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

In the Matter of the Claim of	
ESTATE OF PAT WAYNE HUFF, DECEASED; ERMINE HAILEY, ADMINISTRIX	Claim No. LIB-II-017
ESTATE OF DONALD WARNER, DECEASED; JANET WARNER, PERSONAL REPRESENTATIVE	Claim No. LIB-II-018
ESTATE OF JAMES TURLINGTON, SR., DECEASED; DEBBIE SCHOOLING, ADMINISTRIX	Claim No. LIB-II-019
ESTATE OF MARGARET SCHUTZIUS, DECEASED; JEFFREY P. CONSOLO, ADMINISTRATOR	Claim No. LIB-II-020
ESTATE OF MARK EDWARD CORDER, DECEASED; CARLA JEAN MALKIEWICZ, REPRESENTATIVE	Claim No. LIB-II-021
ESTATE OF BONNIE BARNES PUGH, DECEASED; ROBERT LEE PUGH, EXECUTOR	Claim No. LIB-II-022
ESTATE OF MIHAI ALIMANESTIANU, DECEASED; IOANA ALIMANESTIANU, EXECUTRIX	Claim No. LIB-II-047
Against the Great Socialist People's Libyan Arab Jamahiriya	Decision No. LIB-II-164

Counsel for Claimant: Stuart H. Newberger, Esq.
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Oral hearing held on September 14, 2012.

FINAL DECISION

These claims against the Great Socialist People's Libyan Arab Jamahiriya ("Libya"), brought separately by the estates of Pat Wayne Huff, Donald Warner, James Turlington, Sr., Margaret Schutzius, Mark Edward Corder, Bonnie Barnes Pugh, and Mihai Alimanestianu (collectively, the "claimants"), are for wrongful death of claimants'

respective decedents as a result of the mid-air terrorist bombing of UTA Flight 772 over Niger on September 19, 1989. Each claimant seeks additional compensation (over and above the $10 million each has already received from Libya under the Claims Settlement Agreement) based on their having obtained prior U.S. court judgments awarding them damages for the wrongful deaths.

By its Proposed Decision dated May 16, 2012, the Commission denied the claims on the ground that it was not persuaded that the special circumstance of claimants' judgments warranted additional compensation[1] under Category C. The claimants, by letter dated May 31, 2012, objected to the Commission's Proposed Decision and requested an oral hearing. By letter dated June 21, 2012, the Commission requested that claimants submit any additional evidence that they wished it to consider in support of their objection. In response, under cover of letter dated August 23, 2012, claimants submitted a consolidated brief outlining the grounds upon which they object to the Commission's Proposed Decision, along with supporting exhibits, including the *Letter from John D. Negroponte, Deputy Secretary of State, to the Honorable Mitch McConnell, United States Senate*, dated July 28, 2008 (the Negroponte Letter); an intra-State Department email attaching a document entitled "Update on Libya Claims," dated August 11, 2008 (Libya Update); an email from the Department of State to the Senate Foreign Relations Committee, dated July 31, 2008, attaching the so-called "*Pugh* Points"; and two declarations, one from claimants' counsel, Mr. Newberger, and one from

[1] Throughout this decision, any reference to the claimants receiving "additional compensation" means compensation, based on their having obtained a prior court judgment, in addition to the $10 million each claimant has already recovered under the Claims Settlement Agreement.

Ambassador Jean-Jacques Beaussou, the former French Ambassador to Libya.[2] The oral hearing on the objections was held on September 14, 2012.

DISCUSSION

Category C of the January Referral consists of

> claims of U.S. nationals for compensation for wrongful death, in addition to amounts already recovered under the Claims Settlement Agreement, where there is a special circumstance in that the claimants obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death, provided that (1) the Commission determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement; and (2) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.[3]

The Proposed Decision concluded that claimants had in fact "obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death" and that "the Pending Litigation against Libya [had] been dismissed before the claim [was] submitted to the Commission." *See* PD at 7. Thus, the only question the Commission must determine on objection is whether "the existence of a prior U.S. court judgment for wrongful death warrants" additional compensation.

In their brief and at the oral hearing, claimants made four arguments in support of the view that their prior court judgments warrant additional compensation: (1) the parties to the Claims Settlement Agreement ("CSA") intended to provide "additional compensation" to claimants on account of their judgments, (2) those judgments establish that the claimants suffered damages greater than the $10 million they have already

[2] Ambassador Beaussou had been retained by claimants' counsel to assist in negotiating a settlement of the *Pugh* litigation directly with Libya.

[3] *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") at ¶ 5.

received, (3) the judgments had a litigation and settlement "value" greater than $10 million, and (4) the judgments were the catalyst for the global settlement with Libya. At the oral hearing, counsel for the claimants focused almost exclusively on the first argument, that the parties to the CSA intended to provide them with additional compensation.

In support of their first argument, claimants appear to make two distinct but overlapping arguments that are discussed in detail in the sections that follow. To summarize, claimants assert that it was the *mutual* intent of the parties to the CSA that they receive additional compensation. They argue that, though the CSA does not explicitly address this point, the parties' intent to provide claimants additional compensation is evident from the supplemental materials associated with the CSA (specifically, the Libyan Claims Resolution Act (the "LCRA"), the Secretary of State's Certification, the Negroponte Letter, the Libya Update, the Pugh Points, and the affidavit testimony of counsel for the claimants who were involved in discussions with Libya and the United States). Claimants also appear to make a second argument about intent, this one focused not on the *mutual* intent of the parties, but rather on the intent of the *United States* (*i.e.*, the Congress and the State Department). Claimants argue that, when the U.S. concluded the CSA, *it* intended that these seven claimants receive additional compensation. This argument also relies on the same supplemental materials associated with the CSA. To the extent that this is a separate argument, it appears to be one not about the meaning of the CSA but rather about the meaning of the language in Category C of the January Referral. As such, the Commission examines the argument about intent in the context of both the CSA and the terms of Category C.

Claimants' second argument is that their claims warrant additional compensation because $10 million is less than the amount of their prior court judgments against Libya. Claimants assert that the question presented by the Referral language is *not* whether their losses were greater than other wrongful death claimants but rather whether their judgments establish that each claimant is entitled to more than the amount already paid by the Department of State. According to the claimants, that question must be determined by examining whether the judgments reflect damages greater than the amounts already received.

With respect to their third argument, claimants assert that the "judgments had a surrender value, and a value in the negotiations and thus in the CSA, greater than the value of the un-adjudicated claims." Claimants further assert that such greater value was accounted for by the Department of State through the differentiation of claims in the December and January Referrals based upon the stage of the litigation associated with each claim. Claimants assert that, according to the structure of the Referrals, there was a hierarchy of claims: settled claims were treated differently than non-settled claims, which in turn were treated differently than claims that had not been the subject of litigation at all. Further, claimants argue that in valuing a claim, the stage of litigation is an important factor and, therefore, it was reasonable for the Department of State—especially in light of the origins of the program in litigation—to differentiate among claimants based on the stage of litigation (*i.e.*, between those who had obtained judgments and those who had not).

At the oral hearing, claimants' counsel asserted, relying on the Declarations of Mr. Newberger and Ambassador Beaussou, that throughout the negotiation process it was "explicit" that the settlement numbers had been "adjusted for the fact that a judgment had

been issued." On this point, claimants further contend that the judgment of a United States district court is final, and treated as final, until proven to have been rendered in error. Therefore, while the possibility of the reversal of a judgment has an effect on its settlement value, it cannot entirely negate the added value of the judgment. During the oral hearing, counsel also highlighted Mr. Newberger's statement that the parties to the CSA (*i.e.*, the United States and Libya) took the claimants' "temperature" as the agreement was being entered into in order to determine if claimants were going to be "satisfied with two to three times" the amount of the Lockerbie settlement.

In support of their fourth argument, that the judgments were the catalyst for the global settlement with Libya, claimants assert that the chronology of events following their judgments, including Libya's sudden interest in a global settlement, certainly suggested more than coincidence. Further, claimants assert that while the Lockerbie and LaBelle matters had long been pending, there was no indication that Libya was inclined to change its position; moreover, while the Lautenberg Amendment likely gave Libya some cause for future concern, the *Pugh* judgments made that concern tangible and immediate.

Counsel for the claimants submitted a detailed factual record to support their position and provided helpful argument during the oral hearing. The Commission has reviewed all of the documents in the record and carefully considered claimants' arguments in reaching this Final Decision.

Analysis

I. Applicable Law

The fundamental question before the Commission is whether the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the $10 million each of these seven claimants has already recovered for wrongful death under the Claims Settlement Agreement. In making this determination, the Commission is required to apply, in order, the "provisions of the applicable claims agreement"—in this case the CSA—and then "the applicable principles of international law, justice, and equity." 22 U.S.C. § 1623(a)(2) (2006). Thus, in examining the present claims, the Commission first examines claimants' evidence and argument in light of the proper meaning of the CSA before turning to, as necessary, applicable principles of international law, justice, and equity.

II. The Intent of the Parties to the Claims Settlement Agreement

The Proposed Decision rejected the argument that the parties intended that the claimants receive additional compensation. It concluded that "the Agreement is silent on the issue of the significance of previous court judgments on the amount of compensation for wrongful death claims." PD at 8. It then looked "to the documents implementing that Agreement to determine the intent of the parties in reaching the settlement" and then concluded that "neither the [CSA] nor the series of documents implementing that Agreement is dispositive as to whether compensation is warranted under the circumstances of these claims." *Id.* at 8-9. The claimants agree in part. As their Objection Brief puts it, "[t]he CSA text does not, of course, specifically address the question presented." According to the claimants, however, this does not dispose of the

argument. Though the text of the CSA does not speak to the issue, claimants say that the *intent of the parties* was for the claimants to receive additional compensation. In urging reconsideration and reversal, they introduce new evidence and additional argument. Claimants' objection brief summarizes their argument as follows:

> The intent of the parties to the Claims Settlement Agreement ('CSA') was to provide additional compensation on account of the court judgments, that additional compensation was part of the 'fair compensation' for wrongful death, and the State Department assured Congress, in terms that mirror Category C of the January Referral, that further recovery was 'warranted' because of 'a prior court judgment[.]'

As explained in further detail, the Commission rejects that argument. To understand why, however, requires clarification of the distinction between, on the one hand, the mutual intent of the parties and, on the other hand, the intent of the United States and/or a relevant part of the U.S. government (the State Department and/or Congress). Subsection A addresses the mutual intent of the parties (and the intent of the United States and/or a relevant part of the U.S. government, to the extent that such intent might be relevant to the *mutual* intent of the parties). Subsection B then addresses the issue of the intent of the United States and/or a relevant part of the U.S. government, to the extent that it might be a distinct argument; namely, that the State Department may have intended that this Commission award claimants additional compensation *irrespective of the mutual intent of the parties.* That intent could be relevant since the Commission's jurisdiction is defined by a referral from the State Department; if the State Department intended that the Commission award claimants additional compensation, the Commission would place significant weight on that fact in its determination of the issue.

A. The Mutual Intent of the Parties to the CSA

The Commission approaches the issue of "intent" with particular care and purpose in this program. The claims agreement applicable to this program, the CSA, is, as Congress has made clear, "binding under international law."[4] To interpret it, we are thus bound by international-law principles of treaty interpretation.[5] Under Article 31(1) of the Vienna Convention on the Law of Treaties,[6] "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in context and in light of its object and purpose." As one authority on international law has put it, "Article 31 emphasizes the intention of the parties *as expressed in the text*, as the best guide to their common intention."[7] Strictly speaking, then, interpreting treaties does not involve divining the parties' intent in the abstract. Rather, intent is relevant only to the extent that it is evidenced in the "ordinary meaning to be given to the terms of the treaty in context and in light of its object and purpose."

To understand the "context" of a treaty, international law permits the use of "any instrument which was made by one ... part[y] in connection with the conclusion of the

[4] Libya Claims Resolution Act ¶2(2), Pub. L. No. 110-301, 122 Stat. 2999, 2999 (Aug. 4, 2008).
[5] In terms of United States domestic law, the CSA is not a "treaty" because it was not ratified by the United States Senate. *See* U.S. CONST. Art. II, Sec. 2, cl. 2. It is nonetheless a "treaty" for purposes of the international-law principles of interpretation. Any reference to "treaty" in this decision thus means "treaty" as defined by international law, not U.S. domestic law.
[6] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (hereinafter "VCLT"). Although the United States is not a party to the Vienna Convention, the provisions we rely on here, Articles 31 and 32, reflect customary international law. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Servia and Montenegro*), Merits, 2007 I.C.J. 43, 109-10.
[7] JAMES CRAWFORD, BROWNLIE'S PUBLIC INTERNATIONAL LAW 379 (8th ed. 2012) (emphasis added); *see also* Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 REC. DES COURS 43 ("The proposals submitted to the Vienna Conference by the International Law Commission were inspired by the textual approach; primacy was accorded to the text of the treaty as the basis for its interpretation. The Commission said in its commentary that its proposal 'is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.'").

treaty *and accepted by the other part[y] as an instrument related to the treaty.*"[8] In addition to "context," international law also requires that "any subsequent practice in the application of the treaty *which establishes the agreement of the parties regarding its interpretation*"[9] be taken into account.

Thus, the parties' "intent" can be determined only to the extent that it is evidenced by instruments and/or subsequent practice that satisfy specific standards. In particular, when looking at documents other than the text of the CSA itself, including documents generated by United States government officials, the only ones that matter for interpreting the CSA are those that were "accepted by [both the United States and Libya] as an instrument related to the [CSA]" or those that evidence "subsequent practice ... which establishes the agreement of [both the United States and Libya] regarding [the CSA's] interpretation." The Commission's discussion of the parties' "intent" throughout this decision must be understood through this lens, and reference is made to the parties' "intent" in large part because that is how claimants frame their argument.

As discussed in detail below, the only documents that satisfy these requirements are the LCRA, the Secretary of State's Certification (and accompanying Memorandum of Justification), and the President's Executive Order. An examination of these documents, which were the documents essential to the conclusion and implementation of the CSA, leads the Commission to the conclusion that the CSA does not provide, in the words of the January Referral, "that the existence of a prior U.S. court judgment for wrongful death warrants additional compensation."

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[8] VCLT Art. 31(2)(b) (emphasis added).

[9] *Id.* Art. 31(3)(b) (emphasis added). *See generally* Case Concerning Kasikili/Sedudu Island (Botswana/Namibia), 1999 I.C.J. 1045, 1075-78 (noting that, under Article 31(3), a report that one party to the treaty had never seen could not be used as relevant evidence for interpreting the treaty).

In undertaking a proper examination of the terms of the CSA, the Commission is mindful of two overriding facts concerning the nature of this agreement. One is that both the Executive and the Legislative branches of the United States government (particularly the State Department and the Senate) played a role in the U.S. agreeing to the CSA and that in the course of the United States' negotiation with Libya, the two branches were involved in a complex dialogue. In considering the evidence of the communications between these two branches of government as part of the interpretive process, however, the Commission is careful to distinguish between evidence of the *mutual* intent of the parties to the CSA and evidence of a *unilateral* intent of the United States (the State Department and/or Congress). Only evidence of the mutual intent of the parties is relevant in the interpretive process.

The other relevant fact is that the CSA is fundamentally a diplomatic document, one that incorporates the sensibilities of states. Thus, and as is typical for lump-sum settlement agreements, there is no language of fault or liability, and the terms of the agreement reflect a complete mutuality of commitments, regardless of the relative culpability of one of the parties to the other, or the relative desire of each party to be released from pending claims in the other party's domestic courts. Accordingly, Article I of the CSA makes no distinction between the two parties. It provides that the objective of the agreement is to "(1) reach a final settlement of the Parties' claims, and those of their nationals . . .; (2) terminate permanently all pending suits (including suits with judgments that are still subject to appeal or other forms of direct judicial review); and (3) preclude any future suits that may be taken to their courts."

By the same token, the *quid pro quo* for this objective is also framed as a mutual commitment; Article II provides that the "two Parties agree to authorize the establishment

of a humanitarian settlement fund (the "Fund") as the basis for settling the claims and terminating and precluding the suits specified in Article I." Article II further provides that the Fund is to be "established, operated and financed as set out in the Annex to this Agreement."

The diplomatic nature of the Agreement's language thus requires us to look elsewhere to understand the true meaning of the Agreement on the question before us. One of the crucial places to look is the LCRA. Congress passed the LCRA two weeks before the conclusion of the CSA and effectively provided a pre-authorization for the Executive Branch to conclude the Agreement.[10] Given that fact and given the public nature of federal statutes, it is clear that Libya was fully aware of the LCRA's contents.[11] It can therefore be viewed as an "instrument ... made by [the United States] in connection with the conclusion of the [CSA] and accepted by [Libya] as an instrument related to the treaty."[12] Thus it is appropriate to consider the LCRA as evidence of the "context" for purposes of interpreting the CSA.

By its terms, the LCRA specifically contemplated the later CSA: Section 2 defines the term "claims agreement" as "an international agreement, binding under international law, that provides for the settlement of terrorism-related claims of nationals of the United States against Libya through fair compensation." Section 3 of the LCRA states the "Sense of Congress" that it supports the President's efforts "to provide fair compensation to all nationals of the United States who have terrorism-related claims

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[10] Congress passed the LCRA on July 31, 2008 (with the President signing it into law on August 4, 2008). The CSA was then concluded on August 14, 2008.

[11] That Libya was aware of this widely publicized piece of legislation is undeniable, particularly since State Department officials were, at the time of the enactment of the LCRA through the conclusion of the CSA, closely engaged with representatives of Libya in negotiating that agreement.

[12] VCLT Art. 31(2)(b).

against Libya through a comprehensive settlement of such claims by such nationals against Libya pursuant to an international agreement between the United States and Libya as part of the process of restoring normal relations between Libya and the United States."

Section 5 of the LCRA details exactly what the United States was requiring of Libya in the CSA, and what the United States was prepared to give in return. Under paragraph (a)(1) of Section 5 of the LCRA, Congress reestablished Libya's immunity for certain terrorism-related acts. The LCRA did this by amending the Foreign Sovereign Immunities Act ("FSIA") so that the terrorism-related exceptions to foreign immunity would not apply to Libya for terrorism-related acts[13] occurring prior to June 30, 2006. Section 5 of the LCRA thus effectively gave Libya what it sought from the United States in the CSA: the permanent termination of all pending suits against Libya, and the legal assurance that they would have no liability for terrorism-related acts occurring prior to June 30, 2006. In exchange for this legal immunity, the U.S. was to receive the lump-sum settlement money.

The LCRA also describes precisely when Libya would receive the legal immunity it sought. According to the terms of the LCRA, the legal immunity contained in paragraph (a)(1) of Section 5 was not to come into effect at the time of the adoption of the LCRA, nor was it to come into effect upon the conclusion of the CSA. Rather, Libya's legal immunity would be triggered only upon submission of a certification by the Secretary of State to the Congress. Under paragraph (a)(2) of Section 5 (hereinafter, the "certification paragraph" of the LCRA), that certification had to

[13] More specifically, acts "of torture, extrajudicial killing, aircraft sabotage, [and] hostage taking." 28 U.S.C. § 1605A(a)(1).

> (B) stat[e] that the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—
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> (i) payment of the settlement referred to in section 654(b) of division J of the Consolidated Appropriations Act . . .; and
>
> (ii) fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act . . . .

The certification requirement thus specifically identifies two groups of claims that had to be satisfied by Libya as a condition for the United States to grant the immunity from suit that Libya sought. It therefore becomes crucial to understand what these two categories are, as these are the only two groups of claims for which Congress required funding as a condition of reestablishing Libya's immunity, and the money to cover these claims was the direct *quid pro quo* for the reestablishment of Libya's immunity. As explained below, the claims that were the subject of the certification requirement—and the certification itself—did not include any of the "special circumstances" claims (such as the Category C claims) or indeed any of the claims categories that comprise the State Department's second (*i.e.*, January) Referral to the Commission. To understand why this is so requires more details about the certification process that followed the LCRA and CSA.

Secretary of State Rice sent the LCRA "certification" to the appropriate congressional committees on October 31, 2008, about three months after the LCRA.[14] The certification states that the Secretary had received, pursuant to the CSA, funds from Libya "sufficient to ensure" payment of the two categories mentioned in the LCRA.

The certification was accompanied by a Memorandum of Justification, which provided the reasons for the Secretary's certification. This document provides further

[14] http://www.state.gov/documents/organization/138871.pdf. *See also* Department of State Public Notice 6476, 74 FED. REG. 845 (Jan. 8, 2009).

details about the two groups of claims described in the LCRA's certification paragraph. The first three paragraphs of the Memorandum of Justification read as follows:

> The Libyan Claims Resolution Act (P.L. 110-301) (the 'Act') provides Libya with legal protection from terrorism-related claims predating its removal from the state sponsors of terrorism list upon the Secretary of State certifying to the appropriate Congressional committees that the United States Government has received sufficient funds to ensure payment of the Pan Am and LaBelle settlements and fair compensation for other U.S. death and physical injury claims in pending cases against Libya.
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> On August 14, 2008, the U.S.-Libya Claims Settlement Agreement (the 'Agreement') was signed by the U.S. Government and the Government of Libya. The Agreement establishes a process whereby each Party receives resources for the full and final settlement of its claims and suits and those of its nationals and, upon receipt, each party is obligated to take certain actions, including the restoration of sovereign immunity and the dismissal of all covered suits. On October 31, 2008, the United States received the agreed-upon amount of $1.5 billion for distribution as a full and final settlement of its claims and suits and those of U.S. nationals.
>
> This amount is sufficient to ensure the remaining payment of $536 million for the Pan Am 103 settlement and $283 million for the La Belle settlement, the two settlements referred to in section 654(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Div. J, P.L. 110-161; 121 Stat. 2342). The remaining $681 million is sufficient to ensure full and fair compensation for the claims of nationals of the United States for wrongful death and physical injury in those cases described in the Act which were pending against Libya on the date of enactment of the Act (August 4, 2008) as well as other terrorism-related claims against Libya.

Just like the LCRA's certification paragraph, therefore, the Memorandum identifies the claims that Libya had to compensate and the amount of compensation it was required to pay to satisfy the provisions of the LCRA. The Memorandum refers first to "the Pan Am and LaBelle settlements," which were "the two settlements referred to in section 654(b) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008 (Div. J, P.L. 110-161; 121 Stat. 2342)." This first group of claims thus comprised the Pan Am 103 and LaBelle claims, which were claims for outstanding amounts owed by Libya to those claimants under pre-LCRA private

settlements between those claimants and Libya. Together, these claims are known as the "settled claims." These claims correspond to the claims identified in clause (B)(i) of the LCRA's certification paragraph. The Memorandum makes clear that the United States received a total of $819 million in full satisfaction of those claims, $536 million for the Pan Am 103 claimants and $283 million for the LaBelle claimants. It was this settlement that provided the compensation benchmark for claims against Libya for wrongful death ($10 million) and personal injury ($3 million).

The Memorandum accompanying the Certification also identifies the second group of claims, and it refers to this group as "other U.S. death and physical injury claims in pending cases against Libya." This group of claims corresponds to the claims identified in clause (B)(ii) of the LCRA's certification paragraph and was more fully referred to as "claims of nationals of the United States for wrongful death and physical injury in those cases described in the Act which were pending against Libya on the date of enactment of the Act (August 4, 2008)." The Memorandum states that the United States received $681 million, which, the Secretary certified, constituted receipt of "fair compensation" for those claims. Indeed, as the Memorandum makes clear, this $681 million was sufficient to pay not only "fair compensation" for these claims—i.e., $10 million for each wrongful death and $3 million for each physical injury—but also to provide compensation for "other terrorism-related claims against Libya." This latter group of claims, however, was *not* included in the certification that Congress required of the Secretary in the LCRA, nor was it part of the Secretary's actual certification to Congress.

On the same day that the Secretary of State made her certification to Congress, President Bush issued an Executive Order implementing the CSA by, among other things,

settling all of the claims within the terms of Article I of the CSA and terminating all pending suits. It is only at this moment, with the issuance of this Executive Order, that both parties—the United States and Libya—had effectively satisfied their respective obligations to each other under the CSA. The United States had received the money necessary to establish "the Fund" required under the CSA, and Libya had now received both the termination of the relevant pending lawsuits and immunity from any and all terrorism-related lawsuits for acts prior to June 30, 2006. At this point, the United States required nothing more of Libya, and Libya required nothing more of the United States.

Nothing in the CSA, the LCRA or the Certification (or its Memorandum of Justification) suggests that the two parties intended that claimants receive additional compensation because of their prior U.S. court judgments. Indeed, as the text of these documents and the sequence of events make clear, the mutual intent of the parties extended only to providing compensation to the two groups of claimants described in the LCRA's certification paragraph and Secretary of State's Memorandum of Justification accompanying her certification to Congress.

Claimants argue that there are three other documents relevant for understanding the mutual intent of the parties to the CSA: (1) a July 28, 2008 letter from Deputy Secretary of State John D. Negroponte to Senate Minority Leader, Senator Mitch McConnell (hereinafter referred to as the "Negroponte Letter"); (2) a communication from the State Department to the Senate Foreign Relations Committee on July 31, 2008 at 3:44 p.m., enclosing a single page (with no title or any other information identifying it) of what claimants call the "*Pugh* Points"; and (3) an intra-State Department email dated August 11, 2008 with an attachment entitled "Update on Libya Claims Issue" (hereinafter "Libya Update"). The claimants argue that these three documents—individually and

together—demonstrate that the parties intended that the existence of a prior U.S. court judgment warrants payment of additional compensation to the claimants.

To understand both claimants' argument and why it ultimately fails requires a fuller understanding of these three documents and their role in both the adoption of the LCRA and the conclusion of the CSA. As explained in detail below, none of these documents is, in the words of the Vienna Convention on the Law of Treaties, an "instrument[] ... accepted by [Libya] as an instrument related to the [CSA]."[15] Put simply, the portions of these three documents that claimants rely on do not speak to the issue here, the *mutual* intent of the parties to the CSA.[16]

Negroponte Letter: The State Department sent the three-page Negroponte letter to the Senate on Monday, July 28, 2008, three days before the LCRA was introduced (and passed) in Congress. The letter begins by noting that the Department was "pursuing a comprehensive claims settlement agreement with Libya to compensate American victims of terrorism rapidly and fairly." The second paragraph then notified the Senate that the Department had "proposed legislation to assist in implementing such an agreement."

The next three paragraphs address, respectively, the Pan Am 103 families' wrongful death claims, the La Belle Discotheque bombing victims' claims, and "other pending terrorism cases against Libya by U.S. nationals for wrongful death or physical injury." The Pan Am 103 families' wrongful death and La Belle Discotheque bombing victims' claims are the "settled claims" and correspond to those described in clause (B)(i) of the LCRA's certification paragraph. The language the letter uses is as follows: "[I]n

[15]VCLT Art. 31(2)(b).

[16] As explained in Section II.B below, nor do they demonstrate that the State Department intended to provide claimants compensation.

implementing the proposed legislation, we intend to require monies sufficient" to pay $536 million and $283 million to these two groups of "settled claims." The claimants from the "other pending terrorism cases" are "guaranteed compensation comparable to what we understand was provided for physical injuries in the LaBelle Discotheque settlement and for fatalities in the Pan Am 103 settlement, that is, $3 million per physical injury and $10 million per death."[17]

It is the language of the next paragraph, the sixth, that claimants cite in their objection. In its entirety, that paragraph reads as follows:

> It should be noted that in our negotiations we have not limited our objectives to obtaining funds to satisfy the certification requirements of the proposed legislation, either for these cases or for others (there are also emotional distress and commercial claims). We can now report that as a result of our diplomatic efforts we expect to receive several hundred million dollars for U.S. claimants under the settlement in addition to the amounts described above. We intend to use this additional money for three purposes: (1) to permit further recoveries for death and physical injury victims in the non-settled cases where special circumstances warrant, for example, if the injuries are especially severe, or if there is a prior court judgment; (2) to provide payments for emotional distress to close relatives who are not legally entitled to share in wrongful death payments, such as non-dependent parents; and (3) to address commercial claims against Libya for past acts of terrorism where American companies can demonstrate a right to compensation.

Claimants' argument relies on the third sentence that begins in the middle of the paragraph. Emphasizing that the sentence begins with "[w]e intend," claimants call this sentence the "best and most direct statement of intent." Claimants further argue that "[a]t that critical moment, when the State Department was asking Congress to enact the LCRA and to allow the United States to consummate the CSA, the State Department assured

[17] By this language the Negroponte Letter confirms that the phrase "other pending terrorism claims"—i.e., the phrase the Negroponte Letter used to identify the claimants in clause (B)(ii) of the certification paragraph of the LCRA—did not include what is now the Category C claims, since this sentence limits the guaranteed compensation to $10 million for wrongful death claims and does not include provision for compensation beyond that amount on account of the existence of a prior U.S. court judgment.

Congress of its intention to provide additional compensation to the *Pugh* claimants. These assurances—including, *inter alia*, that the State Department had negotiated for additional funds for this express purpose and that a prior court judgment was a special circumstance that 'warrant[ed]' additional recovery—were explicit and unequivocal." As this last part of this argument makes clear, claimants also rely on this same sentence for the proposition that the State Department explicitly acknowledged that a judgment was in fact a special circumstance warranting additional compensation.

Even assuming, however, that that one sentence in the three-page Negroponte Letter reflects the State Department's "explicit and unequivocal" intent that a prior court judgment warranted additional compensation, this would simply reflect the *State Department's* intent, and moreover its intent *on Monday, July 28, 2008.* It says nothing about the *parties'* mutual intent in the CSA, and there is no evidence Libya even knew about it, let alone that Libya "accepted [it] … as an instrument related to the [CSA]."[18] Moreover, it does not even establish *Congress's* intent when passing the LCRA on Thursday, July 31, 2008, three days later. As described above, the LCRA makes no mention of this supposed "explicit and unequivocal intent." Congress's intent is thus clear from the text of the LCRA: the only claims for which the LCRA and the Secretary's certification "explicit[ly] and unequivocal[ly]" guaranteed compensation were the settled claims and the pending wrongful death and physical injury claims up to a compensation level of $10 million and $3 million respectively. In short, the Negroponte Letter does not provide any evidence relevant to the mutual intent of the parties—and certainly does not

[18] VCLT, Art. 31(2)(b).

establish that the parties intended to provide additional compensation to the claimants on account of their prior court judgment.

Pugh Points: Claimants describe the "*Pugh* Points" document as "a State Department email to the Senate Foreign Relations Committee, which had potential jurisdiction over the [legislative] proposal, responding to an inquiry of Senator Isakson (who is on the Committee), with respect to the *Pugh* claims." Like the Negroponte Letter, the "*Pugh* Points" document is a communication from the State Department to Congress. Thus, claimants similarly argue that the "*Pugh* Points" document also constitutes not only the State Department's intent but also Congress' intent in enacting the LCRA. Claimants thus appear to argue that, since the "*Pugh* Points" document shows both the State Department's and Congress' intent, it can be used as evidence to show that the mutual intent of the parties to the CSA was to provide claimants additional compensation because of their prior U.S. court judgments.

The "*Pugh* Points" is a one-page, six-paragraph document with an introductory paragraph followed by five numbered paragraphs. The most relevant language in the document is found in the fourth numbered paragraph. In full, that paragraph reads as follows:

> 4. In addition, however, unlike the Pan Am claimants, the Pugh claimants will have an opportunity to apply for additional compensation in light of any special circumstances surrounding their claim. This is because the USG will obtain under the settlement several hundred million dollars beyond what is necessary to pay the Pan Am and LaBelle settlements and the assured amounts for other death and physical injury claims. Therefore, the Pugh claimants will be able to seek additional compensation to take account of the stage their litigation had reached in U.S. courts, or any other special circumstances they believe warrant receiving more than other U.S. claimants.

As the Proposed Decision made clear, this language in the *Pugh* Points is distinctly more equivocal on the relevant issue than is the Negroponte Letter. All the

"*Pugh* Points" document provides claimants is exactly what they have already received: "an *opportunity* to apply for additional compensation" and that they "will be *able to* seek additional compensation." Nothing in the "*Pugh* Points" guarantees the claimants any additional compensation. PD at 11. Indeed, if anything, this language in the "Pugh Points" document undermines the claimants' argument by making clear that all they were provided was an opportunity not a guarantee; surely, as pointed out in the Proposed Decision, if the State Department had intended to make the guarantee the claimants assert, it could have done so more clearly.

On objection, claimants point to language in the fifth (and final) numbered paragraph of the "*Pugh* Points"; it states that the comprehensive settlement with Libya "will *assure* the Pugh claimants *unprecedented* recoveries, $10 million of which is *guaranteed off the top* for the death claims alone." *Pugh* Points ¶ 5 (emphasis added). Claimants argue that the $10 million they have already received is "'precedented' by the Lockerie settlement itself. Moreover, the reference to 'assured' recoveries, a portion of which is 'guaranteed off the top,' communicates that more will, in fact, be awarded, though not in amounts that can be guaranteed."

The problem with this argument is that the language claimants point to has nothing to do with the issue these claims raise. Several clues from the document make this clear. First, nowhere in this fifth paragraph is there any reference to the "prior court judgment," Negroponte Letter at 3, or to "the stage their litigation had reached in the U.S. courts," *Pugh* Points¶ 4, nor even to "special circumstances" at all. Second, immediately after the sentence claimants quote, the document continues with the following parenthetical sentence: "(There are also emotional distress and property claims in the Pugh case that can also be considered for compensation from this pool of money.)"

Thus, while the phrases "unprecedented" and "guaranteed off the top" may (in claimants' words) "communicate[] that more will, in fact, be awarded," the language most likely refers to the emotional distress and commercial claims, not to claims that a prior court judgment entitles a claimant to additional compensation.

This becomes even clearer when the language is viewed in the context of the whole document. The language claimants' cite is from the document's final paragraph, which appears to be a summation of the whole document. Indeed, the parenthetical sentence that follows[19] is the last sentence of the whole document, making it even more likely that the language is a broad discussion of the claims of *all* of the UTA Flight 772 claimants, not just the estate claimants in the seven claims before the Commission now. This final portion of the document also appears to hearken back to the first paragraph of the document. The first paragraph speaks of the "Pugh case" and "Pugh claimants" broadly, referring first to the "death claimants," then to "the relatives with emotional distress," followed finally by "the owner of the aircraft [who] can apply for his property loss." It then states, "So, while it is impossible to be sure, the Pugh claimants could end up [with] considerably more than the $70 million that is guaranteed." The use of the language "while it is impossible to be sure" in the subordinate clause and the use of the conditional tense ("could end up") in the main clause almost conclusively show that the only "guarantee[]" was the $70 million. More importantly for the present argument, it makes clear that even if the document contemplated the "Pugh claimants" receiving more than $70 million, the drafters of the "*Pugh* Points" were most likely referring to the

[19] "(There are also emotional distress and property claims in the Pugh case that can also be considered from this pool of money.)"

"Pugh claimants" broadly, so as to include not just these seven estate claimants, but all the claimants from the bombing of UTA Flight 772.[20]

That there was no guaranteed assurance of payment is reinforced in another exchange of correspondence between Senator Isakson and the State Department, this one in September and October 2008. In a letter to Secretary Rice dated September 16, 2008, Senator Isakson states that "[i]t appears that the amount of the fund will not be nearly enough to pay [the *Pugh*] family members what the Court has awarded them for their pain and suffering. It is my hope that the Department of State will work with the Government of Libya to receive these funds as expeditiously as possible, and to work with all claimants to distribute the funds to reflect as closely as possible the judgments, if any, they received by the Courts." The State Department's Assistant Secretary of State for Legislative Affairs, Matthew A. Reynolds, responded on October 21, 2008, in relevant part, that, "Consistent with the Libyan Claims Resolution Act, we plan to use the funds the United States will receive pursuant to the agreement to pay the settlement amounts that representatives of the Pan Am 103 and LaBelle Discotheque bombings had negotiated with Libya, and to provide other U.S. nationals with pending cases who were killed or physically injured comparable compensation – that is, $10 million per death and $3 million for physical injury. The remaining funds would be available for additional purposes, including *potential* compensation for other types of claims and augmentation for death and physical injury in the non-settled cases where special circumstances such as

[20] When the phrase "Pugh claimants" is understood in this broad sense, the "Pugh claimants" have already received well over the "guaranteed" $70 million. In addition to the $70 million that the State Department provided these estate claimants, the Commission has awarded compensation to many "Pugh claimants" with emotional distress claims, *see, e.g., Claim of ANNE CAREY, Claim No. LIB-II-034, Decision No. LIB-II-116*, and to the "Pugh claimant" who was the "owner of the aircraft" destroyed by the bombing of UTA Flight 772, *see Claim of INTERLEASE, Claim No. LIB-II-023, Decision No. LIB-II-163.*

especially severe injuries or a prior court judgment warrant" (emphasis added). Thus, even months after the passage of the LCRA and the conclusion of the CSA, the State Department still appears to have been unwilling to commit to a guarantee to pay additional monies to these seven claimants on account of their court judgments.

As to the argument that the "*Pugh* Points" document constitutes evidence of Congress's intent, the principal evidence of the Senate's reaction to the *Pugh* Points, if any, is the LCRA itself. As explained above, the LCRA contains no reference—general or specific, express or implied—to the *Pugh* claims for additional compensation on account of their court judgment. Moreover, the evidence claimants provided to the Commission suggests that the email to which the "*Pugh* Points" document was attached was sent a few hours *after* the Senate had voted to pass the LCRA. Claimants' evidence indicates that the email was sent at 3:44 p.m. on July 31, 2008, but the Senate passed the bill just before 1 p.m. that day.[21] Therefore, there is no indication that the "*Pugh* Points"—a document sent to the Senate—had any role in establishing or confirming the intent of the Congress, let alone the *mutual* intent of the parties to the Claims Settlement Agreement.

Libya Update: Turning to the third document, the "Update on Libya Claims Issue," claimants assert that the email with the attachment was "sent to plaintiffs in the 'pending litigation'" in August 2008.[22] Claimants further assert that the reason the State Department sent the document to them was to "urg[e] the *Pugh* claimants to stay [their federal court legal] proceedings."

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[21] See, Library of Congress, Bill Summary and Status 110th Congress (2007 – 2008) S.3370.

[22] The Commission is unable to verify this assertion because the claimants have produced only a redacted printout, one that has no indication that the claimant received it at all, let alone when.

Claimants contend that "[t]his Update states explicitly that 'under the agreement, sufficient funding should be available for at least three *additional* purposes for claims not subject to the [Lockerbie and LaBelle] settlements,' including specifically 'claims . . . where there has been a previous U.S. court ruling.'" (all alterations in claimants' submission). Claimants contend that "[t]his is a statement that if the funds are available, they will be made available for certain purposes." On this basis, claimants argue that the only proper limitation on an award to the *Pugh* claimants would be an insufficient amount of funds.

Once again, the fundamental problem with claimants' argument is that this document simply does not speak to the relevant issue, the *mutual* intent of the parties. It is after passage of the LCRA—and so obviously could not have had any role in Congress' decision—and there is no other evidence that it was a necessary part of the *quid pro quo* between the United States and Libya.[23] Though the Libya Update might be viewed as an "instrument which was made by [the U.S.] in connection with the conclusion of the [CSA]," there is no evidence that it was "accepted by [Libya] as an instrument related to the [CSA]."[24] Once again, then, like the Negroponte Letter and the Pugh Points, the Libya Update cannot be used as evidence of the meaning of the CSA.

Finally, the evidence claimants introduce about Libya's intent is insufficient to show that Libya actually intended that additional money from the CSA's Fund be distributed to these seven claimants because of their prior court judgment. International law does permit "[r]ecourse … to supplementary means of interpretation, including the

[23] Below we reframe claimants' argument and directly address claimants' contention that the Libya Update is relevant for understanding the *State Department*'s intent, which could thus be relevant for understanding the language in the January Referral.
[24] VCLT, Art. 31(2)(b).

preparatory work of the treaty and the circumstances of its conclusions . . . to determine the [treaty's] meaning" when the ordinary meaning is "ambiguous or obscure."[25] Claimants' evidence about Libya's intent consists of declarations from Mr. Newberger and Ambassador Beaussou. Even if the CSA's meaning were sufficiently "ambiguous or obscure" and even assuming the declarations could be viewed as relevant evidence as to the "circumstances of [the CSA's] conclusion" (in the broadest sense), the declarations merely describe the negotiating posture of Libya during *private* negotiations. There is no evidence that, in the global state-to-state settlement when both private and public factors were considered, Libya was willing to provide the same level of compensation it may have contemplated in the private negotiations. In addition, the source of Ambassador Beaussou's understanding about Libya's intention to include additional funds is unclear, especially in light of the fact that there is no evidence that he had any further correspondence with the Libyan Government after June 2008, nearly two months before the CSA was finalized.

In sum, under international law,[26] the only documents relevant for understanding the meaning of the CSA or the intent of the parties to the CSA are the CSA itself, the LCRA, the Secretary of State's Certification (and accompanying Memorandum of Justification), and Executive Order 13,477. These documents establish that the discernible intent of the parties in concluding the CSA was to satisfy the compensatory expectations of the two groups of claimants identified in the certification paragraph of the

[25] VCLT Art. 32(a).

[26] To reiterate, it is international law that the Commission must apply here. Not only does the Commission's authorizing statute require it in general, *see* 22 U.S.C. § 1623(a)(2) (2006), but Congress has specifically required it in the context of interpreting this particular claims settlement agreement. *See* Libyan Claims Resolution Act, Pub. L. No. 110-301, § 2(2), 122 Stat. 2999, 2999 (2008) (defining the term "claims agreement" as the CSA and, in so doing, noting that the CSA is "binding under international law").

LCRA. Once Libya paid that amount, the United States was to dismiss all pending suits against Libya and restore its sovereign immunity for terrorism-related acts prior to June 30, 2006. The *quid pro quo* was complete when Libya actually paid and the President issued Executive Order 13,477 on October 31, 2008. The Commission is satisfied that the mutual understanding of the parties, as reflected in the terms of the CSA, was limited to funds for those two groups of claims and did not include additional funds for those who had a prior court judgment.

B. Relevance of the Intent of Congress and the State Department to the Proper Interpretation of Category C of the January Referral

Claimants also rely on many of these same documents to argue that the State Department "inten[ded]" to provide claimants additional compensation. In doing so, however, they equate the State Department's intent with the mutual intent of the parties, so as to frame this argument as part of the claim that this was the parties' mutual intent. As noted above, however, in and of itself, the State Department's intent is insufficient to show the parties' mutual intent. Still, one could see the argument as a more direct one: the State Department promised the claimants additional compensation, and so the Commission must provide it. In legal terms, perhaps one could see this as an argument that the State Department's intent should affect the Commission's interpretation of the language in Category C of the January Referral letter.

The Referral covers claims "where there is a special circumstance in that the claimants obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death," but only "provided that...*the Commission* determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in

addition to the amount already recovered under the Claims Settlement Agreement." January Referral at ¶ 5 (emphasis added). On its face, then, it gives the Commission discretion to determine *whether* claimants' judgment warrants additional compensation. Claimants disagree. They point to the Negroponte Letter in particular. As claimants' counsel elaborated at the oral hearing, by phrasing the January Referral in the precise terms that were used in the Negroponte Letter, the State Department "told [the Commission] what the answer is"; namely, that additional compensation is in fact warranted in the case of prior court judgments.[27] Claimants assert that "[i]t would be disingenuous to cite to the availability of these funds for this specific purpose as a means of convincing victims of terror to forego their judgments, unprecedented in size, while not actually intending to award them additional compensation on the basis described."

They also point to both the "*Pugh* Points" and the Libya Update. As described above, the "*Pugh* Points" do not promise the claimants anything other than "an opportunity to apply for additional compensation." The language in the Libya Update is more helpful to claimants' argument, but the nature of that document simply does not lend itself to a guarantee that claimants would receive additional compensation; more importantly, nothing in the Libya Update constitutes a mandate from the State Department that *this Commission* award claimants additional compensation, particularly given the Commission's statutory mandate to decide claims by applying "in order ... [t]he provisions of the applicable claims agreement," followed by "[t]he applicable

[27] The Negroponte Letter states, in relevant part, "We can now report that as a result of our diplomatic efforts we expect to receive several hundred million dollars for U.S. claimants under the settlement in addition to the amounts described above. We intend to use this additional money for three purposes: (i) to permit further recoveries for death and physical injury victims in the non-settled cases where special circumstances warrant, for example if the injuries are especially severe, or if there is a prior court judgment; . . . ."

principles of international law, justice, and equity."[28] Certainly if the State Department had intended to guarantee additional compensation to this group of claimants—a defined, small and identified group—it could have done so directly itself, rather than refer the claim to this Commission with full knowledge of the Commission's statutory mandate.

This leads to the fundamental problem with claimants' overall arguments concerning the intent of the State Department and the "assurances" given by the Department; namely, that the argument is inconsistent with the actual terms of Category C of the January Referral. As noted above, the language of Category C of the January Referral gives the Commission discretion, clearly requiring the Commission to determine whether a prior court judgment warrants additional compensation: The operative clause of Category C provides that compensation may be awarded "provided that (1) the Commission determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement." By this language, the State Department made the question of whether the existence of a prior U.S. court judgment for wrongful death warrants additional compensation subject to the Commission's examination and adjudication. By the terms of Category C, and the Commission's operative law, the Commission's consideration of this question is not limited, as the claimants contend, only by the amount of money available in the Fund. Indeed, the amount of money available in the Fund is not even included as a relevant matter for the Commission's consideration. Rather, as noted above, the Commission decides claims based on its statutory mandate to apply, first, the CSA and then as necessary, applicable principles of international law,

[28] 22 U.S.C. § 1623(a)(2) (2006).

justice, and equity. *See* 22 U.S.C. § 1623(a)(2)(2006). Absent explicit indication otherwise, this is the law that Congress requires this Commission to apply, and the State Department was surely fully aware of that fact when it drafted the January Referral.

Had the Department of State, in the Negroponte Letter, the "*Pugh* Points" or the Libya Update, intended to express that it had in fact determined that a prior court judgment for wrongful death was indeed a special circumstance warranting compensation, it could have and surely would have merely charged the Commission under Category C with determining the amount of such compensation rather than determining both if such compensation were warranted and the amount of such compensation, if any. Indeed, this point is reinforced by the language of the final sentence of the Category C paragraph in the January Referral, which recommends limits on the amount of "compensation." That sentence begins with the subordinate clause "*If* the Commission decides to award additional compensation for claims that meet these criteria."[29] The State Department thus clearly contemplated the Commission either awarding *or not awarding* compensation under Category C.

At the oral hearing, the claimants argued that the Department of State used permissive language in the Referral in case of "exigent circumstances" or other judgments unknown to the Department of State at the time of the drafting of the January Referral. This, however, seems highly unlikely: the universe of possible claimants for Category C was limited to plaintiffs in the nineteen Pending Litigation cases listed in Attachment 1 to the January Referral and was thus well known to the Department of

[29] The entire sentence reads as follows: "If the commission decides to award additional compensation for claims that meet these criteria, we recommend that the Commission award an appropriate amount up to but no more than the amount of the part of the judgment awarded to the decedent's estate as against the state of Libya or its agencies or instrumentalities, minus any interest awarded in that judgment and minus any award to the decedent's estate given by the Department of State.

State. Among those nineteen cases, none of them other than the *Pugh* case had reached judgment and so the possibility of there being other claimants under Category C would have been virtually nil. In any event, if there had in fact turned out to have been other claimants with "a prior court judgment for wrongful death," it is not clear why the State Department would have wanted those hypothetical claimants treated any differently from the seven claimants here. The "exigency" of some other judgment would either occur—in which case some other claimants would have to be treated just like these seven—or, much more likely, it would not. In either case, the possibility of an "exigency" does not explain the permissive language in the January Referral.

In sum, the Commission affirms its determination in the Proposed Decision that the supplemental materials to the CSA establish that the *Pugh* claimants are only entitled to an *opportunity* to seek additional compensation beyond the guaranteed $10 million they have already received. *See* PD at 10-12. The Department of State assured Congress only that a process by which claimants could establish their claim would be provided, precisely what it in fact provided for claimants under Category C of the January Referral.

III. Claimants' Damages Exceed the Compensation Thus Far Received

The January Referral requires that the Commission determine whether the "existence" of a judgment "warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement." The claimants argue that additional compensation is warranted because their particular federal court judgments specify that each of the claimants has suffered damages greater than $10 million, the compensation each has already received. This fact, however, is not relevant to the question the January Referral requires the Commission to answer. The question is not if a *particular* judgment

warrants additional compensation but rather, whether the mere "existence" of that judgment warrants additional compensation. In this context, the size or value of a judgment may be indicative of its importance in the scheme of a claims settlement agreement; in and of itself, however, it is not relevant to the issue of whether additional compensation is warranted because of its mere "existence."

IV. Litigation and Settlement Value of the Judgments

Counsel argues that "as a matter of law, equity and justice" a person with a judgment is situated "in a far better position than someone who seeks to avoid those burdens and risks [of proving liability], and negotiates a compromise on that basis." While in an individual settlement this may be true in the abstract, that is not the question before the Commission here. The question here is whether, in the context of the CSA and as a matter of the applicable principles of international law, justice and equity, the fact that the claimants had a judgment while other wrongful-death claimants did not have one warrants additional compensation beyond that which other wrongful-death claimants receive. With regard to international law, the Commission stated in its Proposed Decision that "[t]he claimants have not provided, and the Commission has not in its independent research found, any precedent in international law awarding a claimant additional compensation for wrongful death because of a judgment received in a domestic court." PD at 9. On objection, claimants do not dispute this. While claimants repeatedly refer to "law, equity and justice," the only law they cite is U.S. law that merely provides that federal district court judgments are presumptively correct, entitled to preclusive effect, and considered final unless and until overturned on appeal. This is all correct as

far as it goes, but it does not provide a *legal* basis for this Commission to award claimants additional compensation because of their judgment.

Claimants do, however, press the argument that justice and equity dictate that the greater settlement value of a judgment during settlement negotiations means that, in the words of Category C, "a prior U.S. court judgment for wrongful death warrants" additional compensation. In essence, judgments are worth something in settlement negotiations, and so also should be worth something now. This may be true, but here the relevant settlement is the comprehensive settlement between the United States and Libya. Thus, in order to establish that additional compensation is warranted, the claimants must establish that the leverage derived from their position allowed the U.S. Government to obtain additional funds under the CSA. However, claimants have not shown this: neither the documents relied on by claimants as evidence of the intent of the negotiating parties[30] nor any other evidence contemporaneous to the settlement submitted by the claimants establishes that the United States in fact received extra funds from Libya because of claimants' judgment.

Furthermore, claimants' observations that the differentiation of claims under the Referrals reflects an intention to value claims based on their litigation status is not supported by the Referrals. The fact is that not all claims in similar litigation posture were treated in a similar fashion under the Referrals. For example, the LaBelle Discotheque victims do not appear to have had a valid enforceable settlement agreement with Libya at the time of the CSA, but were paid first without further adjudication—just like the Pan Am 103 victims' estates that did have such an agreement. On the other hand,

[30] These documents include the Negroponte Letter (Exhibit 4G), Pugh Points (Exhibit 19) and Update (Exhibit 22). *See generally supra* Part II.

the LaBelle claimants were Pending Litigants, but unlike other Pending Litigants, they were ineligible for additional compensation under Category D of the January Referral.

V. The Judgments were a Catalyst for Settlement

Lastly, claimants argue that their judgments were the catalyst for the settlement, both because of their existence and their size. In its Proposed Decision, the Commission stated that "[t]hough the claimants and their lawsuit may have played a role in bringing Libya to the bargaining table, claimants have failed to establish that their role was greater than numerous other factors." PD at 17. As detailed in the Proposed Decision, the Commission analyzed all of the facts and circumstances related to the settlement of claims under the CSA. In particular, in response to claimants' assertion that Libya's sudden interest in a global settlement was due to their judgment, the Proposed Decision cited a Congressional Research Service report which stated that it was the 2008 amendments to the Foreign Sovereign Immunities Act that "appear[] to have signaled to the Libyan authorities the urgency of the need to resolve outstanding claims." PD at 18. After taking account of all of the facts and circumstances and in light of claimants' additional argument on this point, the Commission remains unpersuaded that the claimants' judgments were responsible enough for the settlement to warrant additional compensation.

CONCLUSION

Based on the evidence and information submitted, and for the reasons set forth above, the Commission finds that the claimants have failed to establish either based on the meaning of the CSA (or intent of the parties to the CSA) or under the principles of international law, justice, or equity that the existence of a wrongful death judgment warrants compensation beyond the $10 million that each of these claimants has already received. Accordingly, the Commission concludes that the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, February 15, 2013
and entered as the Final Decision
of the Commission.

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj C. 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	
ESTATE OF PAT WAYNE HUFF, DECEASED; ERMINE HAILEY, ADMINISTRIX	Claim No. LIB-II-017
ESTATE OF DONALD WARNER, DECEASED; JANET WARNER, PERSONAL REPRESENTATIVE	Claim No. LIB-II-018
ESTATE OF JAMES TURLINGTON, SR., DECEASED; DEBBIE SCHOOLING, ADMINISTRIX	Claim No. LIB-II-019
ESTATE OF MARGARET SCHUTZIUS, DECEASED; JEFFREY P. CONSOLO, ADMINISTRATOR	Claim No. LIB-II-020
ESTATE OF MARK EDWARD CORDER, DECEASED; CARLA JEAN MALKIEWICZ, REPRESENTATIVE	Claim No. LIB-II-021
ESTATE OF BONNIE BARNES PUGH, DECEASED; ROBERT LEE PUGH, EXECUTOR	Claim No. LIB-II-022
ESTATE OF MIHAI ALIMANESTIANU, DECEASED; IOANA ALIMANESTIANU, EXECUTRIX	Claim No. LIB-II-047
Against the Great Socialist People's Libyan Arab Jamahiriya	Decision No. LIB-II-164

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

PROPOSED DECISION

These claims against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") brought by the respective estates of Pat Wayne Huff, Donald Warner, James Turlington, Sr., Margaret Schutzius, Mark Edward Corder, Bonnie Barnes Pugh, and Mihai Alimanestianu (collectively, the "claimants"), are for wrongful death of claimants'

decedents as a result of the mid-air terrorist bombing of UTA Flight 772 over Niger on September 19, 1989. The claimants seek additional compensation (over and above the $10 million each claimant has received from Libya through the Department of State) based on their having obtained prior U.S. court judgments in their Pending Litigation awarding them damages for the wrongful deaths.

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. *January 15, 2009, Letter 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 claims are made under Category C. According to the January Referral Letter, Category C consists of

> claims of U.S. nationals for compensation for wrongful death, in addition to amounts already recovered under the Claims Settlement Agreement, where there is a special circumstance in that the claimants obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death, provided that (1) the Commission determines that the existence of a prior U.S. court judgment for wrongful death warrants compensation in addition to the amount already recovered under the Claims Settlement Agreement; and (2) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 5. 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"), 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

The claimants submitted completed Statements of Claim asserting claims under Category C of the January Referral Letter, along with exhibits supporting the elements of their claims. These submissions included evidence of the U.S. nationality of each claimant's decedent and that of the heirs of each decedent's estate; the authority of each named estate representative to act on behalf of the respective estates; claimants' inclusion as named parties in the complaint filed in *Pugh, et al. v. Socialist People's Libyan Arab Jamahiriya*, 02-cv-2026 (D.D.C.), part of the Pending Litigation referred to in Attachment 1 of the January Referral Letter; the dismissal of *Pugh*; and the district court judgments obtained by the claimants. Additionally, the claimants have provided a brief, court documents, and background information in support of their claims.

The claimants contend that the existence of the judgments they had obtained, prior to the espousal of their claims by the United States, warrants compensation in addition to the $10 million each claimant has received from Libya through the Department of State. Specifically, in their brief, claimants make seven arguments: (1) "the Executive Branch provided express assurances that the *Pugh* Claimants would 'be able to seek additional compensation' to take account of their judgments"; (2) the "decision to displace a federal court judgment...raises highly sensitive constitutional concern...[and] while it is presumably within Congress' and the Executive's power to espouse claims..., such power should be exercised in a way that reflects deference to the Judicial Branch where the Judicial Branch has had involvement..."; (3) "the failure to respect [claimants'] judgments would fundamentally undermine the statutory process that Congress had established"; (4) the "U.S. Government—albeit for important political reasons—effectively nullified the

Pugh judgments, depriving the Claimants of any ability to enforce their awards"; (5) "all of the findings necessary to support this Commission's awards ... already were made by Judge Kennedy in his opinion"; (6) "for more than five years, the Pugh Claimants worked tirelessly to obtain the first-ever contested terrorism judgment against a sovereign state"; and (7) "[i]t is widely recognized that the *Pugh* litigation was instrumental in creating the circumstances that enabled the U.S. Government to reach agreement with Libya on resolution of all pending claims arising from Libyan terrorism."

DISCUSSION

As an initial matter, the Commission notes that the claimants have submitted documentation which appears sufficient to establish that each estate representative is duly authorized to represent the respective claimant before the Commission. Accordingly, the Commission finds that the ESTATE OF PAT WAYNE HUFF, DECEASED, ERMINE HAILEY, ADMINISTRIX; ESTATE OF DONALD WARNER, DECEASED, JANET WARNER, PERSONAL REPRESENTATIVE; ESTATE OF JAMES TURLINGTON, SR., DECEASED, DEBBIE SCHOOLING, ADMINISTRIX; ESTATE OF MARGARET SCHUTZIUS, DECEASED, JEFFREY P. CONSOLO, ADMINISTRATOR; ESTATE OF MARK EDWARD CORDER, DECEASED, CARLA JEAN MALKIEWICZ, REPRESENTATIVE; ESTATE OF BONNIE BARNES PUGH, DECEASED, ROBERT LEE PUGH, EXECUTOR; and ESTATE OF MIHAI ALIMANESTIANU, DECEASED, IOANA ALIMANESTIANU, EXECUTRIX, are the proper claimants in these claims.

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined as Category C of the January Referral Letter, specifically

claims of individuals who: (1) are United States nationals; (2) have been named as parties in a Pending Litigation case which has been dismissed; and (3) obtained a prior U.S. court judgment in the Pending Litigation case awarding damages for wrongful death. January Referral Letter, *supra*, ¶ 5.

Nationality

In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that to meet the nationality requirement, a claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. In the case of claims brought by estates on behalf of beneficiaries, it is a well-established principle of the law of international claims, which has been applied by both this Commission and its predecessors (the War Claims Commission and the International Claims Commission) that, for purposes of determining the nationality of a claim, the nationality of the injured party as well as the beneficiaries of his or her estate must be evaluated in order to establish that the claim has been held continuously by U.S. nationals from the date of injury through the date of the Settlement Agreement.[1]

The claimants have each submitted evidence of the identity and U.S. nationality of their respective beneficiaries along with evidence of the U.S. nationality of each of claimants' decedents. Based on this and other evidence in the files, the Commission

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

determines that these claims were owned by U.S. nationals at the time of the incident and continuously thereafter through the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimants must be named parties in the Pending Litigation listed in Attachment 1 to the January Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. January Referral Letter, *supra*, ¶ 5. The claimants have provided copies of the Amended Complaint in *Pugh*, filed in the United States District Court for the District of Columbia, in which each is named as a party. Additionally, the claimants have provided Orders of Dismissal from the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, dated February 27, 2009 and March 6, 2009 respectively, as evidence of the dismissal of this Pending Litigation. The Commission, therefore, finds that the claimants have satisfied this element of their claims.

Court Judgment

Category C of the January Referral Letter further requires that the claimants establish that each has obtained a prior U.S. court judgment in the Pending Litigation awarding damages for wrongful death. January Referral Letter, *supra*, ¶ 5. The claimants have submitted the Judgment of the United States District Court for the District of Columbia dated January 24, 2008, wherein the court awarded compensation to the claimants for the wrongful deaths of their respective decedents. Based on this evidence, the Commission finds that the claimants have also satisfied this element of their claims.

In summary, therefore, the Commission concludes that these claims are within its jurisdiction pursuant to the January Referral Letter and are entitled to adjudication on the merits.

Merits

Category C of the January Referral Letter is unique among the categories of claims referred because it gives the Commission discretion to determine whether this category of claims, as defined in the Referral Letter, is compensable, rather than defining a compensable category of claims. Specifically the Commission must determine whether claimants are entitled to compensation above and beyond that awarded for wrongful death based solely on the existence of claimants' prior U.S. court judgment. On this question, the Commission is directed by the ICSA to apply, in the following 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) (2006).

Applicable Claims Agreement

The applicable claims agreement for purposes of these claims is the Claims Settlement Agreement, which settles the claims of U.S. nationals "if such claim[s] ... arise[] from ... death ... caused by [aircraft sabotage] occurring prior to June 30, 2006." Since the Agreement is silent on the issue of the significance of previous court judgments on the amount of compensation for wrongful death claims, the Commission must next refer to the documents implementing that Agreement to determine the intent of the parties in reaching the settlement. In this program, such documents include the LCRA, Executive Order 13,477 and the two Referral Letters.

Neither the LCRA nor the Executive Order speak to the issue. The January Referral Letter, on the other hand, does. In the language of Category C, the Referral charged the Commission with determining whether the existence of a prior U.S. court judgment for wrongful death warrants additional compensation—indicating that the issue of an award of compensation for such claimants had not been predetermined. Accordingly, as neither the Claims Settlement Agreement nor the series of documents implementing that Agreement is dispositive as to whether compensation is warranted under the circumstances of these claims, the ICSA directs the Commission to apply the applicable principles of international law, justice and equity.

International Law

The claimants have not provided, and the Commission has not in its independent research found, any precedent in international law awarding a claimant additional compensation for wrongful death because of a judgment received in a domestic court. The Commission's own precedents establish that in one program *preference* was given to claimants in similar circumstances. Specifically, the statute authorizing the Commission to adjudicate claims under the Soviet Claims Program explicitly directed that "[t]he Commission shall give preference to the disposition of the claims... with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States."[2] Further, the Department of Treasury was directed to make "[p]ayment in full of the principal amount of each award" in such claims before making payments to other non-preferred claims.[3] The Commission notes that the Department of State in the majority of the claims that it referred to the Commission has

[2] See, 22 U.S.C. § 1641d(a)(2006).
[3] See, 22 U.S.C. § 1641i(2006)

implemented a similar *preferred* structure with respect to the "Pending Litigation" claims, including claimants' claims. Accordingly, as there is no international law on point, the Commission must consider whether under the principles of justice and equity these Category C claims warrant additional compensation.

Justice and Equity

As noted above, claimants make seven arguments, each of which might be viewed as a suggestion that justice and equity favor their receiving additional compensation. As explained in more detail below, however, the Commission is not persuaded that any of them—whether individually or in combination—suffices to warrant additional compensation. While there is no doubt that claimants suffered immeasurably, the key question here is whether the fact that they had a federal district court judgment prior to the signing of the Claims Settlement Agreement warrants compensation beyond the $10 million they have already received.

1. The Executive Branch's Assurances to Congress. The claimants assert that "the Executive Branch provided express assurances that the Pugh Claimants would 'be able to seek additional compensation' to take account of their judgments."

While the claimants are literally correct, there is no evidence that anyone in the Executive Branch expressly promised the Pugh Claimants that they would actually *receive* additional compensation. Indeed, the most that can be said for the evidence is that the Pugh Claimants were assured an *opportunity* to seek additional compensation. But this is exactly what the language of Category C of the January Referral Letter provides—an *opportunity* to come to this Commission to seek recovery above the $10 million each of them has already received. No one in the Executive Branch promised them more than that.

Claimants point to three pieces of evidence to support their argument: (1) a July 28, 2008 letter from Deputy Secretary of State John D. Negroponte to Senate Minority Leader Mitch McConnell; (2) an August 11, 2008 document entitled "Update on Libya Claims Issue"; and (3) a document that purports to be a portion of an electronic mail message allegedly sent from someone in the State Department to Senator Johnny Isakson of Georgia.

The Negroponte letter and the "Update" document both discuss multiple aspects of the Libyan claims settlement. Included in the former is language suggesting that some of the Libya settlement money could be used "for three purposes," including "to permit further recoveries for death and physical injury victims in the non-settled cases where special circumstances warrant, for example if the injuries are especially severe, or if there is a prior court judgment." The "Update" document includes similar language. The alleged e-mail to Senator Isakson is a little different. It focuses entirely on the *Pugh* case. However, the document the claimants have provided the Commission lacks any e-mail header information and includes neither Senator Isakson's name nor any indication of who in the State Department actually sent it. Indeed, the document contains no hint that it is even the text of an actual email. Even accepting at face value that the document is what the claimants purport it to be, nothing in it guarantees the Pugh Claimants anything beyond what they have already received. For example, it states, "[t]he Pugh death claimants will have an opportunity to seek further recovery beyond the guaranteed $10 million," and "the Pugh claimants will be able to seek additional compensation to take account of the stage their litigation had reached in the U.S. courts, or any other special circumstances they believe warrant receiving more than other U.S. claimants."

All of this language suggests that the Pugh Claimants are entitled to exactly what they got: an *opportunity* to seek compensation beyond the guaranteed $10 million they have already received.

2. The Unique Separation of Powers Concerns Raised by the LCP and the Special Need to Respect the Federal Court's Judgments and Award. The claimants contend that the "decision to displace a federal court judgment...raises highly sensitive constitutional concerns [and] while it is presumably within Congress' and the Executive's power to espouse claims..., such power should be exercised in a way that reflects deference to the Judicial Branch where the Judicial Branch has had involvement... ."

While claimants rightly allude to the potential for separation-of-powers concerns, those concerns are unaffected by the fact that the Pugh litigants' case had reached judgment, while other cases against Libya had not.

Claimants provide no legal support for the view that distinctions of this sort matter in the context of international claims settlement. Indeed, in upholding the Executive Branch's right to settle international claims, the Supreme Court of the United States has never distinguished among claims based on stage of litigation. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Dames & Moore, the challenger to the Algiers Accords, not only had a final judgment against the Government of Iran, but also an execution of that judgment in Washington State, as well as prejudgment attachments. The Algiers Accords extinguished Dames & Moore's *final* judgment and nullified its attachments, a far more sweeping action than that taken with respect to the Pugh Claimants' case. The Court addressed the separation-of-powers issues head on, making no mention of distinctions based on the stage of litigation and of course rejecting a constitutional challenge even

when the plaintiff had an attachment against Iranian government property. It thus follows that the government's espousal of the claims of the Pugh litigants, who were nowhere nearly as far along in their litigation as Dames & Moore was, raises no greater separation-of-powers problems. Indeed, here, in contrast to the Algiers Accords, Congress was involved, promulgating a statute supporting the President's decision to settle the claims, the Libyan Claims Resolution Act (LCRA). The LCRA also specifically provided for the extinguishing of all claims, including those with judgments. If anything, this Congressional involvement strengthens the idea that the President's actions did not infringe on any separation-of-powers principles.[4]

That being said, the Commission notes that it has previously held 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). Accordingly, the Commission makes no finding on this point.

3. Respect for Congress's Creation of a Cause of Action Against Terrorist States. The claimants argue that "the failure to respect their judgments would fundamentally undermine the statutory process that Congress had established...[and] have a substantial chilling effect on future victims who would have no reason to pursue such an arduous process."

The fundamental problem with this argument is that it was Congress itself that, in claimants' words, "fundamentally undermine[d] the statutory process that Congress had established," and of course, that is Congress's prerogative.

[4] *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-655 (1952) (Jackson, J., concurring); *id.* at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.").

Foreign states are immune from the jurisdiction of United States courts unless the Foreign Sovereign Immunities Act (FSIA) provides a specific exception.[5] The claimants' lawsuit relied on the Antiterrorism and Effective Death Penalty Act of 1996, which established an FSIA exception for certain acts of state-sponsored terrorism.[6] But, the 2008 Libyan Claims Resolution Act (LCRA) changed all that for Libya. The LCRA re-established Libyan immunity from suits under the FSIA state-sponsored terrorism exception by removing jurisdiction from the federal courts to adjudicate terrorism claims against Libya. Specifically, Section 5 of the LCRA provides that, upon certification by the Secretary of State of receipt of sufficient funds from Libya:

> "(A) Libya...shall not be subject to the exceptions to immunity from jurisdiction...contained in 1605A, 1605(a)(7), or 1610...; (B)...any... private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply to claims against Libya...in a Federal or State court; and (C) any attachment, lien, execution, garnishment, or other judicial process brought against property of Libya...in connection with an action that would be precluded by subparagraph (A) or (B) shall be void."[7]

Further, while there is little question that the 1996 amendments to the FSIA were aimed at giving victims the right to seek damages against foreign states that supported terrorism, Congress—and the President—could easily have viewed the LCRA as furthering the same goal. After all, the mass settlement led to large numbers of victims receiving actual awards, unprecedented in litigation under the state-sponsored terrorism exception. Furthermore, the argument that future victims will be chilled could apply equally to those claimants whose lawsuits had not yet reached judgment. It thus fails to provide a reason to distinguish the Pugh Claimants based only on the existence of their judgment. In any

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[5] 28 U.S.C. § 1604.
[6] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 221(a), 110 Stat. 1214, 1241 (Apr. 24, 1996).
[7] *See* Libyan Claims Resolution Act, Pub. L. No. 110-301, sec. 5, 122 Stat. 2999, 3000-3002 (Aug. 4, 2008).

event, the compensation scheme adopted by the Department of State for this program specifically addresses the potential for a "chilling effect" on future victims in bringing forth litigation: it provided claimants who had pursued litigation with preferred treatment in both the adjudication and payment of their claims.

4. The Extraordinary Financial Sacrifices Made By the Pugh Claimants as a Result of the LCP. The claimants here assert that the "U.S. Government—albeit for important political reasons—effectively nullified the Pugh judgments, depriving the Claimants of any ability to enforce their awards," causing "a direct loss by the claimants in deference to the Nation's foreign policy objectives."

The problem with arguing that the Pugh Claimants suffered a "direct loss" is that litigating is inherently risky, even after receiving a large judgment. Claimants appear to start with the premise that the judgment was the equivalent of money in hand -- but, it was not. When Congress and the President extinguished the courts' jurisdiction to hear the Pugh litigants' suit, the case was still on appeal, the judgment had not been executed, and no property had been attached. While the claimants had begun the process of seeking enforcement, there were certainly no guarantees. Had the United States not settled the case, it is not clear that the Pugh litigants would have been able to realize anything, let alone the $10 million each of the claimants in fact have now already received. A one-hundred percent chance for $10 million may well be worth more than some probability—unknown and uncertain—of recovering in the future some proportion of a judgment for a far greater amount. It will of course never be known what the *Pugh* claimants would have been able to realize if the United States had not espoused their claims, but it is enough to say that they by no means suffered a "*direct* loss."

5. Judge Kennedy's Factual Findings. Claimants contend that "all of the findings necessary to support this Commission's awards ...already were made by Judge Kennedy in his opinion."

While claimants rightly note that Judge Kennedy made extensive factual findings, nothing in his decision directly supports the particular issue of relevance in this Category C claim: whether the Pugh Claimants are entitled to *additional* compensation, above and beyond the $10 million they—just like other wrongful death claimants in this Libyan claims program—have already received. Judge Kennedy did make detailed findings about, among other things, the horrific nature of the victims' injuries. But, as horrific as these injuries were, these facts—facts the Commission acknowledges with great sympathy—do not speak to whether a "special circumstance" of a prior U.S. court judgment might or might not entitle a claimant to additional compensation before this Commission.

6. The Pugh Claimants' Personal Efforts. The claimants state that "for more than five years, the Pugh Claimants worked tirelessly to obtain the first-ever contested terrorism judgment against a sovereign state," and assert that these "efforts are unparalleled among all cases brought pursuant to the FSIA terrorism exception." Relatedly, they note that they were under "substantial and painful burdens, reliving the pain and suffering they experienced, ... detailing it under oath for the [c]ourt."

While all true—claimants have litigated tirelessly and undoubtedly through much pain—this is not sufficient reason to distinguish the Pugh Claimants from the many other claimants who have suffered unspeakable anguish. All of the claimants in this program have been required to relive their individual tragedies, during both the course of litigation and this claims process. For instance, other parties have come before the Commission

during oral hearings, and nearly all of them have executed sworn statements detailing their experiences. Accordingly, the Commission is not persuaded that claimants' relative degree of effort is substantially greater than that which has been put forth by other claimants in the Libya claims program, so as to require additional compensation.

7. The Significant Role of the Pugh Judgment in Causing Libya to Agree to Compensate All Victims of Libyan Terrorism. Claimants contend that "[i]t is widely recognized that the *Pugh* litigation was instrumental in creating the circumstances that enabled the U.S. Government to reach agreement with Libya on resolution of all pending claims arising from Libyan terrorism." In support of this contention, the claimants have submitted a Washington Post editorial that speculates as follows: "the Pugh judgment—and the fear that some two dozen other pending suits could result in huge awards—weighed heavily on Libya."[8]

Though the claimants and their lawsuit may have played a role in bringing Libya to the bargaining table, claimants have failed to establish that their role was greater than numerous other factors. For example, one must consider the role played by Congress. To start, it was Congress that passed the 1996 state-sponsored terrorism exception to the Foreign Sovereign Immunities Act that gave the claimants the right to bring suit in the first place.[9] In early 2008, Congress then amended the Foreign Sovereign Immunities Act again. This new 2008 law permitted all plaintiffs in FSIA state-sponsored terrorism suits to subject foreign government assets to liens of lis pendens upon filing of a lawsuit and

[8] *A Fair Shake,* Washington Post, February 17, 2009 at A12.
[9] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 221(a), 110 Stat. 1214, 1241 (Apr. 24, 1996).

also permitted any plaintiff with a final judgment to attach even indirectly held property.[10] The Congressional Research Service noted that these changes in the law "appear[] to have signaled to the Libyan authorities the urgency of the need to resolve outstanding claims."[11]

Moreover, litigation in other terrorism-related cases against Libya contributed significantly to the settlement as well. In particular, the victims of the Pan Am 103 and La Belle discotheque bombings also brought suit against Libya,[12] and these suits no doubt also played a role in Libya's decision to settle. Indeed, Congress likely viewed the Pan Am 103 and La Belle discotheque cases as crucial, since it passed a law in 2008 prohibiting the use of funds for assistance to Libya until "the Government of Libya has made the final settlement payments to the Pan Am 103 victims' families, paid to the La Belle Disco bombing victims the agreed upon settlement amounts, and is engaging in good faith settlement discussions regarding other relevant terrorism cases."[13] Other evidence also suggests that the cases brought by the Pan Am 103 and La Belle discotheque victims were important catalysts to the eventual settlement. For example, during the Senate's consideration of the LCRA, then-Senator Biden, Chairman of the Senate Committee on Foreign Relations, stated, "with passage of the Libyan Claims Resolution Act, the United States moves closer to a comprehensive resolution of all outstanding claims...most notably, the Pan Am 103 bombing over Lockerbie, Scotland...and the bombing of the La

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[10] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, sec. 1083(a)(1), 122 Stat. 3, 228 (Jan. 28, 2008); *id* at sec. 1083(b)(3), 122 Stat. at 341 (amending 28 U.S.C. § 1610).

[11] Christopher M. Blanchard & Jim Zanotti, Libya: Background and U.S. Relations, Congressional Research Service. Updated Feb. 18, 2011, at 9.

[12] *See* Rein v. Libya; Beecham v. Libya. There were also numerous other terrorism-related lawsuits brought against Libya. See, *Clay v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-707; *Estate of John Buonocore III v. Socialist Libyan Arab Jamahiriya* (D.D.C) 06-cv-727; *Franqui v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-734; *Harris v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-732; *McDonald v. Socialist People's Arab Jamahiriya* (D.D.C.) 06-cv-729; and *Patel v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-626.

[13] Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Division J, § 654, 121 Stat. 1844, 2342 (Dec. 26, 2007).

Belle discotheque in Berlin in April 1986."[14] In his remarks, he made no mention of the UTA 772 bombing at all.

Finally, the Executive Branch itself certainly played an indispensable role in the settlement. Besides the obvious fact that it negotiated the Claims Settlement Agreement, and did so for *all* victims of Libyan-sponsored terrorism, the Executive Branch also submitted several Statements of Interest in the *Pugh* litigation. Each of the Statements noted that the government was in active negotiations with the Libyan government to settle all of the outstanding claims, and not just those related to the Pugh suit.[15] Furthermore, in July of 2007, President Bush, in a letter to Muammar al Qadhafi, reportedly identified "the resolution of the La Belle settlement as an issue of importance for further consolidation of U.S. – Libya relations."[16]

In summary, many factors no doubt had a role in Libya's decision to settle these cases. Whatever the relative weight of these various factors in effecting the settlement, however, the claimants have not met their burden to show that their judgment was a more significant factor than numerous others, at least for the purposes of entitling the claimants to additional compensation.

Conclusion

Based on the evidence and information submitted in support of this claim, and for the reasons set forth above, the Commission finds that the claimants have not met their burden of proof in these claims: they have failed to established that the prior judgments they obtained warrant additional compensation beyond the $10 million already paid to

[14] *Cong. Rec.* S7979 (July 31, 2008)
[15] See e.g., *Pugh*, Statement of Interest of the United States, January 16, 2007.
[16] Christopher M. Blanchard & Jim Zanotti, Libya: Background and U.S. Relations, Updated Feb. 18, 2011, at 37.

each claimant by the Department of State.[17] In light of the foregoing, the Commission concludes that these claims do not qualify for compensation under Category C of the January Referral Letter. Accordingly, while the Commission sympathizes with the claimants for the ordeal that their decedents and their families must have endured, it concludes that these claims for additional compensation based on the wrongful death of claimants' decedents as a result of the bombing of UTA Flight 772 on September 19, 1989, must be and are hereby denied.

The Commission finds it unnecessary to make determinations with respect to other aspects of these claims.

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

Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

Anuj C. Desai, Commissioner

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).

[17] Section 509.5(b) of the Commission's regulations provides:

> The 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.

45 C.F.R. 509.5(b) (2010).