

COMMENT

OUT OF SERVICE: THE CAUSES AND CONSEQUENCES OF RUSSIA'S SUSPENSION OF JUDICIAL ASSISTANCE TO THE UNITED STATES UNDER THE HAGUE SERVICE CONVENTION

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1. INTRODUCTION

Somewhere in the Foreign Ministry of the Netherlands, nestled in the “Mecca of international law,”¹ there is a file containing the ratification instruments for the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.² A researcher confined to this Dutch filing cabinet could reasonably conclude that judicial assistance flows freely between Russia and the United States under the Convention. Both states have ratified it,³ and neither country has entered

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¹ See, e.g., Guillaume Sacriste & Antoine Vauchez, *The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s*, 32 LAW & SOC. INQUIRY 83, 89–90 (2007) (observing that the capital of the Netherlands has been considered the “Mecca of international law” since the early 1920s).

² Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 26, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention or Convention] (designating the depository location for the instruments of ratification).

³ Hague Convention on Private International Law, Status Table: 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 [hereinafter Hague Service Convention Status Table] (providing a comprehensive listing of countries and their signatory status regarding the Hague Service Convention. See also RSM

reservations or declarations expressly declining to recognize the other's rights under the Convention.⁴

This commitment to mutual judicial assistance should be a triumph for the Hague Conference. Russia and the United States have fundamentally different legal systems⁵ and a uniquely complicated political relationship.⁶ Setting aside the antagonism that often characterizes Russo-American relations,⁷ simply building a workable transnational litigation bridge between a civil and a common law jurisdiction would be a significant feather in the Hague Conference's cap.⁸

Russo-American judicial cooperation in the world beyond the Convention's pages, however, leaves much to be desired. Russia effectively severed Hague Service Convention ties with U.S. courts in July 2003 and continues to rebuff efforts to restore "normal judicial cooperation."⁹ Though this policy is purportedly grounded in Russia's interpretation of Article 12 of the Convention, this Note will demonstrate that Russia's legal

Production Corp. v. Fridman, Civ. A. No. 06-11512, 2007 WL 2295907, at *3 (S.D.N.Y. Aug. 10, 2007) (approaching analysis of service under the Hague Service Convention "with the understanding that the convention is currently in force" between Russia and the United States).

⁴ The Hague Conference on Private International Law maintains a comprehensive listing of each member state's declarations and reservations on its website. Hague Service Convention Status Table, *supra* note 3.

⁵ Russia and the United States feature civil and common law legal systems, respectively. See, e.g., Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1107 n.125 (2008) (identifying major civil and common law jurisdictions). As discussed in Section 3, *infra*, the development of the Russian legal community and its role in private international law policy-making also differs significantly from the corresponding narrative in the United States.

⁶ See *infra* Section 3.

⁷ See, e.g., Alexei Arbatov, *Eurasia Letter: A Russian-U.S. Security Agenda*, FOREIGN POL'Y, Autumn 1996, at 102, 117 (describing the fragility of "nonconfrontational" relations between the United States and Russia).

⁸ See, e.g., Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1190 (2004) (identifying the "promised reconciliation" of differing civil and common law litigation practices as a major goal of the Hague Conference regime).

⁹ Bureau of Consular Affairs, U.S. Dep't of State, Russia Judicial Assistance, http://travel.state.gov/law/info/judicial/judicial_3831.html (last visited Dec. 6, 2009) [hereinafter State Department Website]. This source also provides a brief summary of the breakdown in Hague Service Convention relations from the perspective of the U.S. government. See also *Kuklachev v. Gelfman*, No. 08-CV-2214 (CPS), 2008 WL 5068860, at *2 n.2 (E.D.N.Y. Nov. 24, 2008) (noting Russia has suspended judicial cooperation with the United States, although it remains a signatory to the Hague Service Convention).

argument is pretextual. Analysis of Russia's Hague Service Convention participation in the context of the country's foreign policy agenda, judicial system, and legal culture suggests that the collapse of the Convention channel was caused by the very differences the Hague Conference is supposed to overcome.

Exploration of the factors behind Russia's suspension of Convention cooperation with the United States invites discussion of the implications for parties in U.S. courts seeking to effect service on Russian soil, and for the future of transnational litigation generally. Each of these issues will be addressed below.

First, however, a quick overview of the Hague system is in order. The remainder of this Section will survey the Hague Service Convention regime, identify the Convention's status under Russian and U.S. law, and review basic facts surrounding the Russo-American dispute over the application of the Convention between the two states.

1.1. *The Hague Service Convention: Origins, Importance, and Structure*

The Hague Service Convention is a product of the Hague Conference on Private International Law [hereinafter Hague Conference], an "intergovernmental organization with its own legal personality under public international law."¹⁰ The Hague Conference is the premiere international body working to develop a unified private international law regime.¹¹ The Hague Service Convention itself, with fifty-nine contracting states including all of the members of the G8,¹² is intended to apply in "all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."¹³ The Hague Service Convention's status as the standard legal

¹⁰ Andrea Schulz, *The Accession of the European Community to the Hague Conference on Private International Law*, 56 INT'L & COMP. L.Q. 939, 939 (2007).

¹¹ *Id.* at 949. See also Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 313 (2008) (describing the Hague Conference as "the leading international organization devoted to facilitating international judicial cooperation through multilateral treaties").

¹² Hague Service Convention Status Table, *supra* note 3.

¹³ Hague Service Convention, *supra* note 2.

framework governing transnational service is unlikely to change in the near future.¹⁴

A key feature of the Hague Service regime is the “Central Authority.”¹⁵ Under Article 2 of the Hague Service Convention, each state party must establish a Central Authority to act as an international service clearing house, receiving requests for service from courts abroad and then effecting service within its borders.¹⁶ The Central Authority’s transmission of foreign judicial documents defuses a potential “diplomatic breach-of-sovereignty concern,” as the country in which service is sought uses its own officials to effect service.¹⁷ Though creation of a Central Authority is mandatory,¹⁸ member states can and have consented to alternate methods of service under the Convention¹⁹ in addition to the basic required Convention channel; these alternate methods include postal and non-Hague diplomatic channels.²⁰ Whether service is made through a Central Authority directly or through another approved Convention channel, “[c]ompliance with the Hague [Service] Convention is of paramount importance to ensure subsequent recognition of a judgment in a Hague signatory country.”²¹

¹⁴ See Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining “Postal Channels” Under the Hague Service Convention*, 55 U.C.L.A. L. REV. 205, 213 (2007) (noting “there is significant potential for the Convention to continue to broaden its reach across borders”).

¹⁵ *Id.* (characterizing the Central Authority as “the centerpiece and principal innovation of the Convention” regime).

¹⁶ For a summary of the relevant features of the convention see *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698–99 (1988).

¹⁷ Donald C. Dowling, Jr., *Forum Shopping and Other Reflections on Litigation Involving U.S. and European Businesses*, 7 PACE INT’L L. REV. 465, 474 (1995).

¹⁸ *Id.*

¹⁹ See *Schlunk*, 386 U.S. at 699.

²⁰ Hague Service Convention, *supra* note 2, art. 10. See also Hawkins, *supra* note 14, at 214.

²¹ Yvonne A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 236 (2003). Dowling also emphasizes the heightened importance of proper service in international litigation. Dowling, *supra* note 17, at 473 (“Many U.S. judgments against foreign defendants have been rendered unenforceable due to service of process defects established in foreign courts at the enforcement stage.”).

1.2. *Acceptance and Interpretation of the Hague Service Convention under U.S. and Russian Law*

Both the United States and Russia have signed and ratified the Convention.²² The United States Supreme Court considers the Convention self-executing;²³ under “the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”²⁴

The Russian Federation also considers itself bound by the Convention and has passed implementing legislation to that effect [hereinafter Russian Implementing Statute].²⁵ The Russian Constitution features a provision similar to the U.S. Supremacy Clause, mandating that treaties concluded by the Russian Federation take precedence over conflicting domestic legislation,²⁶ unless they are declared unconstitutional by the federal Constitutional Court.²⁷

Russia and the United States observe the same basic principles of treaty interpretation. Russia is a party to the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention],²⁸ while the United States largely abides by the Vienna Convention’s terms,

²² Hague Status Table, *supra* note 3.

²³ See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 637 n.175 (2008) (citing *Schlunk*, 486 U.S. at 699-700) (characterizing the Hague Service Convention as self-executing).

²⁴ *Schlunk*, 486 U.S., at 699.

²⁵ Federal’yi Zakon RF ot Feb. 12, 2001 N. 10-FZ “O Prisoedinenii Rossiiskoi Federatsii k Konventsii o Vruchenii Za Granitsei Sudebnykh i Vnesudebnykh Dokumentov po Grazhdanskim ili Torgovym Delam” [Federal Law dated Feb. 12, 2001 No. 10-FZ “On Accession of the Russian Federation to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters”], Ros. Gaz. Feb. 15, 2001. [Hereinafter Russian Implementing Statute]

²⁶ Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 15, cl. 4 (“Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.”).

²⁷ *Id.* art. 125, cl. 6 (mandating that “[a]cts or certain provisions thereof, which are recognized as unconstitutional, shall lose force; international treaties of the Russian Federation, which do not correspond to the Constitution of the Russian Federation, shall not be implemented or used.”).

²⁸ See, e.g., Peter Krug, *Internalizing European Court of Human Rights Interpretations: Russia’s Courts of General Jurisdiction and New Directions in Civil Defamation Law*, 32 BROOK. J. INT’L L. 1, 45-46 (2006) (observing that Russia is a party to the Vienna Convention on the Law of Treaties).

recognizing them as customary international law.²⁹ In particular, the United States has invoked – thereby implicitly recognizing – the Vienna Convention protocols governing termination or suspension of treaties in the event of material breach by a state party.³⁰

1.3. *The Breakdown of Russo-American Hague Service Convention Relations*

As noted above, each party to the Convention must establish a Central Authority to process transnational service requests.³¹ There has, however, been some dispute as to whether the duties of the Central Authority must be carried out by government officials, or whether they can be delegated to a private company³² and, in either case, whether a fee can be charged for effecting service on behalf of a foreign party.

The United States brought this issue to the forefront of Hague Conference politics when it outsourced the duties of its Central Authority to a private company. The process commenced with a series of letters to the Hague Conference beginning in 2002 in which the United States announced its intention to initiate (and, eventually, its successful completion of) this privatization process. The U.S. Department of Justice ultimately awarded the contract to Process Forwarding International (“PFI”).³³ Throughout the process, the Department of Justice explicitly maintained that it was merely delegating the tasks of the Central Authority and not actually designating a new Central Authority or transferring its ultimate responsibilities as Central Authority.³⁴

²⁹ See, e.g., Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 299–300 (1988) (describing instances in which the U.S. government has demonstrated that it considers itself bound by terms of the Vienna Convention).

³⁰ *Id.* at 300; see also Vienna Convention on the Law of Treaties, art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

³¹ See *supra* Section 1.1.

³² See Emily Fishbein Johnson, Note, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up For Bid?*, 37 GEO. WASH. INT’L L. REV. 769, 778–79 (2005) (describing American efforts to construe the Hague Convention terms more broadly in order to allow private process servers to act for the Central Authority).

³³ Letter from United States to Hague Conference Depositary (Aug. 21, 2003), <http://www.hcch.net/upload/outsourcing14.pdf>.

³⁴ *Id.*

The United States formally announced to the Permanent Bureau of the Hague Conference that PFI was assuming the duties of the Central Authority on April 15, 2003.³⁵ Since then, PFI has exercised exclusive authority to transmit outgoing requests for service of process abroad and to process incoming service requests as it discharges the duties of the United States Central Authority under Article 2 of the Convention.³⁶ Since June 1, 2003,³⁷ PFI has charged a processing fee to cover its costs.³⁸

Overall, PFI's tenure as the U.S. Central Authority has been successful. PFI has achieved much faster processing times in effecting service in the United States than the U.S. Marshals that carried out this duty previously, reducing turnaround time from six months to around six weeks.³⁹ Though a handful of Hague Service Convention member states have registered objections to the PFI privatization,⁴⁰ it generally enjoys "international acceptance."⁴¹

Nevertheless, the Russian government has chosen to interpret the imposition of a fee for PFI's services as a fundamental breach of the Convention.⁴² A month after PFI began charging fees, "Russia

³⁵ Press Release, United States of America Central Authority under the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Apr. 15, 2003), http://www.hcch.net/index_en.php?act=events.details&year=2003&varevent=5.

³⁶ Johnson, *supra* note 32, at 781.

³⁷ State Department Website, *supra* note 9.

³⁸ Currently, the processing fee charged by PFI is \$95 per request. See Letter from United States to Hague Depository, *supra* note 33.

³⁹ Johnson, *supra* note 32, at 782, 789 (concluding that outsourcing to PFI was a success).

⁴⁰ These objections and the countermeasures these states employ are discussed below. Russia and Korea are currently the only two countries in which PFI's designation as the U.S. Central Authority precludes all Hague Service Convention assistance. *Id.* at 789.

⁴¹ *Id.* at 782 (noting that the 2003 Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions determined that the "terms of the Convention do not preclude a Central Authority from contracting activities under the Convention to a private entity, while retaining its status as Central Authority and ultimate responsibility for its obligations under the Convention").

⁴² For a brief description of the events that led Russia to claim the Convention had been breached from a Russian perspective, see Aleksandr A. Chikalov, *Mezhdunarodnoe usynovlenie v Rossiiskoi Federatsii: Sudebnye porucheniia po semeinym delam s uchastiem inostrannogo elementa* [International Adoption in the Russian Federation: Judicial Service in Family Matters Involving International Elements] (Sept. 13 2008) available at <http://www.allpravo.ru/diploma/doc39p/instrum6233/> (Russ.).

unilaterally suspended all judicial cooperation with the United States in civil and commercial matters.”⁴³ That fall, a Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Convention convened at the Hague Conference to discuss the role of private contractors under the Convention. The Special Commission’s report unequivocally states that each state party is free to “determine its own model” of Central Authority organization, including “contracting activities under the Convention to a private entity” while retaining the formal status and responsibility of the Central Authority under the Convention.⁴⁴ The Russian Federation declined to support this recommendation and reserved its position.⁴⁵

Over a year later, on December 3, 2004, Russia deposited a declaration with the Dutch Foreign Ministry in its capacity as keeper of the treaty repository formally explaining its opposition to the sorts of fees imposed by the United States, though the declaration does not mention any specific country or contractor. The declaration reads:

The Russian Federation assumes that in accordance with Article 12 of the Convention the service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed. Collection of such costs (with the exception of those provided for by subparagraphs a) and b) of the second paragraph of Article 12) by any Contracting State shall be viewed by the Russian Federation as refusal to uphold the Convention in relation to the Russian Federation, and, consequently, the Russian Federation shall not apply the Convention in relation to this Contracting State.⁴⁶

⁴³ State Department Website, *supra* note 9.

⁴⁴ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS 10 (Nov. 20, 2003), http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf [hereinafter SPECIAL COMMISSION REPORT]. The Special Commission included representatives of 57 member states. *Id.* at 3.

⁴⁵ State Department Website, *supra* note 9.

⁴⁶ See Russian reservations, declarations, and understandings, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965, available at <http://www.hcch.net>

A series of meetings at which the U.S. interpretation of the Convention has been endorsed by the Hague Conference has failed to persuade Russia to modify its position.⁴⁷

2. RUSSIA'S APPEAL TO ARTICLE 12: FISHY CIRCUMSTANCES AND INTERNATIONAL LAW SUGGEST THAT THE ARTICLE 12 ARGUMENT IS A RED HERRING

Russia's explanation for its decision to suspend Convention assistance to the United States appears pretextual for a number of reasons. To begin with, the odd timeline of the Russo-American dispute and Russia's own approach to its Hague Service Convention obligations suggest that Russia's legal argument may be insincere. The weakness of Russia's position under international law further suggests that considerations other than compliance with international legal obligations influenced Russian policy in this case. This is the case regardless to whether the Russian declaration is analyzed as a reservation or as a countermeasure. Finally, the text of Russia's pre-reservation ratification legislation indicates that Russia had long understood and accepted that fees might be charged for effecting service before radically changing its position in 2003.

2.1. *The Curious Timing of Russia's Hague Service Convention Participation and Policies Reveal Three International Law Violations*

The lag time between Russia's accession to the Convention, its suspension of Convention assistance to the United States, its formal reservation, and its fulfillment of its own obligations under the treaty raise a red flag. As a party to the Vienna Convention,⁴⁸

/upload/decl14_ru.pdf, translated in Hague Conference on Private International Law, Declarations Reservations, http://www.hcch.net/index_en.php?act=status.comment&csid=418&disp=resdn (last visited Nov. 12, 2009); see also State Department Website, *supra* note 9 (reprinting and briefly discussing the Russian declaration).

⁴⁷ Hague Conference on Private International Law, Seminar, Ekaterinburg, Russ., May 15-16, 2008, *Hague 1965 Service Convention & Hague 1970 Evidence Convention*, http://www.hcch.net/upload/ekaterinburg_conclusions_e.pdf [hereinafter Ekaterinburg Seminar]; Hague Conference on Private International Law, Second Seminar, Saint Petersburg, Russ., Jan. 30-31, 2007, *Service of Process Under the Hague 1965 Service Convention*, http://www.hcch.net/upload/spseminar_concl_e.pdf.

⁴⁸ See Krug, *supra* note 28 and accompanying text.

Russia is obligated to abide by its provisions, including those governing preservation of a treaty's object and purpose⁴⁹ and those regulating treaty reservations.⁵⁰ By unilaterally suspending the Convention with regard to the United States, entering an invalid reservation, and failing to abide by the terms of the Hague Service Convention, Russia demonstrated a cavalier attitude toward international legal obligations that is at odds with the country's hard-line interpretation of Article 12 of the Convention.

2.1.1. *Suspension of the Convention in 2003 Violated International Law*

International law applies to all states "and every state is obliged to give it effect."⁵¹ A foundational principle of international law is *pacta sunt servanda*; even a domestic constitutional conflict does not excuse treaty violations under international law.⁵² In any case, no such conflict exists in Russia. In addition to Russia's constitutional approval of the supremacy of international treaties,⁵³ domestic Russian legislation on treaty interpretation and application mirrors Article 18 of the Vienna Convention, providing that actions by a treaty signatory which would deprive a treaty "of its object and purposes" violate international law.⁵⁴ Taking its cue from the Vienna Convention, Russian legislation would allow suspension of the nation's treaty obligations in the face of a material breach by another state party.⁵⁵ However, the U.S. privatization and fee structure are simply not a material breach of the Convention. The Hague Conference

⁴⁹ Vienna Convention, *supra* note 30, art. 18.

⁵⁰ See, e.g., Francesco Parisi & Catherine Ševčenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1, 8 (2003) (describing provisions of the Vienna Convention governing reservations).

⁵¹ Kim M. Forcino, Note, *International Service of Process: The Trend Moves Away From Uniformity*, 8 PACE INT'L L. REV. 485, 499 (1996) (citing LOUIS HENKIN ET AL., INTERNATIONAL LAW 149 (3d ed. 1993)).

⁵² See, e.g., William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251 (2006) (examining the intersection of international law principles and the U.S. domestic legal system).

⁵³ See Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution], *supra* notes 26–27 and accompanying text.

⁵⁴ WILLIAM E. BUTLER, THE LAW OF TREATIES IN RUSSIA AND THE COMMONWEALTH OF INDEPENDENT STATES: TEXT AND COMMENTARY 49 (2002).

⁵⁵ *Id.* at 200.

addressed the issue three decades ago, explaining that the primary problem of fees was the difficulty “in determining the amount of and obtaining a check for payment in a foreign currency,” not the charging of fees or any particular fee amount.⁵⁶ These problems are now more easily overcome than they were in 1977. It does not help the Russian case that, under similar circumstances, the Soviet Union charged a processing fee for handling letters of request for judicial assistance under the Moscow Agreement prior to Russia’s accession to the Hague Service Convention.⁵⁷

Nor is there any indication that delegating duties to a private company is a material breach, as long as the United States retains ultimate responsibility, which it has.⁵⁸ Indeed, discussion in the Russian legal community has advocated such outsourcing to improve Russia’s own Hague Service Convention performance.⁵⁹ To this end, Russia currently uses commercial courier services to transmit requests abroad and commercial translation services to translate outgoing requests from Russian into the necessary language—practices mentioned with approval by the Hague Conference.⁶⁰ Such use of private companies to support improved performance of a country’s Convention obligations thus only appears to bother Russia when it takes place in the United States.

⁵⁶ Georges A.L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, 57 *LAW & CONTEMP. PROBS.* 3, 6 (1994).

⁵⁷ Tatyana Gidirimski, *Comment, Service of United States Process in Russia Under Rule 4(F) of the Federal Rules of Civil Procedure*, 10 *PAC. RIM L. & POL’Y J.* 691, 702 (2001).

⁵⁸ See Letter from United States to Hague Conference Depositary, *supra* note 33 (stating that the U.S. has decided to outsource the Central Authority’s service of process activity to a private company).

⁵⁹ See A.E. Zueva, *Problemy primeneniia gaagskoi konventsii 1965 goda O vruchenii sudebnykh i vnesudebnykh dokumentov po grazhdanskim i torgovym delam, ARBITRAZHNYE SPORY*, [Problems/Questions in Applying the 1965 Hague Convention on Service of Judicial and Extrajudicial Documents in Civil and Commercial Matters], Mar. 23, 2007, available at <http://www.kadis.ru/daily/dayprof.phtml?id=36360> (suggesting that the “American experience” with a private organization responsible for forwarding Hague service requests could be successfully applied in Russia).

⁶⁰ See Ekaterinburg Seminar, *supra* note 47 (noting the great progress that has been made in Russia with regard to the “effective implementation” of the Hague Service Convention, especially in expediting service requests).

2.1.2. *Russia's Reservation after Ratification Is Ineffective Under the Vienna Convention*

Russia's violation of the Convention is not cured by its statement, even if one interprets its declaration regarding Article 12 as a reservation.

The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."⁶¹ The language of the Vienna Convention indicates that reservations must be made prior to ratification.⁶² As noted above, Russia ratified the Hague Service Convention in 2001, suspended judicial cooperation in 2003, and formally entered its reservation in 2004.⁶³ Russia's reservation thus came too late to satisfy the requirements of the Vienna Convention, violating the Convention's implied prohibition of reservations after ratification and failing to cure Russia's continuing violation of the Convention with regard to the United States.

2.1.3. *Russia Failed to Provide a Functioning Central Authority for Four Years, Violating a Fundamental Hague Service Convention Obligation*

Russia's strict stance regarding Article 12 of the Convention appears peculiar given the country's failure to provide member states access to a functioning Central Authority of its own until 2005.⁶⁴ In fact, the Russian government first identified its Central

⁶¹ Vienna Convention, *supra* note 30, art. 2(1)(d).

⁶² See, e.g., Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 331 (2005) (noting that "there is no basis in the Vienna Convention on the Law of Treaties for a reservation after ratification").

⁶³ See *supra* Section 1 (providing an overview of the Hague Service Convention).

⁶⁴ See Service of Process Under the Hague 1965 Service Convention—A Seminar of the Hague Conference on Private International Law, October 4-5 2005, available at http://www.hcch.net/upload/concl14_2005en.pdf ("welcoming" the Russian government's designation of a Central Authority); see also Zueva, *supra* note 59 (noting that the Russian Federation signed and ratified the Convention in 2001, but only designated the Ministry of Justice as its Convention "Central Authority" in 2005).

Authority by presidential decree only in August of 2004.⁶⁵ Insistence on a fine point of treaty interpretation hardly seems appropriate coming from a state that has failed to meet the most basic obligation of the treaty regime.⁶⁶

2.2. *Russia's Implementing Legislation Anticipated Reciprocal Fees and Alternative Central Authorities*

Russia memorialized the terms of its accession to the Convention in a federal statute.⁶⁷ This statute indicates in two ways that the Russian Federation expected regimes of reciprocal fees to exist. First, Article 26 of the statute specifically authorizes state parties to request reimbursement for service-related expenses, and notes that “when a state requests [such fees], any other agreeing state may request reciprocal fees from that state.”⁶⁸ Second, the statute features a “dog that didn’t bark.” Article 12 of the statute provides that a state may refuse service under the Convention where the service requested is beyond the authority of the court addressed, or where such service would infringe state sovereignty or damage state security.⁶⁹ Assuming that *expressio unius est exclusio alterius* translates into Russian, these specific grounds for refusing service preclude additional rationales not expressed in the statute.⁷⁰

⁶⁵ Ukaz Prezidenta Rossiiskoi Federatsii ot Aug. 24, 2004 N. 1101 “O Tsentral’nom Organe Rossiiskoi Federatsii Po Konventsii O Vruchenii Za Granitsei Sudebnykh i Vnesudebnykh Dokumentov Po Grazhdanskim Ili Torgovym Delam” [Decree of the President of the Russian Federation dated 24 August 2004 No. 1101 “Regarding the Central Authority of the Russian Federation under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters”] available at http://www.minjust.rostov.ru/index.php?option=com_content&task=view&id=60&Itemid=48 (designating the Russian Ministry of Justice as Convention Central Authority).

⁶⁶ See Hawkins *supra* note 14, at 213–15 (discussing the essential importance of the Central Authority in the Hague Service Convention system).

⁶⁷ See Russian Implementing Statute, *supra* note 25 and accompanying text.

⁶⁸ *Id.* art. 26.

⁶⁹ *Id.* art. 12.

⁷⁰ Research has not revealed any indication that the U.S. Hague Service Convention interpretation might conflict with the Russian Constitution, which would be a conceivable alternative ground for Russia’s refusal to uphold its Convention obligations toward the United States. See Konstitutsiia Rossiskoi Federatsii [Konst. RF] [Constitution] art. 125 cl. 6 (Russ.) (mandating that “[a]cts or their certain provisions recognized as unconstitutional shall become invalid; international treaties and agreements not corresponding to the Constitution of the Russian Federation shall not be liable for enforcement and application”).

2.2.1. *The Opinion of the Special Commission and State Practice Confirm That the United States' Hague Service Convention Practices Are Legal*

As noted above, the Special Commission clearly indicated that the United States may privatize and charge a fee for its Central Authority functions.⁷¹ This opinion is only strengthened by evidence of state practice.

Under international law, concrete actions taken by states are "weighed most heavily as evidence of state practice."⁷² It is thus significant that other countries charge fees to cover the costs of service. Canada, for example, charged a fee for effecting service under the Convention before the United States outsourced to PFI.⁷³ Other states, such as Italy and China, have responded to the charging of fees by PFI by merely charging reciprocal fees rather than suspending cooperation entirely.⁷⁴ Russia's hard-line refusal to extend any judicial assistance under the Convention whatsoever is a clear outlier in this context.

2.2.2. *As a Countermeasure, Russia's Suspension of Cooperation is Excessive*

Interpreting Russia's suspension of Convention assistance to the United States as a countermeasure, it once again appears that Russia is in violation of its international legal obligations. Under international law, countermeasures must be deployed for the purpose of inducing the other state's "future compliance with international law" and "must be proportionate to the violation they seek to remedy."⁷⁵ Thus, for example, states that object to the

⁷¹ See Special Commission Report, *supra* note 44 (stating that each state party is free to "determine its own model" of Central Authority organization, including "contracting activities under the Convention to a private entity" while retaining the formal status and responsibility of the Central Authority under the Convention).

⁷² Stephanie L. Kotecki, Comment, *The Human Rights Costs of China's Arms Sales to Sudan: A Violation of International Law on Two Fronts*, 17 PAC. RIM L. & POL'Y J. 209, 214 (2008) (citation omitted).

⁷³ See Johnson, *supra* note 32, at 786 ("Prior to PFI's contract, Canada was the only signatory to the Hague Service Convention to declare a specific fee for service of process... Still other states impose reciprocal fees upon countries charging fees for service.").

⁷⁴ *Id.*

⁷⁵ John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIM. JUST. 627, 648

United States charging fees for service through PFI have charged reciprocal fees for service requests originating in the United States.⁷⁶ Russia, meanwhile, has elected to suspend performance of its obligations under the treaty entirely. Though non-performance might be an allowable countermeasure under some circumstances,⁷⁷ it hardly seems proportionate where lesser measures, namely the charging of reciprocal fees, are readily available and are just as likely to encourage the United States to adopt Russia's position.

3. ALTERNATIVE EXPLANATIONS FOR RUSSIA'S HAGUE SERVICE CONVENTION POLICY TOWARD THE UNITED STATES

It thus appears unlikely that international law motivated Russia to adopt its interpretation of the Convention. Rather, the facts of the Russo-American Hague Service Convention dispute are consistent with alternative explanations characterizing the Russian suspension of judicial cooperation as a foreign policy conflict, not a legal decision. This theory is borne out by contemporary political developments in the Russo-American relationship, which underwent a dramatic shift just as Russia's Hague Service Convention policy toward the United States suddenly changed. It is also consistent with structural and historical characteristics of the Russian legal system which make Russian private international law policy particularly susceptible to executive-branch influence relative to other nations, including the United States.

(2008). See also Henning Grosse Ruse-Khan, *A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations*, 11 J. INT'L ECON. L. 313, 329 (2008) (applying countermeasures principles in the context of World Trade Organization disputes, noting that "the general regime on countermeasures in public international law explicitly provides that a state injured by a wrongful act may only take countermeasures against the state responsible in order to induce that state to comply with its obligations") (internal quotation marks and citation omitted).

⁷⁶ See Johnson, *supra* note 32, at 786 (noting that countries such as Italy and China have adjusted to require payment for certain service of process after this day).

⁷⁷ Dehn, *supra* note 75, at 649 ("Countermeasures are 'limited to the non-performance for the time being of international obligations of the State taking' the countermeasures.") (citation omitted).

3.1. *The Iraq War and the Hague Service Convention Dispute: Matching Timelines*

After September 11, 2001, Russian President Vladimir Putin was the first foreign leader to call U.S. President George W. Bush to offer his condolences and assistance.⁷⁸ The sincerity of Russian support was demonstrated by significant, concrete Russian help in the early stages of Washington's Global War on Terror, including the exercise of Russian influence in Central Asia to allow the use of airspace and airfields critical to operations in Afghanistan.⁷⁹ This cooperative spirit extended to arms reductions talks that same year, suggesting that a new era had dawned in Russian foreign policy towards the United States.⁸⁰

However, as the United States prepared to invade Iraq in the spring of 2003, Russian support melted away. Putin ultimately made it clear that he "firmly opposed" the invasion.⁸¹ The Iraq question was widely considered a bellwether for the future of Russian foreign policy toward the United States,⁸² and seems to have indeed been a turning point in relations between the two countries. Since the invasion, the Russo-American relationship has been marked by a deepening series of disagreements.⁸³

⁷⁸ See, e.g., Robin Wright, *Ties That Terrorism Transformed*, L.A. TIMES, Mar. 13, 2002, at 4 (referencing the Putin call).

⁷⁹ See, e.g., Editorial, *Good From Evil: Terrorism United U.S., Russia to End Arms Race*, BRADENTON HERALD (Florida), Nov. 16, 2001, at 10C (emphasizing the importance of Russia's role in the fight against terrorism where Russia and the U.S. have "put aside differences and allied against a common enemy," bin Laden and his Al Qaida network).

⁸⁰ See, e.g., Bob Kemper, *Russia, U.S. Go Forward on Arms: Nuclear Weapons, ABM Pact on Table*, CHI. TRIB., Oct. 22, 2001, at 1 (reporting that Bush and Putin had "made progress on a plan to dramatically reduce their nations' nuclear arsenals"); see also Editorial, *Putin's Terrible Dilemma*, INT'L HERALD TRIB., Mar. 8, 2003, at 6 (observing that Putin had taken "sizeable political risks" at home by supporting U.S. efforts to secure Central Asian basing for U.S. troops and U.S. policy regarding the Anti-Ballistic Missile Treaty).

⁸¹ C. J. Chivers, *Russia Parades Its Military In an Echo of Soviet Days*, N.Y. TIMES, May 10, 2008, at A9.

⁸² See, e.g., Michael Wines, *Putin's Daunting Choice: Which West to Join*, N.Y. TIMES, Feb. 16, 2003, at A12 (discussing the decision Russia must make between supporting either Europe or America).

⁸³ See Peter Grier, *Crises Cast Doubt on Bush's Strategy*, CHRISTIAN SCIENCE MONITOR, Aug. 20, 2008 (noting the shift in relations between the United States and Russia from the first Bush-Putin meeting in 2001 to the 2008 Russian invasion of Georgia); see also David Rising, *Russia: Better U.S. Ties Will Take Time*, CHI. TRIB., Feb. 9, 2009, at 17 (noting hiccups in U.S. relations with Russia, including disputes over NATO expansion and American military bases in Central Asia); Fred Hiatt,

Russia's embrace of the Hague Service Convention and subsequent decision to consider the United States in breach of the Convention corresponds roughly with the timeline described above, with a positive development in 2001 followed by a marked downturn in relations in the summer of 2003. Russia acceded to the Hague Service Convention in 2001, with the Convention entering into force in Russia that same year.⁸⁴ However, in July of 2003, as the war in Iraq continued, Russia notified the United States that it would no longer process U.S. requests for service sent pursuant to the Hague Service Convention.⁸⁵

3.2. *The Role of Civil Law Discomfort With Common Law Litigation Practices: Present, But Not Decisive*

Brought up in the civil law tradition, Russian lawyers tend to approach litigation and service of process in particular quite differently from their common law counterparts. As Born observes, “[c]ivil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state’s own officials and in accordance with its own law.”⁸⁶ This is certainly the case in Russia, which does not officially recognize service other than that effected by—not merely through—Russian courts.⁸⁷ Judges in Russia, in keeping with standard civil law practice, are responsible for directing pretrial litigation in areas reserved for the parties themselves in common law systems.⁸⁸ Since the gap between the two systems is so wide,

A Russia Reality Check, WASH. POST, B7, Feb. 8, 2009 (describing conflicting foreign policies of Russia and the U.S. since the fall of the Soviet Union). Given the recent controversy over the role of Russian influence in the Kyrgyz government’s decision to reconsider the United States’ use of Manas Air Force Base in Bishkek, the contrast between the current state of affairs and Russia’s strong support in Central Asia in 2001 is especially stark.

⁸⁴ Service Convention Hague Status Table, *supra* note 3.

⁸⁵ See State Department Web site, *supra* note 9.

⁸⁶ GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 774 (1996) (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 471, cmt. B (1987)).

⁸⁷ See Hague Conference on Private International Law, Response Russian Federation to 2008 Service Questionnaire 19 (2008), available at <http://hcch.e-vision.nl/upload/wop/2008russianfederation14.pdf> [hereinafter RUSSIAN HAGUE QUESTIONNAIRE] (noting “[m]ethods other than a formal service are not provided for in the Russian legislation”).

⁸⁸ See, e.g., Gidirimski, *supra* note 57, at 696 (discussing the role of the judge in the Russian court system vis-à-vis pre-trial discovery).

and the potential for offense to civil law judges by common law litigators so great, bridging this difference is a major challenge the Hague Service Convention and its ilk must overcome, as their critics often mention.⁸⁹

Though it is difficult to isolate legal-cultural distance as a cause, it is interesting to note that the overwhelming majority of incoming requests for service reported by the Russian Federation Central Authority between 2004 and 2007 are from other civil law countries, with Great Britain hovering near the bottom of the list as the sole exception.⁹⁰

Yet the civil law/common law distinction alone does not explain Russia's suspension of judicial assistance solely with the United States. Though Great Britain is near the bottom of the list, it is still on the list, indicating that common law systems themselves are not so repugnant to Russia that it refuses to deal with them all. Further, the Russian implementing statute creates a mechanism to interface with a common law system.⁹¹ Thus, in practice and on paper, it seems Russia is prepared to cooperate with states that have common law legal systems. A deeper analysis into Russian legal culture is therefore necessary to determine why the Russian government refuses to cooperate with the United States.

3.3. *Russian Legal History and Culture and the Development of Russian Private International Law Policy*

Particularly from an American perspective, private international law in Russia seems difficult to distinguish from "public" foreign policy. As discussed above,⁹² Russia is a civil law country, requiring far more direct court participation in pre-trial service and evidence gathering procedures than is common in the United States.⁹³ Yet, beyond this basic distinction, there is a

⁸⁹ See, e.g., Carbonneau, *supra* note 8, at 1190-91 (describing the limited utility of the Hague conventions because of their failure to reconcile common law and civil law trial differences).

⁹⁰ RUSSIAN HAGUE QUESTIONNAIRE *supra* note 87, at 9.

⁹¹ Russian Implementing Statute, *supra* note 25, art. 23.

⁹² See *supra* Section 3.2.

⁹³ See, e.g., Helen Hershkoff, *Integrating Transnational Legal Perspectives Into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 492-93 (2006) (highlighting distinction in service regimes between civil and common law jurisdictions); see also Johnson, *supra* note 32, at 777 (noting that distinctions between private and public law matters in civil law countries are relatively "complex"); Gidirimski, *supra* note 57, at 695 (noting "U.S. litigants are generally

traditional melding of public and private legal relationships in Russia,⁹⁴ and a subordination of the law and lawyers to decision-makers up the chain that results in a fundamentally different approach to private international law in Russia. Sadly, “law and lawyers have not traditionally been accorded much power or status in Russia.”⁹⁵ Legal developments in Russia are thus not guided by the legal profession, but are rather taking place in a field that has long been subordinated to power-centers elsewhere in the society. It is thus necessary to consider this private international law dispute not merely in terms of the relationship between two legal establishments, but the relations between two fairly hostile states.⁹⁶ This is consistent with a long history of private international law policy’s place in the Russian executive’s toolbox of foreign policy options, as described below.

3.3.1. *Imperial Russian Private International Law Policy*

Russian private international law policy has its foundations in Russia’s early participation in the formation of the formal modern private international law establishment. The Russian Empire was a founding member of the Hague Conference, and a party to the Conference’s first Hague Convention, the Hague Convention on Civil Procedure, which entered into force on May 23, 1899.⁹⁷ Czar Nicholas II was active in international organizations of the time, playing an “instrumental” role in disarmament conferences that same year.⁹⁸ This policy of active engagement abroad led scholars to conclude that international institutions “played important roles

unaccustomed to the view held by civil law countries that service of process is a sovereign act that must be carried out by state officials according to state law”).

⁹⁴ See FRANCES NETHERCOTT, *RUSSIAN LEGAL CULTURE BEFORE AND AFTER COMMUNISM: CRIMINAL JUSTICE, POLITICS AND THE PUBLIC SPHERE* 146 (2007) (observing, in the context of Russian criminal law reform, that the distinction between the private and public spheres has been “traditionally a blind spot in Russian legal culture”).

⁹⁵ GORDON B. SMITH, *REFORMING THE RUSSIAN LEGAL SYSTEM* 1 (1996).

⁹⁶ See *supra* Section 3.1. (explaining recent breakdown of diplomatic relations between the United States and Russia following the Iraq war).

⁹⁷ Droz, *supra* note 56, at 3.

⁹⁸ Alvin Z. Rubinstein, *Moscow’s Diplomacy in International Organizations*, in *INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE: ESSAYS IN HONOR OF GEORGE GINSBURGS* 339, 339 (Roger Clark et al. eds., 2001).

in Russia's diplomacy of safeguarding and advancing state interests."⁹⁹

After the October Revolution of 1917, the attitude of the Russian government to the outside world became somewhat more complicated. Pragmatic use of private international law channels, however, continued.

3.3.2. *Private International Law in the Soviet Era*

As the Western world began to accept the Soviet government as a long-term member of the international establishment, the Soviet foreign policy administration expressed a willingness to participate in international organizations—even with non-socialist countries.¹⁰⁰ In the 1930s, the Soviet Union thus entered into various international agreements, many of which had private international law implications. These included international commercial arbitration agreements of various sorts,¹⁰¹ and the 1935 “Moscow Agreement” between the Soviet Union and the United States.¹⁰² However, while these agreements concerned commercial relationships, they were hardly “private” international law. Given the politicization of commercial activity in the Soviet Union, this is unsurprising. More importantly, this was consistent with Soviet international law theory, which generally maintained that international law “directly affects only the rights and duties of the state proper,” not private citizens.¹⁰³

Trade agreements with foreign countries were doubly compartmentalized, as the Soviet state's ideological and foreign policy commitments naturally made the Soviet Government wary of allowing private citizens direct contact with non-Soviet

⁹⁹ *Id.*

¹⁰⁰ *See id.*, at 340 (discussing the famous Litvinov speech of September 18, 1934 and stating that there was nothing “theoretically unacceptable” about all the Soviet states engaging in an association with non-socialist states).

¹⁰¹ *See, e.g.,* William B. Simons, *The Enforcement of Foreign Arbitral Awards Under Russian Law: The (Ab)Use of The Public Policy Doctrine in Russian Courts*, in *INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE* 373, 399 (Roger Clark et al. eds., 2001) (discussing Soviet-era international arbitration agreements between the Soviet Union and other nations).

¹⁰² The Moscow Agreement remained an important element in Russo-U.S. relations even after the fall of the Soviet Union. *See* Gidirimski, *supra* note 57, at 706 (discussing applicability of the “Moscow Agreement” in 2001, prior to Russia's Hague Service Convention accession).

¹⁰³ GEORGE GINSBURGS, *FROM SOVIET TO RUSSIAN INTERNATIONAL LAW : STUDIES IN CONTINUITY AND CHANGE* 1 (1998).

enterprises.¹⁰⁴ Thus, all foreign trade from the 1930s through the Gorbachev years was conducted through a government monopoly administered by Foreign Trade Organizations ["FTOs"].¹⁰⁵ These FTOs were in turn the subjects of international arbitration agreements between the Soviet Union and various Western countries, described as a "logical comprise to a mutual suspicion . . . of each other's judicial and political systems."¹⁰⁶

As the agreements were conducted on a case-by-case basis, there was surprisingly little consistency from treaty to treaty. The Soviet Union's trademark "uniformity and standardization" in other political and economic policy thus did not apply to trade treaties, even concerning such important issues as the terms of a public policy exception.¹⁰⁷ Characterized by expediency, these agreements apparently gave "little regard to . . . systematic and theoretical issues . . ."¹⁰⁸ In addition, these agreements were generally vague on procedural details such as mechanisms for bringing enforcement actions.¹⁰⁹

Nor was the Soviet Union keen to recognize customary international law as a gap-filler. Soviet legal theory "emphasized the place of the treaty" as the principal source of international law to the detriment of customary international law.¹¹⁰ This was consistent with the Soviet government's general wariness of international law that it had not taken part in making, as such law "was considered to have taken shape under the influence of capitalist states and to contain propositions that did not square with the Soviet Union's approach."¹¹¹ However, while even Soviet scholars recognized that Cold War expediency caused Soviet

¹⁰⁴ Indeed, foreign direct investment was prohibited in the Soviet Union until 1987. Simons, *supra* note 101, at 381 n.14.

¹⁰⁵ *Id.* at 387.

¹⁰⁶ *Id.* at 388.

¹⁰⁷ *Id.* at 391.

¹⁰⁸ KAZIMIERZ GRZYBOWSKI, *SOVIET PRIVATE INTERNATIONAL LAW* 169 (1965).

¹⁰⁹ See Simons, *supra* note 101, at 390-91 (explaining that applications to enforce foreign arbitral awards were made at higher level courts).

¹¹⁰ See BUTLER, *supra* note 54, at 5-6 (noting that the Preamble marks a significant departure from traditional Soviet theory of international law, which identified the treaty as the main source of international law, which differed from general Soviet procedural rules for obtaining enforcement of domestic court judgments).

¹¹¹ GINSBURGS, *supra* note 103, at 61 (internal citation omitted).

violations of international law,¹¹² the Soviet Union's record in international commercial law was apparently quite respectable when it suited the government's purpose. Soviet FTOs, for example, consistently honored adverse arbitration awards made pursuant to international arbitration agreements in the mid to late Soviet period.¹¹³

3.4. Post-Soviet Transition

In its last years, the Soviet Union saw the beginnings of a shift in international law theory and policy. By the late Gorbachev period, arguments appeared in the literature advocating against international law being "artificially divided into capitalist international law, socialist international law, and the international law of developing countries."¹¹⁴ Soviet scholars thus began to revisit their hesitancy regarding Russian participation in a world legal system beyond treaties.¹¹⁵ In 1993, the Duma enacted a law on commercial arbitration in an effort to tap into "the international harmonization of commercial law," the first time a "broad legislative basis" anchored the international system to the Russian domestic legal system.¹¹⁶ In 1995, Russia's basic law on treaties, the Federal Law of the Russian Federation on International Treaties of the Russian Federation, explicitly recognized the role of customary international law and Russia's obligation to follow it.¹¹⁷ Similar

¹¹² See Vladlen S. Vereshchetin & Reina A. Müllerson, *The Primacy of International Law in World Politics*, in PERESTROIKA AND INTERNATIONAL LAW, at 6, 8 (Anthony Carty & Gennady Danilenko eds., 1990) ("Regretfully, the Soviet Union is not blameless in its approach to international law.").

¹¹³ Simons, *supra* note 101, at 394, 413-15 (arguing that, although there were no reports of a Soviet FTO refusing to honor an award against it, a reasonable investor might have insisted on certain conditions surrounding enforcement).

¹¹⁴ Vereshchetin & Müllerson, *supra* note 112, at 9.

¹¹⁵ Compare G.I. Tunkin, *On the Primacy of International Law in Politics*, in PERESTROIKA AND INTERNATIONAL LAW, *supra* note 112, reprinted in RUSSIAN LEGAL THEORY, at 609-16 (W. E. Butler ed. 1996) (arguing that the primacy of international law is necessary for the normal functioning of the inter-State system), with G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 3 (L.N. Shestakov & William E. Butler eds., William E. Butler, trans., Wildy, Simmonds & Hill Publishers Ltd. 2d ed. 2003) (2000) (explaining the principles of "socialist internationalism").

¹¹⁶ Simons, *supra* note 101, at 398-99.

¹¹⁷ See BUTLER, *supra* note 54, at 5. ("The Russian Federation favours undeviating compliance with treaty and customary norms and affirms its adherence to the basic principle of international law—the principle of the good-faith fulfillment of international obligations.").

language appears in the Russian Constitution.¹¹⁸ Finally, Russia formally rejoined the Hague Conference on Private International Law on December 6, 2001.¹¹⁹

Nevertheless, progress was mixed across Russia's international law portfolio, including in the private international law arena. First, structural peculiarities of Russia's treaty-making and judicial systems make it difficult to understand the system. Treaty-making authority is delegated to a variety of state organs, including courts, in the Russian Federation.¹²⁰ The Supreme Arbitration Court is an interesting example. The court is something of a Soviet holdover, as it has its roots in Soviet forums designed to deal with foreign trade in the era of FTOs.¹²¹ The court's responsibilities regarding foreign trade relationships continue: the court "presented" the legislation to the Duma that resulted in Russia's accession to the Hague Service Convention,¹²² and is officially responsible for establishing and maintaining "international relationships and cooperation with supreme courts and specialized courts of various foreign countries."¹²³

Yet the Arbitration Courts, like others in Russia, have suffered from a lack of judges trained in international law and treaty

¹¹⁸ See Tatiana V. Tkachenko, *National and International Aspects of Russian Insolvency Law: Problems and Possible Solutions*, 17 J. BANKR. L. & PRAC 751, 764 (2008) ("Art. 7 of the Constitution of the Russian Federation stipulates the principle that international treaties and widely accepted principles of international law are part of the Russian legal system.").

¹¹⁹ Press Release, Hague Conference on Private International Law, Russian Federation Rejoins the Hague Conference (June 12, 2001), available at http://www.hcch.net/index_en.php?act=events.details&year=2001&varevent=19.

¹²⁰ See William E. Butler, *Treaty Capacity and the Russian State Corporation*, 102 AM. J. INT'L L. 310, 315 (2008) (noting that such "empowered organizations" act as government ministries or state committees "for most treaty purposes" under current Russian legislation). It is unclear, however, if such "interdepartmental" treaties, which are not ratified by the Federal Assembly, take precedence over Russian federal law. *Id.* at 313.

¹²¹ GINSBURGS, *supra* note 103, at 141 (stating the Procedural Code of Arbitration of the Russian Federation "broadens the jurisdiction of arbitration courts to include cases involving foreign organizations, organizations with foreign investments, international organizations, the citizens and stateless persons engaged in entrepreneurial activity").

¹²² Tkachenko, *supra* note 118, at 765. This court played a similar role in Russia's accession to the Hague Evidence Convention. *Id.*

¹²³ *Id.*

interpretation.¹²⁴ This is a holdover of the limited role of judges in the Soviet system, who were “excessively dependent” on directions from the political leadership for guidance.¹²⁵ Though so-called “telephone law” has reportedly diminished greatly since the days when Soviet bureaucrats would literally pick up the phone to inform judges of their decisions, the generation of Russian judges used to “detailed and didactic” instructions from legislation or leaders has not wholly died out.¹²⁶ What’s more, salaries and benefits for judges are subject to manipulation as they are “only partly defined in the law,” and are relatively low.¹²⁷

This has serious consequences for Russia’s international law practice, if not its policy. In the Soviet period, treaty interpretation was the province of government ministries, generally the Ministry of Foreign Affairs or, in the case of economic treaties, the Ministry of Foreign Trade.¹²⁸ Though Russian courts may have the power to strike down legislation that violates international law, they must be prepared to exercise that power for it to mean anything.

In sum, Russian international law policy, including private international law policy, remains more a political tool than an independent legal framework. While this system has maintained fairly good compliance with international law in some areas,¹²⁹ the dominance of political rather than legal actors may make Russia’s positions more unpredictable and harder to justify under international or even domestic Russian law. Russia’s decision to suspend Hague Service Convention assistance to the United States may well stem from this power structure.

4. CONSEQUENCES OF RUSSIA’S HAGUE SERVICE CONVENTION POLICY: THE IMPACT ON LITIGANTS IN U.S. COURTS AND

¹²⁴ GINSBURGS, *supra* note 103, at 121 (noting the poor international law training received by judges and a shortage of international law specialists practicing in Russia); *id.* at 141 (describing an “acute need” for Arbitration Court judges to be educated on international law).

¹²⁵ *Id.* at 122.

¹²⁶ Simons, *supra* note 101, at 468.

¹²⁷ Donald D. Barry, *Decision-Making and Dissent in the Russian Federation Constitutional Court*, in INTERNATIONAL AND NATIONAL LAW IN RUSSIA AND EASTERN EUROPE, *supra* note 10, at 1,10.

¹²⁸ GINSBURGS, *supra* note 103, at 119–20.

¹²⁹ *Id.* at 146 (noting that although “Russia’s performance in the law department lags far behind that of the leaders of the pack,” it is still ahead of many other countries).

IMPLICATIONS FOR THE FUTURE OF INTERNATIONAL LAW

4.1. *Consequences for Litigants in U.S. Courts*

Russia's Hague Service Convention policy clearly impacts parties in U.S. courts with a need to effect service on Russian soil. Recognizing that the Convention is effectively a dead letter between the United States and Russia; U.S. federal district courts have authorized alternate service under the Federal Rules of Civil Procedure, which would otherwise require compliance with the Hague Service Convention regime.¹³⁰ This flexibility, however, does not offer much comfort to parties that may need to pursue enforcement actions on Russian soil.¹³¹

With the primary Convention channel out of commission, none of the alternatives identified by the Convention are officially available. Russia is not a party to any bilateral treaty allowing for direct judicial communication,¹³² does not recognize any form of service other than official service through Russian courts,¹³³ and thus does not provide for alternate service via fax, email, or any other method,¹³⁴ except for consular channels.¹³⁵ Setting aside the fact that the Hague Service Convention is in large part designed to address the general ineffectiveness of consular channels as a means of effecting service,¹³⁶ Russia reportedly does not honor such requests from the United States.¹³⁷

¹³⁰ See, e.g., *Arista Records LLC v. Media Servs. LLC*, No. 06 Civ.15319, 2008 WL 563470 (S.D.N.Y. Feb. 25, 2008) (permitting alternative service in light of Russia's refusal to allow U.S. litigants to utilize Hague Service Convention procedures). As discussed in Section 3, *supra*, U.S. courts have allowed alternate methods of service consistent with the U.S. Constitution's due process requirements where the Hague Service Convention is not functioning. See, e.g., *Arista Records*, 2008 WL 563470, at *1 (applying Federal Rule of Civil Procedure 4(f)).

¹³¹ Gidirimski, *supra* note 57, at 695-96.

¹³² RUSSIAN HAGUE QUESTIONNAIRE, *supra* note 87, at 12.

¹³³ *Id.* at 18-19.

¹³⁴ *Id.* at 22.

¹³⁵ *Id.* at 24.

¹³⁶ See, e.g., Panagiota Kelali, Comment, *Provisional Relief in Transnational Litigation in the Internet Era: What is in the US Best Interest?*, 24 J. MARSHALL J. COMPUTER & INFO. L. 263, 270 n.39 (2006) (discussing slow, cumbersome nature of requests through official diplomatic channels in the context of cybercrime investigations) (citation and internal quotation marks omitted); Robert M. Kimmitt, *International Law in the War on Narcotics*, 84 AM. SOC'Y INT'L L. PROC. 302, 306 (1990) (describing the traditional letters-rogatory system as "less efficient");

In sum, U.S. litigants are now worse off than they were before Russia signed the Convention. Suspension of the Convention essentially sets the clock back to 2001, when observers noted that letters of request through diplomatic channels were the only realistic means of effecting service in Russia that could potentially support a later enforcement action through Russian courts.¹³⁸ With the diplomatic channel non-functional as well, no options remain to parties in U.S. courts that satisfy both Russian domestic law and the Federal Rules of Civil Procedure.¹³⁹

4.2. *International Arbitration: Viable Alternative or Fire to the Convention's Frying Pan?*

Unfortunately, international arbitration may not be an attractive alternative to the sorts of transnational litigation which require working Hague Service Convention channels between the United States and Russia. Judgments won in arbitral proceedings must still be enforced where the losing party's assets are located. Russia's record in this respect is mixed.¹⁴⁰ If anything, Russian courts may be "gradually becoming more hostile to the enforcement of arbitration awards."¹⁴¹ The same "gap between theory and practice" that characterizes Russia's Hague Service

see also Tamayo, *supra* note 21, at 232 (describing situation in which the Kingdom of Saudi Arabia "permitted service of process only through letters rogatory, a slow process requiring government intervention and taking up to one-and-a-half years to complete") (*citing* Hollow v. Hollow, 747 N.Y.S.2d 704, 705 (N.Y. Sup. Ct. 2002)).

¹³⁷ *See* State Department Website, *supra* note 9 ("In July 2003, Russia suspended all judicial cooperation with the United States in civil and commercial matters.").

¹³⁸ Gidirimski, *supra* note 57, at 707.

¹³⁹ For an analysis of this Catch 22 prior to Russia's ratification of the Hague Service Convention, *see id.* at 707-08, 714-15.

¹⁴⁰ *See* William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, And Cases*, 16 AM. REV. INT'L ARB. 261, 304 (2005) (observing that "Russian courts seem to enforce foreign arbitration awards at a rate lower than the international average," despite procedural and substantive law consistent with the New York Convention and the UNCITRAL Model Law).

¹⁴¹ Daniel S. Meyers, *In Defense of the International Treaty Arbitration System*, 31 HOUS. J. INT'L L. 47, 77 n.160 (2008) (citation and internal quotation marks omitted).

Convention policy thus seems to impact its participation in international arbitration systems.¹⁴²

5. CONCLUSION

Despite the best efforts of the Hague Conference, the Russo-American Hague Service Convention impasse continues. The episode does not bode well for the future of the Russo-American relationship and is especially alarming to parties that might need workable transnational commercial litigation channels between the two countries.

The dispute is also strong evidence that transnational commercial litigation is likely to remain “complex, difficult, and inefficient.”¹⁴³ . As this failure of the Hague Conference proves its critics right,¹⁴⁴ it should spur the Conference and its members to redouble their efforts to strive toward a “uniform normative framework” in which the global community can craft international legal solutions.¹⁴⁵ Demand for such a framework will not soon vanish; where there are international transactions, there will be international litigation.¹⁴⁶ Indeed, because functional private international law regimes can be considered not merely a result of, but a prerequisite to robust global economic development,¹⁴⁷ the consequences of continued failure in this arena are more serious than procedural headaches, delays or inconvenience. On the bright side, the Russo-American experience with the Hague Service

¹⁴² Spiegelberger, *supra* note 140, at 304; see also Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 826 n.55 (2001) (“In Russia, for example, courts routinely refuse to enforce international arbitration awards and sometimes reject claims by foreign creditors on peculiar grounds.”).

¹⁴³ Carbonneau, *supra* note 8, at 1118.

¹⁴⁴ *Id.* at 1190-91 (citations omitted).

¹⁴⁵ Christophe Bernasconi, *Some Observations from the Hague Conference on Private International Law*, 101 AM. SOC’Y INT’L L. PROC. 350 (2007).

¹⁴⁶ See Dowling, *supra* note 17, at 465 (“You cannot set up a deal properly if you do not plan for what will happen if the deal goes bad.”).

¹⁴⁷ See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 71 (2008) (“Good courts are central to sustained economic development.”); see also Meyers, *supra* note 141 at 56-58 (noting that, despite disagreement as to whether “increasing legal protections for foreign investments actually increases the volume of such investments,” and whether increasing foreign investment actually increases economic development, nobody has yet proven otherwise).

Convention may serve to identify the political and cultural hurdles the Hague Conference must clear to realize its goals.