UNITED STATES: STATEMENT OF INTEREST TO SET ASIDE DEFAULT JUDGEMENT AGAINST CHINA FILED IN THE JACKSON v. PEOPLE'S REPUBLIC OF CHINA CASE IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

RUSSELL JACKSON, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 79-C-1272-E
	)	
THE PEOPLE'S REPUBLIC OF CHINA,	)	
	)	
Defendant.	)	
	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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August 18, 1983

*[Reproduced from the text provided by the U.S. Department of Justice. The page numbers in the Table of Contents and Table of Authorities have been changed to reflect I.L.M. page numbers.

[The U.S. District Court's Decision of September 1, 1982, and the Chinese Aide Memoire of February 2, 1983, concerning the issues, appear respectively at 22 I.L.M. 75 (1983) and 22 I.L.M. 81 (1983).]

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STATEMENT OF INTEREST OF THE UNITED STATES*/

Introduction And Summary

The People's Republic of China (PRC or China) has recently appeared and moved to set aside the September 2, 1982 default judgment, requested the Court to consider its jurisdictional and other defenses, and opposed the issuance of a 28 U.S.C. 1610(c) "reasonable time" order. The United States supports these PRC requests.

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*/ The United States files this Statement of Interest and appears pursuant to 28 U.S.C. 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit.

The United States is filing this Statement of Interest, and the accompanying affidavits of George P. Shultz, Secretary of State, and Davis R. Robinson, Legal Adviser, Department of State, because United States foreign policy interests are best served by permitting China to appear at this time, and having this Court consider its defenses to plaintiffs' claims prior to the commencement of any execution proceedings. The United States respectfully requests leave to appear through counsel and participate at any hearings in this case.

The United States has had extensive consultations with the PRC about this case and is informed about its facts and history. The United States believes that the PRC's initial failure to appear in these proceedings was based on its belief that international law did not require it to do so (Shultz Declaration, ¶11; Robinson Declaration, ¶¶3(C), 3(H)). The United States has expended considerable diplomatic efforts over the last two and one-half years to persuade the PRC that it is appropriate under international and United States law, and in the best interest of bilateral relations between the two nations, that the PRC appear and present its defenses to this Court (Robinson Declaration, ¶¶3(E), 3(F), 4, 7, 8, 9). Permitting the PRC to have its day in court will significantly further United States foreign policy interests; conversely, denying it that day in court is likely to have a negative impact on United States interests (Shultz Declaration, ¶¶10, 12).

Federal Rules of Civil Procedure 55 and 60(b) vest this Court with substantial discretion to set aside default judgments

for equitable reasons. There are strong bases for setting aside the default judgment and considering the PRC's defenses--China's reasonable reliance on its interpretation of international law as not requiring it to appear, the important United States foreign policy interests that will be served by permitting China to present its views to the Court at this time, the general judicial presumption that resolution on the merits is preferable to default, the assertion by the PRC of well-founded defenses, and the lack of irreparable prejudice to plaintiffs if the default judgment is set aside.

In addition, this Court should defer, until after it rules on the motion to set aside, consideration of plaintiffs' motion pursuant to 28 U.S.C. 1610(c) seeking an order that a reasonable period of time has passed since the entry of the default judgment. Such an order could permit plaintiffs immediately to begin execution proceedings against PRC property anywhere in the United States, prior to consideration of China's defenses by any court. Deferral of a "reasonable time" order is warranted because permitting executions to go forward would create serious additional problems for United States foreign policy interests, including possible corresponding measures by the PRC (Shultz Declaration, ¶7; Robinson Declaration, ¶3(B) (Diplomatic Notes 007/82 (Jan. 15, 1982), 085/82 (Nov. 9, 1982))). Moreover, deferral of a reasonable time order is warranted because there is a strong legal basis for setting aside the default judgment, and deferring such an order would not irreparably injure the bondholders; while issuing such an order could cause the PRC substantial injury.

STATEMENT

1. The 1911 Huguang Railway Bonds

According to information available to the United States Government (see generally Robinson Declaration, ¶3(D), Exhibits 2, 4, 5), the Huguang Railway Bonds that are involved in this litigation were issued by the Imperial Government of China in 1911 to finance, in part, a section of the Huguang Railway which runs from Beijing (Peking) to Guangdong (Canton). The United States and the United Kingdom obtained a commitment from the Imperial Government of China in 1903, that should Chinese capital not be available the railway would be built by British and American capital. Subsequently, British, German and French banks obtained the agreement of the Imperial Government of China to issue Chinese government bonds to finance the construction of the Huguang railroad. The Government of the United States indicated to China that in accordance with the 1903 commitment, the United States expected American banks and financiers to participate in the issuance of the bonds as well. As a result, the bonds were issued by a consortium of British, German, French and American banks and financiers, with each having a one-quarter share.

The loan was for five million five hundred thousand (5,500,000) pounds sterling. The bonds were bearer bonds issued in sterling and secured by customs, salt gabelle, likin and other public revenues. The intergovernmental agreement granted political and financial concessions and privileges to nationals of the participating states, e.g., share in sale of materials, employment of national engineers, exemption from customs duties and taxes, future allocation of track mileage and supervision and

control of sinking fund for amortization. The agreement was sanctioned by an Imperial edict.

The Chinese Government has stated that there was considerable opposition of the Chinese people to the circumstances leading to the flotation of the Huguang Railway bond issue and the terms thereof, as well as to the large foreign debt incurred by the Imperial Government. Further, the Chinese Government has indicated that this bond issue helped to trigger the Wuchang uprising and the Revolution of 1911 (under Dr. Sun Yat Sen) that led to the overthrow of the Qing Dynasty. There appears to be substantial support for these statements in histories of the period. See, e.g., J. Fairbanks & E. Reischauer, East Asia: The Modern Transformation, 629-631 (1965); Clubb, Twentieth Century China, 39 (1978).

With the Revolution of 1911, the Imperial Chinese Government was abolished and the Republic of China was created in its stead. Payments were made on the Huguang loan by the Republic of China until the mid-1930's when that government began to have financial and other difficulties. In 1939, the Republic of China suspended payments altogether--those payments have never been resumed. As late as 1947, however, the Republic of China publicly indicated its desire to repay the loans. The PRC on the other hand has never acknoweldged the debt.

We are aware of no attempts by the plaintiffs before filing this lawsuit to seek satisfaction on the debt obligations arising from the Huguang Bond from either the Republic of China--the government recognized by the United States until 1979 as the sole government for all of China--or the People's Republic of China.

2. The Bond Litigation

Plaintiffs filed this suit on November 13, 1979, less than one year after the United States recognized the PRC Government on January 1, 1979. The United States Government first became involved in the present lawsuit when plaintiffs sought to serve the PRC under the provisions of 28 U.S.C. 1608(a)(4) and 22 C.F.R. Part 93 (Robinson Declaration, ¶3(A)). During the next two and one-half years, additional documents were forwarded, at the request of plaintiffs or the Court, to the PRC under cover of diplomatic notes (Robinson Declaration, ¶3(A)). On each occasion, the PRC returned the documents to the Department of State under cover of its own diplomatic notes (Robinson Declaration, ¶3(B)). The United States believes that those notes have all been promptly forwarded to this Court and constitute part of the record in these proceedings.

China's reasons for returning the court documents set forth in each of the notes may be summarized as follows: (1) the PRC, as a sovereign state, believes it enjoys absolute immunity from the processes of United States and other foreign courts; (2) the PRC believes that international law requires the United States to accord the PRC its immunity from judicial proceedings through diplomatic channels without the PRC's appearance before United States courts; (3) the PRC believes it is not, in any event, responsible for debts represented by bonds issued in 1911 by the predecessor Imperial Chinese Government (Robinson Declaration, ¶3(C)).

This Court found that the bonds in question were issued in 1911 by the Imperial Government of China, that the government of

China defaulted on interest payments as early as 1937, and that the principal became due in 1951. Jackson v. People's Republic of China, 550 F. Supp. 869, 870-872 (N.D. Ala. 1982). Based on these facts, the Court noted that this action might be barred by the statute of limitations. Jackson v. People's Republic of China, Civil Action No. 79-C-1272-E, Transcript, p. 71 (March 29, 1982). Nonetheless, the Court declined to consider that defense in the absence of an appearance of the PRC (id.).

On September 2, 1982, judgment was entered for the bondholders in the amount of $41,313,038.00 with interest thereon at the legal rate from September 1, 1982. The Court concluded that it had jurisdiction under 28 U.S.C. 1330(a), that the issuance of the bonds in the United States constituted a "commercial activity" for which no sovereign immunity would apply under 28 U.S.C. 1605(a)(2), and that the PRC was the successor to the obligations of the Imperial Chinese Government.

3. The Current Situation

The Department of State transmitted the default judgment to the PRC by diplomatic note dated October 18, 1982 (Robinson Declaration, ¶3(A)). The PRC responded by a diplomatic note dated November 9, 1982, restating China's earlier arguments as to the Court's lack of jurisdiction and China's non-responsibility for the bonds at issue in this lawsuit. China also stated its view that the Court's default judgment was "in violation of the basic norms of international law * * *." (Robinson Declaration, ¶3(B), Exhibit 1).

Throughout the pendency of these proceedings, officials of the Department of State have met with Chinese officials in both

Washington, D.C. and Beijing to discuss United States law and procedure. On each occasion it was explained that the Executive Branch had no authority to make determinations with respect to China's claim of immunity or other defenses. In particular, the Department of State has attempted to persuade the PRC that the appropriate way to present its views with respect to sovereign immunity or other defenses under United States law is to communicate directly with the Court through counsel, not through diplomatic channels. United States officials urged the PRC to seek the advice of legal counsel regarding the manner in which its interest could best be protected (Robinson Declaration, ¶¶3(E), 3(F)).

The Department's attempts to persuade the PRC to participate directly in these proceedings have been complicated for a number of reasons. The PRC has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, and has forthrightly maintained its position that it is absolutely immune from the jurisdiction of foreign courts unless it consents to that jurisdiction (Robinson Declaration, ¶3(H)). China's steadfast adherence to the absolute principle of immunity results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers (Robinson Declaration, ¶3(I)).[2/]

2/ The absolute principle of immunity is adhered to by a number of foreign states. While the United States now adheres to the restrictive principle of immunity, the codification of that practice and the removal of the Executive's authority to recognize a foreign state's immunity in a particular case is relatively recent. Compare administrative practice begun in 1952 under the "Tate letter," 26 Dept. State Bull. 984-985 (1952) with the codification of that practice in 1976 by the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, 94th Cong., 2d Sess. (1976).

Moreover, the long absence of relations between the United States and the PRC necessarily meant that there were only limited communications between the two governments on legal matters, leaving PRC authorities generally unfamiliar with United States judicial practice and procedure (Robinson Declaration, ¶3(G)). Finally, because the Chinese view the bonds at issue in this case as an improper part of the western powers' domination of China at the beginning of this century and as directly related to the Revolution of 1911, the PRC maintains it bears no responsibility for the bonds (Robinson Declaration, ¶3(J)).

The entry of the default judgment exacerbated the situation.[3/] In February of this year, Secretary of State Shultz and other senior United States foreign policy officials travelled to Beijing to meet with senior PRC officials. As part of a wide-ranging meeting on major international matters, Chinese leader Deng Xiaoping brought up the default judgment in this case and personally indicated to Secretary Shultz that the PRC regarded it as a serious matter and a major irritant in bilateral relations with the United States (Shultz Declaration, ¶6). Chinese Foreign Minister Wu Xueqian presented Secretary Shultz with an Aide Memoire further protesting the default judgment (Shultz Declaration, Exhibit 1). The PRC indicated that any attempt to enforce the judgment by executing against property owned by the

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3/ Numerous articles by Chinese officials, jurists and scholars have severely criticized the decision and the United States government's failure to take what the PRC considers appropriate steps to deal with it (Robinson Declaration, Exhibits 2-5). These articles are generally considered as statements of official PRC Government positions (Robinson Declaration, ¶3(D)).

PRC or its instrumentalities could be extremely serious, and could lead to "corresponding measures" (Robinson Declaration, Exhibit 1, ¶4; Shultz Declaration, ¶7). At that time, Secretary Shultz offered to send to China a formal delegation to discuss the case (Shultz Declaration, ¶8).

The Chinese Government subsequently invited a United States delegation to Beijing in June 1983 to discuss the Huguang Railway Bond case (Shultz Declaration, ¶9). The United States delegation was headed by the United States Charge-d'Affaires ad interim in Beijing and the Legal Adviser of the Department of State, and included a representative of the Department of Justice's Civil Division (Robinson Declaration, ¶6). The United States delegation sought to assure that China clearly understood our view on sovereign immunity, our judicial system, and available procedures under that system to obtain relief from the default judgment (Robinson Declaration, ¶7).

The United States delegation stressed its position that the appropriate forum for presenting China's views to the United States Government in claims of this sort was the judicial branch--as represented in this case by the Alabama federal district court. The delegation also sought to assure the Chinese Government that such communication could be made, through appearance of appointed counsel, without conceding the Court's jurisdiction under the FSIA, or waiving China's position with regard to absolute sovereign immunity as a matter of international law. The delegation urged the Government of China to

present all its defenses directly to the Court and to do so expeditiously. The United States indicated it would support China's effort to do so (Robinson Declaration, ¶8).

Subsequent to the June meetings in Beijing and further consultations between United States and PRC officials in both Washington, D.C. and Beijing, the PRC informed the United States that it intended to retain counsel, appear in this case, seek to have the default judgment set aside, and present its defenses to the Court (Robinson Declaration, ¶9). This Statement of Interest supports China's request to set aside the default judgment and have its defenses considered by the Court, and to have this Court defer decision on plaintiffs' motion under 28 U.S.C. 1610(c) for an order that a "reasonable time" has passed since entry of the default judgment.

DISCUSSION

I. THIS COURT SHOULD SET ASIDE THE DEFAULT JUDGMENT PURSUANT TO F.R.CIV.P. 55 AND 60(b), AND CONSIDER THE PRC'S LEGAL AND FACTUAL DEFENSES.

1. Under Federal Rules of Civil Procedure 55(c) and 60(b), a default judgment may be set aside for, inter alia, mistake, inadvertence, or any other reason justifying relief from the judgment. The provisions of Rule 60(b), and in particular the provisions of subsection 6, are equitable in origin and vest the district courts with the discretion to set aside default judgments whenever justice so requires. Thus, the courts have consistently held that "there can be little doubt that Rule 60(b) vests in the district courts power 'adequate to enable them to vacate judgments whenever such action is appropriate to accomp-

lish justice.'" Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir. 1981) quoting, Klapprott v. United States, 335 U.S. 601, 614-615 (1949). See generally, 7 J. Moore, Moore's Federal Practice, §60.27 (2d ed. 1982).

The decision to set aside a default judgment lies within the sound discretion of the district court. Seven Elves, Inc., supra, 635 F.2d at 402. See also Basham v. Finance America Corp., 583 F.2d 918 (7th Cir. 1978), cert. denied, 439 U.S. 1128 and 444 U.S. 825 (1979); Baez v. S.S. Kresge Co., 518 F.2d 349 (5th Cir. 1975), cert. denied, 425 U.S. 904 (1976). The courts have repeatedly indicated, however, that "Rule [60(b)] should be liberally construed in order to do substantial justice." Seven Elves, Inc., supra, 635 F.2d at 401. See also Greater Baton Rouge Golf Association v. Recreation & Park Commission, 507 F.2d 227, 228-229 (5th Cir. 1975); Laguna Royalty Co. v. Marsh, 350 F.2d 817, 823 (5th Cir. 1965). As the United States Court of Appeals for the Fifth Circuit recently explained:

> What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause.

Seven Elves, Inc., supra, 635 F.2d at 401.

A liberal construction of Rule 60(b) is further supported by the courts' clear preference for resolutions on the merits rather than default judgments. Medunic v. Lederer, 533 F.2d 891, 893-894 (3d Cir. 1976); Pulliam v. Pulliam, 478 F.2d 935, 936 (D.C. Cir. 1973); Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969).

Thus, in the exercise of their discretion under Rule 60(b), courts should resolve doubts with respect to granting a motion to set aside a default judgment in favor of a judicial decision on the merits of a case. Blois v. Friday, 612 F.2d 938, 940 (5th Cir. 1980); Alopari v. O'Leary, 154 F. Supp. 78 (E.D. Pa. 1957); SEC v. Vogel, 49 F.R.D. 297 (S.D.N.Y. 1969). In particular, matters involving large sums of money should not be resolved by default judgments if it can reasonably be avoided. Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244 (3d Cir. 1951).

These general presumptions against default judgments are, if anything, stronger in cases involving foreign states. The FSIA specifically provides that no default judgment may be entered against a foreign state unless "the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). This requirement was drawn verbatim from F.R.Civ.P. 55(e), likewise limiting default judgments against the United States. The provision represents Congress' determination that foreign states be treated with respect and that liability be imposed only for valid claims. Indeed, United States courts have been diligent in considering defenses available to foreign sovereigns, even where those foreign sovereigns have not formally appeared. See International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982); Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 550-551, n.4 (D.D.C. 1981); Meadows v. The Dominican Republic, 542 F. Supp. 33 (N.D. Cal. 1982); Frolova v. U.S.S.R., 558 F. Supp. 358 (N.D. Ill. 1983).

In addition, and most relevant here, United States courts have shown a willingness to reconsider relevant legal defenses even if the foreign state has not initially appeared. Thus, for example, in Castro v. Saudi Arabia, 510 F. Supp. 309, 313 (W.D. Tex. 1980), the only case under the FSIA where a foreign sovereign has asked that a default judgment be set aside, that request was granted. Similarly, in Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980), a district court considered whether to vacate a default, even though Chile did not formally appear, and its jurisdictional defense was presented to the court in a diplomatic note transmitted to the court through the State Department.

2. In exercising its discretion within the liberal principles for setting aside a default judgment against a foreign state the Court should consider (a) whether the PRC has a meritorious defense (Wright & Miller, Federal Practice and Procedure, §2697); (b) whether the motion is sufficiently timely and the movant should be excused for its previous failure to appear and to defend (Wright & Miller, supra, §2698), and finally, (c) whether granting the motion will cause the judgment-creditor undue prejudice (Wright & Miller, supra, §2699).

a. A substantial part of the Court's inquiry should focus on whether the PRC has a meritorious defense to the bondholders claim. Schwab v. Bullock's, Inc., 508 F.2d 353, 355 (9th Cir. 1974); Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372 (D.C. Cir. 1980); Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp., 383 F.2d 249 (4th Cir. 1967). It is not, however, necessary to prove that a party will actually

prevail at trial; it is sufficient that a stated defense, if established at trial, would defeat the judgment creditor's claim. Tozer v. Charles A. Krause Milling Co., supra, 189 F.2d at 244; United States v. Marodi, 673 F.2d 725, 727 (4th Cir. 1982); Horn v. Intelectron Corp., 294 F. Supp. 1153, 1155-1156 (S.D.N.Y. 1968).

The PRC despite its adherence to the absolute principle of immunity has appeared in this proceeding and put forth a number of legal and factual defenses. These include, inter alia, ineffective service of process, statute of limitations, non-retroactivity of the FSIA, lack of sufficient contacts with the United States with respect to all (or at least some of) the bonds, and the non-commercial nature of the bonds involved in this case. The United States is unaware of domestic judicial decisions considering these defenses in factual contexts similar to those here, and believes that as a matter of comity and out of respect for a foreign sovereign, these defenses should be considered by the Court at this time.

Our support for the PRC's effort to set aside the default judgment should not be confused with government interference with the merits of private party litigation against a foreign state--the United States specifically takes no position on the merits of the PRC's defenses. Indeed, the PRC has taken positions that might be seen as challenging the constitutionality of the FSIA, or raising difficult issues of international law that could affect United States foreign relations. At some point this Court may seek or the United States might submit its position on these, or other issues in this case in which it has an interest. But for

the present, we would urge the Court initially to avoid constitutional questions (Ashwander v. TVA, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring) or those which might involve complex questions of international law. Instead, in determining whether the PRC has meritorious defenses, the Court might wish to consider first such potentially dispositive issues as the lack of valid service of process, statute of limitations, jurisdiction under the FSIA with respect to all or at least some of the bonds, and the retroactivity of the FSIA.

For example, in the present case this Court noted the possibility that a statute of limitations defense might be applicable, but declined to consider it because the Chinese were not present before the Court. Jackson v. People's Republic of China, supra, Transcript, p. 71 (Mar. 29, 1982). At a minimum, where facts available to the Court suggest the prima facie availability of a dispositive defense, such as statute of limitations, Section 1608(e) of the FSIA would seem to require the Court to consider whether that defense bars plaintiffs' claim or right to relief. Even if the language of Section 1608(e) does not technically require the Court to consider an affirmative defense, the policy behind that section, the foreign policy implications of this case, and the availability of what on its face appears to be a valid statute of limitations defense, are appropriate bases for this Court to exercise its discretion and set aside the default judgment.[4/]

4/ We do not mean to suggest that other defenses raised by the PRC are not appropriate bases to set aside the default judgment, but only that based on the facts known to the United States, the statute of limitations defense appears dispositive.

In the present case Alabama state law would determine what statute of limitations would apply. Townsend v. Jemison, 50 U.S. (9 How.) 407 (1850); Gilson v. Republic of Ireland, 682 F.2d 1022, 1024, n.7 (D.C. Cir. 1982); Carden v. Hand, 407 F. Supp. 451 (S.D. Ala. 1975). Alabama provides that actions on defaulted bonds be commenced within ten years from the time the bonds matured. State ex rel. Boswell v. Montgomery, 350 So. 2d 73 (Ala. 1977). The bonds in question were issued in 1911 and matured in 1951. Even if earlier defaults on interest payments are not taken into account,[5/] the statute of limitations began to run in 1951. At all times since 1911 the United States maintained diplomatic relations with a recognized government of all China--such recognition being binding on the courts, United States v. Pink, 315 U.S. 203 (1942)--and accordingly there existed a suable entity. See Guaranty Trust v. United States, 304 U.S. 126 (1938).[6/] Under

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5/ To the best of our knowledge there were defaults on interest payments for substantial periods between 1920 and 1951. Under Alabama law the statute of limitations begins to run as to each interest coupon from the date it matures or is payable. State ex rel. Boswell v. Montgomery, supra, 350 So. 2d at 75. In fact, under Foreign Claims Settlement Commission decisions involving the 1911 Huguang Bonds, the default on the bonds is considered to have run from the time of the first default on interest payments. In re Carl Marks & Co., Decision No. CN-472 (entered as final decision March 11, 1971); In re Catherine E. Olive, Decision No. CN-2-058 (entered as final decision November 21, 1979). Generally, holdings of the Foreign Claims Settlement Commission are not reviewable in any court. See First National City Bank v. Gillilland, 257 F.2d 223 (D.C. Cir.), cert. denied, 358 U.S. 837 (1958); DeVegvar v. Gillilland, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994 (1956); see also, Z & F Assets Realization Corp. v. Hull, 311 U.S. 470, 489 (1941).

6/ In fact, the Republic of China controlled the Mainland until 1949, that is, for at least 38 of the 40 year life of the bonds, and presumably during that period had the benefit of the railroad built with the funds from the bonds.

these facts, plaintiffs' action on the bonds appears to have been barred after 1961.

b. Whether this Court considers it "excusable neglect" (F.R.Civ.P. 60(b)(1)) or just simply "reason[s] justifying relief from the operation of the judgment" (F.R.Civ.P. 60(b)(6)), there are substantial bases for excusing the PRC's initial failure to appear in this lawsuit. Likewise, the PRC's effort at this time to set aside the default judgment and present its defenses to the Court are timely in the special foreign relations context of this case.

The PRC believes that the questions involved in cases such as this are to be resolved in government to government negotiations, and that under international law a state is not subject to the jurisdiction of a foreign court without its consent. Indeed, as far as we know the PRC has never previously appeared as a defendant in a foreign court. The Chinese Government has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, growing, in part, from its adverse experience in the early part of this century with extraterritorial laws and jurisdiction of western powers.

The absolute principle of immunity is still adhered to by a number of foreign states. While the United States now adheres to the restrictive principle of immunity, the codification of that practice and removal of the Executive's authority to recognize a foreign state's immunity in a particular case is relatively recent. As a matter of comity and out of respect for the views of a foreign sovereign, this Court should excuse the PRC's initial

failure to appear because of its reliance on its interpretation of international law, cf. United Artists Corp. v. Freeman, 605 F.2d 854, 857 (5th Cir. 1979).

Moreover, because of the long absence of diplomatic relations between the PRC and the United States, there was a lack of understanding of our different views of immunity, and of how the United States legal system handles claims of immunity. The relative newness of the procedures under the FSIA undoubtedly contributed to this lack of understanding. See Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980). In particular, until recently the PRC did not understand or accept that under our three branch system of government claims of immunity are communicated to the United States for consideration by presentation to the judicial branch.

The present default judgment on plaintiffs' Huguang Bond claims "raise[s] sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962, 1971 (1983). Thus, for example, the present case has generated a series of diplomatic notes and discussions (including some between very senior officials), implicates varying views of international law, and has elicited a Chinese suggestion that attempts at execution against PRC property might lead to "corresponding measures."

As the foregoing suggests, the United States has a substantial foreign policy interest in convincing the PRC, as it does with all foreign states that are sued, to appear and defend

its interests. Nonetheless, convincing foreign states involves overcoming "unique cultural differences and difficulties," (Castro v. Saudi Arabia, 510 F. Supp. 309, 313 (W.D. Tex. 1980)), and in this case required lengthy and intense diplomatic negotiations. Under these circumstances the PRC's motion in seeking to set aside the default judgment less than one year after it was entered is timely. "Courts must take into account that international negotiations have their own distinctive time frames, and must be careful 'to avoid a fixing of our government's course' by premature interposition." Adams v. Vance, 570 F.2d 950, 954-955 (D.C. Cir. 1978), quoting, Nielsen v. Secretary of Treasury, 424 F.2d 833, 844 (D.C. Cir. 1970).

It is the judgment of the Secretary of State that granting the PRC's request to set aside the default judgment and permitting China to have its day in court "would clearly serve the foreign policy interests of the United States" (Shultz Declaration, ¶12). It is also the Secretary of State's judgment that, "after the extensive diplomatic consideration of this matter by the two governments," denying the PRC its day in court "can be expected to affect adversely our bilateral relations with China and hence important foreign policy interests of the United States" (Shultz Declaration, ¶12). Because this case involves the foreign relations of the United States, this Court should give great weight to Secretary Shultz's judgment in considering the motion to set aside the default judgment. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, supra, 315 U.S. at 229; Ex

Parte Republic of Peru, 318 U.S. 578, 587 (1943); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-322 (1936).

c. In the present case setting aside the default judgment would not substantially prejudice the bondholders. See Keegel v. Key West & Caribbean Trading Co., 627 F.2d 274 (D.C. Cir. 1980). They would be free to continue to assert their claims against the PRC in this Court. The bondholders cannot legitimately claim that they are substantially prejudiced by being required to respond to substantial legal defenses available to the PRC. See, e.g., Nash v. Signore, 90 F.R.D. 93, 95 (E.D. Pa. 1981). The bondholders waited almost 30 years after the principal on the bonds was due to bring this action. Since the PRC's defense includes a number of dispositive legal questions related to the issuance of and liability on bonds dating from 1911, the relatively short period of time that has passed since the entry of the default judgment, and the relatively short period that will be necessary to resolve this case on the merits, will not substantially prejudice the bondholders in the presentation of their claims. See, e.g., Horn v. Intelectron Corp., 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968).

II. THIS COURT SHOULD DEFER CONSIDERATION OF PLAINTIFFS' PENDING MOTION FOR A COURT ORDER THAT A REASONABLE PERIOD OF TIME HAS ELAPSED FOLLOWING THE ENTRY OF JUDGMENT UNTIL AFTER IT RULES ON THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT.

1. Pursuant to 28 U.S.C. 1610(c), there may be no execution upon a judgment against a foreign state "until the court has ordered such * * * execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section

1608(e) of this chapter." Plaintiffs had previously moved this Court for such an order. Since then, the PRC has filed its motion to set aside the default judgment and its opposition to plaintiffs' motion for an order that a reasonable time has passed.

The United States urges this Court to defer ruling on plaintiffs' motion until after it rules on the PRC's motion to set aside the default judgment. This Court has the inherent power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants. Landis v. North American Co., 299 U.S. 248, 254 (1936); Will v. Calvert Fire Insurance Co., 437 U.S. 655, 665 (1978) (Rehnquist, J.). The Court's power includes the discretion not to decide certain issues pending further judicial proceedings on related, but not necessarily identical questions. Leyva v. Certified Grocers, 593 F.2d 857, 863-864 (9th Cir.), cert. denied, 444 U.S. 827 (1979).

2. "The factors relevant to wise administration * * * are equitable in nature." Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952); CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962). Thus, in determining whether to defer a ruling on plaintiffs' motion, pending a decision on the PRC's F.R.Civ.P. 60(b) motion to set aside the default judgment, the Court should consider (a) whether deferring decision will fulfill the judicial objective of simplifying the issues (CMAX, Inc. v. Hall, supra, 300 F.2d at 268; United Merchants and Manufacturers, Inc. v. Henderson, 495 F. Supp. 444, 447 (N.D. Ga.

1980)); (b) wherein lies the public interest (see generally, Beverly v. United States, 468 F.2d 732 (5th Cir. 1972)); and (c) the competing interests of the respective parties. CMAX, Inc. v. Hall, supra, 330 F.2d at 268.

a. For the reasons stated in Part I, supra, the PRC is likely to prevail on its motion to set aside the default judgment. Many of the defenses raised by the PRC go to the validity of the default judgment and raise questions that this Court would have to consider before it could enter a section 1610(c) order. Similarly, if the default judgment is set aside the motion for a "reasonable time" order would be moot. In all events, the questions raised by plaintiffs' motion for a reasonable time order will be simplified by first ruling on the motion to set aside the default judgment.

b. The issuance of an order at this time that a reasonable time has passed since the entry of a default judgment would permit the bondholders to begin execution proceedings anywhere in the United States. The Chinese, however, after prolonged diplomatic efforts of the United States, have agreed to appear in this case and present their defenses to this Court. It appears to the United States that the PRC has defenses that the Court should consider. Attempts at execution on the default judgment, prior to consideration of whether it should be set aside, would obviously compound the foreign policy problems that have already resulted from this case (Robinson Declaration, Exhibit 1, ¶4; Shultz Declaration, ¶7).

"'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public

interest than they are accustomed to go when only private interests are involved.'" Yakus v. United States, 321 U.S. 414, 441 (1944) quoting, Virginia Ry. Co. v. System Federation, 300 U.S. 515, 556 (1937). "Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." Landis v. North American Co., supra, 299 U.S. at 256. Where judicial proceedings involving a request for a stay affects United States foreign policy "a court is 'quite wrong in routinely applying * * * the traditional standards governing more orthodox "stays."'" Adams v. Vance, supra, 570 F.2d at 954 quoting, Sampson v. Murray, 415 U.S. 61, 83-84 (1974). That is, "[c]ourts must beware of 'ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President.'" Adams v. Vance, supra, 570 F.2d at 954 quoting, Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973). Thus, a stay to accommodate legitimate foreign policy concerns of the Executive is permissible. American International Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 448 (D.C. Cir. 1981).

c. Issuance of a reasonable time order will permit execution proceedings to commence. No court, however, has considered the merits of the PRC's defenses to the bondholders' claims. The PRC will suffer irreparable injury if its property is executed upon and the Court then ultimately determines that the default judgment was void or should have been set aside.

On the other hand, the bondholders waited almost 30 years after the principal became due to bring this suit. Should the default judgment survive the motion to set aside, it provides for the legal rate of interest from September 1, 1982, until the judgment is paid. Accordingly, deferring a decision on whether a reasonable time has passed since the entry of the default judgment will not substantially prejudice the bondholders.

Moreover, there is substantial doubt that the bondholders will be able to locate PRC property upon which they can lawfully execute. In the context of plaintiff's judgment only 28 U.S.C. 1610(a)(2) provides a basis for execution. Thus, "[t]he property in question must be used for a commercial activity in the United States," and execution is permitted only if "the commercial activity gave rise to the claim upon which the judgment is based." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 28 (1976), reprinted in 1976 U.S. Code, Cong. & Ad. News 6604, 6627. The United States is unaware of any Chinese property located in the United States related to the sale of Huguang Bonds in the United States in 1911--i.e., the commercial activity carried on in the United States giving rise to plaintiffs' claims. Jackson v. PRC, supra, 550 F. Supp. at 873.[7/] Accordingly, a deferral of their request for an order that a reasonable time has passed will not prejudice plaintiffs.

7/ Although this standard provides an exceedingly narrow range of property that might be executed upon, it is consistent with Congress' intent to codify in large part a foreign sovereign's traditional immunity from attachment in aid of execution, and from execution to satisfy a judgment, while carefully delineating limited exceptions to that immunity. H.R. Rep. No. 94-1487, (Cont'd.)

CONCLUSION

For the foregoing reasons the United States respectfully requests that the PRC's motion to set aside the default judgment be granted and that pending resolution of that motion this Court defer decision on plaintiffs' motion for an order that a reasonable time has passed since the entry of the default judgment.

Respectfully submitted,

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supra, at 27, 1976 U.S. Code, Cong. & Ad. News at 6626. Congress established immunity from execution as the general rule under the FSIA (28 U.S.C. 1609), because "[s]uch attachments can * * * give rise to serious friction in United States' foreign relations," and because Congress recognized that although there is a trend toward limiting that immunity "the enforcement or [sic] judgments against foreign state property remains a somewhat controversial subject in international law." Id.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 1983, I served the foregoing Statement Of Interest Of The United States and attached Declarations upon counsel for the parties involved, by causing copies to be mailed, postage prepaid, to:

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