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

In the Matter of the Claim of SUBROGATED INTERESTS TO PAN AMERICAN WORLD AIRWAYS, INC. Against the Great Socialist People's Libyan Arab Jamahiriya	Claim No. LIB-II-171 Decision No. LIB-II-161

Counsel for Claimant: Frederick C. Schafrick, Esq.
Goodwin Procter LLP

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") arises out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988. It is brought by a group of companies that describe themselves as the "Subrogated Interests to Pan American World Airways, Inc." (hereinafter, the "claimants" or "Pan Am Subrogees"). The claimants filed their claim under Category F of the January Referral Letter,[1] asserting that, as the liability insurers of Pan American World Airways, Inc. (hereinafter, "Pan Am"), they paid approximately $485 million to the victims[2] of the bombing of Pan Am Flight 103 to settle a federal court suit brought by

[1] *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* (hereinafter, "January Referral Letter").

[2] Throughout this decision, the Commission may use the term victims to refer to deceased victims of the Lockerbie bombing, as well as the estates and/or family members of the deceased.

those victims against Pan Am. With interest, the claimants assert that they are entitled to over $1 billion in compensation from Libya for this payment.

The Commission denied the claim in its Proposed Decision ("PD") entered May 17, 2012. The Commission concluded it lacked jurisdiction to adjudicate the claim on two separate grounds. First, the claimants failed to meet their burden to prove that they suffered a net financial loss, or represent the parties who suffered a net financial loss, or are otherwise the proper claimants in regard to this claim. Second, the claimants failed to meet their burden of proving the full chains of U.S. nationality of the claim: the only relevant information claimants provided showed that at least 60% of the claim failed because of non-U.S. nationals in the chains of ownership, while the remaining approximately 40% of the claim was not fully accounted for. The Commission additionally found that even if it had jurisdiction over the claim, and even if it were to consider general principles of U.S. insurance law as the relevant law for this claim, the claimants failed to meet their burden to prove the validity of any of their theories of the claim, namely, their theories of subrogation to the Pan Am 103 victims, as well as their theories of indemnity, restitution, and contribution.

The claimants filed a notice of objection on June 25, 2012, and on August 20, 2012, submitted a brief with exhibits in support of their objection. On October 15, 2012, the claimants submitted a letter prepared by the International Union of Aerospace Insurers in support of claimant's position on nationality. The Commission held the oral hearing on October 26, 2012. The claimants filed a post-hearing submission on November 9, 2012.

DISCUSSION

I. Standing

The Commission concluded in the Proposed Decision that the claimants failed to meet their burden of proving that they own the claim; specifically, the claimants failed to prove that they (and not some other entities) actually suffered the net financial loss or represent the parties who actually suffered the net financial loss that forms the basis of the claim, or otherwise are the proper claimants in regard to this claim before the Commission. PD at 5-8. While the Statement of Claim filed with the Commission is purportedly on behalf of the "Subrogated Interests to Pan American World Airways, Inc.," it was in fact filed by United States Aviation Underwriters, Inc. ("USAUI"), the manager of the United States Aircraft Insurance Group ("USAIG"), as the asserted lead insurer of Pan Am. The Commission noted in the Proposed Decision that it requires the actual owner of the claim to be identified, and that the person or entity bringing the claim demonstrate it has legal authority to do so. *Id.* at 5-6. The Commission made clear that it was seeking a step-by-step accounting, tracing the chronological ownership of all aspects of the claim, including, but not necessarily limited to, principals, insurers, reinsurers, retrocessionaires, syndicates and co-insurers. *Id.* at 6.

On objection, the claimants argue that "USAIG has standing to pursue this claim on behalf of the Pan American Subrogees." In addition, the claimants filed, for the first time on objection, a copy of the 1988 Claims Handling Agreement under which claimants assert that "USAIG was appointed claims lead for all the insurers of Pan American." The claimants also state that they have now provided e-mails from most of the other subrogees who had participated in the litigation authorizing USAIG to pursue this claim.

The claimants further state that they have authority to pursue subrogation claims on behalf of themselves, their insurers, their reinsurers, and their retrocessionaires, pursuant to standard reinsurance contracts and practice.

It is the well-settled law of this Commission that claimants must establish that they are the proper claimants, or represent the proper claimants, in relation to the particular claim filed before the Commission. *See* PD at 5. Moreover, international law requires that the proper party to an action be the real and equitable owner of a claim, not the nominal owner.[3] In this claim, with its complex web of insurance, reinsurance and the like, this means that to establish that they are the proper claimants, the "Pan Am Subrogees" must establish that they are in fact the real and equitable owners of the claim.[4]

---

[3] As one scholar has put it, "International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner . . . .The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law." David Bederman, *Beneficial Ownership of International Claims,* 38 Int'l & Comp. L.Q. 935, 936 (1989).

[4] The claimants argue that they should not have to show that they are the real and equitable owners of the claim in the context of the multiple layers of insurance and reinsurance involved here. They point to a United Nations Compensation Commission ("UNCC") insurance-claim decision which stated that it "would be impossible to identify completely all these layers and all the entities involved in sharing the risk." *See* UNCC Report and Recommendations Made by the Panel of Commissioners Concerning the Second Installment of "E/F" Claims, S/AC.26/2002/18 (June 20, 2002), p. 20, para. 77. However, the UNCC specifically required the insurers before it to provide formal undertakings to account to their reinsurers or retrocessionaires for any compensation awarded, thereby affirming that such an undertaking is necessary at some point to determine ownership of this type of claim. *Id.* In this regard, it is significant that the UNCC process did not implicate the continuous nationality rule, and therefore the UNCC had no need to know who the reinsurers or retrocessionaires were in order to determine their nationality. Consequently, the accounting could have been done after the award. In this case, however, the Commission must examine claimants (including, as will be discussed below, reinsurers and retrocessionaires) as a matter of both standing and nationality before the claim can be adjudicated; it is thus necessary to require that the claimant provide an accounting at the time of adjudication. *Cf., e.g., Claim of JOHN RUPPANER*, Claim No. Y2-0465, Decision No. Y2-338 (1968) at 3 ("The issues involved in claims before the Commission include the nationality of claimant and of all predecessors from whom claimant's interest in the claim is derived from the date of loss to the date of filing of the claim, claimant's ownership of the subject property or the extent of such ownership interest therein, the dates and circumstances of the asserted loss, and the value of the property at the time of the loss. To sustain the burden of proof, claimant is required to submit evidence upon which the Commission can base findings of fact and conclusions of law with respect to each of the elements discussed above.").

Claimants have not provided the accounting necessary to establish their ownership of the claim. They have failed to prove either that they (and not some other entities) actually suffered financial loss or that they represent the parties who actually suffered financial loss. In particular, despite requests from the Commission, USAUI has not provided evidence that it has authority to bring this claim on behalf of the reinsurers, retrocessionaires, or any other entities further down the line of claim ownership. Indeed, the claimants have conceded that some of the entities they purport to represent may no longer even exist. *See* PD at 7. Furthermore, the claimants conceded during the hearing that a number of entities that the claimants have contacted have chosen not to participate in this claim and others have not responded to the claimants' inquiry regarding representation. Moreover, the claimants have not provided the full accounting of the ownership of the claim as requested by the Commission and have failed to demonstrate that the parties that actually suffered the net loss would receive their part of any award. *See id.* at 6-8.[5]

Accordingly, the Commission affirms its determination that the Pan Am Subrogees have failed to meet their burden of proof to establish that they are the proper claimants.[6] On this basis alone, the claim must fail. Notwithstanding this conclusion, for the sake of completeness, the Commission will proceed to address the other elements of

[5] While an accounting is undoubtedly challenging, claimants are sophisticated participants in a complex multi-billion dollar market, and they are asserting a claim for over $1 billion. Indeed, it is difficult to understand how major international insurance companies that need to distribute risk and allocate loss and recoveries among those participating in the risk chain could even conduct business without carefully doing such accountings. Yet, despite seeking more than $1 billion in compensation before this Commission, claimants have consistently failed to undertake the full accounting requested of them.

[6] Claimants USAIG, AAU and American Home Assurance Company asserted on objection that they were the actual owners of a small portion of the claim. The Commission addresses those assertions, as well as the argument that there is continuous U.S. nationality as to that portion, below. *See infra* Part II.B. & II.C.

the Commission's jurisdiction determination that claimants challenge in their objection to the Proposed Decision.

II. Other Jurisdictional Elements

Subsection 4(a) of the International Claims Settlement Act of 1949 ("ICSA"), 22 U.S.C. § 1623(a)(1)(C), limits the Commission's jurisdiction in this case to the particular category of claims defined by the January Referral Letter. Accordingly, in order to come within the Commission's jurisdiction, claimants filing under Category F of the January Referral Letter must establish that their claim (i) is a commercial claim; (ii) would be compensable under the applicable legal principles; (iii) is held by a U.S. national; and (iv) was set forth by the claimant(s) named in the Pending Litigation, and that the Pending Litigation against Libya has been dismissed. The Proposed Decision concluded that the claimants had failed to satisfy the third requirement, that the claim have been held by a United States national. Claimants object to this conclusion. They also object to the Proposed Decision's conclusion under the second requirement, that the phrase "applicable legal principles" refers to the Commission's statutory mandate to apply, in order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice, and equity." 22 U.S.C. § 1623(a)(2).[7] The Commission addresses the proper meaning to be accorded to the phrase "applicable legal principles" before turning to the question of U.S. nationality.

A. Applicable Legal Principles

By its terms, Category F of the January Referral Letter limits the Commission's jurisdiction to claims that "would be compensable under the applicable legal principles." January Referral Letter, *supra*, ¶ 8. On its face, this jurisdictional element could be seen

[7] Claimants also object to the Proposed Decision's conclusion on the merits.

as tying the Commission's jurisdiction to a decision on the merits. It does appear to require the Commission to determine whether the claim is valid ("would be compensable") before determining jurisdiction. This would lead to a circularity – the Commission would have jurisdiction only if the claim is valid, but a finding on jurisdiction would thus effectively amount to a finding on the merits. This cannot be the meaning of the language, and the Commission interprets the phrase "would be compensable" to mean that the claim must be the *type* of claim that "would be compensable *in principle*." *See* PD at 9-10. That still leaves, however, the meaning of the phrase "applicable legal principles," which the January Referral Letter does not define. The Proposed Decision concluded that the phrase "applicable legal principles" means the law that this Commission is statutorily required to apply: first, "[t]he provisions of the applicable claims agreement" and second, "[t]he provisions of the applicable principles of international law, justice and equity." 22 U.S.C. § 1623(a)(2). Since the "applicable claims agreement" (the Libya Claims Settlement Agreement[8]) and related legal authorities (the Libya Claims Resolution Act[9] and Executive Order 13477[10]) say nothing about the Pan Am Subrogees' claim,[11] the Proposed Decision concluded that the phrase "applicable legal principles" in this program means "international law, justice, and equity." *See generally* PD at 9-10.

---

[8] *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement" or "CSA").

[9] Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999.

[10] Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008).

[11] The LCRA specifically defines the Libya Claims Settlement Agreement as "an international agreement between the United States and Libya, *binding under international law*, that provides for the settlement of terrorism-related claims of nationals of the United States against Libya through fair compensation." LCRA § 2(2) (emphasis added). The reference to the Agreement being "binding under international law" makes explicit that to the extent that any interpretation of the Agreement might have mattered, the law relevant to that interpretation would have been international law.

The Proposed Decision then turned to international law. Under international law, "insurers are, in principle, entitled to compensation for losses arising out of their function as an insurer." PD at 10.[12] The Commission thus concluded that, "for the purposes of this jurisdictional requirement of Category F only, the claim asserted is compensable in principle." *Id.*

Although claimants obviously agree that they satisfy this jurisdictional element of the January Referral, they argue again that the phrase "applicable legal principles" means the relevant U.S. law and legal standards that would have applied to their lawsuit had it proceeded in U.S. court. Claimants insist on this point because they believe that it will help them both in regard to the other elements of jurisdiction and on the merits. Despite this insistence, they make no new substantive argument about this issue on objection, and the Commission rejects this argument for all the reasons set forth in the Proposed Decision. PD at 9-11; 18.

Moreover, despite rejecting claimants' view of the phrase "applicable legal principles," the Commission specifically addressed the substance of claimants' arguments about U.S. law. *See* PD at 30 ("[E]ven if the general principles of U.S. law—the law that arguably would apply in a lawsuit brought in state or federal court under sections 1605A(c) and (d) of the FSIA—actually constituted the "applicable legal principles" for the Commission to apply, the claim would not be compensable under these principles."); *see also* PD 30-43 (addressing merits of claimants' arguments about the U.S. law of subrogation, indemnification, restitution and contribution). One of claimants' responses to this comprehensive discussion of their U.S.-law arguments is that the Proposed

[12] This was not always the case. Some older sources categorically barred insurance companies from recovery because they charge premiums to cover their risks and mitigate their losses. *See* PD at 11. In any event, the Commission has allowed claims by insurance companies in prior programs. *Id.*

Decision conflicts with what a federal court had already concluded. Claimants frequently refer to the "utter implausibility . . . that a claim for over $485 million held to be viable in court is found to be worth zero on the merits before the Commission." By using the phrase "held to be viable in court," claimants imply that a court had already ruled that the claim was valid. This is not correct.[13]

The court opinion the claimants repeatedly mention, *Hartford Fire Insurance Co. v. Socialist People's Libyan Arab Jamahiriya,* 1999 WL 33589331 (D.D.C. Sept. 23, 1999), was a 1999 decision denying an early motion to dismiss that Libya had brought.[14] The opinion predates the LCRA by almost 10 years, and much had happened in the case in that intervening time. Not only was the opinion not a final decision by the District Court, but the particular aspect of the opinion on which claimants rely – that they had a substantive cause of action under either the Foreign Sovereign Immunities Act ("FSIA") or federal common law – was repudiated by the same judge in 2006 because the law on this point had become clear in the interim. *See* 422 F. Supp. 2d 203, 208 (D.D.C. 2006). The 1999 decision denying Libya's motion to dismiss is therefore irrelevant. Most important, at no point did any court rule that claimants in fact had a meritorious cause of action.

---

[13] Similarly, the claimants state that the Proposed Decision "seems to totally ignore the one obvious decision on point – the decision of Judge Hogan in *Hartford.*" Again, this has no basis. The Commission did not ignore Judge Hogan's decision, but rather repeatedly noted that that decision was irrelevant because Judge Hogan never made any determination on the merits of the claim. PD at 24, 38-39, and 41.

[14] In denying Libya's motion, the District Court recognized that the standard for a motion to dismiss is extremely difficult for the moving party to meet, noting that a motion to dismiss can be granted "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." The court went on to reinforce this by further noting that, "[i]n evaluating [Libya's] motion to dismiss, the Court must construe the complaint in the light most favorable to plaintiffs and give plaintiffs the benefit of all inferences that can be derived from the facts alleged." 1999 WL 33589331 at *2 (internal citations omitted).

Relatedly, the claimants also argue that they would have ultimately prevailed in court. The problem with this argument is that it too has no basis in either fact or law. The District Court twice rejected claimants' argument that they had a cause of action under federal common law and twice pressed claimants to articulate the source of law (i.e., choice of law) on which they were basing their claims. *See* 422 F. Supp. 2d 203, 208 (D.D.C. 2006); 2007 WL 1876392, at *1 and *12 (explicitly stating that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and requesting further briefing on the proper choice of law and "the precise laws under which Plaintiffs contend defendants are liable for their responsibility in the bombing of Pan Am Flight 103."). While the District Court did rule that Libya was responsible for the bombing, 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.

In sum, the phrase "applicable legal principles" in Category F of the January Referral Letter means the law the Commission is statutorily mandated to apply; moreover, even if the phrase refers to the U.S. law that would have applied in claimants' court case (and even assuming the Commission had jurisdiction), the Commission would still reject the claim. *See infra* at 20; *see also* PD at 20-43.

B. Continuous U.S. Nationality

The Commission concluded in the Proposed Decision that it lacks jurisdiction over the Pan Am Subrogees' claim for a second reason as well: the Pan Am Subrogees have failed to establish that the claim was owned by U.S. nationals continuously from the

date of the injury to the date of the Claims Settlement Agreement. PD at 12-20. The claimants argue on objection that the "Commission errs in imposing a continuous nationality requirement in the context of this claim." Specifically, the claimants contend that the Commission has ignored the purposes of the Claims Settlement Agreement, which they assert was intended to resolve *all* claims of the "Parties and their nationals." According to claimants, this includes the Pan Am 103 victims, Pan Am, and (since the claimants contend that they stand in the shoes of the Pan Am 103 victims and Pan Am) them as well.

The Proposed Decision rejected these arguments as inconsistent with the Claims Settlement Agreement, as it has been implemented by the Libya Program referral letters. The January Referral Letter states that, as a matter of jurisdiction, Category F only applies to claims of "U.S. nationals." January Referral Letter, *supra*, ¶ 8. In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held that in order for a claim to be compensable, the claim must have been held by a "national of the United States" continuously from the date it arose until the date of the Claims Settlement Agreement. The Proposed Decision also quoted from *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB–I–049, Decision No. LIB–I–019 (2011), in explaining that the continuous nationality requirement is a matter of customary international law and that the United States recognizes it as such:

> As a general matter, the United States continues to recognize the continuous nationality rule as customary international law. For example, the United States' 2006 comments on the International Law Commission's Draft Articles on Diplomatic Protection clearly convey the United States' position that the continuous nationality requirement – that nationality "be

> maintained continuously from the date of injury through the date of resolution" – reflects customary international law.[15]

PD at 13 (quoting 5 U.S.C. §552(b)(6) FD at 6-8).

Moreover, for purposes of bringing a claim before this Commission, the fact that the Claims Settlement Agreement was intended to resolve all claims of the "Parties and their nationals" is irrelevant. As the Commission explained in great detail in 5 U.S.C. §552(b)(6)

> Equally unsuccessful is claimant's assertion at the oral hearing that the CSA and the LCRA evince a "clear intent" to settle *all* claims against Libya, "not just the claims of those claimants meeting the continuous nationality requirement." The question here is not whether the United States intended to settle all claims in U.S. courts against Libya – clearly it did, and the settlement of all claims was likewise a primary objective of Libya. E.O. 13477 makes this abundantly clear by directing, in sections 1(a) and (b), respectively, the settlement of claims of "United States nationals" and those of "foreign nationals."
>
> The question is which settled claims were to be the subject of compensation by the Commission from the fund established in Article II of the CSA. . . . [T]he intent of the drafters of the CSA, the LCRA or the December Referral Letters to settle *all* claims against Libya does not shed light on when a person must be a U.S. national in order to qualify for compensation under the settlement.

Also without merit is claimants' argument that because the continuous nationality requirement is not explicitly mentioned in the Claims Settlement Agreement, the drafters implicitly meant to reject the requirement. Again, 5 U.S.C. §552(b)(6) speaks directly to the issue:

> Claimant's assertion that because there is no language in any of these documents specifying the continuous nationality requirement, one cannot be imposed, would have some weight were it not for the fact that the continuous nationality requirement ... [is a] long-standing principle[] of international law consistently applied and advocated by the United States to the present day. Consequently, any departure from [this] principle[] would have been clearly articulated and not merely implied. In other words, the *absence* of language cannot be grounds for departure from well-settled law.

---

[15] *See International Law Commission, Comments and observations received from Governments, Diplomatic protection*, at page 19, U.N. Doc. A/CN.4/561 (2006).

The Proposed Decision thus concluded, again quoting from 5 U.S.C. §552(b)(6) as follows:

> Given the fact that the continuous nationality rule is recognized by the United States as customary international law, and that this rule has been applied by both this Commission and its predecessors, a derogation from this rule will not be assumed by the Commission from the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has been no such express derogation in this program. Consequently, the Commission adheres to its earlier finding that in order for a claim to be compensable in this program, it must have been owned by a U.S. national continuously from the date of injury to the date of the Claims Settlement Agreement.

PD at 13 (quoting 5 U.S.C. §552(b)(6) FD at 6-8).

As they did before the Proposed Decision, claimants continue to argue that their own nationality is irrelevant and that the only relevant nationalities for purpose of this claim are those of Pan Am and the American victims of the Lockerbie Disaster. The Commission's Proposed Decision addressed this argument in detail. See PD at 15-16. For all the reasons stated there, the Commission again rejects claimants' argument. Quite simply, for purposes of the continuous nationality requirement, and as noted in numerous prior international law decisions, an insurer bringing a claim as a subrogee does not adopt the nationality of its insured, the subroger. Instead, the insurer must independently – and in addition to the insured – meet the continuous nationality requirement.

The claimants reiterate their argument that continuous nationality should at least not be required of reinsurers. On objection, claimants point out – rightly – that none of the authorities cited in the Proposed Decision involved a claim that was denied *solely* because the reinsurer was not a U.S. national. This factual distinction, however, simply does not matter. The Commission decisions cited in the Proposed Decision consistently require U.S. nationality for all of the relevant parties in the chain of insurance: the party

that suffered the loss, the insurance company that directly insured the loss, and the reinsurer that paid the insurer.[16] The claimants rely on nine Commission decisions in which, as claimants put it, "the Commission considered the claims of insurance companies without apparently ever considering whether those insurers had ceded a portion of their coverage to a reinsurer." However, there is no indication in any of the cited decisions that (a) the losses were further insured by reinsurers or (b) if confronted with a chain of reinsurance, the Commission would not have applied the continuous nationality requirement all the way through the full chain of ownership.

The Commission's jurisprudence on this score is consistent with international law. Claimants have not brought to the Commission's attention any international-law jurisprudence for the proposition that a tribunal can ignore the nationality of reinsurers. Instead, when international law has explicitly considered reinsurers, it has consistently found that their nationality has mattered.[17] For example, when U.S. insurance companies filed claims before the Mixed Claims Commission (United States and Germany), the State Department required them to deduct the amount they received from reinsurance if the reinsurance company was not a U.S. national:

> As the basis of settlement, the actual net out of pocket payments of the American underwriters, including the Veterans Bureau [,] have been established after deducting all sums, if any, received by such underwriters under policies of re-insurance written by corporations, other than those under the laws of the United States or any State or possessions thereof, and partnerships and/or individuals other than such as owe permanent allegiance to the United States.

---

[16] *See* PD at 17; *id.* at 17 n.11.

[17] To be sure, the Commission is looking to jurisprudence that is more than 80 years old, and as noted below, there may be policy reasons to ignore reinsurers in this context. *See infra* at 16-17. However, the principle that reinsurers must be United States nationals flows logically from, and as a direct corollary of, the continuous-nationality principle. In such circumstances it is beyond the Commission's purview to find otherwise. *See, infra,* n.19 and accompanying text.

Hackworth, *Digest of International Law*, Vol. V, pages 809-810. Professor Bederman has likewise noted that international law as a rule requires continuous nationality in insurance claims because insurance subrogees are considered successors in interest based on the idea that the rights of an insurer vest when payment is made to the insured, and not (by virtue of the insurance contract or the relation-back doctrine) at the time the loss occurs and the claim arises. Bederman, *Beneficial Ownership of International Claims supra,* at 942-943. As such, each payment of insurance, and each payment of reinsurance, is a separate step, transferring the ownership of the claim, step-by-step, from one successor in interest to the next during the relevant time period. *See also Eagle Star and British Dominions Insurance Company and Excess Insurance Company* (Great Britain v. Mexico) (1931), 5 U.N.R.I.A.A. 139 at 142 ("the decision on the nationality of the claim from its inception until now does not depend solely upon the nationality of the Insurer claiming, but would also require an investigation of the reinsurance contracts subdividing the profits and losses from the original insurance."); Theodor Meron, *The Insurer and the Insured Under International Claims Law,* 68 Am. J. Int'l Law 628, 642 (1974) ("An international tribunal seized of such a case would have to consider the extremely complicated questions of fact involved in disentangling the web of insurance and reinsurance contracts and determining the losses and their classification according to the nationalities of the insurers (or reinsurers).").[18]

The claimants also argue on objection that the Proposed Decision fails to take sufficient account of the fact that the U.S. facilitated the final settlement payments to all

[18] *See also Claim of AMERICAN SECURITY AND TRUST COMPANY, TRUSTEE UNDER THE WILL OF CARL F. JEANSEN, DECEASED,* Claim No. HUNG-20540, Decision No. HUNG-51 (1957) (U.S. nationality requirements are applied to the beneficial owners of claims held by trusts); *Claim of THE HANOVER BANK, ET AL.,* Claim No. BUL-1181, Decision No. BUL-115 (1957) (same).

of the Pan Am 103 victims, both U.S. and non-U.S. citizens, and that this fact demonstrates that the U.S. was espousing all claims relating to Pan Am 103, regardless of nationality. However, as the Commission noted in its Proposed Decision, this limited payment to non-U.S. nationals was specifically contemplated by the parties. *See* PD at 19 n.15. Congress in the LCRA affirmed that the CSA delineated two classes of claims, the first specifically encompassing only the persons included in the Pan Am 103 and LaBelle Discotheque *private* settlements with Libya, and only with respect to a final tranche of payments due from Libya under these private settlements, and the second encompassing all "nationals of the United States who have terrorism-related claims against Libya." *See* LCRA §§3 and 5. The Pan Am Subrogees were not directly part of the LaBelle or Pan Am 103 private settlements and therefore must be "nationals of the United States."

The Pan Am Subrogees continue to press their argument that, as a matter of policy, the requirement of continuous nationality ought to apply only to the insured, particularly in the context of the specialized aviation insurance market. The claimants state that because the relevant reinsurance programs are complex, involving layers and multiple companies and syndicates, and that because tracing nationality through all the chains of reinsurance has the effect of denying many large insured claims, reinsurers should not be required to be U.S. nationals. They now buttress this argument with a letter from the International Union of Aerospace Insurers arguing that in the unique context of aviation insurance it is necessary to distribute the very large financial risk exposure amongst many underwriters and that the aviation insurance market is dispersed globally.

The continuous nationality requirement does appear to create substantial obstacles to recovery in the context of complex insurance claims, and in this regard the claimants have raised important issues for future policy makers.[19] Nonetheless, the Proposed Decision answered this argument: the relevant international law is currently clear, and the Commission has no authority to change the law for policy reasons. *See* PD at 19. Commission precedent, U.S. practice, and customary international law all require a continuous chain of U.S. nationality in order for a claim to be cognizable, and, as the Commission made clear in 5 U.S.C. §552(b)(6) there is no evidence that either the parties that concluded the Claims Settlement Agreement or the State Department in its referral to this Commission intended to upend that settled legal principle.[20]

C. USAIG, AAU, and American Home Assurance Company

On objection, the claimants argue for the first time that, "at the very least," the Commission should award compensation for the portions of the claim for which there is clear continuity of U.S. nationality. The claimants assert that exhibits to their objection brief prove that a portion of the claim is in fact owned by U.S. nationals. They say that, of the purported Pan Am Subrogees, (1) the USAIG pool sustained a net loss of $12,261,330, after allowing for reinsurance; (2) the Associated Aviation Underwriters, Inc. ("AAU") pool sustained a net loss of $5,571,219; and (3) American Home Assurance

[19] One of the foremost authorities on international law, Ian Brownlie, has written in support of the claimants' policy rationale. *See Ian Brownlie, Principles of Public International Law* 481 (7th ed. 2008) (noting that the current state of international claims law in regard to claims by insurers is to require continuity of nationality, but suggesting that – because the ultimate bearer of loss may not readily be ascertainable in insurance cases, particularly because of the practice of reinsurance – there are cogent policy arguments against requiring continuity of nationality); *see also James Crawford, Brownlie's Principles of Public International Law* 705 (8th ed. 2012) (same).

[20] Claimants argue that denying their claim creates a possible "takings" problem under the Fifth Amendment to the United States Constitution. However, they make no argument to undermine our conclusion in the Proposed Decision that consideration of constitutional issues is outside the scope of the referrals to the Commission. *See* PD at 18 n.13.

Company sustained a net loss of $3,509,076. The claimants further argue that since the majority of the USAIG pool (82%) and the majority of the AAU pool (74%) consist of U.S. companies, the entirety of these pools should be considered U.S. nationals because they shared common pool management.

The evidence to support the alleged payments and net loss calculations consists solely of affidavits. Executives at each of the three (USAIG, AAU, and American Home Assurance Company) declare that their pool or company suffered a loss in the amount listed above. The claimants have provided no substantiation for the alleged payments and calculation of the asserted net losses.

Affidavits alone are not enough. Claimants must provide a substantiated and detailed accounting of their alleged payments and net loss and of the full chain of ownership of those aspects of the claim for which claimants seek compensation. The Commission made clear in the Proposed Decision that (1) the claimants have the burden of proof, PD at 4; (2) the claimants had been asked to "provide a step-by-step accounting, tracing the chronological ownership of all aspects of the claim, including, but not necessarily limited to, principals, insurers, reinsurers, retrocessionaires, syndicates and co-insurers," PD at 6; and (3) the Commission requires the actual owner of the claim to be identified and the person or entity bringing the claim to demonstrate it has legal authority to do so, PD at 6-7. The claimants were therefore on notice that they needed to provide an actual accounting for the claim, and/or any part of it, not merely unsubstantiated affidavits. Moreover, even this small percentage of the claim would amount to more than $21 million plus interest. The Commission will not award tens of

millions of dollars without far more than affidavits as the proof of payment, net loss and ownership of a claim.[21]

In sum, claimants' new evidence about USAIG, AAU and American Home Assurance Company does nothing to undermine the Proposed Decision's conclusion on nationality. To the extent the Pan Am Subrogees did provide information about nationality, it showed that at least 60% of the claim fails because of non-U.S. nationals in the chains of ownership. *See* PD at 14. Furthermore, the Pan Am Subrogees have failed to show the complete chain of nationality as to the remaining approximately 40% of the claim. The only aspect of the claim that the claimants clearly allege to be held continuously by U.S. nationals is the small portion owned by USAIG, AAU, and American Home Assurance Company (less than 5% of the claim),[22] but claimants have failed to meet their burden to substantiate, with credible evidence of a step-by-step accounting, that USAIG, AAU, and American Home Assurance Company suffered even this net loss and that even this portion is owned by U.S. nationals. The Commission therefore affirms its determination in the Proposed Decision that, as a threshold

[21] The claimants also argue in regard to USAIG and AAU that an "insurance pool" can be deemed a U.S. national for purposes of compensation before this Commission. From this premise, claimants argue that because a majority of the USAIG pool and a majority of the AAU pool consist of U.S. companies, both pools are entitled to recover. Under this approach, the nationality of each of the individual companies constituting these two pools becomes irrelevant. To support this novel approach to ownership, claimants cite *Claim of JOINT VENTURE OF PECTEN VIETNAM CO.*, Claim No. V-0522, Dec. No. V-0425 (1985). The problem with this argument is that the claimant in *PECTEN VIETNAM*, a joint venture, was a separate, legally recognized entity, whereas here the claimants have not proven that the USAIG pool and/or the AAU pool are separate, legally recognized entities. Moreover, taking this argument to its natural extension, the Commission would have to consider the nationality of a single "pool" consisting of all the companies that insured Pan Am and then to deny the entire claim: based on the limited information claimants have provided, it appears that more than 50% of the claim is foreign owned.

[22] In their December 2011 submission the claimants effectively conceded that if their position on the nationality of insurance claims is rejected, "only relatively modest claims—where the insurance was entirely American—would be successful."

jurisdictional matter, the claim must be dismissed because the claimants have failed to meet their burden to show complete and continuous chains of U.S. nationality.

* * * * * * * * * *

Finally, the Commission found in the Proposed Decision that even if it had jurisdiction over the claim, and even if the Commission were to adjudicate the Pan Am Subrogees' claim under general principles of U.S. insurance law, the claimants failed to meet their burden of proof as to the validity of any of their theories of the claim, including their theories of subrogation to the Pan Am 103 victims, indemnity, restitution, and contribution. PD at 20-43. Nothing in the claimants' objection materials or oral argument changes that conclusion. Thus, once again, even if the Commission had jurisdiction, the claimants would still have failed to prove the legal merits of their claim.

CONCLUSION

In summary, for the reasons set forth above, the Commission affirms its conclusion in the Proposed Decision that it lacks jurisdiction over the purported Pan Am Subrogees' claim. The Commission also affirms its determination that, even if the Commission had jurisdiction over the claim, it would fail on the merits because the claimants have failed to meet their burden of proof as to the validity of any of their theories of the claim, including their theories of subrogation to the Pan Am 103 victims, indemnity, restitution, and contribution. Accordingly, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, January 30, 2013
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj Desai, Commissioner

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

In the Matter of the Claim of SUBROGATED INTERESTS TO PAN AMERICAN WORLD AIRWAYS, INC. Against the Great Socialist People's Libyan Arab Jamahiriya	Claim No. LIB-II-171 Decision No. LIB-II-161

Counsel for Claimant: Frederick C. Schafrick, Esq.
Goodwin Procter LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") arises out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland on December 21, 1988. It is brought by a group of companies who describe themselves as the "Subrogated Interests to Pan American World Airways, Inc." (hereinafter, the "claimants" or "Pan Am Subrogees"). The claimants allege that, as the liability insurers of Pan American (hereinafter, "Pan Am"), they paid approximately $485 million to settle a lawsuit with the victims of the bombing of Pan Am Flight 103 after Pan Am was found to have engaged in willful misconduct. With interest, the claimants assert that they are entitled to over $1 billion in compensation.

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 Letter").

The present claim is made under Category F. According to the January Referral Letter, 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 Letter lists the suits comprising the Pending Litigation.

The January Referral Letter, as well as a December 11, 2008 referral letter ("December Referral Letter") 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" or "CSA"), 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 Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On July 7, 2010, the Commission received from claimants a Statement of Claim in which they assert a claim under Category F of the January Referral Letter, along with exhibits supporting elements of their claim. The claimants allege that, as the liability insurers of Pan American, they paid approximately $485 million to settle a lawsuit with the victims of the bombing of Pan Am Flight 103 after Pan Am was found to have engaged in willful misconduct. The claimants state that they filed suit against Libya in U.S. District Court to recover the sums they paid to the Pan Am 103 victims[1] and that this suit was dismissed pursuant to the LCRA.

[1] Hereinafter, the Commission may use the term victims to refer to victims, estates, survivors and/or family members.

The Pan Am Subrogees state that their lawsuit against Libya in U.S. District Court was a subrogation action for indemnity, restitution or contribution. Attachment B to their claim form is an explanation of their claim theories and their argument that, had their lawsuit been allowed to proceed against Libya, they would have prevailed. The claimants state that in their federal court action they "pursued their claim invoking Pan American's rights as 'legal representative' of the U.S. nationals killed aboard Flight 103." The claimants have also submitted Attachment C to their claim form, in which they assert that all of the insurers together suffered a loss of $485.8 million (of which the claimants state $375 million was paid to U.S. citizens), and in addition paid more than $21.3 million in legal costs and $10.5 million in other costs.[2] The claimants state that of those amounts, they paid 94%. With interest, the claimants assert that they are entitled to over $1 billion in compensation.

BURDEN OF PROOF

Pursuant to both statute and regulation, claimants before the Commission bear the burden of proving the validity of their claims. *See* 22 U.S.C. § 1623(b) ("All decisions shall be upon such evidence and written legal contentions as may be presented . . . ."); 45 C.F.R. § 509.5(b) (noting that "claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim"). Subsequent to their initial July 7, 2010 submission, the claimants have provided additional information in submissions dated July 18, 2011, October 21, 2011, November 14, 2011 and December 15, 2011.

[2] The claimants subsequently withdrew their claim for legal and other costs.

DISCUSSION

Jurisdiction

I. Claimants Must Establish Their Standing to Bring This Claim

As a threshold matter, it is the well-settled law of this Commission that claimants must establish that they are the proper claimants, or represent the proper claimants, in relation to the particular claim filed before the Commission. *See, Claim of ESTATE OF ELIZABETH L. ROOT, DECEASED; JAMES G. ROOT & DAVID H. ROOT, PERSONAL REPRESENTATIVES*, Claim No. LIB-II-040, Decision No. LIB-II-026 (2011) (claimant must provide the Commission with evidence that claimant is legally entitled to bring the claim). *See also* United Nations Compensation Commission ("UNCC") Report and Recommendations Made by the Panel of Commissioners Concerning the Second Installment of "E/F" Claims, S/AC.26/2002/18 (June 20, 2002), page 20, para. 77 (UNCC required airplane insurers to provide a formal accounting identifying their reinsurers and retrocessionaires); UNCC Report and Recommendation Made by the Panel of Commissioners Concerning the First Installment of "E/F" Claims, S/AC.26/2001/6 (March 15, 2001) ("UNCC First E/F Claims Report"), pages 14, 21 and 24-25, para. 34, 68, 84, 85, 87 and 89 (the UNCC stated it would not award compensation for the same loss more than once; it recommended an award "only for those claims which contained sufficient evidence of . . . the claimant's eligibility to make the claim and/or authority to make the claim on behalf of others"; and, for example, found claim of an employer for payment made to employees was mitigated by the payments made by the UNCC directly to the employees where the employees brought their own individual claims). Here, despite requests from Commission staff, the claimants have failed to

prove that they own the claim, whether because they (and not some other entities) actually suffered financial loss, represent the parties who actually suffered financial loss or otherwise.

While the Statement of Claim filed with the Commission is purportedly on behalf of the "Subrogated Interests to Pan American World Airways, Inc.," it was, in fact, filed by United States Aviation Underwriters, Inc. ("USAUI"), the manager of the United States Aircraft Insurance Group ("USAIG"), as the asserted lead insurer of Pan Am. USAUI asserts that it is acting on behalf of USAIG and Pan Am's concurrent insurers. The Commission staff has sought from USAUI information regarding which entities it has been legally authorized to represent in regard to this claim. It has requested, in particular, that the claimants provide a step-by-step accounting, tracing the chronological ownership of all aspects of the claim, including, but not necessarily limited to, principals, insurers, reinsurers, retrocessionaires, syndicates and co-insurers.

USAUI asserts that it has authority to file the claim on behalf of all the Pan Am Subrogees because it served as "claims lead" on claims against Pan Am pursuant to a "Claims Handling Agreement" that all insurers entered into in 1988. However, USAUI has not provided a copy of this agreement to the Commission. Furthermore, even assuming such an agreement, USAUI has not otherwise provided evidence that *all* the other insurance companies have authorized USAUI to file a claim on their behalf before the Commission, nearly twenty years after the "Claims Handling Agreement." More significantly, USAUI has provided no evidence that it has authority from the reinsurers, retrocessionaires, or any other entities further down the line of claim ownership. In its submission dated December 15, 2011, USAUI states that the "insurers provided $750

million dollars in liability coverage, but, under the 'vertical' coverage arrangement for airline insurance, each insurance company, syndicate or pool only provided a discrete and several percentage of the total direct coverage." Over time "some of those insurers have been acquired by other insurers and are no longer publicly traded . . . or . . . have spun off of larger enterprises . . . [or] gone into receivership or liquidation." USAUI also states that many of the companies that participated in the insurance pools no longer participate, and "therefore they have no present commercial relationship with the managers of those pools." Indeed, USAUI stated in its December 15, 2011 submission that, in reality, the insurance pool it directly represents only suffered a loss of $12 million. However, USAUI does not limit its claim to one for $12 million. Furthermore, USAUI has not provided a calculation or substantiating evidence for even this amount of alleged loss.

From the very limited responsive information the claimants have provided, it is clear that the direct insurers of Pan Am did not suffer the total amount of loss (or even perhaps most of the loss) claimed because they were reimbursed through further ceding of the insurance coverage. Nor have the claimants explained, if an award were to be made, how the entities that actually own the claim and suffered the loss (whoever they might be) would receive the proceeds of the award. The claimants have not made it possible for the Commission even to sever the claim with any degree of accuracy. The claimants have, therefore, failed to prove that they are the owners of the claim, or have the legal authority to represent the owners of the claim. Accordingly, the Commission

determines that the Pan Am Subrogees have failed to meet their burden of proof to establish that they are the proper claimants. On this basis alone, the claim must fail.[3]

II. Elements of Jurisdiction Required in the January Referral Letter

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under the January Referral Letter. Therefore, in order to come within the Commission's jurisdiction, claimants filing under Category F of the January Referral Letter must establish that their claim: (i) is a commercial claim; (ii) would be compensable under the applicable legal principles; (iii) is held by a U.S. national; and (iv) was set forth by the claimant(s) named in the Pending Litigation, and that the Pending Litigation against Libya has been dismissed.

A. Category F of the January Referral Letter Covers Only Commercial Claims

As noted above, the Commission's jurisdiction under Category F of the January Referral Letter is limited to commercial claims. January Referral Letter, *supra*, ¶ 8. The claimants here are insurance companies alleging claims of subrogation, indemnity, restitution and contribution. Commerce is generally viewed as the exchange of goods and services, and insurance companies provide the service of undertaking to indemnify another party against risk of loss, damage or liability.[4] As such, while the underlying injuries purportedly remunerated by the claimants were for the wrongful death of the Pan Am 103 victims—certainly not commercial claims—the claims as asserted by the Pan Am Subrogees for reimbursement of monies they purportedly paid in the course of their

[3] However, in the interests of adjudicative efficiency and economy, the Commission will also address whether the claimants have otherwise satisfied the elements necessary for the Commission to exercise jurisdiction over the claim.

[4] *See, e.g.*, Black's Law Dictionary (9th Ed. 2009); and *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944) ("Commerce" as referred to in the Commerce Clause, refers to any trade or business in which people "bought and sold, bargained and contracted," including the sale of insurance).

insurance services, including their claim of subrogation to Pan Am and their claims of indemnity, restitution and contribution, appear to be commercial claims.[5]

B. Category F of the January Referral Letter Covers Only Claims that are Compensable under the Applicable Legal Principles

By its terms, Category F of the January Referral Letter limits the Commission's jurisdiction to claims that "would be compensable under the applicable legal principles." January Referral Letter, *supra*, ¶ 8. Therefore, this provision of Category F requires that the Commission determine whether the claim being asserted would, in theory, be compensable under the applicable legal principles. In other words, claims that would not be compensable under the "applicable legal principles" do not fall within the Commission's jurisdiction.

The January Referral Letter does not define "applicable legal principles." The claimants argue that the "applicable legal principles" referred to in Category F are the relevant U.S. law and legal standards that would have applied to their lawsuit had it proceeded in U.S. court.[6] The Commission does not agree. The law the Commission is required to apply is mandated by its controlling statute; consequently, the Commission

[5] In contrast, the Pan Am Subrogees' claim that they are subrogated to the victims of Pan Am 103 does not clearly fit into the notion of a commercial claim. However, there is no need to reach this issue: even if a subrogated claim on behalf of victims of a terrorist airplane bombing were viewed as a commercial claim because of the commercial relationship between the airline and its insurers, the claimants have not met their burden of pleading and proof in regard to jurisdiction and in regard to their assertion that they are subrogated to the Pan Am 103 victims, as discussed below in Merits Section II.C.1.

[6] The Commission notes, and as will also be discussed below, that the District Court in *Hartford Fire Insurance Company v. Socialist People's Libyan Arab Jamahiriya*, Case No. 98-cv-3096, never made a determination regarding the applicable law and whether Libya owed the plaintiffs any damages. In a Memorandum Opinion filed on June 28, 2007, the District Court stated that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and then requested briefing on the proper choice of law and "the precise laws under which Plaintiffs contend defendants are liable for their responsibility in the bombing of Pan Am Flight 103." *See* 2007 WL 1876392 at *1 and *12. The District Court did not rule on the validity of the plaintiffs' liability theories prior to dismissing the complaint on July 6, 2010.

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 claim, 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. The claimants here allege derivative property loss claims, as insurers, sounding in subrogation, indemnity, restitution and contribution. Under international law, insurers are, in principle, entitled to compensation for losses arising out of their function as an insurer. As a general matter, international law recognizes the concept of financial indemnity and restitution. *See, e.g.*, UNCC First E/F Claims Report, Page 14, para 33-34 (UNCC noted that "the standing of insurers in the adjudication of claims involving international responsibility for a wrongful act is generally recognized under

international law, as subrogees to their policyholders' rights"; and insurers were eligible in principle to claim compensation for losses that were otherwise compensable before the UNCC); *see also* Marjorie M. Whiteman, *Digest of International Law*, Vol. 8, pgs. 1199-1200 (1967). While some older sources categorically barred insurance companies from recovery simply because they charge premiums to cover their risks and mitigate their losses,[7] the Commission has allowed claims by insurance companies in prior programs.[8] For these reasons the Commission determines, for purposes of this jurisdictional requirement of Category F only, that the claim asserted is compensable in principle.

C. Category F of the January Referral Letter Requires that the Claims Have Been Set Forth by the Claimant Named in one of the Pending Litigation Cases, and That the Litigation have Been Dismissed

Category F of the January Referral Letter also requires, as a matter of jurisdiction, that the claimant be a named party in one of the Pending Litigation cases listed in Attachment 1 to the January Referral; that it have asserted a claim for commercial loss; and that this case have been dismissed. January Referral Letter, *supra*, ¶ 8. The claimants have provided a copy of the complaint in *Hartford Fire Insurance Company v. Socialist People's Libyan Arab Jamahiriya*, Case No. 98-cv-3096, filed in the United

---

[7] *See, e.g.*, 5 *Moore, History and Digest of the International Arbitrations to which the United States has been a Party*, 4640-41 (1898), discussed in *The Insurer and the Insured* at 639 ("[c]laims of insurance companies would be allowed only if it were shown that the sum of a company's losses exceed the sum of its gains through premiums or otherwise, and the allowance could not exceed such an excess of loss."); *Eagle Star and British Dominions Insurance Company and Excess Insurance Company* (Great Britain v. Mexico) (1931), 5 U.N.R.I.A.A. 139 (insurers suffer losses indirectly as a consequence of a contract, into which they have entered voluntarily, professionally, in the normal and ordinary course of their business and in consideration of certain payments, and it is extremely difficult to evaluate their losses because premiums are calculated in proportion to the risks so as ultimately to result in profits on the whole volume of the insurers' transactions); and *Principles of Public International Law* at 481 ("there is authority for the view that the insurer should bear the risks in the contemplation of the policy and should not qualify for protection.").

[8] *See, e.g., Claim of GREAT AMERICAN INSURANCE COMPANY*, discussed *infra* Jurisdiction Section II.D.

States District Court for the District of Columbia, which asserts a cause of action for, *inter alia*, indemnity, restitution and contribution under Count I of the complaint. As discussed above, while the Statement of Claim filed with the Commission is purportedly on behalf of the "Subrogated Interests to Pan American World Airways, Inc.," it has actually been filed by USAUI, the manager of USAIG, as the asserted lead insurer for Pan Am. USAUI asserts that it is acting on behalf of USAIG and Pan American's concurrent insurers. The complaint in *Hartford* lists, as named parties, many of the insurance companies that make up the USAIG pool and alleges that the USAIG pool was managed by USAUI.[9] The Commission, therefore, finds that the claimants were named parties in one of the Pending Litigation cases and that they set forth a commercial claim in that action. In addition, the claimants have provided a copy of an Order of Dismissal, dated July 6, 2010, dismissing the Pending Litigation case. Based on this evidence, the Commission finds that the Pending Litigation case has been properly dismissed.

D. Continuous U.S. Nationality is Required to Exercise the Commission's Jurisdiction

The January Referral Letter states that, as a matter of jurisdiction, Category F only applies to claims of "U.S. nationals." January Referral Letter, *supra*, ¶ 8. In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held that in order for a claim to be compensable, the claim must have been held by a "national of the United States" from the date it arose until the date of the Claims Settlement Agreement. In a subsequent case addressing the requirement of U.S. nationality in the Libya program, the Commission has noted that "the continuous

[9] The complaint also lists the Associated Aviation Underwriters, Inc. pool as a plaintiff, as well as several foreign insurance companies. The nationality of the relevant insurance companies and its effect on jurisdiction will be discussed below.

nationality requirement—and even more fundamentally, the requirement that a claimant be a U.S. national at the time of injury—are long-standing principles of international law consistently applied and advocated by the United States to the present day. Consequently, any departure from these principles would have been clearly articulated [in the Libya Claims Program authorizing documents] and not merely implied." *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-049, Decision No. LIB-I-019 (2011), FD at 6. In 5 U.S.C. §552(b)(6) the Commission discussed in detail the basis of its determination that the continuous nationality requirement applies to the Libya Claims Program, and its conclusions apply equally here:

> As a general matter, the United States continues to recognize the continuous nationality rule as customary international law. For example, the United States' 2006 comments on the International Law Commission's Draft Articles on Diplomatic Protection clearly convey the United States' position that the continuous nationality requirement – that nationality "be maintained continuously from the date of injury through the date of resolution" – reflects customary international law.[10]
>
> * * * *
>
> Given the fact that the continuous nationality rule is recognized by the United States as customary international law, and that this rule has been applied by both this Commission and its predecessors, a derogation from this rule will not be assumed by the Commission from the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has been no such express derogation in this program. Consequently, the Commission adheres to its earlier finding that in order for a claim to be compensable in this program, it must have been owned by a U.S. national continuously from the date of injury to the date of the Claims Settlement Agreement.

5 U.S.C. §552(b)(6) FD at 6-8.

[10] *See International Law Commission, Comments and observations received from Governments, Diplomatic protection*, at page 19, U.N. Doc. A/CN.4/561 (2006).

Despite numerous requests, the claimants have failed to meet their burden to show the full chains of ownership and nationality of the claim. Moreover, the Commission finds that, to the degree the Pan Am Subrogees did provide responsive information, it showed that at least 60% of the claim fails because of non-U.S. nationals in the chains of ownership. In their December 2011 submission, the claimants effectively concede that at least 50% of the insurance coverage has non-U.S. nationality. Claimants' submission states that 25% of the insurance coverage issued to Pan Am was issued through the London insurance market and that, of the companies that participated in this coverage, only one company (one that purportedly provided 1.89% of the coverage) was a U.S. company (and that company has advised the claimants that it does not wish to participate in this claim). The December 2011 submission further states that another 25% of the insurance coverage was provided by French companies through the French insurance market. The claimants also identify two main insurance pools that provided insurance to Pan Am: USAIG provided 30% of the total coverage, while Associated Aviation Underwriters, Inc. (AAU) provided 17.5% of the total coverage. It appears that American Home Assurance Company provided the remaining 2.5% of the coverage. Out of these insurance pools, approximately 10% of the total coverage has been shown to have non-U.S. nationals in the chain of ownership. Furthermore, the claimants have failed to show the complete chains of nationality as to the remaining approximately 40% of the claim. The claimants have submitted some information regarding the chain of ownership of the individual insurance companies that make up each pool, but in most cases not enough information to trace the nationality of ownership from the date the claim arose until the date of the Claims Settlement Agreement. In addition, the claimants

have only provided very limited information about one pool of reinsurance (Extended Reinsurance Group) that they state reinsured 30% of the USAIG pool coverage (i.e., 9% of the total coverage). Claimants state that "dozens of companies and syndicates provided reinsurance to USAIG," but they have not provided any additional information about the USAIG reinsurers, or reinsurers for the other pools, and provide no information about further ceding of insurance coverage beyond reinsurers.

The claimants make four arguments for relaxing the continuous-nationality requirement in this case, all revolving around the fact that they are insurance companies and not natural persons. First, the claimants contend that their own nationality is irrelevant and that "the only relevant nationalities for purpose of the instant claim are those of Pan American and the American victims of the Lockerbie Disaster." The law of nationality in international claims, however, clearly refutes this argument. International law requires a continuous chain of nationality of the espousing state in order for a claim to be cognizable. This rule is a formulation of the principle that an injury to a national is an injury to his state which warrants the advocacy of the state in an effort to obtain redress for the wronged party. Stated differently, the rule connotes the protection of *states'* rights, and not those of individuals. *See Ian Brownlie, Principles of Public International Law* 480-81 (4th ed. 1990); *Claim of ESTATE OF JOSEPH KREN, DECEASED, BY MAGDALENA KREN, EXECUTRIX*, Claim No. Y-660, Decision No. 1171 (1954); and *Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims* 16-18 (Kraus Reprint Co. 1970) (original - 1915).

Indeed, the Commission has repeatedly held that an insurance company, as a subrogee to a claim, does not adopt the nationality of its insured, the subrogor, but rather

has to independently—and in addition to the insured—meet the U.S. nationality requirement. *See, e.g., Claim of THE HARTFORD FIRE AND INSURANCE COMPANY*, Claim No. IR-1101, Decision No. IR-1697 (1994); *Claim of THE HARTFORD*, Claim No. IR-0383, Decision No. IR-1540 (1993). In *Claim of OCEAN-AIR CARGO*, Claim Nos. IR-1102, IR-1429, Decision No. IR-0961 (1994), the Commission rejected arguments similar to those now made by the Pan Am Subrogees. *OCEAN-AIR CARGO* was a breach-of-contract case, and Ocean-Air, the insurer and claimant before the Commission, had provided evidence that both the original purchaser of the goods and Ocean-Air itself were, at all relevant times, nationals of the United States. Nonetheless, the Commission denied its claim for lack of nationality because Ocean-Air was not the direct insurer, but was instead acting as an agent for French companies that initially paid the purchaser:

> The evidence establishes that upon payment of the claims by the French insurance companies, those companies became subrogated to the claims of the original cargo owners and not the claimant. As such, they became the owners of the claims. . . . In light of the foregoing, the Commission determines that these claims were not continuously owned by United States nationals and are, therefore, not claims of United States nationals as defined by the Settlement Agreement and Algiers Accords, and thus are outside the jurisdiction of the Commission as established by those agreements.

Id. at 4-5.

The Pan Am Subrogees make a second argument, that because the relevant reinsurance programs are highly complex, involving layers and multiple companies and syndicates, reinsurers should not be required to be U.S. nationals. Again, however, the international law of nationality, as expressed in the Commission's own jurisprudence, precludes such an argument. When this very issue arose in the context of claims by

reinsurers, the Commission required U.S. nationality for all of the relevant parties in the chain of insurance: the party that suffered the loss, the insurance company that directly insured the loss, and the reinsurer that paid the insurer. *See, e.g., Claim of FORTRESS RE, INC.*, Claim No. IR-0893, Decision No. IR-2210 (1994); *see also Claim of TALBOT, BIRD & COMPANY, INC.*, Claim No. IR-0342, Decision No. IR-1722 (1993) (denying claim of the agent of an insurance company for, among other reasons, failing to meet its burden of demonstrating that it, its principal, and its principal's subrogor were U.S. nationals); *Claim of COMMERCIAL UNION INSURANCE COMPANY*, Claim No. IR-0759, Decision No. IR-2280 (1994) (denying claim for lack of jurisdiction where claimant did not meet burden of proof of continuous U.S. nationality for itself and its subrogor); *Claim of ROYAL GLOBE INSURANCE COMPANY*, Claim No. IR-2730, Decision No. IR-0519 (1992) (denying claim for lack of jurisdiction where claimant insurance company failed to meet its burden of proof of demonstrating continuous U.S. nationality through the "chain of ownership" of the claim, including the "various subrogors"); and *Claim of NEW HAMPSHIRE INSURANCE COMPANY*, Claim No. IR-2731, Decision No. IR-0518 (1992) (same).[11] In short, comporting with a long-standing principle of international law,[12] the Commission has consistently held that claimants bear

[11] *See also Claim of GREAT AMERICAN INSURANCE COMPANY*, Claim No. IT-10,260, Decision No. IT-487 (1959) (denying U.S. insurance company's claim for loss because company failed to provide evidence the insured were nationals of the United States, stating that any "break in the chain of title or ownership of the claim by assignment or otherwise which results in the claim having been owned at any time by a non-citizen defeats the right to such claims"); and *Claim of ALBINE ZIBERT SCHROIF*, Claim No. Y-764, Decision No. 1342 (1954) (denying claim based on lack of U.S. nationality, relying on, among other things, State Department practice as reflected in an August 11, 1926 letter which stated that the United States requires continuous U.S. nationality and that the United States would not espouse the claim of a foreign insurance company).

[12] *See, e.g.*, 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 541, at 809-812 (1943).

the burden of proving the United States nationality of every party in the full chain of ownership of a claim.

Claimants' third argument is that regardless of nationality, they "had a meritorious cause of action under the Foreign Sovereign Immunities Act ("FSIA") to recover indemnity from Libya for amounts expended to compensate the American victims of the Lockerbie Disaster."[13] Claimants further argue that the FSIA should provide "the template for considering claims that had been pending in court" because that statute is "entirely consistent with the Commission's mandate . . . to apply the 'applicable principles of international law, justice, and equity,'" the State Department's referral, and international law precedent. In *OCEAN-AIR CARGO*, the Commission rejected a similar argument, that an insurance company can avoid the chain-of-U.S.-nationality requirement merely because it "has the right to bring an action in the courts of the United States." *OCEAN-AIR CARGO*, at 4. Quite simply, the right to bring a claim in federal court does not create jurisdiction in this Commission: the Commission is mandated by the ICSA to look first to the relevant Claims Settlement Agreement and then to "international law, justice and equity."[14] The Commission, therefore, does not apply the same standards as a federal court adjudicating a case under the FSIA. While this would be true even if claimants "had a meritorious cause of action under the FSIA," it turns out not to matter one way or the other: as will be discussed in the Merits section below, even if the Commission had jurisdiction, it would reject the merits of the Pan Am Subrogees' claims,

---

[13] The claimants also argue that a Commission decision to the contrary would "constitute a taking of property without compensation and due process" and would be "arbitrary in the extreme." The Commission notes in this regard its previous holding that consideration of constitutional issues is outside the scope of the Department of State's referral to the Commission. *See Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-005, Decision No. LIB-I-014, at 5 (2010) (Final Decision).

[14] 22 U.S.C. §1623(a)(2)(B).

even if it were to apply the law the claimants believe to be applicable under the FSIA. Furthermore, as discussed in 5 U.S.C. §552(b)(6) these arguments are inconsistent with the Claims Settlement Agreement, as implemented by the Libya Program referral letters and the LCRA.[15]

Finally, the Pan Am Subrogees argue that, as a matter of policy, the requirement of continuous United States nationality ought to apply only to the insured, particularly in the context of the highly specialized and international nature of the aviation insurance market. The answer to this is simple: the relevant international law is clear, and the Commission has no authority to change the law for policy reasons. Commission precedent, U.S. practice, and customary international law all require a continuous chain of U.S. nationality in order for a claim to be cognizable, and, as the Commission made clear in 5 U.S.C. §552(b)(6) there is no evidence that either the parties that concluded the Claims Settlement Agreement or the State Department in its referral to this Commission intended to upend that settled legal principle.

The claimants have, therefore, failed to meet their burden to show the full chains of nationality of the claim. As discussed above, to the degree the Pan Am Subrogees did provide responsive information, it showed that at least 60% of the claim fails because of non-U.S. nationals in the chains of ownership. Furthermore, the Pan Am Subrogees, despite being asked repeatedly, have failed to show the complete chain of nationality as

[15] The claimants point out that the State Department facilitated the final settlement payments, of the last $2 million of the $10 million agreed upon, to the Pan Am 103 victims, to both U.S. and non-U.S. citizens. However, this limited payment to non-U.S. nationals was specifically prescribed by the LCRA. Congress in the LCRA delineated two classes of claims, the first encompassing all persons included in the Pan Am 103 and LaBelle Discotheque settlements — apparently without regard to nationality — and the second encompassing all "nationals of the United States who have terrorism-related claims against Libya." *See* LCRA §§3 and 5. The Pan Am Subrogees were not directly part of the LaBelle or Pan Am 103 settlements, and therefore must be "nationals of the United States."

to the remaining approximately 40% of the claim.[16] In sum, based on: (1) the language of the Libya program authorizing documents, including the January 15, 2009 Referral Letter, the CSA, the LCRA, and Executive Order No. 13,477; (2) Commission precedent to date in the Libya program; (3) Commission precedent in regard to insurance claims in programs prior to the Libya program; and (4) generally recognized standards of international law — all of which require a continuous chain of U.S. nationality — the Commission concludes that, as a threshold jurisdictional matter, the claim must be dismissed because the claimants have failed to meet their burden to show the complete and continuous chains of U.S. nationality through the chains of insurers, reinsurers, retrocessionaires, and co-insurers.[17]

Merits

I. The History of the Litigation Against Pan Am and Libya

A. Pan Am 103 Victims' Suit Against Pan Am and the Repeated Findings that Pan Am Engaged in Willful Misconduct

On December 21, 1988, Pan American World Airways Flight 103 was destroyed, killing all 243 passengers and 16 crew members. Eleven people in Lockerbie, Scotland were also killed on the ground, bringing total fatalities to 270. The victims' estates sued Pan Am and Alert (a Pan Am affiliate that provided security services in London and Frankfurt; Pan Am and Alert will occasionally be referred to collectively herein as "Pan Am") in the United States District Court for the Eastern District of New York. The jury

[16] Indeed, the claimants' submissions suggest that much of this remaining 40% of the claim also may have non-U.S. nationals in the chains of ownership. For example, in their December 2011 submission they state that if their position in regard to the nationality of insurance claims is rejected, "only relatively modest claims—where the insurance was entirely American—would be successful."

[17] In the interests of adjudicative efficiency and economy, and as it has on occasion done in the past, the Commission will proceed to address the merits of the claim, notwithstanding the claimant's failure to establish the jurisdictional bases for its claim. *See, e.g., Claim of JERKO BOGOVICH*, Claim No. Y-1757, Decision No. Y-857 (1954).

rendered a special verdict finding Pan Am and Alert guilty of willful misconduct that contributed to the bombing. On September 9, 1992, the court entered final civil judgments against Pan Am and Alert. *See In re Air Disaster at Lockerbie*, 37 F.3d 804, 811 (2d Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Subsequently, the United States Court of Appeals for the Second Circuit denied Pan Am and Alert's appeal, noting that the "overwhelming evidence presented during the course of the three and one-half month trial established that Pan Am officials ignored repeated warnings and signals that its security measures were insufficient." 37 F.3d at 819.

In that decision, the Second Circuit noted the following: The trial had been bifurcated into a liability phase, binding on all plaintiffs whose cases were consolidated in the multidistrict litigation, and a damages phase. 37 F.3d at 810. The parties agreed that the case was governed by the Warsaw Convention which generally limits a carrier's liability for damages to $75,000 per passenger, but permits recovery of unlimited compensatory damages provided the damages were caused by the carrier's "willful misconduct." 37 F.3d at 811. The jury specifically found that: (1) Pan Am and Alert engaged in willful misconduct; and (2) the willful misconduct was a "substantial factor in causing the disaster." 37 F.3d at 812.

Pan Am and Alert appealed the trial court determination, challenging the finding of liability and the damage awards. 37 F.3d at 811. In its decision on appeal, the Second Circuit noted that under the Warsaw Convention, willful misconduct "means that a carrier must have acted either (1) with knowledge that its actions would probably result in injury or death, or (2) in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions." *Id.* The Second Circuit further

noted that the district court "carefully and in an extensive and well balanced charge instructed the jury that [in order to find liability,] it must find not only willful misconduct, but also a causal connection between that misconduct and the passenger deaths. [The district court judge] added that defendants' conduct would not be the proximate cause of the accident if the accident would have occurred anyway, absent defendants' acts or omissions." 37 F.3d at 824.

The Second Circuit recounted the evidence and facts supporting the finding of Pan Am and Alert's "willful misconduct," which it determined bordered on the "outrageous":

> In 1985 a bomb hidden inside a radio and packed in an unaccompanied interline bag exploded on an Air India 747 over the North Atlantic, killing all aboard. The dangers of a bomb hidden inside radios packed in interline bags were well known to Pan Am and the airline industry. These . . . incidents not only led to the adoption of [the FAA regulations that Pan Am violated], but they conveyed clear warnings that what actually happened at Lockerbie was a distinct possibility.
>
> In September 1986 Pan Am received a report from a group of Israeli security experts commissioned to review Pan Am security at various airports, including Heathrow and Frankfurt. The security experts concluded that "under the present security system, Pan Am is highly vulnerable to most forms of terrorist attack. The fact that no major disaster has occurred to date is merely providential." The report specifically cautioned Pan Am on the use of x-ray machines as substitutes for physical searches, and the dangers of interline unaccompanied bags.
>
> In October 1988 [the] Alert Manager for Germany . . . wrote a memo to New York headquarters citing the need for more personnel to remedy Frankfurt's security shortcomings. Only minimum efforts were made to remedy them.
>
> In July 1988 the FAA issued a Security Bulletin warning of the high threat of a terrorist retaliatory attack because of the downing of an Iranian Jetliner. In November 1988 Pan Am received an FAA Security Bulletin warning that a raid on a terrorist group had uncovered a bomb built into a Toshiba radio cassette player. (Toshiba Warning). The bulletin warned that the bomb was difficult to detect by the use of normal x-ray.

> *The most willful disregard of passenger safety, bordering on the outrageous*, was in December 1988 when Pan Am received an FAA Security Bulletin advising that the United States Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt to London and on to New York would be bombed. (Helsinki Warning). The Helsinki Warning came just 14 days before the instant tragedy and specifically referred to the Toshiba Warning. Despite these warnings, Pan Am failed to conduct searches of unaccompanied interline luggage, and instead inspected such bags only by x-ray. Pan Am did not even alert x-ray technicians to watch for Toshiba radios. It violated FAA regulations by failing to match the bags with particular tickets without advising the FAA in writing that interline bag match had been discontinued. And it violated other FAA regulations by failing to warn pilots about the unaccompanied bags on board for fear that the crews might become "jittery." Additionally, Pan Am did not replace several members of its security team who were woefully undertrained given their responsibility for thwarting terrorist attacks.

37 F.3d at 819-20 (emphasis added).

As discussed above, the claimants allege that after Pan Am and Alert were judged liable for compensatory damages, the claimants settled and paid all pending Pan Am 103 claims against Pan Am and Alert for death and personal injury for approximately $485 million. The claimants state that the responsibility for these payments was allocated among Pan Am's insurers according to their respective contracts of insurance and reinsurance.

B. Pan Am 103 Victims' Suit Against Libya

After settling with Pan Am and Alert, the Pan Am 103 victims' estates and surviving family members then sued Libya in *Rein v. Socialist People's Libyan Arab Jamahiriya*, 9:96-cv-02077 (E.D.N.Y.). As will be discussed below, the Pan Am 103 victims' suit against Libya was consistent with the releases they signed with Pan Am and its insurers which reserved for the victims the right to sue Libya on their own behalf. The last complaint filed by the *Rein* plaintiffs was the Eighth Amended Complaint filed April

11, 2002. This complaint states a claim for, *inter alia*, compensatory damages for death and personal injury. Page 16, para. 18. The complaint makes no mention of payments that were already received from Pan Am and Alert or their insurers, or that the plaintiffs were seeking "additional" compensation. The parties subsequently entered into a settlement agreement which provided that Libya would make "compensatory" damage payments of $10 million for each of the 270 deaths, totaling $2.7 billion.

C. The Hartford Suit Against Libya

Certain insurers of Pan Am sued Libya in *Hartford Fire Insurance Co. v. Socialist People's Libyan Arab Jamahiriya*, 98-cv-3096, filed in the U.S. District Court for the District of Columbia. The insurers filed the initial complaint on December 18, 1998. The litigation included amendments to the complaint, dispositive motions, and memorandum opinions by the District Court.

The District Court did not make a determination as to whether Libya owed the *Hartford* plaintiffs any economic damages. Rather, on June 28, 2007, the District Court issued a memorandum opinion which, *inter alia*, partially granted Libya's dismissal motion, finding plaintiffs failed to state a claim upon which the Court could grant relief under federal common law and failed to state a claim upon which the Court could grant punitive damages. The District Court stated that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and requested further briefing on the proper choice of law and "the precise laws under which Plaintiffs contend defendants are liable for their responsibility in the bombing of Pan Am Flight 103." *See* 2007 WL 1876392 at *1 and *12. As discussed below in Merits Section II.B., the plaintiffs submitted additional briefing addressing the Court's question, but the Court did

not rule on the validity of the *Hartford* plaintiffs' liability theories. Rather, on August 14, 2008, the United States and Libya concluded the Claims Settlement Agreement. And, on July 6, 2010, the Court issued an order dismissing the case with prejudice.

II. Even If the Commission had Jurisdiction, Claimants Would Have Failed in their Burden of Proof on the Merits

A. Summary

The Commission finds that even if it had jurisdiction and were to assess the claim, the claimants have failed in their burden to prove the applicable law. Furthermore, *even if* the Commission both (1) had jurisdiction, and (2) were to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," and therefore part of the fabric of international law, as the claimants have submitted the Commission should; the claimants have failed in their burden of proving the merits of their claim for a number of reasons. First, the Pan Am Subrogees are not subrogated to the claims of the victims and thus cannot prevail on a theory of subrogation. The Pan Am Subrogees would only be subrogated to the claims of the party they insured, Pan Am. The victims, in contrast, were third parties who brought suit against the Pan Am Subrogees' insured, Pan Am. The relationship between the victims and the Pan Am Subrogees does not permit the Pan Am Subrogees to stand in the shoes of the victims, which is what a subrogation theory demands. Furthermore, even if the claimants were legally subrogated to the claims of the victims, they have failed to prove that Libya's payment to the victims did not also satisfy their claim. Second, claimants' indemnification claim fails because indemnification seeks the repayment of the entire amount paid. Here, the claimants' subrogor, Pan Am, was found to have engaged in willful misconduct that was a proximate cause of the destruction of Pan Am 103.

Because Pan Am is thus at least partially liable, there is no possibility of claimants recovering from Libya the entire amount they paid to the victims. Third, claimants' contribution claim fails because they settled with the Pan Am 103 victims, who executed settlement releases that specifically preserved the rights of the victims to subsequently sue Libya directly, thereby preserving Libya's liability to the victims. Furthermore, the claimants failed to prove that the amount they paid to the victims, which is about 15%, or less than one-sixth, of the overall amount that the victims received, is not Pan Am's appropriate proportionate share of the overall liability, given the U.S. court findings that Pan Am engaged in willful misconduct that bordered on the outrageous and that was a proximate cause of the Pan Am 103 tragedy.

B. Claimants Have Failed to Meet Their Burden of Proving the Applicable Law

As discussed above, pursuant to both statute and regulation, claimants before the Commission bear the "burden of proof in submitting ... information sufficient to establish the elements necessary for a determination of the validity ... of [their] claim." 45 C.F.R. § 509.5(b); *see also* 22 U.S.C. § 1623(b). Moreover, since "the provisions of the applicable claims agreement" do not define the "applicable legal principles" to be applied in this Category F claim, the Commission is mandated to apply, in order, "the applicable principles of international law, justice and equity" in adjudicating this claim. Thus, the claimants bear the burden of showing that the principles of international law support the validity of their claim. The claimants argue that the Commission should apply the law that a federal court would apply under the FSIA, but this argument is insufficient to meet their burden of demonstrating that *international law* supports the validity of their claims. As will be discussed in more detail below, municipal law

principles can be incorporated into, and be a part of, international law, but the Pan Am Subrogees have failed to show which relevant municipal legal principles constitute the applicable international law.[18]

The principal argument claimants make about the "applicable legal principles" the Commission is to apply is that the FSIA should provide "the template for considering claims that had been pending in court" because that statute is "entirely consistent with the Commission's mandate . . . to apply the 'applicable principles of international law, justice, and equity,'" the State Department's referral, and international law precedent. But the FSIA has nothing to say about insurance law.[19] This leads the claimants to rely on what appear to be general principles of U.S. insurance law, rather than the law of a specific jurisdiction, such as New York or some other state.[20] The rationale for this approach, the claimants say, is that the January 2008 amendments to the FSIA purportedly provide them with a cause of action, and the applicable law would

---

[18] Moreover, even if the Commission had jurisdiction and were to apply the law claimants ask to be applied, claimants would still not prevail. *See infra* Merits Sections II.C, II.D and II.E.

[19] Indeed, until January 2008, a mere seven months before the Claims Settlement Agreement and the LCRA, the FSIA did not even provide an independent cause of action. It merely created exceptions for foreign state sovereign immunity in certain circumstances, providing federal and state courts with subject matter jurisdiction to hear such cases. *See* 28 U.S.C. § 1605(a) (2006); *Cicippio-Puleo v. Islamic Rep. of Iran*, 353 F.3d 1024, 1032-36 (D.C. Cir. 2004) (holding that the FSIA "terrorism exception," then found in 28 U.S.C. § 1605(a)(7), merely provides subject matter jurisdiction but does not create any cause of action); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, sec. 1083, 122 Stat. 3, 388-344 (Jan. 28, 2008) (creating a new cause of action under 28 U.S.C. §§ 1605A(c), (d) and thereby abrogating *Cicippio-Puleo*).

[20] This failure to articulate the precise law applicable in their FSIA suit led Judge Hogan, the judge before whom the federal lawsuit was being heard, to require them to explain precisely what law applied to the suit. *See Hartford Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 422 F. Supp. 2d 203, 208 (D.D.C. 2006) (after concluding that plaintiffs had no cause of action under federal common law, permitting them to file an amended complaint but only if they "are prepared to provide a 'coherent alternative' source of law on which to base their claims"); *Hartford Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, 2007 WL 1876392, *12 (refusing "to find Libya liable for torts under generic 'state law' without analyzing [the] specific law or laws" at issue and ordering briefing on "the proper choice of law determination and specific causes of action"). In response, the plaintiffs originally pled New York law, but after Congress passed section 1083 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 388-344 (Jan. 28, 2008) amending the FSIA, plaintiffs reformulated their claims to be based on a new cause of action found in the FSIA. *See* 28 U.S.C. § 1605A(c), (d).

presumably be some sort of general federal law of insurance. This may or may not be correct as a matter of federal law. One thing that is clear, however, is that all this is irrelevant here: the Commission's authorizing statute defines its mandate, and it requires that it apply "international law, justice and equity."[21]

As discussed in Jurisdiction Section II.B above, international law generally permits insurers to recover for losses suffered due to harm incurred by their insured. Beyond this basic principle, however, insurance has not received sustained treatment in international law. It has, on the other hand, been the subject of extensive jurisprudence in municipal legal systems, and in such circumstances, international law resorts to, and borrows from, municipal law. This is exactly what Article 38 of the Statute of the International Court of Justice is referring to when it identifies "the general principles of law recognized by civilized nations" as a source of international law. *See* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 1060. The International Court of Justice ("ICJ") further elucidated the concept of "general principles of law" in the *Barcelona Traction* case, a case involving companies and shareholders. The situation is comparable to the Pan Am Subrogees' case here because, like insurance law, corporate law is far more developed in municipal legal systems than in international law. As the ICJ put it, "whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law." Case Concerning Barcelona Traction, Light and Power Company, Ltd., Judgment, (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5); *see also* Theodor Meron, *The Insurer and the*

[21] 22 U.S.C. §1623(a)(2)(B).

Insured Under International Claims Law, 68 Am. J. Int'l Law 628, 629 (1974) (hereinafter, "*The Insurer and the Insured*").

Importantly, the concept of "general principles of law recognized by civilized nations" requires more than reliance on a single nation's municipal law. As the ICJ put it later in the *Barcelona Traction* case, "[i]t is to rules generally accepted by municipal legal systems … and not to the municipal law of a particular state, that international law refers."[22] And determining these "general principles" is no easy task. As one scholar has put it, "[i]n order … to argue that a general principle of law is a binding rule of international law, it would be necessary to canvass all of the world's great legal systems ["common law, … civil law, … significant religious legal cultures (including Islamic law), and ideological legal systems (including socialist law as practiced in China and elsewhere)"] for evidence of that principle, and also to reference manifestations of that principle in the actual domestic law of as many nations as possible."[23]

In this case, the claimants have not met their burden of demonstrating which relevant municipal legal principles constitute generally accepted principles of international law. They have noted general international law precepts prohibiting a state's intentional destruction of an airplane and requiring compensation for the victims, but those precepts are not the ones of relevance here. Instead, to adjudicate the Pan Am Subrogees' claims, the Commission must answer questions about the law of subrogation, restitution, indemnity and contribution in the insurance context. On that score, claimants have said little.

---

[22] *Barcelona Traction*, 1970 I.C.J. at 37, ¶ 50.

[23] David J. Bederman, *International Law Frameworks* at 14 (Foundation Press, Second Edition, 2006).

In particular, the claimants have not demonstrated that the specific municipal law that U.S. courts would apply in an FSIA suit to insurers' claims of subrogation, indemnity, restitution and contribution—whatever that law might be—constitutes international law. By relying entirely on U.S. law, the claimants have thus failed to sustain their burden to show that they are entitled to recover under any of their theories—subrogation, indemnification, restitution or contribution—as a matter of "international law, justice, and equity." On this basis alone, the claim is rejected.

Nonetheless, in the interest of adjudicative efficiency, the Commission will address in the sections that follow the substance of claimants' arguments. As will be discussed in detail, even if the general principles of U.S. law—the law that arguably would apply in a lawsuit brought in state or federal court under sections 1605A(c) and (d) of the FSIA—actually constituted the "applicable legal principles" for the Commission to apply, the claim would not be compensable under these principles, and neither justice nor equity would require a different result.

C. Claimants Have Failed to Establish that they are Subrogated to the Victims of Pan Am 103

1. General Principles of Subrogation

In their submission of October 2011, the claimants state that they "have previously compensated the victims of such violations of international law [and] have a right in subrogation to recover their losses from the state that perpetrated the destruction." Likewise, in the claimants' Statement of Claim, they state that they "stand in the shoes of . . . the American victims." Attachment A at page 8. However, even if the Commission were to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," the law of subrogation precludes this

argument.[24] Upon paying the claim of its insured, "an insurance company ordinarily becomes subrogated pro tanto to any right of action which the insured has against a third person whose negligence or wrongful act caused the loss or damage. *Such right of subrogation is deemed to arise out of the contract of insurance and to be derived from the insured alone . . . .*" 92 A.L.R.2d 102 §2 (2012) (emphasis added); *see also Pharmacists Mut. Inc. Co. v. Cincinnati Ins. Co.*, 658 F.Supp.2d 745 (D.S.C. 2009); *In re September 11 Litigation*, 649 F.Supp.2d 171 (S.D.N.Y. 2009). As one court clearly explained it:

> [W]hen an insurer settles a claim brought against its insured, it becomes subrogated *to the rights that its insured* may have against third parties. It does *not* become subrogated to the rights of the insured's third party claimant. This is no less true when the "benefit" that the insured receives from its insurer is a payment directly to a third party to avoid the third party's claim.

Intri-Plex Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1053 (9th Cir. 2007) (emphasis in original).

This principle is consistent with the Commission's jurisprudence. The Commission has previously noted that an insurer's right against the harming state derives from its acquisition of *the right of the insured* it compensates. In *Claim of GREAT AMERICAN INSURANCE COMPANY, supra*, the Commission stated:

> By virtue of an equally familiar principle, recognized and applied alike by courts of law and of equity since time immemorial, an insurer who indemnifies the person who has suffered loss through another's wrong-doing, thereby acquires, to the extent of such indemnification, the assured's rights against the wrong-doer; and the insurer thus – by way of subrogation – becoming entitled to the assured's legal remedies, may

[24] Although the District Court in the *Hartford* suit, in a memorandum opinion of June 28, 2007, did countenance the idea that the plaintiffs could "stand in the shoes of the victims," it is clear that the applicable legal theories had not yet been fully developed in the litigation as the District Court in the same memorandum opinion stated that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and also requested further briefing on the proper choice of law and "the precise laws under which Plaintiffs contend defendants are liable for their responsibility in the bombing of Pan Am Flight 103." *See* 2007 WL 1876392 at *1 and *12.

> enforce the same either "at law", by an action in the name of the assured, or in "equity", by suit in the insurer's own name. *The Potomac*, 105 U.S. 630. * * * *U.S. v. So. Carolina State Highway Dept.*, 171 F(2d) 893.

PD at 3; *see also Claim of INSURANCE COMPANY OF NORTH AMERICA*, Claim No. IT-10,372, Decision No. IT-504 (1958), PD at 2.[25] In short, the insurer is subrogated to its *insured's* claims, not those of anyone else and certainly not the rights of the insured's third party claimants. Here, the Pan Am Subrogees are subrogated to Pan Am, and Pan Am alone.

2. The Pan Am 103 Release Preserves to the Victims their Right to Sue Libya Directly

The claimants' settlement with the Pan Am 103 victims further precludes the claimants' subrogation claim. In exchange for the settlement, the victims signed releases that provide further evidence that Pan Am and the Pan Am Subrogees are not subrogated to the victims. The victims' releases include the following language:

> All parties to this release reserve any and all rights they have against foreign states, including but not limited to Libya, Syria and/or Iran, and their employees, agents and assets in connection with the perpetration of an aircraft bombing of Pan Am Flight 103, on December 21, 1988.

This language makes clear that the victims retained their rights to bring suit against Libya, which they in fact did in the *Rein* litigation, and that Pan Am and the Pan Am Subrogees did not become subrogated to the victims.

Moreover, claimants could have negotiated their settlement with the victims in such a way that Pan Am or its insurers had been subrogated. Indeed, the same lead insurers negotiated a settlement of a different terrorism incident, the 1986 hijacking of

---

[25] Similarly, Meron notes in *The Insurer and the Insured Under International Claims Law* that "[s]ubrogation confers on the insurer the same rights and duties as were attached to the insured person by contractual provisions or by the operation of the law, so that the insurer is substituted for the insured and stands in his shoes . . . ." 68 Am. J. Int'l Law 628, 646 (1974).

Pan Am 73, in just such a way. In contrast to the Pan Am 103 release, the relevant language in the Pan Am 73 release reads as follows:

> It is also the express intent and understanding of the Releasor and Releasees that in consideration of said payment and all of the foregoing, Releasor hereby assigns, transfers, sets over and subrogates to Releasees, their successors and assigns, all of Releasor's rights, title and interests in and to any and all such claims of Releasor arising in any manner, or associated in any way with the hijacking involving the aircraft designated Pan Am Flight 73 on September 5, 1986.

The Pan Am 73 release thus specifically attempted to assign and subrogate to the insurers the victims' interest in any and all claims.[26] A release permitting the victims to sue the offending State, such as the releases at issue in this case, further precludes the releasees—here, the Pan Am 103 victims—from having their claims subrogated to the releasor. Under the general principles of the U.S. municipal law of subrogation, the transfer of victims' rights is not automatic when it is a tortfeasor who pays the victims, as is the case here. The Pan Am Subrogees would have had to negotiate for those rights as part of the settlement, and there is no evidence that they did so here. Indeed, the evidence suggests just the opposite. The claimants therefore have not met their burden of proof to show that they, even under U.S. municipal law, are subrogated to the victims.

3. Even if the Claimants were Subrogated to the Victims, the Claim Would Fail

Even if the claimants could prove that they were subrogated to the claims of the Pan Am 103 victims, the claim would still fail, as the claimants have failed to prove that Libya's direct payment to the victims did not also satisfy the Pan Am Subrogees' claim. As discussed above, the *Rein* plaintiffs sought compensatory damages from Libya, just as

[26] The Commission expresses no view on the validity and operation of such a release. But it is clear that the Pan Am 103 releases, in contrast to the Pan Am 73 releases, did not even attempt to assign and subrogate the victims' interests to the insurers.

they had sought compensatory damages from Pan Am. The language of the *Rein* complaint against Libya contains no indication that the *Rein* plaintiffs were seeking some form of "additional" compensation, nor did the plaintiffs even acknowledge any compensation from Pan Am or its insurers. In addition, the settlement agreement between the *Rein* plaintiffs and Libya specifically provides that it covers "compensatory" damages. Since the Pan Am Subrogees allege that they paid the purported entirety of the compensatory damages allegedly assessed by the court for the Lockerbie bombing, the amount Libya subsequently paid to the estates to settle the *Rein* litigation, which included their claim for compensatory damages, would have covered any subrogation-based claims the Pan Am Subrogees had for compensatory damages they paid the Pan Am 103 victims' estates. *See, e.g., Claim of FIREMAN'S FUND INSURANCE COMPANY*, Claim No. IT-10,412, Decision No. IT-524 (1958) (Commission found that Fireman's Fund, pursuant to its contract with its insured, PADC, and through subrogation, became the "real party in interest" in regard to the loss, and determined that the payment by the British Office directly to PADC was pledged to Fireman's Fund, and had to be deducted in calculating the net loss to Fireman's Fund); UNCC Governing Council Decision No. 13, S/AC.26/1992/13, page 2 (September 25, 1992) ("Governments or employers that seek reimbursement under category "E" or "F" claims of amounts paid for losses that had already been paid from the Fund to individual claimants under categories "C" and "D" claims will not be eligible for compensation."); *Gionfriddo v. Gartenhaus Café*, 211 Conn. 67, 71-73 (1989) ("Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments."); *Jones v. Smith*, 1 Kan. App. 2d 331, 334 (1977) (in the event that the injured party

recovers from the lawsuit, she must subrogate her insurance company from the proceeds).[27]

D. Pan Am's Willful Misconduct Precludes the Claimants' Indemnity Claim Against Libya

The Commission will next assess the Pan Am Subrogees' claim that they are subrogated to the rights of Pan Am and are therefore entitled to compensation under a theory of indemnity. Turning first to the issue of the claimants' subrogation rights in regard to Pan Am, the Commission notes that the claimants assert in their July 2011 submission that their right to be subrogated to the interests of Pan Am arises "both as a matter of contract and as a matter of equity." They state that the lead insurance policy provided that, "[i]n the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery thereof against any person or organization . . . ." They also state that equity provides them with the right in subrogation to "assert their policyholders' claims for indemnity or contribution against other responsible parties." For the reasons discussed above, if the Commission had jurisdiction over this claim, it would find that under the general principles of subrogation Pan Am's insurers did become subrogated to Pan Am's rights after the insurers paid the settlement with the victims of Pan Am 103.

Nonetheless, even if the Commission were to assess the claim and to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," the Commission would reject, as a threshold matter,

[27] Indeed, it has been recognized in U.S. municipal law that even where an insurer is subrogated to its insured (in contrast to third party claimants which are not subrogors) and the insured releases a tortfeasor, thereby defeating the insurer's subrogation rights, the insured must return the insurance money it received. *See* 44A Am. Jur. 2d Insurance § 1794.

claimants' assertion that they are entitled to full indemnity or restitution from Libya because of the federal court finding that Pan Am engaged in willful misconduct and that misconduct was a "but-for" and proximate cause of—indeed, a substantial factor in causing—the Pan Am 103 tragedy. *See* 37 F.3d at 812; *id.* at *824*. The U.S. Court of Appeals for the Second Circuit observed that under the Warsaw Convention, willful misconduct "means that a carrier must have acted either (1) with knowledge that its actions would probably result in injury or death, or (2) in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions." 37 F.3d at 811. The Second Circuit further noted that the district court "carefully and in an extensive and well balanced charge instructed the jury that [in order to hold Pan Am and Alert liable,] it must find not only willful misconduct, but also a causal connection between that misconduct and the passenger deaths. [The district court judge] added that defendants' conduct would not be the proximate cause of the accident if the accident would have occurred anyway, absent defendants' acts or omissions." 37 F.3d at 824.

The Second Circuit also noted that the "overwhelming evidence presented during the course of the three and one-half month trial established that Pan Am officials ignored repeated warnings and signals that its security measures were insufficient." 37 F.3d at 819. As discussed in detail above, the Second Circuit recounted the evidence and facts supporting the finding of "willful misconduct" and affirmed that Pan Am acted in a manner that was a "*willful disregard of passenger safety, bordering on the outrageous.*" 37 F.3d at 819-20 (emphasis added). These findings clearly go beyond simple negligence.

In light of these findings, even if the Commission had jurisdiction, and even if it were to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," the claimants would be precluded from bringing indemnification and restitution claims. The Restatement (Third) of Torts, section 22 makes this clear:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement or discharge of judgment, the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
>
> (1) the indemnitor has agreed by contract to indemnify the indemnitee, or
>
> (2) the indemnitee
>
> (i) was not liable except vicariously for the tort of the indemnitor, or
>
> (ii) was not liable except as a seller of a product supplied to the indemnitee by the indemnitor and the indemnitee was not independently culpable.
>
> (b) A person who is otherwise entitled to recover indemnity pursuant to contract may do so even if the party against whom indemnity is sought would not be liable to the plaintiff.

Comment (e) to section 22 makes it clear that a person who is independently liable cannot recover indemnity, stating that, "unlike pure vicarious liability, ... a person whose negligence consists only in failing to prevent an intentional tortfeasor from injuring the plaintiff is still negligent. The policy of allocating a loss according to each person's share of responsibility supports having the negligent tortfeasor and the intentional tortfeasor, as between themselves, each bear their own comparative shares. That is accomplished by contribution, not indemnity." Therefore, applying the principles in section 22 of the Restatement, the claimants could not recover in indemnity from Libya due to Pan Am's

willful misconduct.[28] In fact, this would be true even if Pan Am had merely been negligent. As such, even if the Commission were to assess the claim and to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," it is clear that the Pan Am Subrogees' claims for indemnification and restitution must fail because of Pan Am's own willful misconduct that was a "substantial factor in causing the disaster." 37 F.3d 804, 812.[29]

The claim for indemnification also fails because, as the language of the Restatement (Third) of Torts, section 22, cited above, makes clear, indemnification requires that the claiming party have discharged the liability of the party against which it is bringing the claim. *Cf.*, UNCC First E/F Claims Report, *supra*. However, the Pan Am Subrogees never discharged Libya's liability. As described in more detail below in the assessment of the claimants' contribution claim, the releases between the claimants and the Pan Am 103 victims permitted the victims to sue Libya directly, and indeed they did so successfully.[30]

---

[28] The Commission notes that the UNCC did allow British Airways to bring a claim against Iraq, despite a French court's finding that British Airways acted inappropriately by landing its plane in Kuwait. UNCC Report and Recommendation Made by the Panel of Commissioners Concerning the First Installment of "E/F" Claims, S/AC.26/2001/6 (March 15, 2001), pages 43-45. However, it is apparent that the UNCC did its own factual analysis, independent of the conclusion reached by the French court, in regard to whether British Airways had violated its duty of care to its passengers. *Id.* at page 45, para. 195-196. In contrast, the federal court's repeated determinations here that Pan Am engaged in willful misconduct that bordered on the "outrageous" are based on a detailed, itemized analysis, including a close review by a federal appellate court. The Commission therefore sees no reason to disagree with these factual findings and conclusions.

[29] The claimants also seek recovery based on a theory of restitution; however, in their July 2011 submission to the Commission they state that this claim "sought essentially the same relief as the claim for indemnity." In that regard, the Restatement (First) of Restitution, section 94, comment (b) states that just as with an indemnity claim, a restitution claim is not available where the claimant is responsible for contributory negligence.

[30] The Commission notes that the District Court in *Hartford* initially stated that Pan Am's actions did not preclude the *Hartford* plaintiffs from bringing an indemnity claim. 1999 WL 33589331 at *5 (D.D.C. Sept. 23, 1999). However this was prior to the District Court stating, in its June 28, 2007 memorandum opinion, that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and

E. The Pan American Subrogees Have Failed to Prove a Valid Contribution Claim

Even if the Commission had jurisdiction over this claim, and even if the Commission were to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," the Commission would find that the claimants have failed to prove a valid contribution claim. The claimants state that their contribution claim seeks to "allocate proportionate liability such that the Pan Am Subrogees would pay no more than their 'equitable share' of liability based on 'the relative culpability of each person liable for contribution.'" Generally, under U.S. municipal law, the amount of contribution to which a person is entitled is the excess paid by him over and above his equitable share of the judgment recovered by the injured party. *See, e.g.,* N.Y. Civil Practice Law and Rules § 1402. However, a person who settled with the injured party before liability could be apportioned by a court is not entitled to contribution. *See, e.g. Makeun v. New York*, 471 N.Y.S.2d 293, 298 (N.Y. App. Div. 1984); *Gonzalez v. Armac Industries, Ltd.*, 81 N.Y2d 1, 6 (1993) ("[t]he settling tortfeasor is relieved from liability to any other person for contribution but, in exchange, is not entitled to obtain contribution from any other tortfeasor."). That is, because the claimants settled the claims of the Pan Am 103 victims prior to a judicial determination of Pan Am and Alert's share of the total compensatory damages and the amount of such damages for all of the Pan Am victims, the claim must be denied.

Furthermore, the claimants' contribution claim depends upon their right to seek "contribution" from Libya for monies that Libya would otherwise have had to pay. This

---

the court's request for briefing on the proper choice of law and the precise laws under which the plaintiffs contended the defendants were liable. *See* 2007 WL 1876392 at *1 and *12.

claim fails because the claimants have not proven that their payment to the Pan Am 103 victims, which the claimants allege Libya would otherwise have had to pay the victims, relieved Libya from any of its liability. Indeed, the evidence is to the contrary. Pursuant to the release between the claimants and the Pan Am 103 victims, the victims maintained their right to sue Libya directly, and indeed did so successfully. The claimants argue that the payments Libya made to the victims were "in addition" to the payments the insurers made to settle the claim against Pan Am, instead of for the same compensatory damages, but in their suit against Libya, the Pan Am 103 victims did not mention the payments they had received from the Pan Am insurers, nor did they state that they were seeking "additional" compensation. Furthermore, the settlement agreement between the *Rein* plaintiffs and Libya specifically provides that it covers "compensatory" damages.[31] The Restatement (Third) of Torts, Section 23, Comment (b) explains, "[a] person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment."[32] The Restatement (Third) of Torts, Section 24 defines settlement as "a legally enforceable agreement in which a claimant agrees not to seek recovery outside the agreement for specified injuries or claims from some or all of the persons who might be liable for those injuries or claims."

---

[31] The claimants, represented by counsel and presumably aware of the victims' suit against Libya, could have, absent their settlements (and releases) with the victims, taken action in this regard to try to preserve their purported interest.

[32] *Cf.,* UNCC First E/F Claims Report, *supra* (the UNCC stated it would not award compensation for the same loss more than once; and, for example, found claim of an employer for payment made to employees was mitigated by the payments made by the UNCC directly to the employees where the employees brought their own individual claims).

As a result of the finding that Pan Am's willful misconduct contributed to the disaster, Pan Am was found liable for compensatory damages, after which the claimants state they negotiated settlements with the Pan Am 103 victims. The claimants have not proven that their payment extinguished Libya's liability, or any portion thereof, as required to recover contribution. Indeed, the release signed by the victims specifically retained the victims' right to sue Libya. That the claimants did not extinguish any liability of Libya is also supported by the fact that the victims went on to sue Libya and recover an additional $10 million per victim.[33]

A further comparison here between the Pan Am 103 release and the Pan Am 73 release is informative. The Pan Am 73 release, which, as noted above explicitly states that it assigns and subrogates to the insurers the victims' interest in any and all claims, *also* states in part that "any and all rights of indemnity and/or contribution . . . that any Releasee [which includes Pan Am and its identified insurers] may have against any . . . other persons, firms or entities shall be preserved by the execution of this release." In contrast, the Pan Am 103 release lacks such language.[34]

Furthermore, even if the Commission had jurisdiction, and even if it were to consider general principles of U.S. municipal insurance law as "general principles of law

---

[33] The District Court in the *Hartford* suit initially stated that "Libya will be entitled, in litigation with the *Rein* plaintiffs, to a credit for the amounts previously paid to those plaintiffs by Pan Am." 1999 U.S. Dist. LEXIS 15035, *6. However, this was prior to the District Court's conclusion, in its June 28, 2007 memorandum opinion, that "Hartford has not established its entitlement to judgment as a matter of law on any of its claims" and the court's request for briefing on the proper choice of law and the precise laws under which the plaintiffs contended the defendants were liable. *See* 2007 WL 1876392 at *1 and *12.

[34] The District Court in the *Hartford* suit initially also stated that "Libya is therefore unjustly enriched to the extent it is able to continue to avoid paying the entirety of the *Rein* plaintiffs' damage claims against it." 1999 U.S. Dist. LEXIS 15035, *6 (emphasis added). However, because of the settlements the claimants negotiated with the victims, and as affirmed by the releases, it appears Libya may not have been "unjustly enriched" as it may not have been able to avoid paying the entirety of the damages claim, and the claimants have not provided evidence sufficient to meet their burden of proof to the contrary.

recognized by civilized nations," and even if claimants were to overcome the above fundamental flaws with their contribution claim – the claimants have failed to prove that their settlement was for more than Pan Am's share of the liability for the disaster. As discussed above, claimants before the Commission have the burden of proof. In this context, the burden on the claimants also comports with the Restatement (Second) of Torts, section 433B(2), which provides that "where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor." Here, the claimants have failed to prove that the amount they paid to the victims, which is less than one-sixth of the overall amount that was paid to the victims, is not the claimants' appropriate proportionate share of the liability, given the fact that Pan Am engaged in "willful misconduct" that was a proximate cause and substantial factor of the disaster. That is, the $2.7 billion Libya paid to the Pan Am 103 victims could have been for Libya's share of the overall liability, and the $486 million the claimants paid could have been for Pan Am's share of the overall liability based on the federal court's finding that Pan Am's actions bordered on the "outrageous" and that Pan Am's conduct constituted "willful misconduct." The claimants have not provided evidence to prove that it is unreasonable for Pan Am to be responsible for, and Pan Am's insurers to have paid approximately 15%, less than one-sixth, of the overall liability, given the egregious conduct recounted by the Second Circuit and that court's affirmation of the willful misconduct finding.

Indeed, under international law, a claimant's contributory actions or negligence can result in a reduction of damages or even serve as a complete bar to a claim. A "state

may also take into account the contributory acts of the individual claimant at the time the case arose. If the claimant participated in the wrong, or was guilty of contributory negligence when the injury in question occurred, his government may decline to press the claim, or the respondent state may refuse to pay an indemnity." Whiteman, *Damages in International Law*, Vol. I, at pg. 144. Where a claimant is found to be guilty of "his own carelessness, imprudence, or noncompliance with local regulations," or "carelessness amounting to contributory negligence or even negligent acts, the damages will usually be diminished, if not disallowed." *Id.* at 145, 216-17; *see also* D. P. O'Connell, *International Law*, Vol. II, 1120 (1970) ("The quantum of damages has often been affected by an assessment of the extent to which the injured alien has by his own conduct contributed to the injury. Usually this has been explained as an extenuation of the fault of the State, and has justified a reduction in the reparation.").[35]

[35] *See also* Article 39 of the International Law Commission Draft Articles on State Responsibility (2001) ("In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.").

CONCLUSION

For the reasons discussed above, the Commission concludes that it lacks jurisdiction over the purported Pan Am Subrogees' claim. First, the Pan Am Subrogees have failed to meet their burden of proof to show they own the claim, because they have failed to prove that they (and not some other entities) actually suffered the net financial loss or represent the parties who actually suffered the net financial loss, or otherwise are the proper claimants in regard to this claim before this Commission. Second, the Pan Am Subrogees have failed to meet their burden to show the full chains of nationality of the claim, and, to the degree the Pan Am Subrogees did provide responsive information, it showed that at least 60% of the claim fails because of non-U.S. nationals in the chains of ownership (with the remaining approximately 40% of the claim not fully accounted for). Moreover, even if the Commission had jurisdiction over the claim, the claimants have failed to sustain their burden of proof in submitting information sufficient to demonstrate that international law—as reflected in the "general principles of law recognized by civilized nations"—supports their claim. Finally, even if the Commission were to consider general principles of U.S. municipal insurance law as "general principles of law recognized by civilized nations," the claimants have failed to meet their burden of proof as to the validity of any of their theories of the claim, including their theories of subrogation to the Pan Am 103 victims, indemnity, restitution, and contribution.

The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, May 17, 2012
and entered as the Proposed Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj Desai, Commissioner

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).