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,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

JONATHAN R. MOOK
DIMURO GINSBERG, P.C.
908 King St., Suite 200
Alexandria, VA 22314
(703) 684-4333

PHILIP J. HIRSCHKOP
HIRSCHKOP & ASSOC., P.C.
908 King St., Suite 200
Alexandria, VA 22314
(703) 836-6595

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
JACQUELINE G. COOPER
JOSHUA M. ROBBINS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent

November 12, 2008 * Counsel of Record

QUESTIONS PRESENTED

1. Whether the Cubic judgment is "property at issue in claims against the United States before" the Iran-United States Claims Tribunal, which would extinguish respondent's right to attach that judgment because, as a victim of state-sponsored terrorism, he accepted a partial payment under the Victims of Trafficking and Violence Protection Act, as amended by the Terrorism Risk Insurance Act of 2002.

2. Whether the Cubic judgment is a "blocked asset" that is subject to attachment pursuant to the Terrorism Risk Insurance Act of 2002.

PARTIES TO THE PROCEEDINGS BELOW

The parties to this case below are as reflected in the caption. 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.

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STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA") and the Terrorism Risk Insurance Act of 2002 ("TRIA") are reprinted in the appendix to petitioner's brief ("Pet. Br. App.") at 1a-5a and 6a-13a, respectively.

STATEMENT OF THE CASE

A. The Assassination Of Cyrus Elahi And Dariush Elahi's Resulting Judgment Against Iran.

On October 23, 1990, agents of Iran and specifically the Iranian Ministry of Information and Security ("MOIS") assassinated Cyrus Elahi, a United States citizen, in Paris. *Elahi* v. *Islamic Republic of Iran,* 124 F. Supp. 2d 97, 99, 105 (D.D.C. 2000). Iran had Cyrus Elahi murdered because he had become a vocal and effective advocate for a "free and democratic Iran." *Id.* at 103. When the Iranians shot him, Cyrus Elahi was one of the founders of the Flag of Freedom Organization, a democratic movement that worked closely with the United States government. *Id.* French authorities tried and convicted two Iranian nationals living in Paris of conspiracy to commit terrorist acts, including the assassination of Cyrus Elahi. *Id.* at 105.

Respondent Dariush Elahi, a naturalized United States citizen and administrator of his brother's estate, filed suit against Iran in the United States District Court for the District of Columbia pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. II, § 221(a), 110 Stat. 1214, codified at 28 U.S.C. § 1605 et seq. ("Antiterrorism Act"). The Act modified the Foreign

Sovereign Immunities Act ("FSIA") by authorizing claims against state sponsors of terrorism.[1] Through the Antiterrorism Act, Congress sought to deter terrorist acts and in particular to ensure that U.S. nationals who are "victims of terrorist states be given a United States judicial forum in which to seek redress." *Daliberti* v. *Republic of Iraq,* 97 F. Supp. 2d 38, 50-51 (D.D.C. 2000) (citing *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 12-13, 15 (D.D.C. 1998)).

Since 1984, the State Department has designated Iran as a state sponsor of terrorism. See http://www.state.gov/s/ct/c14151.htm. Iran's direct support of terrorist activities has prompted the United States to suspend diplomatic relations, impose trade restrictions, and participate in the international embargo of the country. See, *e.g.,* Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541; 31 C.F.R. § 596.201 (prohibiting exports and sales to Iran).[2] The United States has concluded that "Iran remain[s] the most significant state sponsor of terrorism." U.S. Dep't of State, *Country Reports on Terrorism 2007*, at 9 (Apr. 2008), *available at* http://www.state.gov/documents/organization/

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[1] Respondent filed suit pursuant to Section 1605(a)(7) of the FSIA. Congress recently replaced this section with an expanded terrorism-related exception. *See* Act of January 28, 2008, Pub. L. No. 110-181, § 1083(a)(1), (b)(1)(A), 122 Stat. 3, 338 (enacting 28 U.S.C. § 1605A).

[2] President Bush recently reaffirmed and renewed sanctions against Iran by issuing a Notice continuing the "national emergency" with respect to Iran "[b]ecause the actions and policies of the Government of Iran continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 73 Fed. Reg. 13,727 (Mar. 11, 2008).

105904.pdf. In addition, Iran has been "the defendant in the largest number of suits filed" under the terrorism exception to the FSIA. See *Suits Against Terrorist States by Victims of Terrorism*, at 68 (Congressional Research Service, July 31, 2008), *available at* http://www/fas/org/sgp/crs/terror/RL31258.pdf.

Respondent prevailed in his suit against Iran and the MOIS. Neither Iran nor MOIS entered an appearance even though "the Islamic Republic of Iran is an experienced litigant in the United States federal court system." *Elahi*, 124 F. Supp. 2d at 100 n.2. Accordingly, the court entered an order of default. *Id.* at 99-100. The FSIA requires that, before a court may enter a default judgment against a foreign state, the plaintiff must "establish[] his claim or right to relief by evidence satisfactory to the Court." 28 U.S.C. § 1608(e). During a two-day, non-jury trial, respondent presented the testimony of seven witnesses and more than 100 exhibits. The court found that "[i]t stands uncontradicted that the murder of Dr. Elahi was an act of assassination undertaken and directed by agents of defendant MOIS at the behest of defendant Islamic Republic of Iran." 124 F. Supp. 2d at 105.

On December 20, 2000, the district court entered a judgment in favor of respondent against Iran and MOIS, jointly and severally, for $11,740,035 in compensatory damages and against MOIS for $300,000,000 in punitive damages. *Id.* at 115. Neither Iran nor MOIS appealed, and the judgment, which is accruing interest, became final.

B. Respondent's Efforts To Enforce His Judgment Against Iran.

Respondent soon found that obtaining a judgment against Iran could be largely a symbolic victory: he still faced the daunting task of enforcing that judgment against a rogue nation whose limited assets in the United States are subject to significant regulation and to the competing claims of other victims of Iran's terrorism.

Respondent sought to enforce his judgment by seeking to attach a particular Iranian asset that had recently been created within the United States: a federal court judgment that Iran obtained in 1998 against Cubic Defense Systems, Inc., an American defense contractor (the "Cubic judgment"). On May 5, 1997, petitioner had secured an award from the International Chamber of Commerce ("ICC") against Cubic for $2.8 million, based on a contractual arrangement related to the resale to the government of Canada of an arms system that had initially been designed for use by Iran. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, No. 7365/FMS (Int'l Ct. of Arbitration of the Int'l Chamber of Commerce), *reprinted in* 13 Mealey's Int'l Arbitration Report (Oct. 1998) ("ICC Award"); see also JA 35-54. The system sold to Canada was a highly modified version of an air combat maneuvering range ("ACMR") that Cubic in 1977 had originally contracted to build for the Iranian Air Force, prior to the overthrow of the Iranian government and the freezing of arms deliveries to Iran following the 1979 hostage crisis. ICC Award ¶¶ 2.1, 15.5-15.6. In June 1998, petitioner filed to confirm the ICC award in the U.S. District Court for the Southern District of California, JA 21-54, and the court issued its judgment on

December 7, 1998. See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998), JA 55-68. Cubic's and petitioner's appeals of the district court's order are pending before the Ninth Circuit (No. 99-56380). The Cubic judgment also is accruing interest.

In November 2001, respondent registered his judgment against Iran in the California district court and filed a notice of lien in the amount of his compensatory damages award against any distribution of the Cubic judgment in favor of petitioner. JA 3 (Dkt. 67). When respondent filed his lien, one other judgment creditor, Stephen Flatow, previously had filed a lien against the same Cubic judgment. In addition, two more judgment creditors subsequently filed liens. See Rafii and Rubin Notices of Lien, JA 7 (Dkt. 124, 130).

C. Congressional Enactment Of VTVPA And TRIA And Respondent's Receipt Of Partial Payment Under TRIA.

Recognizing the difficulty that terrorism victims encounter in enforcing the judgments they secure against state sponsors of terrorism such as Iran, Congress created an additional form of compensation in the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541, Pet. Br. App. 1a-5a. The VTVPA established a system for the payment of compensatory damages to certain individuals who had obtained judgments against Iran or Cuba under Section 1605(a)(7) of the FSIA. See *id.* § 2002(a), Pet. Br. App. 1a-3a. The VTVPA initially compen-sated only those who held a final judgment as of July 20, 2000, before entry of respondent's judgment, or who had initiated suit on five specific dates that did not

include respondent's filing date. See *id.* § 2002(a)(2)(A)(i), Pet. Br. App. 2a. The VTVPA thus did not initially cover respondent's claims against Iran.

The VTVPA provided for direct payments to eligible judgment-holders. See *id.* § 2002(b)(2), Pet. Br. App. 4a. With respect to the portion of these payments funded from general funds, the United States is subrogated to "all rights" of these individuals, "to the extent of the payments" it made. See *id.* § 2002(c), Pet. Br. App. 4a.

In addition, eligible judgment holders were required to relinquish certain enforcement rights with respect to their judgments as a condition of receiving payment. Claimants waived the right to collect some or all of their punitive damages awards and waived the right to execute against or attach (1) property at issue in claims against the United States before an international tribunal, (2) property that is the subject of awards rendered by such a tribunal, and (3) property that is subject to 28 U.S.C. § 1610(f)(1)(A), *i.e.*, property subject to regulation under the International Emergency Economic Powers Act ("IEEPA"). VTVPA § 2002(a)(2)(D), Pet. Br. App. 3a.

On November 26, 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, tit. II, § 201, 116 Stat. 2322, 2337, in a further effort to ensure that American victims of state-sponsored terrorism would receive "some measure of justice." 148 Cong. Rec. S11524, S11527 (daily ed. Nov. 19, 2002) (Statement of Sen. Harkin). TRIA § 201 applies to respondent. As the Conference Report on TRIA explained:

> The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties. It is the intent of the Conferees that Section 201 establish that such judgments are to be enforced.

H.R. Conf. Rep. No. 107-779, at 27 (2002); see also 148 Cong. Rec. at S11528.

TRIA expanded the ability of terrorism victims who secure judgments against state sponsors of terrorism to attach those states' assets. TRIA § 201(a) provides that "[n]otwithstanding any other provision of law," the "blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgments to the extent of any compensatory damages for which such terrorist party has been adjudged liable." See TRIA § 201(a), Pet. Br. App. 6a-7a. The statute defines the term "blocked asset" as "any asset seized or frozen by the United States . . . under sections 202 and 203 of the [IEEPA] (50 U.S.C. §§ 1701, 1702)." *Id.* § 201(d)(2)(A), Pet. Br. App. 12a.

TRIA also amended the VTVPA through a "special rule for cases against Iran" to expand the class of judgment holders against Iran eligible to receive federal compensatory payment. TRIA § 201(c), Pet. Br. App. 7a-8a. TRIA extended eligibility to those who filed suit before October 28, 2000. Respondent filed suit against Iran on October 22, 1999.

When TRIA was enacted, Congress recognized that the funds available would not nearly satisfy the compensatory damages awards of newly eligible

claimants. Through a provision specifically limited to "compensatory awards against Iran," TRIA thus amended the VTVPA to provide for pro rata payments to newly eligible persons. TRIA § 201(c)(4) (adding VTVPA § 2002(d)), Pet. Br. App. 8a-9a. Through a subsection of that provision entitled "[c]ertain claims and rights not relinquished," Congress amended the VTVPA's relinquishment provisions and provided that "[a]ny person receiving less than the full amount of compensatory damages awarded to that party in a judgment [against Iran] . . . shall not be required to make . . . the election relating to relinquishment of any right to execute or attach property" to satisfy the remainder of the compensatory judgment, except "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 of such tribunal." *Id.* § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a. This provision is at the center of the dispute in this case.

Additionally, TRIA amended the VTVPA by adding a canon of "statutory construction" that applies specifically to the newly added subsection addressing the partial payments related to judgments secured against Iran, including respondent's: "[n]othing in this subsection shall bar, or require delay in, enforcement of any judgment to which [the VTVPA] applies under any procedure or against assets otherwise available under this section [of the VTVPA] or under any other provision of law." TRIA § 201(c)(4) (new VTVPA § 2002(d)(4) entitled "Statutory Construction"), Pet. Br. App. 11a. To this end, TRIA also directed the Treasury Secretary, in formulating implementing guidelines, to "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." *Id.* § 201(c)(4) (new VTVPA § 2002(d)(6)), Pet. Br. App. 12a; see Dep't of Treasury, Office of Foreign Assets Control, Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8077 (Feb. 19, 2003).

In April 2003, respondent applied for VTVPA compensation and late that year received payments for approximately $2.3 million, less than 20% of his outstanding judgment for compensatory damages. To qualify to receive these payments, respondent relinquished his rights to attach or execute upon property that "is at issue in claims against the United States before an international tribunal or . . . is the subject of awards by such tribunal." Pet. Br. App. 11a (quoting 68 Fed. Reg. at 8081).

D. The Algiers Accords And The Limited Jurisdiction Of The Iran-U.S. Claims Tribunal.

Because the phrase "property that is at issue in claims against the United States before an international tribunal," meaning here the Iran-U.S. Claims Tribunal (the "Tribunal"), is central to this case, it is critical to understand the genesis of that Tribunal and the narrow scope of its jurisdiction over claims against the United States.

On January 19, 1981, the United States and Iran signed the Algiers Accords in order to resolve various disputes, including Iran's holding hostage U.S. diplomatic and other personnel. The main commitments of the Algiers Accords were (1) by Iran, to release the American hostages and (2) by the United States, to "restore the financial position of Iran, in so

far as possible, to that which existed prior to November 14, 1979" and to "ensure the mobility and free transfer of all Iranian assets within [U.S.] jurisdiction." Declaration of the Democratic & Popular Republic of Algeria, Algiers Accords of Jan. 19, 1981, General Declaration, 20 I.L.M. 224 (1981) ("General Decl."), General Principles ¶ A, Pet. Br. App. 14a-15a.

To implement the United States' commitments, the President issued a series of Executive Orders that directed the transfer to Iran of various Iranian financial assets. Exec. Order Nos. 12,277-12,280, 46 Fed. Reg. 7915-22 (Jan. 23, 1981). The President also directed that most other Iranian property be transferred to Iran "as directed . . . by the Government of Iran." Exec. Order No. 12,281, 46 Fed. Reg. 7923 (Jan. 23, 1981).

The Algiers Accords also created an international tribunal, the Iran-U.S. Claims Tribunal, to arbitrate certain property disputes and to address disputes over the interpretation or performance of obligations under the Accords. Specifically, the Tribunal has jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," but not claims of either government against nationals of the other country. Algiers Accords of Jan. 19, 1981, Claims Settlement Declaration, 20 I.L.M. at 230 ("Claims Settlement Decl."), art. II, ¶ 1, Pet. Br. App. 20a. Further, to be within the jurisdiction of the Tribunal a claim or counterclaim must "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," and must have been "outstanding on the date of [the Claims Settlement] Agreement [Jan. 19, 1981]." *Id.*;

see also General Decl. ¶ 9, Pet. Br. App. 18a (addressing "Iranian properties which are located in the United States"). The Tribunal also has jurisdiction over claims between Iran and the United States that relate to either an obligation under the Accords or to a contractual agreement between the two governments. Claims Settlement Decl. art. II, ¶¶ 2-3, Pet. Br. App. 20a-21a. These "official" claims, and related counterclaims, also must have been outstanding on January 19, 1981. See *Iran* v. *United States*, Case No. B1, Award No. 83-B1-FT, ¶¶ 137-38 (Iran-U.S. Cl. Trib. Sept. 9, 2004).

Tribunal proceedings are closed to the public. Tribunal pleadings, docket sheets and hearing transcripts are not available to non-parties. Moreover, the United States has taken the position that the public dissemination of Tribunal documents in its possession must be restricted pursuant to the federal statute that authorizes the Secretary of State to maintain the confidentiality of Tribunal filings. See 50 U.S.C. § 1701, note; see *infra* at 34 n.5, 46.

E. Cases B/66 And B/61 In The Tribunal.

The Tribunal proceeding that petitioner asserts as a bar to respondent's attachment of the 1998 Cubic judgment is the B/61 case. The B/66 case is also relevant to petitioner's claim.

The B/66 Case: In January 1982, before petitioner sought arbitration in the ICC, it filed a claim in the Tribunal against Cubic Defense Systems and the United States, denominated B/66, based on the earlier-described contracts for the delivery and installation of the ACMR. See *supra* at 4. In April 1987, the Tribunal determined that it lacked jurisdiction over Iran's claim against Cubic because "the General Declaration and Claims Settlement

Declaration did not confer jurisdiction over claims by Iran against United States nationals." See *Ministry of Nat'l Def. of the Islamic Republic of Iran* v. *United States, Cubic Corp.*, 14 Iran-U.S. Cl. Trib. Rep. 276, 278 (1987) ("*B/66 Decision*"), Pet. Br. App. 28a. The Tribunal also dismissed petitioner's claim against the United States because the United States "was not named as a party to either of the [Cubic] Contracts" and had "assumed [no] obligations under the Contracts." *Id.*, Pet. Br. App. 27a-28a.

The B/61 Case: On January 19, 1982, Iran filed Case B/61 before the Tribunal, solely against the United States regarding certain military properties in the United States as of the date of the Algiers Accords. Those Accords provided for the United States to "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." General Decl. ¶ 9 (emphasis added), Pet. Br. App. 18a. Iran claimed that the United States violated Paragraph 9 by barring the transfer to Iran of military equipment produced by numerous military contractors, including the ACMR produced by Cubic. Iran sought a decree requiring the United States to issue export licenses for the military goods or compensation for what Iran had paid and consequential damages. Pet. Br. App. 31a. As President Clinton summarized:

> 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.

Message to the Congress on Iran, May 16, 1996, at http://www.presidency.ucsb.edu/ws/index.php?pid=52818.

Accordingly, the property that is "at issue" in Iran's claim against the United States in the B/61 case includes numerous items of military equipment such as the ACMR that was the subject of petitioner's contract with Cubic. Iran's claim before the Tribunal arising under the Accords does not address the asset that respondent seeks to attach: Iran's 1998 federal court judgment against Cubic. Indeed, as explained below, any dispute concerning that judgment could not fall within the Tribunal's limited jurisdiction. See *infra* at 20-25.

F. Proceedings Below.

When respondent attempted to enforce his FSIA judgment against Iran by attaching the Cubic judgment in the California district court, see *supra* at 4-5, petitioner sought a ruling from the district court that its judgment against Cubic was immune from attachment or execution by respondent and another lienholder. On November 26, 2002, the district court denied petitioner's motion to vacate respondent's lien and upheld the validity of that lien on grounds that are not pertinent here. See Pet. App. 81-106.

The district court also addressed the validity of the lien filed by Stephen Flatow, another judgment holder against Iran who, unlike respondent, received payment under the initial VTVPA payment scheme. Flatow elected to receive payment of 100 percent of his compensatory damages award, and as a conse-

quence, he agreed to the broader relinquishment of rights required under the initial scheme. The district court held that the Cubic judgment was not "at issue in claims against the United States before an international tribunal" and, hence, held that Flatow had not relinquished his attachment rights on this ground. See Pet. App. 90-92. The district court, however, ultimately concluded that Flatow had relinquished his attachment rights because the Cubic judgment is subject to regulation under the IEEPA (a ground not relevant to respondent). *Id.* at 92-97.

Flatow appealed that ruling, and petitioner appealed the district court's ruling denying petitioner's motion to vacate respondent's lien. While this appeal was pending, respondent applied for and received his partial payment. See *supra* at 9.

In October 2004, the Ninth Circuit affirmed the district court's ruling that the Cubic judgment was subject to attachment by respondent, reasoning that the Cubic judgment could be attached pursuant to Section 1610(b)(2) of the FSIA as property of an "agency or instrumentality of a foreign state . . . engaged in commercial activity in the United States." See Pet. App. 65-66. It also affirmed the district court's ruling that Flatow had relinquished his attachment rights because the Cubic judgment is subject to regulation under IEEPA. *Id.* at 48-58.

Petitioner sought review in this Court, which granted certiorari on the limited question whether petitioner constituted an agency or instrumentality of Iran. Finding that the Ninth Circuit had not specifically addressed that question, the Court reversed and remanded for further consideration. *Ministry of Def. & Support for Armed Forces of Iran* v. *Elahi,* 546 U.S. 450, 451-52 (2006) (per curiam).

On remand, the United States appeared as *amicus curiae*. In its brief filed in July 2006, it argued for the first time that respondent had, by receiving payment from the United States in 2003 in partial satisfaction of his compensatory damages award, relinquished his right to attach the Cubic judgment because the property was "at issue" before the Tribunal.

In May 2007, the Ninth Circuit upheld the validity of respondent's lien. It held that respondent had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. because the judgment is not "at issue" in claims before an international tribunal. See Pet. App. 11-14. It further held that the Cubic judgment is subject to attachment under Section 201(a) of TRIA as a "blocked asset." See *id*. at 15-20.[3]

Judge Fisher agreed with the majority's holding on blocked assets, but he reasoned that the Cubic judgment is "at issue" because the Iran-U.S. Claims Tribunal "must determine the effect of the judgment on the amount of liability owed by the United States." See Pet. App. 32.

Petitioner sought rehearing and rehearing *en banc*, which were denied by the court of appeals on July 17, 2007 in an order that also made minor amendments to its earlier opinion. This Court granted certiorari. 128 S. Ct. 2957 (2008).

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[3] The appeals court further found that because there was no evidence that petitioner is a separately constituted legal entity distinct from the Iranian state, petitioner should be deemed an inherent part of the state of Iran. Pet. App. 21-25. As a result, the court held that the Cubic judgment is not subject to attachment under FSIA exceptions that are not at issue here.

G. United States' Blocking Of Petitioner's Assets.

In October 2007, the State Department designated petitioner as an entity of concern with respect to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991, 71,992 (Dec. 19, 2007). The designation was made under delegated authority of Executive Order No. 13382, 3 C.F.R. § 170 (2006), which the President issued pursuant to his authority under IEEPA. See 72 Fed. Reg. at 71,991. By the terms of this designation, the "property and interests in property" of petitioner are now "blocked." *Id.* at 71,992.

SUMMARY OF ARGUMENT

Respondent is entitled to attach the Cubic judgment because he did not relinquish his rights to attach the judgment, which is a "blocked asset."

1. The plain language of VTVPA § 2002(d) and the statute's structure and context show that the 1998 Cubic judgment is not "property at issue in claims against the United States before an international tribunal" and thus that respondent did not relinquish his claim to execution against that judgment. The statute bars execution only against "property" placed "at issue" by being the subject of "claims" based on the Algiers Accords and filed by Iran before the Iran-U.S. Claims Tribunal. The Cubic judgment did not come into existence until 1998 and plainly was not addressed in the 1981 Algiers Accords or made the object of Iran's claim against the United States before the Tribunal. The United States' own filings before the Tribunal understood the phase "property at issue in claims . . . before the [Tribunal]" exactly as respondent does, and confirm that such property is limited to property

existing in 1981 and thus excludes the Cubic judgment. Nor could any such claim be within the Tribunal's limited jurisdiction. If there is any doubt on the scope of relinquished property, Congress directed that "statutory construction" must ensure the widest latitude for execution of judgments secured by victims of terrorism, like respondent, who receive payment for less than the full amount of their compensatory damages judgment.

There is no merit to petitioner's argument that a setoff or counterclaim asserted by the United States has made the Cubic judgment "property at issue" before the Tribunal. The statute's terms preclude petitioner's theory. Moreover, the United States does not contend that it has asserted any counterclaim or setoff that encompasses the Cubic judgment, as the Tribunal's rules would require. Any such setoff or counterclaim would not be within the Tribunal's jurisdiction in any event.

The United States' claim that property is "at issue" whenever it may be relevant to arguments raised in the B/61 case, even if the property is not identified in a claim by Iran arising under the Accords, ignores and is inconsistent with the statutory language (as well as with the U.S. positions before the Tribunal). It also ignores the broader statutory context, which demonstrates Congress' overriding intent to ensure that victims of state-sponsored terrorism who accept partial payments from the government be able to pursue robust enforcement of their judgments. In any event, even under the United States' own definition, the Cubic judgment is not "at issue" in the B/61 case because it will not, in fact, affect the Tribunal's decisionmaking, for reasons that the United States previously has acknowledged.

Finally, the statutory construction urged by petitioner and the United States could not have been intended by Congress because it is unworkable, inequitable and potentially unconstitutional. Congress must have intended to put victims on fair notice of the property rights they relinquish as a condition of accepting partial compensation for their damages resulting from acts of terrorism. Respondent's plain meaning construction provides a bright-line rule to define what property is or is not within the scope of the relinquishment, while the constructions urged by petitioner and the United States do not. To the contrary, those constructions would require that terrorism victims relinquish an open-ended and unknowable set of property rights, ultimately defined by the scope of arguments presented in secret proceedings. This inequity would be particularly acute in respondent's case because he relied on a judicial ruling that determined that the Cubic judgment was not "property at issue" before the Tribunal and because the United States took its current position only several years *after* respondent accepted his partial payment.

2. For reasons including those presented by the United States, the Cubic judgment is a "blocked asset" that is subject to attachment under TRIA § 201(a) by virtue of recent State Department action undertaken against petitioner's property. The United States' determination is entitled to substantial deference. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000). Petitioner offers no contrary analysis.

That the State Department acted after the Ninth Circuit's decision is of no moment, and petitioner's suggestion to the contrary ignores the well-established "principle that a court is to apply the law

in effect at the time it renders its decision." *Bradley* v. *School Bd.*, 416 U.S. 696, 711 (1974). Nor is there any reason for this Court to remand so that the lower courts can consider the effect of the recent designation in the first instance.

ARGUMENT

I. RESPONDENT DID NOT RELINQUISH HIS RIGHT TO ATTACH THE CUBIC JUDGMENT BECAUSE THAT JUDGMENT IS NOT "PROPERTY THAT IS AT ISSUE IN CLAIMS AGAINST THE UNITED STATES BEFORE" THE IRAN-U.S. CLAIMS TRIBUNAL.

A. Property That Cannot Be Attached Is Limited To Property Identified In An Iranian Claim Before The Tribunal Alleging That U.S. Treatment Of The Property Breaches The Algiers Accords.

Traditional tools of statutory construction readily show that the 1998 Cubic judgment is not "property at issue in claims against the United States before an international tribunal," see TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a, and thus that respondent did not relinquish his claim to execution against that judgment. There is no need to search for "structural clues" to support a "broad construction" of the statutory text, as petitioner argues, Pet. Br. 25, or to draw inferences from what "at issue" may mean in isolation in other contexts, as the United States proposes, U.S. Br. 15-16. Instead, the statute's plain language, structure and context establish that the statute bars execution only against "property" placed "at issue" by being the subject of "claims" filed by Iran before the Iran-U.S. Claims Tribunal based on the Algiers Accords. Here, no such

claim was filed or could have been filed that encompasses the Cubic judgment. Instead, as both Iran and the United States have asserted before the Tribunal, Iran's claim against the United States placed at issue only the specific arms system produced and held by Cubic in 1981. See *infra* at 26-29. Even if the statute's meaning were unclear, Congress expressly directed that "statutory construction" must ensure the widest latitude for execution of judgments secured by victims of terrorism, like respondent, who receive payment for less than the full amount of their compensatory damages judgment against state sponsors of terrorism. See VTVPA § 2002(d)(4), Pet. Br. App. 11a; *infra* at 29-32.

1. Congress defined the "property" made unavailable to victims of terrorism by reference to actual "claims against the United States" that place property "at issue" "before" particular "international tribunal[s]" that resolve disputes over identified classes of property. *Id.* § 2002(d)(5)(B), Pet. Br. App. 11a. This provision expressly applied only to certain judgments that terrorism victims secured against Iran, see TRIA § 201(d), and thus referred directly to claims against the United States before the Iran-U.S. Claims Tribunal.

The 1998 Cubic judgment was not and could not be "property" subject to and thus placed "at issue" by a "claim[] against the United States" asserted "before" the Tribunal. VTVPA § 2002(d)(5)(B), Pet. Br. App. 11a. As petitioner and the United States acknowledge, property is "at issue" when it is placed "[i]n question; in dispute." *The American Heritage Dictionary of the English Language* 929 (4th ed. 2000); see also *Black's Law Dictionary* 136 (8th ed. 2004) ("under dispute; in question"); U.S. Br. 14; Pet.

Br. 29-30 n.8. Congress clearly defined "property" in relation to the "claim" that places the property "at issue" or "in dispute." TRIA § 201(c)(4), Pet. Br. App. 11a. Congress' further reference to an "international tribunal[]," *id.*, and TRIA's inherent reference to the Iran-U.S. Claims Tribunal, focus on the property claimed before particular claims settlement tribunals, which in turn address particular property disputes that their organic documents make subject to formal claims.

Here, the Algiers Accords obligated the United States to "arrange . . . for the transfer to Iran of all Iranian properties which are located in the United States and abroad." General Decl. ¶ 9, Pet. Br. App. 18a. The Accords also created the Tribunal, Claims Settlement Decl. art. II, ¶ 1, Pet. Br. App. 20a, and provided it with limited jurisdiction to address claims relating to a particular class of property in existence as of January 19, 1981. Specifically, the Tribunal has jurisdiction over certain claims by nationals of one nation against the other, certain contractual claims arising between the nations, and, as in case B/61, "dispute[s] as to the . . . performance" of the obligations set forth in the Accords. *Id.* art. II, ¶ 3, Pet. Br. App. 21a.

The Tribunal's Rules, agreed to by Iran and the U.S., further govern when such property could formally be placed at issue as the subject of a claim arising under the Algiers Accords, and required that a party initiate arbitration by filing a "Statement of Claim" that identified "property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to the . . . Claims Settlement Declaration." Trib. R. of P., art. 18.1(c), Resp. App. 5. The Statement must identify the points "at issue." *Id.* art. 18.1(f), Resp. App. 5. As

the Algiers Accords themselves indicate, the Tribunal, the United States and Iran have all determined that claims such as B/61 relate to property owned by Iran that was in existence on Jan. 19, 1981. See *infra* at 26-29.

A relatively recent federal court judgment addressing a breach of contract dispute, such as the Cubic judgment, is quite unlike the property subject to claims that the Tribunal was established to address. Typical claims by Iran concern the arms systems undelivered by 1981 as noted by President Clinton, *supra* at 12-13, or Iranian-owned real estate in the United States, including properties that the survivors of Charles Hegna sought to attach in order to enforce a judgment secured against Iran for his death. In decisions the United States and petitioner conspicuously fail to cite, four courts of appeals held that the Hegnas had relinquished their right to pursue such attachments because these real properties were directly the subject of an Iranian claim before the Tribunal, and the courts relied on the United States' presentation of evidence that Iran's pending claims in the Tribunal asserted "custody" under the Algiers Accords of the *same properties* the Hegnas sought to attach. See, *e.g.*, *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1008-09 (7th Cir. 2004) (evidence of a claim in the Tribunal "filed by Iran against the United States in 1982, alleging that the United States had breached its obligations under the Algiers Declarations by failing to grant Iran custody of its diplomatic and consular properties in the United States" and noting that the Tribunal claim "includ[es] the Chicago properties" that the Hegnas were seeking to attach) (internal quotation marks omitted); *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 485, 493 (5th Cir. 2004)

(evidence "that the Lubbock property falls within a list of properties specifically identified as the subject of the Tribunal case") (internal quotation marks omitted); see also *Hegna* v. *Islamic Republic of Iran*, 402 F.3d 97, 99 (2d Cir. 2005) (per curium); U.S. Br. 39, in *id.* (Aug. 26, 2004) ("The Consular Property is 'at issue' before the Claims Tribunal because Iran has filed a claim contending that the Consular Property . . . is being held by the United States in violation of the Algiers Accords."); *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004).

The Cubic judgment stands in stark contrast to the properties that the *Hegna* plaintiffs sought to attach or that is at issue in Iran's claim in case B/61. In that case, Iran seeks compensation from the United States based on an allegation that the United States has not fulfilled its Paragraph 9 obligations to "arrange . . . for the transfer to Iran of all Iranian properties . . . located in the United States" as of Jan. 19, 1981. General Decl. ¶ 9, Pet. Br. App. 18a. Iran's Statement of Claim in the case lists property "at issue" produced by scores of arms manufacturers. In relation to Cubic, Iran's Statement is limited to certain property held by Cubic as of Jan. 19, 1981, including most prominently the ACMR. See *Statement of Claim* (Jan. 19, 1982), L4-11, L28-75; *Iran Consolidated Submission* & Ex. 16 (Mar. 8, 1994), L102-06, 119-22, 129, 132-58.[4] The United States agrees that the Cubic "property at issue" in Iran's claim is the ACMR. See *infra* at 26-29. Iran's Statement of Claim long pre-dates and does not include the 1998 Cubic judgment. The parties principally dispute whether the United States was

[4] At the Deputy Clerk's suggestion, certain citations (beginning "L") are directed to materials that the United States, with the parties' agreement, has sought to lodge with the Court.

required to transfer to Iran arms that, as of Jan. 19, 1981, were subject to export control restrictions and, if so, how to value Iran's loss due to the United States' failure to arrange for the properties' transfer. See, *e.g.*, *Tribunal Hearings* (Dec. 1, 7, 12, & 14, 2006), L1130-1295. The parties have also argued over precisely what property was held by Cubic as of Jan. 19, 1981, and the Tribunal has ruled that Iran's claims in that respect are limited to the items of property that Iran identified in its original Statement in 1982, as elaborated by filings made no later than 1994. See *Tribunal Order*, at 1-4 (Dec. 20, 2005), Resp. App. 32-35.

The 1998 Cubic judgment is not asserted as "at issue" in Iran's Statement of Claim or its other summaries of the "property" at issue before the Tribunal, nor could it be. The district court issued that judgment in December 1998. See 29 F. Supp. 2d 1168 (S.D. Cal. 1998), JA 55-68. That "property" did not exist when Iran and the United States entered the Algiers Accords and is not within the Paragraph 9 obligation of the United States that forms the basis of Iran's claim in Case B/61, and thus for both reasons could not be the subject of a claim within the Tribunal's jurisdiction. General Decl. ¶ 9, Pet. Br. App. 18a. Even had the Cubic judgment arisen before the Algiers Accords, the Tribunal's jurisdiction does not extend to claims by Iran against private parties, and such claims cannot put "property at issue" before the Tribunal. Claims Settlement Decl. art. II, ¶ 1, Pet. Br. App. 20a. Indeed, when Iran in 1982 attempted to pursue a Tribunal claim against Cubic related to the sale and servicing of the ACMR, and joined the United States, the Tribunal dismissed the claim based on the Tribunal's lack of jurisdiction

over the claim. See *B/66 Decision*, Pet. Br. App. 25a-29a.

Nor can the 1998 Cubic judgment somehow be treated as the same "property" as the ACMR, which is "property at issue" before the Tribunal. A U.S. federal court judgment secured by Iran against Cubic for breach of contract is property quite different from an arms system subject to Iran's Tribunal claim. The 1998 Cubic judgment reflects compensation for the breach of a private agreement between Iran and Cubic related to the resale of a modified version of the ACMR to Canada in late 1981. See *ICC Award* ¶¶ 9.15, 9.21. That resale agreement is itself distinct from the contract between Iran and Cubic concerning the manufacture and delivery of the ACMR to Iran (which Iran's Statement of Claim asserts ownership over and the U.S. contests). See, *e.g.*, *id.* ¶ 9.15.

Particularly important for purposes of identifying the "property" placed "at issue" through Iran's claim against the United States, the United States had no role in that resale contract or the legal proceedings addressing it, and had no obligations to Iran related to the resale contract, the ICC award, or the 1998 Cubic judgment. As the United States summarized,

> . . . the United States was not a party to the second agreement between Iran and Cubic, nor was it aware of that agreement, nor was it a guarantor of that agreement. Any losses in relation to that contract are not recoverable against the United States and issues regarding losses under that contract do not belong before this Tribunal.

Tribunal Hearing 124 (Dec. 12, 2006), Resp. App. 42. And, as noted, Iran has not identified the 1998 Cubic judgment as the "property" forming the basis for its

claim against the United States, and the Tribunal's rules and jurisdiction would prohibit any effort to do so.

2. Before the Tribunal, and in sharp contrast to their positions before this Court, Iran and the United States adopted precisely the position respondent is urging here. There, they made absolutely clear that the property that is the subject of Iran's claim, and at issue before the Tribunal as a result, is limited to the Cubic-produced arms system that existed in early 1981. Indeed, both assert that the particular items of property addressed in Iran's claim define the "property at issue in the claim" before the Tribunal. The Tribunal's rulings are in accord.

Following Iran's 1982 Statement of Claim, which generally identified arms systems held in the United States at the time of the Accords as the property subject to its B/61 claim, the Tribunal issued a series of orders directing the parties to identify and file a joint report addressing "property items located in the United States, which are at issue in this case." *Tribunal Order* 1 (March 2, 1984), Resp. App. 11; see *Tribunal Order* 1 (May 14, 1984) (parties to reconcile views of "any Iranian property items located in the United States which are at issue in this case"), Resp. App. 12; *Tribunal Order* (Jan. 21, 1987), L82. In the resulting report, Iran and the United States jointly set forth, "company-by-company," "the property claimed by Iran." *Joint Report*, Cover Letter (July 14, 1989), Resp. App. 14. They agreed that the "Property Claimed by Iran," as it related to Cubic, were "[i]tems comprising an ACMR." *Id.*, Ex. 22, Resp. App. 22. The United States later characterized this Joint Report summary as defining "what property was at issue in the case," *U.S. Rebuttal*, v. 1, at 19 (Sept. 1, 2003), L390, and argued that "only property that has

already been made the subject of a claim is properly at issue in this case." *Id.* at 49 (internal quotation omitted), L419; see *id.* at 52 (all "property at issue in Case B/61 must have been identified in the 1989 Joint Report"), L422. The Tribunal agreed: drawing on a Tribunal ruling that requires production of documents "only insofar as that information related to 'items of property that have already been made the subject of a claim in these Cases,'" it ruled in favor of the motion of the United States to "exclude from these Cases [pre-1981] properties and claims presented by Iran after 1994," as late-filed. *Tribunal Order* 3-4 (Dec. 20, 2005) (quoting *Order* of March 18, 1998), Resp. App. 34-35.

Other Tribunal filings and orders confirm that the parties understood that "property at issue in claims against the United States" was limited to the specific arms systems existing in 1981 and identified in Iran's formal claim. See*, e.g.*, *Tribunal Order* 4 (Mar. 18, 1998) ("the claim in these cases relates to the transfer of certain Iranian property located in the United States at 19 January 1981"), Resp. App. 27; *U.S. Response Br.*, v. 1, at 4 (Mar. 1, 2006) ("unless Iran proves with respect to each item of property at issue that it falls within the scope of Paragraph 9 of the General Declaration, the claim must be dismissed"), L1059; *Tribunal Hearing* 32 (Dec. 7, 2006) ("Iran has typically begun its analysis of each of its claims by focusing on identifying the properties that are at issue"), L1184; *id.* at 33 (not for "the United States to identify for Iran the properties that are at issue in this case"), L1185; *Iran Consol. Submission* 2-3 (Feb. 28, 1994), L102-103; *id.* at 5 n.5 ("items in issue in the instant case"), L105; *id.* at 6 ("the property in issue in case B61"), L106. In the foregoing statements and many others, the parties made clear that

the particular arms systems set forth in Iran's claim, and specifically the ACMR, defined the "property at issue in the claim" before the Tribunal. See *Tribunal Hearing* 36 (Dec. 7, 2006) (in relation to the ACMR, arguing that Iran "lacked title to the property at issue in this claim" and that Iran lacked the "expectation that it would obtain the properties at issue in this claim"), L1188; *U.S. Rebuttal*, Statement No. 16, at 12 (Sept. 1, 2003), L633 ("[t]he property at issue consists of one Air Combat Maneuvering Range ("ACMR") system"); *Iran Reply* 1 (July 2, 1999), L290 ("The items at issue are sophisticated defence equipment called Air Combat Maneuvering Range ('ACMR')"); see also *Tribunal Hearing* 6 (Dec. 7, 2006) (U.S.'s "obligation . . . is restricted to restoring Iran's financial position, with respect to the properties at issue, to that which existed prior to Nov. 14, 1979"), L1158; 2006 *U.S. Response Br.*, v. 5, at 9 (Mar. 1, 2006) ("Regarding the property at issue in this case, Iran has not and cannot show . . . ."), L1113; *id.* at 12 ("The onus is on Iran as the claimant to establish the properties at issue in its claim"), L1116.

Moreover, the United States specifically argued before the Tribunal that the Cubic judgment and related litigation was beyond the Tribunal's jurisdiction, much less property at issue in the Iranian claim. It specifically addressed respondent's efforts to attach the 1998 Cubic judgment, arguing "this litigation has nothing to do with the matters before the Tribunal." *Tribunal Hearing* 38-39 (Dec. 14, 2006), Resp. App. 44-45. It had earlier argued: "Iran has not to date been able to collect this judgment from Cubic. That, however, is not an issue for this Tribunal. Any problems that Iran might have in this regard are outside of this case and . . . outside the jurisdiction of this Tribunal." *Tribunal Hearing*

62 (Dec. 7, 2006), Resp. App. 39; see also *id.* at 49 ("Iran's ability to collect on debts owed to it by private entities is not the Tribunal's concern, however. Indeed, Iran to date has failed to show that there is jurisdiction over this claim such that it could conceivably be of a concern to the Tribunal"), Resp. App. 38. The U.S. asserted that even the resale agreement between Iran and Cubic, much less the ICC award or eventual federal court Cubic judgment, was not "at issue" before the Tribunal: "Simply put, Iran's interactions with Cubic had nothing to do with the United States . . . . The Iran/Cubic [resale] agreement has nothing to do with the United States." *Id.* at 60, L1212; see *id.* at 49 (as to the resale agreement breach, "this sort of claim falls outside of the Tribunal's jurisdiction"), Resp. App. 38; *supra* at 25 (quoting Dec. 12, 2006 hearing); *U.S. Rebuttal*, v. 1, at 2 (Sept. 1, 2003), Resp. App. 30-31. And, of course, the Tribunal reached a similar conclusion when in Case B/66 it dismissed, as beyond the Tribunal's jurisdiction, Iran's claim against Cubic asserting rights related to the ACMR. See *B/66 Decision*, Pet. Br. App. 25a-29a.

3. Even if respondent's obligation to relinquish rights related to the 1998 Cubic judgment were a close question, TRIA itself provides the governing canon of construction that requires judgment in respondent's favor. Specifically in relation to judgments secured against Iran, TRIA § 201(c) added to the VTVPA both the revised relinquishment provision applying to respondent and, immediately preceding it, the following provision entitled "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." TRIA § 201(c)(4) (adding VTVPA § 2002(d)(4)). "[T]his subsection" clearly applies to respondent's judgment secured against Iran and to the "property at issue" language that is the subject of this case, see VTVPA § 2002(d)(5), and respondent's lien was directed against "assets otherwise available . . . under any other provision of law," see *id.*, § 2002(d)(4); TRIA § 201(a), as well as "under this section." See VTVPA § 2002(a). The United States and petitioner conspicuously fail to address or even to cite this statutory directive.

This canon of "statutory construction" was only one part of Congress' broader effort through TRIA § 201 to ensure that victims of state-sponsored terrorism such as respondent could be made whole by executing their judgments against the property of such rogue states. For example, Section 201(a) broadly directs that "[n]otwithstanding any other provision of law . . . the blocked assets of that terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgments to the extent of any compensatory damages for which such terrorist party has been adjudged liable." "[A]ny other provision of law" includes, of course, the "at issue" language of VTVPA § 2002(d)(5).

Because TRIA addressed recovery by terrorism victims of Iran who, by definition, would receive only partial compensation from the United States government, see TRIA § 201(c)(4), Congress sought to ensure that those victims' enforcement of their judgments against Iran would make up the balance of their recovery. To this end, in addition to adding VTVPA § 2002(d)(4)'s canon of "statutory construction," Congress reduced the scope of rights that victims of terrorism would relinquish, see

VTVPA § 2002(d)(5) (entitled "certain claims and rights not relinquished"), and directed that the Secretary of Treasury, in formulating implementing guidelines, "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." *Id.* § 2002(d)(6). Finally, as a remedial statute, TRIA and the VTVPA which it modified must be construed broadly to achieve the purpose of ensuring that victims of terrorism are compensated for the damages they suffered. See*, e.g., Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991).

The legislative history accords with the plain meaning of these remedial provisions. TRIA was enacted against the backdrop of certain Executive Branch measures that had the effect of limiting victims' recovery, and the TRIA conference report explained that "this title establishes, once and for all, that such judgments are to be enforced against any assets in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act." 148 Cong. Rec. at S11528; see H.R. Conf. Rep. No. 107-779, at 27 ("The purpose of Section 201 is to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties"). In addition, TRIA modified and extended the scope of victims' recovery under the VTVPA, which itself reflects Congress' efforts to ensure that victims of state-sponsored terrorism would receive payments, from the U.S. or through enforcement of their judgments, to the limit of their

compensatory awards. See VTVPA § 2002(a)-(d); H.R. Conf. Rep. No. 106-939, at 116 (2000) (purpose of VTVPA is to "help[] American victims of terrorism abroad collect court-awarded compensation and ensure[] that the responsible state sponsors of terrorism pay a price for their crimes"); *id.* at 117 (VTVPA's purpose is to address the fact that many American victims "were not able to collect on their judgements").

B. No Setoff Or Counterclaim Asserted By The United States Places, Or Could Place, The Cubic Judgment "At Issue" Before The Iran-U.S. Claims Tribunal.

Even if "property that is at issue in claims against the United States before" the Tribunal were not, in fact, limited to property subject to a *claim* by Iran, there is no merit to petitioner's atextual argument that a setoff or counterclaim asserted by the United States has made the Cubic judgment "property at issue." See Pet. Br. 31-41. Not only do the statute's terms preclude petitioner's theory, but the United States has asserted no such setoff or counterclaim, and the Tribunal's rules would not permit a setoff or counterclaim to extend to the Cubic judgment.

No alchemy can turn a "claim" into a "counterclaim" or "setoff," turn "at issue in a claim" into "at issue in a proceeding," or turn a claim "against the United States" into one "by the United States." As noted, the Tribunal was established to address particular claims identifying property held in violation of the Algiers Accords, and Congress through TRIA identified a subset of such claims against the United States in defining property that victims of terrorism cannot attach when enforcing judgments against Iran. See *supra* at 20-22. Any *counter*claim or setoff *by* the United States addressing post-1981 property

and *not* constituting an Algiers Accords claim cannot fall within that scope.

Just as fatal to petitioner's argument, the United States does not contend that it has asserted any counterclaim or setoff that encompasses the Cubic judgment. Before this Court, the United States does not point to or rely upon any setoff or counterclaim filings before the Tribunal, but instead argues that principles barring double recovery might mean that if Iran recovers the Cubic judgment that might reduce the amount of U.S. liability under any Tribunal award against it. See U.S. Br. 17-18; but see *infra* at 43-44 (noting U.S. argument at petition stage that other liens placed on the Cubic judgment would ensure no such effect on U.S. liability). Before the Tribunal, the United States made a similar argument, and did not assert any such setoff or counterclaim as provided by the Tribunal's procedures. See *U.S. Rebuttal*, Statement No. 16, 23-25 (Sept. 1, 2003), L644-46. If no such setoff or counterclaim is pending before the Tribunal, there is no basis for petitioner's argument.

In this regard, petitioner ignores the Tribunal's rules, which require that a "counter-claim" or "a claim for the purpose of a set-off" must be formally presented to the Tribunal through pleadings, and in a timely manner:

> In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off . . . .

Trib. R. of P., art. 19 ¶ 3, Resp. App. 8. As with claims, setoffs and counterclaims must specify the

"debt [or] contract . . . out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to . . . the Claims Settlement Declaration." *Id.* art. 18.1(c), Resp. App. 5; see *id.* art. 19.4, Resp. App. 8. Petitioner does not argue that the United States has filed a relevant claim for setoff or counterclaim pursuant to the Tribunal's rules, nor could it do so. The Statement of Defense and other documents provided to respondent by the United States, which represents that it has provided all relevant documents,[5] contain no hint of any United States setoff or counterclaim that extends to the Cubic judgment, and as noted the United States does not claim otherwise.

Any such setoff or counterclaim that petitioner hypothesizes would not, in any event, be within the Tribunal's jurisdiction. The Tribunal's decisions and rules establish that its jurisdiction over claims for setoff and counterclaims is limited to claims that fall within its jurisdiction under the Claims Settlement Declaration in the first instance. See Trib. R. of P., art. 19, ¶ 3, Resp. App. 8 ("the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, *if such counter-claim or set-off is allowed under the Claims Settlement Declaration*") (emphasis added). Construing the Algiers Accords in light of this rule, the Tribunal consistently has held that an "alleged right" to payment can be used for setoff "only if this right is an admissible claim under the Claims

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[5] Respondent does not have direct access to the B/61 pleadings because Tribunal pleadings are not publicly available. Petitioner and the United States recently supplied respondent with all filings in the B/61 and B/66 cases that they identified as "relating to the Cubic claims." U.S. Br. 3 n.1. The United States has agreed to lodge those documents for the Court's convenience and has requested that they be lodged under seal.

Settlement Declaration." *Computer Sciences Corp.* v. *Iran*, 10 Iran-U.S. Cl. Trib. Rep. 269, 309 (1986); see also *id.* at 310 ("counterclaims and claims for the purpose of set-off are governed by the same jurisdictional requirements"); *Westinghouse Elec. Corp.* v. *Iran Air Force*, 33 Iran-U.S. Cl. Trib. Rep. 60, 193 (1997) ("set-offs are permissible only when they meet the jurisdictional requirements for counterclaims"); *Development & Res. Corp.* v. *Iran*, 25 Iran-U.S. Cl. Trib. Rep. 20, 106 (1990) (same). Thus, the Tribunal's jurisdiction over claims for setoff and counterclaims does not extend to property, such as the Cubic judgment, that came into existence long after the Algiers Accords and with respect to which those Accords imposed no obligations upon the United States or Iran. See *supra* at 20-25.

Because the Algiers Accords, the Tribunal's rules, and the United States' practice before the Tribunal preclude petitioner's setoff/counterclaim argument, petitioner's invocation of general principles of international law is unavailing. The VTVPA and TRIA address particular claims before international tribunals, and TRIA specifically addresses particular property-related claims before the Iran-U.S. Claims Tribunal. To discern the scope of Congress' command, and the scope of respondent's relinquishment of rights under federal law, this Court need only construe and apply the federal statute by identifying property at issue in claims before the Tribunal, as determined by the Tribunal's governing documents and procedural rules. That straightforward application of U.S. law presents no occasion to accept petitioner's invitation to import general and free-floating principles of international law into the U.S. Code, see Pet. Br. 38-40, which this Court's decisions preclude in the absence of Congressional direction in

any event. See *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008).[6]

Even if this Court embarked on the course petitioner urges, it would find that there are no general principles of international practice that support petitioner's position. Instead, the jurisdiction and practices of international tribunals with respect to setoffs are specific to each tribunal and determined by each tribunal's governing documents and rules.[7]

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[6] Petitioner's invocation of "the imperative public importance of maintaining U.S. adherence to the Algiers Accords," Pet. Br. 41-44, and of canons of statutory construction that disfavor interpretations that undermine U.S. treaty obligations, *id.* at 36-38, are misplaced because the Cubic judgment is not subject to the Accords and, even if it were, any attachment of the Cubic judgment by respondent would not affect U.S. obligations under the Accords in the B/61 proceeding or otherwise. Accordingly, the "foreign policy interests of the United States," *id.* at 42, are not implicated in this case. The United States does not claim that attaching the Cubic judgment is contrary to the Accords or other treaty obligations.

[7] In relation to the procedural rules governing claims, counterclaims, and setoffs, Iran and the United States expressly modified and narrowed the UNCITRAL rules that are often employed in international arbitrations. *See* Trib. R. of P., arts. 18, 19, Resp. App. 5-9. In addition, the international legal authorities that petitioner cites show only that certain international tribunals have allowed defendants to raise claims for setoff, not that such a practice is compelled by any general rule of international law. *See* Pet. Br. 38-39; cf. *Norwegian Shipowners' Claims* (Nor. v. U.S.), 11 Reports of Int'l Arbitral Awards 309, 310 (Perm. Ct. Arb. 1922) (the governing treaty specifically extended the tribunal's jurisdiction to the setoff claims in question); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb.), 1997 I.C.J. 243, 282-83 (Dec. 17) (decision and separate opinion concerned counterclaims rather than setoffs, and the procedural rules governing that case expressly extended the court's jurisdiction to counterclaims).

In addition, the purported general principles that petitioner attempts to rely on do not support its position. For example, petitioner contends that international tribunals recognize setoffs as reductions in the recovery to a prevailing party "'because of a demand by the defendant arising out of the same transaction.'" Pet. Br. 39 n.10 (quoting *Black's Law Dictionary*). Here, the "setoff" petitioner hypothesizes does not meet this definition because the Cubic judgment is a demand by Iran against a third party and is entirely distinct from the U.S. action regarding the ACMR that is the basis of Iran's claim in the B/61 case.

C. The United States' Construction Of "At Issue" Ignores The Statute's Context And Terms And, In Any Event, Would Not Establish That The Cubic Judgment Is "At Issue" In The B/61 Case.

The United States claims that property is "at issue" whenever it may be relevant to arguments raised in the B/61 case in connection with any issue, even if the property is not actually identified in a claim by Iran arising under the Accords. See U.S. Br. 14 ("at issue" encompasses all "matters that the tribunal may find it necessary to resolve in its decision in a contested proceeding"). Forthrightly advancing a test that suits its financial interests at the expense of terrorism victims, the United States argues that the Cubic judgment is "at issue" in the B/61 case because Iran's claim against the United States "must be reduced by

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Petitioner also cites a passage from Marjorie M. Whiteman, *Damages in International Law* 248-74 (1937), but none of the decisions discussed therein suggests that there is any general rule of international law that governs jurisdiction over setoffs.

the amount of its recovery from Cubic."[8] See *id.* at 12.

1. The United States' abstract construction of "at issue" ignores related statutory language and the broader statutory context. Congress linked "property at issue" to a "claim" lodged before an "international tribunal" established, as by the Algiers Accords, to address claims over particular classes of property. This meaning is confirmed by the practices, jurisdiction, and decisions of the tribunal that Congress directly addressed in defining the "property at issue" that victims could not attach. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)) (addressing "compensatory awards against Iran"). Further, that "property at issue" phrase is embedded in a statute in which Congress repeatedly and expressly indicated its overriding intent to ensure that victims of terrorism could recover their compensatory damages from government funds and, in cases of partial compensation such as respondent's, through robust enforcement of their judgments secured against state sponsors of terrorism. See *supra* at 29-32. The United States fails to address any of these provisions reflecting an intent to compensate victims, including the "statutory construction" canon that strongly

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[8] The United States misleadingly argues that it "could be put in the position of paying twice, once directly, under TRIA, and once indirectly, by compensating Iran for the attached property." U.S. Br. 19. This is simply untrue with respect to respondent's enforcement against the Cubic judgment for two reasons. First, as the U.S. previously acknowledged, *see infra* at 43-44, other liens held on the Cubic judgment ensure that the Cubic judgment will have no effect on U.S. liability to Iran. Second, respondent received government funds under a provision that subrogated the United States to respondent's claim to the extent he is compensated from U.S. funds, enabling the U.S. to secure those payments from Iran. *See* VTVPA § 2002(a), (c).

favors respondent's position. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(4)), Pet. Br. App. 11a. In context, a "claim" that places "property" "at issue" is a formal claim placed before a specific claims tribunal established to address a particular class of disputes over property – not, as the United States would have it, a "claim" in the sense of any argument that might be made before such a tribunal and implicating any type of property, even if plainly not subject to the tribunal's jurisdiction.

Moreover, the United States' broad construction is inconsistent with two other statutory features. First, TRIA requires relinquishment of rights to enforce against property that is either "at issue in claims against the United States before" the Tribunal or "that is the subject of awards" by the Tribunal. TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)(B)), Pet. Br. App. 11a. As the United States acknowledges, U.S. Br. 15, these two clauses must be interpreted in tandem: property "at issue" in a claim is property potentially the "subject of" a Tribunal award. Tribunal awards, however, resolve claims to specific property addressed by the Algiers Accords, *i.e.*, pre-1981 property subject to some obligation under the Accords. Therefore, property not addressed by the Accords, but that the Tribunal nevertheless may consider in the course of deciding an ancillary issue, is not property that could be the "subject of" a Tribunal award.[9] Therefore, such property cannot be "at issue in claims against the United States before" the Tribunal either. This is particularly clear for the

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[9] Tribunal decisions typically are lengthy dispositions that address a host of legal and factual issues, and then culminate in a specific "award" at the end of the document that tracks and addresses the elements of the claimant's claim. *See, e.g.*, *Computer Sciences Corp.*, 10 Iran-U.S. Cl. Trib. Rep. at 316-18.

Cubic judgment, which is not within the Tribunal's jurisdiction, not addressed by the Algiers Accords, and thus not within the class of property that Congress contemplated would be the "subject of" an "award" by the Tribunal.

Second, any Congressional desire to reduce the cost of the VTVPA payment program does not support the United States' broad relinquishment construction or otherwise create a statute biased against victims' recovery whenever there may be an incidental effect on the United States' liability. After all, the relinquishment provision arises in a statute where Congress was *authorizing* payment from public funds to victims of terrorism. Congress knew how to use means other than an anti-recovery rule of construction to protect taxpayers. In particular, the VTVPA payment program provided that the United States would be "fully subrogated" to "all rights" of the victim "against the debtor foreign state," to the extent of compensatory payments made from general Treasury funds. VTVPA § 2002(c), Pet. Br. App. 4a-5a.

2. The United States compounds its error of construing "at issue" in isolation from its statutory context by drawing analogies unrelated to TRIA and the VTVPA, and even these efforts are unavailing. The unrelated federal statutes shed no light on Congress' intent in using the term "at issue" in the context of the relinquishment provision. For example, the United States invokes 5 U.S.C. § 7701(d), a provision that requires an agency official to be notified whenever the interpretation of a civil service law within the agency's jurisdiction is "at issue" in a proceeding before the Merits Systems Protection Board. U.S. Br. 15-16. The United States reasonably suggests that this notice provision should

be construed broadly to apply to all situations in which interpretation of a civil service law "may" arise. *Id.* But this has no bearing on how the term should be interpreted in the context of a provision that addresses property formally placed at issue by statements of claim heard by a claims tribunal, or one that eliminates rights that are otherwise available to victims of state-sponsored terrorism.[10]

Nor does Federal Rule of Civil Procedure 42 support the United States' construction. Rule 42 provides that if "actions before the court involve a common question of law or fact, the court may join for hearing or trial any or all the matters at issue in the actions." The assertion that the phrase "question of law or fact" defines the phrase "at issue," U.S. Br. 15; see also Pet. Br. 29, is a *non sequitur*. The phrase "if actions before the court involve a common question of law or fact" merely establishes the conditions under which consolidation is permitted. The phrase "the court may join for hearing or trial any or all the matters at issue in the actions" then confers broad discretion on the district court to determine the scope of the consolidation. The rule does not in any sense equate the terms "question of law or fact" and "at issue."[11]

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[10] Petitioner offers no support for its bald assertion that terms similar to "at issue" in a string of federal statutes have "been given uniformly wide scope." Pet. Br. 29. In any event, the statutes cited by petitioner address contexts that have no bearing on how the term "at issue" should be interpreted here.

[11] The United States prudently does not endorse petitioner's meritless assertion that the "disjunctive form" of the relinquishment provision (addressing both "property that is at issue in claims" *or* "that is the subject of awards by such tribunal") indicates that Congress intended to make it "broad." Pet. Br. 27-28. That Congress addressed two separate and

Permanent Mission of India v. *City of New York*, 127 S. Ct. 2352 (2007), invoked by the United States, see U.S. Br. 16, in fact supports respondent's position to the extent it has any persuasive force in this context. In *Permanent Mission*, this Court addressed whether a federal court had jurisdiction over a lawsuit seeking a declaration of the validity of tax liens on real property held by a foreign sovereign, pursuant to an exception to sovereign immunity where "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). This Court held that "rights in immovable property" were clearly "in issue" in the tax lien suit because a tax lien "inhibits one of the quintessential rights of property ownership – the right to convey." 127 S. Ct. at 2356. This straightforward statutory construction supports the conclusion that the Cubic judgment is *not* property "at issue in claims against the United States" in the B/61 case. There, the City of New York's fundamental claim that it had a valid tax lien against the foreign sovereign's real property placed the foreign sovereign's "rights in immovable property" squarely in issue. Here, in contrast, Iran's claim "before" the Tribunal does not place the Cubic judgment "at issue" because the claim concerns *different property*. Iran has not made any claim relating to or arising out of the Cubic judgment and,

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foreseeable procedural phases of proceedings is hardly surprising and indicates, if anything, an equivalence of rights (rights at issue are those that may become the subject of an award). The United States similarly does not endorse petitioner's baseless assertion that "Congress sought a broad ambit for the proviso" by providing that claimants who accept partial payments relinquish "all" rights to attach property that is "at issue" before the Tribunal. *Id.* at 28. Again, Congress' use of "all" to define the scope of the rights relinquished indicates nothing about how broadly to interpret "property at issue in claims . . .," which defines when relinquishment is required.

as demonstrated, the Tribunal would not have jurisdiction over any such claim.

3. When the United States addresses the specific context of particular claims before the Tribunal, it quickly reveals that the Cubic judgment is *not* property "at issue" in the B/61 case, even under its own overgenerous construction of "at issue." As canvassed above, the United States has made clear before the Tribunal that the Cubic judgment is not "property at issue" in any claim there, and is not within the Tribunal's jurisdiction. See *supra* at 26-29.

And, before this Court, the United States confirmed that the treatment of respondent's claim, and the resolution of liens against the Cubic judgment, will have absolutely no effect on eventual U.S. liability before the Tribunal – and thus cannot be "at issue" even in the sense advanced by the United States, of affecting the amount of U.S. liability in any judgment Iran may secure against it. As the United States acknowledged at the petition stage, but now conveniently neglects to mention, the United States "would [not] benefit in any practical way" if respondent's attachment efforts are prohibited because two other claimants who did *not* accept payments under the VTVPA (and, therefore, have not relinquished their attachment rights under TRIA § 201) also have liens against the Cubic judgment. See U.S. Pet. Amicus Br. 20. Previously, the United States candidly conceded that resolution of the relinquishment issue with respect to respondent "ultimately [will not] affect the United States' ability to rely on the Cubic judgment to offset any liability it may be found to have in Case B/61." *Id.* Therefore, the Cubic judgment is not "at issue" in the B/61 case even under the United States' own definition.

Now, however, the United States asserts that "[t]his case exemplifies" a potential effect on the United States' liability because permitting respondent to attach the Cubic judgment might "increase by millions of dollars the amount the United States might be found to owe Iran." U.S. Br. 19-20. The United States does not explain its volte face or even address the other liens upon the Cubic judgment that prevent just this outcome. Whatever this case may "exemplify," it does not address "property at issue" in the Tribunal based on the Cubic judgment's availability to satisfy any U.S. liability.

Finally, the one Tribunal decision substantively addressed by the United States similarly undermines its argument. In *Futura Trading Inc.* v. *National Iranian Oil Co.*, 13 Iran-U.S. Cl. Trib. Rep. 99 (1986), the Tribunal applied a standard rule against double recovery. The Tribunal dismissed Futura's contract claim against an Iranian entity because Futura had been made whole for the same loss by collecting on a judgment against Bank of America for failure to honor a letter of credit. *Id. at* 116 (because the bank paid the judgment against it, "Futura has suffered no damage" and therefore "no longer has a cause of action in the present proceedings"). Nothing in the decision suggests that the judgment against the bank was "property at issue" even though the judgment was relevant to the eventual finding regarding liability. The Tribunal did not address or decide anything with respect to what constitutes "property at issue" before it and merely held that *no* property was properly the subject of the separate claim that it had jurisdiction to arbitrate. Indeed, the Tribunal's judgment in *Futura* (*i.e.*, the formal "award" embodied at the end of the Tribunal decision, see *id.* at 117) did not refer to the separate judgment secured

by Futura, which was thus not "the subject of" the award, further confirming that the property could not have been "at issue" in the claim. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)).

D. The Statutory Construction Urged By Petitioner And The United States Is Unworkable, Inequitable, Potentially Unconstitutional, And Thus Could Not Have Been Intended By Congress.

Finally, because Congress crafted TRIA and the VTVPA as a comprehensive effort to compensate victims of terrorism fairly, see *supra* at 29-32, it must have intended to establish a system that puts victims on fair notice of the property rights they relinquish as a condition of accepting compensation for at least a portion of their damages resulting from acts of terrorism.

The plain meaning of TRIA's relinquishment provision, as outlined above, provides just that clarity: "property at issue in claims against the United States in" international tribunals, and specifically the Iran-U.S. Claims Tribunal as contemplated by TRIA, is naturally limited to property (1) existing at the time of the Algiers Accords and that (2) would reasonably be understood by a third party, based on the nature of the property itself, as subject to a potential Iranian claim against the United States based on the Algiers Accords. This standard ensures that victims know what rights they relinquish if they choose to accept partial compensation from the federal government.

In contrast, petitioner and the United States would require that terrorism victims relinquish an open-ended and unknowable set of property rights, ultimately defined by the scope of arguments

presented in secret proceedings. Indeed, petitioner and the United States would have terrorism victims, as in this case, relinquish rights to property that did not even exist upon the signing of the Algiers Accords and that is not the subject of a claim by Iran against the United States – simply because Iran and the United States have recently addressed the property in arguments regarding the calculation of damages that Iran might secure in a separate claim addressing different property that did exist in 1981.

The operation of this standard is inequitable as well as unworkable. Terrorism victims are not provided with notice of the range of property interests that might be or become the subject of arguments before the Tribunal. If property rights "at issue" are as malleable and open-ended as petitioner and the United States suggest, victims would have no way of determining, prior to relinquishing their rights, what property remains subject to attachment and what does not. Even worse, under the theory of petitioner and the United States, the scope of relinquished property is defined by the scope of arguments conducted in secret proceedings. As noted, *supra* at 11, the United States has broadly construed the statute that authorizes the Secretary of State to maintain the confidentiality of filings before the Tribunal. See 50 U.S.C. § 1701, note. To this day, respondent has been unable to review the full record of the proceeding that supposedly precludes his recovery and has been provided with documents that Iran and the United States have deemed relevant only because they have become implicated in a case before this Court. Respondent is aware of no process for victims of terrorism to review Tribunal proceedings prior to relinquishing their rights, and

understands that the Department of State has not provided any such access to Tribunal filings.

The inequity of having to relinquish rights without notice is particularly acute in this case because respondent received what should have served as authoritative assurance that the Cubic judgment was *not* "property at issue" before the Iran-U.S. Claims Tribunal. When respondent accepted his partial payment in 2003, the district court unequivocally had held, in addressing another lienholder's rights, that the Cubic judgment was *not* "property at issue in claims against the United States" in the B/61 case. Pet. App. 91-92 ("the Court finds that the MOD's judgment does not fall within" this relinquishment provision); see Pet. Br. 16 ("the district court ruled . . . that the Cubic judgment was not 'at issue' before the Iran-U.S. Claims Tribunal"). Respondent had no way to review the scope of the confidential Tribunal proceeding and relied in good faith on this judicial ruling against the "relinquishment" argument that petitioner now revives.

Petitioner did not challenge that ruling on appeal of the district court decision. See Pet. App. 49 ("MOD does not argue that the Cubic judgment is either at issue in claims before an international tribunal or the subject of awards rendered by such a tribunal"). Moreover, when respondent accepted his partial payment in 2003, the United States had never suggested to him, or asserted in the pending judicial proceedings concerning the attachment, that he would relinquish his right to attach the Cubic judgment. The United States took this position for the first time in its amicus brief in the Ninth Circuit in July 2006 – several years after respondent received his partial payment.

The unworkable and inequitable nature of the rule petitioner proposes is flatly inconsistent with Congress' intent to benefit and treat fairly victims of terrorism. Moreover, Congress should be presumed to have avoided creating the obvious due process difficulties that petitioner's construction would present. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001).

In the partial payment scheme, Congress expressly acknowledged that it was requiring victims of state-sponsored terrorism to relinquish "rights" to enforce against property as a condition of receiving the payments. See TRIA § 201(c)(4) (adding VTVPA § 2002(d)(5)). Under long-standing due process principles, Congress cannot require citizens to waive "rights" in property without providing them with full and fair notice of precisely what rights they would give up. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985); *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (a decision to relinquish a right must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it"). In this context, "fair notice" requires a reasonably bright-line rule to define what property is or is not within the scope of the relinquishment. Respondent's plain meaning construction provides that clarity, but the standard articulated by petitioner and the United States does not.

II. THE CUBIC JUDGMENT IS A "BLOCKED ASSET" THAT IS SUBJECT TO ATTACHMENT BY RESPONDENT UNDER TRIA.

Congress provided that victims of terrorism such as respondent, who secure a judgment against the state

sponsor of terrorism, be able to satisfy that judgment "to the extent of any compensatory damages" by executing against or attaching "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). For the reasons presented by the United States, see U.S. Br. 30-32, the Cubic judgment is clearly a "blocked asset" for this purpose. Petitioner presents no reason to doubt this conclusion and suggests only that the matter is best addressed initially on remand. This Court, however, can and should now confirm that the Cubic judgment is a "blocked asset" subject to attachment by respondent.[12]

A "blocked asset" for this purpose is "any asset . . . frozen by the United States under . . . sections 202 and 203 of [IEEPA]." TRIA § 201(d)(2)(A). In Executive Order 13382, President Bush invoked his IEEPA authority to declare that "all property and interests in property" of entities designated are "blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." 70 Fed. Reg. 38,567 (June 28, 2005). In late 2007, the State Department further implemented these delegated IEEPA authorities by acting to "block" petitioner's assets, including the Cubic judgment, and thus made them subject to attachment under TRIA § 201(a). See 72 Fed. Reg. 71,991, 71,992 (Dec. 19, 2007) ("Designation") (naming petitioner as an entity "whose property and interests in property are blocked

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[12] Alternatively, respondent has no objection to the United States' suggestion that the Court "vacate the court of appeals' judgment and remand with instructions to affirm the district court's attachment order on the basis of the recent designation of petitioner." U.S. Br. 33. But the Court just as easily could affirm and remand with that same instruction.

pursuant to Executive Order 13382"). The designation was made by "the Acting Under Secretary of State for Arms Control and International Security, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies." *Id.*

As the United States explained, "[t]hat designation blocked all of petitioner's interests in property subject to the jurisdiction of the United States, including the Cubic judgment." U.S. Br. 13; see also *id.* 30 (the Cubic judgment "is now blocked and therefore subject to attachment under TRIA"). This determination is entitled to substantial deference. See, *e.g.*, *Crosby*, 530 U.S. at 386.

Respondent is clearly entitled to execute his judgment against Iran by attaching "blocked assets" such as the Cubic judgment. He "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." TRIA § 201(a); see *Elahi,* 124 F. Supp. 2d at 99; U.S. Br. 30. Iran has been designated by the State Department as a state sponsor of terrorism since January 19, 1984 and is indisputably a "terrorist party" within the meaning of TRIA. See TRIA § 201(d)(4). The Cubic judgment is for an amount considerably less than the compensatory damages awarded respondent in his suit against Iran, even after accounting for the partial payment he received from the U.S. government. See *Elahi*, 124 F. Supp. 2d at 115 (compensatory damages of $11.7 million compared to the Cubic judgment of $2.8 million and the partial payment of $2.3 million).

Petitioner offers no contrary analysis and provides this Court with no reason to second-guess this straightforward application of TRIA. Instead,

petitioner suggests that the Designation's effect is "not properly before the Court at this time" because the Designation was issued after the Ninth Circuit rendered its decision. Pet. Br. 45.

This argument is without merit. It ignores the well-established "principle that a court is to apply the law in effect at the time it renders its decision." *Bradley*, 416 U.S. at 711 (citing *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)). This principle requires this Court to apply the Designation in deciding whether the Cubic judgment is a "blocked asset."[13]

In addition, a remand for the Ninth Circuit to consider the issue following briefing there would be pointless. The Court declined the United States' recommendation at the petition stage to follow just that course, see U.S. Pet. Amicus Br. 16-19, and now the parties have briefed the issue here. Remanding the issue to the lower courts would only prolong and delay the already protracted proceedings in this case, to the detriment of respondent and the United States' declared policy of facilitating redress for victims of state-sponsored terrorism.

Nor is there any reason for the lower courts to consider the Designation in the first instance. The Designation's effect is straightforward. See *supra* at 48-50; U.S. Br. 30. Petitioner's suggestion that

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[13] This Court consistently has held that the prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970) (citing cases); *see also McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (citing cases); U.S. Br. 12, 23 (acknowledging that the judgment below can be affirmed "based on the State Department's recent designation").

"[s]ubstantial fact issues would need to be resolved," Pet. Br. 56, is wholly unsupported. The only "fact" issue that petitioner identifies is "whether MODAFL [the entity named in the Designation] is actually the same entity as petitioner." *Id.* The United States, however, has determined unequivocally that the entities are the same. U.S. Br. 31 ("no doubt that the State Department designated petitioner"); U.S. Pet. Amicus Br. 9. The United States' interpretation of its own designation and Federal Register notice is entitled to substantial deference. See U.S. Br. 32; *Crosby*, 530 U.S. at 386.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

JONATHAN R. MOOK
DIMURO GINSBERG, P.C.
908 King St., Suite 200
Alexandria, VA 22314
(703) 684-4333

PHILIP J. HIRSCHKOP
HIRSCHKOP & ASSOC., P.C.
908 King St., Suite 200
Alexandria, VA 22314
(703) 836-6595

CARTER G. PHILLIPS*
RICHARD D. KLINGLER
JACQUELINE G. COOPER
JOSHUA M. ROBBINS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Respondent

* Counsel of Record

November 12, 2008

RESPONDENT'S APPENDIX

STATEMENT NO. 16

CUBIC ITEMS

I.

IRANIAN PROPERTY AND ITS VALUE

1. The items at issue are sophisticated defence equipment called Air Combat Maneuvering Range ("ACMR"), an electronic air combat training system. This equipment, produced under the Contract entered into with the Company on 3 October 1977, has been identified in the Contract submitted in Iran's Consolidated Submission, Exhibit 16 (Doc. 204). *See* Doc. 236, CUBIC at 1.

2. As acknowledged by Cubic:

   "The ACMR equipment was fully manufactured and ready for shipment to Iran in February 1979." Doc. 236, Cubic, Attachment 4 at 2.

   The items continued to remain on the U.S. soil through 19 January 1981 until CUBIC sold them, upon making some modifications, to the Canadian Government pursuant to a contract dated 16 September 1981. *Id.*

3. The market price of the equipment, constituting Iran's remedy in the main, is the same amount at which the items were sold to the Canadian Government on 16 September 1981. This price, the Total Firm Price Items under Article 7 of the Cubic-Canadian Government Contract, is U.S. $17,139,046.50. See the excerpts at Attachment No. 1. To this amount is also to be added, at the

very least, the Contract price of: i) 4 generators, items identified as 0005AA and 0005AB in the original Contract, in the amount of U.S. $544,654.00 and ii) 4 Airborne Instrumentation subsystem (AIS), item No. 0006, in the amount of U.S. . . . .

* * * *

TRIBUNAL RULES OF PROCEDURE

3 May 1983

Introductions and Definitions

* * * *

STATEMENT OF CLAIM

ARTICLE 18

Text of UNCITRAL Rule

Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

(a) The names and addresses of the parties;

(b) A statement of the facts supporting the claim;

(c) The points at issue;

(d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

Modification of UNCITRAL Rule

Article 18 of the UNCITRAL Rules is modified to read as follows:

> 1. A party initiating recourse to arbitration before the Tribunal (the "claimant") shall do so by filing a Statement of Claim. Each Statement of Claim shall contain the following particulars:
>
> (a) A demand that the dispute be referred to arbitration by the Tribunal;
>
> (b) The names, nationalities and last known addresses of the parties;
>
> (c) A reference to the debt, contract (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights out of or in relation to which the dispute arises and as to which the Tribunal has jurisdiction pursuant to Article II, paragraphs 1 and 2 of the Claims Settlement Declaration;
>
> (d) The general nature of the claim and an indication of the amount involved, if any;
>
> (e) A statement of the facts supporting the claim;
>
> (f) The points at issue;
>
> (g) The relief or remedy sought;
>
> (h) If the claimant has appointed a lawyer or other person for purposes of representation or assistance in connection with the claim, the name and addresses of such person and an

indication whether the appointment is for purposes of representation or assistance;

(i) The name and address of the person to whom communications should be sent on behalf of the claimant (only one such person shall be entitled to be sent communications.)

2. It is advisable that claimants (i) annex to their Statements of Claim such documents as will serve clearly to establish the basis of the claim, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Claim quotations of relevant portions of such documents.

3. No priority for the scheduling of hearings or the making of awards shall be based on the date of filing the Statement of Claim.

Notes to Article 18

1. No claims with respect to which the Tribunal has jurisdiction within the framework of the Algiers Declarations and pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration may be filed before October 20, 1981.

2. All Statements of Claim with respect to matters as to which the Tribunal has jurisdiction pursuant to paragraphs 1 and 2 of Article II of the Claims Settlement Declaration which are filed between October 20, 1981 and November 19, 1981 will be deemed to have been filed simultaneously as of October 20, 1981. All such claims filed between November 20, 1981 and December 19, 1981 will be deemed to have been filed simultaneously as of November 20, 1981. All such claims filed between December 20, 1981 and January 19, 1982 will be

deemed to have been filed simultaneously as of December 20, 1981.

STATEMENT OF DEFENCE

Article 19

Text of UNCITRAL Rule

Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c), and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

Modification of UNCITRAL Rule

Article 19 of the UNCITRAL Rules is modified to read as follows:

> 1. Within a period of time to be determined by the arbitral tribunal with respect to each case, which should not exceed 135 days, the

respondent shall file its Statement of Defence. However, the arbitral tribunal may extend the time-limits if it concludes that such an extension is justified.

2. The Statement of Defence shall reply to the particulars (e), (f) and (g) and include the information required in (h) and (i) of the Statement of Claim (see Article 18, paragraph 1 of the Tribunal Rules). It is advisable that Respondents (i) annex to their Statement of Defence such documents as will clearly serve to establish the basis of the defence, and/or (ii) add a reference and summary of relevant portions of such documents, and/or (iii) include in the Statement of Defence quotations of relevant portions of such documents.

3. In the Statement of Defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim or rely on a claim for the purpose of a set-off, if such counter-claim or set-off is allowed under the Claims Settlement Declaration.

4. The provisions of Article 18, paragraph 1 shall apply to a counter-claim or claim relied on for purpose of a set-off.

Notes to Article 19

1. In determining and extending periods of time pursuant to this Article, the arbitral tribunal will take into account

(i) the complexity of the case,

(ii) any special circumstances, including demonstrated hardship to a claimant or respondent, and

(iii) such other circumstances as it considers appropriate.

In the event that the arbitral tribunal determines that a requirement to file a large number of Statements of Defence in any particular period would impose an unfair burden on a respondent to a claim or counter-claim, it will in some cases extend the time periods based on the above-mentioned factors or by lot.

2. In the event of a counter-claim or claim relied on for the purpose of a set-off, the claimant against whom it is made will be given the right of reply, and the provisions of paragraph 2 of Article 19 of the Tribunal Rules shall apply.

* * * *

IRAN-UNITED STATES CLAIMS TRIBUNAL

Case No. B-61
Chamber One

THE MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,

Respondent.

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2 March 1984

ORDER

1. The Tribunal's Order dated 21 December 1983 is vacated.

2. The Ministry of National Defence is invited to submit by 16 April 1984 its comments on the Requests filed by the Government of the United States of America on 27 February 1984. The Ministry of National Defence is requested by the same date to ensure that the documents, upon which it relies to substantiate its claim, are in a legible form and are presented in an intelligible way.

3. Representatives of the Parties shall meet in The Hague or any other place they may agree upon, during the week commencing 21 May 1984 in

order to identify the contracts as well as any Iranian property items located in the United States, which are at issue in this case, and to reconcile differences as to identify any discrepancies.

4. The parties shall file by 1 August 1984 a joint report arrived at pursuant to the meeting mentioned under 3 above. The report shall state to what extent an agreement has been reached with regard to the contracts and the property. The report shall describe each contract, and in so far as possible each item and indicate its owner and the present location of the item.

5. The Tribunal reserves for a later decision whether to relinquish jurisdiction to the Full Tribunal.

[Redacted]

Chairman
Chamber One

IRAN-UNITED STATES CLAIMS TRIBUNAL

Case No. B-61
Chamber One

THE MINISTRY OF NATIONAL DEFENCE
OF THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA,

Respondent.

---

14 May 1984

ORDER

By Order of 2 March 1984, the Tribunal scheduled further proceedings in this case.

Paragraph 2 of that Order requested the Ministry of National Defence, inter alia, to ensure by 16 April 1984 that the documents, upon which it relies to substantiate its claim, are in a legible form and are presented in an intelligible way.

The Order provided in paragraph 3 that representatives of the Parties should meet during the week commencing 21 May 1984 in order to identify the contracts as well as any Iranian property items located in the United States, which are at issue in this case, and to reconcile differences and to identify any discrepancies. Under Paragraph 4 of that Order,

the Parties were requested to file by 1 August 1984 a joint report arrived at pursuant to their meeting which report should state, inter alia, to what extent an agreement has been reached with regard to the contracts and the property.

On 16 April 1984, the Agent of the Islamic Republic of Iran requested an extension of three months for filing comments and documents as requested in paragraph 2 of the above Order. By Order of 1 May 1984, the Tribunal extended the time limit for this submission to 2 July 1984.

In a submission of 9 May 1984, the Agent of the United States of America requested that the meeting between the Parties in this case by postponed until 2 months after Iran has filed its coments and documents in response to the Tribunal's Order of 2 March 1984. The United States submits "that it is inefficient and pointless to hold a meeting at which the parties are to reconcile their differences before Iran has filed legible and organized copies of the documents that are necessary to permit the United States to identify the properties at issues in this case".

In view of all these circumstances, the meeting of representatives of the Parties as described in paragraph 3 of the Tribunal's Order of 2 March 1984 is postponed to the week commencing 17 September 1984.

The Parties shall file by 3 December 1984 a joint report as described in paragraph 4 of the Tribunal's Order of 2 March 1984.

[Redacted]

Chairman
Chamber One

July 14, 1989

Prof. [Redacted]
Chairman, Chamber One
Iran-United States Claims Tribunal
Parkweg 13
The Hague

Re: Case No. B/61

Dear Chairman [Redacted]

Pursuant to the order of this Chamber (Doc. No. 121), the parties hereby submit the Joint Report of the Government of the Islamic Republic of Iran and the Government of the United States in Case No. B/61. The Joint Report consists of two integral parts: the cover text, which indicates to what extent the parties were able to agree to categorize the property claimed by Iran, and 56 exhibits which, on a company-by-company basis, describe the relevant contract, the property claimed by Iran, and—to the extent possible—the owner of the property and its present location.

The parties' disagreement with respect to any of these four elements is explained, as appropriate, in the parties' Comments. Except as indicated otherwise, the documents attached to each exhibit are submitted by Iran in furtherance of its claim; they do not reflect any agreement between the parties regarding the documents or any legal conclusions following therefrom.

Respectfully submitted,	Respectfully submitted,
[Redacted]	[Redacted]
Agent for the Islamic Republic of Iran	Agent for the United States

CASE NO. B/61

FINAL JOINT REPORT

1. Introduction:

Pursuant to the Order dated 27 May 1987 of Chamber One, and following a week of meetings in The Hague from 9 to 13 November 1987, the Minutes of which meetings are attached hereto and have already been filed with the Tribunal, the representatives of Claimant, the Ministry of Defence of the Islamic Republic of Iran and representatives of Respondent, the Government of the United States of America, met from 3 to 6 May 1988 in The Hague in order to prepare a Joint report and to file it with the Tribunal.

2. Results of meetings:

(a) The Tribunal's Order asked the Parties to report to "what extent an agreement has been reached with regard to the contracts and the property. The report shall describe each contract, and in so far as possible each item and indicate its owner and the present location of the item." Therefore, the Parties agreed upon new categories, as follows:

Category One

Iran titled property currently located at [Redacted]

Category Two

Iranian titled property that is or has been in the possession of the U.S. company—

(A) and there is no dispute regarding the underlying contract between the

Parties to the contract; or

(B) there is no dispute about the title of Iran but there is a dispute regarding the underlying contract between the Parties to the contract.

Category Three

Property for which title is in dispute and which may be the subject of a dispute regarding the underlying contract.

(b) The following three charts show the extent to which the Parties agree about the status of Iran's properties, in view of the above categories:

1. Those items of property over whose status the Parties agree:

[Redacted]

In respect of the property subject to Category One, above, the Claimant declares that since Iran's ownership in the above category is not disputed, the United States' prevention of their export to Iran, and its failure to arrange for their transfer to Iran, constitutes a clear example of violation of the Algiers Accords. The United States Government, thus, bears liability for the ensuing damages.

As to the property subject to category 2A, the Claimant does not see any difference between them and those of category one as far as the United States' obligation for the transfer of Iranian property under Paragraph 9 of the General Declaration is concerned; nor is the remedy to which the Claimant is entitled any different. The property included in category one ([Redacted]) is an indivisible whole and undoubtedly belongs to Iran. In this connection, there is a point to be particularly stressed. This point, which

should be considered as incorporated in all discussions concerning Iran's property in the United States throughout this Joint Report, is as follows. The Claimant has been forced to transfer those items to, or let them remain at, [Redacted]—as well as the items under other categories in any part of the United States—simply because of the Respondent's failure and/or refusal to honor its obligations under the Algiers Accords and other relevant documents. This action was taken as an interim measure until the Tribunal decides Case No. B/61. The Claimant reiterates its demand for the transfer of those properties as well as for other categorized items to Iran.

Since B/1 and B/61 are two separate and independent cases, Iran objects to the comment of the United States Government regarding the duplication of items in these two cases.

U.S. Comments:

List 1 of the Joint Report includes those items whose categorization is not disputed by the Parties. By inclusion of an item in List 1, with respect to any category, the United States does not accept that Iran is entitled to possession of the item or monetary damages. The United States thus reserves the right to present its views concerning Iran's claims with regard to the items identified in this list.

Further, although for the purposes of the Joint Report, the United States has agreed to include the [Redacted], in Category 1, the United States objects to the inclusion in Case B/61 of the FMS property identified in [Redacted] As demonstrated in Exhibit 6, the [Redacted] duplicates, at least to some extent, items identified in the parties Joint Report in Case No. B/1 (Claim 4).

2. Those items of property over whose status the Parties do not agree:

LIST NO. 2

No.	Name of Company	Iran Category	U.S. Category	Status of Contract List of Property Documents and Parties comments
		[Redacted]		
7.	Cubic	Two(B)	Three	See Ex. 22
		[Redacted]		

Iran comments:

In respect of List 2, Iran believes that notwithstanding Iran's effort and good will to fulfill most of the contract, it has not been able to do because of the adverse acts of the U.S. Government from the beginning of the victory of the revolution including the non-issuance of export licenses. The U.S. Government is, therefore, responsible for any damages incurred as a result of the delay in, or non-shipment of, the items to Iran. The U.S. action is also violative of the Algiers Accords.

U.S. comments:

List 2 of the Joint Report includes those items whose categorization is disputed by the Parties. With regard to virtually all of these items, title is in dispute and there may be a dispute regarding the

underlying contract. By inclusion of an item in List 2, with respect to any category, the United States does not accept that Iran is entitled to possession of the item or monetary damages. The United States thus reserves the right to present further views regarding these items.

3. Those items of property over whose status Iran has requested an opportunity to provide further documentation or information:

[Redacted]

Iran comments:

In regard to the above list, the Claimant believes that necessary documents in respect of the remaining items have already been provided to the U.S. Government, but because of lack of the cooperation of the U.S. Companies and no presence of their representatives in the meetings, which Iran believes was necessary for definite response in compliance with the Tribunal's order, Iran is of the opinion that the U.S. Government should have invited the representatives of the respective companies to accompany the U.S. delegation. The failure to do so has resulted in not establishing the status of Iran's property. However, Iran again provided other additional documents to the U.S. Government for further investigation. As a result, the categorization of these items is temporary and the finalization of the categorization is subject to the result of U.S. Government investigation.

U.S. comments:

During the meetings held between the Parties beginning May 3, 1988, Iran stated that it had additional information to provide to the United States for approximately 25 companies. Iran also

asked that the United States clarify certain additional information with other companies. The United States has completed its investigation of the information provided by Iran and has re-contacted the relevant companies for the clarification requested by Iran. As the Parties agreed, the United States has recategorized the items, if appropriate, based on the results of its investigation.

Not all the additional information was actually provided by Iran. Iran requested an opportunity to provide additional information with respect to [Redacted]. Iran also requested an opportunity to discuss with representatives of the Iranian Navy (which was not represented at the meeting) certain information relating to [Redacted] that had been presented by the United States. Iran has still not provided this information to the United States. Accordingly, these companies are classified as "Category 3" companies, but there is no basis for any conclusion regarding the existence of the property, whether title ever passed to Iran, whether the company ever had possession of the property, and whether the property related to a contract dispute.

* * *

Claimant will claim the damages suffered because of the non-implementation of the incomplete project, which is because of the non-issuance of the export licence or the delay of issuance of the export licence by the U.S. Government.

The United States reserves the right to present its views regarding Iran's claim for damages.

The Government of I.R.I. reserves the right to file a statement and required documents in order to prove its claim with respect to all aspects at the Tribunal.

(sgd.) Representative of the Ministry of Defence of the Islamic Republic of Iran	(sgd) Representative of the Government of the United States

[Redacted]

EXHIBIT 22

Name of U.S. Company: Cubic Corporation

Description of Contract:

Contract dated October 23, 1977, between the Deputy Ministry of War for Armament and Cubic International Sales Corporation for the sale of certain subsystems and support equipment comprising an Air Combat Maneuvering Range ("ACMR") to be used by the Iranian Air Force.

Description of Property Claimed by Iran:

Items comprising an ACMR, described at pages one and two of the relevant contract, set forth in Volume 16, Exhibit 21.

Owner of Property:

IRAN COMMENT:

Iran is the owner of property and non-completion of the Contract is due to the act of the U.S. Government, and non issuance of export license since beginning of revolution.

U.S. COMMENT:

Cubic advises the U.S. Government that the Iranian Air Force informed Cubic in May 1979 that the IAF did not consider the completion of the contract "advisable and profitable" and that they desired to discontinue the contract. (Attachment 1). On June 12, 1979, and on August 3, 1979, Cubic also advises that it informed the IAF that the IAF was in breach of the contracts and that pursuant to the California Commercial Code Cubic would sell the system to another buyer. (Attachments 2 and 3). Following this notification, Cubic proceeded to sell the

items to alternative purchasers. Because title never passed to Iran and because of the contract dispute between Cubic and the Iranian Air Force, the items claimed by Iran are properly in Category 3.

Present Location of Property:

IRAN COMMENT:

Company is responsible for the property

U.S. COMMENT:

Since Cubic is not and never has been in possession of any Iranian titled property, the location of these items is unknown.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

The Hague

The Netherlands

[filed 4/18/95]

Case No. B/61
(including Case Nos. A/3,
A/8, A/9, and A/14)

Full Tribunal

ISLAMIC REPUBLIC OF IRAN,

Claimant,

vs.

UNITED STATES OF AMERICA,

Respondent.

CONSOLIDATED RESPONSE OF THE UNITED STATES: PART I

RESPONSE TO LIABILITY CLAIMS: BRIEF

Counsel

[Redacted]

Agent of the United
States

* * * *

[38]

A. Iran Did Not Have a Non-Contingent Ownership Interest in Much of the Property as of January 19, 1981

In order to trigger any United States obligation under the Accords to compensate Iran with respect to any of the property at issue, Iran must have possessed a non-contingent, non-partial ownership interest in that property as of January 19, 1981, the date that the parties adhered to the Accords and therefore the date that any United States obligation would have been triggered. *See* A/15 Partial Award at ¶¶ 40, 43.

Iran has not proved that it had such an ownership interest in any of the property at issue.[68] . . .

* * * *

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[68] Iran glosses over the question of its ownership interest in the specific property at issue with sweeping and inaccurate statements. For example, the Joint Report did not resolve the issue of title to the property for the purpose of obligations arising under the Accords, despite Iran's attempt to mischaracterize that document. Iran's Brief at 5. Even where the United States and Iran agreed in the Joint Report on who had title (*i.e.*, Categories One and Two B)), such agreement went only to the question of who had title *as of July 21, 1989* (the date of the Joint Report). However, as the Tribunal is aware, the relevant date under the Accords is January 19, 1981. Finally, the United States and Iran stated explicitly that the Joint . . . .

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

[filed 18 MAR 1998]

Case Nos. A3, A8, A9,
A14, and B61

Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent.

ORDER

1. The Tribunal notes the following submissions by the Parties: Iran's submission of 8 April 1997 (Doc. 256), requesting that the Tribunal issue an Order requiring the United States to produce "two official census reports prepared by the United States in late 1980 and 1982 for the identification of Iranian properties subject to its jurisdiction" (the "Request"); the United States comments on Iran's Request, filed on 12 May 1997 (Doc. 258); Iran's submission entitled "Necessary Explanations Requested in U.S. Doc. 258," filed on 20 May 1997 (Doc. 259); the United States comments on Iran's submission of 20 May 1997, filed on 16 June 1997 (Doc. 262); Iran's comments on the United States comments of 16 June 1997, filed on 2 July 1997 (Doc. 264); the United

States response to Iran's comments of 2 July 1997, filed on 12 August 1997 (Doc. 266); Iran's comments on the United States response of 12 August 1997, filed on 12 September 1997 (Doc. 268); and the United States response to Iran's comments of 12 September 1997, filed on 1 October 1997 (Doc. 270).

2. Iran requests that the Tribunal issue an Order requiring the United States to produce (i) the information contained in reports on United States Treasury Forms TFR-615 and TFR-625, ….

* * * *

… Cases, but only insofar as they relate to items of property that have already been made the subject of a claim in these Cases. This limitation is dictated, in particular, by reasons of fairness. In connection with this consideration, it should be noted that Iran has been aware of the existence and the import of the census forms it now requests since at least 1983, when it requested in Case No. A15 (II:A and II:B) that the Tribunal order the United States to produce reports submitted on the very same Forms TFR-625 and TFR-615 at issue in the present Request (*see* Doc. 109 of 31 August 1983 in Case No. A15 (II:A and II:B)).

8. Concerning the 1980 TFR-615 census forms, the Tribunal finds that Iran has not proven that those documents are relevant and necessary for these Cases. First, while the claim in these Cases relates to the transfer of certain Iranian property located in the United States at 19 January 1981, the 1980 census forms required the reporting of property in which Iran had any interest held by persons subject to the jurisdiction of the United States *between 14 November 1979 and 31 March 1980*. Second, any relevant information in the 1980 census forms would

have been, by and large, repeated and superseded by information in the 1982 TFR-625 census forms. Pursuant to the United States Iranian Assets Control Regulations, 31 C.F.R. Part 535, "[p]ersons required to report on Form TFR-625 include, but are not limited to, all persons who reported holding tangible property as of March 31, 1980, on Treasury Department Form TFR-615." 47 Fed. Reg. 22361 (1982).

9. The Tribunal finds, further, that the significance for these Cases of the documents and information Iran gathered from the survey it conducted in 1982, *see supra*, paras. 5-6, to the extent such documents and information relate to property currently at issue in these Cases, is comparable to that of the information contained in the relevant 1982 TFR-625 census forms. Thus, the documents and information gathered by Iran may be relevant and necessary for these Cases.

* * * *

[FILED 1 SEPT 2003]

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL

The Hague
The Netherlands

Case No. B/61
(including Case Nos. A3, A8,
A9, and A14)

Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

REBUTTAL OF THE UNITED STATES TO CLAIMANT'S REPLY BRIEF AND EVIDENCE:

BRIEF OF THE UNITED STATES ON ISSUES COMMON TO MULTIPLE CLAIMS VOLUME I OF III (BRIEF)

Counsel:

[Redacted]

Agent of the United States

* * * *

[2] argument that it has established U.S. liability, its compensation claims are largely unsubstantiated and grossly exaggerated.

At the outset, it is as important to understand what this case is *not* about as it is to understand what it *is* about.

First, because Iran challenges U.S. obligations under the Algiers Accords, which became effective on January 19, 1981, this Case cannot concern any alleged acts or failures to act by the United States before January 19, 1981. The Algiers Accords imposed obligations prospectively and may not form the basis of liability for conduct that occurred prior to their effective date. (*See Iran v. United States*, AWD 529-A15-FT at ¶ 69 (May 6, 1992), 28 Iran-U.S. C.T.R. 112, 138-39 [hereinafter Partial Award 529] (rejecting Iran's claim for compensation for storage charges incurred and deterioration of Iranian properties suffered during the period from November 14, 1979, to January 19, 1981).)

Second, this Case is not about liability under the contracts entered into between Iran and private U.S. companies. The United States' obligations at issue in this Case are based only upon the provisions of the General Declaration. The United States has no obligations under the contracts governing the relations between Iran and the private U.S. parties that underlie the claims in this Case. In particular, the United States has no obligation to ensure that the private U.S. parties fulfill the terms on their contracts with the Iranian contracting party. While these contracts may, at times, be pertinent to some issues relevant to this Case, such as whether Iran had title to the disputed property, or whether it had

fully paid for the property for which it now seeks compensation, these contracts do not bind the United States in any manner, because the United States was never a party to them.

* * * *

[19] In a further attempt to clarify what property was at issue in the case, the Tribunal instructed the Parties to meet to discuss Iran's claims, identify any Iranian-claimed property located in the United States, reconcile differences, and then to submit a joint report.[31] During the meetings between the Parties, the United States identified information that was promised by Iran for the preparation of the joint report, but which still had not been received.[32] The Joint Report was filed on July 21, 1989. The Joint Report in no way resolved—or was intended to resolve—the points at issue between the Parties.[33] The Joint Report simply catalogued the property at issue, categorizing each piece of property according to each Party's assertions as to the location of, and . . . .

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[31] *See* Order, Case No. B/61, May 27, 1 987 (Doc. 92) [hereinafter Order, May 27, 1987 (Doc. 92)].

[32] *See* Response of United States, Case No. B/61, Aug. 21, 1992 (Doc. 1983) at 7-8.

IRAN-UNITED STATES CLAIMS TRIBUNAL

[FILED 20 DEC 2005]

Cases Nos. A3, A8, A9, A14 and B61
Full Tribunal

THE ISLAMIC REPUBLIC OF IRAN,

Claimant,

and

THE UNITED STATES OF AMERICA,

Respondent

ORDER

I.

1. During that part of the Hearing devoted to general issues in these Cases, held on 12-14, 16, and 19-23 September 2005, the United States requested that the Tribunal, prior to hearing the individual claims in these Cases, render early decisions on a number of questions, namely:

a. whether the Algiers Declarations impose on the United States an implicit obligation to compensate Iran for losses it incurs as a result of the refusal by the United States to license exports of Iranian properties subject of U.S. export control laws applicable prior to 14 November 1979; if the Tribunal finds that the Algiers Declarations do impose such an implicit obligation on the United States, then

b. whether Iran's claims in these Cases should be dismissed for Iran's failure to cooperate;

c. whether Iran's post-1994 submissions include late-filed claims and evidence which should be excluded from these Cases;

d. whether Iran's claims should be dismissed for Iran's failure to provide its liability case;

e. whether Iran's claims for compensation should be dismissed for failure of proof;

f. whether Iran's claims for consequential damages, or "losses other than replacement value," should be dismissed; and

g. whether consideration of non-export-controlled properties in these Cases should be transferred to Case No. A15(II:A).

2. After having considered the matter, the Tribunal holds that it will decide the questions mentioned *supra*, at subparas. 1.a., 1.b., 1.e., 1.f., and 1.g., after hearing the individual claims in these Cases. The present decision is without prejudice to the Tribunal's ultimate determination of those questions.

II.

3. With respect to the United States' request mentioned *supra*, at subpara. 1.c., the Tribunal takes the following decision.

4. By its Orders of 2 March 1984 (Doc. 41) and 21 January 1987 (Doc. 121), the Tribunal ordered the Parties to meet in order to "identify the contracts as well as any Iranian property items located in the United States, which are at issue" in these Cases and subsequently to submit a joint report "arrived at pursuant to [that] meeting." The Parties submitted this Joint Report on 21 July 1989 (Doc. 171). By Order of 8 April 1993 Doc. 192), the Tribunal further requested Iran to submit its final consolidated

submission "covering all the issues to be decided in these Cases, including the legal and factual bases of the Respondent's liability . . . [and] to make any other legal and factual submissions it believes are necessary to make its case." Iran submitted its Consolidated Submission on 28 February (Docs. 199-200) and 8 March 1994 (Docs. 203-13) ("1994 Consolidated Submission"). The United States submitted its Consolidated Response to Iran's 1994 Consolidated Submission on 18 April 1995 (Docs. 219-26) and 14 August 1995 (Docs. 236-41), and Iran submitted its Reply on 2 July 1999 (Docs. 310-42). The United States submitted its Rebuttal on 1 September 2003 (Docs. 392-449), and Iran submitted "Supplement Documents" on 1 February 2005 (Docs. 466-75, 482).

5. In its present request concerning late-filed claims, the United States asks that the Tribunal exclude from these Cases properties and claims presented by Iran after 1994 on the basis that they are late-filed. Iran responds that, insofar as these Cases relate principally to the interpretation of the Algiers Declarations, they are not subject to the filing deadline contained in Article III, paragraph 4, of the Claims Settlement Declaration. In connection with Iran's assertion, it should be noted that, notwithstanding the absence of a filing deadline in these Cases, these claims relate to properties that were allegedly located in the United States on 19 January 1981 and that such claims have been outstanding since 26 March 1981.

6. The question of whether Iran could continue to add new properties to those claimed in its 1994 Consolidated Submission was raised in 1997 in connection with Iran's 8 April 1997 request (Doc. 256) that the Tribunal order the United States to produce

two census forms. In its 20 May 1997 "Necessary Explanations" of the need for those reports (Doc. 259), Iran stated that the reports "can furnish a useful indication for the determination of Iranian-owned military goods in [the] possession [of certain United States companies] on 19 January 1981 and of their value." In the United States' 16 June 1997 "Comments" (Doc. 262) on "Iran's Necessary Explanations," the United States objected to Iran's request for information concerning items that Iran had not already claimed in these Cases, asserting that it would be unfair and prejudicial to the United States to permit Iran to add claims for additional property that was not identified in Iran's 1994 Consolidated Submission, to which the United States had replied in its Consolidated Response of 18 April 1995 (Docs. 219-26) and 14 August 1995 (Docs. 236-41).

7. By Order of 18 March 1998 (Doc. 274), deciding upon Iran's document production request, the Tribunal ruled that the United States was to provide information contained in certain census forms only insofar as that information related to "items of property that have already been made the subject of a claim in these Cases." In that Order, the Tribunal expressly authorized the United States to "withhold any information concerning property that is not the subject of a claim in these Cases." The Tribunal further noted that "[t]his limitation is dictated in particular, by reasons of fairness," and it imposed the same limitation with respect to information ordered to be produced by Iran. In so deciding, the Tribunal recognized that it would be prejudicial to the United States and inconsistent with fair and orderly proceedings to permit the claims to be expanded in the course of the further pleadings.

8. The United States asserts that, despite that Order, Iran has purported to introduce claims for items of property that were not included in its 1994 Consolidated Submission. Iran asserts its right to do so.

9. In view of the above, the Tribunal rules as follows:

a. The Tribunal hereby affirms its Order of 18 March 1998 (Doc. 274). Consequently, any claims not identified in Iran's 1994 Consolidated Submission, including claims with respect to items of property not identified in that submission, shall be declared inadmissible in these Cases; similarly, any evidence submitted by Iran in support of any such claims shall be declared inadmissible in these Cases.

b. The Tribunal will rely on the Parties to identify any such claims and evidence during that part of the Hearing devoted to the individual claims in these Cases. The Tribunal will make its decisions with respect to the inadmissibility of any such claims and evidence on the basis of the Parties' submissions after the completion of the hearings on all the individual claims.

c. In line with its Order of 1 April 2005 (Doc. 488), the Tribunal accepts for inclusion in the record of these Cases any post-1994 evidence submitted by Iran, insofar as any such evidence relates to items of property that were identified and made the subject of a claim in Iran's 1994 Consolidated Submission.

[Redacted]

President

Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 7th December, 2006

Case B/61

(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
Claimant,

v.

UNITED STATES OF AMERICA
Respondent

PROCEEDINGS

DAY FOUR

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* * * *

[49] the property itself as its remedy in this case, nor does it seek the alleged replacement value of the ACMR. Here, Iran instead primarily seeks as its remedy the gross proceeds of Cubic's resale of a substantially different system, which was sold to the Canadian Government, and which, as counsel has admitted, contained only a portion of the system for

which Iran had originally contracted. Yet, this sort of claim falls outside of the Tribunal's jurisdiction.

The implied obligation found by the Tribunal in the A/15 (II:A) Partial Award applies only to an obligation to compensate Iran for the non-return of export-controlled Iranian property. There is nothing anywhere in the Algiers Accords that turns the United States into a guarantor for the dealings between Iran and US companies.

If Iran believes that it was short-changed by Cubic in its dealings with that company, it needed to find an appropriate forum to seek its remedy against Cubic. And Iran did just that. It first tried to sue Cubic before this Tribunal. That case, Case B/66, was dismissed by the Tribunal in 1987 for lack of jurisdiction.

As previously noted, Iran then filed a claim against Cubic in 1991 before the International Chamber of Commerce, that is the forum set forth in the sales contract to resolve disputes between the contractual parties, Iran and Cubic. And, as previously noted, Iran won its claim against Cubic and was awarded more than $2.8 million, plus interest from the 1991 filing date.

So, Iran had a dispute with Cubic. That dispute has been adjudicated. That should put an end to it. Now the United States is cognizant that Iran has to date been unable to collect this judgment. The issue is winding its way through the court system. Iran's ability to collect on debts owed to it by private entities is not the Tribunal's concern, however. Indeed, Iran to date has failed to show that there is jurisdiction over this claim such that it could conceivably be of a concern to the Tribunal.

* * * *

[62] circumstances, then, the ICC Award actually constitutes a windfall. Iran was able to take money spent on a system for which it admittedly had no use—a bad investment, if you will—and obtain a partial refund. And because Iran has already obtained an award for this money, it is entitled to nothing more from this Tribunal.

Now as you heard, Iran has to date not been able to collect this judgment from Cubic. That, however, is not an issue for this Tribunal. Any problems that Iran might have in this regard are outside of this case and, the United States submits, outside the jurisdiction of this Tribunal. Still, for the sake of completeness, it should again be emphasized that, as Mr. Sellers disclosed, the United States has filed briefs on legal issues in Iran's dispute over this judgment in which the United States has noted reasons why Iran should be entitled to collect this money. Recently, the United States Supreme Court vacated a decision that would have kept Iran from collecting on the ICC award and has remanded the issue to a lower court for reconsideration.

If, however, Mr. President, it were determined that the ICC award is not the entire measure of Iran's losses and that Iran is entitled to additional compensation for this claim, then that claim must somehow be measured. For its part, Iran has failed to provide a roadmap for measuring the value of the actual property. Instead, it points to the proceeds of Cubic's sale of the property to other parties.

As described, however, the items sold by Cubic, while partially origination from the ACMR that was the subject of the Iran-Cubic transaction, ultimately bore little resemblance to that item. Cubic took that ACMR and gutted it, totally transforming the property into a new, saleable item. To use an

imperfect analogy, it took a car, stripped it, substantially modified the usable parts to specifications, made necessary additions, and sold an entirely new, enhanced, technologically superior vehicle to a different customer. Certainly the price of the new . . . .

* * * *

Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 12th December, 2006

Case B/61
(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
Claimant,
v.

UNITED STATES OF AMERICA
Respondent

PROCEEDINGS

DAY SEVEN

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[124] performance of its duties and it pursued its rights under that agreement to bring a claim against Cubic before the ICC.

If Iran incurred any losses, they must relate solely to that second agreement. As the ICC determined, the prior contract between Cubic and Iran, the sales contract, no longer existed after the summer of 1979.

It had been terminated for convenience. And what is important to note here, Mr. President, is that the United States was not a party to the second agreement between Iran and Cubic, nor was it aware of that agreement, nor was it a guarantor of that agreement. Any losses in relation to that contract are not recoverable against the United States and issues regarding losses under that contract do not belong before this Tribunal.

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Before the

IRAN-UNITED STATES CLAIMS TRIBUNAL
The Full Tribunal

in

The Hague
The Netherlands

on

Thursday 14th December, 2006

Case B/61
(Including cases Nos. A/3, A/8, A/9 and A/14)
(IAF CASES)

ISLAMIC REPUBLIC OF IRAN,
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PROCEEDINGS

DAY NINE

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[38] We have addressed this point a number of times, and would point out that Mr. Bundy has offered no support for this assertion and raises it as pure speculation. Iran cannot point to any instance in which it attempted to sell the property on its own or seek the assistance of the custodian, and in which it was required to seek redress in US court. Because

it cannot point to any such instance, Iran instead invokes litigation that has no bearing on the custodians' claims to property to show the Tribunal why it was unreasonable for Iran to take these steps to mitigate.

Mr. Bundy referred to Mr. Sellers' presentation in the Cubic case in which he "gave the Tribunal a taste of the rather extraordinary lengths to which American contractors and companies were willing to go to the frustrate Iranian applications before American courts." And then he stated "For no sooner would one set of proceedings devoted by Iran to lifting attachments on Iran's properties be finished than other US companies would turn around and introduce further attachments."

It is true that Iran received an award from the ICC Tribunal in Cubic that it then confirmed in US court. And it is also true that Iran's award was then subject to attachments by US plaintiffs. But those plaintiffs were not "American contractors and companies", as Mr. Bundy asserted. They were not US property holders who were attempting to assert liens on the award or property arising out of underlying contractual disputes with the contractors.

As I noted, Iran has not been able to show a single instance of any such type of litigation.

Who were these plaintiffs? They were plaintiffs who attempted to attach the Cubic award in satisfaction of their judgment for compensation for the assassination of their family member by Iranian government operatives in France, an incident that has been confirmed by French courts.

It is surprising, first, that Iran would invoke this litigation as a reason to show this Tribunal why it was unreasonable to mitigate in this case, since this

[39] litigation has nothing to do with the matters before the Tribunal, and, second, that Iran would want to highlight before this Tribunal the incident that gave rise to that litigation in the first place.

Iran makes these arguments to attempt to show that, in light of the February Regulation, it was wholly unreasonable for Iran to take steps to mitigate. But ultimately, Mr. President, Members of the Tribunal, Iran's recitation of this untested parade of horribles in answer to Judge Aldrich's question is founded on the assertion—as Mr. Feighery stated earlier—that the February Regulation constituted a breach of the United States' obligations with respect to the export controlled properties.

And as we heard from Mr. Feighery, there could be no breach with regard to the export controlled properties.

And the only reason that Iran clings to the February Regulation, either under a theory of breach or through some other argument that the regulation made the circumstances of mitigation unreasonable, is that that is the only way Iran can offer any appearance of justification of its highly inflated claims—claims for unmitigated and un-depreciated replacement value, not to mention totally unsupported claims for consequential damages, wasted costs and the like.

And so, whether Iran would have faced difficulties in selling its property because of some confusion that could have been caused by the February Regulation for holders of export controlled properties, even if it resulted in no breach with respect to those properties, or difficulties in selling its properties in the context of the broader duty to mitigate irrespective of the Regulation, we will never know, because Iran made

no attempt whatsoever to contact property holders to sell or to arrange for the sale of this property.

Based on the many sales of property undertaken without Iran's permission, we can only speculate that the Tribunal undoubtedly would have found a very motivated group of sellers, entities that would have much preferred . . . .

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