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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*

GREGORY G. KATSAS
*Acting 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 the court of appeals correctly held, contrary to the position of the Executive Branch, that the district court's 1998 judgment confirming a 1997 arbitral award in petitioner's favor is a "blocked asset" subject to attachment by respondent on the theory that the judgment represents military property in which petitioner's interest arose before January 19, 1981.

2. Whether respondent relinquished any right to attach petitioner's judgment when he accepted compensation 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."

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant, vacate, and remand this case in light of developments subsequent to the decision below.

**STATEMENT**

1. In response to the seizure of American hostages at the United States Embassy in Tehran on November 4, 1979, the President exercised his powers under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701, 1702, and "blocked all property and interests in property of the Government of Iran * * * subject to the jurisdiction of the United States." Exec. Order (E.O.) No. 12,170, 3 C.F.R. 457 (1980); see 31 C.F.R. 535.201. The hos-

tage crisis was resolved with the January 19, 1981, signing of the Algiers Accords, 20 I.L.M. 224, in which the United States agreed in principle to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *Ibid.* The Accords established the Iran-U.S. Claims Tribunal in the Hague for resolving, *inter alia*, claims of the United States and Iran against each other concerning their respective performance under the Accords. *Id.* at 230-232; see generally *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, 107, 109, 110 (1982); see 31 C.F.R. 535.211-535.214. The President also directed that most other Iranian property be transferred to Iran "as directed * * * by the Government of Iran." 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), which the Treasury Department implemented by issuing a general license authorizing "[t]ransactions involving property in which Iran" has an interest where: "(1) The property comes within the jurisdiction of the United States * * * after January 19, 1981, or (2) The interest in the property of Iran * * * arises after January 19, 1981." 31 C.F.R. 535.579(a).

2. In 2000, Congress authorized the Secretary of the Treasury to make payments to certain individuals with judgments against Iran. Victims of Trafficking and Violence Protection Act of 2000 (VPA), Pub. L. No. 106-386, § 2002, 114 Stat. 1541. Under that statute, certain judgment creditors who sued Iran under 28 U.S.C. 1605(a)(7) for terrorism-related injuries were eligible to receive payment equal to at least their compensatory damages. VPA

§ 2002(a), 114 Stat. 1541.[1] Those who accept payment under VPA automatically relinquish certain rights, including their right to pursue compensatory damages and, depending on the amount of compensation they receive, their right "to execute against or attach property that is at issue in claims against the United States before an international tribunal, [or] that is the subject of awards rendered by such tribunal." § 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. First, Congress expanded the class of individuals eligible for payment to include all parties with final judgments against Iran who filed suit under Section 1605(a)(7) before October 28, 2000. § 201(c)(1), 116 Stat. 2337. Second, because the funds originally identified might not be sufficient to pay all remaining eligible persons amounts equal to their compensatory awards against Iran, Congress directed the Secretary of the Treasury to make pro rata payments to newly eligible persons. § 201(c)(4), 116 Stat. 2337. Finally, Congress limited the rights that must be relinquished by individuals who receive "less than the full amount of compensatory damage awards," while continuing 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

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

or is the subject of an award by such a tribunal." § 201(c)(4), 116 Stat. 2339; see 68 Fed. Reg. 8080 (2003).

In addition to amending VPA, TRIA authorized creditors with judgments under Section 1605(a)(7) 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 the Trading With the Enemy Act, 50 U.S.C. App. 5(b), or IEEPA. TRIA § 201(d)(2)(A), 116 Stat. 2339.

3. Respondent brought an action against the Islamic Republic of Iran and its Ministry of Information and Security (MIS) under Section 1605(a)(7), alleging that those entities were responsible for the wrongful death of respondent's brother, Cyrus Elahi. See *Elahi* v. *Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99 (D.D.C. 2000). Defendants failed to appear, and the district court found that agents of the MIS murdered Cyrus Elahi at the behest of Iran. *Id.* at 105-106. See 28 U.S.C. 1608(e) (requiring, in the event of default, that the claimant "establish[] his claim or right to relief"). The court awarded respondent $11,740,035 in compensatory damages and $300 million in punitive damages. *Elahi*, 124 F. Supp. 2d at 115.

Petitioner is the Ministry of Defense of the Islamic Republic of Iran. Before the 1979 Iranian revolution, petitioner's predecessor entered into two contracts with Cubic Defense Systems (Cubic), a California firm, for an Air Combat Maneuvering Range (ACMR), a type of military equipment. Pet. App. 6. Following the revolution, Cubic did not deliver the goods. *Ibid.* In 1991, pursuant to the contracts, petitioner sought arbitration by the International Chamber of Commerce (ICC) in Switzerland. *Id.* at 7. Petitioner prevailed before the ICC and, in 1997, obtained an award of $2.8 million. See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys.*,

*Inc.*, 29 F. Supp. 2d 1168, 1171 (S.D. Cal. 1998), appeal pending, No. 99-56380 (9th Cir. filed Aug. 19, 1999) (*Cubic*). In 1998, petitioner obtained a judgment confirming that award in the United States District Court for the Southern District of California. *Ibid.*

After respondent obtained his judgment against Iran, he registered it in the same court in which petitioner had confirmed the arbitration award against Cubic. Respondent then filed a notice of lien against petitioner's judgment against Cubic. See Resp. Notice of Lien para. 2 & Exh. A, *Cubic*, *supra* (No. 98-CV-1165); Pet. App. 8. In response, petitioner sought a determination from the district court that the Cubic judgment was immune from attachment. *Ibid.* The district court held that the Cubic judgment was not immune because petitioner had, by invoking the court's jurisdiction to confirm the arbitration award, waived its immunity from attachment. *Ibid.*

Petitioner appealed, 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 affirmed on the alternative ground, not briefed by the parties, that petitioner was an agency or instrumentality of Iran engaged in commercial activity in the United States, and therefore subject to an exception to attachment immunity under the FSIA, *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 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 petition for a writ of certiorari, and the Court invited the United States' views. 544 U.S. 998 (2005). The United States' brief explained that the FSIA affords greater protection from attachment to the property of foreign states than to the property of their agencies or instrumentalities and that the court of appeals erred in holding that petitioner—a ministry of defense—is an agency or instrumentality of Iran, rather than an inseparable part of the Iranian state. U.S. Br. at 7-17, *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450 (2006) (No. 04-1095). The Court vacated the court of appeals' decision and remanded for further consideration of petitioner's status. 546 U.S. at 452-453.

4. On remand, a divided panel of the court of appeals again affirmed. On the issue this Court had directed the court of appeals to reconsider, the panel majority held that petitioner is "an inherent part of the state of Iran" entitled to the greater protections afforded to foreign states themselves under the FSIA. App, *infra*, 20a.[2] Respondent contended, however, that he could now attach the Cubic judgment on the alternative ground that it is the blocked asset of a terrorist party and therefore subject to attachment under TRIA § 201(a). *Id.* at 11a. Petitioner argued that the Cubic judgment was not a "blocked asset" and that, in any event, respondent waived his right to attach the Cubic judgment when he accepted a $2.3 million payment under TRIA "in partial satisfaction of his $11.7 million compensatory damages award against Iran." *Id.* at 6a, 15a. Petitioner and the United States, as amicus curiae, explained that the Cubic judgment is "at issue" in Claim B/61 brought by Iran against the United States in the Iran-U.S. Claims Tribunal

[2] The court of appeals' original opinion on remand, before being amended on rehearing, is reproduced in an appendix to this brief.

and therefore subject to TRIA's relinquishment requirement. *Id.* at 7a. The court of appeals held for respondent on both points. *Id.* at 10a, 15a.

The panel majority first held that respondent had not relinquished his right to attach the Cubic judgment. It recognized that Iran seeks damages from the United States in the B/61 case before the Claims Tribunal "based on the non-export of contracted-for goods, including the ACMR that was the subject of the Cubic contract," App., *infra*, 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 Claim 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.*

The panel majority further held that respondent could attach the Cubic judgment under TRIA § 201(a) because it is a "blocked asset." The majority determined that the Cubic judgment is a "blocked asset" because "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." App., *infra*, 15a.

Judge Fisher dissented. He would have held that, by accepting compensation under TRIA, respondent relinquished his right to attach the Cubic judgment because it is "at issue" in Claim B/61. Judge Fisher noted Iran's recognition that any amount it collected under the Cubic judgment would offset its claims against the United States, and that, even without that concession, the United States would

be entitled to a setoff because Claim B/61 "arises from the same transaction or contract as the underlying claim." App., *infra*, 26a. That conclusion was further supported by Congress's "evident" intent in enacting the relinquishment provision "to prevent victims of terrorism who accept money from the federal treasury from attaching * * * property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." *Id.* at 26a-27a.

5. Petitioner sought rehearing. The United States filed an amicus brief explaining that rehearing was critical because the majority's holding that the Executive Branch failed to unblock any property in which Iran had an interest antedating the Iranian revolution was inconsistent with numerous Executive Orders and regulations authorizing the transfer of such property, was contrary to the position taken by the United States before the Iran-U.S. Claims Tribunal, and could seriously impair the United States' interests before that tribunal. U.S. Amicus Br. Supporting Reh'g 5-6, 9-11. The United States further observed that the majority's opinion reversed the panel's original opinion in this case, which held that petitioner's interest in the Cubic judgment arose in 1998 and was transferable pursuant to the general license, *id.* at 8; Pet. App. 76, a position that the United States had endorsed at oral argument, Recording of Argument, No. 03-55015, at 45 min. 23 sec. (Jan. 26, 2007).

In response, the panel majority issued an amended opinion. The principal change was 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; App., *infra*, 15a. In its place, the majority inserted a paragraph in which it recognized that "[f]ollowing release of the hostages, the United States un-

blocked most Iranian assets," but went on to state that "military goods such as the ACMR remained blocked." Pet. App. 3. Although no party had urged the distinction upon which the majority rested its amended decision, and neither petitioner nor the United States had had an opportunity to respond to it, the court proceeded to deny the petition for rehearing and ordered that "[n]o further petitions for rehearing or for rehearing en banc may be filed." *Id.* at 4.

6. Further developments since the court of appeals' decision significantly affect the proper analysis of the question presented in the petition. On October 25, 2007, the Department of State designated the Iranian Ministry of Defense and Armed Forces Logistics as an entity of proliferation concern. 72 Fed. Reg. 71,991-71,992. Despite minor discrepancies in translation, petitioner is the same entity as the one designated. See *id.* 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)"). Because the State Department designated petitioner under the authority of an Executive Order that was issued pursuant to IEEPA, the "property and interests in property" of petitioner are now "blocked." *Ibid.*

**DISCUSSION**

Although not presented as separate questions, petitioner actually seeks this Court's review of two distinct issues: (1) whether the Cubic judgment is a blocked asset subject to attachment under TRIA; and (2) whether the Cubic judgment is at issue before the Iran-U.S. Claims Tribunal, such that respondent relinquished his right to attach the judgment under TRIA when, pursuant to the same statute, he accepted payment from the United States Treasury.

The Ninth Circuit's ruling on the first issue is clearly wrong and is contrary to the longstanding position of the United States. That ruling, moreover, was rendered by that court sua sponte on rehearing, without that issue having been addressed by the parties or by the United States in its amicus brief. Despite the sua sponte injection of that issue into the case, the court of appeals barred the filing of any further rehearing petition that could have sought to correct it. The State Department, however, has since designated petitioner as an entity of proliferation concern. Because the Ninth Circuit did not have an opportunity to consider the effect of that recent designation on the status of petitioner's interest in the Cubic judgment—and because of the nature of the proceedings and ruling below—it would be appropriate for the Court to grant the petition, vacate the judgment of the court of appeals, and remand for reconsideration in light of the State Department's recent designation of petitioner.

The second issue does not independently warrant this Court's review. Although the Ninth Circuit's decision on that issue was erroneous as well, even if the court of appeals had correctly held that respondent relinquished his right to execute against the Cubic judgment, other judgment creditors of Iran who have not relinquished their rights of attachment and who have registered liens would execute against the judgment instead. Because petitioner has not established that resolution of that issue is of practical consequence to it, there is no reason for this Court to review the court of appeals' holding on that issue in this case.

## I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CUBIC JUDGMENT WAS BLOCKED, AND THE CASE SHOULD BE REMANDED FOR CONSIDERATION OF THE EFFECT OF THE STATE DEPARTMENT'S RECENT DESIGNATION OF PETITIONER

### A. The Court Of Appeals' Holding That The Cubic Judgment Was Blocked At The Time Of Its Judgment Was Erroneous

1. As the court of appeals correctly held in its initial opinion, Pet. App. 76, the asset here at issue 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. In its initial decision in this case, 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* 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.").

On remand from this Court, the court of appeals reversed itself without even mentioning its earlier holding, Pet. App. 19-20; *cf. id.* at 76, and despite the fact that the United States had, at oral argument, endorsed the court's original conclusion that the Cubic judgment was subject to the general license, see p. 8, *supra*. The court concluded instead that the question whether petitioner's interest in the Cubic judgment was blocked depended upon the nature and status of the underlying assets that were the source of the dispute giving rise to the judgment. Pet. App. 19-20. That conclusion was in error. Respondent is not trying to attach military equipment; he seeks to attach petitioner's money judgment against Cubic, which confirmed an arbitration award for breach of contract. As noted, the regulations treat "judgments" and "merchandise" as distinct types of property. See 31 C.F.R. 535.311. And even if the regulation were ambiguous, the government's construction of it would be entitled to substantial deference. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

Even if the court of appeals were correct in focusing on Iran's interests underlying the Cubic judgment, rather than on the judgment itself, it *still* erred in concluding that the relevant interests pre-date January 1981. Petitioner's claim in the arbitration proceeding was for breach of contract. As the international arbitration award explains, Cubic incorporated parts of the ACMR equipment in a subsequent sale of similar equipment to Canada, which occurred in September 1981. ICC Award ¶¶ 15.6, 15.15(a).[3] 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.* ¶ 11.28.

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[3] The arbitration award is Exhibit 3 to petitioner's petition to confirm the award, filed in the district court below.

After discounting for various costs and allowing for certain profits, the arbitration panel determined that, after the sale, Cubic owed petitioner $2.8 million. *Id.* ¶¶ 18.1, 19.7. The Cubic judgment thus "represents" petitioner's interest not in the military equipment itself, but in its share of the proceeds of the resale of that equipment in September 1981. Because petitioner's interest in the proceeds arose after January 19, 1981, it is subject to the general license, and was not subject to attachment under TRIA, even if the proper focus of the blocked-status inquiry is the property interest that the Cubic judgment "represents."

2. Even if the court were correct in focusing on petitioner's pre-1981 interest in the ACMR or the 1977 contract concerning that equipment, the court failed to consider whether that property interest was subject to other Executive Orders and implementing regulations that unblocked it under IEEPA. As the United States explained to the court of appeals in its amicus curiae brief in support of rehearing (at 10), the President issued several Executive Orders and the Treasury Department issued numerous implementing regulations to ensure the free mobility of Iran's property in accordance with the Algiers Accords. See E.O. 12,277-12,281. 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 transfer to Iran of property owned by Iran on January 19, 1981, the date the Accords were signed, and was, for that reason, not blocked under IEEPA. E.O. 12,281; 31 C.F.R. 535.215. It therefore was not "blocked for purposes of attachment under TRIA.

In response to the petition for rehearing and the government's amicus brief in support of it, the majority deleted its broad statement that "no action by the executive branch has ever unblocked the assets in which Iran has an interest

that antedates the Revolution," App, *infra*, 15a, and replaced it with a narrower, but no less erroneous, categorical statement that the Executive Branch has never unblocked "military goods such as the ACMR," Pet. App. 3, 19. In support of that conclusion, which no party had ever advanced and the United States had no occasion to refute, the court of appeals 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; 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 assets 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' citation to the Arms Export Control Act suggests that its holding is premised on a confusion of two very different issues: (1) whether certain property is "blocked"; and (2) whether the property is subject to other regulations that may limit its use or the entities to whom it can be transferred. Although the various Executive Orders issued after 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 even though those regulations may have prevented the export of mili-

tary property to Iran, the property was not seized or frozen, and Iran was free to dispose of the property in other ways permitted by the regulations and thereby recoup its losses. Thus, the fact that property is regulated under the Arms Export Control Act does not mean that it is blocked.

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, which lifted prior restrictions imposed on property in which Iran had an interest. The 2005 Presidential notice that the court of appeals cites (*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 also misplaced. That advisory stated that "[c]ertain assets" consisting "mainly of military and dual-use property" and relating to claims before the Iran-U.S. Claims Tribunal "remain blocked in the United States." *2007 Export Advisory* 23. That statement, which referred to certain specific assets as to which Iran had only a partial or contingent interest, has no bearing whatsoever on this case.[4] There is no dispute that the physical military equipment that was the subject of the contract between petitioner and Cubic was long ago incorporated by Cubic into another system and sold to Canada. See ICC Award ¶¶ 15.6, 15.15(a). The court of appeals' interpretation of the *2007 Export Advisory*, adopted without any briefing by the parties or by the Treasury Department, which issued it, was mistaken.

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[4] Indeed, the language on which the court of appeals relied does not appear in more recent versions of the export advisory. See, *e.g.*, Office of Foreign Assets Control, Dep't of Treasury, *Foreign Assets Control Regulations for Exporters and Importers* 23 (Oct. 25, 2007).

### B. The Court Should Vacate And Remand For Consideration Of The Cubic Judgment's Status In Light Of The State Department's Recent Designation Of Petitioner

Although the court of appeals erred in holding that the Cubic judgment was at the time of its decision a "blocked asset," subsequent developments establish that the Cubic judgment is now "blocked" on different grounds. As noted, the State Department recently designated petitioner as an entity that has materially contributed to "the proliferation of weapons of mass destruction," whose assets "are blocked." 72 Fed. Reg. at 71,991-71,992. As a consequence, "any assets" in which petitioner has an interest that are "under U.S. jurisdiction [are] frozen." *Ibid.* In addition, because the State Department designated petitioner under Executive Order 13382, see *ibid.*, which the President issued pursuant to IEEPA, property that is frozen as a consequence of the new designation qualifies as a "blocked asset" within the meaning of TRIA. § 201(d)(2)(A), 116 Stat. 2339. In the United States' view, the Cubic judgment is therefore now properly subject to attachment under TRIA. § 201(a) and (d), 116 Stat. 2337, 2339.

Because the State Department's designation of petitioner post-dates the court of appeals' judgment, the parties did not have an opportunity to brief that issue, and the court of appeals had no opportunity to consider whether to rest its holding on that ground, rather than the erroneous ground on which it relied. We therefore recommend that the Court grant the petition, vacate the court of appeals' judgment, and remand for further consideration in light of the State Department's recent designation of petitioner. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam).

There are substantial reasons for the Court to dispose of the case in that manner. In the Iran-U.S. Claims Tribu-

nal, Iran has asserted numerous claims against the United States, alleging that the United States' failure to arrange for the transfer of all Iranian property or alternatively to compensate Iran for losses violates the Accords. In Claim B/61, Iran seeks compensation in excess of $2 billion for losses incurred when the United States refused permission, under the Arms Export Control Act and other authorities, to export military property, including the ACMR. See *President's Message to the Congress Reporting on the National Emergency with Respect to Iran*, Pub. Papers 756 (1996). It obviously is the position of the United States that Iran's claims are without merit, for the reasons explained above. Thus, in responding to that contention, the United States has relied on the various Executive Orders and regulations implementing the United States' obligations under the Accords to argue that Iran was free to dispose of the property consistent with the regulations, and thereby avoid its alleged losses.

Indeed, petitioner agrees that the court of appeals' decision is incorrect and that, consistent with the United States' undertakings in the Algiers Accords, the President *did* lift the blocking orders with respect to the assets at issue here. See Pet. 27; see generally Pet. 25-30. Nonetheless, petitioner appears to raise the prospect that it could use the court of appeals' admittedly erroneous statement before the Claims Tribunal, asserting that if the decision below is correct, the United States is in "manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal." Pet. 27.

In view of these assertions by petitioner, it would be appropriate for this Court to grant the petition, vacate the court of appeals' judgment, and remand to that court for further proceedings. The court of appeals would thereby be afforded an opportunity to reconsider and eliminate its er-

roneous ruling regarding the status of military property—which it otherwise insulated from review by foreclosing the parties from filing a rehearing petition addressing that sua sponte disposition—and instead to find that Iran's interest in the Cubic judgment is now blocked on the basis of the State Department's recent designation. Resting the decision on that ground would not implicate proceedings before the Claims Tribunal. Moreover, that course would not prejudice respondent, because a holding by the court of appeals that the Cubic judgment is blocked and subject to attachment under TRIA as a result of the recent designation would have the same practical consequence for respondent as the court of appeals' present ruling. By the same token, a holding that rested on the recent designation would obviate the basis for petitioner's assertion of a conflict between the decision below and those of other courts of appeals.[5]

Accordingly, it would be appropriate for the Court to grant the petition for a writ of certiorari on the question whether the Cubic judgment is a blocked asset, vacate the judgment of the court of appeals, and remand the case for

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[5] Contrary to petitioner's assertion, however, we do not perceive a conflict among the courts of appeals. See Pet. 24. For example, the court of appeals did not disagree with the Second Circuit that assets subject "to the general license of 31 C.F.R. 535.579, are not blocked assets under the TRIA." Pet. 29 (quoting *Rubin*, 484 F.3d at 150). To the contrary, the panel majority expressly recognized that property in which Iran's interest arose after January 19, 1981, are unblocked, Pet. App. 4, but held that the general license was inapplicable here because petitioner's interest in the property at issue here arose *prior* to that date. *Ibid.* While that determination is erroneous, it does not conflict with the Second Circuit's decision in *Rubin*. Nor, contrary to petitioner's assertion (Pet. 29), does the court of appeals' decision conflict with the Fifth Circuit's decision in *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 485, 493 n.32 (2004), which simply quotes without comment from TRIA's definition of "blocked assets."

further consideration in light of the State Department's recent designation of petitioner.

## II. REVIEW IS NOT WARRANTED ON THE QUESTION WHETHER RESPONDENT RELINQUISHED HIS RIGHT TO ATTACH THE CUBIC JUDGMENT

The United States agrees with petitioner (Pet. 16-23) that the panel majority erred in holding that the Cubic judgment is not "at issue" before the Iran-U.S. Claims Tribunal in Claim B/61. As Judge Fisher correctly observed, TRIA's unambiguous text and the evident Congressional intent demonstrate that the relinquishment provision was meant "to prevent victims of terrorism who accept money from the federal treasury from attaching * * * property that might otherwise be used by the United States to satisfy judgments imposed by international tribunals." Pet. App. 33. No matter what the full scope of the "at issue" provision might be, it is self-evident that the Cubic judgment is "at issue" before the Claims Tribunal. The same facts that were the basis of petitioner's claim against Cubic also give rise to Iran's claim against the United States, such that the United States would be entitled to a set-off in the amount of the Cubic judgment against any award in favor of Iran, and Iran has so acknowledged. See *id.* at 32 (Fisher, J., dissenting). Indeed, even the panel majority recognized that Iran's claim against the United States before the Claims Tribunal, as it "[r]elate[s] to the ACMR," is 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." *Id.* at 12. Thus, even in the majority's view, there is a direct (and inverse) relationship between the amount of petitioner's recovery from Cubic and the amount of Iran's claims against the United States. By per-

mitting respondent to both collect payment from the United States pursuant to TRIA and attach assets that would otherwise reduce the amount of Iran's claim against the United States, the court of appeals' decision forces the United States, in effect, to pay respondent an additional amount beyond what the relinquishment provision was intended to provide. See *id.* at 33 (Fisher, J., dissenting).

Despite the court of appeals' error, the relinquishment issue does not warrant this Court's review. Even if respondent were determined to have relinquished his claims, other judgment creditors of Iran have liens against the Cubic judgment. See Rafii and Rubin Notices of Lien, *Cubic*, *supra* (No. 98-CV-1165). Those other victims have not received compensation under VPA or TRIA and so have not relinquished any right to attach the Cubic judgment. Thus, even if respondent's own attachment efforts were frustrated, it is unlikely that petitioner would benefit in any practical way. Nor, for the same reason, would resolution of the relinquishment issue ultimately affect the United States' ability to rely on the Cubic judgment to offset any liability it may be found to have in Claim B/61.[6]

Moreover, contrary to petitioner's assertions, Pet. 22, the court of appeals' ruling on the relinquishment issue does not conflict with the decisions of other courts of appeals. In each of the four cases petitioner identifies, the property that the judgment creditor sought to attach was the precise subject of a claim by Iran against the United

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[6] That does not mean the relinquishment issue is of no moment. The panel majority's error deprives judgment creditors who did not receive compensation and who have not relinquished their right to attach the Cubic judgment. However, that consequence, which the other claimants have not themselves appeared to contest, does not in itself justify the Court's plenary review.

States in the Iran-U.S. Claims Tribunal.[7] Thus, although the majority erred in its conclusion on this point, its resolution of that issue does not warrant review by this Court.

## CONCLUSION

The Court should grant the petition for a writ of certiorari in part, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the blocked status of the Cubic judgment in light of the State Department's October 25, 2007, designation of petitioner as an entity of proliferation concern. 72 Fed. Reg. at 71,991-71,992.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

GREGORY G. KATSAS
*Acting Assistant Attorney General*

EDWIN S. KNEEDLER
*Deputy Solicitor General*

JOHN B. BELLINGER, III
*Legal Adviser*
*Department of State*

DOUGLAS HALLWARD-DRIEMEIER
*Assistant to the Solicitor General*

ROBERT F. HOYT
*General Counsel*
*Department of the Treasury*

DOUGLAS N. LETTER
LEWIS S. YELIN
*Attorneys*

MAY 2008

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[7] See *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1009 (7th Cir. 2004); *Hegna*, 376 F.3d at 493; *Hegna* v. *Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004); *Hegna* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 229, 230 (S.D.N.Y. 2004), aff'd, 402 F.3d 97, 99 (2d Cir. 2005).

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 03-55015
D.C. No. CV-98-01165-RMB

THE MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN, AS SUCCESSOR IN INTEREST TO THE MINISTRY OF WAR OF THE GOVERNMENT OF IRAN,
PLAINTIFF-APPELLANT

*v.*

CUBIC DEFENSE SYSTEMS, INC., AS SUCCESSOR IN INTEREST TO CUBIC INTERNATIONAL SALES CORPORATION, DEFENDANT

*v.*

DARIUSH ELAHI, INTERVENOR-APPELLEE

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Argued and Submitted:
Jan. 26, 2007—Pasadena, California
Filed: May 30, 2007

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Appeal from the United States District Court
for the Southern District of California
Rudi M. Brewster, District Judge, Presiding

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## OPINION

Before: BETTY B. FLETCHER, KIM MCLANE WARDLAW, and RAYMOND C. FISHER, Circuit Judges.

Opinion by JUDGE B. FLETCHER;

Dissent by JUDGE FISHER

B. FLETCHER, Circuit Judge:

This case arises from Dariush Elahi's attempt to collect on a default judgment he holds against Iran. Elahi seeks to attach a $2.8 million judgment obtained in a contract dispute by the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran. The district court allowed Elahi to attach the judgment, holding that the Ministry had waived its immunity from attachment by submitting to the jurisdiction of the court. We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court on the alternative ground that the judgment is subject to attachment under section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2,322, 2,337 (codified at 28 U.S.C. § 1610 note).

### BACKGROUND

*The Wrongful Death Default Judgment*

Dr. Cyrus Elahi was shot and killed as he left his apartment building in Paris, France, on October 23, 1990. *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 103 (D.D.C. 2000). His brother, Dariush Elahi, brought a wrongful death action against the state of

Iran and the Iranian Ministry of Information and Security ("MOIS") in the United States District Court for the District of Columbia, claiming Iranian agents assassinated his brother. *Id.* at 97, 100. Although Iran and MOIS did not appear, the court heard testimony and read documentary evidence relating to the assassination;[1] this evidence satisfied the court that Iran and MOIS were liable for Dr. Elahi's death. *Id.* at 100-05, 114. It entered a default judgment against Iran and MOIS for $11.7 million in compensatory damages and punitive damages of $300 million. *Id.* at 115. It is this judgment that Elahi now seeks to satisfy by attaching the Cubic judgment.

*The Contract Dispute between Cubic Defense Systems and the Iranian Ministry of Defense*

In October 1977, the predecessor of the Iranian Ministry of Defense and Support of the Armed Forces of the Islamic Republic of Iran ("MOD" or "the Ministry") entered into two contracts with an American defense contractor, now known as Cubic Defense Systems ("Cubic"), for the sale and service of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1170 (S.D. Cal. 1998). Iran made partial payment on the ACMR, but never received it; following the Iranian Revolution of 1979, Cubic breached its contract with the Ministry and sold the ACMR elsewhere. *Id.* In an attempt to recover the

[1] Before a court may enter a default judgment against a foreign state, the Foreign Sovereign Immunities Act requires that the plaintiff "establish [ ] his claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e).

ACMR or its payments, Iran filed a claim against Cubic with the Iran-U.S. Claims Tribunal in The Hague, which was dismissed for lack of jurisdiction.[2] *Id.* Subsequently, Iran requested arbitration before the International Chamber of Commerce ("ICC") in Zurich. *Id.* Having conducted a hearing at which both parties were represented, the ICC issued an award for MOD, ordering Cubic to pay $2.8 million in damages for breach of contract. *Id.* at 1171. The Ministry reduced this ICC award to a judgment ("the Cubic judgment") in the United States District Court for the Southern District of California. *Id.* at 1170-74.

*Elahi's attempt to attach the Cubic judgment*

On November 1, 2001, Elahi sought a lien against the Cubic judgment to satisfy partially his judgment against Iran. MOD filed a motion seeking a judicial determination that the Cubic judgment is immune from attachment by Elahi.[3] Denying the motion, the district court

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[2] The Tribunal is a tribunal of limited jurisdiction. It has jurisdiction only over claims brought against the United States or Iran, not against private parties. It may hear the following claims: (1) those brought by nationals of one state against the government of the other, and related counterclaims; (2) intergovernmental claims arising out of contracts for the purchase and sale of goods and services; and (3) intergovernmental claims regarding the interpretation of the Algiers Declarations. *See* Claims Settlement Declaration, Article II, *available at* http://www.iusct.org/claims-settlement.pdf.

The Iran-U.S. Claims Tribunal was created by mutual agreement of Iran and the United States in response to the Iranian hostage crisis and the freezing of Iranian assets by the United States. For more information about the Claims Tribunal and the Algiers Accords, *see* www.iusct.org/background-english.html.

[3] The Ministry filed a second motion seeking a determination that its judgment was immune from attachment by Stephen Flatow, another

ruled that in waiving its immunity from jurisdiction by submitting to ICC arbitration and seeking confirmation of the arbitration award in district court, MOD had also waived its immunity from attachment of its property. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 236 F. Supp. 2d 1140, 1151-52 (S.D. Cal. 2002).

The Ministry appealed, and we affirmed the district court's holding that Elahi could attach the Cubic judgment, although we relied on different grounds. 385 F.3d 1206 (9th Cir. 2004) *vacated and remanded, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 546 U.S. 450 (2006) (per curiam). Relying on the structure and traditional interpretation of the Foreign Sovereign Immunities Act ("FSIA"), we held that the two immunities are separate and that MOD's waiver of jurisdictional immunity did not waive its attachment immunity. *Id*. at 1219. Nonetheless, we affirmed the district court's determination that Elahi could attach the Cubic judgment on the ground that MOD, as an agency of Iran engaged in commercial activity in the United States, fell within a FSIA exception to immunity allowing attachment of certain property connected to commercial activity. *See id*. at 1219; *see also* 28 U.S.C. § 1610(b).

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judgment creditor. The district court granted the Ministry's motion as to Flatow, and we affirmed. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206, 1217 (9th Cir. 2004) *reversed on other grounds as to Elahi by Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* 546 U.S. 450 (2006). Because Flatow did not appeal our decision to the Supreme Court, that judgment is not now before us.

The Ministry appealed to the United States Supreme Court, which granted certiorari on the limited question of whether MOD constituted a foreign state or an agency or instrumentality of a foreign state. *See Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 126 S. Ct. 1193, 1194 (2006) (per curiam). Noting that FSIA offers broader immunity from attachment to a foreign state than to a foreign state's agencies and instrumentalities, the Court addressed the question of whether we had properly determined that the Ministry was an agency or instrumentality of Iran rather than the foreign state itself. *Id*. Finding that we had not, the Court remanded for reconsideration. *Id*. at 1195.

On remand, we requested two rounds of supplemental briefing and permitted the United States to appear as *amicus curiae*. As a result of this supplemental briefing, two additional issues have emerged. First, the parties agree that in 2003, Elahi applied for and received payment of $2.3 million from the United States Treasury in partial satisfaction of his $11.7 million compensatory damages award against Iran. In receiving this payment, Elahi signed a declaration in which he relinquished some, but not all, of his rights to pursue the remainder of his default judgment against Iran. Specifically, he relinquished his right to punitive damages and his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal." Office of Foreign Assets Control, Department of Treasury, *Payment to Persons Who Hold Certain Judgments Against Cuba or Iran*, 68 Fed. Reg. 8,077, 8,081 (Feb. 19, 2003); *see also* Victims of Trafficking and Violence Protection Act of 2000 ("Victims Protection

Act"), Pub. L. No. 106-386, § 2002(a)(2)(D) (as amended by TRIA, § 201(c)(4)).

The Ministry and the United States both argue that by accepting this payment Elahi waived his right to attach the Cubic judgment. They contend that the Cubic judgment is currently "at issue" in Claim B/61 before the Iran-U.S. Claims Tribunal in The Hague in which Iran is attempting to recover, from the United States, *inter alia*, any value of the Cubic contracts in excess of the ICC award.

The second new issue is Elahi's contention that he may attach the Cubic judgment under TRIA § 201, which created an alternative avenue of attachment for certain judgment creditors of "terrorist part[ies]."

## DISCUSSION

### 1. Elahi's purported waiver pursuant to his receipt of payment under the Victims Protection Act

In the fall of 2000, Congress directed the Secretary of the Treasury to make available to certain judgment creditors of Iran payments equal to the creditors' compensatory damages awards. Victims Protection Act, § 2002(a)(1). Under this statute, a person is eligible to receive payment for certain judgments against Iran for harms caused by state-sponsored terrorism. *Id.* § 2002(a)(2)(A)(i). Creditors who had filed suit on certain dates were eligible to receive payment, as were those who had received a final judgment by July 20, 2000. *Id.* §§ 2002(a)(2)(A)(i), (ii). Under the terms of the Victims Protection Act, Elahi was not eligible to receive payment.

In 2002, Congress amended the Victims Protection Act in several ways, three of which we highlight here.

*See* TRIA § 201. First, it expanded the class of judgment creditors eligible to receive payment under the Victims Protection Act to include certain creditors who had filed suit against Iran before October 28, 2000 based on claims of state-sponsored terrorism. Victims Protection Act, § 2002(a)(2)(A)(ii) (as amended by TRIA § 201(c)(1)). This amendment made Elahi eligible to receive payment under the Victims Protection Act, as he had filed suit before October 28, 2000. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d at 99-100 (noting entry of default judgment on August 14, 2000). Second, based on Congress's recognition of the limited funds available to pay victims with judgments against Iran, the amended Victims Protection Act authorized the Secretary of the Treasury to make pro rata payments on compensatory damages awards. Victims Protection Act, § 2002(d)(1) (as amended by TRIA § 201(c)(4)). Finally, the statute requires a person who accepts a pro rata payment to relinquish certain rights, including the right to execute against or attach "property that is at issue in claims against the United States before an international tribunal" or that is the subject of awards by such tribunal. *Id*. § 2002(a)(2)(D) (as amended by TRIA § 201(c)(4)). Elahi concedes that he waived this right by accepting a pro rata payment under the Victims Protection Act.

Iran has brought a claim against the United States in the Iran-U.S. Claims Tribunal, Claim B/61, for damages based on the non-export of contracted-for goods, including the ACMR that was the subject of the Cubic contract, by United States companies who breached contracts following the Iranian Revolution. Related to the ACMR, Iran contends in its brief to the Claims Tribunal that the $2.8 million ICC award (which became the Cu-

bic judgment) did not fully compensate it for Cubic's non-delivery of goods, and it seeks to recoup the difference from the United States. In that filing, Iran distinguished between the Cubic judgment and its claim before the Claims Tribunal, stating, "[t]he subject-matter of this case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties." In other words, the Cubic judgment itself already adjudicated in the ICC action is not "at issue" in Iran's claim that it has not been fully compensated by the United States.

We find this concession persuasive in distinguishing between the contractual obligations resolved through the Cubic judgment and the United States' obligations that will be addressed before the Claims Tribunal. In essence, 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.[4] In contrast, the Cubic judgment had resolved Cubic's liability to Iran for nondelivery of the ACMR.

Nonetheless, Iran argues that the Cubic judgment is "at issue" before the Claims Tribunal because Iran has offered to offset from its demand against the United States in Tribunal Case B/61 any proceeds it receives from the Cubic judgment. This argument ignores Iran's presentation of its claims against Cubic to the ICC and its resulting judgment against Cubic. Having arbitrated

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[4] The main commitments of the Algiers Accords were (1) the release by Iran of 52 American hostages; and (2) the agreement by the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." *See* General Declaration, General Principles, A at 1, *available at* http://www.iusct.org/generaldeclaration.pdf

this dispute before the ICC and secured a judgment against Cubic for its breach, Iran has fully adjudicated its claim against Cubic for non-delivery of the ACMR. Further, as noted *supra*, the Tribunal has no jurisdiction over claims against private parties.[5] The question of whether Elahi can attach the Cubic judgment is a separate matter from Iran's claim against the United States. Iran's claim against Cubic has been addressed by a tribunal, resolved by the $2.8 million arbitration award against Cubic, and further reduced to a judgment in the Southern District of California.[6]

We hold that the Cubic judgment is not "at issue" before the Claims Tribunal and therefore that Elahi did not waive his right to attach the Cubic judgment by accepting a pro rata payment under the Victims Protection Act.[7]

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[5] *See supra* note 2.

[6] We note that four sister circuits have recently barred claims brought by a family who has accepted payment under the Victims Protection Act, as amended by TRIA, on the grounds that the properties they were attempting to attach were "at issue" before the Claims Tribunal. *See Hegna v.Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004). Each of those cases presented a factual situation, different from the one with which we are confronted, involving properties that had not yet been subject to any judicial determination of liability. Here, the Cubic judgment has been adjudicated and, as Iran concedes in its filing to the Claims Tribunal, is no longer at issue before the Tribunal.

[7] The majority and the dissent interpret differently the breadth of the term "at issue." The majority is guided by the plain meaning of "at issue," which is "under dispute" or "in question." Black's Law Dictionary (8th ed. 2004).

**2. Attachment under TRIA § 201(a)**

On remand, Elahi advances the alternative claim that he may attach the Cubic judgment under TRIA § 201(a).[8] We agree that Congress created, in passing TRIA, a method of attachment for creditors such as Elahi who hold final judgments for harms caused by terrorism. *See* TRIA § 201(a) (incorporating by reference 28 U.S.C. § 1605(a)(7)).

Under TRIA, these creditors may attach "the blocked assets of [a] terrorist party." *Id*. Specifically, TRIA § 201(a) provides:

> (a) In general.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], in every case in which a person has obtained a judgment against a terrorist party on

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TRIA does not suggest a different conclusion. The dissent reads Congress's choice of the phrase "at issue" as cutting a broader swath than the phrase "the subject of" resolved claims. However, that distinction is untenable. It would embrace both properties as to which any dispute already has been resolved and those currently contested. "At issue" clearly means only those disputed before the Tribunal.

[8] Elahi refers to this claim as one for relief under 28 U.S.C. § 1610(f)(1)(A), as amended by TRIA. We find it clearer to refer to it as attachment under TRIA. TRIA's text does not expressly reinvigorate § 1610(f)(1)(A) from President Clinton's waiver, *see* Pres. Determ. No. 2001-03, 65 Fed. Reg. 66483 (Oct. 28, 2000), despite TRIA's legislative history showing an intent to "build[ ] upon and extend[ ] the principles in section 1610(f)(1) of the Foreign Sovereign Immunities Act," by "eliminat[ing] the effect of any Presidential waiver . . . purporting to bar or restrict enforcement of such judgments, thereby making clear that all such judgments are enforceable against any assets or property under any authorities referenced in Section 1610(f)(1)." H.R. Conf. Rep. No. 107-779 at 27 (Nov. 13, 2002), *reprinted in* 2002 U.S.C.C.A.N. 1430, 1434.

> claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a) (alteration in original).

Elahi's claim for relief under TRIA § 201(a) turns on two factors: (1) whether Iran is a "terrorist party" under that statute and (2) whether the Cubic judgment is a "blocked asset." The first factor is easily answered. TRIA includes within its definition of "terrorist party" a foreign state "designated as a state sponsor of terrorism" by the Secretary of State. TRIA § 201(d)(4). Iran is subject to this definition, having been designated by Secretary of State George Shultz as a state sponsor of terrorism. *See* Secretarial Determ. 84-3, 49 Fed. Reg. 2836-02 (January 23, 1984).

We therefore turn to the second factor, whether the Cubic judgment fits within TRIA's definition of a blocked asset. TRIA defines "blocked asset" to mean "any asset seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act [("IEEPA")] (50 U.S.C.

§§ 1701, 1702)." TRIA § 201(d) (2)(A). The IEEPA grants the President broad authority[9] to regulate for-

[9] 50 U.S.C. § 1702(a)(1) grants the President the following powers:

> (a)(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit—
>
> (i) any transactions in foreign exchange,
>
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
>
> (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;
>
> (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and
>
> (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the

eign assets when faced with "an unusual and extraordinary threat" related to a declared national emergency. 50 U.S.C. § 1701(b). Following the hostage crisis in 1979, President Carter exercised his authority under IEEPA to freeze Iranian assets in the United States:

> I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979). He delegated to the Secretary of the Treasury his authority under IEEPA to carry out this Order. *Id.* Pursuant to that authority, the Treasury Department issued the Iranian Assets Control Regulations, 45 Fed. Reg. 24,432 (Apr. 9, 1980), codified at 31 C.F.R. part 535. Particularly relevant here is 31 C.F.R. § 535.201, which blocked the transfer of goods to Iran:

> No property subject to the jurisdiction of the United States or which is in the possession of or control of persons subject to the jurisdiction of the United States in which on or after [November 14, 1979] Iran has any interest of any nature whatsoever may be transferred, paid, exported, withdrawn or otherwise dealt in except as authorized.

31 C.F.R. § 535.201 (1980). Subsequently, President Carter issued Executive Order 12,282, which unblocked

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> interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

assets in which Iran acquired an interest after January 19, 1981. Exec. Order 12,282, 46 Fed. Reg. 7925 (Jan. 19, 1981). However, Executive Order 12,170 and 31 C.F.R. § 535.201 have never been unblocked or revoked. *See Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 67 (E.D. N.Y. 2004).

The Ministry argues that the Cubic judgment is not a blocked asset under TRIA because Executive Order 12,282 unblocked certain Iranian assets. In support of its argument, MOD cites two cases in which district courts found that TRIA did not permit the attachment of Iranian property because the assets at issue did not fall within TRIA's definition of "blocked assets." *See Bank of New York v. Rubin*, 2006 WL 633315 (S.D. N.Y. Mar. 15, 2006); *Weinstein*, 299 F. Supp. 2d 63. However, the reasoning in those cases is inapplicable here. Iran's interest in the properties in question in *Rubin* and *Weinstein* arose after January 19, 1981, so Executive Order 12,282 unblocked those assets. In contrast, Iran's interest in the ACMR arose in October 1977 when Iran executed the contracts with Cubic or at the latest by October 4, 1978 when Iran made a payment of approximately $12,900,000 on the contracts. *See MOD v. Cubic*, 29 F. Supp. 2d at 1170. Indeed, as both *Rubin* and *Weinstein* acknowledge, 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. *See, e.g., Weinstein*, 299 F. Supp. 2d at 67 (noting that assets pre-dating January 19, 1981 continue to be blocked by 31 C.F.R. § 535.201, "which the parties concede ha[s] never been expressly revoked or repealed").

In sum, we find that the Cubic judgment is a "blocked asset" under TRIA because it represents Iran's interest in an asset "seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act." TRIA § 201(d)(2)(A). Because TRIA § 201(a) waives attachment immunity for such blocked assets, we hold that Elahi may attach the Cubic judgment.

**3. MOD's status under FSIA**

The Supreme Court's remand order asks us to determine the status of MOD. We answer that question although it is relevant only if our determination, either that the Cubic judgment is a blocked asset or that Elahi did not waive his right to attach the judgment under the Victims Protection Act, is in error.

All parties agree that, at a minimum, MOD is a "foreign state" for purposes of FSIA and that, as such, its assets would be subject to attachment under the narrow set of circumstances set forth in § 1610(a). The disputed question is whether MOD is an "agency or instrumentality" whose property is subject to attachment under the broader set of exceptions contained in § 1610(b). The answer turns on whether the entity, here the Ministry, is a "separate legal person." 28 U.S.C. § 1603(b).

In answering this question, some courts have created a "characteristics" test, asking whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, and hold property in its own name. *See Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 684 (S.D. N.Y. 1996); *Bowers v. Transportes Navieros Ecuadorianos*, 719 F. Supp. 166, 170 (S.D. N.Y. 1989). On the other hand, circuit courts have adopted a "core functions" test, asking

whether the defendant is "an integral part of a foreign state's political structure" or, by contrast, "an entity whose structure and function is predominantly commercial." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) (internal quotation marks and alterations omitted); *see also Garb v. Republic of Poland*, 440 F.3d 579, 594 (2d Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003); *Magness v. Russian Fed'n*, 247 F.3d 609, 613 n.7 (5th Cir. 2001). The United States, in its briefing as *amicus curiae*, urges us to adopt the core functions test.

In *Transaero*, the D.C. Circuit considered whether the Bolivian Air Force constitued a part of the Bolivian state or an agency or instrumentality of that state for purposes of service of process under FSIA. Considering FSIA's purpose, the court noted that FSIA codified the "restrictive" approach to sovereign immunity in which immunity is "repealed" for commercial acts and "preserved" for "inherently sovereign or public acts." *Transaero*, 30 F.3d at 151; *accord Republic of Austria v. Altmann,* 541 U.S. 677, 690-91 (2004) (In passing FSIA, Congress's intent was to codify the "restrictive" theory of sovereign immunity, according to which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."). The D.C. Circuit found this "restrictive" approach to support a "core functions" test. Construing narrowly legislative history that would support applying the characteristics test, the D.C. Circuit pointed out that the characteristics test suffered a serious defect: Because "any nation may well find it convenient (as does ours) to give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself," almost any

arm of the state would be considered instrumentalities. *Transaero*, 30 F.3d at 151 (noting that under the legislative history test, the United States Departments of State and Defense would count as instrumentalities). We agree. A foreign state is nothing more than the sum of its parts; in other words, like the United States, the state of Iran exists only through its head of state, its ministries, and the myriad administrative offices that collectively embody a sovereign state. More importantly, the foreign state can act only through these entities.

We add that it is illogical to distinguish between a "foreign state" and "agency and instrumentality" on the basis that the latter is a "separate legal person" while the former is not. A central purpose of FSIA was to specify the circumstances under which the federal courts could assert jurisdiction over a foreign state. Thus, the Act *presupposes* that a "foreign state" is capable of suing and being sued. Indeed, in numerous provisions, the Act explicitly anticipates legal actions brought by or against foreign states. *See* 28 U.S.C. § 1605 (enumerating circumstances in which "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States"); *id*. § 1608 (specifying the manner in which to serve process "upon a foreign state or a political subdivision"); *id*. § 1607 (limiting immunity from counterclaims in "any action brought by a foreign state, or in which a foreign state intervenes"). If the touchstone of an "agency or instrumentality" is whether it can sue or be sued, then these provisions of FSIA become superfluous, thereby undermining the two-tiered scheme of immunity and liability that Congress sought to impose.

We adopt the "core functions" test as the appropriate benchmark for deciding whether an entity should be viewed as a "foreign state" or as an "agency or instrumentality." This analysis has been adopted by each of our sister circuits which has considered the issue, *see Garb,* 440 F.3d at 594; *Roeder*, 333 F.3d at 234; *Magness*, 247 F.3d at 613 n.7, and it is consistent with the purpose and structure of FSIA.

The question thus becomes whether MOD is inherently a part of the political state or a commercial actor. As the D.C. Circuit observed in *Transaero*, "the powers to declare and wage war" are so intimately connected to a state's sovereignty that "it is hard to see what would count as the 'foreign state' if its armed forces do not." 30 F.3d at 153. We find this reasoning persuasive, although we decline to adopt the D.C. Circuit's categorical rule that the armed forces will always be a part of the foreign state itself. *See id*. It is possible to imagine situations in which a state would "subcontract" its defense to paramilitary groups or mercenary forces that would not properly count as part of the state but rather as "separate legal person[s]." However, we adopt a strong presumption that the armed forces constitute a part of the foreign state itself, and that presumption has not been rebutted here.

Here, Elahi has presented no evidence that MOD is a "separately constituted legal entity" distinct from the Iranian state. *First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba* (*Bancec*), 462 U.S. 611, 624 (1983).[10] He has not established that MOD is "primarily

[10] We do not imply, by mentioning the *Bancec* factors, that a litigant could overcome the presumption that the armed forces constitute a part of the state through a showing that would satisfy the *Bancec* test for in-

responsible for its own finances," that it is run as a "distinct economic enterprise," that it operates with "independence from close political control," or that it exhibits any of the traits—other than the capacity to sue and be sued—that the Court has identified as characteristic of a "separately constituted legal entity." *Id.* As such, Elahi has failed to overcome the presumption that MOD constitutes an inherent part of the state of Iran.

*A. Attachment of the property of a foreign state.*

Although MOD is a "foreign state," Elahi asserts that he may still attach the Cubic judgment under 28 U.S.C. § 1610(a)(7). Under this provision, Elahi must satisfy two conditions. First, his judgment against Iran must "relate[ ] to a claim" brought "against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing." *See id.* (incorporating by reference 28 U.S.C. § 1605(a)(7)). Elahi asserts, and MOD has no choice but to concede, that he has satisfied this requirement. Second, the property in dispute, *i.e.*, the Cubic judgment, must be "property . . . used for a commercial activity in the United States." *Id.* § 1610(a). The parties dispute whether Elahi has satisfied this second requirement.

Section 1610(a) provides that, under certain circumstances, "the property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution . . . upon a judgment entered by a court of the United States." 28 U.S.C. § 1610(a). Focusing on

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dependence of an instrumentality. We expressly decline to discuss what evidentiary showing would suffice to overcome this presumption, since it is not before us on these facts.

whether Iran's contract with Cubic constituted commercial activity, Elahi argues that the Cubic judgment was "used for commercial activity in the United States" because it "arose out of MOD's commercial activity." This analysis begs the question. Even assuming the Cubic contract constituted a commercial contract for sale of military goods and services, we are still faced with the question posed by § 1610(a) on the use to which MOD has put the judgment. The source of the property is not determinative and "the mere fact that the property has a nexus or connection to a commercial activity in the United States is insufficient." *Af-Cap Inc. v. Chevron Overseas Ltd.*, 475 F.3d 1080, 1094 (9th Cir. 2007) (internal quotation marks omitted); *accord Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 253 (5th Cir. 2002); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya,* 773 F.2d 31, 36-37 (3d Cir. 1985) (rejecting an argument that property used to house the Libyan ambassador to the United Nations was subject to attachment under § 1610(a) because the property was acquired in a commercial transaction and reasoning that if "acquisition of property in a particular commercial transaction or act indelibly stamped the property as used for commercial activity, even foreign embassies and chancelleries would be subject to execution. Plainly Congress did not intend a result so inconsistent with recognized principles of international law.").

To satisfy § 1610(a), MOD must have used the Cubic judgment for a commercial activity in the United States, and this it has not done. We have recently stated that "property is 'used for a commercial activity in the United States' when it is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to

a commercial activity." *Af-Cap Inc.*, 475 F.3d at 1091 (emphasis in original). Cautioning that "FSIA does not contemplate a strained analysis of the words 'used for' and 'commercial activity,' " we instructed courts to "consider[ ] the use of the property in question in a straightforward manner." *Id*. The Ministry has not used the Cubic judgment as security on a loan, as payment for goods, or in any other commercial activity. Instead, Iran intends to send the proceeds back to Iran for assimilation into MOD's general budget. Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the Cubic judgment is not subject to attachment under § 1610(a).

**CONCLUSION**

We conclude that although Elahi may not attach the Cubic judgment under § 1610(a), he may do so under TRIA.

The judgment of the district court is **AFFIRMED.**

FISHER, Circuit Judge, dissenting:

When Dariush Elahi applied for and accepted $2.3 million from the United States Treasury under the Terrorism Risk Insurance Act of 2002 (TRIA), he relinquished the right to attach property at issue in claims against the United States before an international tribunal. *See* Pub. L. No. 107-297, § 201(d)(5)(B), 116 Stat. 2322, 2339. Iran's Ministry of Defense (MOD), and the United States as amicus curiae, argue that Elahi has relinquished his right to attach the Cubic judgment be-

cause it is "at issue" in Iran's Case B/61 before the United States-Iran Claims Tribunal.[1] I agree.

Case B/61 involves the status and disposition of Iranian military property and assets situated in the United States. One of the pieces of military equipment in dispute in Case B/61 is the Air Combat Maneuvering Range (ACMR), which MOD purchased from Cubic on October 3, 1977. Because Iran has already recovered $2.8 million from Cubic for damages arising out of the 1977 Cubic contract, the United States is entitled to use the Cubic judgment as a setoff against any award in Case B/61.

Although the Cubic judgment will affect the amount of money damages the United States will have to pay, the majority concludes that the Cubic judgment is not "at issue" in Case B/61 and can be attached by Elahi. As a result, the government—if found liable in Case B/61—will no longer have the benefit of the $2.8 million Cubic judgment that otherwise would be deducted by offset. Because the majority's interpretation of "at issue" contradicts the term's plain meaning and Congress' intent in passing TRIA, I respectfully dissent.

## I. TRIA's Relinquishment Provision

By enacting TRIA in 2002, Congress expanded the class of judgment creditors eligible to receive payments from the United States Treasury for judgments awarded against "terrorist part[ies]." TRIA § 201(a). Sponsors expressed the hope that TRIA would provide American

[1] Neither party disputes that the United States-Iran Claims Tribunal is an "international tribunal" for purposes of TRIA's relinquishment provision. *See Hegna v. Islamic Republic of Iran*, 402 F.3d 97, 99 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1008-09 (7th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004).

victims previously denied compensation, such as Elahi, with "some measure of justice." 148 Cong. Rec. S11524-01, 11527 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

However, TRIA's justice comes at a cost. Those who receive partial compensation must agree to relinquish the right to execute or attach property "that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal," TRIA § 201(d)(5)(B), and recipients must sign an agreement stating:

> I hereby relinquish . . . 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 the subject of awards by such tribunal.
>
> I understand that the relinquishment that I make in the event of any pro rata distribution is irrevocable once the payment is credited to the bank account I have identified in this application.

*See* Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8077-02, 8081 (Feb. 19, 2003).

When Elahi accepted TRIA funds in April 2003, he knew that he risked waiving the right to attach the Cubic judgment. As early as 2002 MOD argued before the district court that the Cubic judgment "is at issue in Case *B/61* between the United States and Iran in the Hague." *See Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 236 F. Supp. 2d 1140, 1146 (S.D. Cal. 2002) (quoting MOD's briefing). Although I am deeply sympathetic to

Elahi and his family for their personal loss, relinquishment of the right to attach the Cubic judgment is part of the bargain Elahi struck by accepting funds from the United States treasury.

**II. Plain Meaning of "At Issue"**

This case presents a question of statutory interpretation. As such, the first step is determining "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). For our purposes, the language at issue is "at issue."

When determining the plain meaning of language, we may consult dictionary definitions. *See Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007). Black's Law Dictionary defines "at issue" as "[t]aking opposite sides; under dispute; in question." Black's Law Dictionary (8th ed. 2004). Similarly, the American Heritage Dictionary of the English Language (4th ed. 2000), defines "at issue" as "[i]n question; in dispute." It is evident from these definitions that Congress selected a term with a relatively broad meaning. *See Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004) (rejecting narrow interpretation of "at issue").[2]

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[2] Like the majority, my analysis is guided by the plain meaning of "at issue." *See* Op. at 6411 n.7. We part ways because the majority limits the term "property . . . at issue" to property that is the subject of a merits determination before the Claims Tribunal. *See id.* However, an issue is "in question" or "at issue" in a dispute even if it is not the subject of a merits determination. The effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property "in question."

The Cubic judgment is at issue before the Claims Tribunal because—under any scenario—the Tribunal must determine the effect of the judgment on the amount of liability owed by the United States. Iran has voluntarily pledged to offset the $2.8 million Cubic judgment against any award it wins against the United States in Case B/61. If Iran keeps its promise, that will affect the Claims Tribunal's determination of the amount of damages the United States will have to pay Iran.

Significantly, even if Iran were to renege on its promise, the Cubic judgment would be at issue because the United States could then claim an entitlement to a setoff. Under Claims Tribunal precedent, a defending party may request a reduction of damages where the setoff arises from the same transaction or contract as the underlying claim. *See Computer Sciences Corp. v. Gov't of the Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 269 (Chamber 1 Apr. 16, 1986). The $2.8 million Cubic judgment—like Iran's underlying claim—arises from the 1977 contract between Iran and Cubic for the ACMR equipment. Moreover, the United States could also argue that offset is mandated by the doctrine of judicial estoppel. *See Raygo Wagner Equip. Co. v. Iran Express Terminal Corp.*, 2 Iran-U.S.C.T.R. 141 (Chamber 3 Mar. 18, 1983) (finding Iran judicially estopped from asserting that Claims Tribunal lacked jurisdiction where it forwarded inconsistent position before American court).

Because the Claims Tribunal will have to consider the effect of the judgment on any award levied against the United States government, I must conclude that the Cubic judgment is "property that is at issue" before the Claims Tribunal.

### III. Reading the Statute as a Whole

My conclusion is reinforced by reading TRIA as a whole. Because statutory provisions are not written in a vacuum, we should also examine TRIA's purpose and various provisions to understand the meaning of "at issue." *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc). There is no legislative history to guide us, but it is evident from the plain text of § 201 that TRIA's relinquishment provision was intended 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.

Acting on this understanding, other circuits have rebuffed attempts by applicants to attach Iranian property that might become the subject of an award against the United States before the Claims Tribunal. In *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004), the Fourth Circuit held that a family that accepted payment under TRIA relinquished its right to attach former Iranian diplomatic properties located in Bethesda, Maryland. The court held that such properties were "at issue" before the Claims Tribunal because Iran filed claims against the United States alleging that the federal government unlawfully "fail[ed] to grant Iran custody of its diplomatic and consular properties in the United States." *Id.* (citation and internal quotation marks omitted). Because Iran's claim remained pending before the Claims Tribunal, the court concluded that "it would appear rather straightforward that the Bethesda properties fall within the contours of the Hegnas' relinquishment." *Id.* In short, had the Hegnas succeeded in effec-

ting the sale of the properties to satisfy the balance of their judgment against Iran, the United States would then have had to compensate Iran for the value of those properties (if found liable to Iran), in effect covering the funds paid to the Hegnas through their attachment. This is the very result Congress intended to avoid through the relinquishment proviso.

Although Elahi's attachment involves cash rather than buildings, adherence to legislative intent results in the same outcome. Having already received TRIA funds from the United States treasury, Elahi should not be permitted to attach property that might otherwise be used to satisfy a judgment against the United States. As in *Hegna*, the only way to effectuate congressional intent is to prohibit Elahi from doing so.

**IV. Iran's "Concession"**

Although the majority's interpretation of "at issue" contradicts plain meaning and congressional intent, the majority is "persua[ded]" to hold in favor of Elahi because Iran "conceded" in briefing to the Claims Tribunal that the Cubic judgment and Case B/61 do not share identicality of subject matter. Op. at 6410. There are convincing reasons to be persuaded otherwise.

In its briefing to the Claims Tribunal, Iran argued against giving res judicata effect to the ICC's adjudication of its claim against Cubic because:

> [the ICC's] case and the present one lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose. The object of this litigation, unlike that in the ICC lawsuit, is the United States' obligation under the Algiers Declarations to arrange for the transfer of the

> items to Iran. The opposing party in this Case is, obviously not a U.S. private company, but the United States' Government. The subject-matter of this Case, at variance with the ICC action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties.

However, Iran's argument concerned the equitable doctrine of res judicata and therefore has little bearing on this court's exercise in statutory interpretation. Even if Iran were correct that the subject matter of Case B/61 is at variance with the ICC arbitration, it does not follow that the Cubic judgment is not at issue in Case B/61. "At issue" is not synonymous with identity of subject matter, a distinction that Congress clearly understood when it drafted TRIA.

TRIA's relinquishment provision prohibits applicants from attaching two different types of property: (1) property that is "*the subject of*" *resolved* claims before an international tribunal; and (2) property that is "*at issue*" when claims remain *pending*. "[T]he use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *Sec. & Exch. Comm'n v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). By using the conceptually broader term "at issue," it is evident that Congress did not intend to limit the relinquishment provision strictly to property that is *the subject of* a pending claim before the Claims Tribunal.

Thus, the majority's rationale that the Cubic judgment is not at issue because Case B/61 addresses the federal government's liability for failing to restore frozen assets (including the ACMR), whereas the Cubic judgment reflects Cubic's liability for the non-delivery

of the ACMR, is wide of the mark. *See* Op. at 6410. The majority's observation is, of course, accurate but not dispositive of the relinquishment analysis. Because MOD's claim against the United States is still pending, the relevant question is not whether the Cubic judgment and Case B/61 share the same parties, causes of action or even the same "subject," but whether the Cubic judgment is "at issue" or "in question" in Case B/61. Because the Claims Tribunal will have to consider the impact of the Cubic judgment on the amount of liability owed by the United States, the answer to that question is yes.

By relying so heavily on Iran's argument—made in a different context to another tribunal—the majority rests its analysis on a shaky foundation. TRIA itself—its text and purpose—offers much firmer ground for an exercise in statutory interpretation. Adherence to established doctrines of statutory construction leads to the conclusion that Elahi relinquished his right to attach the Cubic judgment. I therefore respectfully dissent.