



## BACKGROUND

Plaintiffs are judgment creditors of Iran who seek to attach certain ancient Persian artifacts held by the University of Chicago and the Field Museum of Natural History (“the Museums”). Plaintiffs allege that these artifacts are the property of Iran and are subject to attachment in satisfaction of their judgment under either section 201 of TRIA or the attachment provisions of the FSIA, 28 U.S.C. §§ 1609, 1610. One of the collections plaintiffs seek to attach, the Chogha Mish Collection, is the subject of a claim by Iran against the United States at the Iran-U.S. Claims Tribunal in the Hague (“the Tribunal”). The United States filed a Statement of Interest (“First SOI”) in these proceedings on July 28, 2004 (Docket No. 20), explaining that the artifacts were not subject to attachment under either TRIA or FSIA. On March 3, 2006, the United States filed a Second Statement of Interest (Docket No. 145), addressing a further question raised by the litigation concerning whether parties other than the foreign sovereign have standing to assert that the property is immune from attachment. On November 16, 2007, following the Court’s ruling that immunity could only be asserted by the foreign sovereign itself and Iran’s appearance in this matter, the United States filed a Third Statement of Interest (Docket No. 300) recommending that the Court limit discovery to only that which was necessary for plaintiffs to respond to Iran’s Renewed Motion to Declare Property Exempt (Docket No. 199).

In its third Statement of Interest, the United States noted that the Court had, in its July 26, 2007 discovery order (Docket No. 281), raised several substantive issues relating to the United States’ position with respect to the artifacts in the Tribunal, including the issue of whether the United States has contested title to the Chogha Mish collection. The United States advised the Court that it was considering whether to present additional views on these issues following completion of whatever discovery was authorized. Thereafter, however, resolution of Iran’s

motion was deferred pending an appeal to the Seventh Circuit to address other issues, including the proper scope of discovery on Iran.<sup>2</sup> Following that appeal and the completion, on remand, of discovery and summary judgment briefing on whether or not the artifacts are immune from attachment, the United States now presents its views with respect to whether the Chogha Mish collection may be attached.

## ARGUMENT

As set forth further below, the Chogha Mish collection is not subject to attachment under either TRIA or FSIA because it is not a “blocked asset” as defined by TRIA; and because plaintiffs have not established any applicable exception to attachment immunity under FSIA.

### **I. The Chogha Mish Collection is Not a “Blocked Asset” of Iran.**

The parties’ summary judgment filings indicate that the following facts about the Chogha Mish collection are undisputed: In 1966, Iran loaned the Chogha Mish collection to the University of Chicago’s Oriental Institute (“the Institute”) for purposes of academic study, and the Institute returned most of the collection to Iran in 1970. *See* Plaintiffs’ Rule 56.1 Response to Iran’s Statement of Material Facts (“Plfs’ Rule 56.1 Resp. to Iran”) (Docket No. 657) ¶¶ 60-63. In 1982, Iran informed the Institute that some items of the collection were missing, and the Institute agreed to search for and return any inadvertently retained artifacts. *See id.* ¶ 64. Iran also filed a claim in the Iran-U.S. Claims Tribunal against the United States in 1983 related to the missing objects. *Id.* ¶ 65.

Section 201(a) of TRIA provides that “in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . the blocked

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<sup>2</sup> The United States filed *amicus curiae* briefs in the Seventh Circuit, *see* 2009 WL 8132813 (7th Cir. June 26, 2009), and in opposition to plaintiffs’ petition for a writ of certiorari from the Supreme Court. 2012 WL 1891593 (S. Ct. May 25, 2012). Neither brief, however, addressed the issues discussed herein, as they were not presented for decision.

assets of that terrorist party ... shall be subject to execution or attachment in aid of execution in order to satisfy such judgment.” Section 201(d)(2)(A) defines “blocked asset” as any asset “seized or frozen by the United States under section 5(b) of the Trading with the Enemy Act or under sections 202 and 203 of the International Emergency Economic Powers Act.” As previously explained in the United States’ first Statement of Interest, most of Iran’s assets that were blocked in response to the 1979 hostage crisis, including the Chogha Mish collection, were no longer subject to blocking following the signing of the Algiers Accords in 1981 and the issuance of Executive Order 12281, 46 Fed. Reg. 7923 (Jan. 19, 1981) (“Direction to Transfer Certain Iranian Government Assets”). *See* First SOI at 6-11; *see also Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 67-68 (E.D.N.Y. 2004) (noting that “[p]ursuant to the Algiers Accords, most Iranian assets were unblocked”).

Nevertheless, plaintiffs now contend that the collections at issue are blocked assets based on the Treasury Department regulation that defines the properties unblocked by E.O. 12281 as “all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities.” 31 C.F.R. § 535.333(a). The regulation further provides that a property interest is “contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset.” 31 C.F.R. § 535.333(c). Here, both Iran and the Institute agree that the Chogha Mish collection belongs to Iran. *See* Plfs’ Rule 56.1 Resp. to Iran ¶ 60; Museums’ Amended Motion for Summary Judgment (Docket No. 650) at 1-2; First SOI at 4-5. Plaintiffs argue, in sum, that title of the artifacts is “contested” because the collection is the subject of a claim before the Tribunal. *See* Plaintiffs’ Consolidated Response to Motions for Summary Judgment (Docket No. 655) at 39-40. However, the language of the regulation makes clear that for the asset to be “contested,” the

contest must be between Iran and the property holder (in this instance, the University of Chicago), *not* between Iran and a third party such as the United States. On this point, the First Circuit recently rejected the proposition that “[a]n asset can become ‘contested’ ...where the judgment creditor asserts Iran’s ownership of the property ... notwithstanding the absence of any contest between the actual holder and Iran.” *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 56-58 (1st Cir. 2013).<sup>3</sup>

Moreover, there has never been any contest as to the ownership of the Chogha Mish artifacts at the Tribunal. The matters in dispute between the United States and Iran turn on whether the United States fulfilled its obligations relating to the return of the collection, including whether Iran gave appropriate directions for transfer and sufficient indication to the United States that it required assistance in arranging for transfer of the artifacts. *See, e.g., Islamic Republic of Iran v. United States of America*, Case No. A-15 (II:A) (Iran-U.S. Claims Tribunal), Claimant’s Brief and Evidence (attached as Ex. 31 to Iran’s Motion for Summary Judgment (“Iran MSJ”) (Docket No. 648-4)); Response of the United States (attached as Ex. 30 to Iran MSJ (Docket No. 648-3); Claimant’s Brief and Evidence in Rebuttal (attached as Ex. 32 to Iran MSJ (Docket No. 648-4)). Because Iran, the Museums, and the United States all agree that that Iran owns the Chogha Mish collection, there exists no contest or dispute over its ownership.

Accordingly, because there is no basis for concluding that title is contested, the Chogha Mish collection is not a “blocked asset” and therefore not subject to attachment under TRIA.

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<sup>3</sup> In that case, plaintiffs sought to attach certain ancient Persian artifacts held by Harvard University and the Boston Museum of Fine Arts. Because Iran claimed no ownership interest in those artifacts, the First Circuit ruled that they were not contested and therefore not “blocked assets” under TRIA. *Id.* at 57-58.

## **II. Section 1610(g) of FSIA Does Not Provide a Basis for Attachment.**

While plaintiffs maintain that most of the artifacts at issue in this case are subject to attachment under the “commercial activity” exception to immunity provided in section 1610(a)(7) of the FSIA, they have abandoned this argument as to the Chogha Mish collection. *See* Plaintiffs’ Response to Iran’s Objections to January 18, 2008 Order (Docket No. 325) at 6 n.1. Instead, they contend that the Chogha Mish collection, as well as the other artifacts, may be independently attached under section 1610(g) of the FSIA. *See* Plfs’ Opp. at 48-49. This argument relies on an incorrect, overly broad reading of the language of § 1610(g) and an erroneous interpretation of its place within the framework of the FSIA.

In 2008, Congress amended 28 U.S.C. § 1610—the part of the FSIA that sets forth exceptions to immunity from attachment or execution—to add subsection (g), which provides that

the property of a foreign state against which a judgment is entered under section 1605A...is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of: (A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Section 1610(g) permits attachment of property in aid of execution on a judgment obtained against a foreign state under the FSIA’s terrorism exception to jurisdictional immunity without regard to whether the property belongs to the state itself or to an agency or instrumentality of the state.

Plaintiffs assert that this provision permits them to attach all of the collections at issue in this case because they have a judgment against Iran. But as the United States has argued before

the Second Circuit in *Hegna v. Islamic Republic of Iran* (Case No. 11-1582) (Docket No. 51), section 1610(g) does not serve as an independent exception to foreign sovereign immunity from attachment. Rather, Congress' evident purpose in enacting this provision was to override, in the context of suits against state sponsors of terrorism, the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983), which held that the separate juridical status of a foreign state's agencies or instrumentalities should generally be respected by our courts. Notably, subsections (A) through (E) of section 1610(g) specifically identify the very factors that courts have considered, post-*Bancec*, in determining an agency's or instrumentality's separate juridical status, and allows attachment of the property of an agency or instrumentality "regardless of" those factors.<sup>4</sup> Thus, section 1610(g) allows judgment holders to attach the property of a juridically-separate instrumentality of a foreign state in satisfaction of a terrorism judgment against the parent foreign state—but only if an existing exception to attachment immunity applies to the property.

In addition, section 1610(g) includes the vital proviso "*as provided in this section*," which on its face makes clear that the subsection is not an independent basis for attachment. *See* 28 U.S.C. § 1610(g) (emphasis added). In authorizing "attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of [the *Bancec* factors]"

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<sup>4</sup> In *Bancec*, the Supreme Court explained that instrumentalities of a foreign state are presumed to have separate juridical status, which can be overcome by a showing of a principal-agent relationship, or where recognition of the instrumentality's separate status would result in fraud or injustice. 462 U.S. at 629. Courts have distilled five factors from *Bancec* to be considered: "(1) the level of economic control by the government; (2) whether the entity's profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity's conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations." *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1381 n.7 (5th Cir. 1992); *see also Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1070-71 & n.9 (9th Cir. 2002) (same). These are the same factors set forth in 28 U.S.C. § 1610(g)(1)(A)-(E).

(emphasis added), the subsection incorporates by reference other provisions within section 1610 that specify the exceptions to attachment immunity for foreign sovereign property. Ignoring this important limitation, and construing section 1610(g) as a stand-alone exception, is not only counter to its plain language but would render the FSIA's other exceptions to immunity under sections 1610(a)(7) or (b)(3) superfluous. *See Harrell v. U.S. Postal Service*, 445 F.3d 913, 925 (7th Cir. 2006) ("Courts should avoid statutory constructions that render another part of the same provision superfluous.") (internal citation omitted). If all that were necessary to establish an exception to attachment immunity was to show that the property was being sought to satisfy a terrorism judgment, then there would be no need for the commercial activity exception set forth in those provisions.

Further, plaintiffs' expansive reading of subsection (g) would render section 1610 internally inconsistent. Sections 1610(a)(7) and (b)(3), which concern judgments that relate to a claim for which there is no immunity under section 1605A, require some relation to commercial activity on the part of the foreign state's property or by the foreign state agency or instrumentality as a condition of attachment of property in aid of execution. But because section 1610(g), which also relates to a judgment under section 1605A, has no such requirement, under plaintiffs' view the statute now both permits and precludes the attachment of foreign state property that has no relation to commercial activity. That construction makes no sense. The logical reading of section 1610(g) is that it was only intended to address the attachment of property belonging to agents and instrumentalities of state sponsors of terrorism—not create an additional exception to attachment immunity that directly contradicts and undermines the

existing exceptions related to precisely the same underlying judgment.<sup>5</sup> As the Supreme Court has held, “[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted).

In sum, section 1610(g) does not provide a freestanding exception to attachment immunity under the FSIA for those who hold a terrorism judgment, and plaintiffs have otherwise failed even to assert that any of the attachment immunity exceptions contained in the FSIA apply to the Chogha Mish collection.

### CONCLUSION

For the foregoing reasons, the Court should find that the Chogha Mish collection is exempt from attachment in this action under either TRIA or section 1610(g) of the FSIA.

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<sup>5</sup> For the reasons set forth herein, the United States disagrees with the analysis of courts that have held to the contrary. See *Ministry of Defense of Iran v. Cubic Defense Systems*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 6231403, \*19 (S.D. Cal. Nov. 17, 2013), *appeal pending* (holding that § 1610(g) “expanded the category of foreign sovereign property that can be attached” to “any U.S. property in which Iran has any interest” in order to assist victims of terrorism) (emphasis omitted); see also *Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 19 n.8 (D.D.C. 2011) (stating in dicta that “§ 1610(g) does not limit attachment to property used in ‘commercial activity’...and thus... removes from the victims the burden of specifying commercial targets...to help them receive justice and recover damages”). To the contrary, the United States believes this reading of section 1610(g) is not supported by the plain reading of its terms, because section 1610(g) expressly provides that an execution on a judgment must be “*as provided in this section*” – a plain reference to section 1610 – and, as explained above, any other reading renders section 1610 internally inconsistent.

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Respectfully submitted,

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