IN THE SUPREME COURT OF THE STATE OF NEW YORK,
QUEENS COUNTY

FU YU XIA Plaintiff, v. SAMUEL PARKINSON, *et al.* Defendants.	Case No. 7573/2016

STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

The United States, by and through its undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] to advise the Court of its views as to the impropriety of the Plaintiff's attempt to effectuate service by way of personal delivery of the summons and complaint to the Consulate General of the People's Republic of China in New York. As many courts have recognized, such service on a foreign consulate is inconsistent with both the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq*. ("FSIA") and the Vienna Convention on Consular Relations ("VCCR"). The United States regularly objects when a foreign court or other body attempts service through personal delivery to U.S. embassies and consulates abroad, and thus has strong reciprocity interests at stake. The United States therefore respectfully requests that the Court recognize that service of a lawsuit against China may be effected only in conformity with the FSIA's service provisions.

BACKGROUND

On June 30, 2016, the Chinese Consulate in New York received a summons and complaint in this case in English only via personal delivery. The complaint names the Consulate General as a defendant in Plaintiff's action for damages for injuries allegedly sustained as a result of actions taken by a security guard on a sidewalk outside the Consulate. Compl. at 2–4. The summons states that the Consulate is required to respond to the complaint within twenty days after service.

[1] This provision provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. It provides a mechanism for the United States to submit its views in cases in which it is not a party. *See, e.g.*, *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000).

DISCUSSION

The FSIA is "the sole basis for obtaining jurisdiction over a foreign state" in United States courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S 428, 434 (1989)); *see also Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). A lawsuit against a consulate is considered a suit against the foreign state itself for purposes of the FSIA. *See, e.g., Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 385 (S.D.N.Y. 2006); *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 345 (9th Cir. 1993). Personal jurisdiction exists under the FSIA where there is both subject matter jurisdiction and proper service. *See* 28 U.S.C. § 1330(a)–(b); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 151 (2d Cir. 2001) ("[S]ubject matter jurisdiction plus service of process equals personal jurisdiction under the FSIA.").[2]

The FSIA sets out, in hierarchical order, four exclusive methods for service of process on foreign states in 28 U.S.C. § 1608. The first two procedures allow for service according to a special arrangement between the parties or "an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(a)(1)–(2). If service cannot be made using either of these methods, it may 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.[3]

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[2] The United States takes no position at this time on the question of whether the court would have subject matter jurisdiction, which turns on whether an exception to foreign sovereign immunity would apply. *See* 28 U.S.C. §§ 1330(a); 1605.

[3] The most natural understanding of this text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work—*i.e.*, at the ministry of foreign affairs in the state's seat of government—not to some other location for forwarding. *See, e.g.*,

Id. at § 1608(a)(3). If service cannot be accomplished in that fashion within thirty days, it must be done under section 1608(a)(4), which provides for service

> by sending two copies 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 Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Id. at § 1608(a)(4). None of these options, however, permits personal delivery of a summons and complaint to a foreign state's consulate in the United States. Plaintiff therefore has failed to comply with the FSIA's requirements in this case.

Moreover, under the FSIA, unless service is pursuant to a special arrangement between the parties or accomplished in accordance with the requirements of an applicable international convention, the summons and complaint must be translated into the official language of the foreign state, and that state must be provided sixty days after service has been made to answer or otherwise respond to the complaint. 28 U.S.C. §§ 1608(a)(3)-(4), 1608(d). The twenty-day limit Plaintiff here has attempted to impose does not comply with these requirements. Courts have made clear that section 1608(a) "mandate[s] strict adherence to its terms, not merely substantial compliance." *Finamar Investors, Inc. v. Republic of Tajikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983).

Barot v. Embassy of Republic of Zambia, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent to foreign minister in state's capital city).

In addition, both China and the United States are parties to the VCCR, which provides that "[c]onsular premises shall be inviolable." 21 U.S.T. 77, art. 31. Courts have held that service of process on consular premises is contrary to this inviolability. *See Swezey v. Merrill Lynch*, 997 N.Y.S.2d 45, 47 (N.Y. App. Div. 2014); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012); Restatement (Third) of Foreign Relations Law § 466, note 2 (1987) ("Service of process at diplomatic of consular premises is prohibited."). Thus, under both the FSIA and the VCCR, the attempted personal service on the Chinese Consulate in this case is inappropriate and ineffective.

The United States has strong reciprocity interests in the enforcement of the applicable rules governing service of process on sovereign states, including application of and strict adherence to the requirements of the FSIA and the VCCR. The United States has long maintained that the United States must be served in a manner consistent with international law when it is sued abroad, and the United States regularly objects when such service does not take place. If the FSIA and VCCR were interpreted to permit parties in the United States to serve papers personally on a consulate, it could make U.S. consulates abroad vulnerable to similar treatment by foreign courts, contrary to the United States' consistently asserted view of the law.

Absent service in strict compliance with the FSIA, 28 U.S.C. § 1608(a), this Court does not have personal jurisdiction over the People's Republic of China in this case.

CONCLUSION

In accordance with the authorities set forth herein, and given the United States' substantial policy interest as described, the United States respectfully urges the Court to recognize the impropriety of personal service on the Chinese consulate.

Dated: August 2, 2016

Respectfully Submitted,

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