered a loss of income. On the same basis, the Commission further determines that the relevant time period over which to average the annual market yield should be 1985-1989 rather than 1980-1989.

Second, the discount rate should not be reduced to account for inflation. Mr. Dubinsky's calculations reduce the discount rate by 4.65%, "the compound annual growth rate of the Consumer Price Index" for the period 1980-1989. The Lease Agreement and Supplemental Rental Agreement, however, were based on fixed sums not subject to inflation. Further, the valuation of the aircraft at the end of the lease period already includes a factor to account for inflation. Because these losses either would not have varied with inflation or included an adjustment for inflation, reducing the discount rate to account for inflation would have the effect of over-compensating the claimant for its losses. In sum, the Commission determines the appropriate present-value discount rate to be 8.47%, the average annual market yield on 5-year Treasury bonds for the period 1985-1989.

iii. Loss of Income

Mr. Dubinsky assumes that the lease payments due under the Headlease Agreement will be paid directly to SPNB in satisfaction of the loan; therefore, he does not include them in his calculations regarding loss of income. The Headlease Agreement and Loan Agreement, however, do not appear to support this assumption.[10] Further, because the loan obligation under the Loan Agreement is slightly greater than the lease payments due under

[10] The Headlease Agreement provides that payment shall be made to the Merchant Bank of Atlanta, whereas the Loan Agreement requires payment at the Security Pacific International Bank.

the Headlease Agreement,[11] the Commission determines that it is appropriate to include both the income received by ILG under the Headlease Agreement and the obligations due under the Loan Agreement in its calculation of loss of income.

Moreover, Mr. Dubinsky's calculation of ILG's loss of future rental receipts—approximately $14.1 million—is based on an extension of the lease for 60 months beyond the original 64-month term, whereas the Commission has determined that there is insufficient evidence to establish that the lease would have been extended at all. Therefore, the Commission finds that had the aircraft not been destroyed, ILG would have been entitled to the 46 remaining monthly payments under the Supplemental Rental Agreement—$166,666 per month—and 15 quarterly lease payments plus the final monthly lease payment under the Headlease Agreement—$1 million and $333,333 respectively—for a total loss of $22,999,969. However, during this same period ILG was obligated to make 16 payments under the Loan Agreement totaling $15,354,493 (15 quarterly payments of $1,001,380 and a final monthly payment of $333,793).[12] Accordingly, the Commission finds that ILG would have been entitled to a net income of $7,645,476 which, reduced to the present value in 1989 using an 8.47% discount rate, would have been $6,464,919.

iv. Loss of the Aircraft

In his submissions, Mr. Dubinsky concluded that ILG suffered a loss in the net amount of $6.6 million based on the value of the aircraft at the end of the lease in 1998. However, as previously discussed, the Commission has determined that the lease period would have ended in 1993 and, hence, the Commission will value the aircraft as of 1993

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[11] The Loan Agreement requires quarterly payments of $1,001,380, and the lease agreements require quarterly payments of exactly $1,000,000. The final monthly payment in the Loan Agreement was $333,793, whereas under the lease agreements, it was $333,333.

[12] The equity portion of each loan payment under the Loan Agreement will be accounted for in the valuation of the aircraft at the end of the lease term expressed as a reduction in the outstanding loan balance.

rather than 1998. According to the "AVITAS BlueBook of Jet Aircraft Values, 1989/1990" submitted by claimant, the value in 1993 of a McDonnell Douglas DC-10-30 delivered in 1973 was estimated to be $35,100,000. As noted above, Schedule 3 to the Loan Agreement consists of the amortization of the loan secured by this aircraft. If payments had been properly made on the loan, the outstanding balance due on the loan at the end of the 64-month lease period in 1993 based on that schedule, would have been $23,296,985. Therefore, the Commission finds that a hypothetical sale of the aircraft at the end of the lease period (in August 1993) would have generated revenue for claimant's predecessor in the amount of $11,803,015 which, discounted to present value in 1989, would have been $8,822,353.

As noted above, however, ILG received a payment from its insurer, LRA, in 1989 based on the insured value of the aircraft in the amount of $34 million. On the date of the incident, the aircraft was subject to an outstanding balance on the loan of $28,838,667, leaving claimant with $5,161,333 in insurance proceeds over and above its loan obligations. This sum offsets the amount of loss with regard to the sale of the aircraft calculated above, reducing the compensable loss to $3,661,020.

Based on its calculations as detailed above, the Commission finds that claimant, as ILG's successor in interest, suffered uncompensated principal losses on September 19, 1989 equaling $6,464,919 in future income plus $3,661,020 in future profits that would have been derived from a theoretical sale of the aircraft at the end of the lease in 1993, for a total principal loss of $10,125,939.

v. Interest

An important question to be considered in this claim is whether the claimant should be granted interest as part of its award. The Claims Settlement Agreement, the LCRA, and the January Referral are silent with regard to the issue of interest. In 5 U.S.C. §552(b)(6) *supra,* the Commission held that compensable physical injury claims in this claims program were not entitled to interest as part of the award. In that decision the Commission noted the conclusion reached by the Mixed Claims Commission, United States and Germany, in its Administrative Decision No. III that

> [t]here is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded ... To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor.

Mixed Claims Commission United States and Germany, *Administrative Decisions and Opinions of a General Nature 1925-1926*, 62 (1926).

In the present claim, however, the Commission has computed the actual amount of loss suffered by the claimant, as opposed to, for example, awarding a fixed sum for establishing that a claimant has suffered injuries significant enough to meet a Commission standard. Further, the Commission notes that its awards under the other categories of the December and January Referrals have been based on the present value of each claim, whereas the award made in the present claim is based on the nominal value of the loss in 1989. Moreover, the Commission has previously awarded interest in claims for destruction of property under Title III of the ICSA. See, e.g., *Claim of PAULINE STALZER AGAINST Italy,* Claim No. IT-10,276, Dec. No. IT-171 (1957). Accordingly,

the Commission concludes that this claim for a commercial loss under the January Referral is entitled to interest as part of its award.

The next question is the appropriate rate of interest. Although there is no settled rule as to the rate of interest, it is an appropriate exercise of the jurisdiction of the Commission to determine this rate in accordance with all the circumstances before it, and consistent with the applicable principles of international law, justice, and equity. Its object in so doing is to arrive at a just and equitable amount of compensation for the wrong. The Commission may also consider its own decisions concerning the applicable rate of interest in its prior international claims programs. In these programs, the Commission has adopted the figure of 6% simple interest as a traditional and customary interest rate for claims of this nature.[13] In light of this international law precedent, custom, and tradition, the Commission concludes that an award of interest in the present case at the rate of 6% simple interest is an appropriate, equitable, and just measure of compensation, under all the circumstances.

Similarly, there is no settled rule in universal effect as to the period during which the interest shall run. The Commission notes, however, that the prevailing opinion in international law is that such interest should run from the date the claim arose until the effective date of the Settlement Agreement.[14] Therefore, the Commission concludes that interest in the present claim shall accrue from September 19, 1989, the date of the incident, through August 14, 2008, the effective date of the Claims Settlement Agreement. Accordingly, the claimant is entitled to an interest award of 113 percent of its principal award, or $11,644,829.

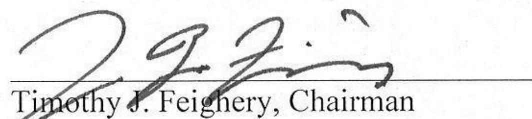
[13] *See, e.g.*, *Claim of JOHN HEDIO PROACH against Poland*, Claim No. PO-3197, Decision No. PO-652 (1962)
[14] *Id.*

Therefore, the Commission enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27.

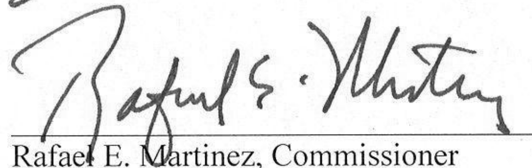
AWARD

Claimant, INTERLEASE INC., is entitled to an award in the amount of Ten Million One Hundred Twenty-Five Thousand Nine Hundred Thirty-Nine Dollars ($10,125,939) plus interest from September 19, 1989 to August 14, 2008 in the amount of Eleven Million Four Hundred Forty-Two Thousand Three Hundred Eleven Dollars ($11,442,311) for a total award of Twenty-One Million Five Hundred Sixty-Eight Thousand Two Hundred Fifty Dollars ($21,568,250).

Dated at Washington, DC, May 16, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

Anuj C. Desai, Commissioner

The decision was entered as the Commission's Final Decision on

July 12, 2012

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2011).