No. 07-615

In the Supreme Court of the United States

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

v.

DARIUSH ELAHI

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

GREGORY G. KATSAS
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

DOUGLAS N. LETTER
LEWIS S. YELIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOHN B. BELLINGER, III
Legal Adviser
Department of State
Washington, D.C. 20520

ROBERT F. HOYT
General Counsel
Department of the Treasury
Washington, D.C. 20220

QUESTIONS PRESENTED

1. Whether respondent relinquished any right to attach petitioner's judgment when he accepted payment under the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1541, thereby waiving his right to attach assets that are "at issue in claims against the United States before an international tribunal."

2. Whether the district court's 1998 judgment confirming a 1997 arbitral award in petitioner's favor is a "blocked asset" subject to attachment by respondent under the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2337.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

International accords, statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Regulations and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 07-615

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

v.

DARIUSH ELAHI

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents two questions concerning whether respondent—a judgment creditor of the Islamic Republic of Iran—may attach an unrelated judgment in petitioner's favor. Although the United States strongly condemns the conduct of Iran that gave rise to respondent's judgment against it, the decision of the court of appeals is erroneous and threatens to undermine important governmental interests, including the proper functioning of the Iran-United States Claims Tribunal (Claims Tribunal or Tribunal) and the long-standing positions of the United States before that Tribunal. In addition, if upheld, the decision could subject the United States to mil-

lions of dollars in additional liability to Iran. At the Court's invitation, the United States filed a brief at the certiorari stage.

STATEMENT

1. In response to the seizure of American hostages in Tehran in November 1979, the President, exercising his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701, 1702, "blocked all property and interests in property of the Government of Iran * * * subject to the jurisdiction of the United States." Exec. Order No. (E.O.) 12,170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. The hostage crisis was resolved through the Algiers Accords of January 19, 1981, 20 I.L.M. 224, in which the United States agreed to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *Ibid*. The United States undertook, with certain exceptions, 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." *Id.* at 227. The Accords established the Claims Tribunal at the Hague to resolve, *inter alia*, claims of the United States and Iran concerning the other's performance under the Accords. *Id.* at 230-232; see *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-666 (1981).

On the day the Accords were concluded, the President directed the transfer to Iran of Iranian financial assets. E.O. 12,277-E.O. 12,280, 3 C.F.R. 105-112 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed * * * by the Government of Iran." E.O. 12,281, 3 C.F.R. 112 (1982); see 31 C.F.R. 535.215. Finally, the President lifted the earlier prohibitions

against transactions in Iranian property. E.O. 12,282, 3 C.F.R. 113 (1982). The Treasury Department implemented that order by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States * * * after January 19, 1981, or (2) The interest in the property of Iran * * * arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. Petitioner is the Ministry of Defense of Iran. Before the 1979 Iranian revolution, petitioner's predecessor contracted with a California firm, Cubic International Sales Corporation, subsequently Cubic Defense Systems (Cubic), to purchase an Air Combat Maneuvering Range (ACMR). Pet. App. 6; J.A. 21.

a. On January 19, 1982, Iran and petitioner filed two claims before the Claims Tribunal relating to Cubic: one against the United States solely (*Islamic Republic of Iran* v. *United States*, No. B/61 (*Case B/61*)); the other against both the United States and Cubic (*Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, 14 Iran-U.S. C.T.R. 276 (1987) (*Case B/66*)). *Case B/61* claimed, with respect to Cubic and other military suppliers, that the United States had violated the Algiers Accords by "bar[ring] the transfer to Iran" of military equipment. App., *infra*, 25a; 1 Claimant's Consolidated Submission 19-20, *Case B/61*; 3 *id.* Ex. 16 (Cubic contract).[1] *Case B/61* sought a decree requiring the United States to is-

[1] The documents reprinted in the appendix to this brief were filed with the Claims Tribunal in *Case B/61* and *Case B/66*. The filings of Iran and of the United States relating to the Cubic claims have been provided by petitioner and the United States, respectively, to counsel for respondent.

sue export licenses for the military goods or compensation for what Iran had paid and consequential damages. App., *infra*, 31a, 43a. *Case B/66* sought the same relief as *Case B/61*, *id.* at 9a-10a, based on an allegation that Cubic had violated the 1977 ACMR contracts, and that the United States had violated its obligations by preventing Cubic from fulfilling the contract, *id.* at 2a.

On the United States' motion, the Tribunal dismissed *Case B/66* in April 1987, holding that it lacked jurisdiction over claims by petitioner against United States nationals and that the United States was not independently obligated to petitioner under contracts with Cubic. *Case B/66*, 14 Iran-U.S. C.T.R. at 277-278. In 1991, petitioner sought arbitration against Cubic in Switzerland before the International Court of Arbitration of the International Chamber of Commerce (ICC). See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Int'l Sales Corp.*, No. 7365/FMS at 7, *reprinted in* 13 Mealey's Int'l Arbitration Report (Oct. 1998) at G-4 (*ICC Award*).[2] The ICC claim requested the same relief—reimbursement for payments and consequential damages—as *Case B/61* and *Case B/66*. *Id*. at 11.

In response to Iran's Cubic claim in *Case B/61*, the United States noted that Iran had sought "recovery for the same Items at issue here" in *Case B/66* and that the same property was "currently the subject of an arbitration [petitioner] brought against Cubic before the [ICC]." App., *infra*, 48a, 50a. The United States urged the Tribunal to "await the decision of the ICC." *Id.* at 50a.

---

[2] The *ICC Award* is Exhibit 3 to the Petition for Order Confirming Foreign Arbitral Award (No. 98-cv-1165), discussed at p. 5, *infra*.

b. The ICC rendered its award in May 1997. The arbitration panel found that in mid-1979, before Iran's assets were blocked and before Iran made the final payments for the ACMR, the parties reached a "common understanding that the Contracts would be *discontinued* and that Cubic would try to resell the equipment," with a later "settlement of the accounts." *ICC Award* 30, 37. "Depending on the result of the attempt to resell the System, either [petitioner] became entitled to be (partly) reimbursed for the payments it had made to Cubic, or Cubic became entitled to claim, in balance, an additional payment from [petitioner]." *Id.* at 48. In September 1981, Cubic sold to Canada a modified version of the ACMR, which was installed by October 1982. *Id.* at 52. After crediting petitioner's advance payments and Cubic's claims for compensation, the arbitrators awarded petitioner the balance, approximately $2.8 million, plus interest. *Id.* at 81, 84.

Cubic refused to pay, and Iran brought suit to enforce the award. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998), appeal pending, No. 99-56380 (9th Cir. filed Aug. 19, 1999). The district court confirmed the award on December 7, 1998, *id.* at 1174, and entered final judgment on August 10, 1999, Judgment (No. 98-cv-1165).

c. In July 1999, Iran filed its reply in *Case B/61*. See J.A. 73-86. Iran attached excerpts of the *ICC Award* and other documents from those proceedings. J.A. 85-86. To counter an anticipated defense, Iran contended that the *ICC Award* "cannot have a *res judicata* impact on the present Case" because *Case B/61* is based on "the United States' obligation under the Algiers Declarations to arrange for the transfer of the items to Iran" and

seeks compensation for "the losses suffered by Iran as a result of the United States' non-export of Iranian properties." J.A. 75-76. Iran recognized, nonetheless, that any amount it recovered from Cubic would "be recuperated from the remedy sought" against the United States. J.A. 76 n.2.

In rebuttal, the United States relied on the *ICC Award* and filings in petitioner's district court action to confirm that award. App., *infra*, 51a-82a. The rebuttal observed that "Iran has already received an award against Cubic for nearly $5 million [including interest] in reimbursement/compensation on its claims brought pursuant to these contracts," and that any further recovery "based on these same contracts would unjustly enrich Iran." *Id.* at 77a. The United States further argued that, "[i]f the Tribunal awards Iran any compensation on this claim, it must deduct the amounts that Iran has already been awarded for these Items by the ICC." *Id.* at 80a.

3. In 2000, Congress authorized the Secretary of the Treasury to make payments to certain individuals with terrorism-related judgments against Iran in suits brought under 28 U.S.C. 1605(a)(7)[3] to be paid out of rents received on Iranian diplomatic and consular properties, or undesignated United States Treasury funds (not to exceed the amount in the Iran Foreign Military Sales Program account). Victims of Trafficking and Violence Protection Act of 2000 (VPA), Pub. L. No. 106-386, § 2002(a) and (b)(2), 114 Stat. 1541, 1543. Those who accept payment under VPA relinquish certain rights, including their right to pursue compensatory damages

---

[3] Congress recently replaced Section 1605(a)(7) with a new 28 U.S.C. 1605A. See 07-615 U.S. Cert. Br. 3 n.1.

and "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." § 2002(a)(2)(B)-(D), 114 Stat. 1542.

The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2337, amended VPA in several ways. Congress expanded the class of individuals eligible for payment, § 201(c)(1), 116 Stat. 2337, but, because the funds originally identified might not be sufficient, Congress directed the Secretary to make pro rata payments to newly eligible persons, § 201(c)(4), 116 Stat. 2337. Congress limited the rights that must be relinquished by individuals who receive "less than the full amount of compensatory damage awards," but continued to require that they relinquish their rights of "enforcement against property that is at issue in claims against the United States before an international tribunal or is the subject of an award by such a tribunal." *Ibid.*; see 68 Fed. Reg. 8080 (2003).

In addition to amending VPA, TRIA authorized creditors with terrorism-related judgments to attach "the blocked assets of [a] terrorist party." TRIA § 201(a), 116 Stat. 2337. "[B]locked asset[s]" include "any asset seized or frozen by the United States" under IEEPA. TRIA § 201(d)(2)(A), 116 Stat. 2339.

4. In February 2000, respondent sued Iran and its Ministry of Information and Security under Section 1605(a)(7), alleging that those entities were responsible for the assassination of respondent's brother because of his opposition to the regime. *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99, 103 (D.D.C. 2000). Defendants defaulted and the court awarded respondent

$11,740,035 in compensatory damages and $300 million in punitive damages. *Id.* at 115.

Respondent registered that judgment in the same court in which petitioner had confirmed the arbitration award against Cubic. In November 2001, respondent filed a notice of lien against petitioner's judgment against Cubic. Pet. App. 8. The district court rejected petitioner's contention that the Cubic judgment was immune from attachment, reasoning that petitioner had waived such immunity by invoking the court's jurisdiction to confirm the arbitration award. *Ibid.*

In 2003, respondent applied for and received payment of $2.3 million under TRIA in partial satisfaction of his judgment against Iran. Pet. App. 10. In accepting that payment, he signed an agreement "relinquish[ing] . . . all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal or that is subject to awards by such tribunal." Pet. App. 30 (quoting 68 Fed. Reg. at 8081).

5. Petitioner appealed the district court's holding that the Cubic judgment was subject to attachment, and the court of appeals affirmed. Pet. App. 38-80. The court of appeals rejected the district court's waiver analysis, *id.* at 59-63, but held that petitioner nonetheless was subject to the court's jurisdiction as an agency or instrumentality of Iran engaged in commercial activity, *id.* at 63-70. The court also rejected petitioner's argument that respondent's attachment of the Cubic judgment was not licensed under IEEPA. The court held that the Cubic judgment was not blocked because petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic," and that it was therefore

subject to the general license for transactions involving property in which Iran's interest "arises after January 19, 1981." *Id.* at 76 (quoting 31 C.F.R. 535.579(a)(2)).

Petitioner filed a certiorari petition. In response to the Court's invitation, 544 U.S. 998 (2005), the United States explained that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1604, affords greater protection from attachment to the property of foreign states than to the property of their agencies or instrumentalities and that petitioner—a ministry of defense—is an inseparable part of the Iranian state, rather than its agency or instrumentality. 04-1095 U.S. Amicus Br. 7-17. The Court vacated and remanded for further consideration of petitioner's status. 546 U.S. 450, 452-453 (2006).

6. a. On remand, a divided panel of the court of appeals again affirmed. 07-615 U.S. Cert. Br. App. 1a-30a (U.S. Cert. App.) (reproducing original opinion). On the FSIA issue, the panel held that petitioner is "an inherent part of the state of Iran" entitled to the greater immunity afforded to foreign states. *Id.* at 20a. Respondent contended, however, that he could attach the Cubic judgment on the alternative ground that it is the "blocked asset[]" of a terrorist party and therefore subject to attachment under Section 201(a) of TRIA. *Id.* at 11a. The court agreed, concluding that "no action by the executive branch has ever unblocked the assets in which Iran has an interest that antedates the Revolution, as its interest in the Cubic judgment does in this case." *Id.* at 15a.

The majority also rejected petitioner's argument, supported by the United States as amicus curiae, that the Cubic judgment is "at issue" in *Case B/61* and that respondent therefore relinquished his right to attach the Cubic judgment when he accepted $2.3 million under

TRIA "in partial satisfaction of his $11.7 million compensatory damages award against Iran." U.S. Cert. App. 6a-7a, 15a. The majority recognized that Iran seeks damages from the United States in *Case B/61* "based on the non-export of * * * the ACMR," *id.* at 8a, and that Iran had represented that it would "offset from its demand against the United States * * * any proceeds it receives from the Cubic judgment," *id.* at 9a. The majority nonetheless held that the Cubic judgment was not "at issue" in *Case B/61* because "the Cubic judgment * * * resolved Cubic's liability to Iran for non-delivery of the ACMR," whereas "Claim B/61 addresses what liability the United States incurred by failing to restore frozen Iranian assets, including the ACMR, as required under the Algiers Accords." *Ibid.*

Judge Fisher dissented. In his view, the Cubic judgment is "at issue" in *Case B/61* because it entitles the United States to an offset in that proceeding, and therefore respondent relinquished his right to attach the judgment by accepting compensation under TRIA. U.S. Cert. App. 26a.

b. Petitioner sought rehearing. The United States, as amicus curiae, explained that the court's holding that the Executive Branch failed to unblock any property in which Iran's interest antedated the Iranian revolution—which contradicted the court's earlier holding that the Cubic judgment was transferrable under the general license, Pet. App. 76—was incorrect and could seriously impair the United States' interests before the Claims Tribunal. Gov't C.A. Reh'g Amicus Br. 5-6, 8-11 (No. 03-55015).

The majority subsequently amended its opinion to delete the erroneous statement that the Executive Branch had never unblocked any property in which

Iran's interest antedated "the Revolution." Pet. App. 3; U.S. Cert. App. 15a. In new language, the majority recognized that "[f]ollowing release of the hostages, the United States unblocked most Iranian assets," but the court nevertheless held that "military goods such as the ACMR remained blocked," Pet. App. 3, a distinction no party had urged.

7. In October 2007, the Department of State designated the Iranian Ministry of Defense and Armed Forces Logistics—the same entity that is petitioner here, see pp. 31-32, *infra*—as an entity of concern with respect to the proliferation of weapons of mass destruction. 72 Fed. Reg. 71,991-71,992. The State Department made that designation under E.O. 13,382, 3 C.F.R. 170 (2006), which the President issued pursuant to his authority under IEEPA, *ibid.*; 72 Fed. Reg. at 71,991. The "property and interests in property" of petitioner therefore are now "blocked." 72 Fed. Reg. at 71,992.

SUMMARY OF ARGUMENT

Although the United States strongly condemns the killing that gave rise to respondent's action, the court of appeals' decision that Cubic's judgment is subject to attachment rests on a misinterpretation of TRIA and other errors of law, and accordingly should be reversed.

1. When respondent accepted payment under TRIA, in partial satisfaction of his judgment, he relinquished any right to attach property "at issue in claims against the United States" before the Claims Tribunal. The court of appeals' holding that the Cubic judgment is not "at issue" before the Tribunal is inconsistent with the plain meaning of that phrase and undermines the evident purpose of TRIA's relinquishment provision. Petitioner's claims against Cubic in the arbitration proceed-

ing and against the United States in *Case B/61* relate to the same losses Iran allegedly sustained from the termination of its contract with Cubic. While the theories of liability may differ, Iran has acknowledged that the Cubic judgment constitutes an integral part of the remedy it seeks against the United States in *Case B/61* and that its claim against the United States must be reduced by the amount of its recovery from Cubic. Under any reasonable construction, the Cubic judgment is therefore "at issue" before the Tribunal.

The court of appeals' contrary conclusion not only contravenes the text of TRIA but would frustrate the statute's purpose. TRIA was designed, *inter alia*, to prevent those who accept payment under that statute for their compensatory judgments against Iran from pursuing attachments that could undermine the United States' position before the Tribunal. Respondent's attachment, if upheld, would potentially subject the United States to millions of dollars in additional liability to Iran by eliminating property that could offset any judgment against the United States in the Tribunal. By accepting the $2.3 million under TRIA, respondent relinquished his right to attach property—like the Cubic judgment—that might be used to satisfy a judgment against the United States before the Claims Tribunal.

2. If the Court determines that respondent relinquished his right to attach the Cubic judgment, it should reverse without reaching the second question presented. If the Court does reach that issue, however, it should vacate the court of appeals' decision and remand with instructions to affirm on alternative grounds. The court's determination that the judgment was blocked because the United States never unblocked Iran's pre-1981 property interests in military equipment is errone-

ous and is contrary to the longstanding position of the United States, including its position before the Tribunal. The Cubic judgment is, however, now blocked as a result of the State Department's designation of petitioner as an entity of proliferation concern. That designation blocked all of petitioner's interests in property subject to the jurisdiction of the United States, including the Cubic judgment.

ARGUMENT

I. BY ACCEPTING PAYMENT FROM THE UNITED STATES, RESPONDENT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT

A. The Cubic Judgment Is "At Issue" Before The Claims Tribunal

To help ensure that American victims of state-sponsored terrorism would receive "some measure of justice," 148 Cong. Rec. 23,121 (2002) (statement of Sen. Harkin), TRIA expands the class of judgment creditors eligible to receive payments from the United States for judgments awarded against "terrorist part[ies]." TRIA § 201(a), 116 Stat. 2337. As Judge Fisher observed, however, "TRIA's justice comes at a cost." Pet. App. 30. TRIA requires those who accept payment under that statute to relinquish the right to attach any property "at issue in claims against the United States before an international tribunal." TRIA § 201(c)(4), 116 Stat. 2339.

The threshold question presented by this case is whether the Cubic judgment is "at issue" in a claim against the United States in the Claims Tribunal. That boils down to a matter of statutory interpretation. Although neither VPA nor TRIA defines the term "at issue," its "ordinary meaning," *United States* v. *Santos*,

128 S. Ct. 2020, 2024 (2008), and statutory context, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006), make clear that the phrase encompasses, at the very least, situations in which the claim before the Tribunal relates to the same subject matter as the property attached, such that the Tribunal could be called upon to make rulings with respect to the property. The filings of Iran and the United States in *Case B/61* demonstrate that the Cubic judgment is at issue in that proceeding.

1. The phrase "at issue" is commonly understood, when used in connection with litigation, to describe matters that the tribunal may find it necessary to resolve in its decision in a contested proceeding. Dictionaries routinely define "at issue" as connoting "[t]aking opposite sides; under dispute; in question." *Black's Law Dictionary* 136 (8th ed. 2004); see *The American Heritage Dictionary of the English Language* 929 (4th ed. 2006) ("[i]n question; in dispute"). *Webster's* similarly defines "at issue" as "in a state of controversy: at variance: at a point where opposing viewpoints are held: in disagreement." *Webster's Third New International Dictionary of the English Language* 1201 (1993). Accordingly, property is "at issue" before the Claims Tribunal if it might reasonably be expected to be addressed in its decision.

That conclusion is further supported by the broader context of the relinquishment provision. A person who receives less than full payment under TRIA for his compensatory damages against Iran need not relinquish all the rights that the VPA required a recipient of full compensation to waive. See TRIA § 201(c)(4), 116 Stat. 2339. Significantly, however, TRIA *does* continue to require the recipient of partial payment to waive his right of "enforcement against property that is at issue in

claims against the United States before an international tribunal or is the subject of awards by such tribunal." *Ibid.*

Congress's use of the phrase "subject of awards" to describe the scope of relinquishment with respect to matters already adjudicated by the Tribunal is also significant. After the Tribunal has issued its award, the award's scope is fixed and determines what matters it actually resolves. See *Webster's* 2275 (defining "subject" as "something concerning which something is said or done: a thing or person treated of * * * <the [subject] of your essay>"). In contrast, when a claim is still in litigation, it is impossible to predict with certainty what the "subject of" the award will be, and so care must be taken not to interfere with anything that is "at issue" in the proceedings that the Tribunal may find it necessary to address in its decision.

Other statutes and court rules likewise employ the phrase "at issue" to describe matters that the court may be called upon to address in the course of adjudicating a case. Federal Rule of Civil Procedure 42(a), for example, permits consolidation of "any or all matters at issue in * * * actions" that "involve a common question of law or fact," which clearly implies that it is the "*question* of law or fact" that is regarded as being "at issue." *Ibid.* (emphasis added). Similarly, Congress has provided that "whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office [of Personnel and Management] is at issue in any proceeding" before the Merit Systems Protection Board, the Board must notify the Director of OPM, who may choose to intervene. 5 U.S.C. 7701(d)(1) and (2). The notice requirement under Section 7701(d)(2) is not limited to circumstances in which the MSPB will *necessar-*

ily address the application of a civil service provision in a definitive way, but extends to all cases in which a party has raised an argument that may lead the Board to interpret the civil service law or regulation in its decision. Cf. *Permanent Mission of India to the U.N.* v. *City of New York*, 127 S. Ct. 2352, 2356 (2007) (equating rights "in issue" in litigation, 28 U.S.C. 1605(a)(4), with litigation that "implicates" those rights).

2. The filings of Iran and the United States before the Tribunal make clear that the Cubic judgment is "at issue" in *Case B/61*. Those filings contain extensive discussion of the *ICC Award* as well as the district court order confirming that award. Both Iran and the United States have recognized that the Cubic judgment and *Case B/61* relate to the same injury claimed by Iran and that the Tribunal must therefore consider the *ICC Award* and Cubic judgment in deciding *Case B/61*.

That has been clear from the outset of the Tribunal proceedings. Iran's claims in each of the three proceedings sought the same monetary remedy: compensation of nearly $13 million for its payments on the Cubic contracts and damages of $15 million. See App., *infra*, 9a-10a (*Case B/66*); *id.* at 31a, 43a (*Case B/61*); *ICC Award* 11. When the United States moved to dismiss *Case B/66*, one of its arguments was that "The Subject Matter of Claim No. B/66 Is Already at Issue in Claim No. B/61." App., *infra*, 18a. Similarly, when the United States urged the Tribunal to delay consideration of the Cubic claim in *Case B/61* pending a ruling by the ICC, it explained that in *Case B/66* petitioner sought "recovery for the same Items at issue here," which "Items are currently the subject of a pending proceeding brought by [petitioner] before the ICC." *Id.* at 50a. Shortly after the ICC issued its award and petitioner filed its action

to confirm that award, Iran again recognized, in a letter from its Agent before the Tribunal to the United States Agent, that "the Awarded Amount constitutes an integral part of the remedy sought in Case B61." *Id.* at 85a.

Most significantly here, the parties have repeatedly stated that the Cubic judgment could affect the extent of Iran's damages and, in the view of the United States, whether Iran even has a valid claim in *Case B/61*. As early as January 1999, before the enactment of either VPA or TRIA, Iran's Agent recognized that, if collected, the Cubic judgment "is naturally to be recouped from the remedy sought against the United States in Case B61." App., *infra*, 84a. Similarly, Iran's Reply before the Tribunal noted that the amount of the Cubic judgment, "if received, will be recuperated from the remedy sought" against the United States. J.A. 76 n.2.[4] The United States' Rebuttal likewise observed that, "[i]f the Tribunal awards Iran any compensation on this claim [in *Case B/61*], it must deduct the amounts that Iran has already been awarded for these Items by the ICC." App., *infra*, 80a. Indeed, the United States went fur-

---

[4] Iran contended, in its Reply in *Case B/61*, that the Cubic judgment did not bar its claim entirely under principles of "*res judicata*" because there was a variance in "subject matter." J.A. 75-77. Contrary to the views of the court of appeals (Pet. App. 13) and respondent (Br. in Opp. 18-19), that assertion does not constitute a concession that precludes petitioner from arguing that the Cubic judgment is "at issue" before the Tribunal. As discussed below, see pp. 21-23, *infra*, the standard for "res judicata," *i.e.*, claim preclusion, is not the same as whether a litigated judgment is "at issue" in a subsequent proceeding. Notably, Iran's Agent also recognized that distinction, because he made a similar assertion about the variance of "subject-matter" and inapplicability of "res judicata" in the very letter in which he stated that "the Awarded Amount constitutes an integral part of the remedy sought in Case B61." App., *infra*, 84a n.*, 85a.

ther, arguing that, because any compensation beyond the Cubic judgment would constitute unjust enrichment, "[t]he Tribunal should dismiss this claim in its entirety." *Id.* at 81a.

The Tribunal's award in *Futura Trading Inc.* v. *National Iranian Oil Co.*, 13 Iran-U.S. C.T.R. 99 (1986), demonstrates the manner in which the Cubic judgment is likely to become a "subject of" the award in *Case B/61* and is therefore "at issue" in that proceeding. In *Futura Trading*, the claimant brought a contract claim against Iran's national oil company, and the Tribunal upheld Futura's "contractual entitlement to the unpaid amount, *i.e.*, U.S. $416,321." *Id.* at 114 (¶ 56). Futura had, however, already collected a judgment in the same amount from Bank of America, premised on the latter's negligence in failing to obtain authority to pay Futura under a letter of credit. *Id.* at 115 (¶ 59). The Tribunal's award therefore held that "Futura has suffered no damage" and "no longer has a cause of action in the present proceedings." *Id.* at 116 (¶ 62). It is quite likely that the Tribunal's decision here will likewise address the Cubic judgment, and determine whether, and to what extent, that judgment reduces or eliminates Iran's claim. Accordingly, the Cubic judgment is "at issue" in *Case B/61* and respondent has relinquished his right to attach that judgment.

3. Moreover, allowing respondent to attach the Cubic judgment would frustrate the evident purposes of Congress in adopting the relinquishment provision. VPA and TRIA provide a mechanism by which certain judgment creditors of Iran may choose to accept payment from the United States for the value (or a pro rata share of the value) of their compensatory damages. VPA § 2002(a), 114 Stat. 1541; TRIA § 201(c)(4), 116

Stat. 2337. While some of the funds for such payments come from rents on Iranian diplomatic and consular properties, the vast majority of the funds comes from the United States Treasury. VPA § 2002(b)(2)(A) and (B), 114 Stat. 1543. Congress insisted that those who receive payments under VPA or TRIA should forego—in exchange for the funds they received—the right to engage in attachment proceedings that could increase the United States' liability to Iran in claims before the Tribunal or frustrate the United States' ability to recoup its payments through appropriate offsets. VPA § 2002(c), 114 Stat. 1543. Otherwise, the United States could be put in the position of paying twice, once directly, under TRIA, and once indirectly, by compensating Iran for the attached property.

Congress understood, as this Court also observed, that the treatment of "foreign assets" was a central feature of the Algiers Accords and that allowing individual claimants to impose "attachments, garnishments, or similar encumbrances" could create serious problems for the Nation's ability to implement its foreign policy. *Dames & Moore*, 453 U.S. at 673. Whereas *Dames & Moore* discussed how attachments could frustrate the President's ability to *negotiate* a resolution to the hostage crisis, TRIA reflects Congress's understanding that they can also frustrate the *implementation* of that resolution.

This case exemplifies the concerns that motivated Congress to insist that Iran's judgment creditors relinquish attachment rights to property at issue before the Tribunal as a quid pro quo of accepting payment under TRIA. Respondent applied for and accepted $2.3 million in TRIA funds. If respondent is permitted to successfully execute on the Cubic judgment, he could deprive

the United States of a defense against liability and would, at the very least, eliminate an offset and thereby increase by millions of dollars the amount the United States might be found to owe Iran. As Judge Fisher noted in dissent, Congress's "evident" intent in requiring relinquishment was to "prevent victims of terrorism who accept money from the federal treasury from attaching, executing on or making claims against property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." Pet. App. 33.

In addition, the legal arguments respondent advances in support of the attachment could, if adopted, undermine the United States' position before the Tribunal. Respondent urges this Court to rule, as the court of appeals did, that the Cubic judgment is "blocked" on the ground that the judgment represents Iran's liquidated "interest in the blocked military asset, *i.e.*, the ACMR." Br. in Opp. 26-27. But, as noted below, see p. 28, the United States has argued before the Tribunal that Iran had no ownership interest in the ACMR as of January 19, 1981. And, because Iran had no title to the ACMR in January 1981, "the United States had no obligation to return that property to Iran under the Algiers Accords." App., *infra*, 70a. Acceptance by this Court of respondent's contrary arguments could undermine the United States' litigation position in *Case B/61*.

More broadly, petitioner states that it would regard a holding that its interest in the Cubic judgment is blocked (because it was never *un*blocked) as a "treaty default" by the United States under the Algiers Accords with respect not only to "the Cubic judgment, but a whole host of assets 'at issue' in *Cases B1*, *B61* and *A15* before the Claims Tribunal." Pet. Br. 54. Congress's

purpose in requiring relinquishment was precisely to prevent those who had accepted payment under TRIA from undertaking further attachments that might create such international disputes. Cf. *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 198 (1857) (avoiding interpretation of statute that would confer "a right which would in any degree impair the constitutional powers of the legislative or executive departments of the Government, or which might put it in [individuals'] power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations").

B. The Court Of Appeals' Reasons For Finding The Cubic Judgment Not "At Issue" Are Without Merit

In concluding that the Cubic judgment was not "at issue" before the Claims Tribunal, the Ninth Circuit relied on the fact that "Claim B/61 addresses what liability the United States incurred by failing to restore * * * the ACMR, as required under the Algiers Accords," whereas the Cubic judgment "resolved Cubic's liability to Iran for non-delivery of the ACMR" based on Cubic's "contractual obligations." Pet. App. 13. But TRIA's relinquishment provision depends not on an identity of parties or theories of liability, but on whether there is a substantive overlap between the attached property and the Tribunal proceeding.

The rule against double recoveries demonstrates that, contrary to the view of the court below, there need not be an identity of parties and legal theories for the judgment in one action to be at issue in a second proceeding. It is hornbook law that when two parties are jointly and severally liable for the same tortious injury, a recovery against one of the parties "diminishes the claim" against the other liable party. 4 Restatement

(Second) of Torts § 885(3), at 333 (1979). That rule applies equally when the two parties are liable under entirely distinct legal theories, such as when one party is liable to the plaintiff for breach of contract and another is liable for tortiously causing the first defendant's breach. *Id.* § 774A(2), at 55. "[S]ince the damages recoverable for the breach of the contract are common to the actions against both, any payments made for the one who breaks the contract or partial satisfaction of the judgment against him must be credited in favor of the defendant who has caused the breach." *Id.* § 774A cmt. e, at 56.[5]

As *Futura Trading* demonstrates, the Claims Tribunal follows the double-recovery rule. Indeed, the court of appeals here impliedly recognized that the Tribunal would have to take the Cubic judgment into account in *Case B/61*. The court noted that Iran claims that "the $2.8 million ICC award (which became the Cubic judgment) did not fully compensate [Iran] for Cubic's nondelivery of goods, and it seeks to recoup *the difference* from the United States." Pet. App. 12 (emphasis added). The court thus recognized that the calculation of damages in *Case B/61* would necessarily have to account for the Cubic judgment.

---

[5] Even within the area of res judicata, to which the court of appeals referred, it is well established, under principles of issue preclusion, that the judgment in one case will be given effect in a subsequent suit in which the same right, question or fact is at issue, even though the second suit is "based on a different cause of action," *Montana* v. *United States*, 440 U.S. 147, 153 (1979)—and even, in many circumstances, when the party asserting the estoppel was not a party to the prior suit, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-330 (1979).

II. IF THE COURT DETERMINES THAT RESPONDENT HAS NOT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT, IT SHOULD VACATE THE COURT OF APPEALS' JUDGMENT AND REMAND WITH INSTRUCTIONS TO AFFIRM ON ALTERNATIVE GROUNDS

If the Court determines that respondent has not relinquished his right to attach the Cubic judgment, it should vacate the court of appeals' judgment, which is based on the erroneous determination that the Cubic judgment was blocked at the time the Ninth Circuit ruled, and remand with directions to affirm the attachment based on the State Department's recent designation of petitioner as an entity of proliferation concern.

A. At The Time The Court Of Appeals Ruled, The Cubic Judgment Was Not Blocked

1. The Ninth Circuit held—based on a theory not advocated by either party or the United States, and in an unexplained departure from its prior holding—that the Cubic judgment was blocked at the time of its decision because it represents an interest in military property that was never unblocked. That holding is mistaken and inconsistent with the United States' longstanding position. Because that erroneous holding, if not set aside, could adversely affect the Nation's foreign relations, this Court should vacate the judgment and remand with instructions to affirm the attachment on other grounds, if the Court does not reverse on the basis of relinquishment.

In its initial opinion, the court of appeals correctly held (Pet. App. 76) that the asset at issue here is petitioner's interest in the judgment it obtained against Cubic. The Treasury Department regulation implementing the relevant Executive Orders recognizes "judgments"

as a type of property that is distinct from "goods, wares, merchandise, [and] chattels." 31 C.F.R. 535.311; see *Estin* v. *Estin*, 334 U.S. 541, 548 (1948) (a "judgment is a property interest"). In its initial decision, the court of appeals correctly held that petitioner's "interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic." Pet. App. 76. The court's initial ruling was also correct that "any transactions involving the Cubic judgment are authorized," *ibid.*, under the general license set forth at 31 C.F.R. 535.579(a)(2), which permits transactions in "property" in which Iran's interest "arises after January 19, 1981," *ibid.* Because transactions in the Cubic judgment were expressly authorized by the general license at the time of the court of appeals' decision, the judgment was *not* blocked and thus was *not* subject to attachment under TRIA at that time. See TRIA § 201(a) and (d)(2)(A), 116 Stat. 2337, 2339; *Bank of N.Y.* v. *Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (Properties "subject to the general license of 31 C.F.R. § 535.579[] are not blocked assets under the TRIA and therefore are not subject to attachment under that statute.").

After this Court vacated the Ninth Circuit's initial decision, and remanded with instructions to consider petitioner's status under the FSIA, the court of appeals reversed itself on the question when petitioner's property interest arose, without even mentioning its earlier holding. Pet. App. 19-20; cf. *id.* at 76. In its new opinion, the court concluded that the relevant property interest was Iran's pre-1981 interest in the ACMR, which, the court held, had never been unblocked following the Algiers Accords. Pet. App. 19-20. That conclusion was erroneous.

Respondent is not trying to attach the ACMR; that asset was sold years ago. Rather, respondent seeks to attach petitioner's 1999 money judgment against Cubic, which confirmed a 1997 arbitration award. As noted above, the regulations treat "judgments" and "merchandise" as distinct types of property, see 31 C.F.R. 535.311, and the "judgment" petitioner seeks to attach did not exist until 1999. Even if the regulation were ambiguous, the government's construction would be entitled to substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Because the judgment post-dates January 19, 1981, it is subject to the general license. See 35 C.F.R. 535.579(a).

Even if the Ninth Circuit were correct in focusing on Iran's interest underlying the Cubic judgment, rather than on the judgment itself, it *still* erred in concluding that the relevant interest pre-dates January 1981. Petitioner's claim in the arbitration proceeding was for breach of contract. As the *ICC Award* explains (at 66, 69), Cubic incorporated parts of the ACMR equipment in a subsequent sale of similar equipment to Canada, which occurred in September 1981. Whether petitioner was "entitled to be (partly) reimbursed for the payments it had made to Cubic" depended entirely on that resale of the equipment in September 1981. *Id*. at 48. Indeed, the ICC ruled that Iran's right to demand payment did not "mature[]" until October 1982, after Cubic had completely installed the Canadian system. *Id.* at 49, 52. After discounting for various costs and allowing for certain profits, the arbitration panel determined that, after the sale, Cubic owed petitioner approximately $2.8 million. *Id*. at 81, 84. The Cubic judgment thus represents petitioner's interest not in the military equipment itself, but in its share of the proceeds of the resale and installa-

tion of that equipment. Because petitioner's right to the proceeds arose after January 19, 1981, it was subject to the general license, and was not subject to attachment under TRIA at the time of the Ninth Circuit's decision, even if the proper focus of the inquiry were the property interest underlying the Cubic judgment.

2. What is more, even if the Ninth Circuit were correct in focusing on petitioner's *pre*-1981 property interest, the court was wrong to hold that that interest was not unblocked by the numerous Executive Orders and Treasury Department regulations promulgated following the Algiers Accords. See E.O. 12,277-12,281, 3 C.F.R. 105-113 (1982); 31 C.F.R. 535.210-.222. In particular, any pre-January 19, 1981, property interest of petitioner represented by the $2.8 million Cubic judgment was subject to the Executive Order and regulation requiring that property owned by Iran on January 19, 1981, be transferred according to Iran's direction. E.O. 12,281, 3 C.F.R. 112 (1982); 31 C.F.R. 535.215. Any such pre-1981 interest was, for that reason, not blocked under IEEPA, and therefore not "blocked" for purposes of attachment under TRIA, § 201(d)(2)(A), 116 Stat. 2339.

The court of appeals rejected that conclusion, holding that the Executive Branch has never unblocked "military goods such as the ACMR," Pet. App. 3, 19, a position no party had ever advanced and that the United States had no opportunity to refute. That holding is erroneous and contradicts the longstanding position of the United States.

In support of its conclusion, the Ninth Circuit cited, without explanation, the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*; its implementing regulations, 22 C.F.R. Pts. 120-130; the President's 1979 Executive Order blocking Iran's interest in property, E.O. 12,170,

3 C.F.R. 457 (1980); a 2005 Presidential notice extending the national emergency with respect to Iran, 70 Fed. Reg. 69,039; and a Treasury Department brochure for exporters concerning foreign asset control regulations, Office of Foreign Assets Control, Dep't of the Treasury, *Foreign Assets Control Regulations for Exporters and Importers* 23 (June 15, 2007) (*2007 Export Advisory*). See Pet. App. 3, 19. None of the cited authorities supports the court of appeals' categorical conclusion that the United States failed to unblock Iran's interest in military property after the Algiers Accords.

The court of appeals' reliance on the Arms Export Control Act is misplaced. Although the Algiers Accords lifted restrictions the President had imposed on Iran's property pursuant to his IEEPA authority, certain property, such as military equipment, remained regulated under other statutes, such as the Arms Export Control Act, as it was on November 14, 1979. See 31 C.F.R. 535.215(c). But while those regulations may have prevented the export of military property to Iran, the property was not seized or frozen under IEEPA, and Iran was free to dispose of the property in other ways permitted by the regulations and thereby recoup its losses.

The court of appeals' reliance (Pet. App. 3, 19) on the 1979 Executive Order is similarly misplaced because it ignores the effect of the Executive Orders issued after the Algiers Accords. Those orders lifted prior restrictions imposed on property in which Iran had an interest. The 2005 Presidential notice that the court of appeals cited (*ibid.*) is also inapposite. It does not impose any new restrictions, but simply extended for one year the national emergency with respect to Iran. 70 Fed. Reg. at 69,039.

Finally, the court of appeals' reliance (Pet. App. 3, 19) on the *2007 Export Advisory* is misplaced. That advisory stated that there "remain blocked in the United States" "[c]ertain assets" consisting "mainly of military and dual-use property" that relate to claims "still being litigated in the Iran-United States Claims Tribunal" by "U.S. nationals * * * against Iran or Iranian entities for products shipped or services rendered before the onset of the 1979 embargo or for losses sustained in Iran due to expropriation during that time." *2007 Export Advisory* 23. While the *2007 Export Advisory* observes that "certain" assets, including "certain" military assets, in the United States remain blocked, it does not state that *no* property interests related to the military were ever unblocked.

Moreover, it is undisputed that the ACMR is not within the class described by the *2007 Export Advisory*. The ACMR is not "in the United States," having long ago been incorporated by Cubic into another system and sold to Canada. The *2007 Export Advisory* language on which the Ninth Circuit relied thus has no bearing whatsoever on this case. The court of appeals' analysis was, in any event, based on a faulty premise—that Iran had a pre-1981 "interest in the ACMR" as such. Pet. App. 20. As the United States has explained before the Tribunal, because the ACMR was never delivered, Iran never obtained an ownership interest in the ACMR itself. App., *infra*, 73a-74a. Rather, Iran retained an interest in the potential residual of the ACMR's sale, a right to payment that did not mature, as the ICC found, until *after* January 19, 1981. See *ICC Award* 49, 52.

3. In response to the United States' brief at the petition stage, respondent contended that the ACMR was not subject to the mandatory-transfer directive because

that directive applies only to Iran's "uncontested and non-contingent . . . property interests." Resp. Supp. Br. 9 (quoting 31 C.F.R. 535.333(a)). Respondent argues that Cubic contested petitioner's interest in the ACMR and that therefore that interest was not subject to the 1981 mandatory-transfer directive. *Ibid.* Respondent's argument misses the mark, because respondent is focusing on the wrong property. Section 535.333(a) relates only to property interests that pre-date January 19, 1981. See 31 C.F.R. 535.215(a), 535.333(a) (defining "[t]he term properties as used in § 535.215"). Because petitioner's interest in the Cubic judgment post-dates 1981, see pp. 23-26, *supra*, the "contested" provisions of 31 C.F.R. 535.333(c) do not apply.

But even assuming that the relevant inquiry concerns petitioner's pre-1981 property interest in its agreement with Cubic, that interest was not "contested" and therefore was not blocked after the promulgation of the Executive Orders and regulations that implemented the Algiers Accords. The *ICC Award* found that neither petitioner's nor Cubic's conduct through 1981 reflected an abandonment of their mid-1979 agreement that Cubic should sell the ACMR to a third party, with a subsequent accounting. *ICC Award* 33-40. Although Cubic and petitioner may have disputed the amounts each was owed following the 1981-1982 sale, petitioner's right to collect any money from Cubic under that agreement did not mature until after January 19, 1981. *Id.* at 52. The parties' dispute over the balance *after the sale* did not retroactively render the unblocked property blocked.

Notably, if respondent's contentions were correct, then the blocking order would have prohibited Cubic from selling the ACMR to Canada. Yet, the entire history of the parties' dealings presupposes that peti-

tioner's interest in the 1979 agreement was *not* blocked. Indeed, the fundamental legal and factual premise of the judgment respondent seeks to attach is that Cubic was carrying out the parties' agreement when it sold the modified system to Canada. Respondent cannot assert as the legal basis for his right to attach the Cubic judgment an argument that would, if accepted, negate the very basis of the judgment he seeks to appropriate.

B. The Cubic Judgment Is Now Blocked And Subject To Attachment Under TRIA

1. Although petitioner's interest in the Cubic judgment was not blocked at the time the court of appeals ruled, it is now blocked and therefore subject to attachment under TRIA. On October 25, 2007, after the court of appeals issued its amended opinion on remand, the Department of State designated petitioner as an entity of proliferation concern pursuant to authority exercised by the President under IEEPA. 72 Fed. Reg. at 71,991-71,992. As a consequence of that designation, "all property and interests in property" of petitioner "that are in the United States" are now "blocked." *Id.* at 71,992. Accordingly, because respondent is a creditor with a judgment under Section 1605(a)(7), see p. 7, *supra*, he may attach the Cubic judgment under TRIA, assuming he has not relinquished that right. See TRIA § 201(a), 116 Stat. 2337; TRIA § 201(d)(2)(A), 116 Stat. 2339.

2. Petitioner asserts that "[s]ubstantial fact issues would need to be resolved as to this matter, not the least of which is whether MOADFL is actually the same entity as petitioner." Pet. Br. 56. In its supplemental brief at the petition stage, petitioner contended that "further proceedings are needed to determine" "whether proper

nomenclature was employed in designating MOD and the responsible agency for the Cubic judgment, the Islamic Republic of Iran's Air Force (which was the named party to the contract with Cubic and the beneficiary of the ICC award)," Pet. Supp. Br. 1, 2 n.2—thus suggesting that petitioner will now dispute that it is a proper party to its own judgment. Petitioner's contention is meritless.

There is no plausible argument to support the suggestion that the Cubic judgment belongs to Iran's Air Force rather than petitioner. Whether or not Iran's Air Force was the named party to the contract with Cubic and a beneficiary of the *ICC Award*—but see Pet. 8 (stating that "the predecessor of the petitioner, the Ministry of Defense ('MOD') of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc.")—it was petitioner that initiated the arbitration proceedings, see *ICC Award* 2 (identifying "Islamic Republic of Iran acting through its Ministry of Defense and Support for Armed Forces" as a party to arbitration), and it was petitioner that sought to confirm the arbitration award in the district court, based on its representation that *it* had obtained the *ICC Award*, see J.A. 21. The district court reduced the arbitration award to a judgment in *petitioner*'s favor. J.A. 55-68; see Pet. Supp. Br. 1 n.1 ("MOD's position has been that the property being attached here is MOD's judgment against Cubic."). At the very least, petitioner is now judicially estopped from denying that it is the owner of the *ICC Award* and the judgment confirming it. See *Zedner* v. *United States*, 547 U.S. 489, 504 (2006).

Similarly, there is no doubt that the State Department designated petitioner in the Federal Register notice. In its amicus brief filed in this Case at the certio-

rari stage, the United States informed the Court that "[d]espite minor discrepancies in translation, petitioner is the same entity as the one designated" by the State Department. 07-615 U.S. Cert. Br. 9. An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (quotation marks omitted). Petitioner identifies itself in this litigation as the "Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ('MODSAF-IRI')." J.A. 21. That nomenclature is consistent with "MODSAF," one of the abbreviations the State Department identified for the designated entity. See 72 Fed. Reg. at 71,992 (listing designated entity as "MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS (a.k.a. MODAFL; a.k.a. MINISTRY OF DEFENSE AND SUPPORT FOR ARMED FORCES LOGISTICS; a.k.a. MODSAF)"). The United States' interpretation of the Federal Register notice is thus not plainly erroneous and so controls. Nor does it matter that the government's interpretation of the Federal Register notice appeared in an amicus brief to this Court, a brief that was joined by the State Department, the agency that issued the notice. See *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008) (giving *Auer* deference to agency interpretation of regulation appearing in amicus brief).

Because the Cubic judgment is now blocked under IEEPA, it is subject to attachment by a qualifying party under Section 201(a) of TRIA.

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that respondent has relinquished

his right to attach the Cubic judgment. If the Court concludes that respondent has not relinquished the right of attachment, the Court should 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.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
DOUGLAS N. LETTER
LEWIS S. YELIN
Attorneys

JOHN B. BELLINGER, III
Legal Adviser
Department of State
ROBERT F. HOYT
General Counsel
Department of the Treasury

SEPTEMBER 2008

APPENDIX

IN THE NAME OF GOD

THE MOST MERCIFUL, THE MOST COMPASSIONATE

[Symbol Omitted]

SUBMITTED TO THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
STATEMENT OF CLAIM
OF

No. B66

[Filed: Jan. 19, 1982]

Ministry of Defense of the Islamic Republic of Iran, of Iranian nationality, domiciled in Iran, at:

Sarhang Sakhaie Avenue,
Tehran, Iran

- AND -

1 - Cubic Corporation

2 - The Government of the United States of America, of United States nationality, domiciled in the United States, at:

* * * * *

1. General Nature and Legal Basis of the Claim:

   Violation by Respondent 1 in fulfilling obligation related to contracts Nos. 134 and 134A dated 23 October 1997 for the sales of parts and installation, erecting, training and utilization of air combat systems for the Iranian Ministry of Defense and violation by the Government of the United States of America of its obligations as expressed in the Declaration of the Government of the People's Democratic Republic of Algeria dated 19 January 1981 and the prevention by the United States of the complete or partial fulfillment of the first Respondent's obligations.

2. Jurisdiction:

   The present suit is under the jurisdiction of the Iran - United States Claims Tribunal at the Hague.

   Although this Statement of Claim is related to a dispute between the Iranian Government and an American firm and, as such, appears to fall outside the jurisdiction of the Tribunal; however, with regard to the spirit of the Algerian Declaration dated 19 January 1981, the Government of the United States of America was obligated to provide all necessary facilities in order to settle disputes between real and legal entities mentioned in the said Declaration; whereas, regarding the disputes under the Contracts, not only have they not facilitated the settlement thereof, but they have actually hindered the performance of obligations by Respondent 1 (Cubic Corp.), who has explicitly and implicitly stated in its correspondence that the reason for the non-fulfillment of its obligations is the decisions taken by the Government of the United States of America. Hence, the Government

of the Islamic Republic of Iran, on the basis of the spirit of the Algerian Declaration, the indisputable and clear legal foundations of civilized nations and the Continental and Anglo-Saxon legal systems, recognizes the Government of the United States of America as responsible for preventing the obligee (Cubic Corporation) from fulfilling its commitments. In addition, due to the strong pressure of the American Government as overseer of Cubic Corporation's obligations, the Government of Islamic Republic of Iran sees the dispute between it and Cubic Corporation and the role of the United States as an indivisible unit and thus considers the Iran - United States Claims Arbitration Tribunal to have full jurisdiction to investigate this dispute.

It is hoped that the Tribunal, by expedience of its responsibility toward the history of international jurisprudence, and in the fare of humanity and history, will look at the indivisibility of the legal relations between the Iranian Government, Cubic Corporation and the American Government, and by accepting its jurisdiction, issue a worthy ruling.

3. Factual Background:

3.1 - Following the conclusion of military and non-military contracts between the Iranian Government at the time (prior to the Islamic Revolution of Iran) and the Government of the United States of America, which were all to the profit of the American Government and private American firms, two contracts as described below were signed with Cubic Corporation:

3.1.1 - Under Contract No. 134 dated 23 October 1997 concluded between the Deputy Minister of Defence for Armament and Cubic Corporation for the purchase of an air combat evaluation system and related spare parts, Respondent 1 was obligated to procure the parts related to the system as per the descriptions States in the contract and related annexes, and after completing the necessary inspections and test plan, to ready the same for shipment to Iran without delay or fault having been reassured of the manufactured parts' correct functioning. Respondent 1 was then obligated to deliver the goods F.O.B. San Diego, California after having informed Iran, in order that the system be transported to Iran, erected and installed for operation for air combat evaluation.

Respondent 1 was also obligated to begin manufacture of the said system within 30 days after signing the contract upon receipt of sums from the Iranian Government and to deliver the said systems to San Diego Harbor within 450 days after receipt of the 50 per cent advance payment.

According to existing documents, Respondent 1 once received from the Iranian Government the sum of US $9,034.355/– being 50 per cent of the total contract value as advance payment

and again, through letter of credit, the sum of US $3,630,684/–. Thus, Respondent 1 has received a total of US $12,665,019/– relating to this contract from the Iranian Government but has not fulfilled any of its obligations. In view of the fact that the manufacture, shipment, installation and readying the air combat evaluation system for operation are part of the obligations of Cubic Corporation according to the said contract, and that Cubic Corporation has received US $12,665,019/– out of the total contract price of US $18,012,170/–, that is Iran has fulfilled more than 70 per cent of its financial obligations while Cubic Corporation has failed to fulfill its obligations, the said Corporation has deprived Iran of the use of system under its obligation for which there exists the utmost need in conditions of war.

Since the said system is purchased for use in combat situations and is utilized to defend the country's territorial sovereignty, and since Cubic Corporation has refrained from fulfilling its obligations and the American Government has hindered the delivery of the said system's parts through boycott policies; the Government of the Islamic Republic of Iran therefore, demands that the American Government be obligated to lift the boycott and to provide for fulfillment of

obligations by Respondent 1, and strongly requests Cubic Corporation to perform its commitments.

3.1.2. - Because the said system and related parts purchased from Cubic Corporation has not been procured and delivered, the Government of the Islamic Republic of Iran has sustained the following losses and damages and requests compensation for the same:

- Restitution of the sum of US $12,665,019/– receivd from Iran in two parts (50 per cent advance payment in addition to the sum under the letter of credit).
- Interest accrued on the above amount at the rate of the U.S. prime rate calculated from 23 October 1997 till January 1982.
- The difference in the dollar parity rate in respect of the said amount payable in dollars at a sum determined by the Tribunal.
- The approximate amount of US $15,000,000/– as the minimum damages resulting from the American Government's decision preventing delivery of the purchased system at the most sensitive war-time period for Iran.

- The sum of US $10,000/– as expenses resulting from the presentation of this Statement of Claim.

3.1.3. - Substantiating evidences for this claim are as under:

- Copy of the original contract in 45 pages with amendments.

- Payment order and receipt of the sum of US $9,034,335/–.

- Bank document and receipt of the sum of US $3,630,684/– through documentary letter of credit.

- Letter No. 1358/3/22-102 from Engineer Yaghmaee, Representative of Cubic Corporation in Iran.

- Letter dated 30/2/1358 (20/5/1979), from Cubic Corporation's Iran representative stating that the above mentioned amounts have been received.

- Explicit and implicit admission by the Respondent and its representative, regarding the failure to transport and deliver the system to Iran.

3.2. - Contract No. 134A called for the installation and complete operation of the air combat evaluation system, its servicing and the preparing of its maneuvering range. According to this contract Cubic Corporation became obligated, on 23 October 1977, in

return for receipt of US $9,500,000/– from the Iranian Government, to perform the erection, complete servicing and preparation of the system, to deliver support equipment and to train personnel for the air combat evaluation system for Iran.

Respondent 1 drew US $302,857/– from the documentary letter of credit opened in the amount of US $1,913,310/– (Bank Markazi's letter No. 09/92459 dated 27/2/1358 (17/5/1979). According to part II of this contract, the Respondent's obligations comprised three main parts:

1) Preparation of the site,

2) Installation of the system, completion and flight test,

3) Operational training and maintenance,

However, none of the above were performed due to the fact that the equipment was not prepared and the system not delivered to Iran.

3.2.1. - Losses sustained due to the Respondent's failure to fulfill its obligations under this contract are as under:

Transportation, delivery and installation of the air combat evaluation system to Iran was not carried out on time.

3.2.2. - The demands of the Government of the Islamic Republic of Iran with regard to this contract are as follows:

- Restitution of the US $302,857/– drawn from the documentary letter of credit.
- Interest accrued on the above amount at the rate of the U.S. prime rate.
- Difference in the dollar parity rate payable in dollars at a sum determined by the Tribunal.

3.2.3. - Substantiating evidences for this claim are as follows:

- Copy of the original contract.
- Non-fulfillment of obligations under the first contract (4-1-2).
- Document showing payment (by the Claimant) and receipt (by the Respondent) of the sum of US $302,857/– (Bank Markazi's documentary letter of credit No. 09/92459 dated 27/2/1358 (17/5/79).
- Correspondence with the Respondent and its explicit and implicit admission concerning its failure to deliver, ship, install, and operate the system in a crucial period of Iran's war-time conditions.

3.3.1 - Total amount demanded under the two claims as detailed below excluding accrued interest and the dollar parity rate difference is US $27,922,876/–.

- Dollar amount received from Iran under the first contract US $12,665,019/–
- Dollar amount received from Iran under

the second contract US $ 302,857/–

total: US $ 12,967,876/–

Interest accrued on the above amounts at the rate of the U.S. prime rate to be determined by the Tribunal.

- The difference in the dollar parity rate to be determined by the Tribunal.
- Sum of various expenses relating to the claim US $10,000/–
- Minimum damages and losses resulting from the American Government's decision to prevent delivery of the system US $15,000,000/–

3.3.2 - Grand total excluding accrued interest and the dollar parity rate difference: US $27,977,876/–.

4. Relief Sought:

Requiring Respondent 1 to fulfill its obligations to deliver, install, and operate the air combat evaluation system, and to supply related spare parts; and requiring Respondent 2 (the American Government) to lift the boycott and to remove any and all obstacles imposed on Respondent 1.

5. Name and address of Claimant's attorney representative:

- Ministry of Defense of the Islamic Republic of Iran, Legal Section, Tehran.

6. Reservation of rights:

The Government of the Islamic Republic of Iran reserves the right to present further documents, evidence and legal financial or non-financial claims not included herein.

/s/ MOHAMMED SALIMI
MOHAMMED SALIMI
Staff Colonel

/s/ For. Col. Afrakhtoh
FOR. COL. AFRAKHTOH
Minister of Defense of the Islamic Republic of Iran

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Claim No. B/66
Chamber 1

THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

CUBIC CORPORATION, AND THE UNITED STATES OF AMERICA, RESPONDENTS

[Jan. 9, 1984]

REJOINDER OF THE UNITED STATES

JOHN R. CROOK
Agent of the United States

ELIZABETH J. KEEFER
Counsel

* * * * *

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Claim No. B/66
Chamber 1

THE MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

CUBIC CORPORATION, AND THE UNITED STATES OF AMERICA, RESPONDENTS

[Jan. 9, 1984]

REJOINDER OF THE UNITED STATES

On January 19, 1982, Iran's Ministry of National Defense filed Claim No. B/66 against the United States and Cubic International Sales Corporation (hereinafter "Cubic"). The United States filed its Statement of Defense on September 15, 1982. Claimant filed its Reply to the Statement of Defense on September 26, 1983. In accordance with the Tribunal's order of November 8, 1983, the United States submits this Rejoinder to claimant's Reply.

INTRODUCTION AND SUMMARY

In Claim No. B/66, claimant seeks specific performance of two contracts signed by the Iranian Ministry of Defense and Cubic in October 1977. Contract No. 134 (hereinafter the Cubic supply contract) provides for the design, manufacture, and delivery of equipment for an Air Combat Maneuvering Range (ACMR) system. Contract No. 134A (hereinafter the Cubic services contract) provides for installation and operation of the ACMR system in Iran. The Statement of Claim contended that Cubic failed to perform either the supply or the services contract. Claimant alleged that it paid Cubic two-thirds of the contract price for the equipment but never received any supplies in return. Claimant also alleged that Cubic drew on the letter of credit established for the services contract but provided no services at any point. The Statement of Claim also contained vague allegations to the effect that an alleged "boycott" by the United States Government prevented shipment of the Cubic equipment. Statement of Claim at 5. Claimant did not, however, charge the United States with violating any specific provision of the Algiers Accords.

On September 15, 1982, the United States filed its Statement of Defense, requesting dismissal of the claim for lack of jurisdiction over Cubic, a United States national, under the Tribunal's decision in Case No. A/2, and over the United States, since the U.S. Government was not a party to either of the contracts at issue. Moreover, evidence submitted by claimant and additional evidence appended to the Statement of Defense demonstrated conclusively that the reason for nonshipment of the ACMR equipment was the claimant's unilateral repudiation and breach of the Cubic contracts in May 1979.

Accordingly, any alleged "boycott" by the United States was irrelevant to performance of the contracts, which had been repudiated well in advance of the hostage seizure and the resulting disruption of relations between the United States and Iran.

Claimant's Reply, filed on September 26, 1983, contains no further evidence or arguments to support Tribunal jurisdiction in this case. While claimant concedes that the United States was not a party to the Cubic contracts (see Reply at 7, 8), it now alleges that the Tribunal has jurisdiction over this case as an official claim under Article II(2) of the Claims Settlement Declaration because the United States controls Cubic in some unspecified way. The Reply also asserts that the United States failure, after the entry into force of the Algiers Accords, to reinstate licenses permitting the export of the Cubic properties violates United States obligations under Paragraph 10 of the General Declaration.[1] The Reply thus alleges a new basis for jurisdiction over Claim No. B/66. According to the Reply, Claim No. B/66 is now a dispute "between the parties as to the interpretation or performance" of the Algiers Accords, and jurisdiction is found under paragraphs 16 and 17 of the General Declaration and Articles II(3) and VI(4) of the Claims Settlement Declaration. See Reply at 12, 16.

The United States respectfully renews its request that Claim No. B/66 be dismissed. Claimant's reformulation of its allegations in its Reply does not cure the jurisdictional defect in its contract claims against Cubic,

---

[1] The Cubic export licenses were initially granted in May 1977 and September 1978 and subsequently renewed. The licenses were suspended, along with all other licenses for the export of Munitions List items, in November 1979 in response to the hostage crisis.

and fails to set forth a contract claim against the United States. Nor does the Reply set forth the factual basis for an interpretive dispute arising from the Cubic contracts. Moreover, any interpretive issues that the Reply may raise are already before the Tribunal in Claim No. B/61. Claim No. B/61 is Iran's general interpretive dispute concerning United States obligations to license the export of military equipment purchased by Iran from private United States suppliers. Because it is senseless to conduct parallel arbitration of United States obligations concerning the Cubic property in two separate cases, any interpretive issues raised here should be addressed in Claim No. B/61. The claim against Cubic should therefore be dismissed for lack of jurisdiction; the claim against the United States should be dismissed because the Tribunal has no jurisdiction and because it is wholly duplicative of another claim before the Tribunal.

ARGUMENT

I. Claim No. B/66 Should Be Dismissed Because It Is a Prohibited Direct Claim Against a United States National.

In its Reply, claimant continues to assert its contract claims against Cubic. The Tribunal has no jurisdiction over this purely private dispute, however. Cubic International Sales Corporation is a privately owned corporation organized under the laws of California. It is therefore a United States national as defined by Article VII(1) of the Claims Settlement Declaration. The Full Tribunal has already decided that it does not have jurisdiction over direct claims by Iran against United States nationals. See Decision of December 15, 1981, in Case No. A/2. The December 6, 1983 award issued by Cham-

ber Two in a claim somewhat similar to this one confirms that the Tribunal lacks jurisdiction over Iran's direct claims against private United States corporations that had contracted to supply military equipment to Iran. See *Ministry of National Defense v. The United States and FMC Corporation*, Award No. 88-A/14-2, at 3. In accordance with these decisions, the Tribunal should dismiss Claim No. B/66 insofar as it is directed against Cubic.

II. Claim No. B/66 Is Not a Proper Official Claim Because It Does Not Arise Out of Any Contractual Arrangements Between the Two Governments.

In an apparent attempt to make out a contract claim against the United States, the Reply alleges for the first time that Cubic is an entity controlled by the United States and that the two are "inseparabl[y] relat[ed]." See Reply at 14. Claimant has not substantiated and cannot substantiate this claim. In assessing whether there is government control of a corporation, the Tribunal has indicated that it will look to the nature of the government's ownership interest and to the extent of the government's right to overall management and direction of the company. *See, e.g., Rexnord, Inc.* v. *The Islamic Republic of Iran, et al.*, Award No. 21-132-3 (Jan. 10, 1983) (respondent corporations found to be controlled entities because Government of Iran had power to appoint and dismiss personnel in charge of their day to day management). The United States Government does not own any stock in Cubic and has never played any role in the management or direction of the company. Thus, Cubic is not a controlled entity within the meaning of Article VII(4) of the Claims Settlement Declaration. In

addition, as claimant now acknowledges, see Reply at 7, 8, the United States is not a party to the Cubic contracts. Accordingly, Claim No. B/66 is not an official claim over which the Tribunal can exercise jurisdiction under Article II(2) of the Claims Settlement Declaration.

III. The Subject Matter of Claim No. B/66 Is Already at Issue in Claim No. B/61 and Should Be Arbitrated in the Context of That Interpretive Dispute

Evidently because it cannot make out a viable contract claim against the United States, claimant attempts to create Tribunal jurisdiction by alleging in its Reply that the United States failure to reinstate export licenses for shipment of the Cubic equipment violates the General Declaration. Claimant has failed to establish any factual basis for an interpretive dispute, however. As discussed in detail in the Statement of Defense, any United States Government actions relating to export licenses are totally irrelevant to Iran's claims on the Cubic contracts because claimant repudiated its obligations under the contracts in May 1979, six months prior to the hostage taking and nearly one year before the breaking of diplomatic relations between Iran and United States. In short, claimant has not received the ACMR system not because the United States will not reinstate export licenses, but because claimant repudiated the contract and failed to pay the contract price for the equipment.

Even if, however, Claim No. B/66 does raise issues of interpretation or performance under the Algiers Accords, the issue of whether the United States is obligated to license the export of military equipment, *in-*

cluding the Cubic equipment is already before the Tribunal in Claim No. B/61. Claim No. B/61, though misdesignated as an official claim, is Iran's general interpretive dispute over United States obligations with regard to the transfer of military property purchased by Iran from private United States suppliers (i.e., military properties purchased outside the FMS program). Claimant has explicitly put Contract No. 134, the Cubic supply contract, at issue in Claim No. B/61.[2] See Exhibit 34 to the Statement of Claim in Claim No. B/61. There accordingly is no need for the Tribunal to address issues raised by the General Declaration in this case. Those issues are wholly subsumed by Claim No. B/61.[3] Hence,

---

[2] Contract No. 134A, the Cubic services contract, has not been put at issue in Claim No.B/61. Contract No. 134A called for the installation, operation and servicing of the ACMR system by Cubic once the system was shipped to Iran. Although Iran has contended that none of the ACMR equipment was ever shipped (Statement of Claim at 5), any dispute concerning the United States obligation to license the export of these services should also be addressed in the context of Claim No. B/61.

[3] In Claim No. B/61, Iran bases its claim that the United States is required to license the export of the Cubic equipment on paragraph 9 of the General Declaration. Claimant's Reply in this case suggests that Paragraph 10 of the General Declaration requires the United States to authorize the export of the Cubic property. Regardless of whether Iran relies on paragraph 9 or 10 or both, the issue of the United States obligation with regard to the Cubic contract should be arbitrated in a general interpretive dispute.

Claimant's Paragraph 10 theory is, in any event, a makeweight. Paragraph 10 does not require the United States to take any action with respect to export licenses for military property. In Paragraph 10, the United States undertook only to "revoke all trade sanctions which were directed against Iran" in response to Iran's unlawful seizure of the United States Embassy in Tehran on November 4, 1979. Those trade sanctions were embodied in three specific executive decrees: Proclamation 4702

any interpretive issues raised in this claim should be referred to the Full Tribunal to be addressed in the context of Claim No. B/61, and Claim No. B/66 should be terminated in accordance with Article 34(2) of the Tribunal Rules. Cf. Order of October 20, 1982, Case Nos. 499 and 257 (Chamber 1) (terminating duplicative claim).

CONCLUSION

For the reasons discussed above, the Reply filed by the Ministry of Defense does not cure the jurisdictional deficiencies of the Statement of Claim. First, claimant cannot create Tribunal jurisdiction over Cubic. Its claim against Cubic should be dismissed as a prohibited direct claim against a private United States national. Second, claimant has not alleged a proper claim against the United States. The United States was in no way involved in the Cubic contracts. Thus, Claim No. B/66 is not an "official" claim under Article II(2) of the Claims Settlement Declaration. Further, any dispute regarding the United States obligation to transfer the Cubic equipment is already before the Tribunal in Claim No. B/61. Any United States obligation with regard to the issuance of export licenses for all Iranian owned military property should be arbitrated by the Full Tribunal within the context of a single interpretive dispute. The United States therefore renews its request that the Tribunal terminate Claim No. B/66 as duplicative in accordance with Article 34(2) of the Tribunal Rules.

---

of November 12, 1979, Executive Order 12205, issued April 7, 1980 and Executive Order 12211, issued April 17, 1980. These trade sanctions did not pertain to export licenses for military property. Furthermore, the United States revoked each of these executive decrees with the issuance of Executive Order 12282 on January 19, 1981.

Dated: January 9, 1984

Respectfully Submitted,
/s/ JOHN R. CROOK
JOHN R. CROOK
Agent of the United States

By: /s/ ELIZABETH J. KEEFER
ELIZABTH J. KEEFER

NAME AND ADDRESS OF PERSON TO WHOM COMMUNICATIONS SHOULD BE SENT:

John R. Crook, Esq.
United States Agent
American Embassy
The Hague, The Netherlands

IN THE NAME OF GOD

THE MOST MERCIFUL, THE MOST COMPASSIONATE

[Symbol Omitted]

SUBMITTED TO THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE

STATEMENT OF CLAIM
OF

No. B61

[Filed: Jan. 19, 1982]

The Islamic Republic of Iran, Ministry of National Defense, of Iranian nationality, domiciled in Iran, at:

Deputy Minister for Legal & Parliamentary Affairs,
Sarhang Sakhaie Ave.,
Tehran - Iran.

CLAIMANT

AND

The Government of the United States of America, of the United States nationality, domiciled in the United States, at:

c/o Department of Defense, the Pentagon

IN THE NAME OF GOD

Statement of Claim

Iran - United States Claims Tribunal

In the Matter of the Arbitration Between:

The Islamic Republic of Iran, Ministry of National Defense, of Iranian nationality, domiciled in Iran, at:

Deputy Minister for Legal & Parliamentary Affairs,
Sarhang Sakhaie Ave.,
Tehran - Iran.

CLAIMANT

AND

The Government of the United States of America, of the United States nationality, domiciled in the United States, at:

c/o Department of Defense, the Pentagon
Washington, D.C. 20301
U.S.A.

RESPONDENT

A- LEGAL BASIS AND GENERAL NATURE OF CLAIM

On January 19, 1981, the Government of Democratic and Popular Republic of Algeria published two Declarations to the effect that the Iranian and United States Governments had agreed to settle their disputes through arbitration by Iran - U.S. Claims Tri-

bunal at the Hague. In view of the fact that in accordance with paragraph 17 of the Declaration, it is within the jurisdiction of the Tribunal to settle any disputes resulting from the interpretation of the Declaration, and that the Government of the United States has, on several occasions, violated the Declaration, inflicting substantial losses on the Iranian Government, the Claimant would like to draw the attention of the Honorable Tribunal to the following:

As provided by paragraph 9 of the above-mentioned Declaration, the United States has undertaken to arrange for the transfer to Iran of all Iranian properties located in the United States and abroad. As shown, however, by the substantiating evidence and documents attached to this statement of claim, the Respondent has, in effect, made no effort to implement the purport of paragraph 9 of the Declaration resorting to such pretexts as the U.S. laws applicable prior to November 14, 1979. The attached Exhibit No. 68 consisting of the U.S. Government letters to the Government of the Islamic Republic of Iran with respect to the properties belonging to Iran is submitted, herewith, for further information of the distinguished Tribunal. The qualification of "subject to the provisions of U.S. Law applicable prior to November 14, 1979, which has been included in the aforesaid paragraph, is in the Claimant's view, exceptionable and contrary to the spirit, subject-matter and purpose of the Algerian Declaration wherein the transfer to Iran of all Iranian properties was explicitly expressed.

Furthermore, it goes without saying that the Government of the United States did not sign the Alge-

rian Declaration with good-faith because while undertaking to arrange for the transfer to Iran of all Iranian properties, the Government makes sure of the inclusion in the Declaration of the loop-hole of "the Provisions of U. S. Law" to avoid abiding by the undertaking. In fact, the United States Government's discretion is according to the loop-hole, the sole guaranty for the fulfillment of the undertaking. This attitude is below the dignity of the countries committing themselves to do something and, as mentioned earlier, is contrary to the spirit and purpose of the Algerian Declaration. It should, also, be added that the acceptance by the Claimant of the qualification, which is contrary to fundamentals of international relations, does not authorize the Respondent to cause the Claimant to incur substantial losses by resorting to the provisions of the U.S. Law. In addition to the illegality just mentioned, the Respondent unilaterally sold the military properties belonging to Iran to the third parties further violating the Algerian Declaration. The actions taken by the Respondent to bar the transfer to Iran of the Iranian properties inflicted, both directly and indirectly, on the Claimant substantial losses amounting to billions of dollars.

The Honorable Tribunal is requested to bind the Respondent to compensate for the losses described in the "Relief Sought" section of the present Statement of Claim.

B- FACTUAL BACKGROUND

During the postwar period, the claimant became one of the major commercial buyers of the Respondent's

military products as a result of the latter's commitment to meet the defensive needs of the region. The parties to the present case, therefore, concluded many agreements in accordance with which the Respondent undertook to supply the claimant with arms and ammunitions. Accordingly both the Claimant and the Respondent made necessary and sufficient arrangements for the American private concerns to conclude and execute the related contracts, (by the necessary arrangements is meant the acquisition of necessary legislative authorization, the issuance by the U.S. Government of export licences and any other measures to facilitate the shipment to Iran of military equipment). Meanwhile, the Iranian Government paid for the purchased military equipment on a commercial basis. There are many cases in which the Claimant has already paid American private concerns for the military equipment, without having received the purchased equipment because of the Respondent's uncooperative action, namely, refusing to issue the export licences concerned.

The payments just mentioned amount to $ 2,264,733,652 (or Rls. 13,386,262,211) which the Respondent is bound to reimburse in addition to the losses incurred by the Claimant as described in the "Relief Sought" section of this Statement of Claim.

The payments were made, in most cases, in the form of Letters of Credit and/or of the order to the beneficiary's account, based on direct contracts including services, training, commercial and production contracts. Purchase order contracts in various forms were also used. During the execution of these contracts, the American parties thereof were instructed,

after the victory of the Iranian Revolution, by the Respondent to violate the contracts as described below:

1. The Claimant fully paid for many purchased military parts and equipment which were not transported to Iran.

2. The contracting parties that received the Claimant's military parts and equipment requiring repairs were instructed by the Respondent not to deliver the repaired parts and equipment.

3. Many projects under way in Iran which, directly or indirectly, related to the Iranian military industries could not get completed owing to non-delivery of the parts and equipment.

4. Many factories ceased operations and production because, as a result of the Respondent's refusal to issue export licences, they could not procure the required raw materials to be delivered by American private concerns.

5. Many properties belonging to the Claimant are currently warehoused in American ports and/or American companies unable to export the said properties to Iran, despite the fact that they are owned by Iran.

6. The advances paid by the Claimant to get the contracts executed were attached due to the Respondent's intervention. In some other cases, the Respondent somehow managed to bar the execution of the contracts for which the advance payments had been made by the Claimant.

7. The Respondent barred the exportation to Iran of the properties belonging to the Iranian Army and stored in the U.S. Army's bases and warehouses considering the useful life of some military equipment which has ended by now, the distinguish Tribunal can figure out the extent of losses inflicted by the Respondent on the Claimant.

8. Many parts previously bought by the Claimant and the exportation to Iran of which was barred by the Respondent, are complementary to military as well as non-military equipment purchased by the Claimant at the prices amounting to billions of dollars. Lacking the said parts, the equipment cannot be operated. Thus, the Claimant has to sustain considerable losses amounting to billions of dollars.

9. All the Iranian parts and equipment have been generally warehoused by the American private concerns demanding considerable storage charges from the Claimant. Given the fact that the Claimant did not want its own parts and equipment to be stored by the American private concerns, the storage charges were, in fact, imposed on the Claimant and the Respondent is bound to compensate for the charges the Claimant had no role therein.

10. Ministry of Defense invited its contracting parties to Vienna for negotiations and settlement of disputes, as provided for in Article I of the Algerian Declaration. Of 95 companies formally invited, 48 expressed their willingness for such ne-

gotiations in September and October, 1981. Negotiations were conducted with 35 companies with most of which our representatives arrived at agreements, in principle, for settlement of existing disputes. However, such settlements produced no results due to non-issuance of the required Export Licences for Iranian government-owned equipment. The companies argued that they would proceed to deliver the equipment provided, however, that the U.S. Government would properly issue the required Export Licences. Being dependent upon such condition, the negotiations could not produce the desired result, causing other companies, which had been, or which were to be, invited, to remain indifferent toward the results obtained. They believed the result would be the same even if agreements were arrived at in principle. Therefore, they did not show much interest in the continuation of such negotiations, with regard to the part of the U.S. Government as an inhibitory element. A further reason for the failure of the negotiations and suspension of agreements was that U.S. suppliers proposed to receive the total prices of equipment, but declined to commit themselves to the delivery thereof. The Government of Iran was quite willing to pay the equipment price provided, however, that the delivery of the equipment would somehow, be guaranteed. Such contradictions would adversely affect the negotiations, impeding a mutual agreement. Therefore, despite the explicit emphasis in the Algerian Declaration on settlement through face-to-face negotiations, as initiated by the Ministry of National Defense

(by direct telex communications or through the Algerian Ministry of Foreign Affairs), the passive attitude of the U.S. Government, as demonstrated by the fact that it clearly declares that it would not issue the required Export Licence) deviated the course of negotiations, caused failure thereof.

The position taken by the U.S. Government was not only an explicit violation of the Algerian Declaration and its obligations thereunder, but also resulted in substantial losses to Iran, and caused the filing of numerous litigations by American private institutions against the Islamic Iranian Ministry of Defense.

C- U.S. GOVERNMENT OBLIGATIONS TO IRANIAN GOVERNMENT

The principle of the Rule of Law as contained in the United States Constitution provides that all contracts entered into by U.S. Government are considered null and void unless ratified by both the Senate and the House of Representatives.

It should be noted that all military contracts entered into between the Iranian and U.S. Governments have somehow been ratified by both Houses prior to implementation, and, as such, the U.S. obligations to Iranian Government are not only sanctioned by the Houses, but are considered as the U.S. Government International Obligations. It is based on such sanctions that the U.S. Government proceeded to conclude military contracts and to forward military or military equipment to Iran. Similar contracts signed

by U.S. private companies have been executed under U.S. Government control and authorization, and are, thus, considered legally binding obligations not only in accordance with the United States internal laws but also with the international law and treaties, the execution of which have been recommended by international organizations.

The Committee for International Law defines a contract as follows (as translated from English text):

Any international agreement executed in writing, signed in one or more international versions, of the nature of the contract, convention, protocol, proclamation, bill, declaration etc., and signed by two or more countries, shall be subject to international law and shall be governed thereby (the definition as proposed by the Committee has been adopted under Part A, para. 1, Article II, of Vienna Law of Treaties Convention).

D- RELIEF SOUGHT

In view of the foregoing, an award is requested to bind the U.S. Government to:

1. Issue Export Licences for Iranian government-owned goods and equipment as detailed in Exhibits attached herewith.

2. Pay a sum of U.S. $ 2,264,733,652.– as well as Rials 13,386,262,211.–, representing the purchase price of such goods and equipment – in case the U.S. Government refrains from the issue of such Export Licences for any reason whatsoever including restrictions imposed by its internal laws.

3. Pay, in addition to the sum under 2 above, the difference excess between rates prevalent at the time of purchase and the execution of award.

4. Pay the proceeding costs as well as other direct, indirect and subordinate losses sustained to the date of the award, as detailed in Exhibits or as deemed reasonable and just by the Tribunal.

5. Pay attorneys' fees, i.e. US $100,000.–.

6. Pay Administrative expenses, translation and reproduction costs US $40,000.–.

E- EXHIBITS

For the information of the Tribunal, the Exhibits relating to various units and commands of the Islamic Republic of Iran, Ministry of Defense are attached herewith, detailing losses and reasons therefor. The Claimant reserves the right to add more exhibits, as required. Losses sustained by various units and commands of the Islamic Republic of Iran, Ministry of Defense are as follows:

SECTION I

a) [**REDACTED**]

1. Exhibit 10

Repairable parts (30 pages): a list of parts sent to U.S. for repair and not yet returned; valued at approximately Rials 9,608,292,454.–.

2. Exhibit 11

Items for which price has been paid; valued at approximately $100,000.–.

3. Exhibit 12

   Items purchased from [**REDACTED**] not yet delivered; valued at approximately $773,584.39.–.

4. Exhibit 13

   Items which suppliers were obligated to deliver; valued at approximately $40,009,000.–.

5. Loses to capital stagnance.

6. Loses arising from increase in price due to non-delivery of parts.

7. Losses resulting from nullification of contract by suppliers, computed as being equivalent to the remaining portion of the contract price

8. Direct and indirect losses due to non-delivery of parts by suppliers and resulting non-operational position of our helicopters.

9. Losses in capital and personnel, based on the report of our "Finance Committee, i.e. $3.75 for each dollar invested.

b) [**REDACTED**]

1. Losses in respect of [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**] detailed in Table P-18 (attached).
   Total $41,776,361.–.

2. Losses in respect of contract 73/53 (Exhibit 14), Total $237,099.–.

c) [**REDACTED**]

c.1. Losses sustained in respect of contract with [**REDACTED**] (Exhibit 20):

1. Total price of items not delivered $12,314,046.76.

2. Interest (at international rates) up to the date judgment is passed and put into effect.

3. Difference in prices of above items at time of purchase and date of final award.

4. Losses sustained - equivalent to total price of undelivered items. Non-delivery of the items caused delay in project implementation, non-utilization of machinery and parts already purchased for the purpose under contracts with [**REDACTED**], gradual wear of equipment, and finally, delay in the [**REDACTED**] repair projects and installations.

5. Cost of maintenance and repair of the afore-mentioned machinery and equipment having been idle due to non-delivery of parts, total $ 5,000,000.–.

c-2. Losses sustained in respect of contracts with company (Exhibit 22):

1. Advance payment	$ 761,343.–
2. Payment for phase I	$ 40,080.–
3. Payment for phase II	$ 36,881,360.–

4. Payment for phase VII $ 10,395,920.–

5. Increase in price of undelivered items $ 1,395,920.–

6. Interest for items 1-5

c-3. Losses sustained in respect of contract with [**REDACTED**] Company (Exhibit 23):

1. [**REDACTED**] $ 20,000.–

2. [**REDACTED**] [**REDACTED**] $ 1,500.–

3. [**REDACTED**] [**REDACTED**] $ 1,400.–

4.a. [**REDACTED**] [**REDACTED**]

b. [**REDACTED**]

c. [**REDACTED**] [**REDACTED**] [**REDACTED**]

Total: $ 319,300.–

5. In view of the fact that due to non-completion of the [**REDACTED**] by the said company and failure in complete shipment of the items and tools under contract and, in general, failure in installation of monitoring system for all [**REDACTED**]s [*sic*], great losses have been inflicted, due to failure in timely implementation of [**REDACTED**] to the existing

systems and equipment, the total of which amounts to $ 3,609,382.–.

c-4. Losses incurred in respect of the contract concluded with [**REDACTED**]y [*sic*] as per attachment (Exhibit 25). These items have been ordered to [**REDACTED**] in respect of the project for installation of [**REDACTED**]. But so far only a number of items valuing $ 3,092,279.74 have been shipped to Iran, which under the present circumstances, are not utilizable. Therefore, the following sums are claimed as loss, by [**REDACTED**]:

1. Value of all items equaling $4,588,431.75.
2. Interest of the sums paid to the company (equaling $309,227,974) on the basis of prevailing rate, up to the date of presentation of this statement of claim.

c-5. Losses sustained in respect of the contract concluded with [**REDACTED**] as per attachment (Exhibit 26) :

1- Due to failure of the named company to carry out its commitments: $12,524,642.04–.
2. Due to non-delivery of the goods by the said company: Rls. 5,170,610.
3. Value of items not delivered: $4,929,543.16.
4. As against the services not carried out: Rls. 522,307,257.

c-6. Losses incurred in respect of nine contracts concluded with [**REDACTED**] as per attachment (Exhibit 24).

1. Due to non-utilizability of the items incompletely shipped to Iran by the comapny, the total value of transaction equalling: $2,336,486.

2. Interest accrued to the sums paid to the company equalling $1,860,194.95.

3. A loss for the delay in shipment of the spare parts to the [**REDACTED**] equalling $50,000.–.

c-7. Losses incurred in respect of the contract concluded with [**REDACTED**] as per attachment (Exhibit 21):

1. Total value of the items sent to U.S. for repair equalling $45,000.–.

2. Losses sustained by [**REDACTED**] ue to failure in timely shipment of the above said items equalling: $ 50,000.–.

d) [**REDACTED**]:

By virtue of the Agreement concluded, [**REDACTED**] against current receipts from the Government of Iran, have purchased goods and have sent one copy of the purchase order to Iran. The total of purchase orders not shipped to Iran due to non-completion of construction are as follows:

Ser.	No. of purchase Orders	Type of Property	Total Sum in US $
1	790	[**REDACTED**]	21,578,600
2	540	[**REDACTED**] [**REDACTED**]	10,021,715
3	570	[**REDACTED**] [**REDACTED**]	930,560
4	77	[**REDACTED**]	76,510
5	11	[**REDACTED**] [**REDACTED**]	63,270
Total No. of Orders	1988		US $32,760,655

Meanwhile, a number of 1215 purchase orders valuing $44,605,910 has been placed by [**REDACTED**] [**REDACTED**] [**REDACTED**]. But the said orders have not been shipped to Iran. Besides, since the factory has not yet been completed and delivered, the total amount claimed by this company is equal to three hundred million dollars ($300,000,000) which is equivalent of the total payments made to [**REDACTED**].

e) Losses incurred by [**REDACTED**]

According to the contract concluded between the Defense Ministry and the [**REDACTED**], the referred companies undertook to install and make available for utilization the [**REDACTED**] [**REDACTED**].

[**REDACTED**]
[**REDACTED**].

1. The sum paid for the said equipment is forty million dollars ($40,000,000).

2. According to terms of the contract concluded, the responsibility for installation and sitting into operation of the said equipment was upon the above-named companies, but due to failure in shipment of spare parts and accessories and failure in sending the expert personnel,
   [**REDACTED**]
   [**REDACTED**].

3. Should the mentioned equipment have been installed and set to work, [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**] export of goods to Iran, the following losses have been incurred:

   i) The value of goods and shipment freight at forty two million dollars ($42,000,000).

   ii) Value of the [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**] ($125,000,000).

   iii) [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]
   [**REDACTED**]

[**REDACTED**]
[**REDACTED**]
$192,000,000.–.

f) Losses incurred by [**REDACTED**] [**REDACTED**]:

1. [**REDACTED**]
[**REDACTED**]
[**REDACTED**]. This amount covers the machinery and equipment, as well as the technical literature concerning the production of [**REDACTED**].

2. On the basis of the contract concluded with [**REDACTED**], the said company have undertaken to ship [**REDACTED**]
[**REDACTED**], in the first stage, and a further 100 for the second stage, [**REDACTED**], to this company. A contract for [**REDACTED**] has been concluded, but the above-named company have sent only [**REDACTED**]
[**REDACTED**]. The above-said company, through telex dated September 1979, attachment (Exhibit 17) declared that due to non-issuance of export licence for the goods in question it is not able to perform its obligations. As a result of this action of U.S. Government, the [**REDACTED**]
[**REDACTED**] were never delivered. The material and moral losses sustained due to this failure amounts to twenty million dollars ($20,000,000) in total [**REDACTED**]
[**REDACTED**] war
[**REDACTED**].

3. In execution of the project for purchase of spares and services from [**REDACTED**], the said company have shipped, for each [**REDACTED**] [**REDACTED**], 589 launching units. Against the failure in full execution of this contract, [**REDACTED**]
[**REDACTED**] claims an amount of ten million dollars (10,000,000.–) as material and moral loss.

4. In respect of the contract for the purchase of installation services concerning main premises of this company's factories at [**REDACTED**] with [**REDACTED**], this company has paid a total of twenty one million and six hundred thousand dollars (21,600,000.–) to the said company, in execution of the mentioned project. Of a total of twenty million dollars valued installation equipment, only twelve million dollars (12,000,000) have arrived to this company and the remaining equipment are being kept in a storehouse in [**REDACTED**], for which an amount of $200,000.– has been paid as storage cost, so far. In addition, due to non-availability of the required parts and tools, the main premises of the company have, after expending of a sum of two thousand five hundred million dollars ($2,500,000,000.–) remained totally unusable. Thus, in consideration of all aspects of the matter, due to non-utilization of the referred to premises, the amount of loss incurred amounts to fourteen million dollars ($14,000,000.–).

g) Losses sustained by [**REDACTED**]

1. Against non-shipment of the parts and goods remaining with the U.S. Companies, as per attach-

ment (Exhibit 15): a total amount of $139,350,000.–.

2. Photocopy of the Agreements reached with United Technology. Despite the conclusion of the contract between the above named company and [**REDACTED**], the Government of the United States has refused to execute this Agreement as per attachment (Exhibit 16).

3. Photocopy of the letter of "[**REDACTED**], purporting the issuance of export licence for the goods. However, the U.S. Government has refused to issue licence for export of the goods belonging to Iran, as per attachment (Exhibit 17).

h) Losses incurred by the Air Force of the Islamic Republic of Iran:

The Air Force of the Islamic Republic of Iran concluded various contracts with U.S. Companies in order to make use of their services in different sections. List of these contracts and names of the contracting companies, as well as total of losses incurred and the interest accruing thereto, are reflected in the table contained in attachment (Exhibit 31) annexed hereto. The total sum of these losses amounts to $430,548,648, inclusive of the interest accrued, calculated up to the date of formulation of this statement of claim.

Meanwhile, attachments Nos. (Exhibit 32, Exhibit 66), contents of contracts and other documents, are presented to the Arbitration, for consideration thereof.

i) Losses Incurred by the [**REDACTED**]
[**REDACTED**]
[**REDACTED**]

Payments made by [**REDACTED**]
[**REDACTED**]
[**REDACTED**], have amounted to $192,421,601.– . This project was left uncompleted and basically was not carried out by U.S. Comapnies. Moreover, the losses incurred in Rial equivalent has totalled three hundred and eighty five million, two hundred and forty five thousand and nine hundred and forty five Rials (Rls. 385, 245,945.-–) the documents and substantiating evidence of which shall be presented to the Arbitration Tribunal in due course.

PART TWO:

The points and cases which should be considered in determining the amount of losses by the honorable arbitrators are as follows:

1. Losses due to increase in universal prices of goods not delivered in due time to Iran, which if purchased or procured now by the Defense Ministry of the Islamic Republic, a price several times as much of their real value in time of conclusion of contract will have to be paid.

2. Losses due to unilateral cancellation of contract, as a result of the act of U.S. Government, and in which the Claimant has had no role whatsoever.

3. Losses incurred, directly or indirectly, as a result of the Respondent's failure in delivery of parts and machinery, by claimant.

4. Losses in terms of finance and personnel. In many cases the Claimant has paid unjustifiable sums for uncompleted projects for several consecutive years.

5. Probable losses concerning that part of documents and supplements which in case of necessity, shall be added to this statement of Claim and presented to the Arbitration Board.

6. In view of the cases of loss which should be taken into consideration, the Claimant requests that the interest accruing to the amounts of losses be calculated on the basis of 22% per annum from the date of formulation of each of the contracts and the occurrence of the expenses up to the date of the formulation of this statement of claim, plus the losses and the accruing interest at the same annual rate from the date of presentation of this Statement of Claim up to the issuance of award and execution thereof.

7. Meantime, the Claimant requests an amount of one hundred thousand dollars ($100,000.–) as litigation costs and the overall expenses relating thereto.

8. Name and Address of the Attorney/s who shall be responsible for the defense of this Statement of Claim in the Arbitration Tribunal:

9. Name and address of the person to whom all correspondence concerning this litigation should be sent:

Staff Colonel- Mohammed Salimi

Minister of Defense of the
Islamic Republic of Iran.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

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

ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

CONSOLIDATED RESPONSE OF THE UNITED STATES: PART I RESPONSE TO LIABILITY CLAIMS BY COMPANY

VOLUME 6 OF 10

D. STEPHEN MATHIAS
Agent of the United States

CONRAD K. HARPER
MICHAEL J. MATHESON
JUDITH L. OSBORN
SHARON E. CONAWAY
Counsel

CUBIC

[Symbol Omitted]

RESPONSE TO LIABILITY CLAIMS: CUBIC

In its claim relating to Cubic Corporation, Iran seeks compensation for property that is currently the subject of an arbitration Iran brought against Cubic before the International Chamber of Commerce, International Court of Arbitration (the "ICC"). The Tribunal should await the decision in that case before proceeding with respect to Iran's claim here.

FACTS

The United States understands Iran's claim relating to Cubic to be for subsystems and support equipment (The "Items") comprising an Air Combat Maneuvering Range (the "ACMR"), a customized electronic air combat training system to be used by the Imperial Iranian Air Force ("IIAF"). These items are listed on documents that Iran submitted with respect to Cubic. Iran's Consolidated Submission, Exhibit 16 (Doc. 204).

Cubic and the Government of Iran entered into a contract for sale of the ACMR on October 23, 1977 (the "Contract"). *Id*. Iran and Cubic recognized and provided in the Contract for the need to obtain U.S. government approval for export of the Items. In Section XI of the Contract, the parties provided for cancellation of the Contract if Cubic were unable to obtain either an initial license or a subsequent renewal. *See* Attachment 1 at § XI. The Contract also included a *force majeure* clause excusing Cubic for any delay, interruption, or failure to perform "due to any cause to the extent it is beyond CUBIC's fault or control." *Id*. at § XII(7).

In a memorandum dated May 15, 1979, Iran concluded that "continuation of the . . . contract is unprof-

itable [and] inadvisable," and that Iran wished to discontinue the Contract. Attachment 2.[1] The memorandum suggested that Cubic find another buyer for the Items. Attachment 2. Iran reiterated its decision to abandon the Contract in a memorandum dated May 29, 1979, stating that the "Air Force does not recognize the completion of the contract concerned advisable and profitable taking into consideration the lack of need to [sic] the subject system." Attachment 3. On June 10, 1979, Iran sent a letter to Cubic advising Cubic to take all necessary actions to sell the ACMR system. *See* Attachment 4 at 4.[2]

Cubic formally notified Iran on August 3, 1979 that Iran had breached the Contract, that the Contract was accordingly in default, and that Cubic would begin arrangements for sale of the ACMR to another buyer or buyers. Attachment 5. According to Cubic's letter, Iran's breaches included, *inter alia*, the failure: (1) to accept the Items; (2) to provide for shipment to Iran of Items that had been packaged and ready since February 1979; and (3) to pay Cubic the balance of the Contract price. *Id*. Cubic's notification also cited Iranian statements that Iran "would not or was unable to pay for the [Items]," and that "Cubic should take steps to sell the ACMR to another buyer." *Id*. Cubic reconfirmed its notice of default by correspondence to Iran dated Au-

---

[1] The United States originally submitted Attachments 2, 3, and 5 to the Tribunal as exhibits to its Statement of Defense and Request for Dismissal for Lack of Jurisdiction (the "B/66 Brief") in Case B/66. *See Ministry of National Defence of the Islamic Republic of Iran v. United States*, Case B/66, Chamber 1, B/66 Brief (Sept. 15, 1982), Exhibits 1 and 2.

[2] Cubic provided this document to the United States.

gust 13, 1979 and September 9, 1979. *See* attachment 4 at 4.

Subsequently, Iran filed Case B/66 against Cubic and the United States in the Tribunal, seeking, *inter alia*, recovery for the same Items at issue here. The Tribunal dismissed Iran's claims for lack of jurisdiction. *Iran v. United States*, AWD 302-B66-1 (Apr. 28, 1987), *reprinted in* 14 Iran-U.S. C.T.R. 276. The Items are currently the subject of a pending proceeding brought by Iran before the ICC. *Iran v. Cubic Defense Systems, Inc.*, No. 7365/FMS (I.C.C. Court of Arbitration).

ARGUMENT

The United States should not be required to compensate Iran with respect to any of the Items. Iran has submitted no evidence to prove that it is entitled to such compensation. All Iran has submitted in support of its claim with respect to Cubic is a copy of the Contract listing the Items. Iran's Consolidated Submission, Exhibit 16.

In the interest of consistency, efficiency, and equity, the Tribunal should await the decision of the ICC in the pending arbitration before proceeding with respect to Iran's claim here. The United States requests that once the ICC renders its decision, Iran and the United States be provided an opportunity to exchange further pleadings.[3]

---

[3] In any event, the facts show that Iran is not entitled to any compensation from the United States with respect to the Items. Iran did not have any ownership interest in the Items as of January 19, 1981, and they were therefore not the subject of any obligation of the United States under the Algiers Accords. In addition, Iran caused its own loss by breaching and repudiating the Contract. In any event, Iran assumed the risk of non-export of the Items.

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Case No. B/61
(including Case Nos. A3, A8, A/9, and A/14)

ISLAMIC REPUBLIC OF IRAN, CLAIMANT

v.

UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

REBUTTAL OF THE UNITED STATES
TO CLAIMANT'S REPLY:

STATEMENT NO. 16
(CUBIC CORPORATION)

CLIFTON M. JOHNSON
Agent of the United States

GEORGE A. LEHNER
ALEC UGOL
MALLORY A. STEWART
Counsel

BEFORE THE
IRAN-UNITED STATES CLAIMS TRIBUNAL
THE HAGUE
THE NETHERLANDS

Case No. B/61
(including Case Nos. A3, A8, A/9, and A/14)

ISLAMIC REPUBLIC OF IRAN, CLAIMANT,

v.

UNITED STATES OF AMERICA, RESPONDENT

Full Tribunal

REBUTTAL OF THE UNITED STATES
TO CLAIMANT'S REPLY:

STATEMENT NO. 16 (CUBIC CORPORATION)

INTRODUCTION

In its claim relating to Cubic Corporation ("Cubic"), Iran seeks additional compensation for property that has been the subject of extensive arbitration proceedings before the International Chamber of Commerce (the "ICC"). Indeed, Iran already received an award from the ICC of all the compensation to which it is entitled. Iran now brings this claim against the United States in an attempt to receive additional compensation,

compensation which would amount to an unjust enrichment in this case.

To advance its claims for additional compensation, Iran makes arguments before this Tribunal that directly contradict arguments it made before the ICC. During the course of its ICC arbitration, Iran argued that the contracts with Cubic were mutually terminated prior to January 19, 1981. To support its claim against the United States, Iran, now argues that the contractual relationship was *not* terminated. Moreover, Iran repeatedly asserted before the ICC that it had authorized Cubic to resell the property. Yet it now argues that the United States should have prevented the resale and returned the property to Iran.

Furthermore, Iran now seeks an inflated amount in compensation for the property. Even if the United States were somehow responsible for the property, Iran has failed to establish its alleged losses. Indeed, because Iran never had to pay the full contract price for this property, and because Iran has already been awarded over five million dollars in compensation plus interest, Iran, in fact, did not suffer any losses and most likely incurred a financial gain through the non-receipt of this property. In the absence of any evidence to support the United States' liability or any accurate way to assess Iran's alleged losses with respect to this claim, and given that this claim has been fully heard and decided by another international tribunal, this claim should be dismissed.

STATEMENT OF FACTS[1]

On October 23, 1977, the Imperial Iranian Air Force ("IIAF") and Cubic entered into two related contracts for the delivery and installation of an air combat system and the supply of spare parts. The first contract (the "Sales Contract," included herein as Exhibit 3) provided for the sale of an Air Combat Maneuvering Range ("ACMR") to be used by the IIAF. (Exhibit 3 at 1, Art. 1.) The total contract price was $18,068,670 (*id. at 2, Art. II*) with Iran making a 50% down-payment of $9,034,355 (*id.* at 6, Art. VIII). Under the Sales Contract, Iran agreed to make the remaining payments in four stages, as different milestones in the contract were met. (*Id.*)

In addition, Cubic was to establish two letters of credit within 30 days of the signing of the Sales Contract. The Sales contract required one letter of credit in the amount equal to one-half the contract price. Cubic would refund Iran's down payment with this letter if the

---

[1] The following facts are taken, in part, from the International Chamber of Commerce International Court of Arbitration Award relating to the property at issue here. (*Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic International Sales Corporation*, no. 7365/FMS (ICC International Court of Arbitration May 5, 1997) *reprinted in* Mealy's International Arbitration Report, Vol. 13, Iss. 10 (Oct. 1998) at G-4, included herein as Exhibit 1. The ICC decided upon these facts after extensive briefing by Iran, and Iran has sued to confirm the ICC's Award in U.S. courts. (Iran's Petition for Order Confirming Foreign Arbitral Award, filed in the U.S. District Court for the Southern District of California, no. 98-CV-II65-B (June 25, 1998), included herein as Exhibit 2.) Accordingly, any attempt on Iran's part to dispute these facts would be in direct contradiction to its representations before U.S. courts and should therefore be disallowed.

contract were cancelled. The other letter credit was to be in the amount equal to 25% of the contract price, and would serve as Cubic's performance guarantee. (*Id.* at 13, Art. XII, ¶ 16.) Delivery under the Sales Contract was to be made in the United States, F.O.B., at Cubic's facility in San Diego, California (*id.* at 5, Art. VII) with Iran accepting delivery after performance of an in-plant acceptance test, and transporting the property to its final destination (*id.* at 4, Art. V).

Under the terms of the second contract between the IIAF and Cubic (the "Services Contract", included herein as Exhibit 4), Cubic was to install, service, and integrate the ACMR Instrumentation System and train Iranian troops in its use. Iran was to pay Cubic an additional $7,898,859 for this work. (*Exhibit* 4 at 2, Art. II.) The contracts were amended on August 8, 1978, to accommodate technical changes desired by the IIAF[2] with the amount due under the Sales Contract dropping to $18,012,170. (Exhibit 6 at ¶ A.2.)

Both contracts include a clause allowing Iran unilaterally to terminate the contracts, in writing, for its con-

---

[2] (*See* "Contract Amendment Number 1," included herein as Exhibit 5; "Contract Amendment Number 2," included herein as Exhibit 6; "Contract Amendment O & M Number I," included herein as Exhibit 7.) Most of these design changes related to the IIAF's desire to house the ACMR in a building rather than in mobile vans. This necessitated the building of the housing structure and increased security. (Exhibit 5; Exhibit 1, Opinion at G-6, ¶ 2.3.) The IIAF's inability to complete the structure in a timely manner was a large factor in its decision not to accept the ACMR when it was ready for delivery in February 1979. (Memorandum from Brigadier General Imanian, Chief of Staff, Air Force of the Islamic Republic of Iran, to Deputy Ministry of National Defense for Armament, "Air Combat Maneuvering Range" (May 15, 1979), included herein as Exhibit 8, at ¶ 1.b.)

venience. (Exhibit 3 at 11-12, Art. XII, ¶ 12; Exhibit 4 at 12, Art. XI, ¶ 15). If Iran were to terminate for its convenience, Cubic would then have 90 days from the date of termination to submit a claim for expended funds and to seek a reasonable profit. (Exhibit 3 at 11, Art. XII, ¶ 12(c); Exhibit 4 at 13, Art. XI, ¶ 15(e).) If the parties could not agree on the final price to be paid upon termination for convenience, the matter was to be submitted to arbitration. (*Exhibit 3 at 13, Art. XII, ¶ 15; Exhibit 4 at 14, Art. XI, ¶ 18*.) A separate clause of the Sales Contract isolated Cubic from liability due to excusable delays. (*Exhibit 3 at 9*, Art. XII, ¶ 7.)

Between 1977 and 1979, the IIAF provided a 50% advance payment and two 10% progress payments. In sum, its payments to Cubic amounted to $12,608,519 of the $18,012,170 due under the Sales Contract. The IIAF also paid $302,857 of the $7,898,859 due to Cubic under the Services Contract. (Exhibit 1, Opinion at G-6, ¶ 2.2.)

In January 1979, James Jenkins, Cubic's Director of Contracts, visited Iran to review the in-country preparations being made to accept the system. After reviewing the situation in Iran and realizing that as a result of the political upheaval in the country Iran had failed to erect the required systems and materials enabling it to utilize the ACMR, Mr. Jenkins broached the possibility in a letter dated January 15, 1979 of the contracts being terminated and the system being resold.[3] In his letter, Mr. Jenkins estimated that the termination costs for the project would approximate the original $18 million con-

[3] (Letter from James B. Jenkins, Director of Contracts, Cubic Corporation, to Colonel Rabii, Director of Projects, Imperial Iranian Air Force, "Air Combat Maneuvering Range" (Jan. 15, 1979), included herein as Exhibit 9, at 5.)

tract price. (Exhibit 9 at 5, ¶ E.10.) Iran never responded to the letter, and Cubic moved forward to complete the project. (Exhibit 1, Opinion at G-13, ¶¶ 9.1-9.3.)

In February 1979, Cubic informed the IIAF that the ACMR was completed and ready to be packaged for shipment and installation as scheduled.[4] At that time, the IIAF was to pay an additional $2,701,825 under the Sales Contract. The IIAF never made this payment, nor did it make a payment in the same amount due in March 1979. (Exhibit 1, Opinion at 18-19, ¶ 8.5; Exhibit 5 at 2, ¶ D.) Similarly, the IIAF failed to make an $85,000 payment due under the Services Contract in February 1979. (Exhibit 1, Opinion at 18-19, ¶ 8.5) Moreover, the IIAF failed to respond to *seven* separate inquiry letters forwarded by Cubic in February and March 1979. (*Exhibit 1, Opinion at G-13, ¶ 9.3.*)

On April 2, 1979, Major Makonei of the IIAF asked Cubic's representative in Iran, Ali A. Nomai, if a foreign country could buy the ACMR system. (Ali Nomai, Record of Telephone Conversation with Major Makooei, "Iran ACMR" (Apr. 2, 1979), included herein as Exhibit 11.) Mr. Nomai replied that, when the Iranian government decided what it wanted to do with the hardware, Cubic's contract people would be available to assist it. *Id.* Several days later, in a telex dated April 4, Cubic's Director of Contracts, James B. Jenkins, attempted to persuade the IIAF not to abandon the project, citing both the project's advantages for training Iranian pilots

---

[4] (Telex from James B. Jenkins, Director of Contracts, Cubic Corporation, to Colonel Khatami, IIAF Purchasing Mission, "Contract for IIAF ACMR Dated 23 October 1977" (Feb. 23, 1979), included herein at Exhibit 10.)

and the large termination costs that Iran would face.[5] During a subsequent conversation between Mr. Nomai and the IIAF, Mr. Nomai noted that:

> [A]t the present time, [Cubic has] no immediate foreign customer for the ACMR and it may take a year or two before we do. However, in case of a cancellation, we will try to sell the hardware and deduct what the [IIAF] owes Cubic and then reimburse [the IIAF] for what amount is left.

(Ali Nomai, Record of Telephone Conversation with Major Safavi, "Iran ACMR" (Apr. 15, 1979), included herein as Exhibit 14.)[6] On May 15, 1979, the Chief of Staff of the IIAF wrote an internal memorandum to the Deputy Ministry of National Defense for Armament, discussing the consequences of terminating the contracts. The memorandum concluded that the IIAF: "does not have the possibility of complete exploitation of the [ACMR] and is not in the position of being able to apply such a system within at least the next five years of

---

[5] (Telex from James B. Jenkins, Director of Contracts, Cubic Corporation, to National Iranian Air Force, Attention Brigadier General Mosttaffavi, "Air Combat Maneuvering Range (ACMR)" (Apr. 6,1979), included herein as Exhibit 12.)

[6] Because Mr. Nomai had become the spokesperson from Cubic in Iran, the IIAF requested a formal letter acknowledging Mr. Nomai's right to act on behalf of Cubic. A letter was forwarded on May 19, 1979, stating that Mr. Nomai "is empowered to negotiate all contractual matters regarding both of the subject contracts." *(Telex from Walter J. Zable, President, Chairman & CEO, Cubic Corporation, to Deputy Ministry of War, Attention Mr. Bahrami, "Contracts Dated 22 October 1977 for the Furnishing of an Air Combat Manuevering Range (ACMR) for the National Iranian Air Force" (May 19, 1979)*, included herein as Exhibit 13.)

time." (Exhibit 8 at ¶ 1.) The memorandum further stated that:

> [W]ith due regard to the lack of a need for the above mentioned system, [the IIAF] considers the continuation of this contract would be of no benefit and inadvisable and it is proposed that the continuation thereof would be abandoned and the purchased material and equipment be sold to the manufacturing corporation or through the corporation to another country.[7]

1. (Exhibit 8 at ¶ 2.)

On May 20, 1979, Mr. Nomai wrote a letter to the IIAF in Farsi, referencing the Sales Contract as having been "discontinued" or "halted" (depending upon the translation used) three months earlier, due to the special circumstances in Iran.[8] The letter indicated that the balance of $5,403,651 was due, pursuant to Article 12, Paragraph 12, the contractual provision authorizing Iran to terminate the Sales Contract "in whole or in part when it is in the interest of the Government." (Exhibit 15 at ¶ 3.)

---

[7] According to the dissent of ICC Panelist Richard Mosk, Iran was picking and choosing during this period which military projects with U.S. contractors it desired to pursue and which it preferred to terminate. "It is a matter of public record that the new Iranian Government expressed its intention to review contracts with foreign companies, and to continue those contracts that it considered in Iran's national interest." (Exhibit 1, Mosk Dissent at G-50, p. 4 (quoting *Rockwell International Systems* v. *Iran*, AWD 438-430-1 at ¶ 92 (Sept. 5,1989), 23 Iran-U.S. C.T.R. 150, 171.))

[8] (Letter from Ali A. Nomai, Representative in Iran, Cubic Corporation, to Deputy Ministry of National Defense for Armament, "Air Combat Maneuvering Range" (May 20,1979), included herein as Exhibit 15 at 15.)

Cubic's letter further stated that "Cubic Corporation will try all possible ways to assist the Government of Iran to attain a decision and prevent the loss of time and money." (*Id.* at ¶ 9.) It detailed three alternatives by which this goal might be achieved: (i) all property could be shipped to Iran; (ii) Iran could take responsibility for selling the property; or (iii) Iran could give Cubic the authority to sell the property, and make all required modifications to the new customer's specifications prior to the sale, allowing Cubic to take a percentage of the proceeds to offset the costs of any reasonable customer modifications and a small percentage as a brokerage fee. (*Id.*)

On June 10, 1979, the IIAF gave Cubic permission to seek another purchaser. It specified that it should be notified of the offer prior to sale, but stated that it would give authorization for the sale if the offer was reasonable.[9] Cubic responded two days later, again stating that it "is ready to take any action with respect to the sale of the system to another country."[10] It pointed out, however, that "the possibility of the sale of the system as separate equipment (piece by piece) is more than the possibility of the sale of the system as a complete unit." (Exhibit 17)) Cubic further alerted Iran that: "one cannot possibly predict a specific and precise time for finding a proper buyer with an appropriate price. Furthermore, if a buyer would be found, . . . the time and cost

[9] (Memorandum from Colonel Jahangear Kamkar, Deputy Minister of National Defense for Armament, to Cubic Corporation, "Air Combat Maneuvering Range" (June 10, 1979), included herein as Exhibit 16.)

[10] (Memorandum from Ali A. Nomai, Representative in Iran, Cubic Corporation, to Deputy Ministry of National Defense, "Air Combat Maneuvering Range" (June 12, 1979), included herein as Exhibit 17, at ¶ 3.)

to adopt the necessary changes for a purchasing country are unpredictable." (*Id. at ¶ 4.*)

Finally, Cubic requested clarification with regard to: (1) the status of the Sales Contract; (2) the percentage of brokerage fee that would be acceptable; and (3) whether the IIAF would accept the costs for modifying the system to meet the specifications that would be required by any new customer. (*Id. at ¶ 5*)

Cubic received no formal response to its letter of June 12, 1979. However, Cubic's Iranian representative attended two meetings in Iran over the next month. *(Exhibit 1, Opinion at G-13 -G-14, ¶¶ 9.11-9.14.)* At the second meeting, Iran formally requested that the system be sold on its behalf by Cubic. (*Id.* at G-14, ¶ 9.14.)

Based on the above, the ICC found that a common understanding had been reached in June and July 1979, that the contracts would be discontinued, and that Cubic would attempt to resell the equipment. (*Id. at G-14. G-15, ¶¶ 9.15, 9.21.*)

After Iran's 1979 agreement that Cubic could sell the Items to another buyer, Cubic sought other potential buyers for the air defense system. In 1981, Cubic sold pieces of the ACMR, as modified to the customer's specifications,[11] to the Government of Canada. (Statement of Michael L. Guenther, included herein as Exhibit 18, at ¶ 24.) Other pieces of equipment from the system were sold to the U.S. Government. (*Id.* at ¶ 33.) Iran acknowledged that it learned of the sale of the Items at

[11] As noted above, Cubic had informed Iran that the ACMR system would have to be extensively modified to be marketable. (Exhibit 15 at 3.)

some point in early 1982.[12] Two years later, however, and knowing that the property had already been sold, the IIAF nonetheless wrote Cubic in February 1984 stating that the IIAF was ready to receive the ACMR system. (Telex trom IIAF to Cubic (Feb. 20, 1984), included herein as Exhibit 19.) The IIAF again wrote Cubic in December 1990, stating that it was "prepared to negotiate about receiving all equipment subject of the contract," even though the IIAF knew the property had already been sold pursuant to its own instructions.[13]

PROCEDURAL HISTORY

On January 19, 1982, Iran filed a Statement of Claim with the Tribunal against the United States Government and Cubic, based on the Sales Contract and the Services Contract. In that claim, Case No. B/66, Iran "allege[d] that Cubic failed to fulfill its contractual obligations to deliver, ship, install and operate the [ACMR] system." *Iran* v. *United States and Cubic*, AWD 302-B66-1 at ¶ 1 (April 28, 1987), 14 Iran-U.S. C.T.R. 276,276. On September 15, 1982, the United States filed a Statement of Defense and a request that the claim be dismissed against both respondents for lack of jurisdiction. *Id*. at

---

[12] *See* Iran's Reply (Brief and Evidence in Answer to the United States' Consolidated Response to the Questions of Liability (Part I) and Compensation (Part II) Filed in Two Lots Under Docket Nos. 219-226 Dated 18 Apri1 1995 And 236-242 Dated 14 August 1995): Volume XXI, Case No. B/61 (including Case Nos. A/3, A/8, A/9, and A/14), July 2,1999 (Doc. 330) [hereinafter Iran's 1999 Reply: Volume XXI (Doc. 330)], Statement 16 at 7 n. 6.

[13] Letter from M. Mohammadi, Deputy Minister of Defense and Support for the Army Forces in Parliamentary and Legal Affairs, to Cubic Corporation, "Contract date 23.20.1977" (Dec. 6, 1990), included herein as Exhibit 20.)

277, ¶ 2. On April 28, 1987, the Tribunal dismissed Iran's claim for lack of jurisdiction. *Id*. at 278, ¶¶ 9, 11.

On September 24, 1991, almost 5 years after Case No. B/66 was dismissed, Iran filed an ICC claim against Cubic, seeking an award of $45,000,000 for breach of contract and asserting that Cubic breached the agreement when it recalled its specialists from Iran in the winter of 1979. Cubic counter-claimed for breach of contract. *See generally* Exhibit 1. It appears from the ruling, however, that Iran changed its theory of recovery during the proceedings, shifting from a breach of the contracts based on Cubic's abandonment of the project, to a breach of an alleged modified agreement that Cubic would resell the system to a third party, and finally to a mutual ternination of the contracts by implication.[14] *Id.*

On May 5, 1997, the three judge ICC arbitration panel issued its Award in this case. The panel was split on its decision, with the chainman issuing the final Award over dissents from both party-appointed arbitrators.[15] The chairman found that the parties had implic

---

[14] Significantly, Iran never argued that *it* had terminated the agreements for convenience, as Iran was solely entitled to do under the contracts' terms. If Iran had terminated for convenience, it would have been obligated to pay Cubic for the work performed plus the negotiated profit. Hence, given that the work was completed at the time that a termination would have occurred, to accept Iran's contention that the parties had implicitly agreed to terminate the contracts, one must accept that Cubic was willing to forfeit its right to full payment and profit, and receive no consideration for this forfeiture.

[15] In his dissent, Cubic's party-appointed arbitrator, Richard Mosk, stated that Cubic should not be held liable for any of Iran's claimed damages, as any damages were Iran's own fault. *See* Exhibit I, Mosk Dissent at G-49 - G-70. On the other side, Iran's party-appointed arbitrator, Dr. S. Jamal Seifi, argued that the parties mutually terminated

itly agreed: (1) to terninate the contracts; (2) that Cubic would sell the system on behalf of Iran, in whole or in parts, with appropriate deductions taken for the work that Cubic put in to modify the system; (3) that the sale price, less modifications, would be applied against the balance due, with the remainder returned to Iran. Ultimately, the Tribunal awarded Iran $2,808,519, plus interest at the rate of 12% per annum from September 24, 1991 until the date of the Award.[16] *Id.* at G-33, ¶ 20.5.

When Cubic refused to pay the award on the grounds that the ICC had gone beyond its jurisdictional mandate, Iran petitioned the U.S. District Court for the Southern District of California to confirm the award. *Ministry of Defense and Support for the Anned Forces of the Islamic Republic of Iran* v. *Cubic Defense Sys., Inc.*, 29 F. Supp. 2d 1168 (S.D. Cal. 1998) ("Ministry of Defense"). In its petition, Iran argued that the parties had agreed to the resale of the system.[17] Cubic filed a

---

the agreements in recognition of frustration of the contracts, and that

under Iranian law, additional damages should have been awarded in favor of Iran. See Exhibit 1, Seifi Dissent at G-33 - G-48.

[16] The actual amount that Iran was awarded, including interest and costs, as calculated by Iran, comes to approximately $4,750,000. Letter from Dr. M. Akhavan, Director of Foreign Claims and Contracts, Ministry of Defense and Support for Armed Forces, to Chairman of Cubic Corporation, "ICC Case No 7365 MOD of Iran v. Cubic" (Aug. 11, 1997), included herein at Exhibit 21.

[17] Iran specifically argued: "[a]fter the revolution of 1979 in Iran, [the IIAF] expressed its willingness to sell the system to a third party through Cubic. This offer was accepted by Cubic. However, without notifying [the IIAF], Cubic sold the goods and never supplied [the IIAF] with the details of [or the proceeds from] the subsequent sale . . . These actions gave rise to the dispute which was the subject of the arbitration in Zurich, Switzerland." *Exhibit 2 at 3.*

cross-motion to vacate the award, asserting that the award exceeds the scope of the terms of the arbitration submission and ignores the terms of the parties' contracts.[18] Cubic further argued that it was not given a meaningful opportunity to present its case. *Ministry of Defense*, 29 F. Supp. 2d at 1174; Exhibit 22 at 30.

The district court confirmed the award on December 7, 1988. *Ministry of Defense*, 29 F. Supp. 2d at 1168. This ruling is now on appeal to the U.S. Court of Appeals for the Ninth Circuit. Cubic's Notice of Appeal, filed in the U.S. District Court for the Southern District of California, no. 98-CV-1165-B (Aug. 19, 1999), included herein as Exhibit 23.

PROPERTY CLAIMED

The property at issue consists of one Air Combat Maneuvering Range ("ACMR") system, and all necessary sub-parts [hereinafter the "Items" or the "property"]. *See* Exhibit 3 at 1, ¶ 1. There is no dispute that the property was within the jurisdiction of the United States on January 19, 1981. At some point before September, 1981, Cubic modified some subsystems of the ACMR to the specifications of the Canadian government. Cubic subsequently sold that property to the Canadian government on September 16, 1981, and the

---

[18] *Ministry of Defense*, 29 F. Supp. 2d at 1172; Cubic's Memorandum of Points and Authorities in Support of Respondent Cubic Defense Systems, Inc.'s (1) Opposition to Petitioner's Motion to Confirm the May 5, 1997 ICC Arbitration Award and (2) Cross-motion to Vacate the May 5, 1997 ICC Arbitration Award, filed in the U.S. District Court for the Southern District of California, no. 98-CV-1165 (Oct. 9, 1998), included herein as Exhibit 22, at 8, 24.

property was thereafter transferred out of the United States. Its current location is unknown.[19]

There is no dispute that the property in question is on the United States' munitions control list and, accordingly, under U.S. law, requires an export-controlled license prior to export. *See* Exhibit 3 at 7, Art. XI; Exhibit 4 at 6, Art. X. Indeed, on May 13, 1977, before the two contracts were even signed, Cubic applied to the U.S. government for a license to export the hardware.[20] The U.S. Government granted this request on June 6, 1977 (License No. 03856). *Exhibit 24*. Cubic also received permission from the U.S. government on September 28, 1978 to export of the services necessary to perform its responsibilities under the Services Contract.[21] The license to export the hardware was twice renewed.[22]

---

[19] It appears that four generators and four airborne instrument subsystems were not included in the package that was sold to Canada. Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 1-2 n.1. Instead, some or all of this property was sold separately to the U.S. government. *See* Exhibit 18 (Guenther Statement), at 16-17, 19, ¶¶ 33, 36. The exact location of that property, both before and after January 19, 1981, is unclear from the evidence presented, but the United States does not dispute that these parts were within its jurisdiction.

[20] See Letter from William B. Robinson, Director, Office of Munitions Control, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (June 6, 1977), included herein as Exhibit 24, (referring to Cubic's application dated May 13, 1977).

[21] Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State to Rosemary Anderson, Security and Safety Manager, Cubic Corporation "MC Case 212-78" (Sept. 28,1978), with reference to Letter from Rosemary Anderson to William B. Robinson (Sept. 14, 1978), attached herein as Exhibit 25.

[22] U.S. Department of State Form DSP-5 (Application/License for Permanent Export of Unclassified Implements of War and Related Technical Data), License No. 059520 (May 17, 1978) attached herein as

The U.S. government export licenses for the property were suspended on November 28, 1979, long after the IIAF had indicated its desire to cancel the contracts and Cubic had declared the IIAF to be in material breach of the agreements.[23]

Exhibit 26; U.S. Department of State Form DSP-5 (Application/ License for Permanent Export of Unclassified Implements of War and Related Technical Data), License No. 083431 (May 16, 1979) attached herein as Exhibit 27. It should be noted that, prior to November 1979, the export license for the Sales Contract property had been reissued at a dollar value which would allow the export of only $100,000 worth of property. Exhibit 27. Accordingly, as of November 1979, Iran would not have been entitled to export the full ACMR system (at an estimated value of approximately $18 million) under the then-current export license. As the Tribunal recognized in Partial Award 529, countries contracting to purchase export controlled property from U.S. companies assumed the risk that they would not be able to obtain a valid export license at a level sufficient to allow them to obtain the export controlled property. *Iran* v. *United States*, AWD 529-A15-FT ¶¶ 59-60 (May 6, 1992), 28 Iran-U.S. C.T.R. 112, 133-4. Accordingly, because the Tribunal has already upheld the validity of the U.S. export licensing system, and because the Algiers Accords only require the United States to compensate Iran for property that it was entitled to receive as of November 1979, this export limitation means that the United States should not be required to reimburse Iran for the ACMR, when Iran was not entitled to receive more than $100,000 of that system prior to November 1979. *See* Rebuttal of the United States to Claimant's Reply Brief and Evidence: Brief of the United States on Issues Common to Multiple Claims ("Common Issues Brief") at Part 1.A. Furthermore, because this pre-November 1979 export license determination had denied Iran's right to receive an ACMR worth more than $100,000, Iran cannot establish that the United States' subsequent March 1981 decision not to permit the exportation of export controlled property to Iran—in any way caused the non-transfer of the $18 million ACMR at issue in this claim. *See* Common Issues Brief at Part IV.C.

[23] *See* Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (Nov. 29, 1979), attached here-

ARGUMENT

I. The United States Can Have No Liability For This Property Because, As Iran Argued, The Contracts Were Terminated Prior To 1981, And Thus Iran Did Not Have Title To The Items, Nor Did The United States Prevent Any Shipment of The Items To Iran.

Because Iran has made extensive arguments before the ICC that the contracts at issue had been terminated prior to January 19, 1981, the Tribunal must dismiss Iran's arguments to the contrary in this claim. Iran may not, in good faith, receive an award against Cubic in the ICC proceeding by arguing that the contracts were terminated in 1979, and then seek additional compensation from the United States before this Tribunal by arguing that the contracts were still in effect as of January 19, 1981. Moreover, Iran has maintained both before the ICC and in U.S. courts that it authorized the resale of the Items to a third party prior to January 19, 1981. *See* Exhibit 1; Exhibit 2. Iran may not now argue that the United States is liable for failing to intervene to prevent this resale and return the Items to Iran in contravention to Iran's own instructions. Because Iran's arguments are entirely inconsistent, this claim should be dismissed.

Even if Iran's representations before the ICC did not preclude it from presenting contradictory arguments in this proceeding, however, the evidence shows that Iran lost title to the property at issue before January 19,

---

in as Exhibit 28 (Suspending export license 83431); Letter from William B. Robinson, Director, Office of Munitions Control, U.S. Department of State, to Rosemary Anderson, Security and Safety Manager, Cubic Corporation (Dec. 5, 1979), attached herein as Exhibit 29 (Ordering Cubic to suspend providing its technical assistance to Iraq, as well).

1981, either through its own termination or its own breach of the contracts. Moreover, Iran has entirely fai1ed to present evidence or arguments that the United States was in any way responsib1e for Iran's alleged losses. Accordingly, Iran is not entitled to any compensation from the United States under the Algiers Accords.

A. Iran Maintained Before The ICC And U.S. Courts That The Cubic Contracts Were Terminated Prior To January 19, 1981, And That Iran Wanted The Items Sent To A Third Party, And Iran Cannot Be Heard To Argue Otherwise Before This Tribunal.

On May 5, 1997, the ICC ordered Cubic to pay nearly $5 million in reimbursement and interest to Iran based, in part, on Iran's arguments that the contracts between the two parties had been terminated in 1979. *See* Exhibit 1, Opinion at G-33, ¶ 21; Exhibit 21. Indeed, the ICC Award explained that Iran relied on the testimony of its Iranian Law expert to demonstrate that the May/June 1979 negotiations between the IIAF and Cubic had resulted in the mutual termination of the contracts: "By referring to Dr. Vahedi's [Iran's expert] characterization of the communications regarding resale [of the Items], [Iran] made it clear that it agreed with Vahedi's view that the resale agreement had an essential element in it, namely, mutual termination of the Contracts." *Exhibit 1, Opinion* at G-18, ¶ 11.6.

Moreover, in Iran's Motion to have the ICC award enforced in the U.S. District Court for the Southern District of California, Iran specifically recognized that as of 1979 it no longer wanted the property returned to it. Iran specifically stated that: "[a]fter the revolution of 1979 in Iran, [the IIAF] expressed its willingness to sell

the system to a third party through Cubic. This offer was accepted by Cubic." Exhibit 2 at 3. Because Iran specifically argued that it did not want the Items returned as of 1979, and even asked that these Items be sold to a third party, it cannot argue that the United States had an obligation to return the property to Iran in 1981.

Under internationally accepted principles of law, and as a result of previously arguing that the contracts had been terminated in 1979, Iran is estopped in these proceedings from arguing that the contracts were still in effect as of January 19, 1981.[24] Because, as Iran argued before the ICC, the contracts were terminated during the 1979 negotiations between the IIAF and Cubic, and under the Sales Contract title only passed upon performance of the contract, Iran had no title to the property at issue in January 1981. *See* discussion in Section B below. Accordingly, the United States had no obligation to return that property to Iran under the Algiers Accords. Alternatively, if Iran revoked the contracts and sought Cubic's assistance in reselling the Items to a third party in 1979, as it argued before the U.S. District Court, the United States was under no obligation to thwart Iran's wishes and return the Items to Iran. Either way, Iran cannot argue that the United States should be held responsible for the return of these Items in January 19, 1981. Accordingly, this claim must be dismissed.

---

[24] *See* MacGibbon, Estoppel in International Law, 7 Int'l Law and Comp. L. Q. 468, 468-69 (1958) ("Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation"); *accord*. B. Cheng, General Principles of Law as Applied by International Courts and Tribunals, 141-42, 146, 157 (1953).

B. Iran Did Not Have Title To The Property On January 19, 1981, And Therefore The United States Has No Responsibility For The Property Under The Algiers Accords.

Whether or not Iran is held to its representations that the contracts with Cubic were mutually terminated, the evidence shows that these contracts were indeed terminated prior to delivery. Accordingly, under Iranian law, Iran did not have title to the Items. Paragraph 9 of the General Declaration does not obligate the United States to compensate Iran for property that was not under Iranian title. See "Common Issues Brief" at Part J.A.; Part IV.E. Moreover, Iran's own actions prevented the delivery of these Items, and the United States should not be held responsible for their alleged loss.

1. Even Where The Contract Specifies That Iranian Law Applies, Title Would Not Have Passed To Iran At The Time Of Contracting; Because The Sales ContractWith-Cubic Involved The Sale Of Newly Produced Property.

In its most recent filings before the Tribunal, Iran argues that even if there was a complete termination of the contracts, it still had title to the Items under Iranian law. *See* Iran's 1999 Reply: Volume XXIV (Doc 333), Statement 16 at 10. However, Iran must prove that title for the claimed property passed to Iran before January 19, 1981, even if the particular contract specified that Iranian law applied. Aside from its bald assertions that Iranian law allowed for the transfer of title, Iran fails to satisfy its burden of proof that title actually transferred. Indeed, as discussed below, because there was no deliv-

ery of the newly produced Items, Iranian law does not provide for the transfer of title to Iran. *See* Common Issues Brief at Part IV.E.5.

Iran claims that once a contract is entered into, the title of the contracted-for property always and immediately transfers to the buyer.[25] Under Iranian law, however, title passes at the time of the execution of the sales contract only with respect to goods that exist and are specifically identified by the contracting parties as the subject matter of the sale at the time of the execution of the sales contract ("identified goods"). *See* Common Issues Brief at Part IV.E.5.b.. Title does not pass at the time of contract in the sale of goods that do not then exist, such as property that will be produced in the future under the terms of the contract ("non-identified goods"). *See id.* Title to non-identified goods,[26] such as

---

[25] *See* Iran's Reply (Brief and Evidence In answer to the United States' Consolidated Response to the Questions of Liability (Part I) And Compensation (Part II) Filed In Two Lots Under Docket Nos. 219-226 Dated 18 April 1995 And 236-242 Dated 14 August 1995): volume I General Points of Liability and Damages Part 1 of 3: The Text, Case No. B/61 (including Case Nos. A/3, A/8, A/9, and A/14), July 2,1999 (Doc. 310) at 73-75.

[26] Iranian law differentiates between two types of contracted-for goods, identified and non-identified goods. "Identified goods," which in Persian are called "*ein moayan:*" denotes such goods that exist and are distinctly identified by the parties to a sales contract at the time they enter into such contract as the goods constituting the subject matter of their sales contract "Non-identified goods," which in Persian are called "*kolli*" or "*kolli fe zemeh*," denotes such goods that do not exist at the time of the sales contract - or if they exist at such time, they are not identified by the contracting parties as the subject matter of the sales contract. For instance, "A" visits the office of a car dealer and signs a contract for the purchase of ten cars which, at that time, may not have been manufactured or owned by the dealer. Thus, in the sale of non-

the newly produced ACMR system at issue here, passes only upon delivery. *Id.*[27] Therefore, because Iran never paid the final amount due under the Sales Contract and because there was no arrangement for shipment or delivery of the Items, title to the non-identified goods in this claim never passed to Iran. *See* Common Issues Brief at Part III.E.2.

2. Iran's Own Actions Prevented It From Obtaining Title To The Items.

Cubic performed all of its obligations under the Sales Contract up to the moment of Iran's obligation to pay for and accept delivery of the completed property. Cubic produced the ACMR on schedule. Exhibit 10. At that time, under the Sales Contract, the IIAF was required to pay Cubic $2,701,824 and then another $2,701,824 in March 1979. It is uncontested that the IIAF failed to make either of these required payments, effectively breaching the Sales contract, even though Cubic had performed its obligations in full.

Because Iran refused to pay the agreed upon price for Cubic's production of the Items, Iran failed to perform its obligations under the Sales Contract. As a result of its non-performance, or breach, delivery of the

---

identified goods, the seller needs to manufacture, produce, or procure such goods and deliver them to the purchaser. Hence, in the sale of non-identified goods, the delivery of the goods constitutes an essential element of the sale. *See* Common Issues Brief at IV.E.5..

[27] Moreover, under the terms of the Sales Contract, delivery was to be made "F.O.B." at Cubic's facilities in San Diego, California. *See* Exhibit 3 at 5, Art. VII. For delivery to be completed under internationally recognized definitions of "F.O.B." the property must be placed on board the shipment carrier. *See* UCC § 2-319; see also Common Issues Brief at Part III.E.4.

Items was never made. Accordingly, Iran did not receive title to the Items, and the United States cannot be required to compensate Iran for this property.

In the ICC hearing, Iran argued that its actions did not constitute breach of the contracts because there was mutual agreement between the parties to terminate the contracts. *See* Exhibit 1, Opinion at G-18 -G-21, ¶¶ 11.1-11.28.[28] (Cubic disputes this point, however, and argues that Iran breached the contract.[29] Iran states that after tennination of the contracts, the parties agreed that the Items would be resold to a third party and that the proceeds would go to Iran. Even if this were the case, which Iran has failed to sufficiently support, Iran does not explain why the United States should be responsible for not interceding to prevent the resale. Iran seems to suggest that the United States should have transferred the Items to Iran despite Iran's admission that it did not have the capability and resources to utilize the ACMR System and despite Iran's specific desire to have the Items resold to a third party. If the United State had indeed interfered with Cubic's resale of the Items, Iran would not have been able to seek additional compensa-

---

[28] Iran relied on the Iranian legal concept of "Eghaleh" to explain that the contracts were implicitly terminated by mutual agreement. *See* Exhibit I, Opinion at G-18 - G-19, ¶¶ 11.9-11.13. This concept requires, however, that there be an "unambiguous mutual consent" or a "meeting of the minds" between the parties to dissolve the contract. *Id.* at G-18, ¶ 11.10. As the ICC correctly concluded, Cubic never consented to termination in the absence of Iran's payment of the remaining $5,403,651 it owed under the contracts. *Id.* at G-19, ¶ 11.20

[29] In Judge Mosk's dissent, he also concludes that there was no termination of the contracts, but instead Iran breached the contracts. Exhibit I, Mosk Dissent at G-62, pp 41-2.

tion from Cubic before the ICC for failing to forward the proceeds of the Canadian sale to Iran.

Regardless of the precise manner in which the original Sales and Services contracts were terminated, these contracts were no longer in effect as of January 1981. In the absence of a contract, Iran's title to the Items was clearly in question as of that date. Because Iran has failed to prove that it obtained clear title to these Items as of the valuation date, the United States can have no liability for them under Paragraph 9. *See* Common Issues Brief at IV.E.

C. Because Any Losses Iran Suffered Were A Direct Result Of Its Own Actions, Any Award On This Claim Would Place Iran In A Better Position Than It Was In As Of November 1979.

As a result of Iran's actions, Iran no longer had title to these Items as of November 1979. Iran had also agreed before November 1979 that Cubic would attempt to resell the Items to a third party. Because any claim for compensation can only be derived from the termination of contractual relations between the IIAF and Cubic, there is no justification for holding the United States responsible for the transfer of these Items. Indeed, any losses associated with the termination of contractual relations between Cubic and the IIAF has already been arbitrated and decided by a competent tribunal. To award any additional compensation on this claim now would not only unjustly enrich Iran, but it would also require the United States to place Iran in a superior position to its November 1979 status, a requirement that is contrary to the mandates of the Algiers Accords.

The ordinary meaning of Genera1 Principle A of the Algiers Accords is clear. The Principle requires that: "Within the framework of and pursuant to the provisions of the two Declarations . . . the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." Declaration of the Government of the Democratic and Popular Republic of Algeria ("General Declaration") (Jan. 19, 1981) (1 Iran-U.S. C.T.R. 3), General Principle A. The United States must "restore"—not improve—Iran's financial position as of November 1979. *See* Common Issues Brief at I.A. As of November 1979, Iran had not paid Cubic for the completion of the contracts, had effectively terminated the contracts, and had instructed Cubic to resell the Items. Accordingly, under the plain language of the Accords, Iran should not receive any compensation from the United States on this claim.

Because it was Iran's failure to abide by the terms of the Sales Contract, and Iran's alleged termination of that contract prior to November 1979 that resulted in the non-transfer of the Items, Iran should not recover from the United States for any associated losses. Importantly, there is no evidence in the record that the United States had any responsibility for the non-shipment of the Items to Iran. Indeed, the evidence shows that the U.S. export licenses were granted and renewed in advance of any expected shipment. *See* Exhibits 24-27. Because Iran has not provided any evidence that the United States prevented Iran from receiving these Items or had any responsibility for their transfer to Iran, the United States should not be held responsible for their loss. Moreover, under the express terms of the Algiers Accords, the United States is not required to compensate Iran for these Items.

In sum, Iran has already received an award against Cubic for nearly $5 million in reimbursement/compensation on its claims brought pursuant to these contracts. This award was granted to Iran based on Iran's arguments that the contracts had been terminated prior to 1981. The ICC also considered Iran's representations that Cubic's resale of the property was on Iran's behalf under a new agreement between the parties. *See* Exhibit 1, Opinion at G-8, ¶ 5.1. Iran may not argue before this Tribunal that the Sales contract was still in effect as of January 19, 1981, merely to receive further compensation on this claim. Moreover, Iran has failed to prove that it had title to the Items as of January 19, 1981. Finally, Iran has failed to allege that the United States was in any way responsible for any loss of the Items. Because any recovery from the United States based on these same contracts would unjustly enrich Iran, the Tribunal should dismiss this claim.

II. The United States Cannot Be Required To Compensate Iran Where Iran Has Failed To Show Its Losses.

If the Tribunal determines that Iran is entitled to further compensation on this claim, the United States can only be responsible for Iran's actual losses with regard to the Items, calculated as the fair market value of the Items on the valuation date, minus any amounts Iran still owes Cubic for the Items' production and resale, any amounts Iran would have had to pay for the shipment of the Items, and any amounts that Iran has already been awarded as compensation for the non-transfer of the property. *See* Common Issues Brief at V. Iran completely ignores these factors and instead seeks the full September 1981 price that Cubic negotiated with Canada for the purchase of the modified ACMR system:

$17,139,046.50. Iran's 1999 Reply: Volume XXl (Doc. 330), Statement 16 at 1. Iran also adds the alleged price for 4 generators and 4 airborne instrumentation subsystems that were apparently not sold to Canada in that transaction. *Id.* at 1-2. Iran seeks a total amount of $18,401,008.50 for the Items. *Id.* at 2. Because Iran fails to take into account any amounts it owes Cubic in its calculations, any amounts Iran would have had to pay for shipment of the Items, or any amounts it has already received as compensation for these Items, Iran's asserted losses are entirely incorrect, and the Tribunal should dismiss this claim.

To the extent that the Tribunal nevertheless awards Iran additional compensation, the compensation amount should be made in accordance with the report prepared by the independent valuators, Ernst & Young LLP ("Ernst & Young"). *See* Ernst & Young, LLP Valuation Analysis of Certain Assets with Respect to which Iran Asserts Claims in Case B/61, as of March 26, 1981, Cubic Defense Systems, Statement 16, included herein as Exhibit 30. According to the E&Y Report, any compensation amount cannot exceed $5,130,000, the estimated fair market value of the saleable portion of the ACMR system that Iran originally sought to purchase from Cubic. *See* Exhibit 30 at ii. If the Tribunal awards Iran the full fair market value of the Items, it is assuming that the contracts were not terminated by Iran's actions, and thus the amounts that Iran still owes Cubic under the Sales contract should be deducted from this fair market value.

A. Any Compensation On This Claim Must Be Reduced By The Amount Of Money That Iran Saved By Not Receiving The Items.

Ernst & Young estimated the fair market value of the Items utilizing the Cost and Market Approaches.[30] Mainly based on the Canadian contract price for the Items, reduced by the remaining technical life span of the parts, Ernst & Young estimated that in March 1981 the Items had a total fair market value of $5,130,000. Exhibit 30 at 7. Under Tribunal precedent, however, Ernst & Young's determination of fair market value must be reduced to account for any amounts that Iran would have to pay to receive the Items. *See* Common Issues Brief at V.C.2. According to the Sales Contract, after Cubic had made the Items available for Iran's inspection and shipping, Iran had to pay an additional $5,403,651 for Cubic's completed production of the property.[31] Additionally, under the Contract, Iran would have been responsible for the costs of shipping the Items to Iran. *Exhibit 3 at 5, Art. VII*. If the Tribunal awards Iran the estimated fair market value of the Items, it should subtract the amount Iran owed Cubic for the final production of the Items, because Iran saved this amount of money by not receiving the Items. In other words, the Tribunal must subtract $5,403,651 from

---

[30] These valuation approaches are described in further detail in: Ernst & Young, LLP Valuation Analysis of Certain Assets with Respect to which Iran Asserts Claims in Case B/61, as of March 26, 1981, for the Common Issues Brief.

[31] *See* Exhibit 5; Exhibit 6 (the 30% due under Milestones 3 & 4 in "Contract Amendment Number 1" multiplied by the $18,012,170 total price set by "Contract Amendment Number 2").

Ernst & Young's estimate of $5,130,000, the fair market value of the Items in March 1981. Moreover, the Tribunal must subtract the cost of shipping all of the property to Iran, a cost that Iran agreed to pay under the Sales Contract. *Id.* Because Iran actually saved money by not receiving the Items, this claim should be dismissed.

B. Any Amount Of Compensation On This Claim Must Be Reduced By The Amounts That Iran Has Already Received As Compensation For These Items.

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

---

[32] Indeed, Iran itself seems to recognize that any award it receives on this claim would be repetitive of its ICC Award against Cubic because on January 14, 1999, it sent a letter to the Agent of the United States at the Tribunal, stating that if it received the amounts due from Cubic under the ICC Award it would "be recouped from the remedy sought

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

CONCLUSION

The Tribunal should dismiss this claim in its entirety. Iran has already received an award relating to these Items from Cubic based on the argument that the contracts were mutually terminated in 1979, and Iran should not be allowed to re-allege claims for this property against the United States based on contradictory arguments. Iran has argued that the contracts with Cubic, which were governed by Iranian law, were terminated prior to delivery, and Iranian law is clear that sales contracts for the production of future goods do not confer title absence completion of the contract and delivery of the Items. Moreover, Iran asks the Tribunal to

---

against the United States in Case B61." Letter from M.H. Zahedin-Labbar, Agent of the Islamic Republic of Iran, to Allen S. Weiner, Agent of the United States, "Re: Case No. B61" (Jan. 14, 1999), included herein as Exhibit 31; *see also* Iran's 1999 Reply: Volume XXI (Doc. 330), Statement 16 at 3 n.2 (stating that any amount received from Cubic "will be recuperated from the remedy sought" in this case.). Iran must not be allowed to seek additional compensation from the United States when it is presently enforcing an award against Cubic that covers the very same losses that Iran allegedly suffered.

grant an award of the full value of the property, despite the uncontested fact that Iran failed to make the final required payments for this property under the Sales contract, tallied at nearly $5 million. In sum, if the Tribunal grants this claim, it would: (1) allow Iran to seek double compensation based on inconsistent assertions of fact; (2) it would reward Iran for having failed to fulfill its obligations under the Sales contract; (3) it would place Iran in a superior position than it was in as of November 1989; and (4) it would hold the United States responsible for the results of Iran's own actions. Neither the Algiers Accords nor internationally accepted principles of equity support such a holding; and accordingly, this claim should be dismissed.

Respectfully submitted,

/s/ CLIFTON M. JOHNSON
CLIFTON M. JOHNSON
Agent of the United States

[Symbol Omitted]

AGENT OF THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE IRAN-U.S. CLAIMS TRIBUNAL THE HAGUE

IN THE NAME OF GOD

[No. 34188]
[Date: Jan. 14, 1999]

URGENT

Mr. Allen S. Weiner
Agent of the United States of America
Iran-U.S. Claims Tribunal
Parkweg-13
The Hague

Re: Case No. B61
(CUBIC DEFENCE SYSTEMS INC.)

Dear Mr. Weiner,

As you know one of the important cases still pending before this Tribunal is Case B61. The subject-matter of this Case is the United States' obligation under Paragraph 9 of the General Declaration for the transfer of a series of Iranian military items remaining on the U.S. soil through 19 January 1981. The defence articles at issue in Case B61, at variance with case B1, have been purchased directly from the private U.S. companies. One of such companies is CUBIC DEFENCE SYSTEMS INC. (Hereinafter referred to as "CUBIC"). *See* Doc. 204. (Exh. 16). The property at issue is an Air Combat Maneuvering Range ("AMR"), an electronic air

combat training system. The manufacture of this equipment was already complete by 19 January 1981 and was sold by CUBIC to the Canadian Government on 16 September 1981. As a result Iran's remedy with respect to this company is in the main the price at which the AMR was sold, i.e. U.S. $17,139,046.50.

In the meantime, an ICC arbitral tribunal, called upon to resolve the dispute between the Iranian Ministry of Defence and Support for Armed Forces and CUBIC, made an award of damages in the Ministry's favour in the amount of U.S. $2,808,519 plus interest (hereinafter referred to as "Awarded Amount"). *Islamic Republic of Iran* v. *Cubic Defence Systems Inc.* (hereinafter referred to as "ICC Award"). A copy of the ICC award is attached.* The Awarded Amount, if received, is naturally to be recouped from the remedy sought against the United States in Case B61.

Iran took the necessary action to enforce the ICC Award at the United States District Court, Southern District of California. The Court granted Iran's Petition for Confirmation of the Foreign Arbitral Award on 12.7.1998. *See* Court's Order attached. While the enforcement procedure was running its course, the so-called judgment creditors in *Stephen M. Flatow* v. *The Islamic Republic of Iran, et al* moved to garnish the Awarded Amount. *See* Garnishment Summons attached. The Court—apparently District Court for Alexandria, Virginia—is to decide the motion for garnishment TOMORROW, 15 January 1999.

---

* This Award, as argued in Iran's pleadings to be filed, does not enjoy *res judicata* in Case B61 for lacking all the three otherwise required identities of parties, object and subject matter.

In view of the fact the Awarded Amount constitutes an integral part of the remedy sought in Case B61 pursued within the framework of the Algiers Declarations, you are requested to ask your Government to advise the Court, through a Suggestion of Interest or as otherwise deemed appropriate, of the context in which the enforcement of the ICC Award is to be viewed, preventing it from granting such a motion due to the incompatibility of such interferences with the United States' commitments under the Algiers Declarations. The United States has made such a required intervention in the enforcement process of an award in Case A27, (AWD No. 586-A27-FT) to impede the attachment of the awarded amount. This Awarded Amount unless received by Iran, cannot be offset against any relief which the United States may be found to owe Iran with regard to CUBIC in Case B61.

To conclude, Iran understands that any action the United States might take with respect to this request will be without prejudice to any positions taken, or to be taken, by the Parties in Case B61 respecting CUBIC.

Yours sincerely,

[ILLEGIBLE]
M.H. ZAHEDIN-LABBAF
Agent of the Islamic
Republic of Iran