

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ioan Micula, et al., Petitioners, v. Government of Romania, Respondent	Civil Action No.: 1:17-CV-02332-APM
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STATEMENT OF INTEREST OF THE UNITED STATES

In response to the Court’s Request for Views to the Department of State, *see* Order, June 11, 2018 (ECF No. 23), and pursuant to 28 U.S.C. § 517,¹ the United States, through the Department of Justice, submits the following Statement of Interest.

I. Introduction

On June 11, 2018, the Court issued an Order requesting “assistance from the United States Department of State before ruling on the Order to Show Cause” currently pending and relating to Respondent Government of Romania and its counsel. *See* ECF No. 23, at 3. The Court requested the views of the United States on whether (and, if so, when) it has ever received notice from the Romanian Minister of Foreign Affairs, by way of a “note verbale” (also known as a “verbal note”) or otherwise, concerning how the Government of Romania will accept service of process. *Id.* The United States

¹ 28 U.S.C. § 517 provides in full: “The 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.”

appreciates the Court’s invitation. In addition to answering the Court’s specific questions, the United States also sets forth its position that, as a matter of international law, service of legal process on a sovereign government by mail is not proper for a sovereign that has not consented to such service. Because this principle of international law may affect how the United States is treated in foreign courts, the United States believes that it is important to present its position on the matter in this case, as more fully elaborated below.

II. Discussion

A. Neither the Department of State nor the Department of Justice have found a copy of Romania’s note verbale or evidence indicating receipt of the note.

With respect to the question posed by the court, “whether the Government of Romania has ever communicated to the United States Department of State specific requirements for service of process under Article 10(a) of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 261 (‘Hague Service Convention’), when the Government of Romania is a named defendant in a civil suit” (ECF No. 23, at 1), the Department of State represents that it has not found any record of such a communication.

With respect to the 2015 template note verbale² that is Exhibit B to Romania’s Memorandum of Law to Show Cause (ECF No. 18), the components of the Department of State most likely to have received such a note directly or indirectly are:

- The Bureau of European and Eurasian Affairs;
- The Bureau of Consular Affairs;

² Exhibit B appears to be a template for a note verbale intended to be sent by Romanian embassies to the ministries of foreign affairs where those embassies are located, for example, from the Romanian Embassy in Washington, D.C., to the U.S. Department of State.

- The Bureau of Administration (which maintains records of diplomatic correspondence between the Department of State and foreign embassies);
- The Office of the Legal Adviser; and,
- The U.S. Embassy in Bucharest, Romania.

None of these components has located a version of the Romanian note verbale based on the text of Exhibit B. However, the lack of issuance or receipt of a note verbale does not constitute a waiver by Romania of an objection to service by mail upon the Government of Romania as discussed below.

Within the Department of Justice, the Civil Division's Office of Foreign Litigation, Office of International Judicial Assistance ("OIJA"), is not aware of the note or of this requirement for service on Romania. OIJA is the United States' Central Authority for purposes of service under the Hague Service Convention.

B. The United States does not consent to service of process upon itself by postal channels under Article 10 of the Hague Service Convention.

The United States submits additional views related to the Court's inquiry. In the view of the United States a sovereign foreign government's mere lack of objection pursuant to Article 10 of the Hague Service Convention has no relevance to the question of whether service of process by mail on an embassy is a legally permissible form of service on that sovereign. Such service by mail on a sovereign government, barring express consent, is not proper as a matter of customary international law.

The United States does not consent to service of process upon itself by postal mail, even in the absence of an objection pursuant to Article 10 of the Hague Service Convention. The United States recently affirmed this position before the Supreme Court of the United States in *Water Splash Inc. v. Menon*. While that case turned on whether an individual Canadian citizen could be properly served via mail with process issued out of a

Texas state court (*see* 137 S. Ct. 1504, 1505 (2017)), the United States noted in an amicus curiae brief the distinction between service on an individual *citizen* as opposed to a *sovereign* government. *See* Brief of the United States as Amicus Curiae in Support of Petitioner, at 19 n. 6, Case No. 16-254, 2017 WL 382689, at *19 n. 6 (S. Ct. Jan. 24, 2017). The Solicitor General went on to state that the United States does not consent to service of process via mail upon itself:

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, provides the exclusive means of service for purposes of suing a foreign state in a U.S. court. *See* 28 U.S.C. 1608(a)(1)-(4); Fed. R. Civ. P. 4(j)(1). Section 1608(a) does not provide for service by a plaintiff on a foreign sovereign through postal channels without the foreign sovereign's consent. Similarly, service on the U.S. Government cannot be effected through Article 10, even though the United States does not object to Article 10 service by postal channels for private individuals or companies.

Id. (internal quotation marks and citation omitted). The United States affirmed this position through a public guidance document issued in January 2018. *See* U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention*, 2 (Jan. 12, 2018), <https://www.justice.gov/civil/page/file/1036571/download>.

In becoming parties to the Hague Service Convention, neither Romania nor the United States objected pursuant to Article 10(a) of that Convention and therefore the Convention does not limit the freedom to send judicial documents, by postal channels, from abroad to persons in either country. *See* Hague Service Convention, U.S. Central Authority page, available at: <https://www.hcch.net/en/states/authorities/details3/?aid=279>. However, otherwise applicable law would still apply to service by postal channels. As the Supreme Court recognized in *Water Splash*, “in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are

met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.” 137 S.Ct. at 1513 (citation omitted). With respect to foreign litigation against governments, as discussed above, service by mail on an embassy, barring consent, is not proper as a matter of customary international law. Thus, in litigation against the United States, both in Romania and in other foreign countries, the United States consistently objects to service by mail on its embassies, instead insisting on service through OIJA, if served via the Hague Service Convention or through other applicable service conventions, or through diplomatic channels.

III. Conclusion

In conclusion, the United States has no record of receipt of the Romanian note verbale discussed in ECF No. 18 in this case. Further, the United States reiterates its long-standing position that it does not consent under Article 10 of the Hague Service Convention to service of process via mail on its embassies, consulates, or other diplomatic outposts. Instead, the United States continues to insist on service upon itself through OIJA (if served via the Hague Service Convention or through other applicable service conventions) or through diplomatic channels.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, a copy of the foregoing was filed and served via the CM/ECF system, which will serve a Notice of Electronic filing upon all counsel of record, including the following:

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