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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

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

LIST OF PARTIES BELOW

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

RULE 29.6 NOTICE

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD"), respectfully prays that a writ of certiorari issue to review the July 17, 2007, judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit, of July 17, 2007, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, reported at 495 F.3d 1024 (9th Cir. 2007), and is reprinted at App. 5. The Ninth Circuit's denial of a rehearing en banc was issued on July 17, 2007, and is reprinted at App. 4.

The Ninth Circuit opinion was issued in response to a per curiam opinion of this Court, granting a petition for writ of certiorari filed by MOD, vacating an earlier opinion of the Ninth Circuit, and remanding for further proceedings. See 546 U.S. 450 (2006).

That earlier opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit was of October 7, 2004, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, was reported at 385 F.3d 1206 (9th Cir. 2004), and is reprinted at App. 38. That decision was from an appeal of an order from the U.S. District Court for the Southern District of California of November 26,

2002, 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at App. 81.

STATEMENT OF JURISDICTION

Petitioner seeks review from the amended opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of July 17, 2007. The Ninth Circuit denied a petition for rehearing en banc on that same date. App. 4. Petitioner was granted, on September 24, 2007, leave by Circuit Justice Kennedy to file this petition by November 14, 2007.

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

STATUTORY PROVISIONS INVOLVED

This Petition implicates a number of aspects of foreign sovereign immunity, as prescribed by Congress under the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1602 et seq. The crucial questions for review by this Court are controlled by the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), App. 107; and by the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), App. 112.

STATEMENT

1. This is now the second time this matter has come before the Court. In response to an earlier decision by the Ninth Circuit – that the Islamic

Republic of Iran's ("Iran") Ministry of Defense ("MOD") was not entitled to the protections of the Foreign Sovereign Immunities Act (FSIA), as a constituent part of a foreign state under 28 U.S.C.§ 1610(a), for purposes of immunizing its property from attachment or execution – MOD was obliged to seek review from this Court. In a per curiam opinion, this Court granted the petition, vacated the Ninth Circuit's opinion and remanded for a more searching analysis of MOD's status. See 546 U.S. 450, 452-32 (2006) (per curiam).

The Ninth Circuit has now ruled that MOD is, indeed, a constituent part of Iran, and its property is not subject to attachment under FSIA section 1610(a). See App. 28. MOD takes no exception to this ruling. But the Ninth Circuit went on to hold that the property at issue here – a judgment against a military contractor that is at issue in proceedings between Iran and the United States before the Claims Tribunal at The Hague – is subject to attachment under the Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464 (2000), App. 107; and by the Terrorism Risk Insurance Act (TRIA) of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002), App. 112. That is the subject of the present petition.

2. a. As this Court has consistently observed, Congress legislated the 1976 Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., in order to "remedy [then existing] problems [with civil actions involving foreign sovereigns as defendants] by enacting . . . a comprehensive statute containing a 'set of legal standards governing claims of immunity in

every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities'." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). The FSIA not only defines foreign sovereigns and their agencies and instrumentalities, see 28 U.S.C.§ 1603; it also establishes rules as to the acquisition of both personal and subject-matter jurisdiction over foreign sovereign defendants. See id. § 1330.

A foreign sovereign defendant is presumed immune from the jurisdiction of the courts of the United States, see id. § 1604, unless the underlying cause of action falls within any of the clearly-enumerated exceptions provided for in the Act. See id. § 1605. In the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, tit. II, § 221, Congress legislated a significant new exception for foreign sovereign immunities, now codified at 28 U.S.C. § 1605(a)(7). This allowed victims of torture, extrajudicial killing, aircraft sabotage, hostage taking (all defined at id. § 1605(e)) or providing material support for such acts, to sue responsible foreign sovereigns, provided that the defendant nation was designated a state-sponsor of terrorism, pursuant to the Export Administration Act, 50 U.S.C. App.§ 2405(j), and that an adequate opportunity to arbitrate the dispute had been exhausted. See 28 U.S.C.§§ 1605(a)(7)(A) & (B).

The FSIA not only establishes the immunity of foreign sovereigns from the plenary jurisdiction of U.S. courts, it also prescribes the immunities of the property

of foreign states from attachment and execution by a U.S. court. Once again, the FSIA establishes a default rule that "the property in the United States of a foreign state shall be immune from attachment arrest and execution. . . ." Id. § 1609. A party seeking to levy such an attachment, arrest or execution on foreign sovereign property must demonstrate that one of the relevant exceptions of FSIA section 1610 applies. Most importantly, any foreign sovereign property to be attached or executed against must be "used for a commercial activity in the United States. . . ." Id. § 1610(a).

In legislating the AEDPA in 1996, Congress also provided a mechanism for parties having judgments against foreign sovereigns, based on the "terrorist-state" exception of FSIA section 1605(a)(7), to enforce those judgments under section 1610 of the FSIA, but within the strictures of the absolute prohibitions of section 1611. As amended, section 1610 allows that if "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), [then execution or attachment is permissible against the foreign state's commercial property in the United States,] regardless of whether the property is or was involved with the act upon which the claim is based." Id. § 1610(a)(7).

b. Against this backdrop of the FSIA, Congress has enacted other legislation, the complex interplay of which forms the basis of the underlying case and this petition.

In the 2000 Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. No. 106-386, § 2002,

114 Stat. 1464 (2000); App. 107-11, Congress established a system for the payment to individuals of damage awards procured by virtue of suits brought under section 1605(a)(7) of the FSIA. See id. § 2002(a); App. 107-09. This mechanism provided for direct payments from the U.S. Treasury to the affected individual, and for the United States to be subrogated to the interests of such individuals, after payment was made. See id. § 2002(c); App. 110.

Lastly, Congress in 2002 enacted the Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, tit. II, § 201 116 Stat. 2322 (2002), codified at 28 U.S.C.§ 1610 note; App. 112-19. TRIA section 201 permits persons who obtained a judgment against a party on a claim based on an act of terrorism, within the waiver of immunity under FSIA section 1605(a)(7), to execute against or attach the blocked assets of a terrorist party, subject to substantial limitations, in order to satisfy the judgment to the extent of any compensatory damages for which that party has been adjudged liable. See id. § 201(a); App. 112.

One important aspect of applying this statute involves the determination of whether the assets sought to be attached constitute "blocked assets" within the meaning of the enactment. See id. § 201(d)(2); App. 118 (cross-referencing IEEPA, 50 U.S.C.§ 1701 et seq., and the Trading with the Enemy Act, 50 U.S.C. App.§ 5(b)). If a particular property was not characterized as a "blocked asset" under TRIA, it was ineligible for attachment or execution in satisfaction of a judgment procured under FSIA section 1605(a)(7).

TRIA also amended portions of VTVPA

pertaining to the payment system for victims of terrorist attacks having judgments procured against Iran under the waiver of foreign sovereign immunity in FSIA section 1605(a)(7). See TRIA, § 201(c); App. 113-17. The major change made was that individuals who received payments from the U.S. Treasury under the compensation scheme were required to relinquish their rights to subsequently attach any Iranian property in the United States that "is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal." TRIA, § 201(c) (amending VTVPA § 2002(d)(5)(B)); App. 117.

4. The case giving rise to the present petition has as its genesis two separate sets of proceedings, one tragic and controversial, the other governmental and mundane. Both must be understood in order to make sense of the compelling need for review of the issues raised here.

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

The Elahi proceeding (along with that regarding the claims of Stephen Flatow, see App. 39, 41-42, which are no longer relevant for purposes of the present petition) are part of a larger pattern of collateral litigation, generated by holders of default judgments against certain foreign sovereigns seeking execution or attachment against various forms of property found in the United States. See, e.g., *Flatow v. Alavi Foundation*, 67 F. Supp.2d 535 (D. Md. 1999); *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249 (D.C. Cir. 2002). This litigation arises from these circumstances.

b. In October 1977, the predecessor of the petitioner, the Ministry of Defense ("MOD") of the Islamic Republic of Iran, entered into a pair of contracts with Cubic Defense Systems, Inc., a California-based defense firm, relating to the sale and servicing of equipment (an air combat maneuvering range (ACMR)) for use by the Iranian Air Force. See *Ministry of Def. of the Islamic Republic of Iran v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168, 1170 (S.D. Cal. 1998). Following the Iranian revolution of 1979, the delivery of the equipment did not take place for reasons that were disputed. See id. In September 1991, and pursuant to the terms of the contracts, MOD filed a request for arbitration with the International Chamber of Commerce (ICC) in Zurich, Switzerland. Id. After submissions from both MOD and Cubic, the ICC ruled in favor of MOD and issued a Final Award requiring Cubic to pay MOD $2.8 million. Id. at 1171.

In June 1998, MOD filed a petition in the District Court for the Southern District of California (the "Cubic proceeding"), seeking to confirm the award

entered by the ICC pursuant to the New York Convention, opened for signature June 10, 1958, 21 U.S.T. 2517, reprinted in 9 U.S.C.A.§ 201 note. See 29 F. Supp.2d at 1170. The district court granted MOD's petition and confirmed the ICC Award on December 7, 1998. Id. at 1174. Both Cubic and MOD took cross-appeals of the district court's decision, and those appeals remain pending. The merits of the dispute between MOD and Cubic are not otherwise implicated in this petition.

c. In November 2001, Elahi registered in the Southern District of California the default judgment against the Islamic Republic of Iran, procured in the federal district court for the District of Columbia, 124 F. Supp.2d 97 (D.D.C. 2000). Elahi also filed a lien notice and sought to garnish the judgment debt owed MOD by Cubic. See App. 80-81. Petitioner resisted this attachment or execution, and the district court ruled, in November 2002, that the MOD was not immune from Elahi's action. See App. 106.

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

d. MOD took an appeal to the Ninth Circuit on the district court's rulings favorable to Elahi.

The court of appeals (Betty Fletcher, J., writing) reversed some of the grounds held by the district court, but sustained others. See App. 38.

The Ninth Circuit agreed with the district court's ruling that MOD was liable for satisfaction of Elahi's judgment against a separate ministry and entity of the government of the Islamic Republic of Iran. Despite the fact that it treated the Islamic Republic of Iran as a foreign state under FSIA section 1603(a), and not as an "agency or instrumentality of a foreign state" under FSIA section 1603(b), the court of appeals nonetheless applied the more lenient standard of FSIA section 1610(b)(2), to the Cubic judgment and held that MOD's interest in the Cubic judgment would be subject to attachment by Elahi in satisfaction for his claim against Iran and MOIS. See App. 65-66.

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

e. As noted above, MOD sought review in this Court on that earlier Ninth Circuit ruling. After

requesting the views of the Solicitor General, 544 U.S. 998 (2005), this Court granted the petition, vacated the panel decision, and remanded for further proceedings. See 546 U.S. 450 (2006) (per curiam). This Court held that the panel may have improperly applied FSIA section 1610(b) (relevant only for "agencies of instrumentalities" of a foreign sovereign), instead of section 1610(a) (which applies to the foreign sovereign itself). See id. at 451-52.

This Court was particularly critical of the panel decision, insofar as it ostensibly relied on a concession by MOD that it was an agency or instrumentality of a foreign sovereign. See id. at 453 ("The court [of appeals] noted that 'Elahi appears to concede' that the Ministry is an 'agency and instrumentality,' but any relevant concession would have to have come from the Ministry, not from Elahi, whose position the concession favors. Thus, in implicitly concluding that the Ministry was an 'agency or instrumentality' of the Islamic Republic of Iran within the meaning of § 1610(b), the Ninth Circuit either mistakenly relied on a concession by respondent that could not possibly bind petitioner, or else erroneously presumed that there was no relevant distinction between a foreign state and its agencies or instrumentalities for purposes of that subsection.") (citations omitted).

f. On remand, the panel (constituted as before, with Judge Betty B. Fletcher writing) ordered further briefing on the FSIA issues, as well as those arising under the VTVPA and TRIA. See App. 9-10. The United States also participated as an amicus supporting the position of MOD. See App. 2, 10. In its

most recent opinion, the panel ruled, consistent with the suggestion by this Court, that MOD was a central organ of Iran, exercising core functions of a foreign sovereign, and that the Cubic judgment was immune under the FSIA section 1610(a) from attachment by Elahi, insofar as the property in dispute was not "used for a commercial activity in the United States." See App. 21-28. MOD concurs with this ruling, which is otherwise not relevant to this petition.

A majority of the panel went on, however, to rule in favor of the validity of Elahi's attachment on alternative grounds, namely, that it complied with the TRIA and VTVPA. The panel held that (1) Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury, pursuant to the VTVPA, because the Cubic judgment is not "property that is at issue in claims against the United States before an international tribunal," TRIA, § 201(c)(4); see App. 11-14; and (2) that the Cubic judgment is a "blocked asset" within the specific meaning of TRIA sections 201(a) and 201(d)(2)(A). See App. 15-20.

Circuit Judge Raymond C. Fisher dissented from the panel's holding, see App. 28-37, indicating that Elahi relinquished any right to attach the Cubic judgment, insofar as that property was intimately related to a claim before an international tribunal, within the meaning of TRIA section 201(c)(4). Examining the "at issue" language, and construing the relevant TRIA provisions as a whole, Judge Fisher concluded that the panel improperly assumed that MOD had conceded this issue by virtue of a submission

made at the Iran-U.S. Claims Tribunal. See App. 35-37.

g. Both of the panel holdings are erroneous, and place the Ninth Circuit's jurisprudence in conflict with that of sister circuits over a matter having significant statutory importance and delicate diplomatic implications. This timely petition follows.

REASONS FOR GRANTING THE PETITION

REVIEW IS NEEDED TO CLARIFY FOREIGN SOVEREIGN IMMUNITY FROM ATTACHMENT IN CASES ENTAILING WEIGHTY FOREIGN RELATIONS CONCERNS

This petition invites the Court to resolve a major outstanding area of controversy in the application of foreign sovereign immunities. As this Court has previously noted, "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States. . . ." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

It is for these reasons that this Court, in the wise exercise of its plenary review powers, has recently addressed issues of interpretation and application of the Foreign Sovereign Immunities Act (FSIA) and collateral statutes. In *Powerex Corp. v. Reliant Energy*

Services, Inc., this Court held, as a threshold procedural matter, that the statutory bar on review of remand orders is applicable to suits removed under the FSIA. See 127 S.Ct. 2411, 2419-20 (2007). Also last Term, this Court ruled on the jurisdictional immunities enjoyed by diplomatic establishments in the United States in property tax disputes. See *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352 (2007).

This petition raises an equally compelling set of issues regarding foreign sovereign immunities: the protections to be afforded foreign states from execution or attachment in U.S. courts. The FSIA not only governs the jurisdictional immunity of foreign sovereigns in U.S. courts, see 28 U.S.C.§§ 1604, 1605; but also the immunity from attachment and execution of property of a foreign state. See id. §§ 1609-1611. As has already been discussed, the provisions of the attachment/execution immunity provisions of the FSIA interact with other federal statutes regarding claims against, and disposition of, the property of certain foreign sovereigns in the United States. Moreover, the risks of unsettling the United States' foreign relations are enhanced when at issue is the actual seizure and distraint of property owned (or claimed by) a foreign sovereign. It is particularly important in these circumstances that congressionally-enacted rules for the treatment of foreign sovereign property be consistently applied, especially when these provisions were determined by Congress to be consistent with international law. See 28 U.S.C.§ 1602.

At issue in this case are the specific protections

to be afforded foreign sovereign property in U.S. courts, especially against attachment or execution in satisfaction of terrorism-related claims under FSIA section 1605(a)(7). The number of default judgments pursuant to this FSIA provision have escalated in the past decade, involving putatively millions of dollars of claims against such foreign sovereign defendants as Sudan, Libya, Syria, Iraq, and Iran.[1]

Through the VTVPA and TRIA, Congress has legislated an exquisitely-detailed mechanism for the satisfaction of such judgments. But there are substantial restrictions and limitations on the ability of individual litigants to attach foreign sovereign property, as one might expect for such a diplomatically-sensitive area of U.S. foreign relations law.

Two of these restrictions are at issue here. The first is whether an individual relinquishes a right to attach if the property is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4); App. 117. The second involves the definition of a "blocked asset" under the TRIA, see id. § 201(d)(2); App. 118, which is a requisite in order for property to be subject to attachment.

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[1] For a sampling of recent cases in the federal courts of appeals, see, e.g., *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356 (D.C. Cir. 2006); *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192 (D.C. Cir. 2004); *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d Cir. 1998).

A. The Ninth Circuit's Ruling on TRIA Section 201(c)(4)'s "At Issue" Provision is Based on False Premises, Raises Significant Foreign Relations Issues, and Conflicts With the Holdings of at Least Four Other Circuits.

1. TRIA section 201(c)(4)'s "at issue" clause provides that when an individual, holding a judgment pursuant to FSIA section 1605(a)(7), accepts monetary relief under TRIA and VTVPA, they relinquish the right to attach property of a foreign nation that is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4) (amending VTVPA § 2002(d)(5)(B)); App. 117. The panel's opinion was premised on a false assumption: that Iran, in litigating Case B/61 before the Iran-United States Claims Tribunal in The Hague, somehow conceded that the Cubic judgment was not relevant, or "not at issue" before the Tribunal. See App. 12-13. Like the panel's previous attempt to have MOD concede material legal points in this litigation, which was expressly rejected by this Court, see 546 U.S. at 453, this ground for decision is likewise unavailing.

As was indicated in briefing before the court of appeals, see U.S. Br. 14-16, the Cubic judgment is at issue in Case B/61, pending before the Iran-U.S. Claims Tribunal. Case B/61 involves the status and disposition of Iranian military property or assets situated in the United States, which may or may not have been part of the Foreign Military Sales (FMS) program. Iran seeks the return of these properties or assets, or, in the alternative, the receipt of replacement value for them from the United States government. As

a presidential statement to Congress of May 16, 1996, indicated:

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

President Clinton's Message to the Congress on Iran, May 16, 1996, available at http://clinton6.nara.gov/1996/05/1996-05-16-report-on-national-emergency-with-respect-to-iran.html (visited Oct. 24, 2007).[2]

One of the pieces of military equipment at issue in Tribunal Case B/61 is Contract Number 134 between MOD and Cubic International Sales Corporation (now Cubic Defense Systems, Inc.) of October 3, 1977, for the sale, repair and maintenance of an Air Combat

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[2] MOD does not endorse, in all respects, the United States government's characterization of Iran's claim in Case B/61, but this statement is nonetheless illustrative of the subject-matter of the case.

Maneuvering Range (ACMR). The Cubic contract for the ACMR was the subject of an arbitration before the International Chamber of Commerce (ICC), which issued an award, on May 5, 1997, in favor of the Islamic Republic of Iran in the amount of $2,805,519. See Declaration of Mina Almassi, Case No. 98-1165, Docket No. 85, ¶ 7 & Exh. 2 (filed Sept. 13, 2002), reproduced at U.S. Br. at A15. That ICC arbitration award was enforced in proceedings below and is now known as the Cubic judgment. Although the Tribunal has yet to issue an award in Case B/61, it has (in another award) indicated that Cubic contract number 134 is at issue in Case B/61. See *Ministry of National Defence of the Islamic Republic of Iran v. United States*, Case No. B/66, Award No. 302-B66-1, at ¶ 10 (Apr. 28, 1987), WL Iran Award 302-B66-1.

As the United States contended before the Ninth Circuit, see U.S. Br. 15-16, the statement in Iran's filing before the Tribunal, in Case B/61 – that the ICC arbitral award was not "res judicata" before the Tribunal – does not affect the determination here. The ICC arbitration established *Cubic's* liability to Iran under Contract 134 for the provision of ACMR; the Tribunal proceedings are intended to determine the *United States'* liability to Iran under the Algiers Accords for interfering with the export of needed supplies, parts, equipment, and expertise to maintain the ACMR.

As Judge Fisher observed in his dissent, App. 28, the decisive matter was Iran's undertaking to offset the proceeds from the ICC award (and, now, the Cubic judgment) from any potential liability that the United

States has with respect to the entirety of Case B/61. Judge Fisher questioned whether Iran made any "concession" (Judge Fisher's quotes, App. 35) at all in this regard. See App. 37.

What is undisputed here is that the United States stands to gain a benefit before the Iran-U.S. Claims Tribunal if the Cubic judgment is repatriated to Iran, and for that reason alone, the Cubic judgment is "at issue" in Case B/61 before the Tribunal, as Judge Fisher noted in his dissent. See App. 32, 36-37. After reviewing the plain meaning of the "at issue" language of the TRIA, Judge Fisher concluded that the Cubic judgment is clearly before the Claims Tribunal under theories of set-off or judicial estoppel. App. 32-33. The requisites of VTVPA section 2002 having been satisfied, Elahi has clearly relinquished any right to attach the Cubic judgment.

2. TRIA section 201(c)(4)'s "at issue" proviso involves significant foreign relations issues, and the court of appeals' holding and interpretation of such raises substantial concerns. In pleadings the Islamic Republic of Iran filed before the Claims Tribunal in Case B/61, Iran has indicated that it will deduct from its claim against the United States any funds that Iran receives from Cubic via the ICC award and (now) the Cubic judgment. The United States, in its memorials before the Tribunal, has acknowledged that "the awards due from Cubic under the ICC Award . . . would be 'recouped from the remedy sought against the United States in Case B61'." U.S. Rebuttal, Case B/61, at 24-25 n.32 (filed Sept. 1, 2003) (quoting 1999 correspondence and filings made by Iran's agent before

the Tribunal at The Hague).

If left unreviewed, the Ninth Circuit's holding would permit Elahi to attach the Cubic judgment, and these funds would thus not be available to Iran and there would be no offset of any award that the United States would be obliged to pay Iran. Because the status of the Cubic judgment will determine the final outcome of Case B/61 in the Iran Claims Tribunal, it is most certainly "at issue in [a] claim[] against the United States before an international tribunal." Indeed, were Elahi to prevail here it would mean that the United States would be satisfying Elahi's judgment against Iran.

It is no wonder that Congress sought to prevent this result – complicating the defense of international litigation in which this country is a party, and deflecting the payment of judgments against foreign sovereigns onto the U.S. taxpayer – by legislating VTVPA section 2002 requiring the relinquishment of recourse against certain classes of Iranian property and assets in the United States. These significant foreign relations concerns strongly counsel this Court to grant review of this petition. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194, 196 (1983)); *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

As this Court noted in another foreign sovereign immunity case, "the primacy of federal concerns is evident" in cases "rais[ing] sensitive issues concerning the foreign relations of the United States." *Verlinden*

B. V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) ("We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area."). Finally, this Court has held that it is "not for the courts to deny an immunity which our government has seen fit to allow." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

3. Other courts that have considered the issue have given a broad ambit to TRIA section 201(c)(4)'s "at issue in claims against the United States before an international tribunal" language. In *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000 (7th Cir. 2004), the Seventh Circuit ruled, in regard to the attachment of two condominium units that had previously served as Iranian consular residences, that the property was "at issue" before the Tribunal in a number of cases, raising the United States' obligations under the Algiers Accords to protect and return Iranian property in the United States. See id. at 1008-09 (quoting *Islamic Republic of Iran v. United States*, 33 Iran-U.S. Cl. Trib. Rep. 362 (1997)). The attachments were thus quashed, as having been relinquished under the TRIA. Precisely this same result was reached by the Fourth Circuit. See *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 236 (4th Cir. 2004).

Moreover, as Judge Fisher recounted in his dissent, "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." App. 34 (citing *Hegna* in the Fourth Circuit). Judge Fisher properly noted that Congress chose the "at issue" language to effectuate the purpose of forcing potential claimants to relinquish a broad class of attachments. See App. 31-32 (citing *Hegna* in the Fifth Circuit, which rejected a narrow interpretation of "at issue"). Judge Fisher also observed, App. 30, that TRIA section 201(c)(4) includes not only property "at issue" before an international tribunal, but also the narrower class of property that is "the subject of" resolved claims, suggesting that the "at issue" language was intended to be broader.

The Ninth Circuit opinion is in manifest conflict with at least four other circuits. While the panel majority seemed to acknowledge the split, see App. 14 n.6 (citing the *Hegna* cases in the Second, Fourth, Fifth and Seventh Circuits[3]), it asserted that the other circuit authorities were distinguishable because they "involv[ed] properties that had not yet been subject to any judicial determination of liability." Id. Judge Fisher questioned, in his dissent, the relevance of such a characterization of those precedents. See App. 34. The panel's assertion, see App. 14-15 n.7, that the "at issue" provision should be construed so as not to apply to matters that have already been resolved at the Iran Claims Tribunal, or have already been the subject of

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[3] 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, 492-93 (5th Cir. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004).

awards by that body, is belied by the TRIA's express language.

Moreover, the Ninth Circuit's cramped construction of the "at issue" language in TRIA is in conflict with that of other courts of appeals that have considered the issue. The Fifth Circuit indicated that "'[a]t issue' includes a broader swath of conflict" than asserted by respondent in the proceedings below, or as accepted by the panel majority. See *Hegna*, 376 F.3d at 492 (citing BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "at issue" as "[t]aking opposite sides; under dispute; in question."')). The panel majority implicitly rejected the Fifth Circuit's view, see App. 15 n.7 (criticizing the "broader swath" language of the Fifth Circuit's *Hegna* decision, although without attribution), but offered no coherent construction of its own.

Review is warranted on this significant issue of statutory construction regarding the TRIA's "at issue" provision.

B. The Circuit's Holding That the Cubic Judgment is a "Blocked Asset," Within the Meaning of TRIA Section 201(d)(2)(A), Misconstrues the Statute and Conflicts with the Ruling of Two Other Circuits.

The panel majority ruled, App. 15-20, that the Cubic judgment was a "blocked asset" within the meaning of TR IA, particularly sections 201(a) and 201(d)(2)(A). Curiously, the same panel reached precisely the opposite conclusion in its earlier ruling, see 385 F.3d at 1216, App. 55; id. at 1224, App. 76 (citing 29 F. Supp.2d 1168 (S.D. Cal. 1998)), when it

appeared that such would support a holding *against* Iran's immunity from attachment under the FSIA. When this Court vacated the panel's earlier holding on FSIA grounds, the panel reversed course and held that the Cubic judgment is a "blocked asset" under the TRIA.

The Ninth Circuit's earlier holding was correct, based on a reading of the statute and the facts of this case. The panel's holding also conflicts with at least two other courts of appeals that have applied a narrow construction to the "blocked asset" language of TRIA.

1. The Ninth Circuit's holding turns on the technical language of section 201 of TRIA. By its own terms, TRIA applies only to the "blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party). . . ." TRIA, § 201(a); App. 112. The phrase "blocked asset," is, however, given a very specific definition under TRIA, including "any asset seized or frozen by the United States under. . . sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." TRIA, § 201(d)(2)(A); App. 118. Blocked assets also include "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C.App. 5(b))." Id.

Contrary to the Ninth Circuit's most recent holding, the Cubic judgment is "regulated," not "blocked," within the meaning of TRIA section 201(a) because it has neither been "seized" or "frozen" by the United States. See TRIA, § 201(d)(2)(A); App. 118. The Cubic judgment is subject to the general license of 31 C.F.R.§ 535.579(a), because Iran's interest in the Cubic

judgment arose after January 19, 1981. Indeed, the panel said as much in its earlier ruling. See App. 53 ("The combination of these regulations makes clear that the Cubic judgment is properly regulated by the IACR. . . .").

In order to avoid this result, the panel held, see App. 20, that Iran's interest in the property arose in October 1977, when Iran executed the underlying contracts with Cubic, or, at the latest, in October 1978, when Iran made a payment on the contracts. This ruling contradicts the panel's prior opinion. See 385 F.3d at 1216, App. 55 ("Flatow contends that § 535.579(a)(2) is applicable to the Cubic judgment because it is property in which MOD gained an interest after January 19, 1981. With this much we agree."); id. at 1224, App. 76 ("MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against Cubic. *MOD v. Cubic Def. Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998)."). The property being attached here is *not* the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract.

MOD could not have had any interest in the Cubic judgment, until such time as a U.S. court had recognized as enforceable an international arbitral award granting the Ministry a right of action to collect the award. See 29 F. Supp.2d at 1174. The panel's attempt to "back-date" Iran's potential interest in the Cubic judgment, to a time prior to January 1981,

should be unavailing. The Ninth Circuit's ruling is in substantial tension with that of the Second Circuit, which held that "[t]o seize or freeze assets [under IEEPA] transfers possessory interest in the property." *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003). No such transfer could have occurred here in relation to MOD's interest in the ACMR or the Cubic judgment. Cubic has never made any payment to MOD, in compliance with the arbitral award. The Ninth Circuit has thus given an extraordinarily broad ambit to the definition of "blocked assets" under the TRIA, despite that statute's narrow definition.

The Ninth Circuit's opinion also subverts the United States' foreign policy position vis-à-vis Iranian assets under the Algiers Accords, the international agreement which established the Iran Claims Tribunal and which has governed this nation's financial relations with Iran since 1981.[4] The panel decision potentially places the United States in a position of judicially-declared default on its obligations under the Algiers Accords. Needless to say, this Court has long held the view that "an act of Congress ought never to be construed to violate the law of nations if any other

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[4] See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, Iran-U.S., ¶¶ 4-9, 20 I.L.M. [International Legal Materials] 224 (1981) (the United States committed itself to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979" and "to ensure the mobility and free transfer of Iranian assets within its jurisdiction."); Dept. of State Bull. No. 2047, Feb. 1981 at 1; 1 Iran-U.S. Cl. Trib. Rep. 3 (1983).

possible construction remains. . . ." *Murray v. The Schooner CHARMING BETSY*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (cited with approval in *F. Hoffmann-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)).

Even if the panel's factual supposition is true (that Iran's interest in the Cubic judgment arose prior to January 1981), the Algiers Accords and presidential determinations thereafter, had the effect of unblocking most Iranian assets in this country. See *Rubin v. Islamic Republic of Iran,* 2007 WL 1169701, at *4 (N.D. Ill. Apr. 17, 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 67 (E.D.N.Y. 2004). Assets blocked by Executive Order [EO] 12170, were later unblocked by EOs 12281, 12282, and 1283. See, e.g., 31 C.F.R.§ 535.215. If the panel was correct in its holding, all interests which Iran had in the United States as of November 14, 1979, have remained blocked, placing the United States in manifest violation of the Algiers Accords, and subject to remedial proceedings at the Iran-U.S. Claims Tribunal.

2. A number of courts have held that not all assets regulated by Executive Order 12170, 44 Fed Reg. 65729 (1979), constitute "blocked assets" under the TRIA. In *Weinstein v. The Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004), the United States District Court for the Eastern District of New York noted that

> the TRIA defines a "blocked asset" as any asset "seized or frozen" by the United

> States under IEEPA §§ 202 and 203. Unfortunately, these terms are not further defined in the TRIA. And the terms "seized" and "frozen" do not appear in §§ 202 and 203 of the IEEPA, 50 U.S.C. §§ 1701and 1702. According to plaintiffs, the Court should therefore resort to the legislative history of the statute for interpretation. In plaintiffs' view, the legislative history of the TRIA demonstrates that the term "blocked assets" under the TRIA is an "omnibus term encompassing all Iranian assets which have been blocked, frozen, seized, restricted or otherwise regulated by any proclamation, order, regulation or license issued pursuant to IEEPA." Pls.' Mem. at 21.

Id. at 74.

In short, the *Weinstein* court was faced with the exact circumstances as presented below — a claim under TRIA for seizure of liquidated funds of the Islamic Republic of Iran — and the same assertion by claimants (that all property blocked by EO 12170 are necessarily "blocked assets" under TRIA). Nevertheless, that court "rejected plaintiff's arguments that all Iranian assets which entered U.S. jurisdiction after the 1979 blocking order, i.e., EO 12170, are 'blocked assets' within the meaning of the TRIA, and that the term 'blocked assets' includes all assets 'regulated' or 'licensed' under IEEPA." Id. at 33. The court went on to further note that "blocked assets"

should not be read to be an "omnibus" term, but rather one which was specifically limited by the language of TRIA to assets "seized or frozen by the United States under specified statutes, one of which is the IEEPA." Id. at 75.

The *Weinstein* court's conclusion and reasoning was specifically adopted by the Second Circuit in *Bank of New York v. Rubin*, 484 F.3d 149 (2d Cir. 2007). In *Rubin*, the interpleaders sought to attach bank accounts at the Bank of New York held on account for Bank Melli Iran. The Second Circuit held

> that assets blocked pursuant to Executive Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979), and its accompanying regulations, see 31 C.F.R. Part 535, that are also subject to the general license of 31 C.F.R.§ 535.579, are not blocked assets under the TRIA and therefore are not subject to attachment under that statute.

484 F.3d at 150. The Second Circuit has thus endorsed a narrow construction of the "blocked assets" language of the TRIA, at variance with the Ninth Circuit's holding. See also *Hegna*, 376 F.3d at 493 n.32 (5th Cir. 2004) (noting limited definition of "blocked assets" under TRIA section 201(d)(2)); *Weininger v. Castro*, 462 F. Supp.2d 457, 480 (S.D.N.Y. 2006); *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 235 (D. Mass. 2006).

3. There is no indication that the Cubic judgment has been "seized or frozen by the United States," in the manner contemplated by TRIA section 201(d)(2)(A). On its own terms, then, TRIA is

inapplicable in this case. The Ninth Circuit's judgment, if left unreviewed, will vastly complicate the United States' foreign policy interests in regards to the Islamic Republic of Iran and compromise this country's obligations under the Algiers Accords. Just as the views of the Solicitor General were requested when this matter was previously before the Court, see 544 U.S. 998 (2005), they should again be sought in this instance.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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