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## A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act

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# A Practical and Theoretical Analysis of Service of Process under the Foreign Sovereign Immunities Act

## I. Introduction

The Foreign Sovereign Immunities Act of 1976 (FSIA)<sup>1</sup> established a special set of rules for serving process<sup>2</sup> upon foreign states.<sup>3</sup> Prior to the FSIA, no special statutory provisions existed for serving foreign states,<sup>4</sup> which often led plaintiffs to attach U.S. assets of the foreign state in order to obtain *quasi in rem* jurisdiction over the defendant state.<sup>5</sup> This situation

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1. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602–1611 (1976).

2. *Id.* §§ 1605(b), 1608. The service provisions of the FSIA have been discussed in the following publications: Ascencio & Dry, *An Assessment of the Service Provisions of the Foreign Sovereign Immunities Act of 1976*, 8 J. OF LEGIS. 230 (1981); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009, 1022–28 (1979); Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity, Part IV*, 1980 COM. L.J. 364, 370–71 (1980); Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 397–402 (1982); SMIT, *The Foreign Sovereign Immunities Act of 1976: A PLEA FOR DRASTIC SURGERY*, 1980 AM. SOC'Y INT'L L. PROC. 49, 66 (1980); Note, *Service of Process Under The Foreign Sovereign Immunities Act of 1976: The Arguments for Exclusivity*, 14 CORNELL INT'L L.J. 357 (1981); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 443–46 (1977).

3. The FSIA defines a “foreign state” as including a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in § 1603(b). 28 U.S.C. § 1603(a) (1976). See *infra* note 19 and accompanying text for a discussion of the meaning of “agency or instrumentality.”

4. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, 23 (1976) [hereinafter cited as House Report]; S. REP. NO. 1310, 94th Cong., 2d Sess., 9, 23 (1976) [hereinafter cited as Senate Report]. See generally Miller, *Service of Process on State, Local, and Foreign Governments Under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers*, 46 F.R.D. 101, 121–39 (1969). Apparently, this gap existed because the *Federal Rules of Civil Procedure* were established prior to the advent of restrictive sovereign immunity, so there was no need to provide for service upon foreign states, *id.* at 122, and Congress never attempted to fill the gap afterwards, *id.* at 127.

5. House Report, *supra* note 4, at 26; Senate Report, *supra* note 4, at 26.

resulted in foreign relations tensions,<sup>6</sup> which sometimes made the State Department's sovereign immunity determinations political as well as legal decisions.<sup>7</sup> Moreover, the attached assets often could not be used to satisfy a resulting judgment.<sup>8</sup>

The FSIA's service provisions were designed to eliminate these problems and provide an adequate means of commencing suit against foreign states.<sup>9</sup> Specifically, the FSIA eliminated prejudgment attachment in most suits against foreign states.<sup>10</sup> Consequently, it eliminated *quasi in rem* jurisdiction and substituted specific methods of service by which to obtain *in personam* jurisdiction over the defendant state.<sup>11</sup> Other provisions of the FSIA provide for post-judgment attachment to satisfy a judgment.<sup>12</sup>

Because the FSIA's service provisions are complex, the sufficiency of service frequently becomes an initial issue in lawsuits against foreign states.<sup>13</sup> Although the number of reported opinions dealing with the sufficiency of service is small,<sup>14</sup> enough cases have dealt with the FSIA's service

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6. House Report, *supra* note 4, at 27; Senate Report, *supra* note 4, at 27; *see, e.g.*, *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961).

7. *See* House Report, *supra* note 4, at 7; Senate Report, *supra* note 4, at 9.

8. *See Immunities of Foreign States, Hearings on H.R. 3493 Before the Subcommittee on Claims and Governmental Relations of the Comm. on the Judiciary*, 93d Cong., 2d Sess. 43-44 (1973) (State and Justice Dep't section-by-section analysis). The Department of State had taken the position that although attachment of a foreign state's property was not prohibited if the state was not immune from suit, the property so attached could not be retained to satisfy a judgment because the property of a foreign sovereign is immune from execution even if the sovereign is not immune from suit. *Id.*; *see* *Stephen v. Zivnostenska Banka National Corp.*, 222 N.Y.S.2d 128, 134 (App. Div. 1961); *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 469, 472 (Sup. Ct. Westchester Co. 1959). Judgments so obtained simply formed a basis for recognition and enforcement abroad or a diplomatic claim by the State Department on the claimant's behalf. *Carl*, *supra* note 2, at 1014; *von Mehren, The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L. 34, 42-43 (1978).

9. House Report, *supra* note 4, at 8, 26; Senate Report, *supra* note 4, at 9, 25.

10. *See* 28 U.S.C. § 1620(d) (1976). The FSIA permits pre-judgment attachment if the foreign state has waived its immunity therefrom and the purpose of such attachment is to secure satisfaction of an ultimate judgment rather than to obtain jurisdiction. *Carl*, *supra* note 2, at 1042.

11. House Report, *supra* note 4, at 8; Senate Report, *supra* note 4, at 9; *see* 28 U.S.C. § 1608 (1976).

12. 28 U.S.C. §§ 1609-1611 (1976).

13. The common points of contention include the sufficiency of the translations required in § 1608(a)(3) and (b)(3) and whether all the required documents were ever sent. *See infra* notes 197-205 and accompanying text.

14. Many service problems are resolved at an early stage because the plaintiff need only re-serve the documents as corrected in order to commence suit.

The reported decisions dealing with the FSIA's service provisions at this writing are: *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250 (7th Cir. 1983); *Harris Corp. v. National Iranian Radio and Tel.*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981); *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982), *vacated mem. op.* (Feb. 27, 1984), *dismissed* (Oct. 26, 1984); *International Schools Serv. v. Iran*, 505 F. Supp. 178 (D.N.J. 1981); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979); *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980); *United Euram v. Union of Soviet Socialist*

provisions to give an indication of what the courts believe constitutes compliance and to expose problem areas in which the statute or its administration<sup>15</sup> could be improved.

This article analyzes compliance with the service provisions of the FSIA and evaluates their strengths and weaknesses. It first outlines the permissible methods of service from a practitioner's perspective. It then examines case law and analyzes what should constitute compliance with the FSIA's service provisions. Finally, the article makes some modest proposals for improving service upon foreign states under the FSIA.

## II. The FSIA's Service Provisions

### A. IN GENERAL

Section 1608 sets forth the exclusive provisions for service upon foreign states and their instrumentalities.<sup>16</sup> Separate provisions exist for service on (1) foreign states and their political subdivisions<sup>17</sup> and (2) a foreign state's agencies and instrumentalities.<sup>18</sup> In order to serve the defendant, therefore, a claimant must determine into which category the defendant falls. Fortunately, the statute's definition of an agency or instrumentality<sup>19</sup> of a foreign state has caused courts little difficulty.<sup>20</sup> In case of doubt, a claimant should serve the defendant according to both sets of provisions.

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Republics, 461 F. Supp. 609 (S.D.N.Y. 1978); 40 D 6262 Realty Corp. v. United Arab Emirates, 447 F. Supp. 710 (S.D.N.Y. 1978), Gray v. Permanent Mission, 443 F. Supp. 816 (S.D.N.Y. 1978), *aff'd mem.*, 508 F.2d 1044 (2d Cir. 1978). Two significant unreported decisions are: *In re Related Iranian Cases*, No. C-79-3542 (N.D. Cal. Aug. 15, 1980); *Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F (N.D. Tex. June 21, 1979).

15. Service upon foreign states is administered by the State Department pursuant to the FSIA and regulations published at 22 C.F.R. part 93 (1983).

16. 28 U.S.C. § 1608 (1976); House Report, *supra* note 4, at 23; Senate Report, *supra* note 4, at 23. The rules also apply to filing an answer or other responsive pleading and to obtaining a default judgment. House Report, *supra* note 4, at 23; Senate Report, *supra* note 4, at 23. Section 1605(b) also contains certain service provisions for admiralty suits brought to enforce a maritime lien. *See infra* notes 52-75 and accompanying text.

17. 28 U.S.C. § 1608(a) (1976).

18. *Id.* § 1608(b).

19. *Id.* § 1603(b). Section 1603(b) provides:

(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.

*Id.*

20. *See, e.g.*, Gray v. Permanent Mission, 443 F. Supp. 816, 820 (S.D.N.Y. 1978), *aff'd mem.*, 508 F.2d 1044 (2d Cir. 1978) (held a foreign state's United Nation's mission to be a foreign state and not an agency or instrumentality).

Each set of provisions contains a hierarchical scheme of service methods.<sup>21</sup> Thus, a plaintiff's attorney must proceed down the list and either determine that an antecedent method is inapplicable or exhaust it before moving on to the next one.

## B. SERVICE UPON A FOREIGN STATE OR POLITICAL SUBDIVISION

There are four permissible methods of service upon foreign states or political subdivisions. The first and preferred method is 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.<sup>22</sup> This provision is designed to encourage potential plaintiffs and foreign states to agree upon a procedure for service.<sup>23</sup>

Whether this purpose is being achieved is unclear; no reported case under the FSIA evidences such a private method of service. It is advisable for the drafting attorney to provide for a method of service if convenience in litigation is likely to be in the client's interest. Since such a provision itself may suffice to waive immunity,<sup>24</sup> however, it may not be possible to specify a method outside the context of an express waiver. The parties should specify a number of alternate methods of serving the documents, preferably in a hierarchy, sufficient to cover all possible contingencies. Normally, the foreign state should designate an agent, and preferably more than one, to

21. 28 U.S.C. § 1608(a)-(b) (1976); House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 23.

22. 28 U.S.C. § 1608(a)(1) (1976).

23. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 23.

24. The legislative history of the FSIA indicates that an agreement to arbitrate or the presence of a choice-of-law clause suffices to waive sovereign immunity. House Report, *supra* note 4, at 18; Senate Report, *supra* note 4, at 18. The courts, however, appear to have limited such waiver to agreements to arbitrate in the United States, apparently on the ground that the parties contemplated enforcement of the arbitration agreement in U.S. courts if necessary in such cases, and no such recourse is necessary when the arbitration is to occur elsewhere. *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1285 (E.D. Pa. 1981) (in damage actions, clauses that do not specify arbitration in United States are not waivers of immunity); e.g., *Paterson Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A.*, 493 F. Supp. 621, 624 & n.8 (S.D.N.Y. 1980) (agreement to arbitrate in defendant state's territory not waiver of immunity); *Chicago Bridge & Iron Co. v. Islamic Republic of Iran*, 506 F. Supp. 981, 987-88 (N.D. Ill. 1980). Thus, an arrangement made for service in the United States also would probably waive immunity. In *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337 (S.D.N.Y. 1982), however, the court concluded that the appointment of the New York Secretary of State to receive process did not waive sovereign immunity, stating: "At most, such an appointment may waive objections to *personal* jurisdiction. It cannot be construed to waive objections to the subject matter jurisdiction of any court, nor to waive affirmative defenses, like sovereign immunity, which may be available in particular suits." *Id.* at 1346. This result seems erroneous for the following reasons: the same considerations would apply to agreements to arbitrate, which are considered waivers, because it ignores the peculiar relationship between subject matter and personal jurisdiction in the FSIA; and a service arrangement would not be made unless the parties believed that suit could be brought upon the contract. Moreover, even in the face of a purported waiver of subject matter jurisdiction, the court must dismiss the case when the lack thereof becomes apparent.

receive service. To ensure receipt of the papers, at least one of the agents should be situated in the United States, and any others should be variously located in the foreign state's bureaucracy and be equipped to receive service by various modern methods of telecommunication, such as telex, telecopy, and modern air delivery services.

Finally, it is important to appreciate that section 1608(a)(1) only gives the parties latitude to choose *methods* of service; the content of the documents served is still governed by the FSIA, the applicable principles of pleading, and due process.

The second method of service, available only if no special arrangement exists, is by delivery of a copy of the summons and complaint pursuant to an applicable<sup>25</sup> international convention on the service of judicial documents.<sup>26</sup> The only such convention to which the United States is a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents.<sup>27</sup> Under the Convention, service normally occurs by a judicial officer or other authority serving the documents upon a designated central authority in the receiving state, which then serves the documents pursuant to the legally prescribed methods for domestic suits or by a particular method requested by the applicant if it is consistent with the receiving state's law.<sup>28</sup> In addition, a person may mail judicial documents directly to persons

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25. For an international convention to apply, both the United States and the foreign state must be parties to the convention. House Report, *supra* note 4, at 25; Senate Report, *supra* note 4, at 23.

26. 28 U.S.C. § 1608(a)(2) (1976).

27. 20 U.S.T. 361, T.I.A.S. No. 6638 (1969). The Hague Convention governs service in suits against the following foreign states unless there is a special service arrangement: Austria, Belgium, Denmark, Federal Republic of Germany, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Norway, The Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, The United Arab Republic, The United Kingdom, and Yugoslavia. *Id.* 20 U.S.T. at 367-69. This list is updated in TREATIES IN FORCE and the annotations to Federal Rule 4 in 28 U.S.C.A.

28. *Id.* arts. 2-3, 5, 20 U.S.T. at 362. Article 5 provides:

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

*Id.* art. 5, 20 U.S.T. at 362-63. Compatibility with the receiving state's internal law under subsection (b) is presumed unless the requested method is affirmatively prohibited. *See infra* note 185 and accompanying text. Service may not be disallowed merely because the receiving state's law does not permit the cause of action. Hague Convention, art. 13, 20 U.S.T. at 364.

abroad, or judicial officers or other officials of the sending state may effect service directly through their counterparts in the receiving state.<sup>29</sup> Finally, each contracting state may use consular channels and, in exceptional circumstances, diplomatic channels to forward service documents to those authorities designated by the receiving state for such purpose.<sup>30</sup>

The third and most common method of serving foreign states is sending the summons, complaint, and a "notice of suit,"<sup>31</sup> together with a translation of each into the foreign state's official language, by return receipt mail, to be sent by the court clerk to the head of the ministry of foreign affairs of the foreign state.<sup>32</sup>

Whenever a notice of suit is required, a copy of the FSIA must be attached as part thereof, meaning that it too must be translated.<sup>33</sup> If this method has not succeeded within thirty days, service can be made by the fourth method. Under this method the claimant sends two copies of the summons, complaint, and notice of suit, each translated into the foreign state's official language, by return receipt mail to be addressed by the court clerk to the State Department's Director of Overseas Citizens Services,<sup>34</sup> who then transmits one of the copies through diplomatic channels<sup>35</sup> and sends the court clerk a certified copy of the diplomatic note indicating when the papers were transmitted.<sup>36</sup>

### C. SERVICE UPON A STATE AGENCY OR INSTRUMENTALITY

The provisions for service upon a state agency or instrumentality are set

29. *Id.*, art. 10, 20 U.S.T. at 363.

30. *Id.*, art. 9, 20 U.S.T. at 363.

31. A "notice of suit," or of a default judgment, is a short summary of the nature of the suit containing (1) the title of the proceeding, including the docket number, (2) the name of the court, (3) the name of the foreign state or political subdivision concerned, (4) the nature of the documents served (*e.g.*, Summons and Complaint; Default Judgment), (5) a statement of the nature and purpose of the proceedings, including why the foreign state or political subdivision has been named and the relief requested, and (6) the date of the default judgment if that is what is being served. 22 C.F.R. part 93, annex. *See generally* House Report, *supra* note 4, at 11, 24-25; Senate Report, *supra* note 4, at 7, 24.

32. 28 U.S.C. § 1608(a)(3) (1976). This procedure is based on FED. R. CIV. PROC. 4(i)(2)(D). House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 24.

33. *See* 22 C.F.R. § 93.2(e) (1983).

34. On January 8, 1979, Overseas Citizens Services succeeded to the functions of the former Office of Special Consular Services, the sub-agency still specified in the statute.

35. Transmittal by "diplomatic channels" means that the State Department pouches a copy to the U.S. embassy in the foreign state, which then prepares a diplomatic note of transmittal to deliver with the other papers to the appropriate official at the foreign state's ministry of foreign affairs. The Department then returns to the court the diplomatic note used in transmitting the papers. Alternatively, the State Department could transmit the papers to the foreign state's embassy in Washington, D.C. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 24.

36. 28 U.S.C. § 1608(a)(4) (1976). The foreign state need not accept the papers for such transmittal to be valid; the foreign state need only have received actual notice of the suit by receiving the papers sent as specified. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 24.

forth in section 1608(b).<sup>37</sup> These provisions also embody a hierarchical scheme, but are more numerous and offer more flexibility than those of section 1608(a).

First, like section 1608(a)(1), and for the same reasons, section 1608(b)(1) gives first priority to service pursuant to a special arrangement between the parties. It should be easier to come to such an arrangement with an agency or instrumentality than with the foreign state itself because most such entities operate as private commercial entities and often waive immunity to suit as a condition to a transaction. In the context of such a waiver, providing for a method of service is not a significant concession and is normally done.

The second method actually consists of two alternatives. A copy of the summons and complaint must be delivered either (1) to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive process in the United States or (2) in accordance with an applicable international convention on service of judicial documents.<sup>38</sup> No hierarchy between the two alternatives is given; thus, it is unclear what the preferable method of service is if the agency or instrumentality itself could be served under the Convention and its officers or agents could also be served in the United States. The issue is partially resolved by looking at the manner in which the agent is appointed. If it is done by the contract governing the transaction under which the claim arises, subsection (b)(1) would apply because the appointment would constitute a special service arrangement. In this situation, section 1608(b)(2) would not apply.

If no officer or agent is present in the United States, of course, then only the Convention could apply. The only situation open to question, therefore, is when merely an officer or managing or general agent is present in the United States and the contract does not call for service upon such officer or agent. In these circumstances serving either the officer or agent or the agency or instrumentality would be permissible because subsection (b)(2) presents them in the form of options, though serving the U.S. agent appears preferable because it more closely resembles service under section 1608(b)(1). Serving the officer or agent in the United States also is preferable from a strategic standpoint because it is easier and less expensive, and actual receipt of the documents is more likely.

Subsection (b)(3) contains three more options if service is not possible by the above methods. These three methods are not in a preferential hierarchy; the plaintiff may select any one them. Each requires, however, that the summons and complaint be translated into the foreign state's official language.<sup>39</sup> No notice of suit need be included.

Under the first of these options, the plaintiff may have the court send a

37. 28 U.S.C. § 1608(b) (1976).

38. *Id.* § 1608(b)(2).

39. *Id.* § 1608(b)(3).



letter rogatory<sup>40</sup> and then serve the agency or instrumentality in accordance with the foreign state or political subdivision's response to it.<sup>41</sup> Second, the plaintiff may simply transmit the documents by any form of mail requiring a signed receipt, to be addressed and dispatched to the defendant by the court clerk.<sup>42</sup> This is the most common method of the three. Finally, service may be accomplished by a method directed by the court, so long as it is consistent with the law of the place where service is to be made,<sup>43</sup> which is not necessarily that of the foreign state. Service by court order must be regarded as a last resort because it calls for the exercise of discretion, causes uncertainty, and may irritate foreign states, even though the method chosen is not prohibited by its law. When this option is used, counsel should examine the possibility of requesting service pursuant to state law, Federal Rule 4, or local rules of service developed under the authority of Federal Rule 83.

#### D. MISCELLANEOUS SERVICE PROVISIONS

##### 1. *Time of Service*

The time at which service is deemed to have been made is important for statute-of-limitations purposes and for determining when an answer or other responsive pleading must be filed. Section 1608(c) provides that service under subsection (a)(4) occurs as of the date of transmittal indicated in the certified copy of the diplomatic note.<sup>44</sup> In all other cases, service is deemed to have occurred as indicated in the certification, signed postal receipt, or other applicable proof of service.<sup>45</sup>

##### 2. *Time to Answer or Reply*

In normal federal cases, the defendant is given twenty days in which to file its answer or other responsive pleading unless an extension is granted.<sup>46</sup> The FSIA, however, gives foreign states sixty days.<sup>47</sup> This longer period may be designed in part to make the suit less offensive and to give the defendant

40. A letter rogatory, or letter of request, is the medium whereby one country, speaking through its courts, requests another country's courts to assist the administration of justice in the former country through their own procedures. BLACK'S LAW DICTIONARY 815 (5th ed. 1979). See generally 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 204-16 (1968).

41. 28 U.S.C. § 1608(b)(3)(A) (1976).

42. *Id.* § 1608(b)(3)(B).

43. *Id.* § 1608(b)(3)(C). At least two pre-FSIA decisions permitted ad hoc service methods under rule 83 of the *Federal Rules of Civil Procedure*, Republic Int'l Corp. v. Amco Eng'rs., Inc., 516 F.2d 161, 165 (9th Cir. 1975); Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 108 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966) (relying upon local court rules established under rule 83). No post-FSIA decision has needed to rely explicitly upon rule 83, though one court cited the above cases in permitting court-ordered service upon the state of Iran under rule 4. *In re Related Iranian Cases*, No. C-79-3542 (N.D. Cal. Aug. 15, 1980).

44. 28 U.S.C. § 1608(c)(1) (1976).

45. *Id.* § 1608(c)(2).

46. FED. R. CIV. PROC. 12(a).

47. 28 U.S.C. § 1608(d) (1976). This period may be extended as well.

state time to formulate any sovereign immunity defense. Since the U.S. government has sixty days to respond when it is sued,<sup>48</sup> however, it may be that Congress simply decided to give foreign states equal treatment.<sup>49</sup>

The sixty-day response period must be mentioned in both the summons and the notice of suit where required. Surprisingly, plaintiffs occasionally fail to comply with this requirement.<sup>50</sup> This defect may be remedied by serving the summons and notice of suit again with the correct period specified.

### 3. *Service of Entries of Default and Default Judgments*

Section 1608(e) requires that once a claimant establishes its right to relief by evidence satisfactory to the court and a default judgment is entered, a copy of such judgment must be sent to the foreign state in the manner prescribed for service in subsections (a) and (b).<sup>51</sup> Presumably, the method would be the same as that originally used to serve process, unless this method has become impracticable. Notice of an entry of default must also be served, but the evidentiary standard of section 1608(e) does not apply.

### 4. *Service Provisions for Admiralty Suits Brought to Enforce Maritime Liens*

Satisfaction of section 1605(b)'s special service provisions will render an admiralty action brought to enforce a maritime lien an *in personam* claim up to the value of the vessel or cargo upon which the lien arose.<sup>52</sup> Much as Congress designed section 1608 to render pre-judgment attachments unnecessary, section 1605(b) is designed to avoid the need to arrest a foreign state's vessel or cargo in order to commence suit against it.<sup>53</sup>

A plaintiff must fulfill two requirements under section 1605(b). First, a copy of the summons and complaint must be delivered to the person, or such person's agent, who is in possession of the subject vessel or cargo.<sup>54</sup> If the vessel or cargo is arrested or attached pursuant to process obtained by the plaintiff, then the plaintiff loses its *in personam* remedy and the foreign state is entitled to immunity.<sup>55</sup> If, however, the plaintiff was unaware that the

48. FED. R. CIV. PROC. 12(a).

49. See House Report, *supra* note 4, at 25; Senate Report, *supra* note 4, at 25.

50. This occurred in *Jackson*. See Plaintiff's Opposition to Defendant's Motion for Relief from Judgment by Default and Motion to Dismiss, at 55-56, *Jackson v. People's Republic of China*, mem. op. (Feb. 27, 1982) (order setting aside default judgment).

51. 28 U.S.C. § 1608(e) (1976).

52. *Id.* § 1605(b). The value of the vessel or cargo is determined as of the time notice of the suit is served under subsection (b)(1). *Id.*

53. House Report, *supra* note 4, at 21; Senate Report, *supra* note 4, at 21. Section 1605(b) does not preclude suit pursuant to § 1605(a), nor would it preclude a subsequent action under § 1605(a) to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

54. *Id.* § 1605(b)(2).

55. *Id.*

vessel or cargo of a foreign state was involved, serving the process of arrest will constitute valid notice.<sup>56</sup>

Second, notice to the foreign state must also be initiated<sup>57</sup> as provided in section 1608 within ten days of when notice was delivered to the person in possession of the vessel or cargo.<sup>58</sup> If the plaintiff is unaware of the foreign state's interest, however, the ten-day period does not begin running until the plaintiff does become aware of it.<sup>59</sup> This second requirement is designed to ensure that the foreign state receives prompt and actual notice of the suit in the event the copies served upon the master or his agent fail to reach the foreign state.<sup>60</sup> This danger arises because shipmasters are often employed by charterers rather than by shipowners.<sup>61</sup>

The case of *Velidor v. L/P/G Benghazi*,<sup>62</sup> illustrates the working of section 1605(b) and its interrelationship with sections 1605(a) and 1608. In *Velidor*, dissatisfied Yugoslavian seamen demanded wages owed under the Seamen's Wage Act<sup>63</sup> upon the *Benghazi's* docking in the United States.<sup>64</sup> When payment was not forthcoming, they had the ship arrested to satisfy their claims.<sup>65</sup> The plaintiffs had served only the master and not also the foreign state as required by section 1605(b)(2), because they did not know that the vessel was owned by a state entity.<sup>66</sup> The owner of the vessel, Compagnie

56. *Id.* As a practical matter, such unawareness will be rare because the flag of the vessel, the circumstances giving rise to the maritime lien, and the information in ship registries kept in U.S. ports should make known the ownership of at least the vessel, if not the cargo. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, at 21. Reliance upon such a registry which did not disclose a foreign state's ownership, however, would be *prima facie* evidence of unawareness. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, at 21. This was the case in *Velidor v. L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), in which the Lloyds Register indicated that a shipping company other than the actual state-owned company was the owner. *Id.* at 815 n.3. In addition, other ships in the subject vessel's fleet flew another state's flag. *Id.* The district court also apparently accepted these facts as evidence of unawareness. *Id.* Accordingly, the district court held that it had jurisdiction under § 1605(b). *Id.* at 815. Later proceedings at the district level made this holding irrelevant, as the cause of action was held to be proper only under § 1605(a). *Id.* at 816. Absent such circumstances, unawareness normally would be established by affidavit. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, at 21.

57. Whether the notice actually must be received within the ten days, or whether it must be received at all is not specified in the statute. The committee reports state only that this notice requirement to ensure that the state receives "prompt notice" of the lawsuit. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, at 22. Thus, it appears that the notice need only be dispatched within the ten days but that it must be received within a reasonable time.

58. 28 U.S.C. § 1605(b)(2) (1976).

59. *Id.*

60. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, at 22.

61. *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981).

62. *Id.*

63. The Seamen's Wage Act, 46 U.S.C. §§ 596-597 (1976), gives seamen, American or foreign, the right to be paid specified percentages of their wages due upon arrival in a U.S. port where cargo is unloaded. To enforce this right, seamen may bring actions in U.S. courts and may arrest their vessel to satisfy their claims. *Id.* § 597.

64. 653 F.2d at 814.

65. *Id.*

66. *Id.* at 815-16 & n.3.

Algero-Libyen de Transport Maritime (CALTRAM), then asserted its status as an agency or instrumentality of Algeria and Libya and demanded that the arrests be lifted because of the service defect.<sup>67</sup> The plaintiffs admitted that service was improper for purposes of a maritime claim under section 1605(b), but asserted that they had been unaware of the ship's sovereign ownership, that their claim could also be cognizable under 1605(a)(2), and that, accordingly, section 1608(b)(2) governed service.<sup>68</sup> Sections 1605(b) and 1608(b)(2) were satisfied, the plaintiffs argued, because the master was the foreign state's agent, which meant that the foreign state's "officer, . . . managing or general agent" had been served in conformity with section 1608(b)(2).<sup>69</sup>

The court agreed with the plaintiffs' arguments. Relying upon the committee reports' reminders that claims could lie both under section 1605(a) and 1605(b),<sup>70</sup> the court first found that the defendants were engaged in a commercial activity in the United States<sup>71</sup> and that the plaintiffs' claims arose from this activity.<sup>72</sup> The court then looked to section 1608(b)(2) and held that under agency principles of maritime law, a ship's master is regarded as the owner's agent and representative and, therefore, that the master was an officer, general or special agent for accepting process within the meaning of section 1608(b)(2).<sup>73</sup>

The Third Circuit's decision in *Velidor* confirmed the option of proceeding under either section 1605(b) or section 1605(a) when the individual requirements of either can be met. As the court pointed out,<sup>74</sup> this result comports with Congress' intent that, in order to make it easier for private plaintiffs to commence suit upon foreign entities, section 1605(b) should not

67. *Id.* at 814-16.

68. *Id.* at 816.

69. *See id.* at 820-21.

70. *Id.* at 819.

71. 653 F.2d at 819. Section 1605(a)(2) disallows a claim of sovereign immunity for claims arising from commercial activities in the United States. 28 U.S.C. § 1605(a)(2) (1976). A commercial activity is defined in § 1603(d) as a regular course of commercial conduct or a particular commercial transaction or act. *Id.* § 1603(d). The commercial character of an activity is determined by examining its inherent nature rather than its purpose. *Id.* Such activity is "carried on in the United States" if it has "substantial contact" with the United States. *Id.* § 1603(e); *see also id.* § 1605(a)(2) ("commercial activity" within § 1605(a)(2) may be one carried on in the United States, an act in connection with a commercial activity carried on elsewhere, or an act outside U.S. territory in connection with a commercial activity conducted elsewhere but having a direct effect in the United States, all may constitute commercial activities within § 1605(a)(2)).

72. 653 F.2d at 820. Section 1605(a)(2) requires that the claim be "based upon" a commercial activity carried on in the United States by the foreign state. 28 U.S.C. § 1605(a)(2) (1976). This statutory requirement reflects the minimum contacts requirement that the lawsuit arise from the alleged minimum contacts. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

73. 653 F.2d at 821.

74. *Id.*

preclude suit under other sections of the FSIA simply because that section's requirements can be met.<sup>75</sup> The court's conclusion on this point, however, should not be read to suggest that less than literal compliance with the statute is sufficient so long as the foreign state receives actual notice. The plaintiffs in *Velidor* met the literal requirements of section 1608(b)(2), and the only question was whether they were required to proceed exclusively under section 1605(b).

### III. Compliance with the FSIA's Service Provisions

#### A. THE ANALYTICAL FRAMEWORK

Determining whether personal jurisdiction<sup>76</sup> has been obtained over a defendant requires a two-step analysis. First, one must determine whether the technique of service used was permitted by the applicable statute. When a foreign state is the defendant, this statute is the FSIA. Second, if the first requirement is satisfied it is still necessary to see whether the method of service comported with the due process clause of the U.S. Constitution. This requirement is met if, under the circumstances, the chosen method of service was reasonably calculated to give the defendant actual notice and an opportunity to appear and defend.<sup>77</sup>

Under this analysis, literal compliance with the statute does not necessarily constitute adequate service.<sup>78</sup> Conversely, service may be invalid because the FSIA's provisions were not complied with, even though the defendant received actual notice and appeared in court. None of the FSIA's

75. House Report, *supra* note 4, at 22; Senate Report, *supra* note 4, 22.

76. Under the scheme of the FSIA, personal jurisdiction under 28 U.S.C. § 1330(b) technically is not acquired unless one of the exceptions to sovereign immunity applies. House Report, *supra* note 4, at 23; Senate Report, *supra* note 4, at 23. The inquiry performed in determining the applicability of an exception, however, involves considerations normally associated with subject matter jurisdiction because the court is determining whether the case is of the type it is permitted to adjudicate under federal statutes and the Constitution.

As with personal jurisdiction, the question of whether a court has subject matter jurisdiction over a case has both constitutional and statutory dimensions. One must first determine whether the case falls within article III's grant of federal judicial power, and second whether the case is embraced by the terms of a statute. *See Texas Trading and Milling Corp. v. Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981). Under the scheme of the FSIA, these requirements also must be met before personal jurisdiction is acquired over a foreign state. The second of these requirements is met if an exception applies. If an exception applies, the article III requirement should be met in nearly every case because most cases are brought under § 1605(a)(2) and the FSIA's jurisdictional standard under §§ 1603(d)-(e) and 1605(a)(2) is more demanding than that of due process. In cases brought under other exceptions a genuine due process issue might arise.

77. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

78. The constitutional standard is built into the three options in § 1608(b)(3), however, because the subsection requires that the option employed must be reasonably calculated to give actual notice. 28 U.S.C. § 1608(b)(3) (1976). Thus, satisfying this provision also satisfies due process.

service provisions appear facially unconstitutional; most of them are lifted in some form from the previously upheld provisions of rule 4 of the Federal Rules of Civil Procedure,<sup>79</sup> and in any event appear reasonably calculated to give actual notice if complied with and employed in the appropriate factual situations. Indeed, the *Mullane* standard<sup>80</sup> is written into section 1608(b)(3). It appears that, outside a clear non-compliance with the statute, a constitutional question could arise only if (1) the plaintiff chooses and a court approves a technique under section 1608(b)(3) that under the facts makes actual notice too unlikely,<sup>81</sup> (2) none of the means of serving a foreign state or political subdivision under section 1608(a) applies or has worked, as occurred in several cases brought against Iran,<sup>82</sup> and a deficient nonstatutory technique is fashioned or (3) the translations required under some subsections are so affirmatively misleading that reasonable notice cannot be deemed to have been given.<sup>83</sup>

The following sections analyze, in the context of the case law, compliance with the FSIA's service provisions. The translation problem is discussed separately because of its uniqueness and because it has been addressed in only one case to date.

## B. THE COURTS' TREATMENT OF THE FSIA'S SERVICE PROVISIONS

### 1. *Compliance in General*

Except for cases involving exceptional facts, the courts have required strict compliance with the terms of the FSIA's service provisions. This result appears proper because tolerating less than full compliance threatens the uniformity of results that Congress sought to achieve and risks the type of foreign relations complications that Congress sought to eliminate when passing the statute.

The need for strictness has been upheld in several cases. In *40 D 6262 Realty Corp. v. United Arab Emirates*,<sup>84</sup> the plaintiffs attempted to serve a foreign state under section 1608(a)<sup>85</sup> merely by affixing a "notice of petition" to the U.S. realty in question and mailing a copy to the Permanent Mission of the United Arab Emirates Government.<sup>86</sup> This attempt at service

79. See FED. R. CIV. PROC. 4(i).

80. See *supra* text accompanying note 77.

81. As noted *supra* note 76, meeting § 1608(b)(3) will automatically satisfy the Constitution. Since the standard ultimately employed is that of due process, it is appropriate to view compliance with this subsection in constitutional terms.

82. See *infra* notes 142–81 and accompanying text.

83. See *infra* notes 131–33 and accompanying text.

84. 447 F. Supp. 710 (N.D. Cal. 1978).

85. The opinion leaves unclear what subsection the plaintiffs intended to satisfy.

86. *Id.* at 711.

fell far outside any provision of section 1608(a)<sup>87</sup> and, accordingly, was held invalid.<sup>88</sup> Relying upon the FSIA's legislative history, the court also noted that service upon an embassy by mail is precluded by the Act<sup>89</sup> and violates the Vienna Convention on Diplomatic Relations.<sup>90</sup> Since the plaintiffs' attempt at service in this case did not even approach compliance, however, the decision does not squarely stand for either a strict or loose approach to compliance.

In a similar case, *Alberti v. Empresa Nicaraguense de la Carre*, the Seventh Circuit held that the plaintiffs' service of the papers upon the Nicaraguan ambassador to the United States was inadequate.<sup>91</sup> Relying upon the committee reports' statement that mailing the complaint and summons to a foreign mission would violate the Vienna Convention on Diplomatic Relations and thus be precluded under the FSIA,<sup>92</sup> the court properly rejected the plaintiffs' argument that the ambassador could be construed as the head of the ministry of foreign affairs under section 1608(a)(3).<sup>93</sup> Although the *Alberti* court reached the proper result, it applied the wrong subsection of section 1608. Since the defendant was an agency or instrumentality of a foreign state, service should have been made under section 1608(b)(3), not section 1608(a)(3). The opinion never mentioned that the plaintiffs were attempting to employ the wrong subsection, so that even if they had satisfied it, service still would have been improper.

An analogous situation with a greater degree of compliance existed in *Gray v. Permanent Mission*.<sup>94</sup> In that case, the plaintiff brought a foreclosure action against the Congo's Mission to the United Nations, and sought to serve it by serving an untranslated summons and complaint upon the Mission's "secretary."<sup>95</sup> Since this procedure clearly did not meet any method

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87. Service was clearly not pursuant to an agreement, so § 1608(a)(1) was inapplicable. The defendant was not a party to the Hague Convention, so § 1608(a)(2) did not apply. Sections 1608(a)(3) and (4) could not have been satisfied because these subsections require translated copies of the complaint, summons, and notice of suit, none of which were provided.

88. *Id.* at 711.

89. *Id.* at 712 (citing House Report, *supra* note 4, at 24-25).

90. 447 F. Supp. at 712 n.3; see Vienna Convention on Diplomatic Relations art. 22(1), 23 U.S.T. 2227, T.I.A.S. No. 7502 (1972). The Vienna Convention states:

The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.

*Id.* Whether serving an embassy by mail would violate article 22(1) was brought to the State Department's attention by concerned foreign states, who claimed that the 1973 bill, which allowed such service, would violate the Convention. 71 DEP'T ST. BULL. 458 (1974). The Department agreed, the bill was amended, and Congress wrote this conclusion into the legislative history. See House Report, *supra* note 4, at 26; Senate Report, *supra* note 4, at 25-26.

91. 705 F.2d 250 (7th Cir. 1983).

92. *Id.* at 253.

93. *Id.*; see *supra* note 90.

94. 443 F. Supp. 816 (S.D.N.Y.), *aff'd mem.*, 508 F.2d 1044 (2d Cir. 1978). The decision is noted in *Comment*, 11 VAND. J. TRANSNAT'L L. 841 (1981).

95. 443 F. Supp. at 818.

contained in section 1608(a), the plaintiff argued that the Mission was an agency or instrumentality and that service was proper under section 1608(b)(2) because the secretary was an officer or agent thereof.<sup>96</sup> The court rejected this argument, holding that the mission was a foreign state and not an agency or instrumentality, which meant that section 1608(b) did not apply.<sup>97</sup> The court suggested that in any event, service upon "defendant's secretary" too vaguely identified the person intended to be served under section 1608(b)(2) to satisfy that section, and further indicated that such a person probably would not have the degree of authority necessary to be the type of person contemplated by the section.<sup>98</sup> Finally, the court concluded that since notice was in English and delivered only to "defendant's secretary," since the summons and complaint were drawn up on a pre-printed legal form, and since the defendants did not employ an attorney or take other legal actions until threatened with eviction, it was "obvious that the officials of the Congo Mission did not understand their rights under American law."<sup>99</sup> This statement suggests that the court considered the service to have violated not only the FSIA, but also due process.

Despite the plaintiff's obvious non-compliance with the FSIA, however, the court went beyond the holding necessitated by the facts<sup>100</sup> and ruled that strict compliance with the statute is required: "Every mode of service prescribed by the statute assumes either prior agreement between a foreign state and the American authorities . . . or mandates strict attention to the linguistic and diplomatic problems inherent in such situations."<sup>101</sup> This statement is irreproachable. The court's treatment of section 1608(b)(2), however, bears more discussion. First, in suggesting that serving someone designated "defendant's secretary" would be too vague a designation to comply with section 1608(b)(2), the court appears to have gone too far and confused the fact of serving the proper person with labels. Section 1608(b)(2) by its terms requires only that an officer or agent of the defendant agency or instrumentality be served, not that such person's specific title be designated. Therefore, service upon such a person otherwise in compliance

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96. *Id.* at 820.

97. *Id.* The court stated that it was hard to imagine a purer embodiment of a foreign state than such a mission and cited the House Report's discussion of the FSIA's attachment provisions, in which it was stated that diplomatic and consular missions are those of the foreign state itself. *Id.*; see House Report, *supra* note 4, at 29.

98. 443 F.2d at 820 n.4. The court stated: "The plaintiff has stated only that service was made on 'defendant's secretary.' This person is not identified more specifically and would not appear to have the degree of authority contemplated by the statute." *Id.*

99. *Id.* at 821.

100. Apparently in reference to the plaintiff's dismal attempt at service, the court stated that "informal" notification "clearly outside" the "obvious" requirements of the applicable statute cannot substitute for those which meet those requirements. *Id.* at 821. This statement arguably could be read as not requiring strict compliance, but the court appears to have been speaking in the context of the facts rather than stating a general rule.

101. *Id.*



with this section should be deemed satisfactory. Moreover, no comparable requirement exists for service upon the officials or agents of domestic corporations, partnerships, or unincorporated associations,<sup>102</sup> and none of the foreign relations considerations present when suing foreign states appear to require a different rule under the FSIA. Requiring that the person's specific position be set forth would be cumbersome and lead to too many instances of good faith non-compliance with a statute designed to make it easier for plaintiffs to commence suit, with no corresponding policy benefit.

The court's conclusion that the person served at the Mission must possess the type of authority that an official or agent under section 1608(b)(2) should possess, however, appears sound. The court's focus upon authority indicates that one should apply general principles of agency to determine whether the right person is being served. Agency principles are used under section 1605(a)(5) to determine whether the tortfeasor is an official or agent acting within the scope of employment.<sup>103</sup> The authority requirement also appears in section 1605(b),<sup>104</sup> and was applied in *Velidor*. There appears to be no reason not to do the same under section 1608(b)(2).

The *Velidor* case also stands for a strict approach to compliance. In that case, the court did not pause to invalidate service under section 1605(b) because the foreign instrumentality itself had not been served in addition to the master of the vessel, even though the instrumentality had actual notice.<sup>105</sup> The court in *Jackson v. People's Republic of China* also spoke of the need for strict compliance with the FSIA's service provisions, setting aside its default judgment, *inter alia*, on the ground that the record did not disclose that a translated copy of the summons was ever served.<sup>106</sup>

The only court that permitted less than strict compliance with the methods outlined in section 1608 is the Eleventh Circuit in *Harris Corp. v. National Iranian Radio and Television*.<sup>107</sup> In that case the plaintiff attempted to serve the Iranian agency or instrumentality in several ways.<sup>108</sup> None of the

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102. See FED. R. CIV. PROC. 4(d)(3). The summons need only contain the name of the party defendant. *Id.* 4(b).

103. *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414 (D.D.C. 1983). Under § 1605(a)(5) the court would apply the agency law of the jurisdiction in which the claim arose, *id.* at 1417, but under § 1608(b)(2) a court would be free to apply whatever agency law is appropriate under the forum state's choice-of-law rules. See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

104. 28 U.S.C. § 1605(b) (1976).

105. 653 F.2d at 819; see *supra* notes 62-75 and accompanying text.

106. No. 79-C-1272-E, slip. op. at 7-8 (Feb. 27, 1984), *vacating* *Jackson v. People's Republic of China*, 550 F. Supp. 869 (D. Ala. 1982).

107. 691 F.2d 1344 (11th Cir. 1982). Other cases permitted method of services wholly outside the methods outlined in § 1608, but such cases raise the slightly different issue of the exclusivity of § 1608's methods, not compliance with a specific method in § 1608.

108. The methods were: (1) telexing the summons and notice of suit and stating in the telex that the pleadings would be as allowed in *New England Merchants National Bank v. Iran Power*

methods used strictly complied with the statute,<sup>109</sup> though some succeeded in giving the defendant actual notice.<sup>110</sup> No court-ordered service under section 1608(b)(3)(C) was obtained.<sup>111</sup> Nevertheless, the court held that service was sufficient because the defendant had received actual notice and because the parts of section 1608(b) that had not been complied with, which the court left unspecified, existed merely to ensure receipt of actual notice.<sup>112</sup> The court never stated which method it found sufficient. Although the court may have been frustrated by the difficulties in serving Iranian entities at that time, this is no excuse for not requiring the plaintiff to obtain court-ordered service under section 1608(b)(3)(C) if the other accepted methods were unavailing. The decision is particularly regrettable because it was decided after the cases discussed above had established uniform precedent to the contrary. That the court duly chastised the plaintiff for not following the rules and warned future plaintiffs to do better<sup>113</sup> offers scant consolation.

## 2. *Evaluating Compliance in Default Situations*

The case of *Jackson v. People's Republic of China*,<sup>114</sup> raises the issue of compliance in a default situation. The court, in upholding service in its default judgment<sup>115</sup> and in setting the default judgment aside,<sup>116</sup> adverted to the need for strict compliance with the FSIA's service provisions. In fact, there existed numerous defects in service which arguably violated the Act.<sup>117</sup> Since the PRC did not make an appearance, however, not all of these defects were readily apparent to the court when it issued its default judgment. Despite the disadvantage of not having the foreign state before the court to point out service defects, the same requirements apply, and the court is obligated to inquire into the sufficiency of service under these standards. First, section 1608(e) provides that the court may not enter a

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Generation and Transportation Co., 495 F. Supp. 73 (S.D.N.Y. 1980), (2) sending the summons, complaint and notice of suit in English and Farsi by registered mail to the defendant in Iran, as well as to the State Department for transmittal through diplomatic channels, and (3) sending the documents to the defendant's attorneys. *Id.* at 1352 n.15.

109. Service by telex and through opposing counsel are not even mentioned in § 1608. Service through diplomatic channels is allowed only against the foreign state itself, not state agencies and instrumentalities.

110. *Id.* at 1352.

111. *Id.* at 1352 n. 16.

112. *Id.* at 1352.

113. *Id.* at 1352 n.16.

114. 550 F. Supp. 869 (D. Ala. 1982), *vacated mem. op.* at 7-8 (Feb. 27, 1984), *dismissed* (Oct. 26, 1984).

115. 550 F. Supp. at 873.

116. *Mem. op.* at 7 (Feb. 27, 1984).

117. These defects included numerous translation errors, *see infra* notes 135-37 and accompanying text, and the apparent failure to send a translation of the summons. Also, the initial summons erroneously gave the PRC 20 rather than 60 days to answer or respond, but this error was subsequently corrected.

default judgment unless it appears by "evidence satisfactory to the court" that the claimant is entitled to relief.<sup>118</sup> This section is largely unconstrued, but its language and judicial practice under rule 55(e) of the Federal Rules of Civil Procedure,<sup>119</sup> from which this section is derived,<sup>120</sup> appear to place an affirmative burden upon the claimant to demonstrate the validity of its cause of action, which should include a showing that service complied with the FSIA and due process. Second, foreign relations considerations also mandate that a default plaintiff not obtain a windfall when the FSIA is not complied with. It could be argued that the foreign state could avoid such a result merely by appearing. When states fail to appear, however, they generally do so for principled reasons stemming from their interpretation of international law, and thus litigation can be a significant irritant to U.S. relations with that country. Such foreign relations considerations were a major reason why the *Jackson* default judgment was set aside.<sup>121</sup> Therefore,

118. 28 U.S.C. § 1608(e) (1976). This section provides:

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

*Id.*

119. Normally, affirmative defenses are waived if not initially raised. In suits against the U.S. government this rule is "subject to the provision of Rule 55(e)" that a plaintiff must establish his claim by evidence satisfactory to the court. 2A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.29, at 8-279 (1983). In *Knouff v. United States*, 74 F.R.D. 555 (W.D. Pa. 1977), for example, the government's failure to file a timely answer led the plaintiff to argue that since under rule 8(d) matters not denied in the answer are deemed admitted, the court need not test the plaintiff's allegations. The court, however, recognized that a pleading rule should not determine the court's duty to investigate the facts under rule 55(e). Such a result, stated the court, "would clearly violate the mandate of Rule 55(e)." *Id.* at 557; cf. *Trueblood v. Grayson Shops*, 32 F.R.D. 190 (E.D. Va. 1963) (court obligated to consider "prima facie" meritorious defenses in deciding whether to set aside entry of default under rule 55(c)).

120. House Report, *supra* note 4, at 26; Senate Report, *supra* note 4, at 25.

121. Mem. op. at 8-10 (Feb. 27, 1984), *dismissed* (Oct. 26, 1984). The default judgment generated a reaction in the PRC sufficient to make it a topic of discussion during Secretary of State Shultz's February 1983 visit to the PRC. According to Secretary Shultz:

Chairman Deng Xiaoping personally expressed to me the PRC Government's serious concern about the default judgment in these proceedings and his apprehension that that judgment was and would continue to be a major irritant in bilateral relations. Chairman Deng vigorously stated his government's view that the PRC enjoys absolute immunity from the processes of United States or other foreign courts and that the PRC Government is not responsible for the particular debt at issue here of a predecessor Chinese government. Chairman Deng indicated that the PRC regarded the Huguang bonds as especially objectionable because the PRC believes that foreign powers forced those bonds on a corrupt Imperial Government and because the issuance of the bonds was one of the events that gave rise to the Chinese Revolution of 1911.

7. At the February meetings, Chinese Foreign Minister Wu Xuegian also presented me with an Aide Memoire setting forth China's views in this regard in writing. The Aide Memoire recites China's position on sovereign immunity and liability for the debts at issue. It specifically states (para. 3) that, if the default judgment is executed upon and Chinese property in the United States is judicially attached, "the Chinese Government reserves the right to take measures accordingly." The Aide Memoire further states (para. 4) that the

in order to avoid making things worse it is important to require that the FSIA be complied with to the letter.

### 3. *Compliance with the FSIA's Translation Requirements*

Section 1608(a)(3)–(4) requires that the summons, complaint, and notice of suit be served upon the foreign state both in English and in the foreign state's official language. The same requirement applies under section 1608(b)(3) with respect to the summons and complaint. In addition, a notice of any default judgment must be translated if translations were required when commencing suit.<sup>122</sup> Finally, the translator should certify the translation as accurate to the best of his or her knowledge. This translation requirement bears some elaboration, as it poses numerous pitfalls to the unwary.

The translation requirement is not needed to satisfy due process notice requirements. No translations are required in suits against private foreign persons under rule 4(i) of the Federal Rules of Civil Procedure.<sup>123</sup> Rather, like the notice of suit, it is purely a statutory requirement designed to further reduce the chances of misunderstanding, make being hailed into U.S. court as painless as possible, and generally minimize the frictions inherent in suits against foreign states.<sup>124</sup>

The cost of this courtesy, in both time and money, is high. Competent translations are expensive; the cost of the translations in the *OPEC* suit reportedly exceeded \$12,000.<sup>125</sup> Bearing this expense is necessary, however, to avoid litigation over the sufficiency of the translations. It is well worth the attorney's time to find translators with a knowledge of legal terminology in both English and the foreign state's language.

The translation must be into the foreign state's "official" language. The Act, however, does not define this term. This gap could pose occasional problems when the foreign state has no official language. This problem arose recently, with a twist, in *Jackson v. People's Republic of China*,<sup>126</sup> The translations were made into Chinese, but used traditional, or classical,

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United States Government should "take effective steps to stop the aggravation of events and handle the case properly so that Sino-U.S. relations and normal trade and economic exchanges may not be impaired."

Declaration of George P. Shultz ¶¶ 6–7, *Jackson v. People's Republic of China*, 550 F. Supp. 869 (D. Ala. 1982), *vacated mem. op.* (Feb. 27, 1984).

122. See 28 U.S.C. § 1608(e) (1976).

123. FED. R. CIV. PROC. 4(i).

124. One might also conclude that the absence of the translation requirement in sections 1608(a)(1)–(2) and (b)(1)–(2) also demonstrate the non-constitutional nature of the requirement. In these sections, however, the foreign state has in some way agreed to a form of service. Thus, even if due process required translations, the agreements contemplated in these sections would constitute a waiver of this requirement.

125. SMIT, *supra* note 2, at 66 n.107.

126. 561 F. Supp. 869 (N.D. Ala. 1982), *vacated mem. op.* (Feb. 27, 1984), *dismissed* (Oct. 26, 1984).

characters that had been largely unused for over twenty-five years because the PRC has adopted a simplified written language. The defendant argued that such characters did not constitute its official language.<sup>127</sup> In vacating the default judgment, the court rejected this contention and held that the official language had indeed been used, adding that the defendant had not shown that using traditional characters made the documents incomprehensible.<sup>128</sup> The court's conclusion that the traditional characters were the PRC's official language is debatable, but the introduction of a requirement of prejudice is unjustified. Such a consideration may be appropriate under a due process analysis, but not in evaluating compliance with the statute. This conclusion is consistent with the other distinctions between literal compliance with the statute and compliance with due process noted earlier.

In most cases, common sense is sufficient to determine which of several unofficial languages to use. For instance, no statute makes English the official language of Great Britain, but no one would doubt that, were the translation requirement applicable,<sup>129</sup> the proper language to use would be English.<sup>130</sup> In cases of doubt, it is advisable to consult the State Department. If the suit is against an agency or instrumentality and court-ordered service is possible, plaintiffs should consider exploiting the court-ordered service provision for purposes to obtain a ruling on the proper language for translation. Whenever doubt exists, plaintiffs should consider translating the documents into two languages to be safe if doing so is not too expensive.

The accuracy of the translations necessary to meet the statute has been addressed only in *Jackson*. At a minimum, the three documents that are translated must perform the constitutional function of affording reasonable notice of the suit and the opportunity to defend. Since the translation itself is only a courtesy and not constitutionally required,<sup>131</sup> the translations normally would not be a consideration in the due process analysis. It is conceivable, however, that the translations could be so affirmatively misleading and so deviate from the English versions that they could cause confusion sufficient to violate due process standards. It is important to emphasize that with respect to due process claims, not only must the translation be inaccurate, but, unlike with the preferable statutory analysis, the foreign state must be prejudiced thereby and must allege this in its motion to dismiss. Foreign relations considerations suggest that courts should give foreign

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127. Memorandum in Support of Defendant's Motion to Set Aside the Judgment Pursuant to Fed. R. Civ. Proc. 60(b), at 4, *Jackson v. People's Republic of China*, *mem. op.* (Feb. 27, 1984) [hereinafter cited as PRC Memorandum].

128. *Jackson*, *mem. op.* at 7 & n.6.

129. Since Great Britain is a party to the Hague Convention, it would be served under § 1608(a)(1) or (2), and its instrumentalities would be served under § 1608(b)(1) or (2).

130. See D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 4-5 (1963).

131. See *supra* notes 123-24 and accompanying text.

states the benefit of the doubt in close cases. Moreover, the problem is the plaintiff's fault, and, unless the statute of limitations has run, the mistakes may be corrected and the documents re-served.

The statute appears to require the translations to do more than merely satisfy the minimum due process standard, at least when a notice of suit is required. The committee reports described the function of this document as follows:

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.<sup>132</sup>

This is obviously more detailed than what due process requires.<sup>133</sup> The translation of the notice of suit must be adequate to meet these goals, or at least not be so misleading and inconsistent with the English version that these purposes are not achieved.

The case in which the translations come closest to violating the statute is *Jackson v. PRC*.<sup>134</sup> In that case, numerous material mistranslations occurred in the complaint,<sup>135</sup> the notice of suit,<sup>136</sup> and the notice of entry of

132. House Report, *supra*, note 4 at 24-25; Senate Report, *supra* note 4, at 24.

133. See *supra* text accompanying note 77.

134. 550 F. Supp. 869 (E.D. Ala. 1982), *vacated mem. op.* (Feb. 27, 1984), *dismissed* (Oct. 26, 1984).

135. See PRC Memorandum, *supra* note 17, appendix 8, at 9-12, 16-20 (affidavit of I-Chuan Chen) [hereinafter cited as Chen Affidavit]. For example, the term "action" was mistranslated as "activity" or "operation"; thus the legal connotation of the term was lost. *Id.* at 9. The phrase "Jurisdiction over the claims in this action" was mistranslated as "Jurisdiction appeals to this activity (or operation's) announcement." *Id.* The term "sinking" in "sinking fund" was mistranslated into the place name of the Xinjiang Uygur Autonomous Region of the PRC, while "fund" was not translated. *Id.* at 10. "Bearer bonds" was mistranslated into "those people who have bonds." *Id.* "Subject to service of process" was mistranslated as "produce valid (or effective or efficacious) effect." *Id.* "Proceeds" became "lawsuit" or "litigation." *Id.* "Pursuant to" became "to pursue," "seek," "chase," or "woo." *Id.* at 11. The crucial phrase "constitutes a 'commercial activity carried on in the United States by a foreign state'" was rendered as "to set up (or to establish; to found) an activity for carrying out foreign commerce in the United States." *Id.* "Hereby secured" was changed to "are all safe (or secure)." *Id.* "Prayer for Relief" became "Consolations for the Prayers" or "Prayers' Consolations." *Id.* at 12. Finally, the monetary amount demanded, \$100 million, was mistranslated into \$220 million. *Id.*

136. In the Notice of Suit, which is meant to explain the nature of the suit and U.S. law and procedures to the foreign state, see *supra* notes 31, 132, and accompanying text, the phrase "is certified to be a class action" was mistranslated as "a group to be guaranteed (or to be assured) by." *Id.* at 12-13. "State immunity" was rendered as "tax exemption" at one point and at another point as "tax exemption law of each State within the United States of America." *Id.* at 13. "Default Judgment" was mistranslated as "Judgment on breaking the contract (or violating the treaty)." *Id.* "Date of Default: Not Applicable" became "Date of Unpaid Dues: Will not apply for it." *Id.* The term "The Foreign Sovereign Immunities Act of 1976" was expressed as the "Foreign Country Autonomous Taxation Free-from-Tax Law." *Id.* at 13-14.

default,<sup>137</sup> and the record disclosed no translation of the summons.<sup>138</sup> The cumulative effect of the translation errors and the use of traditional rather than modern Chinese characters arguably fell below statutory standards. The court, however, rejected arguments based on the mistranslations because it believed that the documents sufficiently informed the PRC of the nature of the claims and because it had not been shown that the PRC was prejudiced as a result of the alleged mistranslations.<sup>139</sup>

#### 4. *The Exclusivity of the Enumerated Service Methods*

##### a. Compliance When All Enumerated Methods Fail

In a number of lawsuits growing out of the Iranian Revolution, courts were faced with the question of how to serve Iran consistently with the FSIA when all enumerated methods had been tried without success. The issue was difficult to solve in cases against the foreign state itself because of legislative history indicating that Congress intended the FSIA's service provisions to be the exclusive means of serving foreign states<sup>140</sup> and because section 1608(a) contains no backstop provision allowing a court to order a makeshift means of service consistent with due process, as does section 1608(b).<sup>141</sup>

i. *Suits under Section 1608(a)*. Section 1608(a) contains no provision for court-ordered service when all else fails. The last resort envisioned by Congress was service through diplomatic channels<sup>142</sup> under section 1608(a)(4). Congress gave no indication of what should happen when diplomatic channels do not exist between the United States and the foreign state.

Several cases against Iran presented courts with this dilemma. The first

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137. In the "Notice of Entry of Default," the name of the document was translated as "Notice of Default Judgment." *Id.* at 14. Under the *Federal Rules of Civil Procedure* an entry of default is issued and then a default judgment is entered. See FED. R. CIV. PROC. 55. Under the FSIA the court may enter a default simply for failure to appear, but it may not issue a default judgment until after a hearing at which the plaintiff must prove its right to relief. 28 U.S.C. § 1608(e) (1976). Stating that an actual default judgment had occurred, therefore, materially affected what the PRC was told about the nature of what had occurred (it had not yet incurred liability) and its rights (a hearing was yet to be held).

In addition, the term "Hukuang Railways Bearer Bonds" was mistranslated as "Gu Guan (Valley [strategic] Pass) Railways Bond Bearers." Chen Affidavit, *supra* note 135, at 15. "Identity of Other Parties" was expressed as "clear verification of other relations." *Id.* "Nature of documents served" was mistranslated as "originally held documents." *Id.* Finally, the English text "why the foreign state has been named, and relief requested" was expressed "why the foreign government is the name [used here as a noun], and relieve [meaning remove] complaint." *Id.* at 15-16.

138. PRC Memorandum, *supra* note 127, appendix 8, exhibits A & E. The file that the State Department maintained for the *Jackson* case contained no translated summons. *Id.*

139. Mem. op. at 7. The court did, however, regard the missing translation of the summons as a sufficient basis for setting aside the default judgment. *Id.* at 7-8.

140. See House Report, *supra* note 4, at 23-24; Senate Report, *supra* note 4, at 23.

141. See 28 U.S.C. § 1608(a)-(b) (1976).

142. For a discussion of the meaning of "diplomatic channels," see *supra* note 35.

of these was *Electronic Data Systems Corp. (EDS) v. Social Security Organization of Iran*,<sup>143</sup> which involved claims against both Iran and Iranian agencies and instrumentalities. In *EDS*, the plaintiffs argued that: (1) certain earlier court orders ordering the plaintiffs to make service covered the claim against Iran as well as claims against the Iranian agencies and instrumentalities, and (2) their attempts to serve Iran should be deemed sufficient because Iran had actual notice of the action and of the specific relief sought.<sup>144</sup> The court held first that the earlier orders did not purport to apply to the claim against Iran and second that actual notice was not enough to constitute effective service because no applicable section of the FSIA had been satisfied.<sup>145</sup> Although the court recognized that the FSIA was intended to help plaintiffs obtain redress in the courts, the court emphasized that "Congress intended section 1608 to provide the exclusive procedures for services upon foreign states,"<sup>146</sup> and considered this factor overriding. Since no evidence disclosed that the plaintiffs had attempted to serve Iran under section 1608(a), the court did not need to face squarely the issue of what happens when all else fails. The opinion, however, suggests that the FSIA embodies the exclusive methods by which foreign states may be served.

The next case to deal with this situation was *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*<sup>147</sup> In that case the Iranian Government failed to sign the return receipts and return them by the Iranian postal service as required under section 1608(a)(3).<sup>148</sup> Under the next alternative, section 1608(a)(4), no return receipts are required, but diplomatic channels are, and they were lacking in this case. The plaintiffs, therefore, moved the court to order a substitute form of service. Iran opposed this motion, arguing that section 1608(a) does not authorize such service and that Congress was certainly aware that international unrest might render service impossible at times and intentionally made no provision for service under such circumstances.<sup>149</sup> Iran interpreted Congress' silence as evidence that the FSIA was meant to contain the exclusive methods of service upon foreign states.<sup>150</sup>

The court rejected this argument and held (1) that the FSIA does not preclude substitute forms of service and (2) that substitute service is indeed authorized under the *Federal Rules of Civil Procedure*.<sup>151</sup> With respect to

143. No. CA3-79-218-F (N.D. Tex. June 21, 1979).

144. *Id.*, slip. op. at 9.

145. *Id.* at 10-11.

146. *Id.* at 10 (citing House Report, *supra* note 4, at 24).

147. 495 F. Supp. 73 (S.D.N.Y. 1980).

148. *Id.* at 78.

149. *Id.*

150. *Id.*

151. *Id.*



the FSIA, the court reasoned that since, like section 1608(b)(3)(C), section 1608(a)(4) requires no signed return receipt for service to be complete, "service through diplomatic channels was intended to serve the same purpose as the substitute service provision in the section dealing with agencies and instrumentalities,"<sup>152</sup> section 1608(b)(3)(C). "The only logical conclusion to be drawn," stated the court, "is that Congress did not seek to cover the problem of effecting service upon a foreign government should diplomatic channels be closed."<sup>153</sup> The court found nothing in the Act or its legislative history prohibiting a court from recognizing a mode of service when all prescribed methods have failed.<sup>154</sup>

The court then looked for specific authority for fashioning a substitute form of service and found it in rule 4(e) and (i) of the Federal Rules of Civil Procedure,<sup>155</sup> which authorizes a court to fashion a mode of extraterritorial service if such service is authorized by a state or federal statute.<sup>156</sup> The court concluded that since the FSIA (1) authorizes service upon Iran and (2) does

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152. *Id.* at 79.

153. *Id.*

154. *Id.*

155. *Id.*

156. Rule 4(e) of the Federal Rules of Civil Procedure provides:

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Rule 4(i) of the Federal Rules of Civil Procedure provides, in pertinent part:

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

nothing to restrict "the court's otherwise unfettered authority" under rule 4(e) and (i) to fashion a substitute mode of service, substituted service was authorized under the circumstances.<sup>157</sup> The court concluded that Iran already had actual notice of the pendency and nature of the suit, but nevertheless ordered the plaintiffs to (1) telex the summons and notice of suit and mail a copy of the pleadings under separate cover, (2) serve a copy of the pleadings upon Iran's counsel, and (3) file an affidavit with the court reciting compliance with the above measures.<sup>158</sup>

The last major Iranian decision, *In re Related Iranian Cases*,<sup>159</sup> relied heavily upon *New England Merchants*.<sup>160</sup> This case also involved frustrated attempts to serve Iran under section 1608(a)(3).<sup>161</sup> The court phrased the issue as "whether Congress' failure to specify a particular mode of service in instances where diplomatic channels are closed amounts to a prohibition on this court's inherent power to order a form of service of process which comports with Federal Rules of Civil Procedure and the requirements of due process."<sup>162</sup>

The court determined that although the FSIA's legislative history describes section 1608's procedures as "exclusive,"

when this part of the legislative history is read together with the language of §1608(a) and considered in context with the overall purpose of the statute it is reasonable to conclude that the FSIA service provisions were meant to be exclusive in circumstances of normal diplomatic relations provided for in the Act, and were not intended to thwart a court's ability to respond to anomalous situations like the present Iranian affair. This interpretation is supported by the presumption of rationality that applies to statutory construction. If we accepted defendants' view that Congress has shielded Iran from amenability to service of process by barring the desired court order, we would have to accept that Congress acted irrationally by providing greater advantages to a nation that had severed relations with the United States and refused to cooperate with litigation, than a nation with which the United States enjoys good relations. For these reasons we must agree with Judge Duffy's analysis [in *New England Merchants*] and conclude that the FSIA does not preclude issuance of a court order for serving Iran in light of the special facts of the cases before the court.<sup>163</sup>

The court then concluded that it had "the inherent power to fashion a mode of service not covered and not inconsistent with a specific statute or rule" and that the FSIA did not limit this power under the circumstances,<sup>164</sup>

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157. 495 F. Supp. at 80.

158. *Id.* at 81.

159. No. C-79-3542 (N.D. Cal. Aug. 15, 1980).

160. *See supra* note 149.

161. *Id.*, slip. op. at 3.

162. *Id.* at 4.

163. *Id.* at 4-5.

164. *Id.* at 5. The court relied upon two pre-FSIA cases, *Republic Int'l Corp. v. Amco Engrs., Inc.*, 516 F.2d 161 (9th Cir. 1975), and *Petrol Shipping Corp. v. Kingdom of Greece*, *compare* footnote 43, 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

stating that "the Federal Rules are designed to dovetail with specific statutes authorizing service in order to insure that no gaps occur."<sup>165</sup> The court ordered the plaintiffs to send by telex or, failing that, cable, the summons and notice of suit, and to send the pleadings in English and Farsi by return receipt mail to each defendant not yet so served, and to serve the pleadings upon Iran's counsel.<sup>166</sup>

In the final Iranian case, *International School Service v. Government of Iran*,<sup>167</sup> the plaintiffs again failed to effect service under section 1608(a)(3) and applied for an order authorizing service by telex. The court granted this order in a short opinion virtually devoid of analysis, the court noting only that court-ordered service by telex could not prejudice Iran because it could later object to such service.<sup>168</sup>

The holdings of *New England Merchants, Related Iranian Cases*, and *International School Service* stand for the proposition that whenever service cannot be effected under section 1608(a), it may be done under rule 4(i), which effectively creates by judicial fiat a section 1608(b)(3)(C) in suits against foreign states under section 1608(a).<sup>169</sup> The text of FSIA and its legislative history, however, indicate that service outside the terms of the FSIA, including court-ordered service upon foreign states and political subdivisions, was not authorized by Congress. If this is true, then whether courts otherwise have power to fashion ad hoc methods of service under rules 4(i) and 83 is irrelevant; Congress took this power away for purposes of service under the FSIA. That is, the FSIA preempts these other rules.

First, the statute on its face allows court-ordered service in section 1608(b) and not under section 1608(a). Had Congress contemplated service as being available under rule 4(i), there would be no need for section 1608(b)(3)(C). Thus the application of *inclusio unius es exclusio alterius* indicates that court-ordered service is unavailable in suits against the foreign state under section 1608(a). Second, the unambiguous language of exclusivity in the committee reports indicates that no further procedures for service are authorized. Not only is section 1608 as a whole described as setting forth "the exclusive procedures with respect to service on a foreign state or its political subdivisions, agencies or instrumentalities,"<sup>170</sup> but section 1608(a)

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165. *Id.* at 6, (citing *United States v. Rockhill*, 9 F.R.D. 696 (D. Ore. 1950)); 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1117, at 483-84 (1969).

166. Slip. op. at 8.

167. 505 F. Supp. 178 (D.N.J. 1981).

168. *Id.* at 179.

169. The result in *Related Iranian Cases* is particularly unwarranted because the court ignored binding precedent in the Ninth Circuit holding that rule 4 does not authorize service upon foreign states. *Republic Int'l Corp. v. Amco Engrs., Inc.*, 516 F.2d 161, 165 (9th Cir. 1975). Although the Ninth Circuit did authorize such service under rule 83, *id.*, the court in *Related Iranian Cases* never relied upon rule 83.

170. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 24.

is described as setting forth "the exclusive procedures for service on a foreign state or political subdivision thereof,"<sup>171</sup> and section 1608(a)(4) is described as a method of "last resort."<sup>172</sup> Although Congress probably did believe that section 1608(a)(4) would cover all situations, the fact that it does not cover all situations does not thereby create a gap to be filled by judicial legislation. Third, Congress did consider the relationship between the FSIA and rule 4,<sup>173</sup> and ended up making no provision for its use. The great variations in the methods of service under rule 4 prior to the FSIA, which resulted in uncertainty and forum shopping, were a result that the FSIA's service provisions were specifically designed to avoid.<sup>174</sup> Before the FSIA was passed, the courts were split over whether rule 4 authorized district courts to arrange for service upon foreign states.<sup>175</sup> Congress apparently intended to resolve this controversy by setting up an exclusive scheme for service upon foreign states.<sup>176</sup> Finally, given Congress' apparent sensitivity to the need for greater delicacy in suits against foreign states themselves as opposed to their agencies and instrumentalities,<sup>177</sup> it is likely that Congress decided not to entrust courts with the power to decide directly how foreign states and their political subdivisions are to be served.<sup>178</sup>

Thus, section 1608 was not meant to "dovetail" with rule 4. To permit

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171. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 23. In contrast, the reports do not describe the methods in § 1608(b) as exclusive. Apparently, Congress believed this was unnecessary since court-ordered service can cover all contingencies. Thus, the presence of the exclusivity language with regard to § 1604(a) suggests that Congress intended to emphasize that no methods other than those in § 1604(a) may be used upon foreign states and political subdivisions.

172. See House Report, *supra* note 4, at 23; Senate Report, *supra* note 4, at 23.

173. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings before the Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 94th Cong., 2d Sess. 90 (1976) (statement of J. Roderick Heller).

174. *Id.*

175. *Id.* Mr. Heller stated: "The proposed legislation would *in effect* end that and the uncertainty it engenders. I don't believe there is a need to amend the Federal Rules." *Id.* (emphasis added).

Congress considered both whether to amend rule 4 to reflect the passage of § 1608 and whether simply to amend rule 4 and not pass § 1608, *id.* at 86, but did neither. Arguably, Congress was leaving it to the courts to decide whether service could occur pursuant to rule 4. It is more likely, however, that Congress decided that passing § 1608 mooted the issue of whether serving foreign states could be served under rule 4 because § 1608's provisions are exclusive. See *id.* at 90.

176. The commentators have uniformly concluded that the methods in § 1608 are exclusive. 7B J. MOORE, *MOORE'S FEDERAL PRACTICE* § 1608 (1983); 14 C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3662 (1982 Supp.) (The Act "is intended to preempt any other state or federal law."); Kane, *supra* note 2, at 402; Note, *supra* note 2, at 368. Although Kane concluded that § 1608 was meant to be exclusive, she concluded that the court-ordered service in *New England Merchants* was "justified." Kane, *supra* note 2, at 402. No legal basis for such exception in view of Congress' intent was articulated, however.

177. See Note, *supra* note 2, at 361-62. For instance, the notice of suit that is required under § 1608(a) but not under § 1608(b) evidences this increased concern.

178. *Id.* at 362-63.

such loose application of the statute would frustrate several purposes behind establishing section 1608. Congress sought to establish a single statute that would govern the procedures for suits against foreign states to assure uniformity and reduce foreign relations tensions. Disallowing such service under difficult circumstances does, of course, compromise the goal of providing effective remedies against foreign states. Congress, however, deemed the law as written adequate to achieve this goal. The way to deal with this problem is not to bend the rules beyond recognition but to persuade Congress to change them. Until then, as the court indicated in *EDS*, the law must be applied as written.

Curiously, it appears that the efforts of the courts in the Iranian cases to avoid the FSIA may have been unnecessary and their holdings erroneous for the simple reason that the State Department's regulations provide for service through diplomatic channels of a third country if direct diplomatic channels are lacking and the defendant foreign state has authorized the third country to represent its interests in the United States.<sup>179</sup> Although the *New England Merchants* court did not address this option, the court in *Related Iranian Cases* did and rejected it on the ground that it had not been shown that service would actually be accomplished or that Iran had authorized a third country to represent its interests.<sup>180</sup> In the Iranian cases, however, such service might have been effected through Swiss channels.<sup>181</sup> The first rationale of no guarantee of actual receipt is unpersuasive because the same could be said of the statutory methods in that and many other cases. In short, such service was worth the attempt in view of the alternative of bending the statute beyond its intended meaning. In such difficult situations it might be appropriate for the State Department to communicate its evaluation of the situation to the court as well. Since the third-country option does not exist when the foreign state has not authorized a third state to represent its interests in the United States, however, indirect diplomatic channels may be totally lacking in other cases.

ii. *Suits under Section 1608(b)*. Court-ordered service is expressly authorized by section 1608(b)(3)(C) when the methods in section 1608(b)(1)-(2) are unavailable.<sup>182</sup> Whether a particular method is acceptable in a particular case is determined by (1) whether it satisfies due process and the FSIA by being reasonably calculated to provide actual notice<sup>183</sup> and (2) whether it is

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179. 22 C.F.R. § 93.1(c)(3) (1983). Using a third country may be employed to effect service when diplomatic channels are closed between the two countries concerned. The United States has used this method of service in settling disputes with Cuba. Note, *supra* note 2, at 367.

180. No. C-79-3542, slip. op. at 6.

181. Note, *supra* note 2, at 367 n.71.

182. The other two methods specified in § 1608(b)(3), however, need not be unavailable before the court may fashion service under § 1608(b)(3)(C).

183. 28 U.S.C. § 1608(b)(3) (1976).

"consistent with the law of the place where service is to be made."<sup>184</sup> The first requirement contemplates a normal due process analysis and needs no further elaboration. The second requirement, however, can present unique challenges to a court in any case. It is tedious and often impossible to find specific, affirmative authority in foreign law for a particular method of service. In recognition of this problem, the courts have interpreted the requirement as allowing a method of service so long as the applicable foreign law does not affirmatively prohibit it.<sup>185</sup> The principle does not mean that a court should turn a blind eye to the requirements of the foreign state's law, but only that a *prima facie* showing of conformity with such law may prevent dismissal. Thus, it is unlikely that a foreign agency or instrumentality will be prejudiced by a facially invalid attempt at service pursuant to its or a third state's law. Since the defendant is only an agency or instrumentality rather than the sovereign itself, political problems are likely to be minimal. If the agency or instrumentality appears, showing the invalidity of service under local law can be viewed as one way of carrying its normal burden of showing that it is entitled to immunity. If a default is entered, however, then section 1608(e) should require a stronger showing by the plaintiff that service conformed with the applicable foreign law before a default judgment is entered.<sup>186</sup>

This reading of the statute appears permissible and appropriately places the burden of showing non-compliance upon the party in the best position to determine the content of the applicable foreign law. Although the committee reports are equivocal on this point,<sup>187</sup> such a result is consistent with the purpose of the FSIA to facilitate the commencement of lawsuits against foreign states.<sup>188</sup>

#### b. Exclusivity in State Court Prior to Removal

The FSIA provides for the removal to federal district court, at the discretion of the foreign state, of suits against foreign states brought in state courts.<sup>189</sup> A plaintiff might file suit in state court utilizing local service procedures in an attempt to circumvent the FSIA's scheme,<sup>190</sup> though no

184. *Id.* § 1608(b)(3)(C).

185. *In re Related Iranian Cases*, No. C-79-3542, slip. op. at 7; *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. at 78-79.

186. *See supra* notes 114-21 and accompanying text.

187. The committee reports first state that the requirement was meant to take "into account the fact that the laws of foreign countries may *prohibit* the service in their country of judicial documents by process servers in the United States," but then state that no court should direct such physical delivery of the documents "unless it is clearly consistent" with the law of the foreign state. House Report, *supra*, note 4, at 25 (emphasis added); Senate Report, *supra* note 4, at 25 (emphasis added).

188. *See supra* note 8 and accompanying text.

189. 28 U.S.C. § 1441(d) (1976).

190. *See Kane, supra* note 2, at 400-01.

reported decision evidences any such attempt to date. Although there is no explicit prohibition of this tactic in the Act or the legislative history of the removal provision,<sup>191</sup> the intent of Congress in passing the FSIA and the practice of courts in other areas of unusual federal interest indicate that no such maneuver should be permitted.

First, permitting service under state long-arm statutes prior to removal would clearly frustrate Congress' intent to reduce uncertainty and establish a uniform body of law governing suits against foreign sovereigns.<sup>192</sup> The removal provision itself was designed to further this purpose.<sup>193</sup> Second, the language of the committee reports describing the service methods of section 1608 as exclusive is not limited to federal courts.<sup>194</sup> Third, since federal courts consider issues affecting foreign relations matters of special federal interest, they prefer that such issues be adjudicated under a uniform federal standard.<sup>195</sup> Service upon a foreign sovereign presents such an issue. Thus, it appears that federal policies must prevail over any burdens imposed on state courts by having to follow unfamiliar federal service procedures.

#### IV. Possible Improvements in the FSIA's Service Provisions

##### A. COURT-ORDERED SERVICE UPON FOREIGN STATES

The statutory gap exposed in the Iranian cases should be closed to eliminate the risk that courts again will engage in the type of legal gymnastics performed in those cases. The available evidence suggests that Congress meant the FSIA to provide the exclusive provisions governing service against foreign states, but also that it did not foresee situations in which these provisions would not be sufficient to advance the FSIA's goal of providing an effective means of redress against foreign states.<sup>196</sup> The State Department regulation allowing for service through a third country authorized to represent the defendant foreign state cannot cover all cases in which diplomatic ties are lacking because not all states have or are willing to appoint such representatives. Expanding the regulation to allow service through a third country even absent authorization by the defendant foreign state, or even reliance upon it, compromises the exclusivity of the statu-

191. See House Report, *supra* note 4, at 32-33; Senate Report, *supra* note 4, at 32.

192. House Report, *supra* note 4, at 6; Senate Report, *supra* note 4, at 8; Kane, *supra* note 2, at 401.

193. The committee reports state: "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in state courts." House Report, *supra* note 4, at 32; Senate Report, *supra* note 4, at 32.

194. House Report, *supra* note 4, at 24; Senate Report, *supra* note 4, at 24.

195. E.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964) (scope of act of state doctrine must be determined by federal standard because of foreign relations considerations).

196. See *supra* notes 169-81 and accompanying text.

tory provisions and may go beyond what Congress intended in section 1608(a)(4). Thus, a new statutory provision is needed to fill the current gap on the statute and regulations. The twin congressional goals of exclusivity and providing effective redress can be fulfilled simply by adding a fifth option to section 1608(a) allowing for court-ordered service if all other methods prove unavailing. So long as the provision incorporates a requirement that service be consistent with the foreign state's law, there is little basis for fearing foreign relations complications from court-ordered service. Although the danger of provoking tensions is normally greater in a suit against the foreign state itself than against its instrumentalities, such a provision's potential adverse impact upon U.S. relations with the defendant state would be insignificant since it would apply only when diplomatic ties are lacking.

#### B. MINIMIZING TRANSLATION ISSUES

Translation issues should be kept to a minimum. A judge is not in a good position to evaluate the adequacy of the translation. The problem inevitably degenerates into a battle of translation experts, and even when an error can be ascertained it is difficult to assess its impact upon the foreign state's understanding of the lawsuit. In the end, the squabble could frustrate the purpose of the translation requirement of rendering U.S. lawsuits against the foreign state less bothersome.

Therefore, it is important to find ways to minimize the possibility of translation issues arising. The goal would be not to render the translations immune from attack by a presumption, but merely to prevent sloppy work from ever being filed. The current practice of having the translator certify the translation as accurate does not mean that it is accurate, and thus this procedure does not solve the problem.

A starting point is to recognize that the judicial code already provides a qualification process for interpreters who shall serve at trials in each judicial district.<sup>197</sup> It bears investigating whether the FSIA and this statute could be

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197. 28 U.S.C. § 1827 (1976). This statute provides, in pertinent part:

(a) The Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of interpreters in courts of the United States.

(b) The Director shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters in courts of the United States in bilingual proceedings . . . and in so doing, the Director shall consider the education, training, and experience of those persons. The Director shall maintain a current master list of all interpreters certified by the Director and shall report annually on the frequency of requests for, and the use and effectiveness of, interpreters. The Director shall prescribe a schedule of fees for services rendered by interpreters.

(c) Each United States district court shall maintain on file in the office of the clerk of court a list of all persons who have been certified as interpreters, including bilingual interpreters by the Director of the Administrative Office of the United States Courts in accordance with the certification program established pursuant to subsection (b) of this section.

28 U.S.C. § 1827 (1976).



amended to require the translations to be done by this group of persons, or whether an analogous group could be qualified for such translations.<sup>198</sup> Alternatively, the FSIA or State Department regulations could simply require a plaintiff to obtain court approval to retain a particular translator upon presentation of that person's qualifications. With any of these options, the plaintiff could be given the benefit of strong but not irrebuttable presumption of adequacy.

It would be too burdensome for the State Department to become involved in the translation process either by certifying the translation as correct to create an irrebuttable presumption of correctness or by performing and certifying the translation itself. Creating the irrebuttable presumption necessary to make such a certification process work creates the risk that a certified document could still be mistranslated and yet not be subject to challenge. This could embarrass the State Department, irritate the foreign state, and raise due process concerns. The FSIA was intended to relieve the State Department from bearing the brunt of a foreign state's chafe. Giving it responsibility for the translations would be a step backwards.

In a default situation, a plaintiff must demonstrate its right to relief by evidence satisfactory to the court, which includes a showing that service was adequate. It is in this situation that the dangers from a poor translation are most acute; indeed, a poor translation could be a reason why the defendant state did not appear. Therefore, it would be appropriate to require a court-appointed translator, or a court-approved translator other than the original translator, to certify the accuracy of the translations before a default judgment is entered.

Whenever the method of service requires a notice of suit to be served, a translated copy of the FSIA must be served as part thereof.<sup>199</sup> This requirement is burdensome and costly.<sup>200</sup> Since, unlike the other documents to be translated, its form will be identical from lawsuit to lawsuit for each language, it would be helpful for the State Department to keep and make available to plaintiffs at minimal cost files of the translations for use in subsequent lawsuits. Although the first plaintiff to serve a particular foreign state under the applicable subsections will carry the greatest burden, the problem will disappear over time, and the time and expense saved in the long run would further the congressional purpose of facilitating the institution of lawsuits against foreign states.

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198. The choice between these two alternatives would rest on whether the interpreters qualified under § 1827 would also be competent to translate legal documents. Interpreters who are fluent at translating witnesses' testimony are not necessarily competent to perform specialized translations, nor is a good legal translator necessarily competent to do interpreting work.

199. 22 C.F.R. § 93.2(3) (1983).

200. See *supra* text accompanying note 125. Professor Smit has proposed eliminating the translation requirement because of its expense. Smit, *supra* note 2, at 66 n.107.

One might be tempted to remedy the translation problem by providing, as is often done in treaties written in two or more languages, that in case of ambiguity the English version of the documents shall be deemed authoritative. Although this method of heading off translation disputes befits the notion that the translation is a convenience and not a due process requirement, establishing such a rule would vitiate the translation requirement and invite sloppiness without necessarily resolving any questions raised in the defendant's mind by an inconsistency between the two texts.

In view of the costs and difficulties that the translation requirement can create, it is not out of place to consider whether this provision's benefits are worth all the trouble. After all, the translation is a convenience, not a due process requirement.<sup>201</sup> It appears that the provision should be retained. A translation, if accurate, does further reduce the chances that the defendant state's rights may be jeopardized. In domestic suits, the legal system is willing to expend great resources to protect against marginal infringements of individuals' rights even when guilt or liability is not in doubt. Similar, and perhaps greater, deference is due a foreign state, whose fate in a lawsuit may come back to haunt U.S. foreign relations in untold tangible and intangible ways. The benefits of making U.S. lawsuits less painful for foreign states are often intangible and incapable of measurement. Providing a translation of the relevant documents eliminates a possible irritant and excuse for retaliation, and helps facilitate the gradual subjection of foreign states to the rule of law. Thoughtful individuals introduced the translation requirement, and it should be disposed of only upon clear evidence that it is not having its desired effect.

### C. VERIFYING WHAT DOCUMENTS WERE SERVED

In *Jackson v. PRC*,<sup>202</sup> an issue developed over whether the plaintiffs ever served a translation of the summons. It was this service issue that constituted a ground for setting the default judgment aside.<sup>203</sup> Such an issue should never be allowed to arise. When the State Department reviews documents from the court before they are sent under section 1608(a)(4), it is required to make sure all the necessary documents are present and to notify the court if they are not.<sup>204</sup> Unfortunately, that the Department has a duty to make sure all the required documents exist before they are sent does not mean that they all exist or were all sent. In fact, under the current system, no one with a knowledge of the defendant state's official language examines the docu-

201. See *supra* notes 123–24 and accompanying text.

202. 550 F. Supp. 869 (D. Ala. 1982), *vacated mem. op.* (Feb. 27, 1984), *dismissed* (Oct. 26, 1984).

203. *Mem. op.* at 7–8.

204. 22 C.F.R. § 93.1(b) (1983).

translations exist or are sent. This practice probably does not comply with the current regulations. In order to achieve the desired level of care and certainty, a more specific regulation requiring the Department to produce a document is probably necessary. The regulations could be amended to require the Department to certify that someone with knowledge of the foreign state's official language has examined the documents to make sure all the necessary translated documents exist, that all the necessary documents were sent to the defendant in the case, and that it has sent no others.<sup>205</sup> This certification would not preclude all questions relating to what documents were served or received from arising, but it would deter frivolous allegations of non-receipt or non-service from being made by establishing rebuttable presumptions that the State Department's assertions are correct and that what was sent was received.<sup>206</sup>

#### D. PROPOSED RESTRUCTURING OF SECTION 1608

One commentator has proposed eliminating (1) the translation requirement, (2) the separate provisions for foreign states and agencies and instrumentalities, (3) any reference to foreign law, and (4) the hierarchical set of service methods, and instead providing that a foreign state may be served in the manner a foreign state is served under the Federal Rules and that for such purpose the head of the defendant state's foreign ministry shall be regarded as a managing or general agent of the foreign state.<sup>207</sup> A simpler provision would have an inherent appeal and would more closely resemble the service provisions of the British State Immunity Act<sup>208</sup> and the European Convention on State Immunity.<sup>209</sup> The Canadian State Immunity Act,

205. One might gather from negative implication that the Department would have notified the clerk of the court pursuant to 22 C.F.R. § 93.1(b) if all the documents were not sent, but this did not prevent the issue from arising in *Jackson*. It would better advance the cause of certainty to affirmatively require the Department to certify in some way that all required translations were in the file were dispatched and that no others were sent.

206. As a matter of tidiness, one further change not worthy of textual discussion appears in order. Section 1608(a)(4) of the statute should be amended to reflect the transfer of the Director of Special Consular Services' functions to Overseas Citizens Services on November 17, 1978. Other statutes are updated to reflect changes in the makeup of agencies. More importantly, it is wise to minimize all potential for confusion to foreign states and U.S. plaintiffs.

207. SMIT, *supra* note 2, at 66.

208. Section 12(1) of the United Kingdom's statute provides, quite simply:

12.—(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

State Immunity Act, 1978, ch. 33, *reprinted in* 17 I.L.M. 1123 (1978). Section 12(6) provides that this procedure is not applicable if the state has agreed to another manner of service. *Id.* § 12(6).

209. Article 16(2)–(3) of the European Convention provides:

2. The competent authorities of the State of the forum shall transmit

however, closely resembles the FSIA in having a hierarchical service system and in distinguishing between the state itself and its agencies and instrumentalities.<sup>210</sup> This similarity should carry some weight because Canada had five years to observe the FSIA in action and still passed a similar service provision. The British, on the other hand, because of their EEC membership, could not deviate materially from the scheme of the European Convention.

Other factors also suggest that at this point in time it would be better not to perform a wholesale revision of section 1608. First, except for the Iranian cases and perhaps *Alberti*, the evidence does not suggest that litigants or the courts find section 1608 too difficult to apply. Second, Congress, the State Department, and the Justice Department considered and rejected the approach of rule 4 for a number of reasons. It hoped to promote the use of contractual service provisions, further the interest in joining international service conventions, and to set forth clearly the relationship of such forms of service with the remaining methods of service. It also sought to reduce the sources of uncertainty that had irritated foreign states by providing a detailed statute with built-in procedural protections and courtesies.

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—the original or a copy of the document by which the proceedings are instituted.

—a copy of any judgment given by default against a State which was defendant in the proceedings, through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State for onward transmission, where appropriate to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages of the defendant State.

3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.  
European Convention on State Immunity, art. 16(2)–(3), May 16, 1972, Additional Protocol, 74 Europ. T.S. 1, *reprinted in* 11 I.L.M. 470 (1972).

210. Section 9(1)–(5) of the Canadian State Immunity Act provides:

9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made

- (a) in any manner agreed on by the state;
- (b) in accordance with any international Convention to which the state is a party; or
- (c) in the manner provided in subsection (2).

(2) For the purposes of paragraph (1)(C), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Under-Secretary of State for External Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

(3) Service of an originating document on an agency of a foreign state may be made

- (a) in any manner agreed on by the agency;
- (b) in accordance with any international Convention applicable to the agency; or
- (c) in accordance with any applicable rules of court.

(4) Where service on an agency of a foreign state cannot be made under subsection (3), a court may, by order, direct how service is to be made.

(5) Where service of an originating document is made in the manner provided in subsection (2), service of the document shall be deemed to have been made on the day that the Under-Secretary of State for External Affairs or a person designated by him pursuant to subsection (2) certifies to the relevant court that the copy of the document has been transmitted to the foreign state.

State Immunity Act, ch. 95, § 9(1)–(5), 1980-81-82 Can. Stat.

Finally, there is a merit in continuity for its own sake. Even if the approach of rule 4 deserved more serious attention during the Act's passage, the burden of proof necessary to justify major changes increases over time. Absent compelling evidence that section 1608 is fundamentally inadequate or U.S. ratification of a future multilateral state immunity convention with inconsistent service provisions, there is insufficient justification for performing drastic surgery. Now that foreign states are becoming accustomed to the procedural workings of the Act, a major change in the Act's central procedural provision risks provoking the kind of irritation that the Act was designed to minimize.

## V. Conclusion

The service provisions of the FSIA seek a balance between the need to facilitate redress against foreign states and the danger that doing so may cause international frictions and retaliation. Doubts should be resolved in favor of strict compliance to prevent the type of foreign relations complications that not only the service provisions, but the rest of the Act was designed to avoid. If a claimant does not comply with section 1608, the only consequence in most cases will be that the defendant must be re-served. If a court creates a foreign relations incident in the name of facilitating judicial redress, the international and legal wounds will remain long after the particular case is put to rest.

Suits against foreign states touch political nerves not only in the foreign state, but also raise sensitive issues at home. Often the particular state or the nature of its activities are the subject of strong feelings which no judge can block out completely, as in the Iranian cases. The opinions in such cases are immediately suspect at home and abroad as being result oriented, and governed by political motives rather than the rule of law. When the opportunity arises to reduce the cause for such suspicions and provide rules of law, the moment should be seized. In order to maintain the integrity of the FSIA and U.S. courts, it is essential to create both the impression and the reality that the FSIA is being followed to the letter and that the courts are applying a law rather than conducting foreign policy.

The FSIA's service provisions on balance have proven workable and fair when conscientiously applied. The courts, quite properly, have generally read the statute strictly, the only significant exception being the court-ordered service in the Iranian cases. The minor reforms suggested in this article merely represent ways to close certain gaps that Congress did not anticipate or to otherwise streamline the process and prevent petty disputes from arising. The larger task of interpreting the statute consistently with congressional intent and with an appreciation for the effects of court decisions on foreign relations lies with the courts.