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AN ASSESSMENT OF THE SERVICE PROVISIONS OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

*Diego C. Asencio**
and
*Robert W. Dry***

INTRODUCTION

Although the restrictive doctrine of sovereign immunity, whereby citizens can sue foreign states in the domestic courts of their states, has evolved slowly in most of the world, the United States adopted the restrictive doctrine in 1952 in the "Tate Letter"¹ and codified it in the Foreign Sovereign Immunities Act of 1976 (hereinafter FSIA).² The Department of State sponsored the legislation which became the FSIA.³ It did so in order to extricate itself from the sensitive process of determining whether foreign states should be entitled to immunity from suit in actions brought against them in this country by private plaintiffs.⁴ In addition, the Department sought to alleviate problems associated with efforts to obtain *quasi-in-rem* jurisdiction by means of attachment of assets. The property so attached was often subject to immunity; even if that hurdle was overcome and a judgment was obtained, execution of the judgment might be impossible. As one scholar commented, "Of what use is the restrictive theory of immunity, if service cannot be obtained?"⁵

The FSIA changed that. Not only does the FSIA clarify the cir-

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The positions taken in this paper are the authors' own and do not necessarily reflect the views of the Department of State.

1. 26 DEP'T ST. BULL. 984 (1952).
2. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-1611 (1976)). The FSIA came into force January 19, 1977, 90 days after the President signed it into law.
3. Letter from Monroe Leigh, Legal Advisor of the Dep't of State, to the Attorney General of the United States (Nov. 10, 1976), *reprinted in* 41 Fed. Reg. 50,883 (1976).
4. See 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 24 (1968) [hereinafter cited as WHITEMAN], for a discussion of procedures used to acquire jurisdiction before enactment of the FSIA.
5. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 673 (3d ed. 1971).

cumstances in which a foreign state will be immune, it also embodies a federal long-arm statute pursuant to which *in personam* jurisdiction can be obtained over a foreign state, political subdivision, agency, or instrumentality, provided that service of process is effected in compliance with the service provisions in the FSIA. Further, the FSIA clarifies the nature of assets of foreign states upon which execution can be had. Significantly, the role of the Department of State is virtually eliminated. In an appropriate case it may file an *amicus curiae* brief,⁶ or it may become involved in performing the ministerial function of serving process upon a foreign state.

As the first such Act in the world, the FSIA is unquestionably of landmark significance. Not only is it novel, but suits brought under its provisions can have far-reaching international political affects. For example, the *Letelier* judgment for damages, the price-fixing suit against OPEC, and most recently the hundreds of claims against Iran following its revolution, are all covered under the Act.⁷ The importance of the Act cannot be underestimated: a private plaintiff now has an effective remedy against a foreign state or its various constituent elements as these potential defendants engage in commerce or perform other acts as any juridical person with ever-increasing frequency. It is for these reasons that the provisions of the new Act deserve very close study.⁸ This article examines the provisions regarding service of process upon foreign states because they are truly unique and contain political pitfalls. In reviewing the Act,⁹ this discussion will aid those who may be in a position to utilize these provisions or to recommend changes in them.

An Overview

From the time the bill was first introduced in 1973 until 1976 when the FSIA was enacted, its service provisions underwent probably the most substantial changes of any section of the Act. The resulting service statute, codified at 28 U.S.C. § 1608, is not only comprehensive but also quite technical.¹⁰ Section 1608 provides for not only service upon foreign states and political subdivisions of foreign states but also their

6. Letter from Monroe Leigh, *supra* note 3, 41 Fed. Reg. at 50,883.

7. Cases discussing the FSIA follow Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L LAW 200 (1979). The American Society of International Law publishes all cases involving the FSIA that come to its attention in its bimonthly publication, *International Legal Materials*. Another excellent resource for the FSIA is V G. DELAUME, *TRANSNATIONAL CONTRACTS* appendix (ed. 1981) [hereinafter cited as DELAUME].

8. The FSIA has already been analyzed in depth by various authors: V DELAUME, *supra* note 7; Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543 (1977); Note, *Sovereign Immunity: The Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429 (1977) [hereinafter cited as *Limits of Judicial Control*].

9. The Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act of the American Bar Association reviewed the FSIA in 1980. See 9 INT'L L. NEWS 2-3 (1980).

10. A comprehensive discussion of the legislative history of the FSIA is found in *Limits of Judicial Control*, *supra* note 8.

agencies and instrumentalities. However, service upon each entity is discussed in different subsections, 1608(a)¹¹ and (b),¹² respectively. Although there are a number of similar provisions for service upon foreign states and agencies, for example, service through a special arrangement, an international convention, the subsections differ. The method of last resort for foreign states is the diplomatic channel. For foreign agencies, when all other methods either fail or are unavailable, service will be made by an order of the court, in a manner consistent with the law of the place where service is to be made. Service can also be made upon foreign agencies by letters rogatory¹³ or upon a managing agent of a foreign agency in a manner similar to that provided in Rule 4(i) of the Federal Rules of Civil Procedure.¹⁴ The statute further provides that attempts at service shall take place in a hierarchical manner until, under one of the methods, successful service is obtained. The time at which an answer or other responsive pleading shall be due is set forth in section 1608. The manner for proof of service is explicitly set forth. Finally, default judgments must be served in the same manner as process commencing the action.

The Exclusivity of the FSIA's Methods of Service

Service of process upon foreign states in suits brought under the FSIA must be effected in strict compliance with the methods provided in section 1608(a). The statute states that service in both state and federal courts "shall be made" according to the methods enumerated.¹⁵ The legislative history states, in at least two places in the section-by-section analysis, that the FSIA sets forth the "exclusive" procedures for service of process and service of a default judgment.¹⁶

The courts agree. The United States District Court for the Southern District of New York has held in two cases that service must meet the requirements of the Act to be valid. In *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*,¹⁷ originally brought in the New York Supreme Court, service was made by personal delivery of a summons and complaint upon "defendant's secretary."¹⁸ Defendant, after the case was removed to the district court,

11. 28 U.S.C. § 1608(a) (1976).

12. 28 U.S.C. § 1608(b) (1976).

13. A letter rogatory is a formal communication from a court in which a suit is pending to a court in a foreign country, requesting the foreign court's assistance in obtaining the testimony of a witness residing in that foreign jurisdiction. The foreign court is asked to assist in recording that testimony and to transmit it to the court making the request.

14. 28 U.S.C. § 1608(a) (1976).

15. *Id.*

16. H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6622-23 [hereinafter cited as H.R. REP. NO. 94-1487].

17. 443 F. Supp. 816 (S.D.N.Y. 1978).

18. *Id.* at 818. This method of service would also appear contrary to the holdings of two pre-FSIA cases involving service of process issues; see *Hellenic Lines v. Moore*, 345 F.2d 978 (D.C. Cir. 1965); *Oster v. Dominion of Can.*, 144 F. Supp. 647 (N.D.N.Y. 1956), *aff'd*, 238 F.2d 400 (2d Cir. 1956). The *Gray* court, however, cited neither of these cases.

petitioned to quash the complaint on the ground of improper service.¹⁹ Plaintiffs argued that defendants nonetheless had actual notice of the suit, a fact which defendants conceded. Notwithstanding actual notice the court found service faulty and dismissed the action, stating that "violence has been done to the congressional concern for the difficulties inherent in cross-cultural and cross-lingual litigation which is apparent on the face of the service provisions of the Immunities Act."²⁰

*40 D 6262 Realty Corp. v. United Arab Emirates*²¹ also originated in state court. Petitioners attempted service by affixing a "notice of petition" to the premises of the Permanent Mission of the United Arab Emirates and then mailing a copy to the Mission.²² The court, relying upon legislative history and *Gray*, had little trouble in dismissing the action for failure of service since it did not accord with the FSIA.²³

One case, however, raised questions regarding exact compliance with the Act. *Iptrade International S.A. v. Federal Republic of Nigeria*,²⁴ utilizing the FSIA's jurisdictional provisions, involved the confirmation of an arbitral award against Nigeria. The district court ordered that the clerk of the court serve a copy of the arbitral award upon the Federal Republic of Nigeria by mailing it with return receipt to the Foreign and Defense Ministers of Nigeria and the Embassy of Nigeria in Washington.²⁵ Although a return receipt was received from the Embassy, no receipt found its way back from Nigeria. Nonetheless, the court found service sufficient under section 1608 and entered a default judgment.²⁶ The case can be criticized in light of the precedents set by *Gray*²⁷ and *United Arab Emirates*.²⁸ In addition, service by registered mail upon a foreign embassy is not only not provided in the service provisions of the Act but is also expressly contrary to the legislative history.²⁹

19. *Id.* at 819.

20. *Id.* at 821.

21. 447 F. Supp. 710 (S.D.N.Y. 1978).

22. *Id.* at 711.

23. *Id.* at 712.

24. 465 F. Supp. 824 (D.D.C. 1978).

25. *Id.* at 826.

26. *Id.* at 827.

27. *Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y. 1978).

28. *40 D 6262 Realty Corp. v. United Arab Emirates*, 447 F. Supp. 710 (S.D.N.Y. 1978).

29. See H.R. REP. NO. 94-1487, *supra* note 16, at 6625, which states,

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state [The] second means, of questionable validity, involves the mailing of a copy of a summons and complaint to a diplomatic mission in a foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with Section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458-59 (1974).

SERVICE THROUGH AN APPLICABLE INTERNATIONAL CONVENTION

Section 1608(a):

Service in the courts of the United States and of the States shall be made upon a foreign state or a political subdivision of a foreign state: (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents.³⁰

Unless the parties have agreed upon the method of service by, for instance, designating an agent for service in the contract that has been breached,³¹ the plaintiff must follow in a hierarchial manner the methods of service specified in section 1608(a). The first such method is service "in accordance with an applicable international convention on service of judicial documents."³² Currently, the United States is party to only one such agreement, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter cited as the Hague Service Convention), signed at the Hague, November 15, 1965.³³ A second convention regarding service of judicial documents is the Inter-American Convention of Letters Rogatory, effected in Montevideo, Uruguay, January 30, 1975,³⁴ and its Protocol,³⁵ which were recently adopted by the United States.³⁶ As the conventions are self-explanatory with regard to their service provisions,³⁷ this discussion will focus upon the difficulties which can arise in serving a foreign state under the Conventions.

The Hague Service Convention provides a relatively simple and rapid method for service in most cases. Each signatory state must des-

30. 28 U.S.C. § 1608(a)(2) (1976).

31. Examples of such "special arrangements" are found in V DELAUME, *supra* note 7, appendix.

32. 28 U.S.C. § 1608(a)(2) (1976).

33. Hague Service Convention, Nov. 15, 1965, 20 U.S.T. 361; T.I.A.S. No. 6638. The treaty entered into force for the United States on February 10, 1969.

34. 14 INT'L LEGAL MATERIALS 339 (1975).

35. 18 INT'L LEGAL MATERIALS 1238 (1979). The Protocol to the Inter-American Convention was done May 8, 1979.

36. The Inter-American Convention and its Protocol were signed by a United States delegate to the Organization of American States on April 14, 1980. The Department of State has not as yet formally recommended ratification.

37. Procedures involved in making use of the conventions are discussed in greater detail in V DELAUME, *supra* note 7; Amram, *The Proposed International Convention of the Service of Documents Abroad*, 51 A.B.A.J. 650 (1965); U.S. DEP'T OF JUSTICE, INSTRUCTIONS FOR SERVING FOREIGN JUDICIAL DOCUMENTS IN THE U.S. AND PROCESSING REQUESTS FOR SERVING AMERICAN JUDICIAL DOCUMENTS ABROAD, Memo. No. 386, Rev. No. 2, (1977); U.S. DELEGATION TO THE SPECIAL COMM'N ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, REPORT (Nov. 21-25, 1977), reprinted in 17 INT'L LEGAL MATERIALS 312 (1978); PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND CRIMINAL MATTERS (Dec. 1977), reprinted in 17 INT'L LEGAL MATERIALS 319 (1978).

For a discussion of procedures used in conjunction with the Inter-American Convention, see Carl, *Service of Judicial Documents in Latin America*, 53 DEN. L.J. 455 (1976) [hereinafter cited as Carl].

ignate an organ of its government as a Central Authority "which will undertake to receive requests for service coming from other contracting States" ³⁸ Summons and complaints are sent in duplicate, under covering forms required by the Convention, directly to the Central Authority of the foreign state. The Central Authority then makes service upon the defendant either in accordance with a specified procedure or in accordance with the law of the foreign state. Once service is made, the Central Authority certifies that it has done so and returns a copy of the documents sent with its certification to plaintiff's counsel, the clerk of the court, United States marshal, sheriff, or bailiff. Furthermore, some states that are parties to the Convention will not serve process upon involuntary defendants unless the documents are translated into the official language of the foreign state in which the defendant resides. ³⁹

For purposes of section 1608(a)(2), however, there are potential problems with the Convention. In addition to the United States, only eighteen countries are presently party to the Convention. ⁴⁰ The number of signatories, alone, is a problem, but the grounds upon which one of the states that is party to the Convention can refuse to serve documents are important. Pursuant to article 13 of the Convention, although a foreign state may not refuse to comply with a request for service solely because the state claims exclusive jurisdiction over the subject matter of the action or because the action could not be brought within that country under its law, ⁴¹ it may do so if compliance with a request would infringe upon its sovereignty or security.

The drafters of the Hague Service Convention worked arduously to eliminate potential use of public policy as an "escape hatch" to service. They did, however, recognize the need for some grounds upon which a state could refuse service. ⁴² In trying to clarify the meaning of the exception, the drafters of the Convention hoped that sovereignty and security would be more precise than municipal law concepts of public policy. The negotiating history of the Convention implies that sovereignty violations and security considerations should be on the same

38. Hague Service Convention, Nov. 15, 1965, art. 2, 20 U.S.T. 361, T.I.A.S. No. 6638.

39. *Id.* art. 7.

40. Barbados, Belgium, Botswana, Denmark, Egypt, Federal Republic of Germany, Finland, France, Israel, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Sweden, Turkey, and the United Kingdom are party to the Hague Service Convention. 8 MARTINDALE-HUBBELL LAW DIRECTORY 4545 (113 ed. 1981).

The Republic of Seychelles acceded to the Hague Service Convention by depositing with the Kingdom of the Netherlands its instrument of accession, dated November 4, 1980. Notification in conformity with art. 31, para. c, of the Hague Service Convention, from the Royal Netherlands Embassy to U.S. Dep't of State (Dec. 18, 1980) (on file at the Journal of Legislation office).

In addition, Italy has expressed its intention to accede to the Hague Service Convention. Telegram from the American Embassy in Rome to U.S. Secretary of State (April 10, 1981) (on file at the Journal of Legislation office).

41. Hague Service Convention, *supra* note 33, art. 13.

42. III CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE, ACTS ET DOCUMENTS DE LA DIXIÈME SESSION 375-76 & *passim* (1965).

plane as violations of international, as opposed to domestic, public policy.⁴³ It is not exactly clear how this concept helps to clarify the exception.⁴⁴ A Central Authority faced with a request for service under the Convention might well look at article 13 before certifying that its government has been served, particularly if the defendant foreign state did not subscribe to the restrictive theory of sovereign immunity.

One case, an aberration one trusts, in which the Hague Service Convention was used to attempt service was rejected on article 13 grounds.⁴⁵ Interestingly, the defendant in the case was the United Kingdom, the only state in addition to the United States that had adopted an act analogous to the FSIA, entitled the State Immunities Act of 1978.⁴⁶ Perhaps it was the particular facts of the case, *viz.*, an action for damages for injuries sustained as a result of the negligent fueling of a British warship in Philadelphia, which led the British Consul in Washington to reply to plaintiff's counsel,

I am returning this complaint to you as article 13 of the 1965 Hague Convention states that the State addressed may refuse to comply with the request for service if it deems that compliance would infringe the principal (sic) of sovereign immunity. The Legal Advisers of the Foreign and Commonwealth Office in London have advised that the Crown is not willing to appear and to submit to the jurisdiction of the United States District Court.⁴⁷

Consequently, the Hague Service Convention, although appearing to be a useful mechanism for service, may in some cases turn out to be an ineffective step in the service procedure upon a foreign state. Although the Convention provides a mechanism for the reduction of difficulties arising in its use, this situation is an inappropriate occasion to invoke the mechanism. Deference must be given to a foreign state's determination of what may constitute a violation of its sovereignty or security. In addition, recourse to the courts of the state in which the request was denied is possible. However, as a matter of practicality, this is not recommended since there exist two other methods of service, provided for in section 1608,⁴⁸ which should prove successful in obtaining service upon the defendant foreign state.

The United States has signed the Inter-American Convention and its additional Protocol⁴⁹ and will soon send the Conventions to the Sen-

43. *Id.*

44. *See, e.g.*, G. SCHWARZENBERGER, *THE INDUCTIVE APPROACH TO INTERNATIONAL LAW* 100-03 (1965), for a discussion of problems regarding international public policy and its relationship to concepts of sovereignty.

45. *Buri v. U.K. & the British Admiralty*, No. 79-3199 (E.D. Pa. Nov. 5, 1980).

46. The State Immunities Act, ch. 33, dated July 20, 1978, was reprinted in 17 *INT'L LEGAL MATERIALS* 1123 (1978).

47. Letter from E.K. Green, Her Majesty's Consul, The British Embassy, to Mr. John Dorfman of Pechner, Dorfman, Woolf, Roonick and Cabot, (Dec. 18, 1979) (on file at the Journal of Legislation office).

48. 28 U.S.C. § 1608 (1976).

49. Inter-American Convention, *supra* note 34; Additional Protocol, *supra* note 35.

ate for advice and consent to ratification.⁵⁰ Once ratified, it would become an applicable convention for section 1608(a)(2) purposes. Thus, a plaintiff suing a foreign state that is party to the Inter-American Convention would be required to utilize the Convention's method of service before proceeding with the two alternative methods of service.

The Inter-American Convention and Protocol provide a procedural framework similar in most respects to the Hague Service Convention. However, article 17 states that "(t)he State of destination may refuse to execute a letter rogatory that is manifestly contrary to its public policy ('the ordre publi')." ⁵¹ This unquestionably provides a much broader basis for a state to deny service than the Hague Convention. Under the Hague Convention denial can take place if a contracting state considers that compliance with the request would violate its security or sovereignty. The Inter-American Convention permits rejection if the letter rogatory itself could be deemed a violation of public policy.

Public policy exceptions are frequently criticized as providing an "escape hatch" to treaty obligations. One hopes that the exceptions in both the Hague Service Convention and the Inter-American Convention will be construed narrowly by the states which are or may become party to the Convention.

SERVICE OF PROCESS BY INTERNATIONAL REGISTERED MAIL

Section 1608(a):

Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state: (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.⁵²

The petitioner suing a foreign state, if he has no special arrangement for service or if he has been unable to serve in accordance with an applicable international convention, must attempt to serve the foreign state defendant by sending a summons, complaint, and notice of suit, duly translated, by international registered mail to the foreign minister or secretary of state of the foreign state defendant. Before service can be attempted through the diplomatic channel, the plaintiff must wait at least thirty days for the mail receipt to be returned to the clerk of the court.

The first consideration is to determine whether international registered mail, return receipt requested, exists in the foreign state. Publication 42 of the United States Postal Service provides a breakdown of

50. See note 36 *supra*.

51. Inter-American Convention, *supra* note 34, art. 17.

52. 28 U.S.C. § 1608(a)(3) (1976).

those countries in which such special mail services are available.⁵³ In those countries in which such mail service exists, the return receipts are executed in accordance with that country's particular mail delivery laws. In addition, Publication 42 warns that "[t]he signature of the addressee is not furnished by some countries, or may be furnished only under specified conditions."⁵⁴ This may pose special problems for petitioners in proving service because pursuant to section 1608(c), "[s]ervice shall be deemed to have been made . . . as of the date of receipt indicated in the certification, *signed* and returned postal receipt"⁵⁵

Setting the technicalities of this method of service aside, a problem with such service, as with Rule 4(i)(D) of the Federal Rules of Civil Procedure, is that the probability of someone signing a return receipt in the country of destination is remote. This is not to say that service has not been effected pursuant to this section.⁵⁶ For the most part, however, particularly if the foreign ministry reads the documents being sent and realizes that by signing and returning the receipt, the court in the United States will obtain jurisdiction over the country, the receipt may very well go unexecuted. To illustrate, of the fourteen defendants in *International Association of Machinists and Aerospace Workers v. OPEC*,⁵⁷ only two return receipts appeared to have been signed and returned properly.⁵⁸

Of further importance, questions can arise as to whether service by registered mail satisfies due process notice requirements. Although service by mail under the rule has been upheld,⁵⁹ Rule 4(i) of the Federal Rules of Civil Procedure requires that service must be "reasonably calculated to give actual notice."⁶⁰ As submitted to Congress in 1973, the original bill codifying sovereign immunity allowed service by registered mail.⁶¹ However, that bill highlighted the problem of adequacy of

53. U.S. POSTAL SERVICE, POSTAL BULLETIN: Transmittal Letter 85, Publication 42 (Oct. 16, 1978).

54. *Id.*

55. 28 U.S.C. § 1608(a)(3) (1976) (emphasis added).

56. *See, e.g.*, County Bd. of Arlington County v. Ger. Democratic Republic, Civ. No. 78-293-A (E.D. Va. Sept. 7, 1978). Unfortunately in that case the registered receipt was received by the court more than 30 days after service was attempted under § 1608(a)(4) creating the anomalous situation in which the American Embassy's diplomatic note advised the German Democratic Republic that it had 60 days from the delivery of the note in which to respond. Notwithstanding that, the court set a trial date 60 days after the date of the date of receipt shown on the return receipt.

57. 477 F. Supp. 553 (C.D. Cal. 1979).

58. As the author recalls, a third receipt was returned, but it was neither signed nor dated.

59. Courts have upheld service by mail on corporations at their principal place of business, as well as by service upon wholly owned subsidiaries and affiliated corporations in forum state which are co-defendants in action. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 330 (E.D. Pa. 1975); *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 462-63, (S.D.N.Y. 1974) (corporation was properly served where summons and complaint were mailed to the corporation's head office in New Brunswick, Canada).

60. FED. R. CIV. P. 4(i); *see also* *Milliken v. Meyer*, 311 U.S. 457 (1940).

61. STAFF OF THE SUBCOMM. ON CLAIMS AND GOVERNMENTAL RELATIONS OF THE HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., REPORT ON THE ADMINISTRATION OF

notice presented by service by registered mail alone, for it required that a second and concurrent method of service be made through the diplomatic channel. According to the legislative history of that early bill, the purpose of the second method of service was to

assure that the foreign state is notified even if through some error—such as the receipt of mailed copy of a summons and complaint by a minor official who fails to bring it to the attention of an ambassador. The foreign state itself does not receive actual notice through the mail.⁶²

This issue of adequate notice was raised in *International Association of Machinists and Aerospace Workers*.⁶³ As indicated previously,⁶⁴ two of the fourteen defendants were, in fact, served by registered mail. Notwithstanding the protestations of plaintiff's counsel and the Department of State, the court ordered the Department to serve once again through the diplomatic channel the two states that had returned registered receipts. As the clerk of court later explained to the Department, "the judge felt that, in the abundance of caution, it might be wise to have the United States Department of State serve them also under Section 1608(a)(4)."⁶⁵

The restrictive theory of sovereign immunity is repugnant to many foreign legal systems. Service of process by registered mail in one of those countries seems to add to the indignity. In its notice to Rule 4(i) of the Federal Rules of Civil Procedure, the Advisory Committee on Rules observed, "Service abroad may be considered by a foreign country to require the performance of judicial, and therefore 'sovereign' acts within its territory, which that country may conceive to be offensive to its policy or contrary to its laws."⁶⁶ In civil law systems generally, service is a ministerial function of courts. Service without the aid of foreign officials can be considered to be an usurpation of the official function of a foreign process server.⁶⁷ The Department of State from time to time receives diplomatic notes of protests from foreign states in which service was effected by registered mail within the country's territory. For

MILITARY CLAIMS IN EUROPE (Comm. Print 1973) [hereinafter cited as SUBCOMM. ON CLAIMS AND GOVERNMENTAL RELATIONS].

62. *Id.* at 43.

63. 477 F. Supp. 553 (C.D. Cal. 1979).

64. See text accompanying notes 57-58 *supra*.

65. Letter from the Clerk, U.S. District Court for the Central District of Cal. to Director, Office of Citizens Consular Services, U.S. Dep't of State (Aug. 9, 1979) (on file at the Journal of Legislation office).

66. COMM'N ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE, FOURTH ANNUAL REPORT 57 (1962).

67. See generally H. SMIT, INTERNATIONAL COOPERATION IN LITIGATION: EUROPE (1965); Ettinger, *Service of Process in Austria*, 9 INT'L L. 693 (1975); Montanelli & Botwinik, *International Judicial Assistance: Italy*, 9 INT'L L. 717 (1975); Heidenberg, *Service of Process and the Gathering of Information Relative to a Law Suit Brought in West Germany*, 9 INT'L L. 725 (1975); Carl, *supra* note 67; but see the Hague Convention of March 1, 1954, 286 U.N.T.S. 265, and the Hague Service Convention, *supra* note 33, which provide for this method of service if the country of destination does not object.

instance, in an *aide-memoire*⁶⁸ delivered to the Department on November 16, 1961, the Embassy of Switzerland pointed out that "the service of judicial documents under Swiss law is a governmental function to be exercised exclusively by the appropriate Swiss authorities."⁶⁹ It further declared that "service of such documents by mail constitutes an infringement of Switzerland's sovereign powers, which is incompatible with international law."⁷⁰ The Department of State replied that it regretted the inadvertent violation of Swiss law, that it had advised the competent United States authorities of their error, and that it hoped that future transmittals of such documents would be avoided.⁷¹

The Hague Service Convention recognizes this conflict between service by mail and sovereignty. Article 10 provides that a contracting state may object to service by mail. The Federal Republic of Germany so declared and has since provided the Department of State with several notes protesting service by mail.⁷² In addition, a recent United States Court of Appeals case⁷³ found that the Federal Trade Commission, in mailing to a French corporation in France a subpoena and a notice informing the witness served that he might become a defendant in the future, violated the sovereignty of France. The case was dismissed.

In view of the concerns expressed by several countries over service by mail abroad, the Department of State has entered into an agreement with the Administrative Office of the United States Courts whereby the Administrative Office has agreed to inform federal court clerks not to send process by mail to those countries which object.⁷⁴ The Department has also advised plaintiffs desiring to sue those foreign states which object to service by mail to forego this method of service. Instead, plaintiffs should forward the documents to the Department for service pursuant to the fourth method provided for in section 1608, the diplomatic channel.⁷⁵

68. An *aide-memoire* is an informal summary of diplomatic interview or conversation which serves as an aid to memory, conforming what has been said.

69. Aide-memoire from the Embassy of Switzerland to the U.S. Dep't of State (Nov. 16, 1961), obtained from U.S. Dep't of State, M.S. File No. 711.331/11-1661 (Nov. 28, 1961) (on file at the Journal of Legislation office) [hereinafter cited as M.S. File No. 711.331/11-1661]; relevant sections reprinted in Bilder, Christenson, Cohen, Huang, Nilsen, Reis, Rubon & Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 AM. J. INT'L L. 793, 794 (1962).

70. *Id.*

71. *Id.*

72. Diplomatic notes from the Embassy of the Federal Republic of Germany to the U.S. Dep't of State (Aug. 13, 1980 & Sept. 27, 1980), obtained from U.S. Dep't of State, Office of Citizens Consular Services, Europe Div., Judicial Assistance File: Federal Republic of Germany (on file at the Journal of Legislation office).

73. *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, No. 78-2160 (D.C. Cir. Nov. 17, 1980).

74. See letter from Carmen A. DiPlacido, Director, Office of Citizens Consular Services, U.S. Dep't of State, to Carl Imley, General Counsel, Administrative Office of the U.S. Courts (Oct. 30, 1980) (on file at the Journal of Legislation office); letter from Carl Imley to Carmen A. DiPlacido (Nov. 7, 1980) (on file at the Journal of Legislation office).

75. Letter from Donald R. Wallace, Chief, Europe and Canada Div., Office of Citizens Consular

SERVICE OF PROCESS UPON A FOREIGN STATE THROUGH THE DIPLOMATIC CHANNEL

Section 1608(a):

Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.⁷⁶

Plaintiffs not having a “special arrangement”⁷⁷ for service of process upon a foreign state may find it very difficult to effect service either through the appropriate mechanisms of the international convention or by registered international mail. Service through “diplomatic channels” by the Department of State in accordance with section 1604(a)(4) is the last resort.

Procedures Employed by the Department of State

The Department of State⁷⁸ will not accept a request for service if the other methods for service in section 1608(a) (discussed above) have not been exhausted, namely, if the notice of suit is insufficient or if the documents are incomplete, not accompanied with full translations, or not transmitted to it by the clerk of the court at which the action is pending.⁷⁹ In addition, before considering service, the Department will ascertain whether the defendant is a foreign state or political subdivision or an agency or instrumentality as defined in the FSIA,⁸⁰ of such

Services, U.S. Dep't of State, to Clerk, U.S. District Court for the Eastern District of N.Y. (Feb. 26, 1981) (on file at the Journal of Legislation office).

76. 28 U.S.C. § 1608(a)(4) (1976).

77. Under section 1608(a)(1), service upon a foreign state may be made “by delivery of a copy of the summons and complaint in accordance with any *special arrangement* for service between the plaintiff and the foreign state or political subdivision.” 28 U.S.C. § 1608(a)(1) (1976) (emphasis added); see text accompanying note 31 *supra*.

78. Although the statute refers to the appropriate office as the Office of Special Consular Services, due to a reorganization, the name of the office has changed to the Office of Citizens Consular Services.

79. See 28 U.S.C. § 1608(a)(4) (1976); 22 C.F.R. § 93.1 (1981), which contains the notice of suit regulations; U.S. Dep't of State airgram A-1578 (May 15, 1979), *reprinted in* V DELAUME, *supra* note 7, appendix.

There are a number of cases in which plaintiffs have requested the Department of State to serve documents without first exhausting section 1608(a)(3) methods of service. These plaintiffs have argued not only that service by mail will undoubtedly not work and that 30 days will have been wasted but also that both courts and plaintiffs have more confidence in service effected by the Department through its channels.

80. 28 U.S.C. § 1603 (1976).

foreign state.⁸¹

Once these requirements are met, the Department will either transmit the summons, complaint, notice of suit, and their translations to the American embassy in the defendant foreign state for service or serve the embassy of the foreign state in the United States. If service is made abroad, a copy of the notice of suit is sent to the foreign state's embassy in the United States to assure that the embassy is duly informed of the impending service upon its government by the American embassy abroad.⁸²

Service is effected by dispatching to the ministry of foreign affairs of the foreign state a diplomatic note enclosing the documents to be served. The note advises the foreign state that it is being sued under the FSIA⁸³ and refers to the Act's provisions regarding immunities. It also suggests that the foreign state defendant consult competent American counsel. The American embassy will then return a copy of the note of transmittal, which it has duly certified to be an authentic copy, together with the duplicate set of documents served, to the Department of State for forwarding to the appropriate clerk of the court. The certified copy of the diplomatic note constitutes proof of service.⁸⁴ If service is made locally upon the foreign state's embassy in Washington, D.C., or New York, substantially analogous procedures are employed.

Service Abroad or in the United States

The FSIA gives the Department of State discretion to serve the foreign state either in the United States or elsewhere. Section 1608(a)(4) requires the Secretary of State to transmit the documents to be served

81. See, e.g., letter from Robert W. Dry, for the Director, Office of Special Consular Services to Frank R. Matera (March 24, 1978) (on file at the Journal of Legislation office). This letter discusses *Yugo Export, Inc., & Ins. Inst. "Novi Sad" v. Port Auth. of Thailand*, Civ. No. 78-484 (S.D.N.Y. Oct. 22, 1979). It states in pertinent part:

Section 1608(a) can only be utilized when the defendant is a foreign state or a political subdivision of a foreign state.

In your complaint you specifically allege that the Port Authority of Thailand is a separate legal entity. You also allege that the Port Authority is a political subdivision. A political subdivision within the meaning of Section 1608(a) is a geographical subdivision. Please note that Section 1603 which defines a foreign state as including an agency or instrumentality of a foreign state is expressly made inapplicable to Section 1608.

82. Service is not effected upon the foreign state by delivery of a copy of the notice of suit alone to the embassy of the foreign country to be served. Service is accomplished only when the American embassy transmits the notice of suit *and* the summons and complaint with translations to the foreign ministry of the foreign state defendant. It should be pointed out that the foreign missions in Washington were duly informed of this method of service by a circular diplomatic note. Diplomatic note from U.S. Dep't of State to foreign embassies in Washington, D.C. (Dec. 10, 1976), *reprinted in* [1976] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 7, at 327-28 (U.S. Dep't of State) [hereinafter cited as 1976 DIGEST]. The purpose of alerting the foreign embassy is to minimize irritation.

83. The statute provides that "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation." 28 U.S.C. § 1608(a) (1976). Regulations are found at 22 C.F.R. § 93.1-93.2 (1981); see note 86 *infra* and accompanying text.

84. 28 U.S.C. § 1608(c)(1) (1976).

“through diplomatic channels to the foreign state.”⁸⁵ The regulations promulgated pursuant to section 1608(a)(4) are more precise than the statute as to what constitutes a diplomatic channel.⁸⁶ Pursuant to these regulations, the Secretary can serve the foreign state through the American embassy in the foreign state or the embassy of the foreign state in the United States, if the foreign state desires or “if otherwise appropriate.”⁸⁷ Conceivably, the Secretary has the authority to serve the foreign state whenever there exist diplomatic channels to that foreign state.

The Department, however, has established a policy favoring service upon the ministry of foreign affairs of the foreign state defendant. This policy is enunciated in the Department of State’s circular instruction providing guidance to all diplomatic and consular posts regarding service upon foreign states:

Embassies are expected to proceed with service upon the ministry of foreign affairs in accordance with Section 1608(a)(4) in the overwhelming majority of cases when directed to do so by the Department. Note that regulations promulgated pursuant to 1608(a)(4), which might be utilized in extremely burdensome or compelling circumstances, provide that the Department would in an appropriate case effect service upon the Embassy of the foreign state in Washington by way of diplomatic note.⁸⁸

One of the major reasons for this policy is expediency. If the foreign state’s embassy in this country were served, transmittal of the service documents to the appropriate officials in the foreign state’s government might take several weeks or longer. Failure to respond to the complaint within a sixty-day period could lead to a default judgment.⁸⁹

While the policy of serving foreign states at their foreign ministries is the customary method of service, the Department has, on several occasions, served foreign embassies in Washington, D.C. For example, in a suit against the Republic of the Philippines,⁹⁰ the Department served the Embassy of the Philippines in this country. Two of the member

85. This method is available if service pursuant to section 1608(3) “cannot be made within 30 days.” 28 U.S.C. § 1608(a)(4) (1976).

86. The regulations stated:

Upon receiving the required copies of documents and any required translations, the Director of Special Consular Services shall promptly cause one copy of each such document and translation (“the documents”) to be delivered—

(1) To the Embassy of the United States in the foreign state concerned, and the Embassy shall promptly deliver them to the foreign ministry or other appropriate authority of the foreign state, or

(2) If the foreign state so requests or if otherwise appropriate, to the embassy of the foreign state in the District of Columbia.

22 C.F.R. § 93.1(c) (1981).

87. *Id.* § 93.1(c)(1)-(2).

88. M.S. File No. 711.331/11-1661, *supra* note 69. Excerpts from this circular instruction are reprinted in 1976 DIGEST, *supra* note 82, at 327-28 and 18 INT’L LEGAL MATERIALS 1177 (1979).

89. 28 U.S.C. § 1608(d) (1976).

90. *Tomanek v. Phil.*, Civ. No. 505885-5 (Cal. Super. Ct., March 20, 1978).

countries of the Organization of Petroleum Exporting Countries, in the antitrust action brought under the FSIA, were served in Washington, D.C.⁹¹ Subsequent to the takeover of our Embassy in Tehran, more than a hundred complaints were served upon the Embassy of Iran in Washington.⁹²

What Constitutes a Diplomatic Channel?

Neither the legislative history nor the FSIA clarifies what constitutes diplomatic channels.⁹³ The modern structure of international relations suggests a spectrum of possible definitions. At one end of the spectrum are friendly diplomatic relations in which foreign states are represented by ambassadors. At the other end is the state of non-recognition, *de facto* and *de jure*. In the middle exist modern and not-so-modern creatures of international law, such as international organizations, interests sections, protecting powers, and liaison offices. There are also entities like the American Institute in Taiwan and its counterpart in this country.⁹⁴ Principles of diplomatic relations and recognition are woven throughout this array.

Since the passage of the FSIA, the Department has received requests to find diplomatic channels in some interesting situations. Responding to a request for service upon Vietnam,⁹⁵ the Department indicated to the court,

It is . . . implicit that diplomatic channels must exist between the foreign state and the United States in order for service to be available under section 1608(a)(4). However, the United States does not maintain diplomatic relations with the government in Vietnam. There is, moreover, no third country protecting power or intermediary available to act on behalf of the United States in Vietnam⁹⁶

In the suit against the Organization of Petroleum Exporting Countries and its member states,⁹⁷ plaintiff's counsel was unable to serve the Organization itself by any of the required methods. The Department of State was requested to serve the Organization through diplomatic channels.⁹⁸ The Department replied that "there are no diplomatic channels

91. The two countries were Algeria and Qatar. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).

92. The Office of Citizens Consular Services of the U.S. Department of State maintains a complete listing of the complaints served.

93. See IV G. HACKWOOD, *DIGEST OF INTERNATIONAL LAW* § 413 (1942); 6 WHITEMAN, *supra* note 4, § 19.

94. Established pursuant to the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (codified at 22 U.S.C.A. § 3301 (West Supp. 1981)), the American Institute in Taiwan and its United States counterpart promote scientific and cultural exchanges between the two countries. They perform functions usually reserved for embassies. The American Institute is a corporation chartered in the District of Columbia.

95. *Kirkwood v. Vietnam*, No. CV 78-0000372 (N.D. Cal. Nov. 20, 1979).

96. Letter from H. Edward Odom, Office of Citizens Consular Services, U.S. Dep't of State, to William L. Whittaker, Chief Clerk, U.S. District Court for the Northern District of Cal. (May 31, 1979) (on file at the Journal of Legislation office).

97. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).

98. Letter from Richard L. Fine to Carmen A. DiPlacido, Acting Director, Office of Citizens

within the meaning of 1608(a)(4) through which service could be made on that Organization."⁹⁹ More recently, in suits brought against Iran and its various agencies and instrumentalities, the Department of State in addition to serving the foreign state itself when named as defendant, has been requested to serve that country's agencies and instrumentalities through the diplomatic channel.¹⁰⁰ In answering the plaintiffs' requests, one of the arguments used by the Department is that no diplomatic channels are maintained with the agencies and instrumentalities. The only channels available were with the Islamic Republic of Iran.¹⁰¹

On a more positive side, since passage of the FSIA, the Department has served, as a matter of routine, numerous foreign states through its diplomatic channels. Service, for instance, has been effected upon Chile, Nigeria, the Soviet Union, the German Democratic Republic, Haiti, the People's Republic of China, and Saudi Arabia.¹⁰²

Service Through a Protecting Power

The regulations pursuant to section 1608(a)(4) indicate that if the United States does not engage in diplomatic relations with or maintain a mission in the defendant foreign state, then service will be made through an existing diplomatic channel, such as "to the embassy of another country authorized to represent the interests of the foreign state concerned in the United States."¹⁰³ These regulations contemplate at least two situations: (1) where a foreign state represents the interests of a smaller state that because of minimal foreign relations concerns, does not maintain an embassy;¹⁰⁴ or (2) where there are no diplomatic relations but the foreign state concerned acts as a protecting power, whether or not it maintains an interests section, in the embassy of some third state.¹⁰⁵ To date, the United States has received no requests to

Consular Services, U.S. Dep't of State (July 17, 1979) (on file at the Journal of Legislation office).

99. Letter from Norbert J. Krieg, Director, Office of Citizens Consular Services, U.S. Dep't of State, to Katharine Peake, Deputy Clerk, U.S. District Court for the Central District of Cal. (July 31, 1979) (on file at the Journal of Legislation office).
100. Discussion of service upon agencies and instrumentalities is beyond the scope of this article.
101. Letter from Ruth A. McLendon, Deputy Assistant Secretary for Overseas Citizens Services, U.S. Dep't of State, to George F. McGrath, Clerk, U.S. District Court for the District of Mass. (Feb. 11, 1980) (on file at the Journal of Legislation office).
102. *Letelier v. Central Nacionolde Informaciones*, No. CIV 78-1477 (D.D.C. Nov. 5, 1980); *E. Europe Import-Export, Inc. v. Fed. Republic of Nigeria*, No. 77-CIV-2809 (May 31, 1979) (Dismissed with Prejudice); *Sowinski v. U.S.S.R. Mission to the United Nations*, Civ. No. 78-C-863 (June 25, 1979); *County Bd. of Arlington County v. Ger. Democratic Republic*, Civ. No. 78-293-A (E.D. Va. Sept. 7, 1978); *Translinear, Inc. v. Bank of Dev. of Haiti*, Civ. No. 79-53850 (S.D.N.Y., filed Dec. 13, 1979); *Scott v. People's Republic of China*, No. CA-3-79-0836 (N.D. Tex., Filed June 29, 1979); *Posthauer v. Saudi Arabia*, Civ. No. C76-2369 RFP (N.D. Cal. Oct. 22, 1976).
103. 22 C.F.R. § 93.1(c)(1) (1981).
104. For example, Monaco is represented by France in this country.
105. Contact with Cuba is possible through the Cuban Interests Section of the Embassy of Czechoslovakia in this country. See [1977] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW § 3, at 22 (U.S. Dep't of State).

serve foreign states represented in the former manner.

Conceivably, in cases in which there are no relations but where there exists some form of third country representation or protecting power, service might be attempted through the diplomatic mission of that third country in the defendant foreign state.¹⁰⁶ For instance, the Department of State served the People's Democratic Republic of Yemen, a country with which the United States has not had diplomatic relations for some twenty years, through the British Embassy located in the capital city, Aden.¹⁰⁷ The British Foreign and Commonwealth Office agreed to the Department's proposal for service through its Embassy,¹⁰⁸ despite the fact that this type of service was never contemplated when the United States Embassy in that country exchanged with the British Embassy a *protocol de remise*¹⁰⁹ at the time of the break in relations between the United States and the People's Democratic Republic of Yemen. The United States served Iraq in the *OPEC* case¹¹⁰ through the United States Interest Section of the Embassy of Belgium in Iraq. Furthermore, when Iran closed its Embassy in Washington, D.C., the Swiss Government was requested (although this was not enunciated in the formal agreement), as part of its protecting power arrangement, to serve Iran in Tehran. It did so in approximately a hundred cases.¹¹¹ This cooperation is possible because it is an accepted diplomatic procedure for a protecting power to act as a conduit for official communications from the protected power to the local power.¹¹² Nonetheless, in situations of this type, the absence of an express agreement in a *protocol de remise* could justify denial by a protecting power of a request to serve judicial documents.

Rejection of the Diplomatic Note by the Foreign State

A discussion of section 1608(a)(4) is not complete without a mention of what may occur after service has been made through the diplomatic channel. On a number of occasions the notes are rejected outright: they are not accepted when personal delivery is attempted. On other occasions, the foreign ministry or embassy, depending upon the channel employed, may return the note and accompanying docu-

106. The channel almost without exception functions as described. 7 U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL 953 (1970).

107. *Muhammadi Steamship Co. v. People's Democratic Republic of Yemen*, Civ. No. 77-5052 (S.D.N.Y. Feb. 19, 1981).

108. Telegram from the American Embassy in London to U.S. Secretary of State (May 8, 1980) (on file at the Journal of Legislation office).

109. In United States diplomatic practice a *protocol de remise* is used when the Department of State breaks off relations with a country. The *protocol* functions as an agreement with a third country under the terms of which United States interests are represented vis-a-vis the nation with which relations have been severed. The United States will resume diplomatic relations with that country under the terms of a *protocol de reprise*.

110. *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979).

111. See note 92 *supra* and accompanying text.

112. W. FRANKLIN, PROTECTION OF FOREIGN INTERESTS: A STUDY IN DIPLOMATIC AND CONSULAR PRACTICE 234 (1947).

ments not only protesting the attempt at service but also expressing its dismay at the attempt by a United States court to obtain jurisdiction over the foreign state defendant.¹¹³ It is quite normal for the foreign state, in arguing that service is a violation of accepted norms of international law, to supply extensive legal arguments about service and sovereign immunity.

The rejection of diplomatic notes is an accepted diplomatic practice.¹¹⁴ Recognizing this phenomenon, the Department has established a policy whereby, if the diplomatic note of rejection refers to the noteserving process, the Department will forward, as a matter of routine, a certified copy of the note to the court at which the action is pending.¹¹⁵ The foreign state, however, will be advised that the

Department [of State] is [neither] in a position to comment upon the merits of the suit [n]or to adjudicate claims to sovereign immunity and that there is no assurance that a court will take notice of the foreign ministry's note and that defenses of sovereign immunity should be made directly to the court in accordance with the provisions of the Foreign Sovereign Immunities Act and, [that] therefore, [the foreign state] should take whatever steps are necessary to avoid a default judgment which may include consulting with competent American counsel.¹¹⁶

The Propriety of Service Through Diplomatic Channel

When the FSIA was first presented to Congress,¹¹⁷ service of process through the diplomatic channel was proposed as a concurrent method of service. If notice was inadequate by the other methods provided in the proposed bill, then service of the summons and complaint through the diplomatic channel would ensure that the foreign state was appropriately notified of the action.¹¹⁸ The proposed bill was withdrawn for reconsideration. A different proposal would have made the provisions for service through the diplomatic channel so complex as to discourage their use. It had provided that if service could not be effected through a special arrangement, letters rogatory, or registered mail, then service would be made through the diplomatic channel in only limited circumstances. The bill defined such circumstances as arising when

(A) the claim for relief arises out of an activity or act in the United States of a diplomatic or consular representative of the foreign state for

113. *See, e.g.*, *Letelier v. Central Nacionolde Informaciones*, No. CIV 78-1477 (D.D.C. Nov. 5, 1980); *Int'l Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), is also illustrative. Of the 13 defendants served, six rejected service outright. Two other nations later provided notes that objected to service.

114. *Id.*

115. U.S. Dep't of State airgram, *supra* note 79.

116. *Id.*

117. The FSIA was first presented as H.R. 11315, 94th Cong., 1st Sess. (1975).

118. *See* SUBCOMM. ON CLAIMS AND GOVERNMENTAL RELATIONS, *supra* note 61; *see* text accompanying note 61 *supra*.

which the foreign state is not immune from jurisdiction under Section 1605 of this title, or

(B) the foreign state uses diplomatic channels for service upon the United States or any other foreign state, or

(C) the foreign state has not notified the Secretary of State prior to the institution of the proceeding in question that it prefers that service not be made through the diplomatic channels.¹¹⁹

The section-by-section analysis accompanying this bill contemplated that foreign states would advise the Department whether they would or would not object to service through the diplomatic channel. Apparently, several bar associations feared that the gap could prove fatal, and hence, the bill was amended to reflect the present statutory language.¹²⁰

It is evident from the foregoing that the Department feared the reactions of foreign states to service through the diplomatic channel. Nonetheless, the United States frequently is sued abroad, and a customary method of service is upon our embassy in the foreign state. Moreover, the European Convention on State Immunity provides for this method of service, as does the United Kingdom State Immunities Act.¹²¹

It is reasonable to conclude that many of the objections raised by foreign states to service through diplomatic channels are in reality objections to the substance of the claims being brought against them. The virtues of service through the diplomatic channel are many. There can be no question that the foreign state received clear notice of the suit being brought against it. The Department of State makes certain that the foreign state is aware of the advisability of engaging the services of competent American counsel, if it becomes necessary to litigate the matter. Furthermore, service through the Department of State permits officers of a foreign state to provide intructions to United States embassies in advance.

CONCLUSION

The frustrations of litigants in obtaining service upon foreign states prior to the FSIA have been eliminated, since it is no longer necessary to attach assets to obtain jurisdiction. At the same time, the Act has removed the Department from participation in the politically sensitive process of deciding what foreign states may be sued.

Service under international conventions, like the Hague Service Convention, and service through international mail can be effective, but there are potential pitfalls. For instance, the exceptions to service under the regimes of the Hague Service Convention¹²² and Inter-American Convention on Letters Rogatory might be employed as an "escape

119. H.R. 11315, *supra* note 117, § 1608.

120. *See generally* H.R. REP. NO. 94-1487, *supra* note 16, at 6622.

121. *See* note 46 *supra*.

122. Hague Service Convention, Nov. 15, 1965, 20 U.S.T. 361; T.I.A.S. No. 6638.

hatch." With regard to the service by mail provisions of the FSIA, the Department of State has formulated policies that respect the sovereignty and due process rights of foreign states.

Its passage has also benefited foreign state defendants sued in the United States. Service through the diplomatic channel is an excellent "last resort," ensuring that the foreign state defendant is fully apprised that it is the subject of a lawsuit. This type of service facilitates notice to the foreign state defendant of the action being brought against it and the steps that it should take to defend itself in a United States court. In the brief period since their enactment, the service provisions of the FSIA have demonstrated their effectiveness in providing a simple method of service accommodating the rights of both private plaintiffs and foreign state defendants.