No. 00-20136

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NINA SCHRODER MAGNESS, AGNES SCHRODER ATKINS, and LEE ALEXANDER MAGNESS,
Plaintiffs/Appellees,

v.

RUSSIAN FEDERATION, et al.
Defendants,

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, and RUSSIAN STATE DIAMOND FUND
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

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

DAVID W. OGDEN
Acting Assistant Attorney General

LINDA JACOBSON
Assistant Legal Adviser
Department of State
2201 C St., N.W.
Washington, D.C. 20520

DOUGLAS N. LETTER
Appellate Litigation Counsel **(202) 514-3602**
Civil Division, Room 9106
U.S. Department of Justice
601 D Street. N.W.
Washington, D.C. 20530-0001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20136

NINA SCHRODER MAGNESS, AGNES SCHRODER ATKINS, and LEE ALEXANDER MAGNESS,

Plaintiffs/Appellees,

v.

RUSSIAN FEDERATION, et al.
Defendants,

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, and RUSSIAN STATE DIAMOND FUND

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29, the United States files this brief as *amicus curiae*, supporting the defendants/appellants Russian Federation, *et al.* The United States urges that the default judgment of well over $234 million against foreign sovereign defendants be set aside because of

improper service of process, so that this dispute can be litigated on its merits rather than through a default.

INTERESTS OF THE UNITED STATES

The United States has a strong interest in this case for several reasons.

First, the United States has a substantial foreign affairs concern that the Foreign Sovereign Immunities Act (hereafter "FSIA") be properly applied so that foreign states are brought into our courts only pursuant to the conditions set by Congress in that statute. As this Court has explained, "[t]he FSIA's purpose was to promote harmonious international relations." *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

In this instance, contrary to plaintiffs' contention, we believe that there was neither full nor substantial compliance with the FSIA service of process requirements, and that a foreign government should not be found liable by our courts under such circumstances.

Second, although the United States obviously wishes its citizens to be treated fairly while litigating against foreign governments, it also has a great stake in having the service of process rules followed so that the likelihood that those governments will appear in our courts to defend the merits of claims against them is increased. Having controversies involving foreign governments resolved on their

merits rather than through default judgments is clearly in the public interest. For the reasons described below, this goal is best achieved when service of process is accomplished as the FSIA provides.

Third, proper service of process against the United States in foreign courts is of enormous importance to the Federal Government. If United States courts follow the service rules established for suits against foreign states, we believe that practice will increase the likelihood that the United States will be treated properly in foreign courts, according to developed service of process rules, rather than through *ad hoc* procedures that individual judges deem sufficient in particular circumstances. Moreover, it is more difficult for United States officials to complain about improper service of process in foreign courts if our own courts are not following the rules.

In this case, the district court correctly found that the plaintiffs did not follow the service of process requirements of the FSIA. The district court nevertheless excused plaintiffs' failure because it believed that the Russian government defendants had "actual" notice of the suit here, and that plaintiffs "substantially complied" with the FSIA mandates. The second conclusion is wrong as a matter of law. Plaintiffs failed to follow (or even attempt to follow) key provisions of the FSIA service rules, despite the clarity and simplicity of those rules, and thus did not substantially comply with them. Accordingly, this Court need not in this case

resolve the issue of whether perfect compliance with the FSIA service of process rules is mandated in all cases; the record here shows that plaintiffs did not come close to substantially complying with those rules.

The court's first conclusion - that actual notice was received - finds no support in the record; there is no evidence that appropriate Russian government officials actually had proper notice before default was entered.

For these reasons, we urge that the default judgment here be vacated and the plaintiffs be given a reasonable time within which to serve the Russian government defendants properly. The United States expresses no views on the merits of the underlying controversy at this time, and whether the defendants might have jurisdictional defenses to plaintiffs' claims.[1]

---

[1] We do note, however, that a substantial question is raised here concerning plaintiffs' claims concerning actions by the Bolsheviks in 1918, nationalizing plaintiffs' property. Because we do not believe that the FSIA has retroactive application (see *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27(2d Cir.), *cert. denied*, 487 U.S. 1219 (1988)), there is a strong likelihood that foreign governmental actions taken at that time are absolutely immune from suit in our courts. In addition, there is considerable doubt that plaintiffs can state a cause of action under the FSIA through their allegations of nationalization of property in the 1990s.

STATEMENT

A. The Applicable Statutory Scheme – The FSIA

This case involves a suit brought by several members of the Magness family against the Russian state itself (the Russian Federation), the Russian Ministry of Culture, and the Russian State Diamond Fund. Because this suit is against a foreign government, it is controlled by the FSIA, the sole mechanism for a civil action against a foreign state in our courts. See *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 443 (1989); *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). This Court has also observed that the FSIA was enacted "to bring uniformity to determinations of sovereign immunity." *De Sánchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1390 (5th Cir. 1985).

Significantly for this case, under the FSIA, "personal jurisdiction depends not only on the applicability of an exception to sovereign immunity but also on service of process in compliance with 28 U.S.C. § 1608." *De Sánchez*, 770 F.2d at 1390 n.4. See 28 U.S.C. § 1330(b); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983); *Argentine Republic*, 488 U.S. at 435 n.3. An understanding of the FSIA service of process provisions is therefore essential here.

The FSIA states clearly in Section 1608 (28 U.S.C. § 1608) the rules governing appropriate service on foreign states and upon their agencies and

instrumentalities.[2] The House of Representatives report on the FSIA reveals that these service of process provisions were the product of careful development after studies carried out by "[a] number of bar associations" and after consultation with the Departments of State and Justice. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), at 11 (*reprinted at* 1976 USCCAN 6604, 6609).[3]

Of considerable importance here, this report further explains that "Section 1608 sets forth the ***exclusive*** procedures with respect to service on * * * a foreign state or its political subdivisions, agencies or instrumentalities." *Id.* at 23 (1976 USCCAN at 6622) (emphasis added). In addition, these service provisions were not crafted in isolation; they "are closely interconnected with other parts of the bill * * *." *Ibid.*

As described next, the FSIA established different methods of service, and Congress provided that "[t]here is a hierarchy in the methods of service." *Id.* at 24 (1976 USCCAN at 6623). Thus, a plaintiff is to use the methods set out in Section

---

[2] The text of Section 1608 is reprinted in Addendum A to appellants' opening brief.

[3] The Senate report on the FSIA is nearly identical to the House report, showing agreement between both bodies on the key provisions in the statute. See S. Rep. No. 1310, 94th Cong., 2d Sess., 23-25 (1976).

1608 in order. *Ibid.* Moreover, the rules differ depending upon the nature of the foreign sovereign defendant.

Under either set of rules, however, the methods of service prescribed by 28 U.S.C. § 1608(a) and (b) are mandatory – both subsections state that service "shall be made" in the manner specified – and 28 U.S.C. § 1608(c) provides that service shall be deemed to have been effected as of the date that a specific event occurs with respect to each method of service. See also Federal Rule of Civil Procedure 4(j)(1) (service on a foreign state or agency or instrumentality thereof "shall be effected" pursuant to 28 U.S.C. § 1608).

Service on a "foreign state or political subdivision of a foreign state" is controlled by Section 1608(a), which provides first for service pursuant to a special arrangement with the foreign nation at issue, or with an applicable international convention. (In this case, service on the defendants Russian Federation and Russian Ministry of Culture should be governed by Section 1608(a).) Neither of these special service provisions was available here. R. at 296-97.

When these methods are not available, service can be accomplished by "sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the

court to the head of the ministry of foreign affairs of the foreign state concerned * * *." 28 U.S.C. 1608(a)(3). Service shall be deemed to have been made under this method "as of the date of receipt indicated in * * * the signed and returned postal receipt." See 28 U.S.C. § 1608(c)(2).

The "notice of suit" required to be sent to the foreign state under paragraph (a)(3) (as well as paragraph (4), discussed below) is a notice "addressed to a foreign state and in a form prescribed by the Secretary of State by regulation." *Id.* at 1608(a). See 22 C.F.R. Part 93 (providing form and requirements of notice of suit).

The notice of suit is not a minor point; the House report addresses it specifically, explaining that "notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service." H.R. Rep. No. 94-1487, *supra*, at 12 (1976 USCCAN at 6609). Accord *id*. at 24-25 (1976 USCCAN at 6623).

If service cannot be made under paragraph (3) within 30 days, the plaintiff may provide two copies of the necessary materials for the district court clerk to send to the Director of Special Consular Services at the United States Department of State, one copy of which is then to be transmitted through diplomatic channels to

the foreign state. If this method is used, the State Department must send the district court a certified copy of the "diplomatic note" indicating when the papers were transmitted. *Id.* at 1608(a)(4). Service of process shall be deemed to have been accomplished under this method "as of the date of transmittal indicated in the certified copy of the diplomatic note." 28 U.S.C. § 1608(c)(1).

Different rules apply for service on "an agency or instrumentality of a foreign state." 28 U.S.C. § 1608(b). (That subsection appears to control service on defendant Russian State Diamond Fund. R. 488.)

This section also provides first for service pursuant to special arrangement or convention. 28 U.S.C. § 1608(b)(1) and (2). If, as here, there is none, service can be accomplished by delivering a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized to receive service for the foreign agency or instrumentality involved. 28 U.S.C. § 1608(b)(2). If service cannot be made under paragraph (1) or (2), it can be made, "if reasonably calculated to give actual notice," by delivery to an authority of the foreign state through a method designated in response to a "letter rogatory or request," or by a form of mail requiring return receipt from the court clerk to the foreign agency or instrumentality to be served, or as otherwise determined by the court involved. 28 U.S.C. § 1608(b).

B. This Litigation and the Service Attempted by Plaintiffs

1. The Magness family owned a piano factory and a mansion in St. Petersburg before the Russian Revolution, and these properties were expropriated by the Soviet government in 1918.[4] R. at 93-97. In recent years, the plaintiff Magness family members believed that changes in law within Russia might provide them certain legal rights concerning this property. They met with government officials in St. Petersburg in the 1990s, in an ultimately unsuccessful attempt to regain their property, and paid fees to Russian agencies in pursuing procedures for this purpose. At the same time, one of the family members purchased two antique pianos, but was not permitted to export them because they were deemed to be state treasures. R. at 90-93.

The Magness family members then filed this suit in federal district court in the Southern District of Texas against the Russian state defendants in July 1997. That court immediately heard plaintiffs' request for a TRO that would have precluded a traveling exhibit of Romanov family jewels from leaving the jurisdiction. In their complaint, plaintiffs alleged that Russia nationalized their

[4] The United States has little independent knowledge of the facts involved in this case, and our presentation is thus drawn from the allegations in the complaint and the rest of the district court record.

property twice (once in 1918 and again recently) and has now also confiscated and expropriated the antique pianos. R. at 1-15.

The Russian Federation was represented at the TRO hearing by United States private counsel. The court denied the TRO in July 1997. R. at 512-13. The case apparently then sat largely dormant, until in August 1998, the district court ordered plaintiffs to serve the summons and the complaint on the defendants before September 1, 1998. R. at 510.

As noted above, plaintiffs did not follow the provisions set out in the FSIA governing service of process. Rather than requesting the clerk of the district court to send the summons, complaint, and notice of suit (together with a translation of each) by mail, with return receipt, to the head of the Russian foreign ministry (as required for service on the Russian Federation and the Ministry of Culture) under 28 U.S.C. § 1608(a)(3), plaintiffs sent their complaint to the Texas Secretary of State for forwarding to Boris Yeltsin, the Russian Federation then-President, at the Kremlin, and directly to the Russian Deputy Minister of Culture in Moscow. R. at 495-502, 668-69.

The record shows that some persons signed for these documents, but it gives no indication who did so, and provides no further evidence of any kind who in the Russian government might have seen these documents after that time and when. R.

at 40, 41, 497, 498. In addition, without first attempting service under Section 1608(a)(3), plaintiffs sent the complaint (directly, rather than by request to the district court clerk) to officials at the U.S. State Department, and they also transmitted the complaint to the private attorneys who had appeared at the TRO hearing. R. at 500-02.[5]

As explained earlier, service on the Russian government itself and its Ministry of Culture should have been sent by the clerk of the court to the head of the Russian foreign ministry, and, if that method did not succeed after 30 days, by the clerk of the district court by certified mail to a designated U.S. State Department official, who would then transmit it through diplomatic channels to the Russian state. Under Section 1608(b) (for service on the Russian State Diamond Fund), if service was not made on an authorized agent, the complaint should have been sent pursuant to instructions in response to a letter rogatory to the proper Russian agency official.

With respect to the Russian Federation and the Ministry of Culture, there is no evidence in the record that plaintiffs ever attempted to serve the Russian foreign

---

[5] There is disagreement in the record on this point, but the private counsel who is listed in the district court docket sheet as counsel for the Russian defendants (Brendan D. Cook) stated that plaintiffs were told he represented Russia only in the TRO proceedings, and could not accept service of process for Russia after those proceedings ended. R. at 345-47, 596-97.

ministry by the proper method – much less that the foreign minister actually received the required materials. In addition, after it received plaintiffs' summons and complaint, the State Department explicitly informed plaintiffs that it would not transmit the documents to the Russian foreign minister because plaintiffs had committed several errors; specifically, plaintiffs had failed to attempt service first under Section 1608(a)(3) through the clerk of the district court to the head of the Russian foreign ministry, to refer in the summons to the 60-day period in which the defendants must answer the complaint, and to provide a notice of suit conforming to State Department regulations. (The State Department requirements are available through the internet and were made clear to plaintiffs' attorneys.) R. at 296-97, 320. The State Department gave plaintiffs' counsel advice on correcting these errors, and provided a contact should plaintiffs have questions. R. at 296-97, 318. There is no evidence that plaintiffs' counsel ever responded.

The record also gives no indication that plaintiffs attempted to fix the deficiencies in service identified by the State Department in order to meet the FSIA rules for service on the Russian Federation or its Ministry of Culture. In addition, there is no evidence that plaintiffs sent the complaint in response to instructions following a letter rogatory, or request the district court clerk to send the complaint

properly to the Russian State Diamond Fund, in conformity with the separate requirements for service on that entity under Section 1608(b)(3).

2.a. The Russian defendants did not timely appear before the district court. That court accordingly entered a default judgment in June 1999, for $234.5 million. R. at 95, 99. *Magness v. Russian Federation*, 54 F. Supp.2d 700 (S.D. Texas 1999).

The Russian defendants later moved to have the default judgment set aside, arguing that process had not been served properly under the FSIA, and thus that the district court had lacked jurisdiction to enter the default judgment. In addition, the Russian state defendants urged public policy considerations for setting aside the judgment because it was hindering cultural exchanges between the United States and Russia through plaintiffs' efforts to execute on the judgment against a traveling exhibit of Russian art treasures. R. at 343, 518-32.

Plaintiffs opposed the motion to set aside the default judgment, arguing that the Russian state defendants had waived any service problems and that there had been substantial compliance with the FSIA requirements. R. at 658-70, 706-13. In doing so, however, plaintiffs did not provide any evidence showing who within the Russian government had actually received notice of the summons and complaint, and when, or that anyone in the Russian Government had received a notice of suit,

the form mandated by the FSIA and prescribed by State Department regulations to explain the nature and significance of the documents.

b. On January 12, 2000, the district court denied the motion to set aside the judgment. R. 714-21. *Magness v. Russian Federation*, 79 F. Supp.2d 765 (S.D. Texas 2000).

The court noted that plaintiffs acknowledged that they had not complied with the FSIA service requirements. R. at 716. It found the case law mixed on whether complete compliance with the FSIA's mandates is required for jurisdiction or whether substantial compliance is sufficient (the court noted that there is no precedent within this Circuit on this point). R. at 715-16.

After describing the arguments of the parties, the district court stated that the Russian defendants had received "actual notice" of the proceedings. R. at 715. However, the court did not point to anything in the record supporting or explaining this conclusion, or discuss it in any way. R. at 714-15. The court nevertheless found the service provided by plaintiffs sufficient: "[T]echnical compliance with the [FSIA] would not serve the interests of justice or judicial economy." R. at 714-15. Accordingly, the court denied the motion to set aside the default judgment.

ARGUMENT

This Court has made clear that default judgments are not favored when the amount of the judgment against a foreign state is "very great," as it is here. See *Hester International Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 175 (5th Cir. 1989). Moreover, in *Hester*, this Court emphasized the preference against default judgments when foreign sovereign nations are involved: "It is in the interest of United States foreign policy to encourage foreign states to appear before our courts in cases brought under the FSIA. When a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal arguments." *Ibid.*, quoting *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551-52 (D.C. Cir. 1987).

For these reasons, other federal courts have vacated default judgments against foreign states so that litigation against those defendants can be resolved on their merits, rather than through default (even when those merits include jurisdictional defenses). See, *e.g.*, *Jackson v. People's Republic of China*, 794 F.2d 1490, 1495-96 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) (affirming district court decision

setting aside default judgment, and finding no jurisdiction for suit against foreign state under FSIA); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988) (same).

In this instance, the Russian defendants have in their opening appellate brief (at 8-9, 11) indicated their desire for the default judgment to be set aside so that they can appear and properly litigate this case. See Br. at 11 ("Had plaintiffs served appellants properly, they would have appeared and defended this action); *id*. at 8-9 (invoking this Court's language in *Hester*, quoted above, concerning the preference for deciding cases on their merits against foreign sovereigns).

The district court nevertheless declined to set aside the default judgment, stating that the Russian defendants had actual knowledge of this suit and that there had been substantial compliance with the service requirements of the FSIA. We believe these conclusions were mistaken, and that this Court can vacate the default judgment without resolving the issue that has divided other courts about whether absolute or substantial compliance with the FSIA is sufficient. As we argue below, the flaws in service here are serious enough as a matter of law so that no substantial compliance with FSIA requirements could be shown. In addition, there is no evidence in the record of actual notice of the sort required by the FSIA.

A. As the district court explained (R. at 715-16), and as the Russian defendants discuss in their opening brief (at 18-21), there is a split among both the federal courts of appeals and the district courts concerning whether full compliance with FSIA service requirements is necessary. That issue has not been decided by this Court.

We note, though, that not one of the court of appeals opinions cited by the district court (R. at 716) or by the plaintiffs in their papers below (R. at 667, 710-11) for the proposition that substantial compliance is sufficient deals with service under Section 1608(a) on a foreign state itself, as opposed to service on one of its agencies or instrumentalities (covered by Section 1608(b)).

By contrast, the D.C. Circuit in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153-54 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995), held that service on the Bolivian state was insufficient when made only on the Bolivian Ambassador and the Consul General in the United States, and on the Bolivian First Minister and Bolivian Air Force in La Paz, but not the Ministry of Foreign Affairs. The D.C. Circuit cited two other Circuit decisions in which service under Section 1608(a) was found deficient because, in the first a translation of the complaint had not been provided, and in the second service was made on the Ambassador rather than on the head of the foreign ministry. See *Gerritsen v. Consulado General de*

Mexico, 989 F.2d 340, 345 (9th Cir. 1993), *cert. denied*, 510 U.S. 828 (1994); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (service by mail on an embassy is precluded by the FSIA).

Thus, the court of appeals opinions that have addressed the subject have not allowed "[l]eniency" or "excused defective service" when dealing with service under Section 1608(a), which applies to two of the defendants here. See *Transaero*, 30 F.3d at 154.

Furthermore, in the analogous area of service of process on the United States and its agencies under Federal Rule of Civil Procedure 4(i), this Court has in a variety of cases upheld dismissal of cases against the United States and/or federal agencies when the service requirements set out in Federal Rule of Civil Procedure 4(i) have not been closely followed, even when federal officials have had actual notice of a suit. See, *e.g.*, *Flory v. United States*, 79 F.3d 24, 25-26 (5th Cir. 1996) (affirming dismissal for lack of proper service even when the United States actually responded on the merits, and plaintiff later failed to correct the service error or show good cause for defective service); *Peters v. United States*, 9 F.3d 344, 345-46 (5th Cir. 1993) (affirming dismissal when United States Attorney was not served properly, regardless of actual notice); *McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994) (affirming dismissal for failure to serve

United States Attorney properly, despite actual notice); *George v. U.S. Department of Labor*, 788 F.2d 1115 (5th Cir. 1986) (affirming dismissal for improper service on Attorney General).

With regard to service on the United States and its agencies, at least three other Circuits have endorsed the proposition that "[w]here the necessary parties in the government have actual notice of a suit, suffer no prejudice from a technical defect in service, and there is a justifiable excuse for the failure to serve properly, courts should not * * * construe [Rule 4(i)] so rigidly * * * as to prevent relief from dismissal." *Jordan v. United States*, 694 F.2d 833, 836 (D.C. Cir. 1982); accord *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984); *Zankel v. United States*, 921 F.2d 432, 436 (2d Cir. 1990).

In light of these various precedents, if substantial compliance is to be accepted by this Court for service under the FSIA, at a minimum it should require the plaintiff to demonstrate a good faith effort to comply with the methods prescribed by the FSIA, and have a justifiable excuse for its failure to succeed under these methods.

B. The record here cannot support a conclusion that there was substantial compliance with the FSIA service requirements.

First, as pointed out above, plaintiffs never provided or attempted to provide service, through the district court clerk, on the Russian foreign ministry. Second, when they asked the State Department to send the summons and complaint to the Russian defendants, they did not include the required notice of suit. R. at 296-97. Plaintiffs also have provided no evidence that they included the notice of suit in the documents they had the Texas Secretary of State forward either.

As explained earlier (*supra*, at 8), Congress believed the Notice of Suit provision important, discussing it in both the Senate and House reports, and expressly delegating to the State Department in the FSIA the responsibility to determine its form by regulation. See 28 U.S.C. § 1608(a).

The Department of State did not transmit the summons and complaint to the Russian government because of the defects discussed above. Accordingly, there is no basis for concluding that plaintiffs substantially complied with the requirements of Section 1608(a)(4), much less that the Russian government received actual notice through the State Department.

The requirement for service on the foreign minister of the foreign state involved is essential, and the failure even to attempt it wholly undermines any claim of substantial compliance. That ministry is the one most likely to be familiar with the practices of other nations and the proper way to deal with those nations and their

judicial systems. Service on the foreign ministry is thus best calculated to obtain the appropriate and timely response from the foreign government. Service on the foreign ministry obviously reduces the likelihood of a summons, complaint, and notice of suit being lost in the bureaucracy of a foreign government, or of these documents not being treated with the necessary amount of gravity.

Thus, Congress enacted the FSIA – after consultation with bar associations and the Departments of State and Justice – in a way designed to minimize friction with foreign governments and to accomplish the goal of having foreign governments actually appear in our courts. Plaintiffs here disregarded that expert legislative judgment.

Compliance with the requirement of formal service on the foreign ministry of a foreign state is also critical to the United States as it responds to suits in foreign courts. The Office of Foreign Litigation in the Civil Division of the Department of Justice regularly opposes assertions of foreign jurisdiction that fall short of what the United States considers proper service under international practice. For example, we have opposed an assertion of jurisdiction through mere notice by publication, naming the United States Ambassador as a defendant, with a 15-day response time, and where the ambassador saw the notice (Venezuela). And, we have opposed jurisdiction where a foreign attorney simply telephoned our embassy and informed

a secretary there that he was suing the United States Army (Honduras). Finally, we have also opposed jurisdiction where an AID mission secretary was merely handed an envelope concerning a suit (Peru, Bolivia).

In our view, none of these situations should constitute proper service. Moreover, the United States Government would not consider that it had been properly served if a foreign party merely provided the type of notice used here, such as delivery of a package addressed to "William Clinton, the White House," and delivery to a Deputy Secretary of a specific agency – such as the Department of Transportation or the Department of Health and Human Services – that might have dealings with foreign states, but lacks centralized responsibility for foreign relations, and does not have expertise in dealing with foreign judicial systems.

Accordingly, the United States Government has a strong interest in foreign judicial matters being brought to its attention through the State Department, which has a firmly established practice of coordinating expeditiously and efficiently with the appropriate office at the Department of Justice in dealing with such foreign matters. Service through other means runs a serious risk of delay and confusion, and is regularly opposed by the United States overseas.

This position is reinforced by generally accepted international practice, which does not even provide for the more liberal means of service in Section 1608(a)(3),

through a form of mail requiring return receipt by the clerk of the district court on the head of the relevant ministry of foreign affairs (which, as explained above, plaintiffs did not attempt to follow here).[6] Thus, Article 20 of the United Nations Draft Articles on the Jurisdictional Immunities of States and their Property (see Report of the International Law Commission on the Work of its 43rd Session (April-July 1991) of the United Nations General Assembly, at 145), explains that service of process is to be accomplished against a sovereign state, absent an international convention binding on that state or other means accepted by the state, by transmission through diplomatic channels to the Ministry of Foreign Affairs. And, the European Convention on State Immunity (11 I.L.M. 470 (1972)) provides in Article 16, that in a legal proceeding against a contracting state, competent authorities of the forum state shall transmit the documents by which such proceedings are instituted through diplomatic channels to the Ministry of Foreign Affairs of the defendant state. The same rule applies in, for example, the United

[6] Section 1608(a)(3) in effect affords the foreign ministry a means of accepting service at its option if the summons, complaint, and notice of suit (and a translation of each) are properly sent by the clerk of the court. Service by this method is deemed to be made only if the receipt is signed and returned. 28 U.S.C. § 1608(c)(2). If service is not accomplished (through return of a receipt signed by an authorized agent of the head of the foreign ministry) within 30 days, then service through transmission by the clerk though the Secretary of State for transmittal to the foreign ministry is the only approved method of service.

Kingdom State Immunity Act of 1978 (17 I.L.M. 1123 (1978)), and the Pakistan State Immunity Ordinance of 1981 (U.N. Legislative Series, Materials on Jurisdictional Immunities of States and their Property (1982), at 24).

Thus, the United States through FSIA Section 1608(a)(3) has already provided a liberalized means of process. In light of accepted international practice, the courts of this country should not fashion an even more lax method of service, as the district court did here.

There appears to be no compelling reason why the rules established by Congress could not be followed in this case. Obviously, there will be some special situations when a foreign country is in the middle of a revolution or great civil unrest or where the United States does not have diplomatic relations with the foreign country, and the normal service rules might not be fully available. But no such circumstances were present in this instance. In addition, the record in this case demonstrates that the State Department has made the service requirements – which are not onerous – easily available to the public, and, in this specific instance, pointed out clearly to plaintiffs' attorneys what the problems were. R. at 468-69. And, the State Department offered to assist plaintiffs by providing the name and telephone number of a staff person to answer questions. R. at 468. See also 22

C.F.R. Part 93 (describing proper service requirements). Yet, there is no record of plaintiffs' counsel attempting to follow the FSIA correctly.

C. Moreover, there is no evidence in the record to support the district court's conclusion that the Russian Federation, the Russian Ministry of Culture, or the Russian State Diamond Fund received actual notice.

The evidence placed in the record by the parties reveals that some persons – who might simply have been security guards at building entrances – signed at the Kremlin and the Ministry of Culture in Moscow for packages containing the summons and complaint here. R. at 497, 498. In addition, the Texas Secretary of State notified plaintiffs' counsel that copies of the summons and complaint had been sent by that office by registered mail to Boris Yeltsin in the Kremlin and to the Deputy Minister of Culture in Moscow, and that the return receipt bore the "Signature of Addressee's Agent." R. at 40-41. There is no record evidence that the documents were actually received by any Russian government official with responsibility for responding to a suit in a court in the United States, or any knowledge about how to do so.

In their district court papers opposing the Russian defendants' motion to set aside the default, plaintiffs provided no further information to show actual notice on any of the defendants. See R. at 655-70, 706-13. Rather, plaintiffs relied

largely on the fact that they had served the papers on the attorneys who appeared in the earlier TRO hearings. As noted earlier, Mr. Cook, the attorney listed in the district court docket sheet for the Russian defendants, explained that plaintiffs' counsel were told that he had no authority to represent Russia beyond the TRO hearing or to accept service of process. R. at 346.

Moreover, at the hearing on whether to enter a default judgment, the district court merely asked whether any appearance was being made for the defendants. Plaintiffs' counsel responded by explaining his attempts to notify a representative of a different, private party defendant (the American Russian Cultural Foundation, which plaintiffs have voluntarily dismissed from this case (R. at 338, 382-83)), and that he had attempted to notify the two attorneys who had appeared at the TRO hearing. R. at 383. The district court made no further inquiry as to whether the defendants had actually or properly been served, or had been notified of the hearing on the motion for a default judgment.

Under these circumstances, plaintiffs fell far short of meeting their burden of showing that the Russian defendants had the sort of actual notice of the case or of the default proceedings that the FSIA would require, even if we assume for the purposes of argument that substantial compliance with the FSIA's service requirements would suffice and that there was substantial compliance.

By contrast, the courts of appeals have found actual notice to foreign instrumentalities under Section 1608(b) in quite different situations, *e.g.*, when the defendant has hired counsel and actually moved to dismiss the complaint (see *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246, 1250 (6th Cir.), *cert. denied*, 510 U.S. 818 (1993)), or when the plaintiffs have served a ship's master, who was an official employed by the defendant and was the defendant's "general agent for conducting the ship's business," and the defendant's officers "immediately became aware of the suit" (see *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982). These circumstances are a far cry from the facts here.

CONCLUSION

For the foregoing reasons, the default judgment entered by the district court should be vacated for failure to serve process adequately on the defendants, and

plaintiffs should be given an opportunity to serve their summons and complaint properly under the FSIA rules so that this case can be resolved on its merits.

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

LINDA JACOBSON
Assistant Legal Adviser
Department of State
2201 C St., N.W.
Washington, D.C. 20520

DOUGLAS N. LETTER
(202) 514-3602
Appellate Litigation Counsel
Civil Division, Room 9106
U.S. Department of Justice
601 D St., N.W.
Washington, D.C. 20530-0001

May 30, 2000

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2000, I served original and six copies of the foregoing Brief for the United States as *Amicus Curiae* Supporting Appellants and a diskette copy upon the Clerk of this Court and two copies and a diskette to the following named counsel, by Federal Express overnight delivery:

Daniel B. Nelson, Esq.
1770 St. James Place
Suite 420
Houston, TX 77056

and served two copies of this brief and a diskette copy via U.S. Mail, First Class Postage prepaid, to:

Martin Mendelsohn, Esq.
Verner, Liipfert, Bernhard, McPherson
and Hand
901 15th Street, N.W., Suite 700
Washington, D.C. 20005

_____
DOUGLAS LETTER
Appellate Litigation Counsel