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No. 07-615
IN THE
SUPREME COURT OF THE UNITED STATES

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN,
Petitioner

v.

DARIUSH ELAHI

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Is an attachment against foreign sovereign property permissible when that property is "at issue in claims against the United States before an international tribunal," and that property is not a "blocked asset," pursuant to the terms of the 2000 Victims of Trafficking and Violence Protection Act and the 2002 Terrorism Risk Insurance Act?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. In earlier proceedings, Cubic Defense Systems, Inc., participated as a nominal party, and Stephen M. Flatow was a plaintiff-intervenor in the district court and an appellant in the court of appeals. See Pet. App. 38, 81.

RULE 29.6 NOTICE

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, is a constituent part of a foreign state, within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a), and has no shareholders or parent corporations. See Pet. App. 25.

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit, of July 17, 2007, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, is reported at 495 F.3d 1024 (9th Cir. 2007), and reprinted at Pet. App. 5. This amended opinion replaced an earlier opinion by the same panel of May 30, 2007, reprinted at U.S. Pet. Amicus Br.1a.

The Ninth Circuit opinion was issued in response to a *per curiam* opinion of this Court, granting a petition for writ of certiorari filed by petitioner, vacating an earlier opinion of the Ninth Circuit, and remanding for further proceedings. See 546 U.S. 450 (2006). That October 7, 2004, opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit was reported at 385 F.3d 1206 (9th Cir. 2004), and is reprinted at Pet. App. 38. That decision was from an appeal of an order from the U.S. District Court for the Southern District of California of November 26, 2002, 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at Pet. App. 81.

An earlier order of the U.S. District Court, granting a petition confirming a foreign arbitral award was of December 8, 1998, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, is reported at 29 F. Supp.2d 1168 (S.D. Cal. 1998), and reprinted at J.A.55.

STATEMENT OF JURISDICTION

Petitioner seeks review from the amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of July 17, 2007. The Ninth Circuit denied a petition for rehearing en banc on that same date. Pet. App. 4. The Petition was filed November 7, 2007, and granted on June 23, 2008.

The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

The crucial questions for review by this Court are controlled by the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), Pet. App.107, reprinted in the Appendix to this Brief ["App."] at 1a; by the Terrorism Risk Insurance Act (TRIA) of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), Pet. App. 112, reprinted in App. 6a; and the International Economic Emergencies Powers Act (IEEPA), 50 U.S.C. § 1701 et seq.

Also at issue in this case are the United States' treaty obligations under the 1981 Algiers Accords with Iran, more formally known as the Declarations of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S., 20 I.L.M. 224 (1981); Dept. of State Bull. No. 2047, Feb. 1981 at 1; 1 Iran-U.S. Cl. Trib. Rep. 3 (1983); reprinted at App. 14a.

STATEMENT

A. The Iran-U.S. Claims Tribunal and *Case B61*

1. As part of the resolution of the crisis in relations between the Islamic Republic of Iran ("Iran") and the United States, the two nations concluded the Algiers Accords on January 19, 1981. See 14 I.L.M. 224; App. 14a; see also *Dames & Moore v. Regan*, 453 U.S. 654, 662-66 (1981). For purposes relevant here, the Algiers Accords are divided into two instruments. The first was known as the General Declaration, App. 14a, which sets forth the obligations of the parties in respect to their international relations, including that the "United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979 [the freezing of Iranian assets by the U.S. in the wake of the hostage crisis]" and "ensur[ing] the mobility and free transfer of all Iranian assets within its jurisdiction. . . ." App. 14-15a. The "free transfer" obligation was derived from paragraph 9 of the General Declaration. App. 18a ("the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad.").

Any dispute over "the interpretation or performance" of these obligations under the General Declaration, App. 19a (¶17), was to be referred to the tribunal established by the Claims Settlement Declaration (CSD), the second part of the Algiers Accords. App. 19a. The CSD established a complex jurisdictional structure for the Iran-U.S. Claims Tribunal ("Claims Tribunal") at The Hague. The

Tribunal was granted jurisdiction over the claims of private U.S. entities against the Iranian government (and allowed such claims to be privately pursued at the Tribunal without the need for espousal or diplomatic protection in certain circumstances), provided that certain subject-matter, party-identity, continuity and procedural requisites were satisfied. See App. 20a (art. II(1)), 22a (art. III(4)), 23-24a(art. VII). In addition to private claims, the Tribunal was granted jurisdiction over "official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services." App. 20a (art. II(2)). Lastly, the Tribunal was given jurisdiction "as specified in Paragraphs 16-17 of the [General] Declaration. . . over any dispute as to the interpretation or performance of any provision of that Declaration." App. 20-21a (art. II(3)).[1]

2. Iran initiated *Case B61* before the Tribunal as the claimant. *Case B61* involves the dispute over the obligation of the United States to return Iranian military properties situated in the United States as of the date of the Algiers Accords, and which were mainly in the possession of private contractors, whether or not as part of the Foreign Military Sales (FMS) program. Based on the United States' obligations under the General Declaration to "arrange, subject to the

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[1] In the Tribunal's practice, cases calling for the interpretation of the Algiers Accords are given the prefix of "A" (as in "*Case A18*"); official claims are given a "B" prefix (as in "*Case B1*").

provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States," see App. 14-15a (¶A), 18a (¶9), Iran sought the return of these properties or assets, or, in the alternative, the receipt of replacement value for them from the United States government. As a presidential statement to Congress of May 16, 1996, indicated:

> Case B/61 involves a claim by Iran for compensation with respect to primarily military equipment that Iran alleges it did not receive. Iran had sought to purchase or repair the equipment pursuant to commercial contracts with more than 50 private American companies. Iran alleges that it suffered direct losses and consequential damages in excess of $2 billion in total because of the United States Government refusal to allow the export of the equipment after January 19, 1981, in alleged contravention of the Algiers Accords.

President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Aug. 9, 2008).[2]

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[2] Petitioner does not endorse, in all respects, the United States government's characterization of Iran's claim in *Case B61*, but this statement is nonetheless illustrative of the subject-matter of the case.

Case B61 involves mainly Iranian military property that was held by private parties in the United States as of the date of the Algiers Accords, as distinct from military equipment held by the United States (which is at issue in the *B1 Case*) or non-military equipment (the subject of the *A15 Case*). The Claims Tribunal had already issued an Award in the *A15 Case*, holding that the United States is under an obligation, by virtue of paragraphs A and 9 of the General Declaration, App. 14-15a, 18a, to compensate Iran for the losses incurred as a result of the U.S. rejection to permit the transfer of the properties. See *Islamic Republic of Iran v. United States*, Partial AWD 529-A15-FT, ¶¶77(d), (e), (g) & (i) (May 6, 1992), 28 Iran-U.S. C.T.R. 112 (1992) (sub-claims II:A & II:B).

B. The Cubic Contract, Arbitration, and Judgment

1. In October 1977, the predecessor of the petitioner, the Ministry of Defense ("MOD") of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc. ("Cubic"), a California-based defense firm, relating to the sale and servicing of an air combat maneuvering range (ACMR) for use by the Iranian Air Force. See *Ministry of Def. of the Islamic Republic of Iran v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168, 1170 (S.D. Cal. 1998); J.A.55, 56-57; see also J.A.34, 37-40. The parties chose Iranian law as the substantive law governing the contracts. See J.A.23 (¶IV), 40 (¶7.1). In the event of a dispute under the contracts, arbitration was to take place in Switzerland, "in accordance with the laws of the Government of Iran in effect as of the date of th[e] contract." See J.A.23 (¶IV), 39 (¶2.6) (quoting Sales

contract art. XII.15 & Service contract art. XI.18).

Following the Iranian Revolution of 1979, delivery of the equipment did not take place for reasons that were disputed. See J.A.56-57; see also J.A.42-45. MOD made partial payments for the ACMR but never received the equipment. Cubic then breached the contract and sold the ACMR to Canada and never remitted the proceeds of that sale to MOD. See J.A.25 (¶VIII), 45-47, 56-57; Pet. App. 6.

2. In January 1982, MOD filed claim B66 before the Claims Tribunal, against both Cubic and the United States, seeking recovery of the contractual damages arising from the failure to deliver, install and operate the ACMR. See J.A.25-26 (¶IX), 57; Pet. App. 6-7. The United States argued before the Tribunal that MOD's claim in *Case B66* was "duplicative of part of the claim in Case No. B61, another 'official' claim filed by MOD against the United States . . . insofar as the claim in Case No. B61 raised issues concerning the interpretation or performance of Contract No. 134 [the Cubic Contracts] pursuant to the General Declaration [of the Algiers Accords]." See *Ministry of National Defense of the Islamic Republic of Iran v. United States & Cubic Corp.*, AWD 302-B66-1, at ¶4 (Apr. 28, 1987), 14 Iran-United States Claims Tribunal Reports ["Iran-U.S. C.T.R."] 276 (1987), reprinted in App. 25a, 26-27a.

In an Award dated April 28, 1987, the Claims Tribunal dismissed *Case B66* for lack of jurisdiction under the Algiers Accords. The Tribunal held that MOD's claim against Cubic was barred by its earlier interpretative ruling of the Algiers Accords, "that the General Declaration and the Claims Settlement

Declaration do not confer jurisdiction over claims by Iran against United States nationals." App. 28a (¶11) (citing *Case A2*, DEC1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. C.T.R. 101 (1982)).

As for MOD's direct claim against the United States for failing to deliver the ACMR, the Tribunal ruled that because the United States "was not named as a party to either of the [Cubic] Contracts" and had "assumed [no] obligations under the Contracts," there was no direct contractual relationship between MOD and the United States that would allow, under the Tribunal's jurisdiction, an official contractual claim to proceed. See App. 27-28a (¶9). The Tribunal was careful to hold, however, that dismissal of MOD's contractual claim against the United States was without prejudice to Iran's analytically distinct claim against the United States for violation of its obligations under the Algiers Accords, requiring the "mobility and free transfer of Iranian assets within its jurisdiction." See Algiers Accords, General Decl., General Principle A; App. 15a. As indicated in the Tribunal Award in *Case B66*, "[t]he Tribunal's dismissal of the claim against the United States in the present case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61." *Case B66*, App. 28a (¶10).

3. Assured in its understanding that the Claims Tribunal was not the proper forum for its direct contractual claim against Cubic, in September 1991 MOD filed, pursuant to the terms of the contracts, a request for arbitration with the International Chamber of Commerce (ICC) in Zurich, Switzerland. See J.A.26

(¶XI), 57. After submissions from both MOD and Cubic, and lengthy proceedings, see J.A.26-31, 57-58, the ICC panel ruled in favor of MOD and issued a Final Award requiring Cubic to pay MOD $2.8 million. See J.A.35, 53 (¶21.1), 58.

The ICC Award ruled that MOD was contractually entitled to be reimbursed for progress payments it had already made to Cubic for the ACMR and Cubic's breach largely arose from its failure to remit to MOD the proceeds of the later Canadian sale of the ACMR. See J.A.45 (¶11.28). The ICC panel calculated the salvage value of the ACMR based on its subsequent physical reconfiguration as the basis of its $2.8 million award to MOD. See J.A.38-39 (¶2.3), 45-47. MOD's contractual recovery in the ICC proceeding was determined by the amount of payments MOD had made to Cubic ($12.6 million), less amounts Cubic had expended to prepare the ACMR for delivery ($10.5 million) and Cubic's profit allowance ($3.5 million), plus the ACMR's salvage value ($4.2 million). See J.A. 47 (¶18.1). The ICC panel calculated contractual interest as running from the date of the commencement of the ICC arbitration, see J.A.53 (¶19.7), and not the January 1982 initiation of proceedings before the Claims Tribunal in *Case B66*, which the ICC characterized as "premature." J.A.51 (¶19.5(d)).

4. In June 1998, MOD filed a petition in the U.S. District Court for the Southern District of California, seeking to confirm the award entered by the ICC pursuant to the New York Convention, opened for signature June 10, 1958, 21 U.S.T. 2517, reprinted in 9 U.S.C.A.§ 201 note. See J.A.21, 22 (¶III). The

district court granted MOD's petition and confirmed the ICC Award on December 7, 1998. J.A.55, 68. Both Cubic and MOD took cross-appeals of the district court's confirmation decision (the "Cubic judgment"), and those appeals remain pending. The merits of the dispute between MOD and Cubic are not otherwise before this Court.

5. As part of the proceedings before the Claims Tribunal in *Case B61*, the Agents of the United States and Iran[3] respectively made filings regarding the character of the case and its connection to the ICC award in the Cubic arbitration. Iran's Agent indicated, in Statement No. 16 filed in *Case B61*, see Decl. of Mina Almassi, Case No. 98-1165, Dckt.85, ¶7 & Ex. 2 (filed Sept. 13, 2002); J.A.70, 71, 72, that "the market price of the equipment [the ACMR], constituting Iran's remedy in the main, is the same amount of which the items were sold to the Canadian Government on 16 September 1981." J.A.73 (¶3). After discussing the ICC Award, the Iranian Agent before the Claims Tribunal represented that "Cubic has not, thus far, paid Iran the awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought" against the United States in *Case B61*. J.A.76 n.2.

This understanding was confirmed by the United States Agent before the Tribunal in a September 1, 2003, filing. See Rebuttal of the United States to

[3] For the authority of Agents at the Tribunal, under the Algiers Accords CSD, see App. 23a (art. VI(2)).

Claimant's Reply, *Case B61*, Statement No. 16 (Cubic Corporation), at 24 & n.32 (Sept. 1, 2003); reprinted at App. 30a. The U.S. Agent noted that

> If the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC: a total amount of $4,751,069.00 in compensation and interest. . . . Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labba[f], Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999).

App. 31a & n.32.

C. Status of Iranian Assets in the U.S.

1. In response to the crisis in relations between Iran and the United States in November 1979, the President exercised his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701, 1702, and "blocked all property and interests in property of the Government of Iran. . . subject to the

jurisdiction of the United States." Exec. Order (EO) No. 12170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. On the day the Algiers Accords were concluded in January 1981, the President directed the transfer to Iran of some, but by no means all, Iranian financial assets under U.S. jurisdiction. EO 12277-12280, 3 C.F.R. 105, 107, 109, 110 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed. . . by the Government of Iran,"EO 12281, 3 C.F.R. 112 (1982); 31 C.F.R. 535.215, but with a number of caveats and conditions that would later become the subject of litigation between the two countries before the Claims Tribunal. Finally, the President lifted the earlier prohibitions against transactions in Iranian property, EO 12282, 3 C.F.R. 113 (1982), which the Treasury Department implemented by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States. . . after January 19, 1981, or (2) The interest in the property of Iran. . . arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. In the 2000 Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000); App. 1-5a, Congress established a system for the payment to individuals of damage awards procured by virtue of suits brought under section 1605(a)(7) of the Foreign Sovereign

Immunities Act (FSIA).[4] See id. § 2002(a); App. 1-3a. This mechanism provided for direct payments from the U.S. Treasury to the affected individual, and for the United States to be subrogated to the interests of such individuals, after payment was made. See id. § 2002(c); App. 4-5a. Those who accepted any payment under VTVPA automatically relinquished certain rights, including their right to pursue punitive damages and, depending on the amount of compensatory damages they received, their right "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." Id. § 2002(a)(2)(B)-(D), 114 Stat. 1542, App. 2-3a.

Congress in 2002 enacted the Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, tit. II, § 201 116 Stat. 2322 (2002), codified at 28 U.S.C.§ 1610 note; App. 6-13a. TRIA section 201 permits persons who obtained a judgment against a party on a claim based on an act of terrorism, within the waiver of immunity under FSIA section 1605(a)(7), to execute against or attach the blocked assets of a terrorist party, subject to substantial limitations, in order to satisfy the judgment

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[4] Section 1605(a)(7) provides an exception to the general rule of foreign state immunity under the FSIA, 28 U.S.C. § 1604, for certain claims against designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7). Congress recently repealed Section 1605(a)(7), and replaced it with a revised terrorism-related exception. See Act of Jan. 28, 2008, Pub. L. No. 110-181, § 1083(b)(1)(A)(iii), 122 Stat. 341; § 1083(a)(1), 122 Stat. 338 (enacting 28 U.S.C. § 1605A).

to the extent of any compensatory damages for which that party has been adjudged liable. See id. § 201(a); App. 6-7a.

One important aspect of applying this statute involves the determination of whether the assets sought to be attached constitute "blocked assets" within the meaning of the enactment. See id. § 201(d)(2); App. 12a (cross-referencing IEEPA, 50 U.S.C.§ 1701 et seq., and the Trading with the Enemy Act, 50 U.S.C. App.§ 5(b)). If a particular property was not characterized as a "blocked asset" under TRIA, it was ineligible for attachment or execution in satisfaction of a judgment procured under FSIA section 1605(a)(7). See id. § 201(a); App. 6-7a.

TRIA also amended portions of VTVPA pertaining to the payment system for victims of terrorist attacks having judgments procured against Iran under the waiver of foreign sovereign immunity in FSIA section 1605(a)(7). See TRIA, § 201(c); App. 7-12a. The major change made was that individuals who received "less than the full amount of compensatory damage awards" from the U.S. Treasury under the compensation scheme were required to relinquish their rights to subsequently execute against or attach any Iranian property in the United States that "is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA, § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 11a. TRIA allowed for the promulgation of guidelines by the Treasury Department to effectuate payments and secure the proper relinquishments of executions or attachments

against Iranian property in the United States. TRIA, § 201(c) (amending VTVPA § 2002(d)(6)), App. 11-12a; see also 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003).

3. On October 25, 2007, after the decision of the Ninth Circuit from which review is sought here (see below), the Department of State designated, under Executive Order 13382, an entity known as the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as having engaged in activities relating to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991-71,992 (Oct. 25, 2007).

D. Elahi's Attachment and Proceedings Below

1. On October 23, 1990, Dr. Cyrus Elahi was killed in Paris, France. See Pet. App. 5; see also *Elahi v. Islamic Republic of Iran*, 124 F. Supp.2d 97, 103 (D.D.C. 2000). In 2000, Dr. Elahi's brother, Dariush Elahi, filed suit against Iran and its Ministry of Information and Security ("MOIS") in the District Court for the District of Columbia for wrongful death. The Iranian government did not enter an appearance with that court, and the district court therefore entered a default judgment in favor of Elahi in December 20, 2000. Id. at 99-100. The judgment against Iran was for compensatory damages in the amount of $11,740,035, and punitive damages of $300 million. Id. at 115.

2. a. In November 2001, Elahi registered in the Southern District of California the default judgment against the Islamic Republic of Iran, procured in the District of Columbia. Elahi also filed a lien notice and sought to garnish the judgment debt owed MOD by

Cubic. See Pet. App. 80-81; J.A.3 (Dckt.67). Petitioner resisted this attachment or execution, and the district court ruled, in November 2002, that the MOD was not immune from Elahi's action. See Pet. App. 106.

Relevant to this petition, the district court ruled (in relation to the claims of Stephen Flatow, a party not before this Court, see, *supra*, at (ii)) that the Cubic judgment was not "at issue" before the Iran-U.S. Claims Tribunal, and, therefore, it was subject to attachment under TRIA. See Pet. App. 90-92. The district court also found that MOD's interest in the Cubic judgment arose, for purposes of characterization as a "blocked asset" under TRIA, at the time MOD successfully sought to enforce the ICC arbitral award in a U.S. court, in December 1998. See Pet. App. 84, 91; see also 29 F. Supp.2d at 1174.

b. MOD took an appeal to the Ninth Circuit on the district court's rulings favorable to Elahi.[5] The court of appeals (Betty Fletcher, J., writing) reversed some of the grounds held by the district court, but sustained others. See Pet. App. 38.

The Ninth Circuit agreed with the district court's ruling that MOD was liable for satisfaction of Elahi's judgment against a separate ministry and entity of the

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[5] During the pendency of the appeal to the Ninth Circuit, Elahi availed himself of the facility offered by the TRIA's amendments of the VTVPA and received compensation from the Treasury for his default judgment against MOIS. He executed the required relinquishments and waivers provided by regulation, see 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003).

government of the Islamic Republic of Iran. Despite the fact that it treated the Islamic Republic of Iran as a foreign state under Foreign Sovereign Immunities Act (FSIA) section 1603(a), and not as an "agency or instrumentality of a foreign state" under FSIA section 1603(b), the court of appeals nonetheless applied the more lenient standard of FSIA section 1610(b)(2), to the Cubic judgment and held that MOD's interest in the Cubic judgment would be subject to attachment by Elahi in satisfaction for his claim against Iran and MOIS. See Pet. App. 65-66.

The Ninth Circuit ruled, in addition, that Elahi's attempted attachment of the Cubic judgment did not violate Treasury Regulations, see 31 C.F.R. pts. 535 & 560, concerning the disposition of Iranian assets in the United States. See Pet. App. 75-76. Significantly, the panel held that, for purposes of the applicability of these regulations, "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)). See also Pet. App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.").

c. MOD sought review in this Court on that earlier Ninth Circuit ruling, and this Court granted the petition, vacated the panel decision, and remanded for further proceedings. See 546 U.S. 450 (2006) (per curiam). This Court held that the panel may have improperly applied FSIA section 1610(b) (relevant only for "agencies or instrumentalities" of a foreign

sovereign), instead of section 1610(a) (which applies to the foreign sovereign itself). See id. at 451-52.

d. On remand, the panel (constituted as before, with Judge Betty B. Fletcher writing) ordered further briefing on the FSIA issues, as well as those arising under the VTVPA and TRIA. See Pet. App. 9-10. In its most recent opinion, the panel ruled, consistent with the suggestion by this Court, that MOD was a central organ of Iran, exercising core functions of a foreign sovereign, and that the Cubic judgment was immune under the FSIA section 1610(a) from attachment by Elahi, insofar as the property in dispute was not "used for a commercial activity in the United States." See Pet. App. 21-28. MOD concurs with this ruling, which is not otherwise before this Court.

A majority of the panel went on, however, to rule in favor of the validity of Elahi's attachment on alternative grounds, namely, that it complied with the TRIA and VTVPA. The panel held that (1) Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury, pursuant to the VTVPA, because the Cubic judgment is not "property that is at issue in claims against the United States before an international tribunal," TRIA, § 201(c)(4); see App. 8-12a; and (2) that the Cubic judgment is a "blocked asset" within the specific meaning of TRIA sections 201(a) and 201(d)(2)(A). See Pet. App. 6-12a.

Circuit Judge Raymond C. Fisher dissented from the panel's holding, see Pet. App. 28-37, indicating that Elahi relinquished any right to attach the Cubic judgment, insofar as that property was intimately

related to a claim before an international tribunal, within the meaning of TRIA section 201(c)(4). Examining the "at issue" language, and construing the relevant TRIA provisions as a whole, Judge Fisher concluded that the panel improperly assumed that MOD had conceded this issue by virtue of its submission made in *Case B61* at the Claims Tribunal. See Pet. App. 35-37.

e. Upon rehearing, the panel slightly modified its opinion to accommodate the objections of the United States as *amicus curiae*, although it declined to alter its holding on the status of the Cubic judgment as a "blocked asset" under the TRIA. See Pet. App. 2-4. The panel's chief amendment was to delete its previous erroneous statement that the Executive Branch had never unblocked any property in which Iran's interest antedated "the Revolution." Pet. App. 3; U.S. Pet. Amicus Br. App. 15a. In its place, the majority inserted a paragraph in which it recognized that "[f]ollowing release of the hostages, the United States unblocked most Iranian assets," but went on to observe that "military goods such as the ACMR remained blocked." Pet. App. 3.

f. This Court subsequently granted review of MOD's petition. 128 S.Ct. 2957 (2008).

SUMMARY OF THE ARGUMENT

I. The decisive issue for review here is whether respondent has relinquished all rights to attach the Cubic judgment because it is "property at issue in claims against the United States before an international tribunal. . . ." TRIA § 201(c); App. 11a. Several structural and textual clues indicate that it was Congress's intent to give a broad ambit to the "at issue" proviso, in order to ensure that private litigants, pursuing their own enforcement tactics with judgments against foreign sovereigns, do not compromise U.S. foreign policy (especially with regard to subrogation interests or efforts to normalize relations with these nations, see VTVPA §§ 2002(c) & (d); App. 4-5a), or the United States' litigation position before international tribunals. Congress's decision to frame the "at issue" caveat in disjunctive form – covering both pending proceedings before international tribunals and the application of awards – is also indicative of a wide scope. Where Congress has used the "at issue" language, or similar formulations, in other enactments, this Court has given it a broadening construction, especially in the foreign relations context. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352, 2356-58 (2007).

Since any award that Iran receives from the Claims Tribunal in *Case B61* (concerning U.S. obligations under the Algiers Accords to allow the "free transfer of all Iranian assets within its jurisdiction," App. 15a (¶A)), would be offset by funds due to Iran from the Cubic ICC award, the Cubic judgment is "at issue" before the Tribunal. This has been confirmed in

official communications before the Tribunal, see J.A.76 n.2; App. 31a & n.32, and in the Tribunal's own decisions. See App. 26-27a (¶4), 28a (¶10). This Court should give a "respectful consideration," *Medellín v. Texas*, 128 S.Ct. 1346, 1361 n.9 (2008), to the interpretations of the Claims Tribunal as regards its jurisdiction under the Algiers Accords. And, in case of any doubt, any ambiguity in the TRIA's "at issue" caveat should be resolved consonantly with the United States' obligations under the Algiers Accords with respect to the Tribunal's jurisdiction. See *Murray v. The CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804). Likewise, the TRIA's "at issue" proviso should be construed consistently with international law's definition of a dispute as encompassing set-offs and recoupments, which require that any award that Iran receives from the Tribunal in *Case B61* be offset by its recovery of the Cubic judgment. Finally, the imperative importance of maintaining U.S. adherence to the Algiers Accords, see *Dames & Moore v. Regan*, 453 U.S. 654, 660, 673 (1981), strongly counsel that this Court give full effect to TRIA's "at issue" provision.

II. Only if this Court concludes that respondent has not relinquished his right to attach the Cubic judgment, need it address its status as a "blocked asset," under TRIA section 201(d)(2)(A); App. 12a. The Cubic judgment was neither "seized" nor "frozen," within the limited ambit of the TRIA's definition (cross-referencing the Trading With the Enemy Act and the International Emergency Economic Powers Act), because Iran's interest in the Cubic judgment arose after January 19, 1981, and was thus subject to the

general license of 31 C.F.R. § 535.579(a). The property that respondent has attached here is MOD's contractual remedy against Cubic, as actuated through an ICC award, see J.A.38-39, 45-47, and not the military equipment that was the subject of the underlying contracts. Iran's interest in the Cubic judgment could only have arisen in 1998 when the federal court confirmed the ICC award. See J.A.68. The court of appeals' ruling that the Cubic judgment nonetheless remains blocked as "military goods," Pet. App. 19, is simply unsupported by the relevant statutory and regulatory authority. Any doubts as to TRIA's definition of "blocked assets," should be resolved in favor of a construction consistent with the United States' obligations under the Algiers Accords. See App. 15a (General Decl., ¶A), 18a (¶9).

Insofar as the Secretary of State's October 2007 designation of the Ministry of Defense and Armed Forces Logistics alters the Cubic judgment's status as a "blocked asset" is even dispositive for this petition (assuming that Elahi has not otherwise relinquished his right to attach), such has never been raised or resolved below. Substantial fact issues as to the effect of the designation would need to be resolved by the district court. This Court has never, in the first instance, ruled on such intervening developments. See *Lawrence v. Chater*, 516 U.S. 163, 165-67, 174-75 (1996) (per curiam); *Youakim v. Miller*, 425 U.S. 231, 234-37 (1976) (per curiam).

ARGUMENT

I. ELAHI RELINQUISHED ANY RIGHT TO ATTACH THE CUBIC JUDGMENT AS IT IS "PROPERTY AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE AN INTERNATIONAL TRIBUNAL."

The threshold issue for this Court's determination is whether respondent has relinquished any right to attach or execute against the Cubic judgment under the Terrorism Risk Insurance Act (TRIA) and Victims of Trafficking and Violence Protection Act (VTVPA). If he has, there is obviously no need for the Court to consider whether the Cubic judgment even qualifies as a "blocked asset," within the meaning of the statute. See *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977).

The crucial statutory language, as derived from the TRIA's amendment of the VTVPA is:

> [a]ny person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall . . . be required to relinquish rights. . . with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

TRIA § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 11a. It is beyond cavil that respondent has, under the

VTVPA and TRIA, received a disbursement of U.S. treasury funds reflecting at least a portion of the compensatory damages awarded by the U.S. district court by way of default judgment against another ministry of the Islamic Republic of Iran. See 124 F. Supp.2d at 99-100, 115. Indeed, respondent executed the relinquishment prescribed by regulation under TRIA section 201(c). See App. 11-12a; 68 Fed. Reg. 8077, 8079-80 (Feb. 19, 2003). And, rather obviously, Elahi's garnishment and attachment is an "enforcement against property," also within the scope of TRIA section 201(c). See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

Nor can it seriously be suggested that the Iran-United States Claims Tribunal, established under the authority of the January 1981 Algiers Accords, is not an "international tribunal," within the meaning of the TRIA. See Algiers Accords, Claims Settlement Declaration (CSD), art. II(1); App. 20a ("An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established. . . ."). See also *Dames & Moore v. Regan*, 453 U.S. 654, 687 (1981); *United States v. Sperry Corp.*, 493 U.S. 52, 55-56 (1989).

The only real question for resolution here, then, is whether the Cubic judgment, which respondent has attached in enforcement of its default judgment, is "at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA § 201(c); App. 11a. Petitioner submits that the TRIA's "at issue" relinquishment provision should be broadly construed, but, in any

event and under any coherent standard of construction, the Cubic judgment is "at issue" in *Case B61* before the Claims Tribunal.

A. TRIA's "At Issue" Caveat Should Be Broadly Construed.

Several textual and structural clues lead ineluctably to the conclusion that Congress intended a broad construction for the TRIA's "at issue" relinquishment provision. See *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831, 840 (2008) ("we are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none.").

1. a. Read together, VTVPA and TRIA fashion a comprehensive statutory scheme in which affected individuals holding judgments against certain foreign sovereigns (and otherwise unable to enforce those judgments), could, instead, receive payments from the public fisc. VTVPA §§ 2002(a)(1), 2002(b)(2), 2002(e); App. 1-2a, 4-5(a); see also *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434 ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism. . . ."). Congress was understandably concerned that such parties should not be suffered to receive excess payments, or even worse, through further attempts at enforcement, actually embarrass United States' foreign policy objectives, whether the prosecution of subrogation claims against those foreign sovereigns, VTVPA § 2002(c); App. 4-5a, or the ultimate normalization of relations with those nations. See id.

§ 2002(d); App. 5a.[6]

Additionally, Congress wished to ensure that affected individuals who received public moneys in satisfaction of judgments, and who executed the necessary relinquishments, would not later seek to attach assets situated in the United States which were the subject of litigation before any international judicial or arbitral forum. Without such a caveat, private litigants could, through their unrestrained attempts at execution, potentially place the United States in an untenable "whip-saw" by distraining assets that had already been awarded to another nation in international proceedings. Congress was justly concerned that the United States not pay twice for the same judgment: first through the allocation of public moneys (derived through the vesting of foreign assets, diplomatic or consular rental income, or foreign military sales proceeds, see VTVPA § 2002(b)(2); App. 3-4a), and again by way of indemnification to a foreign sovereign the property of which had been wrongly executed against.

Indeed, were respondent to prevail here it would mean that the United States would, in effect, be completely satisfying Elahi's judgment against Iran, without any right of recourse via subrogation, a situation that Congress, in legislating the VTVPA, was expressly intent to avoid. See VTVPA §§ 2002(c) & (d);

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[6] Petitioner's discussion of Congress's intent in legislating VTVPA and TRIA, for purposes of the present brief, is without prejudice to its objections to these enactments.

App. 4-5a. It is no wonder that Congress sought to prevent this result – complicating the defense of international litigation in which the U.S. is a party, and deflecting the payment of judgments against foreign sovereigns onto the U.S. taxpayer – by legislating the VTVPA and TRIA's relinquishment of recourse against certain classes of foreign property and assets in the United States.

b. It is significant that Congress sought to broaden the relinquishment proviso by placing it in a disjunctive form, covering two different aspects of proceedings before an international tribunal: "property that is at issue in claims against the United States before an international tribunal *or* that is the subject of awards by such tribunal. TRIA § 201(c); App. 11a (emphasis added). In other words, property can be "at issue" in a "claim[] against the United States before an international tribunal," or the status of that property can be "the subject of [an] award" by that forum. Id.

Congress clearly contemplated that proceedings before international forums can be protracted. It sought to extend the relinquishment caveat not only to recognizing the legal effect of the judgments, sentences or awards of such tribunals, but also to practically preserving the jurisdiction of such bodies by prohibiting execution against property that was "at issue" in a "claim against the United States." Id. By including the "at issue" proviso, Congress was ensuring that a private litigant's attempt at enforcement against a foreign sovereign's property in the United States would not result later in the United States being unable to comply with the ruling of a tribunal, or, even worse,

being obliged to indemnify the other country for a breach of an underlying treaty obligation in respect to that asset.

c. Congress also made clear, in legislating VTVPA (in language unaffected by TRIA's amendments), that a judgment creditor's waiver of rights under the proviso was expansive: "in the case of payment [either of 110% or 100% of compensatory damages, such affected individual] relinquishes *all* rights to execute against or attach property that is at issue in claims against the United States before an international tribunal. . . ." VTVPA § 2002(a)(2)(D); App. 3a (emphasis added). And while no meta-linguistic implications should necessarily be ascribed to Congress's use of such words as "all" or "any," see *Ali*, 128 S.Ct. at 836 n.4, 844-47 (Kennedy, J., dissenting), 849-50 (Breyer, J., dissenting), the structure and context of VTVPA and TRIA's relinquishment caveat is strongly suggestive that Congress sought a broad ambit for the proviso.[7]

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[7] TRIA's sparse legislative history and textual commands for construction do not contradict this conclusion. TRIA section 201(c)'s statement that "[n]othing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies, . . ." App. 11a, obviously does not speak to the modalities for relinquishing the right to enforce. That "the intent of the Conferees that Section 201 establish that such judgments [in favor of affected individuals] be enforced," *Terrorism Risk Insurance Act of 2002*, H. CONF. REP. 107-779, at 27 (2002), 2002 U.S.C.C.A.N. 1430, 1434, likewise is irrelevant to the matters now before this Court.

2. Congress has employed the "at issue" or "in issue" formulation, or variants thereof, in previous enactments, and these have been given uniformly wide scope. See, e.g., 2 U.S.C. § 1411; 9 U.S.C. § 4; 5 U.S.C. § 7117(b)(1); 18 U.S.C. § 3600(a)(7); 26 U.S.C. § 6330(e)(2) (no suspension of tax levy "while an appeal is pending if the underlying tax liability is not at issue in the appeal"); 28 U.S.C. § 1605(a)(3) (exception to foreign sovereign immunity where "rights in property taken in violation of international law are in issue").

For example, in Fed. R. Civ. P. 42(a), the predicate for the exercise of a court's discretion to "join for hearing or trial any or all matters at issue in the actions" is that the actions "involve a common question of law or fact." Fed. R. Civ. P. 42(a)(1). Indeed, this Court has effectively equated these two elements: a matter is "at issue" in a proceeding when it involves "a common question of law or fact." See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 83-84 & n.8 (2006); *Diamond v. Charles*, 476 U.S. 54, 77 (1986) (O'Connor, J., concurring) ("an action sharing common questions of law or fact with those at issue in this litigation").

This approach is consistent with the expanding definition of "at issue," reflecting its use as a legal term-of-art covering a broad ambit of disputes between contesting parties in litigation.[8] Congress is presumed

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[8] The most recent edition of BLACK'S LAW DICTIONARY reflects this trend, defining "at issue" in rather generic terms as "taking opposite sides," "under dispute" or "in question." BLACK'S LAW DICTIONARY (8th ed. 2004); see also

to legislate in light of the plain-meaning of the terms it employs, and this is especially so in the foreign relations context. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352, 2356 (2007) (citing BLACK'S LAW DICTIONARY definition of "lien" contemporaneous with the adoption of the Foreign Sovereign Immunities Act).

Indeed, just two Terms ago, in *Permanent Mission*, this Court had the opportunity to construe the FSIA's exception to immunity in cases where "rights in immovable property situated in the United States are *in issue*." 28 U.S.C. § 1605(a)(4) (emphasis added). This Court adopted a broadening construction of section 1605(a)(4):

> Contrary to petitioners' position, § 1605(a)(4) does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession. Neither does it specifically exclude cases in which the validity of a lien is at issue. Rather, the exception focuses more broadly on "rights in" property.

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining "at issue" as "[i]n question; in dispute"). Previous editions retained the sense, derived from Roman law's principle of joinder of issue (*litis contestatio*) that "at issue" meant when "the parties come to a point in the pleadings [where it is] affirmed on one side and denied on the other. . . ." BLACK'S LAW DICTIONARY 114 (5th ed. 1979); see id. at 842 ("the process of coming to an issue; the attainment of an issue; the issue itself.").

> Accordingly, we must determine whether an action seeking a declaration of the validity of a tax lien places "rights in immovable property. . . in issue."

127 S.Ct. at 2356 (quoting 28 U.S.C. § 1605(a)(4)). A majority of this Court concluded that actions where tax liens were "in issue" were covered by the FSIA's exception to immunity. See id. ("A tax lien thus inhibits one of the quintessential rights of property ownership – the right to convey. It is therefore plain that a suit to establish the validity of a lien implicates 'rights in immovable property'."). In closing, the Court in *Permanent Mission* noted that "[t]he statutory text and the acknowledged purposes of the FSIA make it clear that a suit to establish the validity of a tax lien places 'rights in immovable property. . . in issue'" in the case. Id. at 2358. Given the nearly identical statutory language, the Court should adopt the same broadening construction here.

B. Since Funds Due to Iran from the Cubic ICC Award Would be Recouped From, or Set-Off Against, any Award Against the United States in *Case B61*, the Cubic Judgment is "At Issue" Before the Tribunal.

The United States clearly stands to benefit in proceedings before the Claims Tribunal if the Cubic judgment is released from Elahi's lien and is remitted to MOD. Iran initiated *Case B61* at the Tribunal as the claimant. See App. 30a; see also App. 26a (¶4). *Case B61* is thus a "claim against the United States before an international tribunal," within the meaning of TRIA

section 201(c); App. 11a.

Both the United States and Iran have affirmed, in official representations and filings before the Tribunal, that if MOD receives the proceeds from the Cubic ICC Award, such funds will be deducted, by way of recoupment or set-off, from any award that Iran may receive from the United States in *Case B61*. Iran's Agent indicated, in Statement No. 16 filed in *Case B61*, see Decl. of Mina Almassi, Case No. 98-1165, Dckt.85, ¶7 & Ex. 2 (filed Sept. 13, 2002); J.A.70, 71, that "Cubic has not, thus far, paid Iran the [ICC] awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought" against the United States in *Case B61*. J.A.76 n.2.[9] In response, see Rebuttal of the United States to Claimant's Reply, *Case B61*, Statement No. 16 (Cubic Corporation), at 24 & n.32 (Sept. 1, 2003); App. 30a, the U.S. Agent noted that

> Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the

[9] The court of appeals observation notwithstanding, see Pet. App. 12-13, this filing by Iran was not a "concession" that the ICC award was not "at issue" in *Case B61*. Rather, it was an acknowledgment of the Tribunal's analytically distinct heads of jurisdiction, and the effect of the Tribunal's earlier ruling in *Case B66*.

> ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labba[f], Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999).

App. 31a & n.32. A loss or victory in the enforcement action between Cubic and MOD would enlarge or diminish, respectively, Iran's claim against the United States at the Claims Tribunal in *Case B61*.

That the Cubic judgment is "at issue" in *Case B61* is further supported by the jurisdictional structure of the Claims Tribunal, as confirmed in its previous rulings, which should be accorded a "respectful consideration" by this Court and consonant with the United States' obligations under the Algiers Accords. Additionally, the international law of recoupments and set-offs in litigation before international tribunals confirms this result. Finally, such a holding is consistent with this Court's precedents vindicating the foreign policy interests of the United States in managing litigation before international forums.

1. The Ninth Circuit's holding that because *Case B61* did not involve Cubic as a party, the Cubic judgment could not be "at issue" before the Tribunal, see Pet. App. 12-14, profoundly misapprehends the Tribunal's jurisdiction under the Algiers Accords and ignores the Tribunal's own rulings as to the interplay of its jurisdiction and the Cubic matter. As already noted, see *supra* at 3-6, the Tribunal has jurisdiction under the Algiers Accords CSD over certain claims of

private parties against Iran or the U.S. (as the case may be). See CSD, art. II(1); App. 20a. But the Tribunal has ruled that it has no jurisdiction over the claims of Iran against U.S. nationals (or the U.S. against Iranian nationals), except by way of counterclaim. See *Case A2*, DEC1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. C.T.R. 101 (1982); see also George H. Aldrich, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 488-89 (1996); Charles N. Brower & Jason D. Brueschke, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 96-98 (1998); Moshen Mohebi, THE INTERNATIONAL LAW CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 82-85 (1999).

The Tribunal consequently dismissed MOD's direct claim against Cubic in *Case B66* for lack of jurisdiction, see App. 28a (¶11), and, indeed, that is the reason petitioner later sought recourse before the International Chamber of Commerce. The Tribunal also dismissed MOD's direct claim against the United States because of a lack of contractual privity between Cubic and the U.S. government, another jurisdictional requisite for official claims. See App. 27-28a (¶9). Nevertheless, the Tribunal held in its award in *Case B66* that Iran's claim against the United States for breach of the Algiers Accords' obligation to ensure the "mobility and free transfer of Iranian assets within [U.S.] jurisdiction," Algiers Accords, General Decl., Principle A, App. 15a, *was* within the Tribunal's jurisdiction and *was* actually being litigated by Iran in *Case B61*. See App. 26-27a (¶4), 28a (¶10) ("insofar as the claim in Case No. B61 raised issues concerning the interpretation or performance of Contract No. 134 [the Cubic contracts] pursuant to the General Declaration.

. . . The Tribunal's dismissal of the claim against the United States in the present Case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61."); see also *Islamic Republic of Iran v. United States*, Partial AWD 529-A15-FT (May 6, 1992), 28 Iran-U.S. C.T.R. 112 (1992) (holding that Iran's claims for U.S. breach of Algiers Accords in respect to non-military equipment was within the Tribunal's jurisdiction and granting partial relief to Iran). See ALDRICH, *supra*, at 505-10; BROWER, *supra*, at 278-80, 474-76.

a. The Claims Tribunal has thus held that the United States' obligations under the Algiers Accords in regard to the Cubic judgment are "at issue" and now pending before the Tribunal. The court should construe the "at issue" caveat consistent with the Claims Tribunal's own governing precedents. In interpreting U.S. international obligations, this Court gives "respectful consideration to the interpretation of an international [agreement] rendered by an international [tribunal] with jurisdiction to interpret [the agreement]." *Medellín v. Texas*, 128 S.Ct. 1346, 1361 n.9 (2008) (quoting *Breard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam)).

Although petitioner is mindful that such a consideration cannot trump the plain meaning of a treaty, see *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) ("Even according such ['respectful consideration'], the ICJ's interpretation cannot overcome the plain import of Article 36" of the Vienna Convention on Consular Relations), here the "plain import" of the TRIA's relinquishment provision (in light

of the jurisdictional provisions of the Algiers Accords CSD) is in accord with the Claims Tribunal's own interpretation. Whether or not this Court would care to support a particularly robust form of the "respectful consideration" canon for all treaty interpretation cases, see *Sanchez-Llamas*, 548 U.S. at 365, 382-86 (Breyer, J., joined by Stevens & Souter, JJ., dissenting), is really of no moment here. It is manifest that *Case B61* is within the Tribunal's jurisdiction, and that the Tribunal itself (at the instance of both the U.S. and Iran) has acknowledged that United States' obligations under the Algiers Accords are inextricably linked to the ultimate disposition of the Cubic judgment.

b. There is an even greater point of principle at stake here than according a decent respect to the Tribunal's decisions concerning the effect of its jurisdiction on the Cubic judgment. As a matter of statutory construction (as distinct from the exercise of interpreting the Algiers Accords), the TRIA's "at issue" proviso should be read consistent with the United States' treaty obligations.

From this Court's earliest years, a consistent canon of construction has been that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." *Murray v. The CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804). This Court has thus "indulged" the "presumption" that Congress intends its enactments to be consistent with the United States' treaty obligations. *Chew Heong v. United States*, 112 U.S. 536, 550 (1884); see also *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (construing a statute "in the light of the purpose

of the government to act within the limitation of the principles of international law" because "it should not be assumed that Congress proposed to violate the obligations of the country to other nations."). *The CHARMING BETSY* canon has been extended by this Court, see *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982), to ensure consistency between a statute and a sole executive agreement (such as the Algiers Accords; see *Dames & Moore*, 453 U.S. at 660, 679-86) concluded under the authority of the president. See also *Puget Sound Agricultural Co.*, 13 U.S. Op. Att'y Gen. 503 (1871) ("If this proviso [in an act of Congress requiring a deduction from an international arbitral award in favor of Great Britain] is to cause the payment of a less sum than the amount awarded, it will produce a breach of the treaty, and make th[is] country responsible to the foreign power for such a breach. A statute which may have such consequences should receive the strictest construction allowable under established rules.").

The CHARMING BETSY canon has been reaffirmed in recent opinions of this Court. See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."). Whether viewed as a presumption as to congressional intent, a rule against inadvertent repeal, or a vindication of comity, the canon's principle objective is to ensure the integrity of United States' obligations under international agreements.

Were TRIA and VTVPA's "at issue" caveat to be

construed at variance with the Algiers Accords' jurisdictional provisions in the CSD, as reflected in the court of appeals' ruling, extraordinary mischief could ensue as to both the competence of the Tribunal to render its awards in pending cases and the enforcement of those rulings. See General Decl. ¶17, App. 19a; CSD art. IV(3), App. 22a. Such a result could easily be avoided by giving the "at issue" caveat a sensibly broad ambit.

2. Based on the representations of both Iran and the United States, any award that Iran would receive from the Tribunal (based on Iran's claim that the U.S. breached its Algiers Accords obligation to allow the free transfer of Iranian assets in the United States) would have to be recouped or set-off by any amounts that Iran would have received from Cubic, via the enforcement of the ICC's award in MOD's favor. See App. 30-32a; J.A.76 n.2. The TRIA's "at issue" caveat should thus be construed consistent with international law's definition of a dispute as encompassing counterclaims, set-offs, and recoupments.

Insofar as the accepted definition of a dispute in international jurisprudence is "a disagreement on a point of law or fact, a conflict of legal views or interests between the parties," *East Timor* (Port. v. Austrl.), 1995 I.C.J. 90, 99 (June 30) (¶22) (collecting earlier ICJ and PCIJ judgments), it is no surprise that international tribunals have recognized set-offs of claims as against sovereign parties in litigation. See, e.g., *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herz. v. Serb.), 1997 I.C.J. 243, 282-

83 (Dec. 17) (Order on Counterclaims) (sep. op. of Lauterpacht, J.) (citing *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955)).[10] Allowance of set-offs has been a consistent part of international claims practice for nearly two centuries. See 1 Marjorie M. Whiteman, DAMAGES IN INTERNATIONAL LAW 248-74 (1937); see also *Norwegian Shipowners' Claims* (Nor. v. U.S.), Hague Ct. Rep. (Scott 2d ser.) 39, 78-80 (Perm. Ct. Arb. 1922) (Page Bros. claim) (allowing a set-off on facts similar to those here).

This Court has consistently ruled, both as a matter of federal common law and (later) in construing the FSIA, that a foreign sovereign who initiates litigation in this country may expect to be subject to counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state," 28 U.S.C. § 1607(b), or a set-off for amounts due. See *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 613, 631 (1983); *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (act of state doctrine no bar to consideration of counterclaims or set-offs); *National City Bank*, 348 U.S. at 365 ("the ultimate thrust of the

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[10] International tribunals have recognized, consistent with this Court's own formulation, that while a counterclaim seeks affirmative relief, a set-off or recoupment reduces the recovery to a prevailing party. See *National City Bank*, 348 U.S. at 357-58 & n.2. A recoupment is a "[r]eduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction." BLACK'S LAW DICTIONARY (8th ed. 2004).

consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation."). As a matter of symmetry, a sovereign is entitled (in either inter-State disputes or those involving private claimants) to set-off amounts owed to it arising from the same transactions or occurrences.

Set-offs of claims have, even more pertinently, been prominent in matters before the Claims Tribunal. Under the Algiers Accords, only awards against Iran would be eligible for automatic payment from the Security Account constituted from Iranian funds originally frozen by the United States. See General Decl. ¶7; App. 16-17a. In cases where Iran won awards before the Tribunal from American private claimants (by way of counterclaim or set-off), Iran has been obliged to seek enforcement of those awards in U.S. courts under the New York Convention. See, e.g., *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992); *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992), cert. denied, 494 U.S. 1016 (1990); see also MOHEBI, *supra*, at 266-72.

In the Tribunal's past awards, set-offs have been permitted, just as they would be with respect to Iran's recovery of the Cubic judgment. See Iran-U.S. Cl. Trib. R. 18(1), 19(3) ("the respondent may make a counterclaim or rely on a claim for the purpose of a set-off, if such counterclaim or set-off is allowed under the Claims Settlement Declaration."), 19(4), available at http://www.iusct.org/index-english.html; *Islamic Republic of Iran v. United States*, ITL AWD 83-B1-FT,

¶¶76-142 (Sept. 9, 2004), Westlaw Iran Award ITL 83-B1-FT; *Computer Sciences Corp. v. Islamic Republic of Iran*, AWD 221-65-1, at 51-53 (Apr. 16, 1986), 10 Iran-U.S. C.T.R. 269, 309 (1986) ("claims for set-off are generally governed by the same standards as counterclaims. The concept of set-off necessarily presupposes the existence of a claim that can be used for such set-off."). The Tribunal has allowed set-offs of amounts derived from collateral proceedings, even absent privity of contract with the sovereign seeking an adjustment, and even so far as with respect to different causes of action. See *Futura Trading Inc. v. Islamic Republic of Iran*, AWD 263-324-3, ¶62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986). There seems no doubt, therefore, that since funds due to Iran from the Cubic ICC award would be necessarily deducted (by way of set-off or recoupment) from any judgment that Iran receives from the United States in *Case B61*, the Cubic judgment is "at issue" before the Tribunal.

3. This Court has recognized the imperative public importance of maintaining U.S. adherence to the Algiers Accords. See *Dames & Moore*, 453 U.S. at 660 (1981) (explaining that certiorari before judgment – granted under Supreme Court Rule 11 only when the matter is of "imperative public importance" – was necessary because inaction would allow Iran to "consider the United States to be in breach of the Executive Agreement."). "[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries." *Dames & Moore*, 453 U.S. at 679. It is well-settled that the "the congressional purpose in authorizing blocking orders is 'to put control of foreign assets in the hands of

the President. . . .'" *Id*. at 673 (quoting *Propper v. Clark*, 337 U.S. 472, 493 (1949)). The goal of a "unified national policy in the administration of the [Trading with the Enemy] Act," *Propper*, 337 U.S. at 493, requires Executive management of the complex diplomatic efforts relating to disputed assets because those assets "serve as a 'bargaining chip' to be used by the President. . . ." *Dames & Moore*, 453 U.S. at 673. As in *Dames & Moore*, "it is difficult to accept [respondent's] argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this 'bargaining chip' through attachments, garnishments, or similar encumbrances on property." Id. Congressional passage of the VTVPA's and TRIA's relinquishment provision was animated by precisely the same concerns. See VTVPA §§ 2002(c) & (d); App. 4-5a.

The foreign policy interests of the United States in managing cases before international tribunals warrant judicial deference to the interpretations of the Executive Branch. Article II of the Constitution provides the President with the "'vast share of responsibility for the conduct of our foreign relations'." *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952)) (Frankfurter, J., concurring)). Accordingly, the President has "plainly compelling" "interests" in ensuring the reciprocal observance of international agreements such as the Algiers Accords, protecting relations with Iran, and demonstrating commitment to the rule of international

law. See *Medellín*, 128 S. Ct. at 1367 (2008).[11]

Because presidential power to manage and resolve claims is "integrally connected with normalizing United States' relations with a foreign state," *Dames & Moore*, 453 U.S. at 683 (citing *United States v. Pink*, 315 U.S. 203, 229-30 (1942)),[12] this

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[11] Although this Court in *Medellín* held that, despite these interests, the President lacks authority to establish binding rules of decision that preempt contrary state law, see 128 S. Ct. at 1368-71, the Court expressly acknowledged that the President has power to comply with international agreements through other means. See id. at 1371. In this case, the President undoubtedly had constitutional authority to comply with the Algiers Accords by unblocking Iranian assets and undoubtedly maintains constitutional authority to represent the U.S. before the Claims Tribunal.

[12] In *United States v. Pink*, the Court stated:

> Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." Effectiveness in handling the delicate problems of foreign relations requires no less. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised.

315 U.S. at 229-30 (internal citations omitted). See also *Dames & Moore*, 453 U.S. at 683 ("The continued mutual

Court should defer to the Executive's interpretation of the relevant statutory language of TRIA and VTVPA. See, e.g., *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"). This Court has "not only recognized the limits of [its] own capacity to 'determin[e] precisely when foreign nations will be offended by particular acts,' but consistently acknowledged that the 'nuances' of 'the foreign policy of the United States are much more the province of the Executive Branch and Congress than of this Court'." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (citing *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983), and *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327 (1994)). While deference to the foreign policy expertise of the Executive is not unlimited, it is particularly appropriate here because Congress has taken no action rejecting either the Executive Branch's statutory interpretation of TRIA's "at issue" caveat or its assertions that respondent's position will result in the embarrassment of U.S. foreign policy and its litigation position at the Claims Tribunal.

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amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations.") (quoting *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (Learned Hand, J.)).

II. THE CUBIC JUDGMENT IS NOT A "BLOCKED ASSET" UNDER TRIA.

Only if this Court concludes that respondent has not relinquished his right to attach, need it address the status of the Cubic judgment as a "blocked asset" under TRIA section 201(d)(2)(A), which defines that term for property subject to attachment or execution as: "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA § 201(d)(2)(A); App. 12a.

At the time the court of appeals rendered the decision for which review was sought here, the Cubic judgment was not a "blocked asset," and its decision to the contrary was error. To the extent that the October 25, 2007, designation by the Secretary of State of the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as having engaged in activities relating to the proliferation of weapons of mass destruction, 72 Fed. Reg. 71,991 (Oct. 25, 2007), has any bearing on the status of the Cubic judgment as a "blocked asset," such an issue is not properly before the Court at this time.

A. The Cubic Judgment Was Neither "Seized" nor "Frozen" at the Time of the Decision Under Review Here.

The Ninth Circuit ruled, Pet. App. 15-20, that the Cubic judgment was a "blocked asset" within the meaning of TRIA sections 201(a) and 201(d)(2)(A). The same panel reached precisely the opposite conclusion in its earlier ruling, see 385 F.3d at 1216, Pet. App. 55; id.

at 1224, Pet. App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)), when it appeared that such would support a holding *against* Iran's immunity from attachment under the FSIA. When this Court vacated the panel's earlier holding on FSIA grounds, the panel reversed course and held that the Cubic judgment is a "blocked asset" under the TRIA.

The Ninth Circuit's earlier holding was correct, based on a reading of the statute and the facts of this case at the time of decision. As MOD's interest in the Cubic judgment could have only arisen at the time of the district court's 1998 confirmation of the ICC award, the Cubic judgment was neither "seized" nor "frozen," under then-existing regulations. The ostensibly military character of the asset does not change this result. Finally, applying a narrow construction to the "blocked asset" language of TRIA is consistent with the Algiers Accords and the United States' other treaty obligations to Iran, and any holding that the Cubic judgment is "blocked" would place the U.S. in default of significant international obligations, carrying heavy consequences for the U.S. litigation position at the Claims Tribunal.

1. The Ninth Circuit's holding turns on the technical language of section 201 of TRIA. By its own terms, TRIA applies only to the "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party). . . ." TRIA, § 201(a); App. 6a. The phrase "blocked asset," is, however, given a very specific definition under TRIA, including "any asset seized or frozen by the United States under. . . sections 202 and 203 of the

International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA, § 201(d)(2)(A); App. 12a. Blocked assets also include "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b))." Id.

a. Contrary to the Ninth Circuit's most recent holding, the Cubic judgment is "regulated," not "blocked," within the meaning of TRIA section 201(a) because it has neither been "seized" nor "frozen" by the United States. See TRIA, § 201(d)(2)(A); App. 12a. The Cubic judgment is subject to the general license of 31 C.F.R.§ 535.579(a), which provides:

> Transactions involving property in which Iran or an Iranian entity has an interest are authorized where: (1) The property comes within the jurisdiction of the United States or into the control or possession of any person subject to the jurisdiction of the United States after January 19, 1981, or (2) The interest in the property of Iran or an Iranian entity (e.g. exports consigned to Iran or an Iranian entity) arises after January 19, 1981.

Id.; see also *Regan v. Wald*, 468 U.S. 222, 234 (1984) (discussing general licenses with Cuba); *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) ("assets blocked pursuant to Executive Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979), and its accompanying regulations, see 31 C.F.R. Part 535, that are also subject to the general license of 31 C.F.R. § 535.579, are not blocked assets under the TRIA and therefore

are not subject to attachment under that statute.”). Moreover, as a judgment, the proceeds of MOD’s arbitration award against Cubic that has now been confirmed, are treated as a distinct form of property. See 31 C.F.R 535.311. Indeed, the Ninth Circuit said as much in its earlier ruling. See Pet. App. 53 (“The combination of these regulations makes clear that the Cubic judgment is properly regulated by the [Iranian Assets Control Regulations]. . . .”).

In order to avoid this result, the Ninth Circuit held, see Pet. App. 20, that Iran’s interest in the property arose in October 1977, when Iran executed the underlying contracts with Cubic, or, at the latest, in October 1978, when Iran made a payment on the contracts. This ruling flatly contradicts the panel’s prior opinion. See 385 F.3d at 1216, Pet. App. 55 (“Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree.”); id. at 1224, Pet. App. 76 (“MOD’s interest in the Cubic judgment ‘arose’ on December 7, 1998, when the district court confirmed the ICC award against Cubic. *MOD v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998).”).

The property being attached here is *not* the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD’s judgment against Cubic, which confirmed an arbitration award for breach of contract. Iran never sought specific performance in its ICC arbitration with Cubic. See J.A.45 (¶11.28); see also ICC Award ¶6.1

(summarizing Iran's submissions). The ICC arbitration panel acknowledged in its award that the ACMR that MOD had bought and paid for had already been re-configured and re-sold to Canada. J.A.38-39 (¶2.3), 45-47. Indeed, the ICC panel took care to calculate the salvage value of the ACMR as an element of MOD's recovery. J.A.47 (¶18.1). This is consistent with the position of Iran before the Claims Tribunal in *Case B61* that "the market price of the equipment [the ACMR] constitut[es] Iran's remedy in the main. . . ." J.A.73 (¶3). See also U.S. Pet. Amicus Br. 11-13.

MOD could not have had any interest in the Cubic judgment, until such time as a U.S. court had recognized as enforceable an international arbitral award granting it a right of action to collect the award. See J.A.68. Any attempt to "back-date" Iran's potential interest in the Cubic judgment, to a time prior to January 1981, should be unavailing. To characterize the Cubic judgment as having actually arisen in 1977 or 1978 ignores that IEEPA's statutory and regulatory scheme requires (at a minimum) some sort of possessory interest by a sanctioned entity in the relevant property. See *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003) ("[t]o seize or freeze assets [under IEEPA] transfers possessory interest in the property."). No such transfer could have occurred here in relation to MOD's interest in the ACMR or the Cubic judgment. Cubic has never made any payment to MOD, in compliance with the arbitral award. The Ninth Circuit has thus given an extraordinarily broad ambit to the definition of "blocked assets" under the TRIA, despite that statute's narrow definition, and a number of countervailing

considerations.

b. If this Court were to find that petitioner's interest in the Cubic judgment arose after January 19, 1981 (the date of the Algiers Accords), that would be the end of the matter. The Cubic judgment was subject to the general license of 31 C.F.R.§ 535.579(a), and so was neither "seized" nor "frozen," and cannot definitionally be a "blocked asset" under the TRIA.

But even if the Ninth Circuit's factual supposition is true (that Iran's interest in the Cubic judgment somehow arose prior to January 1981), the Algiers Accords and presidential determinations thereafter, had the effect of unblocking most Iranian assets in this country. See *Rubin v. Islamic Republic of Iran,* 2007 WL 1169701, at *4 (N.D. Ill. Apr. 17, 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 67 (E.D.N.Y. 2004). Assets blocked by Executive Order [EO] 12170, were later unblocked by EOs 12281, 12282, and 1283. See, e.g., 31 C.F.R.§ 535.215 ("all persons subject to the jurisdiction of the United States in possession or control of properties. . . are licensed, authorized, directed and compelled to transfer such properties held on January 18, 1981 as directed after that day by the Government of Iran, acting through its authorized agent."). See also U.S. Pet. Amicus Br. 13-14.

In other words, even if Cubic had been deemed to have been in possession of any Iranian interest in the ACMR, as of the date of the Algiers Accords, such could have been transferred to Iran. Indeed, such was the United States' obligation under the Algiers Accords General Declaration. See App. 15a (¶A), 18a (¶9). If

the Ninth Circuit's decision to the contrary is left undisturbed, it would mean that all interests which Iran had in the United States as of November 14, 1979, have remained blocked, placing the United States in manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal. See App. 19a (¶17).

c. That leaves the court of appeals' suggestion, as contained in its amended opinion after denial of rehearing, Pet. App. 19, that Iran's interest in the ACMR remained blocked even in the wake of the Algiers Accords. Once again, this presumes (as it must) that the relevant "property" or "blocked asset" here, TRIA § 201(a); App. 6a, is Iran's interest in the ACMR, and not the enforcement of the ICC award granting contractual remedies to MOD. In any event, the Ninth Circuit's reliance on a supposed "military goods" exception, Pet. App. 19, to the United States' obligations under the Algiers Accords is not supported by the relevant statutory and regulatory authority.[13]

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[13] Petitioner has been entirely consistent concerning the legal character of the Cubic judgment. MOD did previously argue that it qualified as a military asset under the FSIA, see 28 U.S.C. § 1611(b)(2) ("property is, or is intended to be, used in connection with a military activity and. . . is of a military character. . . ."). That is an entirely different inquiry from whether MOD had a possessory interest in the judgment such as to trigger a blocking order prior to January 19, 1981, or whether it had been otherwise "froz[en] or "seiz[ed]" within the meaning of the TRIA. In any event, when MOD indicated in prior proceedings before the Ninth Circuit that "[t]he property at issue here is a

See also U.S. Pet. Amicus Br. 13-15.

As a matter of straightforward textual analysis, the Arms Export Control Act (AECA), 22 U.S.C. § 2751 et seq., relied upon below, cannot be relevant to the "blocked asset" analysis under TRIA. The reason is that TRIA section 201(d)(2)(A) textually limits its scope to a "seiz[ure]" or "fr[eezing]" under the authority of the Trading with the Enemy Act (TWEA), 50 U.S.C. App. § 5(b), or the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701 & 1702. TRIA neither cites nor cross-references AECA. Even more pertinently, any sanction under AECA would be a "regulation" of the relevant property, and not a "seiz[ure]" or "fr[eezing]" within TRIA's limited ambit.

2. As with the TRIA's "at issue" caveat, the proper construction of the TRIA's definition of "blocked asset" can be resolved by straightforward textual and structural analysis. It is manifest that by virtue of fashioning a purpose-built definition of "blocked asset" in TRIA section 201(d), App. 12a, and limiting the statutory scope of "seiz[ures]" and "fr[eezings]" to those allowed under specified sections of TWEA and IEEPA, Congress intended a narrow ambit to "blocked asset[s]"

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liquidation to a monetary amount of a military asset manufactured by Cubic and owned by MOD," J.A.88, it merely confirms petitioner's contention here that the relevant "property" is the Cubic judgment (reflecting an arbitral award for contractual breach claims) and not the ACMR.

eligible for execution against under TRIA.[14]

But even if there should be any textual doubt on the TRIA's narrow definition of "blocked asset," such should be resolved conformably with the United States' obligations under the Algiers Accords and other international agreements with Iran. As already discussed, the Algiers Accords imposed an obligation on the United States to "ensure the mobility and free transfer of all Iranian assets within its jurisdiction," App. 15a (General Decl., ¶A), and that the "United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979,[15] for the transfer to Iran of all Iranian properties which are located in the United States and abroad. . . ." App. 18a (General Decl., ¶9). Any application of TRIA that would result in a holding that the Cubic judgment is a "blocked asset" and subject to attachment, and thus may not be remitted to Iran, would facially violate

[14] TRIA provided additional exclusions, not otherwise implicated here, of property ineligible for "blocked asset" treatment. See TRIA § 201(d)(2)(B); App. 12-13a.

[15] Part of the applicable U.S. law subsisting prior to November 14, 1979, was the United States' obligations under the Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., Aug. 15, 1955, art. IV(1), T.I.A.S. No. 3853, 8 U.S.T. 899 ("Each High Contracting Party shall. . . refrain from applying unreasonable or discriminatory means that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.").

these treaty commitments. This would especially be the case in conjunction with a predicate finding that Iran's interest in the Cubic judgment arose prior to the Algiers Accords.[16] Such a ruling emanating from this Court would essentially amount to a judicial declaration that the U.S. was in treaty default not only in regards the Cubic judgment, but a whole host of assets "at issue" in *Cases B1, B61* and *A15* before the Claims Tribunal. It is not the place of petitioner to opine further in this filing on the consequences of such an occurrence.

Happily, this Court need never reach such a cross-roads because *The CHARMING BETSY* canon, discussed, *supra*, at 36-37, provides the measure of judicial calculus in assessing a construction of a statute that would result in a "violat[ion of] the law of nations." 6 U.S. (2 Cranch) at 118. Indeed, the grounds for applying *The CHARMING BETSY* canon to TRIA's "blocked asset" language may be even more compelling than for the "at issue" caveat.[17] At stake with the scope

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[16] Insofar as TRIA was enacted four years after the district court's confirmation of the ICC award, the terms of the Algiers Accords and 1955 Treaty of Amity would counsel that TRIA not be applied retroactively to "impair [MOD's] legally acquired rights and interests" in the Cubic judgment. See *Landsgraf v. USI Film Prods.*, 511 U.S. 224, 243-47, 271-72 (1994); *United States v. The Schooner PEGGY*, 5 U.S. (1 Cranch) 103, 110 (1801).

[17] Nor is there any contradiction that petitioner, employing *The CHARMING BETSY* canon, seeks a broadening construction of TRIA's "at issue" caveat, while

of the "blocked asset" definition is a central set of commitments under the Algiers Accords: the United States' duty to release Iranian assets that had been subject to seizure and blockage as of November 14, 1979, and afterwards in response to the crisis in relations between the two nations. To allow private parties, such as respondent, to further distrain those properties, in violation of the clear terms of the Algiers Accords, is a result that should be avoided "if any other possible construction remains." Id.

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submitting that TRIA's definition of "blocked assets" should be narrowly construed. It is the nature of the international obligation affected by the potential reading of the statute that matters, and not the direction of the interpretive ratchet. If a broad reading of a statute would result in a violation of an international obligation, *The CHARMING BETSY* canon would counsel a narrowing corrective, and vice versa.

This is all consistent with the canon of treaty interpretation that U.S. obligations under international agreements should be construed liberally and in good faith. See *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902) (a treaty "should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. . . .[They] should be interpreted in that broad and liberal spirit. . . ."); *Geofroy v. Riggs*, 133 U.S. 258, 271-72 (1890). ("[i]t is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. . . .[W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.").

B. As the Effect of the October 2007 Designation was Never Passed Upon by Lower Courts, it Should Not be Addressed Here in the First Instance.

The October 25, 2007, designation by the Secretary of State, under Executive Order 13382, of the Iranian Ministry of Defense and Armed Forces Logistics (MODAFL) as a suspected proliferator of weapons of mass destruction, 72 Fed. Reg. 71,991 (Oct. 25, 2007), occurred over three months after the issuance of the Ninth Circuit's amended opinion, see Pet. App. 1, and just days prior to the filing of the writ of certiorari. No lower court has had the opportunity to pass on the effect of the Secretary of State's October 2007 designation on the status of the Cubic judgment as a "blocked asset" under TRIA. Substantial fact issues would need to be resolved as to this matter, not the least of which is whether MODAFL is actually the same entity as petitioner.

Because the State Department's October 2007 designation of petitioner post-dates the court of appeals' judgment, prohibiting the lower court's ability to address the issue, and because "ordinarily, this Court does not decide questions not raised or resolved in the lower court," *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (per curiam), this Court should vacate the judgment of the lower court and remand for further consideration in light of the recent designation only if that issue would be dispositive. As this Court has stated, "[t]his Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below

are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927); see also *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam).

While these exceptional circumstances have included intervening events, this Court has addressed the issue only to the extent of vacating the judgment below and remanding the case for further proceedings. *Youakim*, 425 U.S. at 234. In *Youakim*, this Court reasoned that since "[n]either the appellants nor the District Court had the benefit of either of these developments [including the issuance of a state program guidance] when the case was in the lower court. . . it is appropriate to afford them the opportunity to do so, but that the claim should be aired first in the District Court." Id. at 235-36. Thus, this Court vacated the judgment of the lower court and remanded the case to that court for further proceedings in light of the intervening events. Id. at 237; see also *Thorpe v. Housing Authority*, 386 U.S. 670, 673 (1967) (per curiam) (remanding for reconsideration in light of supervening administrative directive issued by federal authorities).

Since *Youakim*, this Court has consistently viewed intervening developments as "exceptional circumstances" to be considered, but only insofar as this Court has exercised its power to grant certiorari, vacate the judgment below, and remand the case (GVR) for reconsideration. See *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam) (Stevens, J., concurring; Rehnquist, C.J., concurring in part and dissenting in part; Scalia & Thomas, JJ., dissenting). In *Lawrence*, a child was denied social security benefits for failure to

meet state procedural requirements on proof of paternity. Id. at 164-65. In his response to the petition for certiorari, the Solicitor General noted a new interpretation of the Social Security Act issued by its administration, and thus recommended that this Court issue a GVR order so that the case may be considered in light of the new statutory interpretation. Id. at 165. This Court observed that it has

> GVR'd in light of a wide range of developments, including [its] own decisions. . . new federal statutes. . . administrative reinterpretations of federal statutes. . . . changed factual circumstances. . . and confessions of error or other positions newly taken by the Solicitor General. . . . [A GVR order is appropriate] [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.

Id. at 165-67. Moreover, when this Court is "uncertain, without undertaking plenary analysis, of the legal impact of a new development, especially. . . one which the lower court has had no opportunity to consider," a GVR order is appropriate. Id. at 174. Therefore, in

light of the intervening statutory interpretation, the *Lawrence* Court granted certiorari, vacated the judgment of the lower court, and remanded the case for further proceedings. Id. at 175.

In accordance with this Court's jurisprudence, and as the Solicitor General correctly recommends, U.S. Pet. Amicus Br. 16-19, if the effect of the State Department's October 2007 designation on the Cubic judgment as a "blocked asset" would somehow "determine the ultimate outcome of [this] litigation," 516 U.S. at 167 – if Elahi is found not to have relinquished his right to attach – the proper disposition of this case would be to vacate the court of appeals' judgment and remand for further proceedings.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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September 5, 2008

Appendix

UNITED STATES PUBLIC LAWS
106th Congress - Second Session
Convening January 24, 2000

PL 106-386 (HR 3244)
October 28, 2000
VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000

An Act To combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, to reauthorize certain Federal programs to prevent violence against women, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 2002. PAYMENT OF CERTAIN ANTI-TERRORISM JUDGMENTS.

(a) PAYMENTS.--

(1) IN GENERAL.--Subject to subsections (b) and (c), the Secretary of the Treasury shall pay each person described in paragraph (2), at the person's election--

(A) 110 percent of compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United

States Code, plus amounts necessary to pay post-judgment interest under section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected on June 2, 2000), subject to final appellate review of that order; or

(B) 100 percent of the compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United States Code, plus amounts necessary to pay post-judgment interest, as provided in section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected June 2, 2000), subject to final appellate review of that order.

Payments under this subsection shall be made promptly upon request.

(2) PERSONS COVERED.--A person described in this paragraph is a person who--

(A)(i) as of July 20, 2000, held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28, United States Code, against Iran or Cuba, or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims; or (ii) filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000;

(B) relinquishes all claims and rights to compensatory damages and amounts awarded as judicial sanctions under such judgments;

(C) in the case of payment under paragraph (1)(A), relinquishes all rights and claims to punitive damages awarded in connection with such claim or claims; and

(D) in the case of payment under paragraph (1)(B), relinquishes all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code.

(b) FUNDING OF AMOUNTS.--

(1) JUDGMENTS AGAINST CUBA.--For purposes of funding the payments under subsection (a) in the case of judgments and sanctions entered against the Government of Cuba or Cuban entities, the President shall vest and liquidate up to and not exceeding the amount of property of the Government of Cuba and sanctioned entities in the United States or any commonwealth, territory, or possession thereof that has been blocked pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, or regulation issued thereunder. For the purposes of paying amounts for judicial sanctions, payment shall be made from funds or

accounts subject to sanctions as of April 18, 2000, or from blocked assets of the Government of Cuba.

(2) JUDGMENTS AGAINST IRAN.--For purposes of funding payments under subsection (a) in the case of judgments against Iran, the Secretary of the Treasury shall make such payments from amounts paid and liquidated from–

(A) rental proceeds accrued on the date of the enactment of this Act from Iranian diplomatic and consular property located in the United States; and

(B) funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund on the date of the enactment of this Act.

(c) SUBROGATION.--Upon payment under subsection (a) with respect to payments in connection with a Foreign Military Sales Program account, the United States shall be fully subrogated, to the extent of the payments, to all rights of the person paid under that subsection against the debtor foreign state. The President shall pursue these subrogated rights as claims or offsets of the United States in appropriate ways, including any negotiation process which precedes the normalization of relations between the foreign state designated as a state sponsor of terrorism and the United States, except that no funds shall be paid to Iran, or released to Iran, from property blocked under the International Emergency Economic Powers Act or

from the Foreign Military Sales Fund, until such subrogated claims have been dealt with to the satisfaction of the United States.

(d) SENSE OF THE CONGRESS.--It is the sense of the Congress that the President should not normalize relations between the United States and Iran until the claims subrogated have been dealt with to the satisfaction of the United States.

(e) REAFFIRMATION OF AUTHORITY.--Congress reaffirms the President's statutory authority to manage and, where appropriate and consistent with the national interest, vest foreign assets located in the United States for the purposes, among other things, of assisting and, where appropriate, making payments to victims of terrorism.

(f) AMENDMENTS.--

(1) Section 1610(f) of title 28, United States Code, is amended–

(A) in paragraphs (2)(A) and (2)(B)(ii), by striking "shall" each place it appears and inserting "should make every effort to"; and

(B) by adding at the end the following new paragraph:

"(3) WAIVER.--The President may waive any provision of paragraph (1) in the interest of national security.".

* * * * *

UNITED STATES PUBLIC LAWS
107th Congress - Second Session
Convening January, 2002

PL 107-297 (HR 3210)
November 26, 2002
TERRORISM RISK INSURANCE ACT OF 2002

An Act To ensure the continued financial capacity of insurers to provide coverage for risks from terrorism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

(a) IN GENERAL.--Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order

to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

(b) PRESIDENTIAL WAIVER.--

(1) IN GENERAL.--Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.--A waiver under this subsection shall not apply to–

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(c) SPECIAL RULE FOR CASES AGAINST IRAN.--Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386;

114 Stat. 1542), as amended by section 686 of Public Law 107-228, is further amended–

(1) in subsection (a)(2)(A)(ii), by striking "July 27, 2000, or January 16, 2002" and inserting "July 27, 2000, any other date before October 28, 2000, or January 16, 2002";

(2) in subsection (b)(2)(B), by inserting after "the date of enactment of this Act" the following: "(less amounts therein as to which the United States has an interest in subrogation pursuant to subsection (c) arising prior to the date of entry of the judgment or judgments to be satisfied in whole or in part hereunder)";

(3) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively; and

(4) by inserting after subsection (c) the following new subsection (d):

"(d) DISTRIBUTION OF ACCOUNT BALANCES AND PROCEEDS INADEQUATE TO SATISFY FULL AMOUNT OF COMPENSATORY AWARDS AGAINST IRAN.--

"(1) PRIOR JUDGMENTS.--

"(A) IN GENERAL.--In the event that the Secretary determines that 90 percent of the amounts available to be paid under subsection (b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of the date of the enactment of this

subsection in cases identified in subsection (a)(2)(A) with respect to Iran, the Secretary shall, not later than 60 days after such date, make payment from such amounts available to be paid under subsection (b)(2) to each party to which such a judgment has been issued in an amount equal to a share, calculated under subparagraph (B), of 90 percent of the amounts available to be paid under subsection (b)(2) that have not been subrogated to the United States under this Act as of the date of enactment of this subsection.

"(B) CALCULATION OF PAYMENTS.--The share that is payable to a person under subparagraph (A), including any person issued a final judgment as of the date of enactment of this subsection in a suit filed on a date added by the amendment made by section 686 of Public Law 107-228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that person bears to the total amount of all unpaid compensatory damages awarded to all persons to whom such judgments have been issued as of the date of enactment of this subsection in cases identified in subsection (a)(2)(A) with respect to Iran.

"(2) SUBSEQUENT JUDGMENT.--

"(A) IN GENERAL.--The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of

the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

"(B) CALCULATION OF PAYMENTS.--To the extent that funds are available, the amount paid under subparagraph (A) to such person shall be the amount the person would have been paid under paragraph (1) if the person had been awarded the judgment prior to the date of enactment of this subsection.

"(3) ADDITIONAL PAYMENTS.--

"(A) IN GENERAL.--Not later than 30 days after the disbursement of all payments under paragraphs (1) and (2), the Secretary shall make an additional payment to each person who received a payment under paragraph (1) or (2) in an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraphs (1) and (2).

"(B) CALCULATION OF PAYMENTS.--The share payable under subparagraph (A) to each such person shall be equal to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

"(4) STATUTORY CONSTRUCTION.--Nothing in this subsection shall bar, or require delay in, enforcement of any judgment to which this subsection applies under any procedure or against assets otherwise available under this section or under any other provision of law.

"(5) CERTAIN RIGHTS AND CLAIMS NOT RELINQUISHED.--Any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which this subsection applies shall not be required to make the election set forth in subsection (a)(2)(B) or, with respect to subsection (a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code, except that such person shall be required to relinquish rights set forth–

"(A) in subsection (a)(2)(C); and

"(B) in subsection (a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.--The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment

instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS.--In this section, the following definitions shall apply:

(1) ACT OF TERRORISM.--The term "act of terrorism" means–

(A) any act or event certified under section 102(1); or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.--The term "blocked asset" means–

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that–

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for

which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.--The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.--The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).

Algiers Accords

Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S.

General Declaration

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the Resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran,

in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

* * * * *

POINTS II AND III: RETURN OF IRANIAN ASSETS AND SETTLEMENT OF U.S. CLAIMS

* * * * *

Assets in the Federal Reserve Bank
4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

Assets in Foreign Branches of U.S. Banks
5. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest

thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

Assets in U.S. Branches of U.S. Banks

6. Commencing with the adherence by Iran and the United States to this Declaration and the Claims Settlement Agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing Security Account specified in that Agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer for return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing Security Account in the Central Bank, until the balance in the Security Account has reached the level of U.S.$1 billion. After the U.S.$1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the

Security Account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the Security Account has fallen below U.S.$500 million, Iran shall promptly make new deposits sufficient to maintain a minimum balance of U.S.$500 million in the Account. The Account shall be so maintained until the President of the arbitral tribunal established pursuant to the Claims Settlement Agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the Claims Settlement Agreement, at which point any amount remaining in the Security Account shall be transferred to Iran.

Other Assets in the U.S. and Abroad

8. Commencing with the adherence of Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the conclusion of arrangements for the establishment of the Security Account, with arrangements will be concluded with 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraphs 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this Declaration and the attached Claims Settlement Agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

* * * * *

11. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by

persons other than the United States nationals arising out of the events specified in the preceding sentence.

* * * * *

SETTLEMENT OF DISPUTES
17. If any other dispute arises between the parties as to the interpretation or performance of any provision of this Declaration, either party may submit the dispute to binding arbitration by the tribunal established by, and in accordance with the provisions of, the Claims Settlement Agreement. Any decision of the tribunal with respect to such dispute, including any award of damages to compensate for a loss resulting from a breach of this Declaration or the Claims Settlement Agreement, may be enforced by the prevailing party in the courts of any nation in accordance with its laws.

Claims Settlement Declaration

The Government of the Democratic and Popular Republic of Algeria, on the basis of formal notice of adherence received from the Government of the Islamic Republic of Iran and the Government of the United States of America, now declares that Iran and the United States have agreed as follows:

Article I
Iran and the United States will promote the settlement of the claims described in Article II by the parties directly concerned. Any such claims not settled within six months from the date of entry into force of this

Agreement shall be submitted to binding third-party arbitration in accordance with the terms of this Agreement. The aforementioned six months' period may be extended once by three months at the request of either party.

Article II

1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights, excluding claims described in Paragraph 11 of the Declaration of the Government of Algeria of January 19, 1981, and claims arising out of the actions of the United States in response to the conduct described in such paragraph, and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements

between them for the purchase and sale of goods and services.

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration.

Article III

1. The Tribunal shall consist of nine members or such larger multiple of three as Iran and the United States may agree are necessary to conduct its business expeditiously. Within ninety days after the entry into force of this Agreement, each government shall appoint one-third of the members. Within thirty days after their appointment, the members so appointed shall by mutual agreement select the remaining third of the members and appoint one of the remaining third President of the Tribunal. Claims may be decided by the full Tribunal or by a panel of three members of the Tribunal as the President shall determine. Each such panel shall be composed by the President and shall consist of one member appointed by each of the three methods set forth above.

2. Members of the Tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out. The UNCITRAL rules for appointing members of three-member tribunals shall apply *mutatis mutandis* to the appointment of the Tribunal.

3. Claims of nationals of the United States and Iran that are within the scope of this Agreement shall be presented to the Tribunal either by claimants themselves or, in the case of claims of less than $250,000, by the government of such national.

4. No claim may be filed with the Tribunal more than one year after the entry into force of this Agreement or six months after the date the President is appointed, whichever is later. These deadlines do not apply to the procedures contemplated by Paragraphs 16 and 17 of the Declaration of the Government of Algeria of January 19, 1981.

Article IV

1. All decisions and awards of the Tribunal shall be final and binding.

2. The President of the Tribunal shall certify, as prescribed in Paragraph 7 of the Declaration of the Government of Algeria of January 19, 1981, when all arbitral awards under this Agreement have been satisfied.

3. Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.

Article V

The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.

Article VI

1. The seat of the Tribunal shall be The Hague, The Netherlands, or any other place agreed by Iran and the United States.

2. Each government shall designate an Agent at the seat of the Tribunal to represent it to the Tribunal and to receive notices or other communications directed to it or to its nationals, agencies, instrumentalities, or entities in connection with proceedings before the Tribunal.

3. The expenses of the Tribunal shall be borne equally by the two governments.

4. Any question concerning the interpretation or application of this Agreement shall be decided by the Tribunal upon the request of either Iran of the United States.

Article VII

For the purpose of this Agreement:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by

nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement. Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court.

3. "Iran" means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof.

4. The "United States" means the Government of the United States, any political subdivision of the United States, and any agency, instrumentality or entity controlled by the Government of the United States or any political subdivision thereof.

Article VIII

This Agreement shall enter into force when the Government of Algeria has received from both Iran and the United States a notification of adherence to the Agreement.

THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN,
Claimant,
v.
THE GOVERNMENT OF THE UNITED STATES OF AMERICA, CUBIC CORPORATION,
Respondents.
CASE NO. B66
CHAMBER ONE
AWARD NO. 302-B66-1
Iran - United States Claims Tribunal
Filed April 28, 1987
Signed April 28, 1987

AWARD

I. INTRODUCTION

1. The Claimant, THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN ("MOD") filed a Statement of Claim with the Tribunal on 19 January 1982 against THE GOVERNMENT OF THE UNITED STATES OF AMERICA ("the United States") and CUBIC CORPORATION ("Cubic"). The claim is stated to arise out of two contracts, Nos. 134 and 134A ("the Contracts") entered into on 23 October 1977 between MOD and Cubic for the supply and installation of an air combat system and the parts in connection with that system. MOD alleges that Cubic failed to fulfill its contractual obligations to deliver, ship, install and operate the system. It claims that the United States interfered in the performance of the Contracts by preventing the delivery of certain parts by Cubic, and

that, in so doing, it violated its obligations under the Algiers Declarations. MOD seeks to recover from Cubic US$12,967,876 paid to Cubic in advance payments. It seeks to recover US$15,000,000 in damages against the United States.

2. On 15 September 1982, the United States filed a Statement of Defence together with a request that the claim be dismissed for lack of jurisdiction against both Respondents. The United States argues that pursuant to the Decision of the Full Tribunal in Case No. A2, the Tribunal has no jurisdiction over claims brought by Iran against United States nationals such as Cubic. Further, the United States argues, there was no contractual relationship between it and MOD for the purchase and sale of goods and services so as to give rise to an "official" claim within the meaning of Article II, paragraph 2, of the Claims Settlement Declaration.

3. MOD filed a Reply on 26 September 1983 in which it argued, inter alia, that there existed an "inseparable relation" between the United States and Cubic with regard to the performance of the Contracts, and that this served as a basis for the Tribunal's jurisdiction.

4. The United States filed a Rejoinder on 9 January 1984 in which it maintained its previous arguments. It further contended that the claim against it was duplicative of part of the claim in Case No. B61, another "official" claim filed by MOD against the United States and currently pending before Chamber One of the Tribunal, insofar as the claim in Case No. B61 raised issues concerning the interpretation or

performance of Contract No. 134 pursuant to the General Declaration.

5. Cubic filed a submission on 20 June 1984 in which it stated that, as a wholly privately-owned corporation organised under the laws of the State of California, no claim could be brought against it by an Iranian government entity pursuant to the Decision of the Full Tribunal in Case No. A2.

6. Both MOD and the United States have requested that the Tribunal render an expedited decision on the issues of jurisdiction in this Case on the basis of the documents presently before it.

II. REASONS FOR AWARD

7. The question before the Tribunal is whether it has jurisdiction in the present Case over, first, the United States and, second, Cubic as Respondents.

A. The United States

8. In order for the present claim to qualify as an "official claim," MOD must establish the existence of "contractual arrangements . . . for the purchase and sale of goods and services" within the meaning of Article II, paragraph 2, of the Claims Settlement Declaration. Thus, MOD must satisfy the Tribunal that the United States was bound by a contract with MOD to perform certain obligations under the two Contracts at issue.

9. The Tribunal considers it significant that the United States was not named as a party to either of the Contracts. In the absence of any evidence establishing that the United States had assumed any obligations

under the Contracts, this fact must be regarded as decisive. Thus, the Tribunal concludes that there is no basis in the present Case for an "official" claim against the United States. See The Ministry of National Defence of the Islamic Republic of Iran and Government of the United States of America, Award No. 247-B59/B69-1 (15 August 1986).

10. The Tribunal's dismissal of the claim against the United States in the present Case is without prejudice to any findings it may make concerning Contract No. 134 in Case No. B61.

B. Cubic Corporation

11. It is not disputed that Cubic is a non-governmental corporate entity of United States nationality. In one of its earliest interpretative rulings on the meaning of the Claims Settlement Declaration, the Tribunal held that the General Declaration and Claims Settlement Declaration did not confer jurisdiction over claims by Iran against United States nationals. Case No. A2, Decision No. DEC 1-A2-FT (26 January 1982), reprinted in 1 Iran-U.S. C.T.R. 101. See also Award No. 247-B59/B69-1, supra. There is thus no basis on which the Tribunal can entertain the claim which the MOD seeks to bring against Cubic, a United States national, in the present Case.

III. AWARD

For the foregoing reasons,

i) The claims of THE MINISTRY OF NATIONAL DEFENCE OF THE ISLAMIC REPUBLIC OF IRAN against THE GOVERNMENT OF THE UNITED

STATES OF AMERICA and CUBIC CORPORATION are dismissed for lack of jurisdiction.

ii) Each Party shall bear its own costs of the arbitration.

Dated, The Hague, 28 April 1987

Karl-Heinz Bockstiegel
Chairman Chamber One

Mohsen Mostafavi
Concurring

Howard M. Holtzmann

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
The Hague
The Netherlands

Islamic Republic of Iran, Claimant v. United States of America, Respondent	Case No. B/61 (including Case Nos. A/3, A/8, A/9, and A/14) Full Tribunal

REBUTTAL OF THE UNITED STATES TO CLAIMANT'S REPLY
Statement No. 16
(Cubic Corporation)

Counsel:
George A. Lehner
Alec Ugol
Mallory A. Stewart

Clifton M. Johnson
Agent of the United States

* * * * *

B. Any Amount of Compensation on This Claim Must be Reduced By the Amounts that Iran Has Already Received For These Items.

Moreover, Iran has failed to deduct any amounts that it has already received as compensation for this

property. The Tribunal's case law requires a claimant to adjust a compensation request to take these factors into consideration. See Common Issues Brief at V.C. Indeed, the Tribunal has specifically recognized the applicability of settlement agreements and collateral decisions, even absent privity of contract with the United States and even as to different causes of action. *See Futura Trading Incorporated v. National Iranian Oil Company*, AWD 263-324-3 at ¶ 62 (Oct. 30, 1986), 13 Iran-U.S. C.T.R. 99, 116 (1986); *Itel Corporation v. Iran*, AWD 530-490-1 at ¶ 36 (June 8, 1992), 28 Iran-U.S. C.T.R. 159, 174 (1992). If the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC: a total amount of $4,751,069.00 in compensation and interest. Exhibit 22.[32]

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[32] Indeed, Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent letters to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought against the United States in Case B61." Letter from M.H. Zahedin-Labbar, Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999), included herein as Exhibit 31; *see also* Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 3 n.2 (stating that any amount received from Cubic "will be recuperated from the remedy sought" in this case).

In sum, if the Tribunal awards Iran any compensation on this claim it would be ordering the United States to place Iran in a superior position than it was in as of November 1979. This is against the principles of the Algiers Declarations. Moreover, any compensation on this claim would unjustly enrich Iran because it would provide Iran with the value of Items which Iran never fully paid for, or obtained title to, and it would also afford double compensation to Iran for claims on which Cubic is already obligated to pay full compensation.

* * * * *

Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.