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The ABCs of Service of Process Under the Foreign Sovereign Immunities Act

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THE ABCs OF SERVICE OF PROCESS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

I. INTRODUCTION

If a plaintiff fails to deliver service of process to a foreign sovereign in accordance with the Foreign Sovereign Immunities Act (FSIA),[1] then a Federal or State court cannot acquire personal jurisdiction over that foreign sovereign even if the court has subject matter jurisdic-

1. The Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (1988)) [hereinafter FSIA].

tion.[2] As a result, the "serving party"[3] must deliver service of process exactly as instructed by 28 U.S.C. § 1608,[4] the FSIA service of process provision, or risk dismissal for failure to have personal jurisdiction over the "foreign entity."[5] The United States' historical struggle with the concept of sovereign immunity has produced an outcome which melds personal jurisdiction and service of process.[6]

II. BACKGROUND

For more than 150 years, the United States granted immunity as a matter of law to foreign states from suits in United States' courts regardless of the nature of the claim.[7] In 1952, the United States attempted to depart from the practice of granting general immunity to foreign states by adopting the "restrictive" theory of sovereign immunity as advocated by the Tate Letter.[8] Unfortunately, the De-

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2. *Id.* § 1330(b). "Section 1330(b) provides personal jurisdiction wherever subject matter jurisdiction exists under subsection (a) and service of process has been made under § 1608 of the Act." Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 485 n.5 (1983).

3. Throughout this article, the term "serving party" refers to the party who is attempting to deliver service of process on a foreign state, or its political subdivision, agency or instrumentality.

4. The Supreme Court held "that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). *See generally* Andrew G. Bradley, *Service of Process Under the Foreign Sovereign Immunities Act of 1976: The Arguments for Exclusivity*, 14 CORNELL INT'L L.J. 357 (1981); Diego C. Asencio & Robert W. Dry, *An Assessment of the Service Provisions of the Foreign Sovereign Immunities Act of 1976*, 8 J. LEGIS. 230 (1981).

5. Throughout this article, the term "foreign entity" refers to the party being served with service of process under the FSIA, regardless of whether the "entity" is an individual or an organization. "Foreign entities" consist of three categories under the FSIA: 1) a foreign state, 2) a political subdivision of a foreign state, or 3) an agency or instrumentality of a foreign state. FSIA, *supra* note 1, § 1603. *See infra* text accompanying notes 55-97.

6. *See generally* MICHAEL W. GORDON, FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS §§ 1.01-5.02 (1991).

7. *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136, 3 L. Ed. 287 (1812). Although the *Schooner* holding is rather narrow, courts regard the *Schooner* decision as extending absolute immunity to foreign sovereigns. Arthur von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 39-40 (1978). *See generally* Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

8. The Tate Letter was named after Jack B. Tate, the Acting Legal Advisor to the Department of State. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 985 (1952), *and reprinted in* Alfred Dunhill of London v. Cuba, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.) [hereinafter the Tate Letter]. The Tate Letter expressed a general shift in U.S. policy concerning sovereign immunity, and a specific intent by the State

partment of State was never able to fully implement the "restrictive" theory through its "suggestions of immunity."[9]

Under the "restrictive" theory of sovereign immunity, a foreign state's public acts, committed within its own territory, were immune while its commercial acts were not immune.[10] The initial responsibility for deciding whether the act was public or commercial fell upon the executive branch — specifically the State Department.[11] If the State Department determined the act to be public, it delivered a "suggestion of immunity" to the court, which courts felt compelled to follow.[12] As a result, foreign states exercised tremendous political pressure to persuade the State Department to make "suggestions of immunity" to the court.[13]

Department to adopt the restrictive theory as the basis for making future "suggestions of immunity." GORDON, *supra* note 6, § 4.01 at 4-1.

9. Prior to the FSIA, the State Department made "suggestions of immunity" to U.S. courts as a customary response to diplomatic requests for immunity. "Suggestions of immunity" reflect the executive branch's dominant role in granting or denying sovereign immunity, and eventually evolved into a formal hearing process. GORDON, *supra* note 6, § 4.03, at 4-11. "A 'suggestion of immunity' [was then] sent to a court from the department . . . [where it] gained the force of law." *Id.* § 4.02, at 4-5. Therefore, if the State Department had strictly abided by the "restrictive" theory in its "suggestions of immunity," as contemplated by the Tate Letter, Congress would not have needed to codify the theory in the FSIA. However, foreign relations interests crept into the decisionmaking process once again. Rich v. Naviera Vacuba, 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

10. *See generally* Michael E. Jansen, *FSIA Retroactivity Subsequent to the Issuance of the Tate Letter: A Proposed Solution to the Confusion*, 10 NW. J. INT'L L. & BUS. 333 (1989); Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORD. L. REV. 155 (1981); Russell S. Burman, *Restrictive Immunity and the OPEC Cartel: A Critical Examination of the Foreign Sovereign Immunities Act and the International Association of Machinists v. Organization of Petroleum Exporting Countries*, 8 HOFSTRA L. REV. 771 (1980); Stanley Hilton, *The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns*, 41 U. PITT. L. REV. 841 (1980).

11. *See* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480, 487 (1983). Under the FSIA, the determination of public or commercial act is still required. *See* Note, *Two Faces of the Trader: Guidelines for Distinguishing Between Governmental and Commercial Acts Under the Foreign Sovereign Immunities Act of 1976*, 23 TEX. INT'L L.J. 465 (1988).

12. Even prior to the Tate Letter, the Supreme Court held State Department "suggestions of immunity" to be binding. *See, e.g.*, Republic of Mex. v. Hoffman, 324 U.S. 30 (1945); *Ex Parte* Republic of Peru, 318 U.S. 578 (1943).

13. As a result of political pressure placed on the State Department by foreign governments, "suggestions of immunity" were made even when sovereign immunity was unavailable under the restrictive theory's commercial act exception. *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess., 34-35 (1976) (testimony of Monroe Leigh, Legal Adviser of the Department of State). *See* Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORD. L. REV. 543, 548-549 (1977). *See generally* Monroe Leigh, *Sovereign Immunity — The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974). In cases where

In 1976, Congress enacted the Foreign Sovereign Immunity Act (FSIA) and codified the "restrictive" theory of sovereign immunity as a matter of federal law.[14] Congress passed the FSIA to relieve the executive branch of "case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.' "[15] More specifically, "the purpose of the [FSIA] . . . is to provide *when and how* parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."[16] Section 1604 of the FSIA grants general immunity to foreign states and their political subdivisions, agencies and instrumentalities from the jurisdiction of United States federal and state courts for all acts, subject to the exceptions contained in sections 1605 to 1607.[17]

> § 1604. Immunity of a foreign state from jurisdiction
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> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.[18]

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the State Department failed to deliver a "suggestion of immunity" to the court, the court determined whether sovereign immunity existed on the basis of past State Department decisions. *See* Andreas F. Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 909-912 (1969). As a result, both the executive and judicial branches determined foreign sovereign immunity by use of a variety of factors, including politics, which caused the courts to apply the restrictive theory in a haphazard manner. *Id.* at 906-909. *See also* Frederick A. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. WORLD PUB. ORD. 1, 11-13, 15-17 (1976).

14. FSIA, *supra* note 1.

15. *House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* U.S.C.C.A.N. 6604 (1976) and 1976 WL 14078, 2 (Leg. Hist.), *quoted in Verlinden*, 461 U.S. at 488 [hereinafter House Report]. The House and Senate Committees filed identical reports, and references *infra* to the House Report may be deemed to represent the views of the Senate Committee as well. *See Senate Judiciary Committee, Define Jurisdiction of U.S. Courts in Suits Against Foreign States*, S. Rep. No. 1310, 94th Cong., 2d Sess. 8-9 (1976).

16. House Report, *supra* note 15, at 1.

17. FSIA, *supra* note 1, § 1604. "As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." *Id.* § 1606.

18. *Id.* § 1604.

If the foreign state's actions satisfy one of the exceptions contained in sections 1605 to 1607, then section 1330(a) grants subject matter jurisdiction to federal district courts regardless of the amount in controversy.[19]

> § 1330. Actions against foreign states
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.[20]

Section 1330(b) grants personal jurisdiction over the foreign state *if* the court gains subject matter jurisdiction in accordance with section 1330(a) *and* the plaintiff delivers service of process in accordance with the FSIA's service of process provision (section 1608).[21]

> § 1330. Actions against foreign states . . .
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.[22]

Therefore, proper service of process must be made under section 1608 (and subject matter jurisdiction obtained under one of the exceptions contained in sections 1605-1607 or under an applicable international agreement), or the court fails to obtain personal jurisdiction over the foreign state, or its political subdivision, agency, or instrumentality.[23]

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19. *Id.* § 1330(a).

20. *Id.*

21. *Id.* § 1330(b).

> For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a) . . . . Besides incorporating these jurisdictional contracts (sic) by reference, section 1330(b) also satisfies the due process requirement of adequate notice *by prescribing that proper service be made under section 1608* of the [FSIA].

House Report, *supra* note 15, at 8 (emphasis added). Congress "carefully interconnected" the FSIA's personal jurisdiction clause, the service of process clause, and the exceptions clauses. *Id.* Ergo, if the serving party fails to deliver *proper* service of process under the FSIA, then the court fails to obtain personal jurisdiction over the foreign entity.

22. FSIA, *supra* note 1, § 1330(a).

23. *See* Shapiro v. Republic of Bol., 930 F.2d 1013 (2d Cir. 1991); Magnus Elecs. v. Royal Bank of Can., 620 F. Supp. 387 (N.D. Ill. 1985); Unidyne Corp. v. Aerolineas Argentinas, 590

Thus, subject matter jurisdiction and proper service of process are necessary for personal jurisdiction over a foreign state.[24]

Section 1608 of the FSIA "sets forth the exclusive procedures with respect to service on . . . a foreign state or its political subdivisions, agencies or instrumentalities."[25] However, section 1608 distinguishes between the procedures to be used in serving a foreign state or its political subdivision and in serving an agency or instrumentality of a foreign state.[26] In addition, section 1608 sets forth the specific criteria to be examined to determine when service has been made.[27] Delivery of service of process by any other means results in ineffective service of process and dismissal of the case.[28]

F. Supp. 398 (S.D. Va. 1984); Gray v. Permanent Mission of the People's Republic of the Congo to the U.N., 443 F. Supp. 816 (S.D.N.Y. 1978). *But see* Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435 (W.D. Pa. 1987).

24. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). *See also* Shapiro v. Republic of Bol., 930 F.2d 1013 (2d Cir. 1991); Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985).

25. House Report, *supra* note 15, at 18; Alberti v. Empresa Nicarguense de la Carne, 705 F.2d 250, 253 (7th Cir. 1983); LeDonne v. Gulf Air, 700 F. Supp. 1400, 1411 (E.D. Va. 1988). Prior to the enactment of the FSIA, there was no specific statute that provided instructions on how to serve a foreign sovereign. Congress remedied the situation by providing § 1608 — the FSIA service of process provision. Section 1330(b) underscores the importance of service of process by granting personal jurisdiction only where service of process is in accordance with the FSIA service of process procedures. Gray v. Permanent Mission of People's Republic of Congo to U.N., 443 F. Supp. 816, 819 (S.D.N.Y. 1978).

26. Section 1608(a) sets forth the exclusive procedures for serving a foreign state (e.g., Canada, Mexico) and its political subdivisions (e.g., Quebec, Yucatan). On the other hand, § 1608(b) sets forth the exclusive procedures for serving an agency or instrumentality of a foreign state (e.g., Mexico's state-owned oil company, PEMEX).

27. *See* FSIA, *supra* note 1, § 1608(c).

28. *See, e.g.*, Security Pac. Nat'l Bank v. Derderian, 872 F.2d 281 (9th Cir. 1989); Lucchino v. Foreign Countries of Braz., South Korea, Spain, Mex., & Arg., 631 F. Supp. 821 (E.D. Pa. 1986); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985). Delivery of service of process upon a consular official, personally present in the jurisdiction ("I gotcha' jurisdiction"), is invalid service of process and ineffective in securing personal jurisdiction under the FSIA. National Am. Corp. v. Federal Republic of Nig., 448 F. Supp. 622 (S.D.N.Y. 1978). *See also* Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (1965). Section 1608 was specifically added to avoid questions of inconsistency with the Vienna Convention on Diplomatic Relations. House Report, *supra* note 15, at 20. *See* Vienna Convention on Diplomatic Relations, Dec. 13, 1972, art. 22, § 1, 23 U.S.T. 3227. *But see* Renchard v. Humphreys & Harding, Inc., 59 F.R.D. 530 (D.D.C. 1973). Affixing a "notice of petition" to premises and mailing copy to foreign state's permanent mission is invalid service of process under the FSIA. Realty Corp. v. United Arab Emirates Gov't, 447 F. Supp. 710 (S.D.N.Y. 1978). *But see* Banco Metropoliltano, S.A. v. Desarrollo de Autopistas y Carreteras de Guat., S.A., 616 F. Supp. 301 (S.D.N.Y. 1985) (Guatemalan bank delivered service of process to another Guatemalan Bank by way of Consulate of Guatemala in New York; service was made by hand, without translation, and without signed receipt, but the court held service of process to be valid for purposes of the FSIA).

Although the FSIA seems straightforward and easily applied, many judges regard the FSIA confusing, technical and difficult to use.[29] For service of process issues, both conclusions are somewhat correct. Generally speaking, problems do not arise if FSIA service of process procedures are, in fact, followed. However, if FSIA service of process procedures are not followed to the letter, the FSIA can become a morass of subtle and paradoxal issues. This article attempts to provide a clear, concise guide to service of process under the FSIA. An explanation of what must, and what should, be done when serving a foreign state or its political subdivision, agency or instrumentality is provided.

III. PERSONAL JURISDICTION

Of all the issues concerning service of process under the FSIA, none are more important than those which involve the grant of personal jurisdiction over a foreign sovereign.[30] When the FSIA was enacted, Congress stated in its House Report that the FSIA had four basic objectives.[31] One of those objectives was, "for the first time in U.S. law, [to] provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction."[32] Congress' purpose in providing section 1330's comprehensive jurisdictional scheme — which includes both subject matter and personal

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29. Judge Ward called the FSIA a "remarkably obtuse" document, a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary." Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105-1106 (S.D.N.Y. 1982), *quoted in* Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting).

30. *See generally* David T. Pendegrast, *Strangers in a Strange Land: Personal Jurisdiction Analysis Under the Foreign Sovereign Immunities Act*, 47 WASH. & LEE L. REV. 1159 (1990); Bradley W. Paulson, *Personal Jurisdiction Over Aliens: Unravelling Entangled Case Law*, 13 HOUS. J. INT'L L. 117 (1990); Ronald Rogers, *Exploring the Nexus Test for Asserting Jurisdiction Under the Foreign Sovereign Immunities Act*, 10 N.C. J. INT'L L. & COM. REG. 263 (1985); Eric Johnson & Chrisanne Worthington, *Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT'L & COMP. L. 209 (1982); Terence J. Pell, *The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 CORNELL INT'L L.J. 97 (1981); Laura G. Schofield, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980). For an excellent discussion of the concepts of "general" and "specific" personal jurisdiction, see Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

31. *See* House Report, *supra* note 15, at 2-3.

32. *Id.* at 3.

jurisdiction — was to increase "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."[33]

To ensure uniformity, Congress took years in creating the FSIA. Congress began studying possible alternatives in the mid-1960s.[34] Congress allowed the Department of State and Justice to work extensively on the FSIA, and then submitted it to numerous authorities and practitioners of international law for comment.[35] After extensive consultation, subcommittee hearings, and redrafting, particularly with respect to the jurisdictional and service of process provisions, Congress enacted the FSIA.[36] Upon enactment, Congress declared that the FSIA "sets forth the *sole and exclusive standards* to be used in resolving questions of sovereign immunity . . . ."[37] Furthermore, "[a]side from setting forth comprehensive rules governing sovereign immunity, the [FSIA] prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, *[and] procedures for commencing a lawsuit against foreign states in both Federal and State courts* . . . ."[38]

Section 1330(b) is the key provision of the FSIA and, as stated above, closely interconnects the service of process provision contained in section 1608 with personal jurisdiction. According to the House Report and a simple reading of the clear and plain language of section 1330(b), a Federal or State court cannot acquire personal jurisdiction over a foreign state, or its political subdivision, agency or instrumentality unless the serving party delivers service of process in strict accordance with the procedures stated in section 1608.[39] The language of section 1330(b) is clear, "*[p]ersonal jurisdiction* over a foreign state *shall exist* as to every claim for relief . . . *where service has been made under section 1608* of this title."[40]

Unfortunately, some courts either ignore the clear requirements of the FSIA and the intent of Congress, or fail to understand the proper analysis of a case involving service of process under the FSIA.[41]

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33. *Id.* at 7.
34. *Id.* at 4.
35. *Id.*
36. FSIA, *supra* note 1.
37. House Report, *supra* note 15, at 6-7 (emphasis added).
38. *Id.* at 7 (emphasis added).
39. *See id.* at 18; FSIA, *supra* note 1, § 1330(b).
40. FSIA, *supra* note 1, § 1330(b) (emphasis added).
41. Federal courts are split over the question of whether FSIA service of process requirements are strict and failure to follow to them, even if only a technical violation, deprives the court of personal jurisdiction. The following courts have held that strict compliance is required. Magnus Elecs. v. Royal Bank of Can., 620 F. Supp. 387 (N.D. Ill. 1985); Unidyne Corp. v.

In *Harris Corp. v. National Iranian Radio & Television*, an American manufacturer brought suit against the National Iranian Radio and Television Company and Bank Melli Iran, an agency of the State of Iran.[42] The *Harris* court began its analysis correctly when it found subject matter jurisdiction to exist under section 1330(a), and stated that it "must complete the section 1330(b) inquiry by evaluating service of process."[43] The *Harris* court stated another truism when it held that it must "assess the exercise of authority against the standards of due process."[44] The two-part analysis which the *Harris* court announced is correct. In assessing the grant of personal jurisdiction under section 1330(b), a court must conduct 1) a statutory inquiry and 2) a constitutional inquiry.[45]

However, the *Harris* court failed to follow the analysis that the court itself acknowledged. The *Harris* court found that the American manufacturer failed to fulfill FSIA's service of process requirements, but then declared that the FSIA service of process procedures "exist merely to assure that actual notice be received."[46] Since the foreign state received actual notice, the court held that service was sufficient despite being statutorily improper.[47] Ironically, the *Harris* court admonished those seeking to invoke the FSIA to follow the service

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Aerolineas Argentinas, 590 F. Supp. 398 (S.D. Va. 1984); Gray v. Permanent Mission of the People's Republic of the Congo to the U.N., 443 F. Supp. 816 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2nd Cir. 1978). Other courts hold that substantial compliance which gives actual notice permits courts to assert personal jurisdiction over a foreign sovereign. Dehart v. A.C. & S., 682 F. Supp. 792 (Del. 1988); Obenchain v. Nacionale de Inversiones, 656 F. Supp. 435 (W.D. Pa. 1987); Banco Metropolitano v. Desarrollo de Autopistas, 616 F. Supp. 301 (S.D.N.Y. 1985); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982); Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981).

42. *Harris*, 691 F.2d at 1346.

43. *Id.* at 1352.

44. *Id. See* Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

45. *Id.*

46. *Harris*, 691 F.2d at 1352. The plain language of the FSIA contradicts this proposition. Furthermore, Congress explicitly included the language "if reasonably calculated to give actual notice" in only one of the seven FSIA service of process methods. FSIA, *supra* note 1, § 1608(b)(3). Thus, Congress must have intended, *a fortiori*, something more than "reasonably calculated to give actual notice" in the other six methods. It seems to the author that Congress intended to create a comprehensive legal, rather than equitable, scheme to protect the special interests of foreign sovereigns, which traditionally have been protected by the sovereign immunity doctrine. For the *Harris* court to state otherwise, besides creating law which affects foreign relations where courts have no constitutional or statutory mandate to do so, contradicts the plain language of the statutes, the statutory construction of the FSIA and the intent of Congress.

47. *Harris*, 691 F.2d at 1352.

provisions.[48] However, this admonishment misses the point because the serving party does not "invoke" the FSIA, the foreign sovereign "invokes"[49] the FSIA as an affirmative defense.[50] While the FSIA requires the serving party to follow the FSIA's service of process requirements, the foreign sovereign must prove that it is, in fact, a foreign sovereign.[51]

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48. *Id.* at n.16.

49. *See* Realty Corp. v. United Arab Emirates Gov't, 447 F. Supp 710, 712 (S.D.N.Y. 1978) (service by affixing copy of "notice of petition" to premises in question and mailing copy to United Arab Emirates Government's permanent mission is ineffective to secure personal jurisdiction for purposes of the FSIA); National Am. Corp. v. Federal Republic of Nig., 448 F. Supp 622, 636-637 (S.D.N.Y. 1978) (service upon a Nigerian consular official, personally present within the jurisdiction of the court, is ineffective to secure personal jurisdiction over Nigeria for purposes of the FSIA). *See also* Lucchino v. Foreign Countries of Braz., South Korea, Spain, Mex., & Arg., 631 F. Supp. 821 (E.D. Pa. 1986).

50. Once a plaintiff asserts a claim against a defendant, the defendant can present additional facts establishing a defense, even if all plaintiff's allegations are true. JACK H. FRIEDENTHAL, MARY K. KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 288 (1985). Such a defense is called an affirmative defense, and is pleaded in the Answer. *Id.* at 288-89. The FSIA grants immunity to foreign states and their political subdivisions, agencies and instrumentalities in U.S. federal and state courts. FSIA, *supra* note 1, § 1604. By proving the additional facts of "sovereignty," the defendant establishes an affirmative defense — sovereign immunity — which must be established with sufficient proof. *See infra* note 51. After establishing proof of "sovereignty," the burden of proof shifts to the plaintiff to prove a basis for jurisdiction. *In re* Sedco, 543 F. Supp. 561, 564 (S.D. Tex. 1982). Hence, the plaintiff must show the existence of an exception to sovereign immunity contained in §§ 1605 to 1607 to obtain subject matter jurisdiction. FSIA, *supra* note 1, § 1330(a). Thus, sovereign immunity is more than just an affirmative defense under the FSIA — its absence is a jurisdictional requirement. MOL, Inc. v. Peoples Republic of Bangl., 736 F.2d 1326, 1328 (9th Cir.), *cert. denied*, 468 U.S. 103 (1984); Osen by Sheldon v. Mexico, 729 F.2d 641, 644 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). *See also* Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 (D.C. Cir. 1982) ("The Act thereby connects the issue of subject matter jurisdiction to the issue of sovereign immunity: the absence of immunity is a condition to the presence of subject matter jurisdiction."), *cert. denied*, 464 U.S. 815 (1983). To obtain personal jurisdiction, the plaintiff must prove 1) subject matter jurisdiction and 2) proper service of process under § 1608. *Id.* § 1330(b). Accordingly, the existence of sovereign immunity deprives the court of both subject matter jurisdiction and personal jurisdiction.

51. *See* O'Connell Mach. Co. v. M.V. "Americana," 566 F. Supp. 1381 (S.D.N.Y. 1983) (affidavit from Italian Counselor of Commercial Activities was sufficient to establish that shipper was "agency or instrumentality" for FSIA purposes); Curran v. Aerlingus, 16 Av. Cas. (CCH) 17, 845 (S.D.N.Y. 1981) (affidavit of Aerlingus regional officer as to foreign state ownership of airlines is sufficient for FSIA purposes absent any countervailing proof); Jet Line Servs. v. M/V Marsa el Hariga, 462 F. Supp. 1165 (D. Md. 1978) (Libyan freighter proved that it was an "agency or instrumentality" of Libya by demonstrating that 1) it was a legal person, 2) it was not a citizen of the United States, and 3) it was not created under the laws of a third country). *But see* Outbound Maritime Corp. v. P.T. Indonesian Consortium of Constr. Indus.,

IV. STATUTORY AND CONSTITUTIONAL ANALYSIS

The most persuasive framework for analysis of personal jurisdiction issues arising under the FSIA came in the decision of *Texas Trading & Milling Corp. v. Federal Republic of Nigeria.*[52] In *Texas Trading*, the court announced a two-part analysis which required 1) a statutory inquiry and 2) a constitutional inquiry.[53] Thus, the first issue, after subject matter jurisdiction is established under section 1330(a), is to determine whether the court has obtained personal jurisdiction over the foreign sovereign under section 1330(b). The statutory inquiry requires asking whether the serving party delivered service of process in accordance with statutory strictures of section 1608. If the serving party fails to deliver service of process in strict compliance with the FSIA requirements, then the court fails to obtain personal jurisdiction over the foreign sovereign. If the serving party proves that service of process was delivered in accordance with the statutory strictures of section 1608, then the constitutional inquiry needs to be addressed. The constitutional inquiry requires asking whether the service of process method complies with the due process clause of the United States Constitution.[54] If the method of service fails to comply with due pro-

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575 F. Supp. 1222 (S.D.N.Y. 1983) (affidavit from company officer is insufficient for FSIA purposes because 1) officer was not an Indonesian Government official and 2) officer did not state underlying facts of company nationalization).

52. The *Texas Trading* court stated:

> The [FSIA], therefore, makes the *statutory aspect* of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction. . . . But, the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, *in addition, a due process scrutiny* of the court's power to exercise its authority over a particular defendant.

Texas Trading, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (emphasis added).

53. The *Texas Trading* court asked: "Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)? Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?" *Id.*

54. "[N]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. A foreign state is a person for the purposes of due process. *See* Texas Trading & Milling Co. v. Federal Republic of Nig., 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Under the FSIA, Congress allows courts to obtain personal jurisdiction over the foreign sovereign through proof of 1) subject matter jurisdiction and 2) proper service of process. FSIA, *supra* note 1, § 1330(b). However, Congress' grant of power is not unlimited — "[t]he due process clause of the fifth amendment constrains a federal court's power to acquire personal jurisdiction via [international] service of process." Chase & Sanborn Corp. v. Granfinanciera, S.A., 835 F.2d 1341, 1344 (11th Cir. 1988).

cess, then the court fails to gain personal jurisdiction. If the service of process method complies with due process, then the court obtains personal jurisdiction over the foreign sovereign.

V. STATUS OF THE FOREIGN ENTITY

When dealing with foreign entities, the serving party must first determine the status of the foreign entity to ascertain whether the FSIA is applicable.[55] If the entity is not a "foreign state" at the time when the action commences, the FSIA and section 1608 are not applicable.[56] In that case, service of process would be in accordance with Rule 4 of the Federal Rules of Civil Procedure or the appropriate State's service of process and long-arm statute.[57] If the entity is a foreign state, or political subdivision, agency or instrumentality of a foreign state, then the FSIA is applicable. The serving party must then utilize the proper service of process procedure[58] listed in section

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Thus, the FSIA requires a two-prong constitutional due process analysis. First, the due process aspects of service of process must be examined under Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950). The issue is one of fairness and notice under the Fifth Amendment. That is, the question is whether the service was reasonably calculated to inform the defendants of the pendency of the proceedings against them so that they might take advantage of the opportunity to be heard in their defense. Mariash v. Morrill, 496 F.2d 1138, 1142-1143, 1143 nn.6-9 (2d Cir. 1974); *See* House Report, *supra* note 16, at 8; McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). Second, the due process aspects of personal jurisdiction must be examined under International Shoe Co. v. Washington, 326 U.S. 310 (1945) since service of process is the physical means by which personal jurisdiction is obtained under the FSIA. The issue is one of fair play and substantial justice embodied in the due process clause. Crimson Semiconductor v. Electronum, 629 F. Supp. 903, 906 (S.D.N.Y. 1986). It is important to note that even Congress recognized the necessity for this two-prong constitutional due process analysis. *See* House Report, *supra* note 16, at 8 ("The requirements of minimum jurisdictional contacts and adequate notice are embodied in the [FSIA].").

55. The practitioner should make this preliminary determination simply as a matter of practicality. If served improperly, the foreign state could merely not answer and later claim the court failed to obtain personal jurisdiction. *See* FSIA, *supra* note 1, § 1330(b). *But see* Dehart v. A.C. & S., 682 F. Supp 792 (Del. 1988) (failure to deliver service of process in accordance with the FSIA is not cause to enlarge time period allowing objections to personal jurisdiction when foreign entity was silent for 4 years). For another perspective on the difficulty of determining the status of a foreign entity, see Note, *Gregorian v. Izvestia: An Analysis of the Elusive Soviet Defendant*, 14 MD. J. INT'L L. & TRADE 75 (1990).

56. *See* Chase & Sanborn Corp. v. Granfinanciera, S.A., 58 B.R. 721 (Bankr. S.D. Fla. 1986) (FSIA is not applicable where defendant corporation was nationalized by Colombia after action was commenced and service of process was effected).

57. *See, e.g.*, FED. R. CIV. P. 4(c).

58. If service of process is made under the wrong procedure, the court can dismiss the case. *See, e.g.*, Segni v. Commercial Office of Spain, 650 F. Supp. 1040 (N.D. Ill. 1986); Resource Dynamics Int'l v. General People's Comm., 593 F. Supp. 572 (N.D. Ga. 1984).

1608 or the presiding court will fail to obtain personal jurisdiction over the foreign entity.[59] Thus, the determination of the "status" of the foreign entity is very important since it allows the proper selection of the FSIA service of process method and, thereby, allows the court to obtain personal jurisdiction over the foreign entity.[60]

Section 1603 defines three categories of entities under the concept of "foreign state."

> § 1603. Definitions
>
> For the purposes of this chapter —
>
> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
>
> (c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.[61]

First, the "foreign state" itself constitutes a category.[62] Second, the political subdivisions of the foreign state constitute a category.[63] Third, the agencies or instrumentalities of the foreign state constitute a category.[64] If the status of the foreign entity fits any of the above categories, the foreign entity is considered a "foreign state" for the general purposes of the FSIA.[65]

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59. *See* FSIA, *supra* note 1, § 1330(b).
60. *See* GORDON, *supra* note 6, § 7.07.
61. FSIA, *supra* note 1, § 1604(a-c).
62. "In section 1608, the term "foreign state" refers only to the sovereign state itself." House Report, *supra* note 15, at 15.
63. FSIA, *supra* note 1, § 1603(a).
64. *Id.* § 1603(b).
65. *Id.* § 1603(a).

However, the FSIA service of process provision takes the above analysis one step further since section 1608 delineates two different modes of service of process depending upon the "status" of the foreign entity.[66] First, section 1608(a) deals with service of process methods made upon a foreign state or its political subdivision.[67] Second, section 1608(b) deals with service of process methods made upon an agency or instrumentality of a foreign state.[68] Thus, the distinction of "status" is important for purposes of selecting the proper method of service of process.

Determining whether the foreign entity constitutes a "foreign state" creates a problem for the serving party and the court alike because neither the legislative history of the FSIA[69] nor the Supreme Court define "foreign state" for purposes of the FSIA.[70] Consequently, courts look to international law[71] and federal common law[72] in an attempt to define "foreign state." In addition, the Supreme Court held that the internal law of the foreign state cannot be used to determine whether the foreign entity is a "foreign state."[73]

The Second Circuit adopted the *Restatement Third Foreign Relations*' concept of "foreign state" for its circuit.[74] "Under international

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66. *Id.* § 1608(a-b).

67. *Id.* § 1608(a).

68. *Id.* § 1608(b).

69. House Report, *supra* note 15, at 15.

70. The Supreme Court has yet to take up this issue for purposes of the FSIA.

71. According to international law, a sovereign state has certain well accepted capacities, rights and duties: (a) sovereignty over its territory and general authority over its nationals; (b) status as a legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies; (c) capacity to join with other states to make international law, as customary law or by international agreement.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987) (hereinafter RESTATEMENT (3D) FOREIGN RELATIONS), *quoted in* Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237, 1243-1244 (2d Cir. 1991).

72. *See* RESTATEMENT (3D) FOREIGN RELATIONS, *supra* note 71, § 201, *quoted in* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Administrazione Straordinaria, 937 F.2d 44, 47 (2d Cir. 1991); National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989). *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-319 (1936) (listing attributes of sovereign statehood as power 1) to declare and wage war, 2) to conclude peace, 3) to maintain diplomatic ties with other sovereigns, 4) to acquire territory by discovery and occupation, and 5) to make international agreements and treaties).

73. *See* First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983), *cited in* Marlowe v. Argentine Naval Comm'n, 604 F. Supp. 703, 705 (D.D.C. 1985).

74. *Klinghoffer*, 937 F.2d at 44; *Morgan Guar. Trust*, 924 F.2d at 1243-1244; *National Petrochemical*, 860 F.2d at 553.

law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."[75] In practical terms, the determination process need not go so far.[76] The serving party merely needs to ascertain whether the United States government recognizes the foreign entity as a "foreign state." If the United States government recognizes the foreign entity as a "foreign state," the courts generally will follow suit as a matter of law.[77] However, if the United States government does not recognize the foreign entity as a "foreign state," the court will look to other statements from the executive branch and, as suggested above, to international law and federal common law.[78]

To determine "political subdivisions of a foreign state," reference to FSIA's legislative history assists the serving party and court to some extent.[79] Congress' *House Report* defines a "political subdivision

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75. RESTATEMENT (3D) FOREIGN RELATIONS, *supra* note 72, § 201. *Cf.* The Montevideo Convention on the Rights and Duties of States (1933), art. 1, 49 Stat. 3097 ("The State as a person of international law should possess the following qualifications: (1) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."), *quoted in* Myres S. McDougal, *International Law, Power and Policy: A Contemporary Perspective*, 82 ACAD. DE DROIT INT'L, RECUEIL DES COURS 133 (1953), *quoted in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 155 (1981); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965) (indicating "permanent" populations); 1 OPPENHEIM'S INTERNATIONAL LAW: A TREATISE 118-119 (H. Lauterpacht, 8th ed. 1955) ("To qualify as a state under international law, an entity must have a territory, a population, a government and the capacity to engage in diplomatic or foreign relations. States in federal unions, provinces or cantons usually lack the last attribute, which is a vital element of sovereignty."), *cited in* THOMAS BUERGENTHAL & HAROLD G. MAIER, PUBLIC INTERNATIONAL LAW IN A NUT SHELL § 1-2, 2 (2d ed. 1990). *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (1979).

76. Usually, one of three things happen. First, the United States government recognizes the entity as a "foreign state." In that event, the court would hold likewise. Second, the United States government does not recognize the entity, but "suggests" to the court, as *amicus curae*, to recognize or not recognize the entity as a "foreign state," in which case the court generally follows the government's "suggestion." Third, the United States government is silent, and does not "suggest" anything to the court. In this case, the court will have to make its own determination by examining what the government has said and done with reference to the foreign entity, and examine the foreign entity's actions.

77. *See, e.g.*, Republic of Vietnam v. Pfizer, 556 F.2d 892, 894 (8th Cir. 1977).

78. English v. Thorne, 676 F. Supp. 761 (S.D. Miss. 1987) (Vatican deemed a "foreign state" for purposes of the FSIA); Meaamaile v. American Somoa, 550 F. Supp. 1227 (D. Hawaii 1982) (Somoa is a territory of the United States and is not a "foreign state" for purposes of the FSIA).

79. *See* House Report, *supra* note 15, at 15.

of a foreign state" as "all governmental units beneath the central government, including local governments."[80] Nevertheless, there are two problems in determining if the foreign entity is a political subdivision. First, one must "first identify the foreign state to which the alleged political subdivision belongs."[81] Second, one must distinguish "political subdivisions" from "agencies or instrumentalities" of a foreign state.[82]

Section 1603(b) defines "an agency or instrumentality of a foreign state."[83] To consider a foreign entity to be a "separate legal person," pursuant to section 1603(b)(1)[84] and, as a result, to determine the foreign entity to be an "agency or instrumentality of a foreign state," the foreign entity[85] "must be capable of suing or being sued in its own name, of contracting in its own name or of holding property in its own name under the law of the foreign state where it was created."[86] In the *House Report*, Congress gave specific examples of what constitutes an agency or instrumentality of a foreign state.

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.[87]

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80. *Id.* at 15. *See also* Williams v. Shipping Corp. of India, 489 F. Supp. 526, 531 (E.D. Va. 1980), *aff'd*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

81. GORDON, *supra* note 6, § 6.06.

82. *See* Bowers v. Transportes Navieros Ecuadorianos (Transnave), 719 F. Supp. 166 (S.D.N.Y. 1989); Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 398 (E.D. Va. 1985).

83. FSIA, *supra* note 1, § 1603(b).

84. *Id.* § 1603(b)(1).

85. Regardless of whether the foreign entity is a corporation, association, foundation, or other entity. *See generally* Rebecca J. Simmons, *Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act*, 90 COLUM. L. REV. 2278 (1990); Note, *Foreign Sovereign Immunity — A Strict Construction of the Concept of Instrumentalities Under the Foreign Sovereign Immunities Act*, 15 VAND. J. TRANSNAT'L L. 653 (1982).

86. House Report, *supra* note 15, at 15. *See Unidyne*, 950 F. Supp. at 400; *Williams*, 489 F. Supp. at 531. *See also* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (listing ability to open bank accounts, to acquire and alienate property, and to conclude contracts in entity's own name as factors establishing existence of "separate legal person"). Individuals acting in their official capacity are included in the definition of "agency or instrumentality of a foreign state" despite § 1603(b) and the FSIA's legislative history apparent focus on organizations. *See, e.g.*, Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).

87. House Report, *supra* note 15, at 16. *See, e.g.*, Bowers v. Transportes Navieros Ecuadorianos (Transnave), 719 F. Supp. 166 (S.D.N.Y. 1989) (Ecuadorian steamship company

If the serving party lacks sufficient data, after filing a complaint, to make a status determination of the foreign entity, courts will generally allow limited discovery since subject matter jurisdiction and personal jurisdiction relate directly to the status of the foreign entity.[88] Although the FSIA fails to describe appropriate international discovery procedures, the FSIA's legislative history directs courts to refer to domestic law in implementing discovery procedures.[89] The Supreme Court held that the discovery rules contained in the Federal Rules of Civil Procedure[90] constitute the proper vehicle in framing discovery orders, unless the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters[91] is more effective in obtaining discovery.[92]

> [I]n framing [an international discovery order], a court . . . should take into account the importance to the . . . litigation of the . . . information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[93]

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is an "agency or instrumentality" of Ecuador); LeDonne v. Gulf Air, 700 F. Supp. 1400 (E.D. Va. 1988) (corporation created by treaty between four Persian Gulf states is an "agency or instrumentality" for purposes of FSIA); Harris v. VAO Intourist, 481 F. Supp. 1056 (E.D.N.Y. 1979) (two Soviet state-owned tourist services in Moscow are "agencies or instrumentalities" for purposes of FSIA); Jet Line Serv. v. M/V Marsa el Hariga, 462 F. Supp. 1165 (Md. 1978) (Libyan freighter is an "agency or instrumentality" for purposes of the FSIA). *But see* Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977) (Yugoslavian "workers organization" which operates nuclear facility is not an "agency or instrumentality" for purposes of FSIA).

88. *See* Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1978), *cited in* Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990). *See, e.g.*, Resource Dynamics Int'l v. General People's Comm. for Communications & Maritime Transp., 593 F. Supp. 572 (N.D. Ga. 1984).

89. House Report, *supra* note 15, at 23.

90. *See* FED. R. CIV. P. 26-37.

91. *See* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, 23 U.S.T. 2555.

92. Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522, 556 (1987). However, courts scrutinize discovery motions closely to ensure there is no unfair or abusive discovery. *Id.*

93. RESTATEMENT (3D) FOREIGN RELATIONS, *supra* note 71, § 442(1)(c).

However, the courts will not grant discovery motions if "no conceivable basis of jurisdiction" exists.[94]

A simple answer to the problem of determining a foreign entity's status lies in requiring the "foreign entity" to include a statement of status in the contract when the parties originally entered into the deal.[95] Not only should such a declaration of status be easy to draft, it should also be easy to negotiate, and to include, in any contractual agreement between the serving party and the foreign entity.[96] Of course, negotiation and inclusion of a declaration of status in the contract requires forethought and preparation to deal with issues concerning foreign sovereigns.[97]

VI. Foreign States and Political Subdivisions

If the status of the foreign entity is a "foreign state"[98] or a "political subdivision of a foreign state,"[99] the serving party must apply section 1608(a).[100] Section 1608(a) provides four methods of service of process listed in an hierarchal order.[101] The four methods of service of process

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94. International Terminal Operating Co. v. Skibs A/S Hidlefjord, 63 F.R.D. 85, 87 (S.D.N.Y. 1973).

95. *See* Sebastian V. Grassi, Jr. & Lin Yi, *Sovereign Immunity and Service of Process in International Contracts*, 68 MICH. BAR J. 1124 (1989). Grassi and Yi suggest incorporating a number of provisions in contracts with foreign entities. The provisions are waiver of immunity, service of process, consent to jurisdiction, and statement of status. *Id.* at 1124-25.

96. Professor Michael W. Gordon, statement made during International Business Law Seminar at University of Florida College of Law (Fall 1991).

97. *See generally* Grassi, *supra* note 95, at 1124-25.

98. *See, e.g.*, English v. Thorne, 676 F. Supp. 761 (S.D. Miss. 1987) (Vatican is a "foreign state" for purposes of the FSIA); Marlowe v. Argentine Naval Comm., 604 F. Supp. 703 (D.D.C. 1985) (Argentine Naval Commission is "foreign state" for purposes of FSIA); Meaamaile v. American Somoa, 550 F. Supp. 1227 (Hawaii 1982) (Somoa is a territory of the United States and is not a "foreign state" for purposes of the FSIA); Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980) (Libya is a "foreign state" for purposes of the FSIA); Gray v. Permanent Mission of the People's Republic of the Congo to the U.N., 443 F. Supp. 816 (S.D.N.Y. 1978) (permanent mission to the United Nations is "foreign state" itself for purposes of the FSIA). *See generally* Note, *Birth of a Nation: The Republic of Palau is Recognized as a Foreign Sovereign Under the Foreign Sovereign Immunities Act of 1976*, 1987 B.Y.U. L. REV. 709; Monroe Leigh, *Foreign Sovereign Immunities Act — 'Foreign State' — Trust Territory of the Pacific Islands — Statehood Under International Law*, 81 AM. J. INT'L L. 220 (1987).

99. *See, e.g.*, Segni v. Commercial Office of Spain, 650 F. Supp. 1040 (N.D. Ill. 1986) (commercial office considered a political subdivision of Spain). To be a political subdivision of a foreign state, the entity must be an integral part of the foreign's state's political structure. *Id.* at 1041-42. *See also* Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp 398 (E.D. Va. 1984) (procurement department of the Argentine Navy is a "political subdivision" of a foreign state.).

100. FSIA, *supra* note 1, § 1608(a).

are: 1) by special arrangement previously agreed to by the parties,[102] 2) by terms of an applicable international convention on service of judicial documents,[103] 3) by any form of mail requiring a signed receipt,[104] or 4) by diplomatic channels via the State Department.[105]

A. *Service By Special Arrangement*

If the parties' contractual relationship includes a special arrangement for the delivery of judicial documents, the serving party must utilize the special arrangement.[106] Congress implicitly encourages parties to agree, in advance, on a service of process method by granting precedence to special arrangements between the parties over all other service of process methods.[107] Section 1608(a)(1) contains the provision for service of process by special arrangement.

> § 1608. Service; time to answer; default
> (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:
> (1) 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;[108]

Under the FSIA, parties may contractually agree to any method of service of process consistent with due process.[109] If a special arrangement for service of document was agreed upon, the only requirement for due process is actual notice since the parties contractually agreed to the method of service. Also, the parties should ensure that there is some method to prove delivery (e.g., require delivery to a particular

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101. It is important to note that the methods must be attempted in the order they are listed; the first method which is appropriate must be utilized. If an earlier method is available, but not used, it should result in improper service of process and, possibly, a dismissal for lack of personal jurisdiction.

102. FSIA, *supra* note 1, § 1608(a)(1).

103. *Id.* § 1608(a)(2).

104. *Id.* § 1608(a)(c).

105. *Id.* § 1608(a)(4).

106. The language of § 1608 makes it very clear that service of process "shall be made . . . in accordance with any special arrangement for service between plaintiff and the foreign state or political subdivision." *Id.* § 1608(a)(1).

107. House Report, *supra* note 15, at 15.

108. FSIA, *supra* note 1, § 1608(a)(1).

109. *Id.*

person and a signed receipt). If the serving party can prove actual notice, courts should declare service valid as a matter of law, so long as delivery was in accordance with the special arrangement.[110]

B. *Service By Applicable International Convention*

If no special contractual arrangement for the delivery of judicial documents exists between the parties, but "an applicable international convention on service of judicial documents"[111] exists, the serving party must follow the dictates of the international convention.[112] Section 1608(a)(2) provides that service shall be made: "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; . . . ."[113] Under the FSIA, courts define an applicable international convention on the service of judicial documents as a convention which explicitly covers the service of judicial documents.[114] If a convention merely has a provision or two concerning service of process of judicial documents, the convention will not be considered to be an applicable international convention on service of judicial documents.[115]

When Congress enacted the FSIA, Congress recognized only one applicable international convention — the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents (hereinafter Hague Convention).[116] Currently, the United States and 27 foreign states are signatories to the Hague Convention.[117] If no other treaty or convention

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110. *See infra* text accompanying notes 221-23.

111. FSIA, *supra* note 1, § 1608(a)(2).

112. *Id.*

113. *Id.*

114. *See* Richmark Corp. v. Timber Falling Consultants, 937 F.2d 1444 (9th Cir. 1991) (Consular Convention between the United States and People's Republic of China is not an "applicable international convention on service of judicial documents" for purposes of FSIA even though the Consular Convention had a specific provision which covered treatment of judicial documents).

115. *Id.* at 1445-46.

116. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, *reprinted in* 28 U.S.C.A. Rule 4, at 138-153 (Supp. 1990).

117. Presently, the signatory nations are Antigua & Barbuda, Barbados, Belgium, Botswana, Canada, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Japan, Luxembourg, Malawi, Netherlands, Norway, Pakistan, Portugal, Seychelles, Spain, Sweden, Turkey, United Kingdom, and the United States. United States Dep't of State, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1990 337 (1990) [hereinafter TREATIES IN FORCE].

exists,[118] the serving party simply determines if the foreign entity's country is a signatory to the Hague Convention.[119] If the foreign entity's country is a signatory to the Hague Convention, the serving party serves the documents in accordance with the Hague Convention.[120] Up to this point in time, no other treaty or convention, other than the Hague Convention, has been recognized as an "applicable international convention" for purposes of the FSIA.[121]

The Hague Convention "create[d] appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time . . . [and] improve the organization of mutual judicial assistance . . . by simplifying and expediting the procedure."[122] The drafters of the Hague Convention "intended to create a unitary approach to the problems involved in serving process abroad."[123] Consequently, the Hague Convention establishes a multilateral regime for the service of judicial and extrajudicial[124] documents by requiring each signatory country to set up a Central Authority to receive letters of request for service of documents.[125]

Under the Hague Convention, serving parties submit letters of request[126] and documents (e.g., summons and complaint), in dupli-

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118. The Hague Convention recognizes the right of signatory states to enter into bilateral agreements permitting other methods of service, and grants preference to those agreements. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 116, art. 11. Thus, a determination of whether there are any applicable bilateral treaties would serve the purpose of deciding which treaty or convention is "applicable." FSIA, *supra* note 1, § 1608(a)(2).

119. *See, e.g.*, TREATIES IN FORCE, *supra* note 117.

120. Not only does the FSIA demand adherence, if both countries "belong" to an international convention, the Hague Convention itself demands it ("The present Convention shall apply in all cases, in civil or commercial matters, [except] . . . where the address of the person to be served . . . is not known."). Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 116, art. 1.

121. *See, e.g.*, Richmark Corp. v. Timber Falling Consultants, 937 F.2d 1444 (9th Cir. 1991).

122. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 116, pmbl.

123. Kadota v. Hosogai, 125 Ariz. 131, 134 (Ariz. Ct. App. 1980). *See also* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 28 (1983).

124. Private documents are documents which do not arise out of litigation, but must be delivered with the formalities of judicial documents by agreement between the parties.

125. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 116, art. 2.

126. The letter of request must conform to the model contained in the Annex of the Hague Convention. *Id.* art. 3.

cate,[127] to the Central Authority or judicial officer of the country in which the court is located.[128] The Central Authority or judicial officer then forwards the documents to the Central Authority of the foreign entity's country.[129] The Central Authority then inspects the documents upon receipt.[130] If the Central Authority rejects the documents, it informs the serving party promptly and specifies the objections.[131] If the Central Authority accepts the documents, it personally serves the documents or delivers the documents to the appropriate agency, which then personally serves the documents.[132]

The Central Authority or the appropriate agency delivers the documents by one of three methods.[133] First, if the internal law of the foreign entity's country requires a certain service of process method, the Central Authority employs that service of process method.[134] Second, if the serving party requests a certain service of process method, the Central Authority employs that method unless the internal law of the foreign entity's country prohibits that particular method.[135] Third, if the foreign entity voluntarily accepts service of process, the Central Authority may employ any service of process method.[136]

Alternatively, the Hague Convention provides three additional service of process methods if the foreign entity's country does not object.[137] First, the serving party may deliver the documents directly to the foreign entity by mail.[138] Second, the serving party may deliver

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127. In addition, the documents must be written in English, French, or the language of the foreign entity's nation. *Id.* arts. 5 and 7.

128. *Id.* art. 3.

129. *Id.*

130. *Id.* art. 4.

131. The Hague Convention limits rejection of the documents to situations where *"the request does not comply* with the provisions of the present Convention." *Id.* (emphasis added).

132. *Id.* art. 5.

133. *Id.* art. 5(a-b) & art. 5, ¶ 2.

134. *Id.* art. 5(a). Requirements for the documents may include, but are not limited to, translation of documents into one of the official languages of the foreign entity's nation. *Id.* art. 5.

135. *Id.* art. 5(b).

136. *Id.* art. 5, ¶ 2.

137. *See id.* art. 10.

138. *Id.* art. 10(a). A signed receipt or some other proof is necessary for proof of delivery. FSIA, *supra* note 1, § 1608(c)(2). Federal courts construing the Hague Convention have consistently upheld delivery of service of process, by postal channels, directly to defendants in countries which are signatories to the Convention and which have not objected to mail service under Article 10 of the Convention. *See, e.g.*, Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986); Sieger v. Zisman, 106 F.R.D. 194 (N.D. Ill. 1985); Chrysler v. General Motors, 589 F. Supp. 1192, 1206 (D.D.C. 1984).

the documents to a judicial officer (e.g., clerk of court).[139] The judicial officer then delivers the documents to the appropriate judicial officer in the foreign entity's country who, in turn, delivers the documents to the foreign entity.[140] Third, any interested party in a suit involving the foreign entity may deliver the documents directly to the appropriate authority in the foreign entity's country who, in turn, delivers the documents to the foreign entity.[141] In effect, the alternative methods bypass the need to use the Central Authority of either country.

C. *Service By Mail Requiring Signed Receipt*

If neither a special contractual arrangement nor an applicable international convention exist, the serving party must deliver service of process to the foreign state or its political subdivision "by any form of mail requiring a signed receipt."[142] Section 1608(a)(3) provides that:

> (3) if service cannot be made under paragraphs (1) or (2), [service shall be made] 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;[143]

It is important to note that section 1608(a)(3) requires 1) a summons and complaint,[144] 2) a "notice of suit,"[145] and 3) a translation of each in the official language of the foreign state.[146]

Congress explicitly authorized the Secretary of State to prescribe the form[147] of the "notice of suit." Section 1608(a), sentence 2, provides

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139. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 116, art. 10(b).

140. *Id.*

141. *Id.* art. 10(c). This method is similar to the previous alternative method and § 1608(a)(3), but bypasses the clerk of court and thereby expedites the entire process.

142. *See* FSIA, *supra* note 1, § 1608(a)(3). *See, e.g.*, Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323 (S.D.N.Y. 1987).

143. FSIA, *supra* note 1, § 1608(a)(3).

144. *Id.* § 1608(a)(3).

145. *Id. See also id.* § 1608(a), ¶ 2.

146. *Id.* § 1608(a)(3). Furthermore, parties cannot modify this FSIA statutory requirement by contract clause requiring all communications relating to contract be transmitted in English Aref v. Arab Republic of Egypt, 892 F.2d 1045 (9th Cir. 1989).

147. FSIA, *supra* note 1, § 1608(a). The form of the "notice of suit" may be found at 22 C.F.R. § 93.2 annex, Dept. Reg. 108.732, 433 F.R. 6367 (1977).

that: "As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation."[148] The Notice of Suit provides the foreign state or its political subdivision with a synopsis of the pending action. The Secretary of State ordered the Notice of Suit to be prepared in the following form:

> Notice of Suit (or of Default Judgment)
>
> 1. Title of legal proceeding; full name of court; case or docket number.
>
> 2. Name of foreign state (or political subdivision) concerned:
>
> 3. Identity of the other Parties:
>
> Judicial Documents
>
> 4. Nature of documents served (e.g., Summons and Complaint; Default Judgment):
>
> 5. Nature and purpose of the proceedings; why the foreign state (or political subdivision) has been named; relief requested:
>
> 6. Date of default judgment (if any):
>
> 7. A response to a "Summons" and "Complaint" is required to be submitted to the court, not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity).
>
> 8. The failure to submit a timely response with the court can result in a Default Judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.
>
> 9. Questions relating to a state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).[149]

After the serving party delivers all the documents to the clerk of court, the serving party asks the clerk of court to effect service pursuant to the FSIA in writing.[150] The writing should list name, title,

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148. *Id.* § 1608(a). "Notice of suit" may also mean "notice of default judgment," if applicable. 22 C.F.R. § 93.2, n.1.

149. 22 C.F.R. § 93.2 annex.

150. As always, get agreements in writing.

and address of the foreign entity. One complete set of documents (summons and complaint, notice of suit, and a translation of each) accompany the writing,[151] along with one extra set of documents for the court's file.[152] In addition, the serving party should always have an extra set of documents available. The clerk of court then mails the documents to the foreign state.[153] The clerk of court addresses the documents to the "head of the ministry of foreign affairs of the foreign state concerned."[154] The minister of foreign affairs then delivers the documents to the foreign entity.[155]

In addition to the above required documents, the serving party should provide the clerk of court with additional documents to ensure no problems occur which may delay prompt completion of service of process.[156] For example, the serving party should include an affidavit from the translator for each document translated.[157] The affidavit should state the translator's qualifications and attest to the accuracy of the translation.[158] The serving party then attaches a copy of the affidavit to each copy of the corresponding translation.[159] Thus, the foreign entity and the court receive corresponding affidavits of accuracy for each translated document received.

The serving party should include other items with the request for service of process to expedite matters. For example, the serving party should provide the foreign entity with a copy of the FSIA.[160] In addition, the serving party should provide the clerk of court with pre-gum-

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151. *Id.*

152. Always give the clerk of court an extra set of documents to ensure that no delays occur.

153. FSIA, *supra* note 1, § 1608(a)(3) ("to be addressed and dispatched by the clerk of the court").

154. *Id.* § 1609(a)(3). *See also* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (delivery of complaint by certified mail to Soviet embassy in Washington, D.C. is improper under FSIA); Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250 (7th Cir. 1983) (Nicaraguan Ambassador to the United States is not "ministry of foreign affairs" for purposes of the FSIA). Congress' purpose of specifying the "ministry of foreign affairs" was to move away from previous practice of allowing service of a foreign state's embassy which conflicted with an international convention on diplomatic relations. House Report, *supra* note 15, at 15. *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227.

155. FSIA, *supra* note 1, § 1608(a)(3).

156. Additional documents may include translations, statutes, and forms for mail service.

157. *See* The Committee on Federal Courts of the New York State Bar Association, *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 87 (1989) [hereinafter *Nuts and Bolts Guide*].

158. FSIA, *supra* note 1, § 1608(a)(3).

159. *Id.*

160. In the Notice of Suit, the serving party must refer to the FSIA statutes — it also makes sense to include a copy of the statutes as well.

med mailing labels.[161] The clerk of court then simply affixes the labels to envelopes bearing the court's name and address. The serving party also has the option to direct the clerk of court to use a particular mail courier.[162] However, regardless of the mail courier which the serving party selects, the serving party should provide the clerk of court with the appropriate funds, information, and paperwork or forms to expedite the requested mail service. Otherwise, minor details may delay delivery of the documents or, worse, cause problems later in litigation.

D. *Service By Diplomatic Channels*

If the serving party cannot deliver service of process by mail within thirty (30) days, the serving party can forward the "required documents" to the foreign entity through diplomatic channels.[163] Section 1608(a)(4) represents the serving party's method of last resort for service of process on foreign states and political subdivisions of a foreign state.[164] Section 1608(a)(4) provides that:

> (4) if service cannot be made within 30 days under paragraph (3), [service shall be made] 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.[165]

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161. Mailing labels are just one example of how the serving party can expedite delivery. Anything else which may expedite delivery should also be included.

162. If the serving party has a particular preference, then that preference should be requested.

163. FSIA, *supra* note 1, § 1608(4). *See, e.g.*, George Wimpey & Co. (Nig.) Ltd. v. Ogun-Oshun River Basin Dev. Auth., 1989 WL 7372 (D.D.C. 1989); Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1988); Meadows v. Dominican Republic, 628 F. Supp. 599 (N.D. Cal. 1986); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Jackson v. People's Republic of China, 555 F. Supp. 869 (N.D. Ala. 1982). The serving party may contact the Office of Citizens Consular Services to determine the time of delivery beforehand and, therefore, expedite delivery of service of process by at least 60 days. This is particularly applicable to countries undergoing social, economic or political upheavals. *See Nuts and Bolts Guide*, *supra* note 157, at n.120.

164. FSIA, *supra* note 1, § 1608(a)(4).

165. *Id.*

The "required documents" by this method consists of *two complete sets* of 1) the summons and complaint,[166] 2) the notice of suit,[167] and 3) the translations[168] of 1) and 2) in the official language of the foreign entity's country.

The serving party requests the clerk of court, in writing, to send the documents to the Director of Special Consular Service (Director).[169] The clerk of court then sends the documents to the Director.[170] Since the serving party has the option of which form of mail to send the documents, the serving party should designate which mail courier to use.[171] As mentioned in the above section on Mail Service, the serving party should provide the clerk of court everything needed to expedite the delivery of the documents.

Upon receipt of the documents, the Director ascertains whether the documents are complete.[172] If the documents are incomplete, the Director promptly advises the clerk of court and specifies objections.[173] If the documents are complete, the Director transmits one complete set to the party being served and keeps the other set for the Director's files.[174]

The Director delivers the documents by one of three diplomatic channels. First, if the United States has an embassy in the foreign entity's country, the Director delivers the documents to the embassy.[175] The embassy then delivers the documents to the foreign ministry or other appropriate authority of the foreign entity's country.[176] Second, if the United States does not have an embassy in the foreign entity's country or the foreign entity's country prohibits service of judicial documents by the first method, the Director personally delivers the documents to the embassy of the foreign entity's country, located in Washington, D.C.[177] Third, if neither the first method nor the second

166. *Id.*

167. *Id.*

168. The serving party should include an affidavit of accuracy for each translated copy. This will reduce any chance of delay caused by defendant challenging the translation as inaccurate or incomprehensible.

169. *Id.* The Director operates out of the Secretary of State's office in Washington, District of Columbia. 22 C.F.R. § 93.1(a), Dept. Reg. 108.732, 42 F.R. 6367 (1977).

170. *Id.*

171. *See* FSIA, *supra* note 1, § 1608(a)(4).

172. 22 C.F.R. § 93.1(b).

173. *Id.*

174. FSIA, *supra* note 1, § 1608(4).

175. 22 C.F.R. § 93.1(c)(1).

176. *Id.*

177. 22 C.F.R. § 93.1(c)(3). *See, e.g.*, Ipitrade Int'l, S.A. v. Federal Republic of Nig., 465 F. Supp. 824, 827 (D.D.C. 1978).

method is possible, the Director delivers the documents through *any existing diplomatic channel available.*[178] For example, the Director may deliver the documents to another country, if that country is authorized to represent the foreign entity's country with the United States.[179] The Director would personally deliver the documents to that country's embassy in Washington, D.C., which would then forward the document to the foreign entity.

In addition to delivering the documents, the Director prepares and attaches a diplomatic note of transmittal (Diplomatic Note) to the documents.[180] The Diplomatic Note requests the documents be forwarded to the foreign entity.[181] In addition, the Diplomatic Note advises the foreign entity to address the court rather than the State Department about jurisdictional and state immunity issues, and, further, to consult a United States attorney.[182]

If an embassy of the United States delivers the documents, the embassy prepares a certified copy of the Diplomatic Note and transmits it to the Director by diplomatic pouch.[183] If the Director delivers the documents, the Director prepares the certified copy of the Diplomatic Note.[184] The certified copy of the Diplomatic Note states the date and place the documents were delivered.[185] The Director then sends the certified copy of the Diplomatic Note to the clerk of court.[186]

VII. AGENCIES AND INSTRUMENTALITIES

If the serving party determines the status of the foreign entity to be an "agency or instrumentality of a foreign state,"[187] rather than "a foreign state or a political subdivision of a foreign state," the serving

178. The language "any existing diplomatic channel available" suggests that the Swiss embassy may be used as a last resort, since they historically maintain a neutral position in international disputes and could be the only existing diplomatic channel left.

179. 22 C.F.R. § 93.1(c)(3).

180. 22 C.F.R. § 93.1(d).

181. *Id.*

182. *Id.*

183. 22 C.F.R. § 93.1(e).

184. *Id.*

185. *Id.*

186. *Id.*

187. FSIA, *supra* note 1, §§ 1603(b), 1608(b). *See* Tifa, Ltd. v. Republic of Ghana, 1991 U.S. Dist. Lexis 11855, 20 (1991) (embassy of Ghana is an "agency or instrumentality" for purposes of the FSIA); LeDonne v. Gulf Air, 700 F. Supp. 1400 (E.D. Va. 1988) (corporation formed by treaty between four "foreign states" is an "agency or instrumentality of a foreign state" for purposes of the FSIA).

party applies section 1608(b).[188] Section 1608(b) provides three methods of service of process and lists the methods in an hierarchal order. The three methods of delivery of service of process are: 1) by special arrangement previously agreed to by the parties,[189] 2) by personal service to the foreign entity's officer or agent in the United States[190] or by terms of an applicable international convention,[191] or 3) by other service of process methods reasonably calculated to give actual notice to the foreign entity.[192]

A. *Service By Special Arrangement*

If the parties' contractual relationship includes a special arrangement for the delivery of judicial documents, the serving party utilizes the special arrangement.[193] Section 1608(b)(1) parallels the language contained in section 1608(a)(1) described above; the only difference lies in the status of the foreign entity (a foreign state or political subdivision of a foreign state versus an agency or instrumentality of a foreign state).[194] Section 1608(b) provides, in pertinent part:

> (b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality;[195]

Thus, the rules governing section 1608(b)(1) are identical to the rules described above in the section concerning foreign states or political subdivisions of a foreign state and Service by Special Arrangement.

B. *Service By Agent or Applicable International Convention*

Section 1608(b)(2) differs significantly from section 1608(a)(2) which allows only one method of service — an applicable international convention — while section 1608(b)(2) allows the serving party two alter-

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188. FSIA, *supra* note 1, § 1608(b).
189. *Id.* § 1608(b)(1).
190. *Id.* § 1608(b)(2).
191. *Id.*
192. *Id.* § 1608(b)(3).
193. *Id.* § 1608(b)(1).
194. *Compare id.* § 1608(a)(1) *with id.* § 1608(b)(1).
195. *Id.* § 1608(b)(1).

native methods of service — an agent or an applicable international convention.[196] Section 1608(b)(2) provides:

> (2) if no special arrangement exists, [service shall be made] by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents. . . .[197]

If no special arrangement exists between the serving party and the foreign state's agency or instrumentality, the serving party must deliver service of process under section 1608(b)(2).[198] Under section 1608(b)(2), the serving party can properly serve the agency or instrumentality 1) by serving the foreign entity's officer or agent in the United States[199] or 2) by serving the foreign entity according to an applicable international convention.[200] Thus, section 1608(b)(2) offers the serving party an option if the foreign entity has an officer or agent in the United States *and* an applicable international convention exists between the foreign entity's country and the United States.[201] However, if only one of the options exist, then the serving party must deliver service of process in accordance with that option (e.g., agent or convention).[202]

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196. *Compare id.* § 1608(a)(2) *with id.* § 1608(b)(2).

197. *Id.* § 1608(b)(2).

198. *Id.*

199. *Id. See* Helm v. South African Airways, 1987 WL 13195 (S.D.N.Y. 1987) (attorney is "agent" for purposes of the FSIA); Bailey v. Grand Trunk Lines New England, 805 F.2d 1097, 1104 (2d Cir. 1986) ("agent" designated by Canadian state-owned railroad to fulfill requirements under chapter 1 of United States' Interstate Commerce Act, 49 U.S.C. § 11501, is "agent" for purposes of FSIA); Velidor v. L/P/G Benghazi, 653 F.2d 812 (3d Cir. 1981) (master of vessel is "agent" of foreign state owner for purposes of FSIA). *See generally* Unidyne Corp. v. Aerolineas Argentinas, 640 F. Supp. 354 (E.D. Va. 1985); Monroe Leigh, *Sovereign Immunity — Definition of 'United States' Under the Foreign Sovereign Immunities Act Does Not Include U.S. Embassy Premises*, 78 AM. J. INT'L L. 900 (1984).

200. FSIA, *supra* note 1, § 1608(b)(2). *See* Deptula v. Derr Flooring Co., 1990 WL 96635 (E.D. Pa. 1990) (judicial documents delivered directly to Canadian "agency or instrumentality" by international certified mail, return receipt requested in accordance with Article 10 of the Hague Convention, is valid service of process for purposes of FSIA since Canada has not objected to that method of service).

201. FSIA, *supra* note 1, § 1608(b)(2).

202. *Id.*

If the foreign state's agency or instrumentality has an officer or agent in the United States, the serving party must deliver service of process to that officer or agent if there is no applicable international convention.[203] If the serving party serves an agency or instrumentality's officer or agent in the United States, then only a copy of the summons and complaint need be delivered.[204] In the alternative, the serving party must deliver service of process in accordance with "an applicable international convention on service of judicial documents" if the United States and the foreign entity's country are signatories to such a convention, and if the foreign entity does not have an officer or agent in the United States.[205] If the applicable international convention is the Hague Convention, the methods for delivery of service of process are identical to the methods described above in the section concerning foreign states and its political subdivisions and Service by Applicable International Conventions. If the agency or instrumentality of the foreign state has an officer or agent in the United States *and* the foreign state and the United States are signatories to an applicable international convention, then the serving party may choose either method of service of process.

C. *Service By Means Which Gives Actual Notice*

If neither a special arrangement, nor an officer or agent in the United States, nor an applicable international convention exist, then section 1608(b)(3) offers the serving party three alternative methods to deliver service of process.[206] Section 1608(b)(3) provides that:

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203. *Id. See* Miller & Co. v. China Nat'l Minerals Import & Export Corp., 1991 U.S. Dist. Lexis 11973, at 14-15 (1991) (senior manager of wholly-owned subsidiary is "agent" for state-owned enterprise where senior manager initiated negotiations between state-owned enterprise and plaintiff to resolve dispute, and state-owned enterprise represented to plaintiff that senior manager "was entrusted to handle the situation"); Helm v. South African Airways, 1987 WL 13195, 9 (S.D.N.Y. 1987) (attorney is "agent" of state-owned airlines for purposes of receiving service of process); *Velidor*, 653 F.2d at 812 (master of vessel is "agent" of owner of ship for purposes of receiving service of process).

204. *See* FSIA, *supra* note 1, § 1608(b)(2). However, the serving party should be aware of FSIA § 1608(c)(2) which requires some "other proof of service applicable to the method of service employed." *Id.* § 1608(c)(2). Furthermore, the serving party ought to include a certified translation of the summons and complaint in the official language of the agency or instrumentality's foreign state.

205. *Id.* § 1608(b)(2). Presently, the only applicable international convention on service of judicial documents is the Hague Service Convention. Richmark Corp. v. Timber Falling Consultants, 937 F.2d 1444 (9th Cir. 1991). House Report, *supra* note 15, at 18. *See* Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* text accompanying note 116.

206. *See* FSIA, *supra* note 1, § 1608(b)(3).

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, [service shall be made] by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.[207]

Section 1608(b)(3) allows the serving party to deliver service of process 1) by means directed by a foreign authority,[208] 2) by any form of mail requiring a signed receipt,[209] or 3) by the method ordered by the court.[210] Regardless of the means, form or method which delivery is made under section 1608(b)(3), service of process must be "reasonably calculated to give actual notice."[211]

1. Service By Direction of Foreign Authority

If the serving party chooses to deliver service by the means which a foreign state's authority directs, the serving party must first look to the foreign state's local law to ascertain the appropriate foreign state authority's name, title and competence to direct service of process.[212] After ascertaining the appropriate foreign state authority, the serving party requests the clerk of court to send a letter rogatory or request to the authority.[213]

The serving party supplies the clerk of court with two sets of documents, which consist of 1) the letter rogatory or request, 2) the

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207. *Id.*

208. *Id.* § 1608(b)(3)(A).

209. *Id.* § 1608(b)(3)(B).

210. *Id.* § 1608(b)(3)(C).

211. *Id.* § 1608(b)(3).

212. An authority of the foreign state or political subdivision is a person or agency which has the legal competence to administer, deliver, order, or direct service of process under local law. *See* BLACK'S LAW DICTIONARY 121-122 (15th ed. 1979).

213. A letter rogatory is "[t]he medium whereby one country, speaking through one of its courts, requests another country, acting through its own [authority] and by methods . . . entirely within the latter's control, to assist the administration of justice in the former country." *Id.* at 815. *See, e.g.*, Concepcion v. Veb Backereimaschenbau Halle, 120 F.R.D. 482 (N.J. 1988); Continental Graphics v. Hiller Indus., 614 F. Supp. 1125 (C.D. Utah 1985).

authority's name, title and address, 3) the summons and complaint, and 4) the translation of each document in the official language of the foreign entity's country.[214] The clerk of court sends one set of the above documents to the authority and keeps one set for the court's files. If the authority responds to the letter rogatory or request, the serving party delivers the service of process exactly as instructed by the authority's response.[215] The serving party then provides the clerk of court with a copy of the requested documents and all subsequent documents for the court's record.[216]

2. Service By Mail Requiring Signed Receipt

If the serving party chooses to deliver service of process by mail, the serving party may deliver service of process by "any form of mail requiring a signed receipt" (e.g., registered mail).[217] The rules for delivery of service of process by registered mail are identical to the rules described above in the section concerning foreign states and political subdivisions of foreign states and Service By Mail Requiring Signed Receipt.

3. Service By Direction of Court

As a service of process method of last resort for serving a foreign state's agency or instrumentality, the serving party may request directions for delivery of service of process from the court.[218] The court may direct the serving party to make delivery by any form consistent with the law of the place where service is to be made.[219] Thus, if delivery of service of process conforms to the directions given by the court, and does not violate the law of the place of delivery, the service of process method need only give actual notice to be proper.[220]

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214. FSIA, *supra* note 1, § 1608(b)(3)(A).

215. *Id.*

216. As stated before, additional copies of documents are always a good idea, especially when they need to be filed with the clerk of court.

217. *Id.* § 1608(b)(3)(B).

218. *Id.* § 1608(b)(3)(C). Author calls this the "method of last resort" because 1) the FSIA is the exclusive means of service of process for foreign sovereigns and 2) if all the other preceding methods are inapplicable or fail to provide results, then this is the only method left.

219. *Id.* The mode of service fashioned by the court need not be identical to the method prescribed by the law of the place of delivery, but must not be prohibited specifically either. International Schs. Serv. v. Government of Iran, 505 F. Supp. 178 (N.J. 1981); New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 78-79 (S.D.N.Y. 1980).

220. FSIA, *supra* note 1, § 1608(b)(3)(C). If service of process conforms with the law of the place of delivery, courts will presume that service of process passes due process limitations.

VIII. PROOF OF SERVICE OF PROCESS

Under section 1608(c), courts will deem service of process to have been made as of the date indicated on the 1) Diplomatic Note, 2) the certification of service, 3) the signed and returned mail receipt, or 4) some other proof of service.[221] Section 1608(c) provides that:

> (c) Service shall be deemed to have been made —
> (1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and
> (2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.[222]

Failure to provide adequate proof of proper service of process generally results in a motion to dismiss, which generally the court will deny on condition that the serving party delivers proper service of process to the foreign entity within a certain period of time.[223]

IX. TIME TO ANSWER

If the serving party delivers service of process in accordance with the FSIA, the foreign entity has sixty (60) days to serve an answer or other responsive pleading.[224] The sixty days begins on either the date of transmittal of the service of process[225] or the date of receipt of the service of process,[226] depending on the means of delivery.

The date of transmittal generally refers only to delivery by means of diplomatic channels.[227] The certified copy of the Diplomatic Note,

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Furthermore, § 1608(b)(3) only requires service "reasonably calculated to give actual notice." *Id.* § 1608(b)(3). *See* International Controls Corp. v. Vesco, 593 F.2d 166, 176 (2d Cir.) (court is free to fashion its own mode of service "to fit the necessities of a particular case," so long as the mode forged satisfies due process), *cert. denied*, 442 U.S. 941 (1979).

221. FSIA, *supra* note 1, § 1608(c).

222. *Id.*

223. Green Air Int'l v. Iberia Airlines of Spain, 1991 WL 70900 (N.D. Ill. 1991) (court denied motion to dismiss on condition that proper service be made within 14 days); Lippus v. Dahlgren Mfg. Co., 644 F. Supp. 1473 (E.D.N.Y. 1986) (court denied motion to dismiss on condition that proper service be made within 30 days).

224. FSIA, *supra* note 1, § 1608(d). This rule parallels FED. R. CIV. P. 12(a), which governs time to answer in suits against the United States and its officers and agencies.

225. FSIA, *supra* note 1, § 1608(c)(2)

226. *Id.*

227. *Id.* § 1608(c)(1). *See also id.* § 1608(a)(4).

which is returned to the clerk of court, indicates the date of transmittal of the service of proceess documents.[228] Therefore, the transmittal date is the date on which service was made when delivery is by diplomatic channels.[229]

The date of receipt refers to delivery by any other means under the FSIA service of process procedures.[230] A certification of delivery, a signed and returned postal receipt, or any other proof of service of process which contains the date of delivery and proof of actual notice constitutes as a valid date of receipt for purposes of the FSIA.[231] Therefore, the date of receipt is the date on which service was made when delivery is by any means other than by diplomatic channels.

X. CONCLUSION

The FSIA is the exclusive source of law for subject matter jurisdiction, personal jurisdiction, and service of process procedures for claims against foreign states, or its political subdivisions, agencies or instrumentalities in Federal and State courts of the United States.[232] The service of process procedures are especially important since proper service of process plus subject matter jurisdiction equates to personal jurisdiction.[233] Therefore, failure to abide by FSIA's service of process procedures results in lack of personal jurisdiction and possible dismissal.[234]

Use of FSIA service of process procedures necessitates the preliminary determination of two facts. First, the serving party must determine if the FSIA is applicable by determining if the entity is a "foreign state."[235] Second, the serving party must determine the exact status of the "foreign state" because FSIA service of process procedures

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228. *Id.* § 1608(c)(1).

229. *See* Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1988) (court held service made when United States embassy in Moscow transmitted documents to Foreign Ministry of USSR, despite rejection of service and return of all documents); Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982) (court held service made when Director of Special Consular Services transmitted documents to embassy, despite China's return of all documents approximately one month later). *See also* George Wimpey & Co. (Nig.) Ltd. v. Ogun-Oshun River Basin Dev. Auth., 1989 WL 7372 (D.D.C. 1989).

230. FSIA, *supra* note 1, § 1608(c)(2).

231. *Id.*

232. *See supra* text accompanying notes 25, 37.

233. *See supra* text accompanying note 24.

234. *See supra* text accompanying note 223.

235. *See supra* text accompanying notes 55-65.

distinguish between a foreign state or its political subdivision, and a foreign state's agency or instrumentality.[236]

If the entity is a foreign state or political subdivision, the serving party has four possible methods of service of process, which are listed in an hierarchial order. First, the serving party delivers service of process in accordance to a special arrangement.[237] Second, the serving party delivers service of process in accordance with an applicable international convention on service of judicial documents.[238] Third, the serving party delivers service of process by any form of mail requiring a signed receipt to the ministry of foreign affairs of the foreign state involved.[239] Fourth, the serving party delivers service of process through the State Department via diplomatic channels as a method of last resort.[240]

If the entity is an agency or instrumentality of a foreign state, the serving party has six possible methods of service of process listed in somewhat of an hierarchial order.[241] First, the serving party delivers service of process in accordance with a special arrangement.[242] Second, the serving party has two choices: 1) the serving party may deliver service of process to the agency or instrumentality's officer or agent in the United States; or, 2) the serving party may deliver service of process in accordance with an applicable international convention on service of judicial documents.[243] Third, the serving party has three choices: 1) the serving party may request directions from an appropriate authority in the foreign state by use of a letter rogatory or request and then deliver service of process exactly as directed; 2) the serving party may deliver service of process by any form of mail requiring a signed receipt; or, 3) the serving party may request directions from the court itself as a method of last resort — the method chosen by the court is limited only by the law of the place of delivery.[244]

The most difficult aspect of dealing with the FSIA service of process procedures is determining the "status" of the foreign entity. How-

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236. *See supra* text accompanying notes 66-87.

237. *See supra* text accompanying notes 106-10.

238. *See supra* text accompanying notes 111-41.

239. *See supra* text accompanying notes 142-62.

240. *See supra* text accompanying notes 163-86.

241. "Somewhat" of an hierarchial order refers to the serving party's two alternative methods of service of process at § 1608(b)(2), and three alternative methods of service of process at § 1608(b)(3). FSIA, *supra* note 1, § 1608(b)(1-3).

242. *See supra* text accompanying notes 193-95.

243. *See supra* text accompanying notes 196-205.

244. *See supra* text accompanying notes 206-20.

ever, this problem is solved easily by including a declaration or a statement of status in each agreement made with the foreign entity. Such a declaration or statement should be easy to draft, easy to negotiate, and, as a result, easy to incorporate in any agreement. Once the status of the foreign entity is determined, the serving party need only go down the list of FSIA procedures and utilize the first applicable procedure available — just as easy as ABC.

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