No. 03-55015

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINISTRY OF DEFENSE & 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 Corp.,

Defendant,

v.

DARIUSH ELAHI,

Plaintiff-Intervenor-Appellee.

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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INTERESTS OF THE UNITED STATES

This appeal involves an attempt by Dariush Elahi, a United States citizen, to attach the property of the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran, an inseparable part of the Iranian state. Elahi sought to

attach the property in aid of execution on a judgment Elahi obtained against Iran for the murder of his brother. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97 (D.D.C. 2000). The United States strongly condemns Iran's political assassination. We file this brief to further critical public interests and in no way defend Iran's conduct.

This Court affirmed Elahi's attachment, on the assumption that the Ministry is an agency or instrumentality of Iran. After the Ministry filed a petition for certiorari, the Supreme Court requested the views of the United States. In response to that request, the Solicitor General filed a brief explaining that the Ministry's status — as an agency or instrumentality of Iran or as an integral part of the Iranian state — had not been properly considered by this Court. That issue is critical, because the Foreign Sovereign Immunities Act (FSIA), the statute governing the immunities of foreign states, provides a higher degree of immunity from attachment to a foreign state than it does to a foreign state's agencies or instrumentalities. The Supreme Court remanded for reconsideration. *Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 126 S. Ct. 1193 (2006).

The United States files this *amicus* brief to further two vital public interests. First, while the United States strongly encourages foreign states to satisfy judgments properly obtained under the FSIA, foreign sovereigns are entitled to receive the full

protections afforded by that statute. The FSIA embodies principles of customary international law regarding foreign states' sovereign immunities. Accordingly, subjecting a foreign state to suit or execution in a manner inconsistent with the FSIA would provoke significant diplomatic objection. Moreover, core components of the United States Government are often sued abroad. If the central organs of foreign states receive only the lesser immunities afforded to agencies or instrumentalities, there is a significant risk that our own Departments will receive reciprocal unfavorable treatment in foreign litigation. For these reasons, the United States has appeared in litigation such as this to ensure the proper application of foreign sovereign immunity principles. *See, e.g., FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003); *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

Second, the United States has a significant interest in ensuring the proper application of the Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act). Under that statute, certain judgment-creditors of Iran may elect to receive compensation in an amount up to the total of their judgments against Iran. The Victims Protection Act requires judgment-creditors to relinquish certain rights to attach Iranian property, in exchange for choosing to accept payment under the act. The United States has an interest in ensuring that individuals who accept

payment do not thereafter seek to exercise the attachment rights they relinquished, both because this is inequitable to other payees, and because, in cases such as this one, the United States may be liable to Iran for any amounts attached. *See, e.g., Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005).

Because Elahi accepted compensation under the Victim Compensation Act and has thereby relinquished any right to attach the Cubic Judgment, and because that property of Iran's Ministry of Defense is immune in any event, we urge the Court to reverse the district court's order, which authorized Elahi to attach the judgment.

STATEMENT OF THE ISSUES

The United States will address the following three issues in this brief:

1. Whether, by accepting compensation under the Victim Protection Act, Elahi has relinquished any right to execute against the Cubic judgment because it is "at issue" before the Iran-U.S. Claims Tribunal;

2. Whether, under the FSIA, a ministry of defense is presumptively part of the state itself or instead an "agency or instrumentality" of the state;

3. Whether a civil, money judgment is "used for a commercial activity" within the meaning of the FSIA's exception to the attachment immunity of foreign state property simply because the judgment resulted from commercial litigation.

STATUTORY BACKGROUND

I. Immunity from Jurisdiction and Execution under the Foreign Sovereign Immunities Act

Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA) to address the scope of a foreign state's immunity from suit. *See* Pub. L. No. 95-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611). The FSIA largely codifies a restrictive theory of sovereign immunity, which generally posits that a foreign state enjoys immunity from suit in actions involving the state's sovereign or public acts, but not in actions involving the state's commercial activities. *See generally, Republic of Austria v. Altmann*, 541 U.S. 677, 688–91 (2004).

The FSIA expresses the general rule that foreign states are immune from suit in courts of the United States. 28 U.S.C. § 1604. It then establishes exceptions to that immunity, 28 U.S.C. §§ 1605–1607, and provides that a federal district court may exercise jurisdiction over a foreign state only if the suit comes within one of the FSIA's specified exceptions, 28 U.S.C. § 1330(a).

In addition to defining a foreign state's jurisdictional immunity, the FSIA modifies the traditional rule barring execution against a foreign state's property. *See Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002). The FSIA establishes a general rule that property in the United States of a foreign sovereign is immune from attachment. 28 U.S.C. § 1609. But Congress "partially

lower[ed] the barrier of immunity from execution." H.R. Rep. No. 1487, at 27 (1976). The FSIA distinguishes between property belonging to the foreign state itself and property belonging to an agency or instrumentality of the foreign state. Section 1610(a) permits execution against the property of a foreign state only if (among other things) the property is "in the United States" and "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). By contrast, Section 1610(b) allows execution against property in the United States belonging to an "agency or instrumentality" of a foreign state that itself is "engaged in commercial activity in the United States," without regard to how the particular property is used. *See* 28 U.S.C. § 1610(b).[1]

The FSIA's distinction between the property of a foreign state and the property of its agencies and instrumentalities reflects a central feature of the restrictive theory of foreign sovereign immunity. That theory recognizes that, when a foreign state engages in governmental functions, it is generally entitled to immunity, but when it

[1] Because the FSIA defines a "foreign state" as including an "agency or instrumentality of a foreign state" (28 U.S.C. § 1603(a)), Section 1610(a) applies both to a foreign sovereign and to its agencies or instrumentalities. H.R. Rep. No. 1487, at 28. Section 1610(b) provides "addition[al]" bases for attachment that apply only to property of a foreign state's agencies or instrumentalities. 28 U.S.C. § 1610(b); *see* H.R. Rep. No. 1487, at 29.

creates agencies or instrumentalities engaged in commercial activity, those entities are more like "any other player in the market." *Republic of Congo*, 309 F.3d at 253.

II. Compensation under the Victims of Trafficking and Violence Protection Act of 2000 and Relinquishment of Attachment Rights

A. In the fall of 2000, Congress directed the Secretary of the Treasury to make available to certain judgment creditors of Iran payment in amounts equal to the creditors' compensatory damages. Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act), Pub. L. No. 106-386, § 2002(a)(1), 114 Stat. 1,464, 1,541–42.[2] Under this statute, a person is eligible to receive payment if, by July 20, 2000, he or she obtained a final judgment against Iran under 28 U.S.C. § 1605(a)(7), a provision of the FSIA that permits suit for harms caused by state-sponsored terrorism. *Id.* § 2002(a)(2)(A)(i). Persons who filed suit against Iran under Section 1605(a)(7) on specified dates are also eligible, regardless of when they obtained a final judgment. *Id.* § 2002(a)(2)(A)(ii).

By the terms of the Victims Protection Act, eligible persons may choose whether to accept payment under the statute. Those who do automatically relinquish "all claims and rights to compensatory damages." *Id.* § 2002(a)(2)(B). Eligible persons with both compensatory and punitive damage awards have the option to receive either

[2] For the Court's convenience, we reproduced Section 2002 of the Victims Protection Act in the addendum to this brief.

100 or 110 percent of their compensatory awards. *Id.* § 2002(a)(1)(A),(B); Office of Foreign Asset Control, Dep't of the Treasury, Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran, 68 Fed. Reg. 8,077, 8,079 (Feb. 19, 2003).[3] In addition to relinquishing all claims and rights to their compensatory awards, eligible persons electing to receive 100 percent of their compensatory award are also required to relinquish any right "to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to [28 U.S.C. §] 1610(f)(1)(A)." Victims Protection Act § 2002(a)(2)(B), (D); *see also* 68 Fed. Reg. at 8,079. By contrast, eligible persons electing to receive 110 percent of compensatory damages are required to relinquish "all rights and claims to punitive damages awarded," as well as all claims and rights to their compensatory awards. Victims Protection Act § 2002(a)(2)(B), (C).

B. The Terrorism Risk Insurance Act (TRIA) amended this aspect of the Victims Protection Act in three ways relevant to this litigation. *See* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201, 116 Stat. 2,322, 2,337.[4]

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[3] For the Court's convenience, we reproduce this Treasury Department regulation in the addendum to this brief.

[4] For the Court's convenience, we reproduce TRIA Section 201 in the addendum to this brief.

First, Congress expanded the class of judgment creditors eligible to receive payment under the Victims Protection Act to include all parties with final judgments against Iran who had filed suit under 28 U.S.C. § 1605(a)(7) on "any * * * date before October 28, 2000." Victims Protection Act § 2002(a)(2)(A)(ii) (as amended by TRIA § 201(c)(1)). Elahi was not eligible for payment prior to the enactment of TRIA. But TRIA's amendment to the Victims Protection Act made him eligible for payment under Section 2002, because he filed suit against Iran prior to October 28, 2000. *See Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 99–100 (D.D.C. 2000) (noting entry of default judgment on August 14, 2000).

Second, Congress recognized that, in light of payments already made, the source of funds it had identified for payments under Section 2002 might not be sufficient to pay all remaining eligible persons 100 or 110 percent of their compensatory awards against Iran. In that event, Congress directed the Secretary of the Treasury to make pro rata payments to newly eligible persons according to specific formulas. Victims Protection Act § 2002(d)(1)(A) (as amended by TRIA § 201(c)(4)) (providing for pro rata payment); *id.* § 2002(d)(1)(B) (as amended by TRIA § 201(c)(4)) (providing for calculation of pro rata shares).

Finally, Congress revised the relinquishment provisions, as they apply to "[a]ny person receiving less than the full amount of compensatory damages awarded." *Id.*

§ 2002(d)(5) (as amended by TRIA § 201(c)(4)). Such parties are not required to relinquish all claims to compensatory damages. *Ibid.* Nor are they required to relinquish their rights to execute against or attach property subject to 28 U.S.C. § 1610(f)(1)(A). *Ibid.* But receipt of any payment does effect a relinquishment of "all rights" to execute against or attach property that is at issue in a claim against the United States before an international tribunal or is the subject of an award by such a tribunal. *Id.* § 2002(a)(2)(D), (d)(5)(B) (as amended by TRIA § 201(c)(4)); see 68 Fed. Reg. at 8,080.

In addition to amending the Victims Protection Act, TRIA expanded creditors' rights to attach certain property of some foreign states. Section 201(a) subjects to attachment "the blocked assets of [a] terrorist party" that is a judgment debtor in an action brought under 28 U.S.C. § 1605(a)(7), the provision eliminating foreign sovereign immunity for suits involving state-sponsored terrorism. TRIA § 201(a). TRIA defines "blocked assets" as "any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 or 203 of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701–1702)." TRIA § 201(d)(2)(A). And TRIA includes foreign states "designated as a state sponsor of terrorism" by the Secretary of State within the definition of "terrorist party." TRIA § 201(d)(4).

ARGUMENT

I. By Accepting Compensation under the Victims Protection Act, Elahi Has Relinquished any Right to Attach the Cubic Judgment.

Iran obtained a $2.8 million international arbitration award against Cubic Defense System in a dispute over a contract for military equipment. *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 385 F.3d 1206, 1210 (9th Cir. 2004). It reduced that award to judgment in the District Court for the Southern District of California. *Ibid.* Elahi claims a right to attach the Cubic judgment under Section 1610(a) of the FSIA and under TRIA Section 201(a). Elahi Supp. Br. 13–20. But neither provision authorizes Elahi's attachment, as he has relinquished "all rights" to attach the Cubic judgment.

In its prior opinion in this case, this Court held that Stephen Flatow, another judgment-creditor of Iran, had relinquished any right to attach the Cubic judgment because he elected to receive payment under the Victim Protection Act. *Ministry of Defense*, 385 F.3d at 1213–1217. Elahi acknowledges that he, too, elected to receive compensation under the Victim Protection Act. Elahi Supp. Br. 19 n.13. Although Elahi accepted compensation under a different provision than Flatow, the same general principle applies: By electing to receive payment under the Victim Protection Act, Elahi has relinquished any right to attach certain property, including the Cubic judgment at issue here.

Flatow chose to receive payment equal to 100 percent of his compensatory judgment against Iran. *Ministry of Defense*, 385 F.3d at 1213. Under the applicable statutory provision, a person electing to recover 100 percent of a compensatory judgment relinquishes the right to attach property that is at issue in claims against the United States before an international tribunal or subject to 28 U.S.C. § 1610(f)(1)(A). Victims Protection Act § 2002(a)(2)(D). This Court concluded that the Cubic judgment is subject to Section 1610(f)(1)(A). *Ministry of Defense*, 385 F.3d at 1217. Accordingly, it held that, by receiving compensation, Flatow had relinquished any right to attach the Cubic judgment. *Ibid*.

Elahi received pro rata compensation under the provision of the Victims Protection Act that was amended by TRIA Section 201(c). Elahi Supp. Br. 19 n.13. That amendment also contains a relinquishment provision. Receipt of any amount of compensation effects a relinquishment of "all rights" to execute against or attach property that is at issue in a claim against the United States before an international tribunal. Victims Protection Act § 2002(a)(2)(D), (d)(5)(B) (as amended by TRIA § 201(c)(4)).

Treasury Department regulations implementing this amendment to the Victims Protection Act explain that anyone receiving payment under the amended provisions "shall be required to relinquish rights * * * with respect to enforcement against

property that is at issue in claims against the United States before an international tribunal." 68 Fed. Reg. at 8,080. The regulations require a person receiving a pro rata payment to sign a declaration stating that "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." *Id.* at 8081. The declaration further states that "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." *Ibid.* Elahi acknowledges that he received compensation "pursuant to" these regulations. Elahi Supp. Br. 19 n.13. Thus, by accepting payment under the amended provisions of the Victims Protection Act, Elahi relinquished any right to attach the Cubic judgment, if that judgment is "at issue" in a claim against the United States before an international tribunal.

The Cubic judgment is "at issue" in a claim against the United States in the Iran-U.S. Claims Tribunal, an international tribunal established at the Hague under the Algiers Accords, which resolved the Iranian hostage crisis in 1981. *See Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1003 n.1, 1008 (7th Cir. 2004). As several courts of appeals have already concluded, the Claims Tribunal is an "international tribunal" for purposes of the Victims Protection Act relinquishment provision. *See, e.g., 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); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226, 235 (4th Cir. 2004).

The record here establishes that the Cubic judgment is at issue before the Claims Tribunal. In the district court, the Ministry of Defense filed "Statement No. 16," an Iranian pleading previously filed in Case No. B/61, which is pending before the Iran-U.S. Claims Tribunal. *See* Decl. of Mina Almassi, Case No. 98-1165, Docket No. 85, ¶ 7 & Ex. 2 (filed Sept. 13, 2002).[5] That pleading specifically notes that the Ministry of Defense obtained an arbitration award against Cubic of $2,808,519, and acknowledges that Iran will subtract any amount it recovers from Cubic in its claim against the United States in the Iran-U.S. Claims Tribunal. The pleading states: "This amount, if received, will be recuperated from the remedy sought" against the United States. Almassi Decl., Ex. 2, at 3 n.2. In an attempt to collect on the arbitration award, the Ministry reduced the award to judgment in the district court. Because the United States' potential liability to Iran in Case No. B/61 will be affected by Iran's ability to collect on the Cubic judgment, that judgment is "at issue" before the U.S.-Iran Claims Tribunal.

[5] For the Court's convenience, we reproduced the Almassi Declaration and Exhibit 2 of that declaration in the addendum to this brief.

The district court here incorrectly concluded otherwise, in light of Iran's filing before the Iran-U.S. Claims Tribunal. There, Iran had argued that the Ministry's arbitration proceeding with Cubic "cannot have a *res judicata* impact on the present case" before the Claims Tribunal because, among other reasons, "the subject matter of this case, at variance with the [arbitration] action, is the losses suffered by Iran as a result of the United States' non-export of Iranian properties." Almassi Decl., Ex. 2, at 3, 4. Based on that assertion, the district court in this case held that "the subject matter of [Case No. B/61] does not include the [arbitration] Award confirmed by this Court." *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 236 F. Supp. 2d 1140, 1146 (S.D. Cal. 2002). Consequently, the district court held that the Cubic judgment is not "at issue" before the Iran-U.S. Claims Tribunal. *Ibid*.

The district court is mistaken. Both the arbitration action and Case No. B/61 concern Cubic's contract with Iran for military equipment. The arbitration action concerned Cubic's liability for non-delivery, and Case No. B/61 will determine the amount of United State's liability, if any. The district court failed to consider Iran's representation that it would subtract from any liability the United States might have the amount of any recovery it obtains from Cubic. *See* Almassi Decl., Ex. 2, at 3 n.2.

Because the United States' liability in Case No. B/61 is directly affected by Iran's ability to collect on the Cubic judgment, that judgment is "at issue" in Case No. B/61.

Accordingly, by operation of law, by already accepting compensation from the United States Government, Elahi has relinquished "all rights" to execute against the Cubic judgment. Victims Protection Act § 2002(a)(2)(D), (d)(5)(B) (as amended by TRIA § 201(c)(4)); 68 Fed. Reg. at 8,080.

II. Alternatively, the Cubic Judgment is Immune from Execution because It Is Not "Used for a Commercial Activity."

A. The Ministry of Defense is Inseparable from the Iranian State.

As described earlier, the FSIA differentiates between attachment of the property of a foreign state (28 U.S.C. § 1610(a)) and attachment of the property of a foreign state's agencies and instrumentalities (28 U.S.C. § 1610(b)). This distinction is critical. The FSIA largely preserves the historic rule that the property of a foreign state is immune from attachment, 28 U.S.C. § 1609, relaxing that rule only if the property is "used for a commercial activity in the United States," and other specified conditions are met, 28 U.S.C. § 1610(a). The FSIA allows greater latitude for attachment, however, in the case of the property of a foreign state's agencies and instrumentalities. Most significantly, it eliminates the requirement that the property itself be "used for a commercial activity in the United States." *See* 28 U.S.C. § 1610(b).

The FSIA's distinction recognizes that a foreign state, which typically owns and utilizes property for core governmental purposes, is entitled to greater protection from attachment than its agencies or instrumentalities, which are more likely to be commercial entities participating in the marketplace as equals with non-sovereign commercial entities. *See Republic of Congo*, 309 F.3d at 253. Execution against a foreign state's property is a more significant affront to the state's sovereignty than either the adjudication of a controversy involving the foreign state or execution against the property of a state's agencies or instrumentalities. *See id.* at 256; *see also* H.R. Rep. No. 1487, at 27 ("The enforcement [of] judgments against foreign state property remains a somewhat controversial subject.").

The Ministry contends that it is a core component of the Iranian Government and therefore is subject only to the limited exceptions to attachment set out in Section 1610(a), not a separate "agency or instrumentality" subject to the broader exceptions set out in Section 1610(b).[6] Ministry Supp. Br. 7–14. The United States agrees.

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[6] Elahi asserts that the Ministry has waived the argument that it is not an agency or instrumentality of Iran, and that its property is accordingly subject to attachment, if at all, under Section 1610(a). Elahi Supp. Br. 7–9. That contention is foreclosed by the Supreme Court's determination that "the Ministry had no reasonable opportunity to argue" that it is an inseparable part of the Iranian state. *Ministry of Defense*, 126 S. Ct. at 1194.

Section 1610(b) could be construed to permit attachment of an agency or instrumentality's property only when the underlying judgment is against the particular agency or instrumentality against which attachment is sought. The Ministry has not

The threshold question here is whether the Cubic judgment, which is payable to Iran's Ministry of Defense is property of an Iranian "agency or instrumentality." That question is answered by the FSIA's definitions of "foreign state" and "agency or instrumentality," *see* 28 U.S.C. § 1603, and the relationship between Iran and its Ministry of Defense.

The FSIA defines the term "foreign state" by inclusion. Section 1603(a) provides that: A "foreign state", except as used in Section 1608 of this Title [addressing service of process], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined by Subsection (b). 28 U.S.C. § 1603(a). Under that definition, the term "foreign state," as used in the FSIA's attachment provisions, necessarily includes a foreign state's Ministry of Defense. A defense ministry, which coordinates a nation's military operations, engages in a quintessential core sovereign function and is presumptively inseparable from the foreign state itself. *See Transaero, Inc. v. La Fuerze Aerea Boliviana*, 30 F.3d 148, 151–53 (D.C. Cir. 1994); *see also Garb v. Republic of Poland*, 440 F.3d 579, 590–93 (2d Cir. 2006) (adopting *Transaero* core functions test); *Magness v. Russian Federation*, 247 F.3d 609, 613 n. 7 (5th Cir. 2001) (same).

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made that argument. Accordingly, the United States expresses no view on that contention.

Iran's Ministry of Defense, like its Ministry of Foreign Affairs, is part of the Iranian "foreign state." *See Roeder*, 333 F.3d at 234–235 (holding that the Iranian Ministry of Foreign Affairs was to be "treated as the state of Iran itself rather than as its agent" because "[t]he conduct of foreign affairs is an important and 'indispensable' governmental function" (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)). The Defense Ministry is, therefore, subject to the limited exceptions to immunity from attachment set out in Section 1610(a).

The question remains, however, whether the Defense Ministry is also subject to exceptions that pertain only to an "agency or instrumentality" of a foreign state. The FSIA defines an "agency or instrumentality" restrictively. Section 1603(b) states in relevant part:

> An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose share or other ownership interest is owned by a foreign state or political subdivision thereof.

28 U.S.C. § 1603(b). *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003). That definition makes clear that, for purposes of the FSIA, a foreign governmental entity cannot qualify as an "agency or instrumentality" of the FSIA unless it is a "separate legal person." 28 U.S.C. § 1603(b)(1).

The FSIA's definition of "agency or instrumentality" reflects the understanding that, over the last century, "governments throughout the world have established separately constituted legal entities to perform a variety of tasks." *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 624 (1983). Such an entity typically does not engage in core governmental functions, but instead is "run as a distinct economic enterprise." *Ibid.* While those instrumentalities take many forms, they are "typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances." *Id.* at 624; *see id.* at 625–26 ("[T]he instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties."). Consequently, an instrumentality is able to operate with "a greater degree of flexibility and independence from close political control" than entities that are not separate from the state. *Id.* at 624–25.

It would be extraordinary for a foreign state to constitute its ministry of defense as a "separate legal person," 28 U.S.C. § 1603(b)(1), with "independence from close political control," *Bancec*, 462 U.S. at 624. A foreign state's organization of its defense ministry as a "separate" entity would, by definition, provide the foreign state with diminished control over an obviously core sovereign function. In addition, a foreign

state's constitution of its ministry of defense as a "separate legal person" would subject the ministry to diminished immunity from suit and attachment of its property in foreign countries in which it may have a presence.

The D.C. Circuit concluded that the prospect that a foreign state would organize its armed forces as a "separate legal person" is so improbable that it adopted a categorical rule that the armed forces should always be treated as a part of the foreign state. *See Transaero*, 30 F.3d at 151–53. But even if a foreign state conceivably might formally organize its ministry of defense as a "separate legal person," *cf. id.* at 156 (Mikva, J., dissenting), there should be, at a minimum, a strong presumption that it has not.

Here, Elahi has presented no evidence that the Ministry is a "separate legal person" distinct from the Iranian state. Elahi contends that, under *Bancec*, the Ministry is a "separate legal person" merely because the Ministry can "enter into contracts and [can] pursue legal actions in [its] own name." Elahi Supp. Br. 5. But in *Bancec*, the Supreme Court made it clear that an entity "extensively controlled," 462 U.S. at 629, by a foreign state is not a separate legal person under the FSIA even if it is established under foreign law "with full juridical capacity * * * of its own," 462 U.S. at 613. Applying that principle, the Supreme Court held that Bancec, which

under Cuban law was "[a]n official autonomous credit institution for foreign trade," was liable for a claim against Cuba. *Ibid.*

Elahi has not shown that the Ministry of Defense has "independence from" Iran's "close political control." *Id.* at 624. He has presented no evidence that the Ministry is run as a distinct economic enterprise, responsible for its own finances. *See id.* at 624–25. And Elahi has not established that the Ministry engages in anything other than core governmental functions. Consequently, Elahi has failed to overcome the presumption that the Ministry is an inseparable part of the Iranian state.

B. A Money Judgment Is Not "Used for a Commercial Activity" Simply Because It Is the Product of Commercial Litigation.

Because the Defense Ministry is an inseparable part of the Iranian state, Section 1610(a) of the FSIA determines whether its property is subject to attachment. Elahi claims that he may attach the Cubic judgment under Section 1610(a) because, he contends, "it is property 'used for a commercial activity in the United States.'" Elahi Br. 13 (quoting 28 U.S.C. § 1610(a)). According to Elahi, the Ministry has used the Cubic judgment for a commercial purpose because that the judgment derives from a dispute about a commercial contract: "Since the asset that [the Ministry] contracted to purchase, i.e., the military asset, constitutes property used for a commercial activity in the United States, then perforce the Cubic judgment, which embodies the monetary value of that asset, is also property used for a commercial activity." *Id.* at 15. That

view is mistaken. Whether property is subject to attachment under Section 1610(a) depends on whether a foreign state is using that specific property for a commercial activity; it does not depend on how the property was created.

As we explained, when Congress "lower[ed] the barrier of immunity from execution" in Section 1610, it was more protective of foreign state property than it was of property belonging to a foreign state's agencies or instrumentalities. H.R. Rep. No. 1487, at 27. "Subsection (a) allows courts to execute only when the property is 'used for a commercial activity,' whereas subsection (b) permits execution of 'any property,' regardless of its use." *Republic of Congo*, 309 F.3d at 253.

Making a state's use of property the critical inquiry for execution rather than the question of whether the state has engaged in commercial activity "helps accomplish the purpose of limiting execution against property directly belonging to a foreign state more severely than execution against property belonging to an instrumentality." *Ibid.* The premise for this disparate treatment "is that agencies or instrumentalities engaged in commercial activity are akin to any other player in the market, and that their functions are primarily commercial. On the other hand, the 'primary function of states is government.'" *Ibid.* (citation omitted) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 460 cmt. b (1987)). Restricting execution to

property used by a foreign sovereign for commercial activity ensures that the execution will not interrupt the public or sovereign acts of the state. *Ibid.*

Elahi's argument collapses the critical distinction between Sections 1610(a) and (b) because it permits attachment of a foreign state's property based on the fact that the foreign state has *previously* engaged in commercial activity. But as the Fifth Circuit has explained, "[t]he focus in subsection (a) is plainly on the 'use' to which the property is put." *Republic of Congo*, 309 F.3d at 253. Thus, an airplane used solely to shuttle a foreign head of state is not "used for a commercial activity," even if the foreign state obtained the airplane through a commercial transaction. *Republic of Congo*, 309 F.3d at 253; *see* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of * * * [the] act."). Similarly, a monetary judgment that is the end product of litigation is not "used for a commercial activity," simply because that the litigation concerned a commercial transaction.

As Elahi has provided no other basis for concluding that the Ministry has used Cubic judgment for a commercial activity in the United States, he has failed to establish a right to attach the judgment under Section 1610(a).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order.

Respectfully submitted,

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July 13, 2006

ADDENDUM

Victims of Trafficking and Violence Protection Act of 2000,
Pub. L. No. 106-386, § 2002, 114 Stat. 1,464, 1,541

(1) IN GENERAL.—Any amount transferred under subsection (c) shall be derived by reducing the amount of Federal law enforcement assistance funds received by the State that convicted such individual of the prior offense before the distribution of the funds to the State. The Attorney General shall provide the State with an opportunity to select the specific Federal law enforcement assistance funds to be so reduced (other than Federal crime victim assistance funds).

(2) PAYMENT SCHEDULE.—The Attorney General, in consultation with the chief executive of the State that convicted such individual of the prior offense, shall establish a payment schedule.

(f) CONSTRUCTION.—Nothing in this section may be construed to diminish or otherwise affect any court ordered restitution.

(g) EXCEPTION.—This section does not apply if the individual convicted of murder, rape, or a dangerous sexual offense has been released from prison upon the reversal of a conviction for an offense described in subsection (c) and subsequently been convicted for an offense described in subsection (c).

(h) REPORT.—The Attorney General shall—

(1) conduct a study evaluating the implementation of this section; and

(2) not later than October 1, 2006, submit to Congress a report on the results of that study.

(i) COLLECTION OF RECIDIVISM DATA.—

(1) IN GENERAL.—Beginning with calendar year 2002, and each calendar year thereafter, the Attorney General shall collect and maintain information relating to, with respect to each State—

(A) the number of convictions during that calendar year for—

(i) any dangerous sexual offense;

(ii) rape; and

(iii) murder; and

(B) the number of convictions described in subparagraph (A) that constitute second or subsequent convictions of the defendant of an offense described in that subparagraph.

(2) REPORT.—Not later than March 1, 2003, and on March 1 of each year thereafter, the Attorney General shall submit to Congress a report, which shall include— Deadline.

(A) the information collected under paragraph (1) with respect to each State during the preceding calendar year; and

(B) the percentage of cases in each State in which an individual convicted of an offense described in paragraph (1)(A) was previously convicted of another such offense in another State during the preceding calendar year.

(j) EFFECTIVE DATE.—This section shall take effect on January 1, 2002.

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

(a) PAYMENTS.—

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

(A) 110 percent of compensatory damages awarded by judgment of a court on a claim or claims brought by the person under section 1605(a)(7) of title 28, United States Code, plus amounts necessary to pay post-judgment interest under section 1961 of such title, and, in the case of a claim or claims against Cuba, amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected on June 2, 2000), subject to final appellate review of that order; or

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

Payments under this subsection shall be made promptly upon request.

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

(A)(i) as of July 20, 2000, held a final judgment for a claim or claims brought under section 1605(a)(7) of title 28, United States Code, against Iran or Cuba, or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims; or

(ii) filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, or July 27, 2000;

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

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

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

(b) FUNDING OF AMOUNTS.—

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

sanctions, payment shall be made from funds or accounts subject to sanctions as of April 18, 2000, or from blocked assets of the Government of Cuba.

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

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

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

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

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

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

(f) AMENDMENTS.—(1) Section 1610(f) of title 28, United States Code, is amended—

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

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

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

(2) Subsections (b) and (d) of section 117 of the Treasury Department Appropriations Act, 1999 (as contained in section 101(h) of Public Law 105–277) are repealed. 28 USC 1606, 1610 note.

SEC. 2003. AID FOR VICTIMS OF TERRORISM.

(a) MEETING THE NEEDS OF VICTIMS OF TERRORISM OUTSIDE THE UNITED STATES.—

(1) IN GENERAL.—Section 1404B(a) of the Victims of Crime Act of 1984 (42 U.S.C. 10603b(a)) is amended as follows:

"(a) VICTIMS OF ACTS OF TERRORISM OUTSIDE UNITED STATES.—

Terrorism Risk Insurance Act of 2002,
Pub. L. No. 107-297, § 201, 116 Stat. 2,322, 2,337

TITLE II—TREATMENT OF TERRORIST ASSETS

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

28 USC 1610 note.

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

28 USC 1610 note.

(b) PRESIDENTIAL WAIVER.—

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

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

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

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

(c) SPECIAL RULE FOR CASES AGAINST IRAN.—Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106–386; 114 Stat. 1542), as amended by section 686 of Public Law 107–228, is further amended—

Ante, p. 1411.

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

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

28 USC 1606, 1610 and note.

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

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

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

"(1) PRIOR JUDGMENTS.—

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

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

"(2) SUBSEQUENT JUDGMENT.—

"(A) IN GENERAL.—The Secretary shall pay to any person awarded a final judgment after the date of enactment of this subsection, in the case filed on January 16, 2002, and identified in subsection (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under subparagraph (B), of the balance of the amounts available to be paid under subsection (b)(2) that remain following the disbursement of all payments as provided by paragraph (1). The Secretary shall make such payment not later than 30 days after such judgment is awarded.

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

"(3) ADDITIONAL PAYMENTS.—

Deadline.

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

"(B) CALCULATION OF PAYMENTS.—The share payable under subparagraph (A) to each such person shall be equal

to the proportion that the amount of compensatory damages awarded that person bears to the total amount of all compensatory damages awarded to all persons who received a payment under paragraph (1) or (2).

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

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

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

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

"(6) GUIDELINES FOR ESTABLISHING CLAIMS OF A RIGHT TO PAYMENT.—The Secretary may promulgate reasonable guidelines through which any person claiming a right to payment under this section may inform the Secretary of the basis for such claim, including by submitting a certified copy of the final judgment under which such right is claimed and by providing commercially reasonable payment instructions. The Secretary shall take all reasonable steps necessary to ensure, to the maximum extent practicable, that such guidelines shall not operate to delay or interfere with payment under this section.".

(d) DEFINITIONS.—In this section, the following definitions shall apply: 28 USC 1610 note.

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

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

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

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

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

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International

Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

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

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

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

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran

February 19, 2003.

AGENCY: Department of the Treasury; Office of Foreign Assets Control.

ACTION: Notice.

SUMMARY: This notice specifies the Secretary of the Treasury's intention to pay on March 21, 2003 certain claims filed pursuant to section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Public Law no. 106–386, as amended by the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law 107–228. Section 2002 directs the Secretary to make payments to persons who hold certain categories of judgments against Cuba or Iran in suits brought under 28 U.S.C. 1605(a)(7).

This notice also specifies the procedures necessary for persons filing applications after November 26, 2002, to establish eligibility for payments authorized by section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (the ''VTVPA''), Public Law no. 106–386, as amended by section 686 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law no. 107–228, and as further amended by section 201 of the Terrorism Risk Insurance Act of 2002 (the ''TRIA''), Public Law no. 107–297. The publication of this notice necessarily precedes the making of payments in order to implement the TRIA's amendments to the VTVPA. This notice supersedes the two notices previously published by the Department of the Treasury (''the Treasury'') on November 22, 2000, and December 15, 2000, at 65 FR 70382 and 65 FR 78533, respectively, for all such applications filed after November 26, 2002. The rules set forth in the two preceding notices shall continue to apply to applications filed with the Treasury prior to November 26, 2002, that are still pending before the Treasury. Applications filed with the Treasury before November 26, 2002, that were determined to be ineligible for payment are no longer pending before the Treasury. Those applicants previously determined to be ineligible for payment, but who may now be eligible due to amendments of section 2002, must therefore file new applications with the Treasury pursuant to the rules set forth in this new notice.

This notice also sets forth estimates of the funds available for payment of eligible Iran-related claims for payment under section 2002 that are filed with the Treasury after November 26, 2002.

DATES: This notice is effective February 19, 2003.

FOR FURTHER INFORMATION CONTACT: For questions regarding submission of applications, Rochelle E. Stern, Chief, Policy Planning and Program Management Division, Office of Foreign Assets Control, tel.: 202/622–2500. For legal questions, Office of the Chief Counsel (Foreign Assets Control), tel.: 202/622–2410.

Part 1. Payment of Certain Claims on March 21, 2003

The Treasury expects to complete the processing of payment on March 21, 2003 to certain claimants pursuant to section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (the ''VTVPA''), Public Law No. 106–386, as amended by section 686 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107–228. The claimants scheduled to receive payment on March 21, 2003 are those who filed lawsuits against Iran on June 6, 2000, received judgments in the lawsuit entitled Carlson v. The Islamic Republic of Iran, Civil Case No. 00–CV–1309 (D.D.C.), and filed claims for payment with the Treasury prior to November 26, 2002.

Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000 (the ''VTVPA''), Public Law No. 106–386, as amended by section 686 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107–228, and as further amended by section 201 of the Terrorism Risk Insurance Act of 2002 (the ''TRIA''), Public Law No. 107–297 will hereinafter be referred to as ''section 2002''.

Part 2. Applicants; Deadlines for Submission of Applications

The term ''Applicant,'' as used herein, refers to a person described in section 2002(a)(2) as eligible for payment under such section 2002 and who files a claim for payment with the Treasury after November 26, 2002. A person described in section 2002(a)(2) is

(1) A person who, as of July 20, 2000, held a final judgment awarding compensatory damages on a claim or claims brought under section 1605(a)(7) of title 28, United States Code, against Iran or Cuba, or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims, or

(2) a person who filed a suit under such section 1605(a)(7) on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, June 6, 2000, July 27, 2000, any other date before October 28, 2000, or January 16, 2002, and holds a final judgment awarding compensatory damages against either Iran (as described below) or Cuba in such suit. With respect to those who filed suits against Iran, such persons must hold final judgments for compensatory damages issued as of November 26, 2002, or must have filed suit on January 16, 2002.

Those who filed claims with the Treasury prior to November 26, 2002, and whose claims were denied, but who may now be eligible for payment due to amendments to Public Law 106–386, must resubmit applications in accordance with this notice. The requirements of Parts 2 through 6 of this notice do not apply to claimants who have already received payment or whose claims are still pending with the Treasury.

Each Applicant must submit a separate, complete application containing all the information and documentation described in Part 3, below. If an Applicant is currently represented by counsel, his or her application must be submitted through that counsel.

Section 2002 distinguishes between final judgments issued as of and after November 26, 2002. In the case of Applicants holding final judgments that were issued as of November 26, 2002, complete applications for payment, as described in Part 3, below, must be received in the Department of the Treasury's Office of Foreign Assets Control by April 7, 2003. In the case of any Applicant holding a final judgment issued after November 26, 2002, in the case filed on January 16, 2002, and identified in section 2002(a)(2)(A) with respect to Iran, complete applications for payment, as described in Part 3, below, must be received in the Office of Foreign Assets Control within 20 calendar days after the date such judgment becomes final.

Part 3. Applications for Payment

Applications for payment under section 2002 must be sent to the Office of Foreign Assets Control, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, Attn: Rochelle E. Stern. Applications must contain all of the information and documentation as specified in this Part 3. Applications must be sent by overnight mail or by overnight courier. Applications sent electronically, via facsimile, by hand delivery, certified mail, or any other means other than overnight mail or overnight courier shall be deemed noncomplying. All information and documentation required by paragraphs (a) through (f) below must be submitted to the noted address by overnight mail or by overnight courier.

All information required by paragraphs (a) through (f) of this Part 3 is to be provided in the order set forth below and numbered correspondingly.

(a) Information Regarding Applicant and Payment.

(1) Information Regarding Applicant: An Applicant shall submit the following information:

(A) name, address, telephone number, and, if available, facsimile number of Applicant and Applicant's social security number or taxpayer identification number; and

(B) if the Applicant is represented by counsel, name(s), address(es), telephone number(s), and facsimile number(s) of Applicant's counsel.

(2) Payment Information: Payments will be made by electronic funds transfer. Payments will be made only to the Applicant or the Applicant's counsel. The application shall designate which of these parties is to receive the payment by including one of the following two statements:

''Payment of amounts owing to [insert name of Applicant] under section 2002 shall be made to [insert name of Applicant].''

''Payment of amounts owing to [insert name of Applicant] under section 2002 shall be made to [insert name of Applicant's counsel].''

An Applicant shall submit the following information:

(A) name of person or entity to whom payment is to be made [insert name of Applicant or Applicant's counsel] (the ''payee'');

(B) American Bankers Association Routing and Transit Code number of the bank holding payee's account (include copy of canceled check or savings deposit slip);

(C) name and address of payee's bank;

(D) payee's bank account number;

(E) type of account (checking or savings); and

(F) social security number or taxpayer identification number of payee.

(b) Documentation on Compensatory Damages.

An Applicant shall submit a copy of the final judgment awarding the Applicant compensatory damages on a claim or claims brought by the Applicant under 28 U.S.C. 1605(a)(7). This copy must be certified by the clerk of the court that awarded the judgment.

In addition, the Applicant must submit a statement signed pursuant to 28 U.S.C. 1746 identifying what proportion, if any, of his compensatory damage award has been paid. This statement must also provide a description of all ongoing attachment and/or execution proceedings relating to the Applicant's judgment, including the case name and number, the name and location of the court where such proceeding has been filed, the date of filing, and the names of all parties involved.

(c) Documentation on Punitive Damages.

An Applicant who elects to receive 110 percent of compensatory damages, as allowed under section 2002(a)(1)(A), shall submit a copy of the final judgment awarding the Applicant punitive damages on a claim or claims brought by the Applicant under 28 U.S.C. 1605(a)(7). This copy must be certified by the clerk of the court that awarded the judgment.

In addition, the Applicant must submit a statement signed pursuant to 28 U.S.C. 1746 identifying what proportion, if any, of his punitive damage award has been paid. This statement must also provide a description of all ongoing attachment and/or execution proceedings relating to the Applicant's judgment, including the case name and number, the name and location of the court where such proceeding has been filed, the date of

filing, and the names of all parties involved.

(d) Documentation on Sanctions.

(1) An Applicant seeking payment of amounts awarded as sanctions by judicial order on April 18, 2000 (as corrected on June 2, 2000) in connection with a claim or claims brought by the Applicant under 28 U.S.C. 1605(a)(7) shall submit a copy of the judicial order of April 18, 2000 (as corrected on June 2, 2000) awarding the Applicant sanctions. The copy must be certified by the clerk of the court that issued the order.

(2) The Applicant must also establish that this order is final and not subject to further appellate review. The Applicant can so establish by providing one of the following:

(A) a copy of a judgment of dismissal by the U.S. Court of Appeals of any pending appeal from the sanctions order, which copy must be certified by the clerk of the court of appeals;

(B) a signed statement that the time to appeal the sanctions order has expired without a notice of appeal having been filed, or a signed written waiver of the right to seek any further review of any adverse aspect of the sanctions order from any party that would have a basis for seeking review of that decision;

(C)(i) a copy of a final decision by the U.S. Court of Appeals on the sanctions order that affirms or otherwise leaves intact the sanctions order, in whole or in part, and that has been certified by the clerk of the Court of Appeals and,

(ii)(I) a citation to the order of the U.S. Supreme Court denying certiorari or dismissing any pending petition for a writ of certiorari;

(II) a signed statement that the time to petition for a writ of certiorari has expired, without such a petition having been filed; or

(III) if the time to petition for a writ of certiorari has not expired, a signed written waiver from all unsuccessful appellants of their right to petition for a writ of certiorari; or

(D) a copy of a final decision by the U.S. Supreme Court on the sanctions order that affirms or otherwise leaves intact the sanctions order, in whole or in part.

(e) Documentation on Final Judgment or Date Suit Commenced.

In order to receive payment, an Applicant must meet one of the following two requirements documenting the final judgment and, where applicable, the date on which the Applicant's suit commenced.

(1) To meet the first requirement, the Applicant must establish that he or she had, as of July 20, 2000, a final judgment for a claim or claims brought under 28 U.S.C. 1605(a)(7) or the right to payment of an amount awarded as a judicial sanction with respect to such claim or claims. The Applicant can establish that he or she had a final judgment for a claim or claims brought under 28 U.S.C. 1605(a)(7) as of July 20, 2000, by submitting the judgment specified in Part 3(b) above, which must be dated July 20, 2000, or earlier, along with all appellate orders on that judgment, if any, and a signed statement demonstrating why further appellate review is unavailable. The Applicant can establish that he or she had a right to payment of an amount awarded as a judicial sanction by submitting the order specified in Part 3(d) above, which must be dated July 20, 2000, or earlier, along with proof that this order is final and not subject to further appellate review.

(2) If an Applicant does not satisfy paragraph (1) above, the Applicant shall submit satisfactory proof of the following:

(A) The date on which the Applicant filed a suit against Iran or Cuba under 28 U.S.C. 1605(a)(7). This proof shall be in the form of a docket sheet or other document that has been certified by the clerk of the court in which the suit was filed. Applicants proceeding under this paragraph shall be eligible for payment only if suit was filed on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, June 6, 2000, July 27, 2000, any other date before October 28, 2000, or January 16, 2002.

(B) That Applicant has a final judgment in a suit described in Part 3(e)(2)(A) above. The Applicant can satisfy this requirement by submitting the judgment specified in Part 3(b) above, along with all appellate orders on that judgment, if any, and a signed statement demonstrating why further appellate review is unavailable. Applicants shall be eligible for payment only if such judgment was issued as of November 26, 2002, with the exception of any final judgment entered in the case filed on January 16, 2002.

(f) Election of Payment Option and Associated Relinquishment.

(1) All Applicants must elect a payment option established by section 2002. If the Applicant has received an award of punitive damages, the Applicant shall elect to receive either 110 percent or 100 percent of the compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, the amount awarded as sanctions on or in connection with a claim or claims brought under 28 U.S.C. 1605(a)(7). If the Applicant has not received an award of punitive damages, the Applicant shall elect to receive 100 percent of the compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, the amount awarded as sanctions on or in connection with a claim or claims brought under 28 U.S.C. 1605(a)(7). It is not within the Department of the Treasury's purview to advise Applicants on which option they should select.

By electing one of these options, the Applicant relinquishes certain claims and rights, as specified in section 2002. See section 2002(a)(2)(B)-(D). If an Applicant elects to receive 110 percent of the compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, the amount awarded as sanctions on or in connection with a claim or claims brought under 28 U.S.C. 1605(a)(7) (110 percent option), the Applicant must relinquish all claims and rights to compensatory damages and amounts awarded as judicial sanctions, as well as all claims and rights to punitive damages. Section 2002(a)(2)(B)–(C).

If an Applicant elects to receive 100 percent of the compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, the amount awarded as sanctions on or in connection with a claim or claims brought under 28 U.S.C. 1605(a)(7) (100 percent option), the Applicant must relinquish all claims and rights to compensatory damages and amounts awarded as judicial sanctions, as well as ''all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to section 1610(f)(1)(A) of title 28, United States Code.'' Section 2002(a)(2)(D). Title 28 U.S.C. 1610(f)(1)(A), in turn, addresses ''any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)) (''TWEA''), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702) (''IEEPA''), or any other proclamation, order, regulation, or license issued pursuant thereto.'' 28 U.S.C. 1610(f)(1)(A). Virtually every transaction involving Cuban property within the jurisdiction of the United States is ''prohibited or regulated'' pursuant to TWEA. Additionally, almost every transaction involving Iranian property within the jurisdiction of the

United States is ''prohibited or regulated'' pursuant to IEEPA. Section 2002(a)(2)(D) therefore prohibits an Applicant who elects the 100 percent option from seeking to execute his or her punitive damage award against, or from seeking to attach, virtually all Iranian or Cuban assets within the jurisdiction of the United States.

To make an election, the Applicant must submit two declarations as set forth in Parts 3(f)(3–4) below. The Applicant must submit (1) either the declaration set forth in Part 3(f)(3)(A) or that set forth in Part 3(f)(3)(B), and (2) the declaration set forth in Part 3(f)(4). All declarations submitted must be completed in full.

In making payments under section 2002, subject to funds availability, the Secretary will pay post-judgment interest on 110 percent of compensatory damages or 100 percent of compensatory damages, according to whether the Applicant elects to receive payment equaling 110 or 100 percent of compensatory damages. The Secretary will not pay post-judgment interest on portions of the judgment for which the Applicant is not entitled to receive payment under section 2002, including amounts awarded as punitive damages. Nor will the Secretary pay post-judgment interest on the amounts awarded as sanctions, as section 2002(a)(1) does not provide for payment of post-judgment interest on sanctions awards.

(2) Section 201 of the Terrorism Risk Insurance Act of 2002 (the ''TRIA''), Public Law No. 107–297 (''section 201'').

Section 201 amends section 2002 by, inter alia, establishing a partial, pro rata payment mechanism, which is described in Part 5 below. This partial payment mechanism, set forth in new subsection (d) of section 2002, will come into effect in the event that the Secretary of the Treasury determines that 90 percent of the amounts available to be paid under section 2002(b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of November 26, 2002, in cases identified in section 2002(a)(2)(a) with respect to Iran. If this determination is made, the payment an Applicant receives will be less than the full amount of unpaid compensatory damages awarded to the Applicant and will not include amounts necessary to pay post-judgment interest under 28 U.S.C. 1961.

Section 201 also amends section 2002 to provide, in new subsection (d)(5), that any person receiving less than the full amount of compensatory damages awarded to that party in a judgment to which new subsection (d) applies shall not be required to make the election set forth in section 2002(a)(2)(B) (*i.e.*, relinquishing all claims and rights to compensatory damages and judicial sanctions) or, with respect to section 2002(a)(2)(D), the election relating to relinquishment of any right to execute or attach property that is subject to section 1610(f)(1)(A) of title 28, United States Code. However, such person shall be required to relinquish rights set forth (1) in section 2002(a)(2)(C) (*i.e.*, all rights and claims to punitive damages), and (2) in section 2002(a)(2)(D) with respect to enforcement against property that is at issue in claims against the United States before an international tribunal or that is the subject of awards by such tribunal.

To take account of new subsection (d)(5), the elections of the 110 percent option and the 100 percent option that appeared in prior **Federal Register** notices on this subject have been amended, as set forth in Part 3(f)(3) below. The amendments provide that, in the event the Secretary makes the determination that funds are inadequate as specified in section 2002(d)(1)(A), the payment the Applicant receives will be less than the full amount of unpaid compensatory damages, and such payment will not include amounts necessary to pay post-judgment interest under 28 U.S.C. 1961. In that event, the relinquishments already made in the declarations and described in Part 3(f)(1) above shall be null and void, and, in lieu thereof, the Applicant, as required by new subsection (d)(5), relinquishes all rights and claims to punitive damages and 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.

(3) To make an election, the Applicant must submit two declarations as set forth in Parts 3(f)(3–4) below. The Applicant must submit (1) either the declaration set forth in Part 3(f)(3)(A) or that set forth in Part 3(f)(3)(B), and (2) the declaration set forth in Part 3(f)(4). The Applicant must sign each declaration pursuant to 28 U.S.C. 1746. All declarations submitted must be completed in full.

To make the election, the Applicant shall submit one of the two declarations set forth in (A) and (B) below. As set forth in Part 3(f)(1) above, applicants who have received awards of punitive damages shall elect either the declaration set forth in (A) or (B) below. Applicants who have not received awards of punitive damages shall use the declaration set forth in (B) below.

(A) ''I, _____ (insert name of Applicant), elect to receive 110 percent of the amount awarded to me as compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, amounts awarded as judicial sanctions on or in connection with the claim or claims I brought under 28 U.S.C. 1605(a)(7). By so electing, I state that I have been awarded a judgment that includes an award of punitive damages. I further state, as required by section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, P.L. No. 106–386 as amended by section 686 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107–228, and as further amended by section 201 of the Terrorism Risk Insurance Act of 2002, Public Law No. 107–297 (''section 2002''), that I relinquish (a) all claims and rights to compensatory damages and amounts awarded as judicial sanctions under such judgments and any related interest, costs, and attorneys fees, and (b) all claims and rights to punitive damages awarded in connection with such claim or claims and any related interest, costs, and attorneys fees. In relinquishing these above-mentioned claims and rights, I recognize that I relinquish any rights to seek writs of attachment, execution, or garnishment, or any other form of post-judgment process intended to obtain partial or complete satisfaction of any amounts awarded in connection with the claim or claims under 28 U.S.C. 1605(a)(7) for which I am electing to receive payment.

''I understand that this relinquishment is irrevocable once the payment is credited to the bank account I have identified in this application. I further agree and acknowledge that, pursuant to section 2002(c), once the payment is credited to the bank account I have identified in this application, and to the extent such payment is made under section 2002(b)(2)(B), the United States shall be fully subrogated and assigned to all of my rights as a judgment creditor, and to the rights, if any, of any other person or entity to whom payments are made (collectively 'payees'), against the debtor foreign state. Such subrogation and assignment of payees' rights as judgment creditors is binding on their guardians, heirs, executors, administrators or assigns.

''In the event that the Secretary of the Treasury determines that 90 percent of the amounts available to be paid under section 2002(b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of November 26, 2002, in cases

identified in section 2002(a)(2)(A) with respect to Iran, I understand that the payment that I receive will be less than the full amount of compensatory damages awarded to me and that such payment will not include amounts necessary to pay post-judgment interest under 28 U.S.C. 1961. In that event, the relinquishment set forth above shall be null and void and, in lieu thereof, as required by section 2002(d)(5), I hereby relinquish (1) all rights and claims to punitive damages awarded in connection with the claim or claims I brought under 28 U.S.C. 1605(a)(7) and any related interest, costs, and attorneys fees, and (2) 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. I further agree and acknowledge that, pursuant to section 2002(c), once the payment is credited to the bank account I have identified in this application, and to the extent such payment is made under section 2002(b)(2)(B), the United States shall be subrogated and assigned, to the extent of such payment, to my rights as a judgment creditor, and to the rights, if any, of any other person or entity to whom payments are made (collectively ''payees''), against the debtor foreign state. Such subrogation and assignment of payees' rights as judgment creditors is binding on their guardians, heirs, executors, administrators or assigns.

''I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (insert date).''

(B) ''I, _____ (insert name of Applicant), elect to receive 100 percent of the amount awarded to me as compensatory damages, amounts necessary to pay post-judgment interest under 28 U.S.C. 1961, and, where applicable, amounts awarded as judicial sanctions on or in connection with the claim or claims I brought under 28 U.S.C. 1605(a)(7). By so electing, as required by section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, P.L. No. 106–386 as amended by section 686 of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107–228, and as further amended by section 201 of the Terrorism Risk Insurance Act of 2002, Public Law No. 107–297 (''section 2002''), I relinquish (a) all claims and rights to compensatory damages and amounts awarded as judicial sanctions under such judgments and any related interest, costs, and attorneys fees, and (b) all rights to execute against or attach property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to 28 U.S.C. 1610(f)(1)(A). In relinquishing these above-mentioned claims and rights, I recognize that I relinquish any rights to seek writs of attachment, execution, or garnishment, or any other form of post-judgment process directed against property that is at issue in claims against the United States before an international tribunal, that is the subject of awards rendered by such tribunal, or that is subject to 28 U.S.C. 1610(f)(1)(A) and intended to obtain partial or complete satisfaction of any amounts awarded in connection with the claim or claims under 28 U.S.C. 1605(a)(7) for which I am electing to receive payment.

''I understand that this relinquishment is irrevocable once the payment is credited to the bank account I have identified in this application. I further agree and acknowledge that, pursuant to section 2002(c), once the payment is credited to the bank account I have identified in this application, and to the extent such payment is made under section 2002(b)(2)(B), the United States shall be fully subrogated and assigned to all of my rights as a judgment creditor, and to the rights, if any, of any other person or entity to whom payments are made (collectively ''payees''), against the debtor foreign state. Such subrogation and assignment of payees' rights as judgment creditors is binding on their guardians, heirs, executors, administrators or assigns.

''In the event that the Secretary of the Treasury determines that 90 percent of the amounts available to be paid under section 2002(b)(2) are inadequate to pay the total amount of compensatory damages awarded in judgments issued as of November 26, 2002, in cases identified in section 2002(a)(2)(A) with respect to Iran, I understand that the payment that I receive will be less than the full amount of compensatory damages awarded to me and that such payment will not include amounts necessary to pay post-judgment interest under 28 U.S.C. 1961. In that event, the relinquishment set forth above shall be null and void and, in lieu thereof, as required by section 2002(d)(5), I hereby relinquish (1) all rights and claims to punitive damages awarded in connection with the claim or claims I brought under 28 U.S.C. 1605(a)(7) and any related interest, costs, and attorneys fees, and (2) 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. I further agree and acknowledge that, pursuant to section 2002(c), once the payment is credited to the bank account I have identified in this application, and to the extent such payment is made under section 2002(b)(2)(B), the United States shall be subrogated and assigned, to the extent of such payment, to my rights as a judgment creditor, and to the rights, if any, of any other person or entity to whom payments are made (collectively ''payees''), against the debtor foreign state. Such subrogation and assignment of payees' rights as judgment creditors is binding on their guardians, heirs, executors, administrators or assigns.

''I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (insert date).''

(4) In addition, all Applicants shall submit the following declaration, which, pursuant to 28 U.S.C. 1746, must be signed by the applicant and, if the payee is different from the applicant, the payee.

''I/We & _____, (insert name of Applicant) and & _____ (insert name of payee, if different from Applicant) am/are entitled to the entire amount to be paid in this application. No other person, corporation, law firm, or other entity whatsoever either claims or is otherwise entitled to receive any portion of this payment from the United States of America. If any other person, corporation, law firm, or other entity (a ''Third Party'') is ever determined by a final judgment of a court of the United States to be entitled to all or part of the payment made to the Applicant and payee (as named above), we (the Applicant and payee) promise immediately to reimburse, with interest, the United States for whatever amount of money is paid by it to a Third Party, and agree further to indemnify and hold harmless the United States for any such claims for payment asserted by a Third Party against the United States.

''I/we declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (insert date).''

Part 4. Sources of Funds for Payment

Section 2002 specifies the sources and amount of funds available for the payments authorized by that section.

See section 2002(b). For purposes of funding payments in connection with judgments and sanctions against Cuba, section 2002 provides that the President shall vest and liquidate up to and not exceeding the amount of property of the Government of Cuba and sanctioned entities in the United States or any commonwealth, territory, or possession thereof that has been blocked pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, or regulation issued thereunder. It further provides that for the purposes of paying amounts for judicial sanctions, payment shall be made from funds or accounts subject to sanctions as of April 18, 2000, or from blocked assets of the Government of Cuba. See section 2002(b)(1).

For purposes of funding payments in connection with judgments against Iran, section 2002 provides that the Secretary shall make payments from amounts paid and liquidated from (a) rental proceeds accrued on the date of the enactment of the VTVPA from Iranian diplomatic and consular property located in the United States, and (b) funds not otherwise made available in an amount not to exceed the total of the amount in the Iran Foreign Military Sales Program account within the Foreign Military Sales Fund on the date of the enactment of the VTVPA to the extent provided by section 2002(b)(2)(B). The amount of funds made available by (a), above, will be determined based in part on information provided by the Department of State. The amount of funds initially made available by (b), above, was determined based on information provided by the Department of Defense.

Part 5. Payments to Applicants

Payments described in this Part are made pursuant to section 2002(d).

(a) Judgments issued as of November 26, 2002

(1) Following the expiration of the period for submitting claims as described in Part 2 of this notice, the Secretary promptly will determine whether 90 percent of the amounts available to be paid under section 2002(b)(2) are inadequate to pay the total amount of compensatory damages awarded in eligible final judgments issued as of November 26, 2002, to Applicants. See section 2002(d)(1)(A).

(2) In the event that the Secretary determines that 90 percent of the amounts available to be paid under section 2002(b)(2) are inadequate to pay the total amount of compensatory damages awarded in eligible final judgments issued as of November 26, 2002 to Applicants in cases identified in section 2002(a)(2)(A) with respect to Iran, the Secretary will, not later than 60 days after making such determination, make payment from such amounts available to be paid under section 2002(b)(2) to each Applicant to which such a judgment has been issued in an amount equal to a share, calculated under section 2002 (d)(1)(B), of 90 percent of the amounts available to be paid under section 2002 (b)(2) that have not been subrogated to the United States under section 2002 as of November 26, 2002.

(3) The share that is payable to an Applicant under (a) of this Part 5, including any Applicant issued a final judgment as of November 26, 2002, in a suit filed on a date added by the amendment made by section 686 of Public Law 107–228, shall be equal to the proportion that the amount of unpaid compensatory damages awarded in a final judgment issued to that Applicant bears to the total amount of all unpaid compensatory damages awarded to all Applicants to whom such judgments have been issued as of November 26, 2002, in cases identified in section 2002(a)(2)(A) with respect to Iran.

(b) Subsequent Judgment

The Secretary will pay to any Applicant awarded a final judgment after November 26, 2002, in the case filed on January 16, 2002, and identified in section 2002 (a)(2)(A) with respect to Iran, an amount equal to a share, calculated under section 2002(d)(2)(B), of the balance of the amounts available to be paid under section 2002(b)(2) that remain following the disbursement of all payments as described in (a) of this Part 5. The Secretary will make such payment not later than 30 calendar days after such judgment becomes final. To the extent that funds are available, the amount paid to such Applicant will be the amount the Applicant would have been paid as described in (a) of this Part 5 if the Applicant had been awarded the judgment prior to November 26, 2002.

(c) Additional Payments

(1) Not later than 30 calendar days after the disbursement of all payments described in (a) and (b) of this Part 5, the Secretary will make an additional payment to each Applicant who received a payment under (a) or (b) of this Part 5 in an amount equal to a share, calculated as described below, of the balance of the amounts available to be paid under section 2002(b)(2) that remain following the disbursement of all payments as described in (a) and (b) of this Part 5.

(2) The share payable to each such Applicant shall be equal to the proportion that the amount of compensatory damages awarded that Applicant bears to the total amount of all compensatory damages awarded to all Applicants who received a payment as described in (a) or (b) of this Part 5.

Part 6. Available Funds for Iran-Related Claims

Congress has directed that payments of eligible Iran-related claims pursuant to section 2002 be made from the following two sources of funds:

(2) Judgments Against Iran.—For purposes of funding payments under subsection (a) in the case of judgments against Iran, the Secretary of the Treasury shall make such payments from amounts paid and liquidated from—

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

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

Section 2002(b)(2).

With respect to the funds referred to in section 2002(b)(2)(A), the Treasury anticipates that approximately $7.8 million in rental proceeds accrued as of October 28, 2000, from Iranian diplomatic and consular property located in the United States will be available for the payment of the eligible claims filed with the Treasury after November 26, 2002, including but not limited to any claims re-filed with the Treasury after having been denied prior to November 26, 2002.

With respect to the funds referred to in section 2002(b)(2)(B), the Treasury anticipates that approximately $14 million will be available for the payment of the eligible claims filed with the Treasury after November 26, 2002, pursuant to section 2002, including but not limited to any claims re-filed with the Treasury after having been denied prior to November 26, 2002.

With respect to the funds referred to in section 20029b)(2)(A), the Treasury anticipates that approximately $14 million will be available for the payment of the eligible claims filed with the Treasury after November 26, 2002, pursuant to section 2002, including but not limited to any claims re-filed with the Treasury after having been denied prior to November 26, 2002.

Part 7. Notice Requirements Inapplicable

This notice advises applicants of the availability of funds pursuant to section 2002 and explains the nature of the information and documentation requirements established by that section. Accordingly, it has been determined that notice and public procedure are not required pursuant to 5 U.S.C. 553(a). Moreover, notice and public procedure are unnecessary pursuant to 5 U.S.C. 553(b)(B) because this notice merely explains the requirements of section 2002 and does not affect the substantive rights of applicants under that section. Notice and public procedure are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B) because section 2002 requires that payments be made ''promptly,'' see section 2002(a)(1), and it is in the public interest to establish the procedures to request payments without delay.

Part 8. Paperwork Reduction Act

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget (OMB) pursuant to section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and assigned OMB Control Number 1505–0177. An agency may not conduct or sponsor, and a person is not required to respond to, an information collection that does not display a currently valid OMB control number. The collection of information specified in this notice is required to enable the Department of the Treasury to determine the eligibility of an applicant under section 2002. The collection of information is voluntary, but it is required to obtain a payment authorized by section 2002. The estimated average burden per applicant is 3 hours. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the agency contact specified earlier in this notice and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

The figures provided above are only estimates of amounts available and may be subject to change.

Dated: February 7, 2003.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: February 12, 2003.

Kenneth Lawson,

Assistant Secretary (Enforcement), Department of the Treasury.

[FR Doc. 03–3925 Filed 2–13–03; 1:47 pm]

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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF THE STATE OF CALIFORNIA

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

Petitioner,

v.

CUBIC DEFENSE SYSTEMS, INC.,

Respondent.

Case No: 98CV1165-RMB

Southern California
(San Diego)

DECLARATION OF MINA ALMASSI IN SUPPORT OF PETITIONER'S MOTIONS FOR JUDICIAL DETERMINATION THAT ITS JUDGMENT AGAINST CUBIC DEFENSE SYSTEMS IS IMMUNE FROM ATTACHMENT OR EXECUTION BY STEPHEN M. FLATOW AND DARIUSH ELAHI

Date: October 15, 2002
Time: 10:30 a.m.
Dept: 2
Judge: The Hon. Rudi M. Brewster

I, MINA ALMASSI, declare as follows:

1. I am an attorney licensed to practice before all of the state and district courts of the State of California and am one of the attorneys of record for Petitioner, THE

MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN ("MOD"), herein. The following is based upon my personal knowledge. If called upon to testify, I could and would testify competently thereto.

2. On June 5, 2001, MOD moved to dismiss Stephen M. Flatow's ("Flatow") appeal to the Ninth Circuit Court of Appeals on the grounds that Flatow had received his compensatory damages from the United States government and in exchange therefore he had relinquished his right to proceed against the asset at issue in this case.

3. Oral argument was heard on December 6, 2001.

4. Subsequently, on December 17, 2001, the Court of Appeals entered an Order staying the appeal for 45 days or until such time as the district court decides this motion, whichever is sooner.

5. Shortly thereafter, pursuant to the instructions of the Court of Appeal, MOD filed a Motion to Expunge Stephen Flatow's Judgment Lien in this Court. Said Motion was dismissed without prejudice at the request of MOD so that MOD could refile its motion and properly seek a judicial determination that its Judgment against Cubic is immune from attachment or execution.

6. Attached hereto as Exhibit "1" is a true and correct copy of the Partial Award entered in Case No. A/15 pending before the Iran-United States Claims Tribunal in The Hague, The Netherlands.

7. Attached hereto as Exhibit "2" is a true and correct copy of Statement No. 16 addressing the value of the assets at issue, which were the subject of the complaint in Case No. B/61 pending before the Iran-United States Claims Tribunal in The Hague, The Netherlands.

8. Attached hereto as Exhibit "3" is a true and correct copy of the relevant pages of the House Report, No. 94-1487 (1976) U.S. Code congressional and Administrative News.

9. Attached hereto as Exhibit "4" is a true and correct copy of information published by the United States Space and Naval Warfare and Systems Command on its website and referenced in MOD's moving papers; Available at http://fms.spawar.navy.mil/054/faq.html.

10. Attached hereto as Exhibit "5" is a true and correct copy of the relevant pages of the research report written by Beard, Michael N., Lt.Col USAF, United States Foreign Military Sales Strategy: Coalition Building or Protecting the Defense Industrial Base 1995 Air War College, Air University, Maxwell Air Force Base, Alabama; Available at http://papers.maxwell.af.mil/projects/ay1995/awc/beardmn.pdf.

11. Attached hereto as Exhibit "6" is a true and correct copy of the Defense Security Cooperation Agency (Facts Book) — Foreign Military Sales, Foreign Military Construction Sales and Military Assistance Facts. (September 30, 2000); Available at http//web1.deskbook.osd.mil/reflib/DDOD/001EN/001ENDOC.HTM.

12. Attached hereto as Exhibit "7" is a true and correct copy of the relevant pages of a recent article in ATLANTIC MONTHLY James Fallows entitled Uncle Sam Buys an Airplane, June 2002, ATLANTIC MONTHLY 62,63.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed at San Jose, California on this 11th day of September, 2002.

MINA ALMASSI

STATEMENT NO. 16

CUBIC ITEMS

I.

IRANIAN PROPERTY AND ITS VALUE

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

2. As acknowledged by Cubic:

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

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

3. The market price of the equipment, constituting Iran's remedy in the main, is the same amount at which the items were sold to the Canadian Government on 16 September 1981. This price, the Total Firm Price Items under Article 7 of the Cubic-Canadian Government Contract, is U.S. $17,139,046.50. See the excerpts at Attachment No. 1. To this amount is also to be added, at the very least, the Contract price of: i) 4 generators, items identified as 0005AA and 0005AB in the original Contract, in the amount of U.S.$544,654.00 and ii) 4 Airborne Instrumentation sub-system (AIS), item No.0006,in the amount of U.S.

EXHIBIT 2 -1

$717,308.00.[1] The total relief is, thus, U.S. $18,401,008.50.

II.
U.S. DEFENCES

A. Common defences already discussed in Iran's Reply (Volume I)

1) "Iran assumed the risk of non-export of the Items". Doc. 236. Cubic, at 3, note 3. See Iran's Reply at 2.1.2, 2.1.4 and 2.2.

B. Special defences raised here

1. U.S. Argument:

"Iran has submitted no evidence to prove that it is entitled to such compensation. All Iran has submitted in support of its claim with respect to Cubic is a copy of the Contract listing the items". Doc. 236 at 2.

Iran's Answer:

The evidence, relied on in this Statement partly produced by the United States itself, in any event, clearly establishes the existence of the items at issue on the U.S. soil as of 19 January 1981 as well as their 1981 market price.

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[1] The specified i) and ii) items do not appear among the system sold to Canada. There is no mention of the sale of the 4 generators, procured under the original Iran-Cubic Contract in the Cubic-Canada Agreement; the number of the AIS sold to Canada is 16 leaving a balance of 4, out of the 20 AIS produced under the original Iran-Cubic Contract, which continued to remain in the Cubic's possession. See Attachment NO. 1 at 7 and Attachment No. 6.

EXHIBIT 1-2

2. U.S. Argument:

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

Iran's Answer:

The ICC proceeding, which has anyway terminated[2], cannot have a res judicata impact on the present case. This is because that 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 ICC lawsuit, is the United States' obligation under the Algiers Declarations to

[2] Islamic Republic of Iran v. Cubic Defence Systems Inc. Case No. 7365/FMC ICC FINAL AWARD (5 May 1997), (ICC Award). See excepts at Attachment No. 2. The ICC legal conclusions are totally alien to Iranian law, on which ICC has purportedly based them. The ICC has neither accepted Iran's argument of Eghaleh (Articles 283-288, Iran's Civil Code), according to which the parties' position prior to the execution of the contract has to be fully restored. Nor does ICC follow the legal consequence of its factual finding that the parties mutually agreed that Cubic would try to sell the items and receive instead the cost of any necessary modifications plus a brokerage fee. This fact-situation is clearly governed by Articles 292 and 293 of Iran's Civil Code (NOVATION). The ICC, however, chose to found its legal conclusion, without any legal justification, on half of the established truth (the parties' agreement to terminate the old Contract) not on the other (the parties' agreement that Cubic pays Iran the sales proceeds net of modification costs and brokerage fees). The ICC's so-called settling the parties' account, resulting in an award of the reimbursement of a minor portion (U.S.$2,808,519) of the total payments made by Iran (USD12,608,519), has no basis whatsoever in Iranian law to which ICC pays lip service as the applicable law. Id. para. 18.1; and the discussions in this Statement. To be said, Cubic has not, thus far, paid Iran the awarded sum of U.S.$2,808,519, nor is there any prospect of such payment. This amount, if received, will be recuperated from the remedy sought.

EXHIBIT 2-3

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. The absence of any single one of those three requisites would deny a judgment res judicata effect. See, e.g., A Treatise on the Law of Rest Judicata by Hulcan Chaud published by William Clowes & Sons, London, 1894. For a very recent publication, see African Journal of International March 1996 8, p. 38 et seq. Res Judicata and the Rule of Law in International Arbitration, Vaughan Louse.

3. U.S. Argument:

"Iran did not have any ownership interest in the items as of January 19, 1981, and they were therefore not the subject of any obligation of the United States under the Algiers Accords." Id. at 3, note 3.

Iran's Answer:

This is string the United States harps on indiscriminately in all cases without rhyme or reason. The United States does not make a single argument, either legally or factually, in support of this bare assertion. The law and fact in the present Case, for the reasons to be stated, fully support Iran's ownership of the equipment.

i) **Iran's Ownership Over the Items Is Established by Applicable Iranian Law**

First and foremost, the applicable law is Iranian law under which any item produced under the Contract automatically becomes Iranian property[3]. The Contract provides that:

[3] See Iran's Reply (Volume I) at 3.1.1.4.3.

EXHIBIT 12-4

> "This agreement shall be construed and performance thereof shall be determined in accordance with the laws of the Government of Iran in effect at the date of this Contract.". Doc. 236, Cubic, Attachment 1, PAGE NO EIGHT, 3. Applicable Law.

This clause is no doubt determinative of the issue of ownership. As stated in the ICC Award:

> "The Parties choice of law is binding on the Arbitral Tribunal pursuant to well established principles of international law..." Attachment 2, para 7.3.

No rule of law can, of course, override the application of Iranian law. As held by ICC:

> "[E]ven if a generally accepted principle of international law existed in this respect,[4] the Tribunal would only be authorized to apply it as a complementary and supplementary rule [emphasis in original], not as a rule in clear contradiction to an unambiguous provision of the Iranian law chosen by the Parties (Sec. 7.3 supra). Id. at para. 19.5 (e).

Iran's understanding of the choice-of-law clause, as held in the ICC Award, was such that:

> "[A]ll issues are exclusively [emphasis in original] by the laws of the Government of Iran in effect at the date of the Contracts (Terms of Reference, Sec. 3.3.3). Id. at para. 7.2.

ii) Factual History Corroborates Iran's Ownership

The factual background too fully confirms Iran's ownership of the items as follows:

a) Cubic has treated the system as Iranian property

Cubic admittedly in early 1979 "agreed to store the equipment for

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[4] The issue referred to is "interest". However, it is clear that the Tribunal refers to this aspect for being a contentious issue in explanation of a settled rule of international law.

EXHIBIT 2-5

the Iranian Air Force and "informed the IAF that it was packing the equipment for storage, as promised pending further advice from the IAF". Doc. 236, Cubic, Attachment 4 at 3.

b) Cubic was to sell the system, not as an owner, but as Iran's proxy

Cubic, as the record bears out, did not set about selling the equipment as its own, but on behalf of Iran. As noted in the ICC Award, Cubic in its letter of 20 May 1979, specifying the purpose of the ongoing negotiations at the time, suggested that:

> "C. DMOND [Iran] will give Cubic Corporation lawful authority to sell the system and make all required modification to the new customer specification prior to the sale... (This system has been built according to Iranian specifications). Needless to say that Cubic Corporation will deduct the costs of any modification to the system and claim a fair percentage as a brokerage fee (Defence and Counterclaim Exh. 71 in the translation of Cubic's legal expert Mr. Kativai). ICC Award at para 9.9.

Cubic again stresses its role as a broker with regard to proposed sale at the conclusion of that letter saying:

> "The status of the sale, in case of sale by this Corporation ("Respondent"), with respect to the cost of the necessary changes for the new buyer and brokerage fee, would be determined". ICC Award at para 9.11.

It was accordingly agreed by the parties, as found by the ICC, that "Cubic would try to resell the equipment". ICC AWARD, para 9.15.[5]

Viewed against this factual background, Cubic sold the ACMR to

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[5] Cubic' original proposal was that "Cubic would ship the system to Iran and Iran would sell it." ICC AWARD, para. 9.16(b). The second proposal related to the resale of the system by Cubic itself. Id. It was Major Makooei, from Iranian Air Force, who suggested that CUBIC sell the ACMR to a foreign country. ICC Award, para. 9.4. Attachment No. 2.

EXHIBIT 2-6

the Canadian Government on 16 September 1981, not as a principal or owner of the property, but in the capacity of a proxy on behalf of the Iran. Cubic did so without informing Iran of the sale in an obvious breach of its proxy responsibilities. Iran was, therefore, under the impression that Cubic had not succeeded in selling the system, when filing a claim with the Tribuna. As ICC has noted:

> "In view of the Cubic's unwillingness to adequately inform Iran on its resale efforts, Iran could reasonably but erroneously understand that such efforts had remained unsuccessful and that the system for which it had paid more than USD 12m, stood still practically ready to be installed and operated in Iran. When understood in such context, Iran's claim brought before the Iran-U.S. Claims Tribunal for fulfillment of Cubic's obligation to deliver and operate the system, was not inconsistent with the assumption of an agreement that Cubic should first attempt to resell the system." ICC Award, Attachment No. 2, at para 10.8.[6]

iii) <u>Iran's beneficial ownership</u>

Iran's Ownership of the ACMR, as a beneficial owner, may not be conveniently rejected in the face of a callosal payment of over

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[6] The ICC further noted in the same para that:

> "At this point of time, [when a claim was filed with this Tribunal against Cubic and the U.S. Government in January 1982] roughly two and half years had elapsed since the Parties had mutually agreed that the System should, if possible, be resold. During this long period, Cubic never informed Iran about its efforts to sell the equipment. When Iran began to inquire in 1981 about Cubic's willingness to enter into settlement negotiation as provided for in the Algiers Declaration of January 19, 1981, Cubic declined on October 21, 1981, to attend any meeting unless Iran would specify the outstanding issues relating to the "former contractual relation" which Iran wished to discuss (Defense and Counterclaim, Exh. 83 to 86). At that point of time, approximately one month had elapsed since Cubic had signed an agreement with the Canadian Government for the sale of an ACMR."

EXHIBIT 2-7

U.S. $ 12 million of the Contract price.[7] This payment, substantial as it is, could -- as found by the ICC -- "reasonably" lead Iran to believe that the system "stood still practically ready to be installed and operated in Iran". Id.

iv) Modifications cannot adversely affect Iran's ownership

The modifications effected on ACMR to make it suit the Canadian Government's required specifications does not negate Iran's ownership, nor does it transform Cubic's title of proxy into that of an owner. The implementation of these modifications had clearly been envisaged in Cubic's mandate for the sale of the system. See p. 6 supra.

In this connection, it is significant to note that, as attested by Cubic itself, the modifications done on the ACMR to adopt the Canadian Government's specifications required no more than 25,000 design man-hours. See Attachment No. 3 (Cubic's Memo of Discovery filed with the ICC, Vol. 11, Exh. 10, p. 16). This number of man-hours, compared to over 113,866 man-hours spent for the design of the Iranian ACMR alone (See Attachment No. 4 Cubic's Statement of Qualification, Vol. 14, Exh. 2), is not substantial. The value of these modifications -- on analogy with the Cubic's offer of an estimated modification cost of U.S.$1,450,000[8] for the sale of the ACMR to the U.S. Navy (See Attachment No. 4, Cubic's Statement of Qualification, Vol. 14, Exh. 4) -- is less than 1/8 of the approximate amount of U.S. $ 12,608,519 paid to Cubic by Iran.

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[7] The total payments made to Cubic is U.S. $12,608,519. See Attachment No. 5.

[8] The figure of U.S.$1,450,000 included -- in addition to the modification cost -- charges for installation, integration and flight test. As was also extensively testified by the experts, Mr. Van Aker and Mr. Hammer, at the ICC Hearing, the system was a "universal" or "standard" one, hence did not need the extensive modifications claimed by Cubic. See Cubic Hearing Minutes of 8-9 Nov. 1995, pp. 434, 461 and 510 at Attachment No. 7.

EXHIBIT 2-8

The ICC Award, though beset with inconsistencies and legally unjustifiable conclusions, takes note of the fact that Iran's ACMR was substantially used for the completion of the ACMR sold to Canada saying:

> "... Cubic had signed an agreement with the Canadian Government for the sale of an ACMR which allowed it to reuse substantial parts of the equipment manufactured for Iran (Sects 12.14 and 14 infra)". ICC Award, para 10.8. Attachment No. 2.

It also likewise confirms that:

> "... Cubic was able to reuse important parts thereof [of Iran's ACMR] in its sale to Canada and other components were sold to various agencies of the U.S. Government." Id. para. 15.6.

4. U.S. Argument:

"In addition, Iran caused its own loss by breaching and repudiating the Contract." Doc. 236, Cubic, at 3, note 3.

Iran's Answer:

The United States does not support this allegation of breach with a scintilla of evidence. The factual background recounted above, in fact, clearly establishes the baselessness of this assertion. As found by the ICC with a view to the parties' contacts and correspondence,

> "[T]he Parties agreed in 1979 to discontinue the Contracts at least for the time being; i.e. until the results of Cubic's attempt to resell the system would be known". ICC Award, para 10.11. Attachment No. 2.

It is therefore unknown on what basis the United States maintains that Iran terminated and repudiated the Contract. Does the United States believe that Iran should have continued to make additional payments to Cubic despite the parties' agreement for the

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discontinuation of the Contract? But, there is no legal foundation for such a position. The ICC, too, categorically rejected a similar suggestion by Cubic, holding that:

> "[I]t follows from Cubic's own proposal that no further payments were to be made by Iran prior to the resale". ICC Award, para 9.18. See also Id. para 9.19 9.20 and 10.4(c).

And finally, supposing there was some kind of breach of contract on the part of Iran, how would that violation make Iran's established ownership of the items disappear? There is, of course, no room for such an argument under Iranian law, or possibly in any other system of law. See also Iran's Reply at 4.2.1.

III.

DESCRIPTION OF ATTACHMENTS

Attachment No.1: Excerpts from CUBIC-Canadian Government's Agreement of 16 September 1981.

Attachment No. 2: Excerpts from ICC FINAL AWARD (5 May 1997).

Attachment No. 3: Excerpts from Cubic's Memo of Discovery filed with the ICC, Vol. 11, Exh. 10 of Cubic's filing with ICC, p. 16.

Attachment No. 4: Excerpts from Cubic's Statement of Qualification, Vol. 14, Exhs. 2 & 4 of Cubic's filing with ICC.

Attachment No. 5: Evidence of total payment of U.S. $12,608,519 to Cubic.

Attachment No 6: Excerpts from the original Iran-Cubic contract evidencing the number of generators to be procured and the AIS to be produced.

EXHIBIT 2-10

Attachment No. 7: Excerpts from ICC's November 1995 Hearing Minutes containing expert testimony that ACMR (the equipment at issue) was of universal application.

EXHIBIT Z-11

CERTIFICATE OF COMPLIANCE

I certify that this brief uses 14 point, proportionately spaced font and, in compliance with this Court's order of May 2, 2006, is no more than 25 pages.

Lewis S. Yelin
Attorney for the United States

Date: July 13, 2006

CERTIFICATE OF SERVICE

I certify that on this 13th day of July, 2006, I caused the foregoing Brief for the Appellees to be filed with the Court and served on counsel by causing by causing an original and15 copies to be delivered by OVERNIGHT DELIVERY to:

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