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NOTES

SERVICE OF PROCESS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: THE ARGUMENTS FOR EXCLUSIVITY

Service of process is an important aspect of any lawsuit. If service is not proper, a court can dismiss a suit.¹ For many years, service of process had presented special problems for litigants attempting to sue foreign sovereigns. The absence of any service provisions dealing with foreign states, subdivisions, agencies, or instrumentalities caused considerable trouble and confusion.² This void prompted courts to fashion ad hoc methods of service on foreign sovereigns.³ These judicially developed methods lacked uniformity.⁴

In 1976, Congress recognized the need for uniform service provisions for foreign sovereigns⁵ and passed the Foreign Sovereign Immunities Act (FSIA).⁶ The FSIA provides a comprehensive scheme for service on foreign states or subdivisions and their agencies or instrumentalities.⁷ Even though the Act does not state that its

1. See 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063 (1969). Although a failure to serve process can prompt a dismissal of an action, a litigant will waive his defense of improper service of process if he does not raise such a defense in a pretrial motion or in a responsive pleading. FED. R. CIV. P. 12 (h).

2. 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, 121-22 (1969). Although Miller specifically discusses the lack of service provisions for foreign governments and instrumentalities under Rule 4 of the Federal Rules of Civil Procedure, before 1976 no other rule or statute provided for the methods of service on foreign sovereigns. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 23, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6622 [hereinafter cited as HOUSE REPORT].

3. See, e.g., *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966).

4. Because the courts formulated service methods to meet the needs of specific plaintiffs and did not develop rules of general applicability, the methods engendered uncertainty. See note 40 *infra* and accompanying text. Additionally, the lack of uniformity among the courts encouraged forum shopping. See note 41 *infra* and accompanying text.

5. Before 1976, various courts and commentators had stressed the need for uniform service provisions for foreign sovereigns. See, e.g., *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966); Miller, *supra* note 2, at 139.

6. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

7. 28 U.S.C. § 1608 (1976) provides:

service provisions are the exclusive method for serving a foreign sovereign, the courts and commentators have considered them exclusive.⁸ The United States District Court for the Southern District of New York recently challenged this presumption in *New England Merchants National Bank v. Iran Power Generation & Transmission*

Service, time to answer; default

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

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
- (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
- (2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or
- (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—
 - (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
 - (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or
 - (C) as directed by order of the court consistent with the law of the place where service is to be made.

8. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1111 (Supp. 1980); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1022 (1979).

Co.⁹ The court held that the FSIA service provisions were not exclusive and ordered a method of service not contained in the FSIA.

This Note will examine the important issue raised by the *New England Merchants National Bank* case: despite the absence of specific statutory language, did Congress intend to make the FSIA service provisions exclusive? This Note will first outline the operation of the service provisions of the FSIA.¹⁰ This Note will then analyze the policies supporting the adoption of the FSIA service provisions.¹¹ Next, this Note will examine the legislative history of the FSIA¹² and discuss the effect of constitutional considerations upon the exclusivity issue.¹³ Finally, this Note will question the legitimacy of the court's reasoning in *New England Merchants National Bank*.¹⁴ The Note concludes that the statutory scheme, legislative history, constitutional and policy considerations furnish strong support for treating the FSIA as the exclusive method for service on foreign entities.

I

SERVICE OF PROCESS UNDER THE FSIA

The service sections of the FSIA contain two sets of service provisions. The choice of provisions depends upon the identity of the party to be served. A plaintiff must comply with section 1608(a)¹⁵ when serving a foreign state or subdivision and must use section 1608(b)¹⁶ when serving an agency or instrumentality of a foreign state.¹⁷

Section 1608(a) describes four techniques for serving a foreign state or subdivision and imposes a hierarchy among the four methods.¹⁸ The plaintiff should first attempt to serve the foreign state or subdivision according to any special arrangement for service existing

9. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980).

10. See notes 15-32 *infra* and accompanying text.

11. See notes 33-42 *infra* and accompanying text.

12. See notes 43-49 *infra* and accompanying text.

13. See notes 50-51 *infra* and accompanying text.

14. See notes 52-74 *infra* and accompanying text.

15. 28 U.S.C. § 1608(a) (1976), *quoted at note 7 supra*.

16. 28 U.S.C. § 1608(b) (1976), *quoted at note 7 supra*.

17. 28 U.S.C. § 1603(b) (1976) defines an agency or instrumentality of a foreign state as 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.

18. See note 7 *supra*.

between the litigating parties.¹⁹ Absent a preexisting agreement, service should be made in accordance with an international convention on extraterritorial service of process to which the United States and the foreign state are parties.²⁰ If service cannot be made under the first two methods, the plaintiff must ask the clerk of the court to send the service documents via registered mail to the foreign state's minister of foreign affairs.²¹ The package of documents must include a "notice of suit" to explain the legal significance of the documents and to indicate the procedural steps that U.S. law requires of the defendants.²² Finally, if service by mail is unsuccessful, the plaintiff may use diplomatic channels to serve the foreign state or political subdivision.²³

Section 1608(b) contains the provisions for service on agencies and instrumentalities of foreign states.²⁴ Like section 1608(a), section 1608(b) prescribes the priority for the service methods it outlines. The plaintiff must first follow any method of service contained in a private agreement between the litigating parties.²⁵ Absent such an arrangement, the plaintiff should effectuate service either by

19. 28 U.S.C. § 1608(a)(1) (1976).

20. *Id.* § 1608(a)(2). The only such convention to which the United States is party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969).

21. 28 U.S.C. § 1608(a)(3) (1976). Each of the papers must be translated into the official language of the foreign state. *Id.*

22. HOUSE REPORT, *supra* note 2, at 24-25. More precisely, the notice of suit should include:

1. Title of legal proceeding; full name of court; case or docket number.
2. Name of foreign state (or political subdivision) concerned;
3. Identity of the other Parties:

JUDICIAL DOCUMENTS

4. Nature of documents served (e.g., Summons and Complaint; Default Judgment):

5. Nature and purpose of the proceedings; why the foreign state (or political subdivision) has been named; relief requested:

6. Date of default judgment (if any):

7. A response to a "Summons" and "Complaint" is required to be submitted to the court, not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity).

8. The failure to submit a timely response with the court can result in a Default Judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.

9. Questions relating to state immunities and to the jurisdiction of United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611, of Title 28, United States Code (Pub. L. 94-583; 90 Stat. 2891).

22 C.F.R. § 93.2 (Annex) (1980).

23. 28 U.S.C. § 1608(a)(4) (1976).

24. *Id.* § 1608(b).

25. *Id.* § 1608(b)(1).

delivering a copy of the summons and complaint to an agent authorized to receive service of process in the United States or by serving the defendant in accordance with an applicable international convention on service of judicial documents.²⁶ If these methods fail, the statute outlines three additional unranked methods.²⁷ The plaintiff may send the summons and complaint in a manner requested by an authority of the foreign state or political subdivision,²⁸ by registered mail,²⁹ or as directed by an order of the court "consistent with the law of the place where service is to be made."³⁰ To satisfy the statutory requirements, these last three methods must be "reasonably calculated to give actual notice,"³¹ and translations of the documents into the official language of the foreign state must accompany the summons and complaint.³²

II

UNDERLYING RATIONALE FOR THE ADOPTION OF THE FSIA SERVICE PROVISION

The establishment of two separate service schemes in the FSIA illustrates that Congress recognized that the differences between foreign states or subdivisions and foreign agencies or instrumentalities required different approaches to service of process. Although neither the FSIA nor its legislative history comments expressly on the rationale for the divergent service schemes, the statutory design suggests a consistent congressional policy that sheds light on the exclusivity issue.

Only in section 1608(a), dealing with foreign states and political subdivisions, does Congress require that a notice of suit accompany the summons and complaint.³³ The notice of suit is "an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures."³⁴ Because it is likely that agencies or instrumentalities will be equally unfamiliar with U.S. law and procedure, this

26. *Id.* § 1608(b)(2). See note 20 *supra* and accompanying text.

27. 28 U.S.C. § 1608(b)(3) (1976).

28. *Id.* § 1608(b)(3)(A).

29. *Id.* § 1608(b)(3)(B).

30. *Id.* § 1608(b)(3)(C). The language "consistent with the law of the place where service is to be made" could mean that a method must not be explicitly prohibited by the foreign country or, alternatively, that the method must be clearly consistent with foreign law. The legislative history is of no help in resolving the question because it supports both interpretations. See HOUSE REPORT, *supra* note 2, at 25.

31. 28 U.S.C. § 1608(b)(3) (1976).

32. *Id.*

33. 28 U.S.C. § 1608(a) (1976). The FSIA requires a notice of suit both when service is made by registered mail pursuant to § 1608(a)(3) and when made through diplomatic channels pursuant to § 1608(a)(4).

34. HOUSE REPORT, *supra* note 2, at 25.

requirement evidences a congressional concern that foreign states or subdivisions be handled as delicately as possible in suits by U.S. citizens. This concern suggests that, especially in the case of service on foreign states or subdivisions, courts should not deviate from the FSIA provisions and develop ad hoc methods of service.

A similar intention is evidenced by Congress's use of diplomatic service as a last resort for serving foreign states or subdivisions³⁵ instead of the "by order of the court" method of last resort available to effect service upon agencies and instrumentalities.³⁶ The use of a court order would allow the greatest degree of latitude in formulating a method of service to meet plaintiffs' circumstances. The utilization of diplomatic service when other methods fail, instead of court-ordered service, indicates an unwillingness on Congress's part to entrust the courts with power to deal with foreign states and subdivisions.

A consistent policy justification underlies the major variations between 1608(a) and (b). The provisions for a notice of suit,³⁷ diplomatic service,³⁸ and the lack of a provision for court-ordered service when serving a foreign state or political subdivision indicate a congressional concern that foreign states and subdivisions be handled more diplomatically than foreign instrumentalities and agencies. This congressional concern would be thwarted if courts were permitted to order a method of service on foreign states or their subdivisions that is outside of the FSIA. Thus, the distinctions between the two service schemes support the exclusivity argument as it applies to foreign states and their subdivisions.³⁹

In addition to the congressional concern evidenced by the distinctions between the FSIA's service schemes, the rationale behind the adoption of the FSIA service provisions points toward the exclusive application of those provisions. Before the passage of the FSIA, one of the criticisms of the lack of specific service provisions was the uncertainty it engendered in parties as to their position in federal

35. 28 U.S.C. § 1608(a)(4) (1976). The House Report on the FSIA refers to the use of diplomatic service as a method of last resort. HOUSE REPORT, *supra* note 2, at 24.

36. 28 U.S.C. § 1608(b)(3)(C) (1976).

37. *Id.* § 1608(a)(3), (4).

38. *Id.* § 1608(a)(4).

39. In *Gray v. Permanent Mission of People's Republic of Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978), the district court discussed the validity of a method for service of process outside of the FSIA upon a foreign state. The court dismissed an action against the Congo Mission for lack of personal jurisdiction due to insufficient service. *Id.* at 821-22. The court examined the service provisions of 28 U.S.C. § 1608(a)(3) and (4) and concluded that service upon a foreign state that did not comply with § 1608(a) would do violence to Congress's mandate of "strict attention to the linguistic and diplomatic problems inherent in [suits against foreign states]." *Id.* at 821. See also note 53 *infra* and accompanying text.

courts.⁴⁰ A plaintiff commencing an action against a foreign state, agency, or instrumentality could not be assured that his method of service would be acceptable. In addition to uncertainty, divergent uses of ad hoc practices encouraged plaintiffs to forum shop.⁴¹ Putting an end to both the uncertainty and the variations in service methods among the circuits was a primary purpose for the adoption of the FSIA service provisions.⁴²

If unaltered, the courts' practice of fashioning methods of service outside of the FSIA will serve to circumvent the Act's purposes to avoid uncertainty and eliminate forum shopping. The magnitude of this concern, however, depends upon the circumstances in which courts resort to extrastatutory methods of service. If courts first exhaust the service methods of the FSIA before fashioning alternative methods, the problem will be minimal, because the FSIA will adequately deal with most situations. On the other hand, if courts fashion methods of service without first attempting service under the FSIA, the problems that the statute sought to remedy will remain. To effectuate congressional intent, therefore, service on foreign sovereigns must comply with the FSIA provisions; or, at the very least, plaintiffs must exhaust FSIA service methods before asking the courts to fashion new service techniques.

III

LEGISLATIVE HISTORY OF THE FSIA

The legislative history of the FSIA supports the contention that the Act's service provisions are exclusive. The House Report states that the FSIA service provisions are "the exclusive procedures with respect to service on . . . a foreign state or its political subdivisions, agencies or instrumentalities."⁴³ The House Report underscores the exclusivity of the FSIA service provisions as they apply to foreign states and subdivisions by stating, "Subsection (a) of section 1608 sets forth the exclusive procedures for service on a foreign state, or

40. Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. J. INT'L L. 487, 498 (1974).

41. *Id.* at 560.

42. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 90 (1976) (statement of J. Roderick Heller) [hereinafter cited as *Hearings*].

43. HOUSE REPORT, *supra* note 2, at 23. Courts give great weight to committee reports when attempting to discern legislative intent. "Although not decisive, the intent of the legislature as revealed by the committee report is highly persuasive." 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.06 (4th ed. C. Sands 1973) (footnote omitted).

political subdivision thereof"⁴⁴

In further support of the exclusivity of the FSIA service provisions, the House Report states that section 1608 precludes a manner of service that was prevalent before passage of the FSIA. The House Report specifies that section 1608 precludes the mailing of a copy of a summons and complaint to a foreign state's diplomatic mission as a method of service.⁴⁵ Section 1608 does not reject, or even discuss, this method of service. Because such method is not mentioned in the FSIA, yet is declared precluded in the House Report, the implication emerges that Congress intended to preclude service methods not specifically allowed by the FSIA.⁴⁶

Although the legislative history of the FSIA strengthens the exclusivity argument, one can use the legislative history to support the contention that the statutory service provisions are not exclusive. Statements in the legislative history on the FSIA indicate that the statute's general purpose is to ensure that U.S. courts will be available to Americans for settling disputes arising from commercial transactions with foreign states or their subdivisions, agencies, and instrumentalities.⁴⁷ That purpose and the fact that under the FSIA service is primarily a notification device⁴⁸ have led at least one commentator to conclude that, if a plaintiff has made a good faith effort to comply with the FSIA and there is actual notice, "the court should be liberal in treating the service requirements of the FSIA as satisfied."⁴⁹ Although not explicitly arguing for nonexclusivity, the clearly expressed sentiment is that courts should permit notice-providing service that is not within the FSIA scheme.

IV

CONSTITUTIONAL ARGUMENTS FOR EXCLUSIVE APPLICATION OF THE FSIA

The separation of powers principle supports the conclusion that the FSIA's service provisions are exclusive. The judiciary has no power over foreign relations; the executive holds this power with the advice and consent of the Senate.⁵⁰ In drafting the FSIA service of

44. HOUSE REPORT, *supra* note 2, at 24.

45. *Id.* at 26.

46. The argument that Congress intended to permit all alternative manners of service except the one expressly mentioned in the House Report is untenable. The House Report itself does not purport to preclude use of such mailing; rather, it states that § 1608 precludes it.

47. *Hearings, supra* note 42, at 24 (statement of Monroe Leigh).

48. *See* Carl, *supra* note 8, at 1028.

49. *Id.*

50. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). *See generally* U.S. CONST. art. II, § 2, cl. 2; art. VI, cl. 2.

process provisions, Congress consciously attempted "to minimize potential irritants to relations with foreign states."⁵¹ Given this foreign relations component of the FSIA's service provisions, courts arguably have no authority to order a form of service outside of the FSIA. Such judicial creativity would violate the principle of separation of powers and would go beyond the courts' area of expertise.

V

THE NEW ENGLAND MERCHANTS NATIONAL
BANK CASE

With the *New England Merchants National Bank* case,⁵² the District Court for the Southern District of New York, which had previously required strict compliance with the FSIA's service scheme,⁵³ became the first court to deny the exclusivity of the FSIA's service provisions. The controversy in *New England Merchants National Bank* arose over an attempt by plaintiffs to attach assets found in the State of New York that were controlled by the State of Iran and several of its agencies and instrumentalities.⁵⁴ New York's attachment statute⁵⁵ required the plaintiffs to serve process on each of these bodies.⁵⁶ The political turmoil in Iran and the tense relations between Iran and the United States rendered service under the terms of the FSIA impossible.⁵⁷ The plaintiffs sought the aid of the court in effecting service. To remedy the situation, the court rejected the argument that the FSIA provisions were exclusive and ordered a substitute method of service on the defendants.⁵⁸

51. HOUSE REPORT, *supra* note 2, at 11.

52. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980).

53. *Gray v. Permanent Mission of People's Republic of Congo to the United Nations*, 443 F. Supp. 816 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978). See note 38 *supra*.

54. 495 F. Supp. at 75.

55. N.Y. CIV. PRAC. LAW. §§ 6201-6226 (McKinney 1980).

56. *Id.* § 6213.

57. 495 F. Supp. at 78.

58. Judge Duffy fashioned a method of service pursuant to Rule 4(i) of the Federal Rules of Civil Procedure. Rule 4(i) states:

(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: . . . (E) as directed by order of the court.

FED. R. CIV. P. (4)(i)(1). The service that Judge Duffy originally ordered included (1) sending in telex messages in Farsi and English to the individual defendants the text of the summons, a notice of suit, and a notice that a copy of the pleadings would be mailed under separate cover; (2) serving a copy of the pleadings upon all counsel who had filed a notice of appearance on behalf of any of the defendants; and (3) filing an affidavit with the clerk of the court reciting compliance with the above requirements. 495 F. Supp. at

The court's basis for denying the exclusivity of the FSIA's service provisions was a belief that Congress did not contemplate a situation in which a plaintiff would attempt service under conditions such as were encountered when the plaintiffs in the case tried to serve the State of Iran.⁵⁹ The FSIA provisions, the court states, were clearly "promulgated in contemplation, at the very least, of friendship and of continuing diplomatic ties if not a generally amicable political environment."⁶⁰ Therefore, the court concluded, plaintiffs trying to serve process under such adverse conditions should not be limited to the FSIA provisions.⁶¹ This conclusion, however, runs counter to the various arguments for exclusivity expressed in this Note and reflects a too hasty abandonment of the FSIA's provisions for serving foreign states and subdivisions.

In section 1608(a)(4) of the FSIA, Congress provided a method of serving foreign states or subdivisions when all other methods fail: diplomatic service.⁶² The statute is not very specific about this method, stating only that "the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state"⁶³ Although the House Report provides some explanation of this process,⁶⁴ the regulations promulgated by the Secretary of State⁶⁵

81. The court stated that this manner of service on the Iranian instrumentalities and agencies was proper under the FSIA because of the power granted to the court under 28 U.S.C. § 1608(b)(3)(C). *Id.* at 79. The court was not sure that its order fully complied with the terms of the statute. The FSIA requires that court-ordered service be "consistent with the law of the place where service is to be made." *Id.* at 78. The uncertainty was caused by the parties' inability to inform the court of the requirements of Iranian law on the subject. *Id.* The court did not and could not find support in the FSIA for its method of service on the State of Iran. *Id.* at 79.

Judge Duffy amended his original order on June 12, 1980. The companies providing telex service to Iran could not send a message in Farsi except for a phonetic version in Farsi. As this was not what the court intended, it amended the order to provide that the plaintiffs send a telex message in English to the individual defendants containing the text of the summons, a notice of suit as provided in § 1608(a)(3) of the FSIA and a notice that a copy of the summons and notice of suit in Farsi would be mailed under separate cover. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, No. 79 Civ 6380 (S.D.N.Y. June 12, 1980).

59. 495 F. Supp. at 79.

60. *Id.* at 80-81.

61. *Id.* at 81.

62. 28 U.S.C. § 1608(a)(4) (1976).

63. *Id.*

64. The House Report states:

Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C.

HOUSE REPORT, *supra* note 2, at 24.

65. 22 C.F.R. § 93.1 (1980).

detail how the Department of State shall effect diplomatic service. The regulations outline three methods of service. The first two methods utilize direct diplomatic channels and entail a transfer of the service documents either to the foreign state via our embassy in the foreign country⁶⁶ or to the foreign state's embassy in the District of Columbia.⁶⁷ In the event that direct diplomatic channels are unavailable a third method allows transmission of the service documents "to the embassy of another country authorized to represent the interests of the foreign state concerned in the United States."⁶⁸

This third method of service, commonly used when direct diplomatic channels are closed between two countries,⁶⁹ involves the appointment by each country of a neutral country as a "protective power." Entrusted with the protection of the interests of the appointing country's nationals,⁷⁰ the "protecting power" country acts as an intermediate diplomatic link between the U.S. and the "hostile" country. Under this method of service, a court could serve process by directing its clerk to send service documents to the Secretary of State. The Department of State Office of Special Consular Services would then send the documents to the U.S. Embassy in the country designated the "protecting power" of the hostile state. In turn, the U.S. Embassy would transmit the documents to the "protecting power," which would serve the appropriate official in the hostile state's ministry of foreign affairs.⁷¹ Thus, the methods of diplomatic service authorized by section 1608(a)(4) of the FSIA⁷² and clarified by Department of State regulations⁷³ provide a manner of service for foreign states and subdivisions when direct diplomatic ties have been severed. The *New England Merchants National Bank* rationale for the nonexclusivity of the FSIA provisions requires the conclusion that Congress contemplated their use only during the times when the U.S. enjoyed friendly diplomatic relations⁷⁴ with the

66. *Id.* § 93.1(c)(1).

67. *Id.* § 93.1(c)(2).

68. *Id.* § 93.1(c)(3).

69. Using another country as an intermediary in litigation is an established means to settle disputes involving countries with which the United States has no direct diplomatic relations. Bilder, Christenson, Cohen, Huang, Nilsen, Reis, Rubin & Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 AM. J. INT'L L. 526 (1962). The United States has settled disputes with Cuba in this way. *Id.*

70. See II L. OPPENHEIM, INTERNATIONAL LAW § 126aa (7th ed. H. Lauterpacht 1948).

71. The United States has served the State of Iran through the Swiss in this manner. Personal interview with Mark Feldman, Deputy Legal Adviser, Department of State (Sept. 30, 1980).

72. 28 U.S.C. § 1608(a)(4) (1980).

73. 22 C.F.R. § 93.1 (1980).

74. See notes 59-61 *supra* and accompanying text.

defendant country. This conclusion is faulty, and the rationale itself is, therefore, unfounded.

CONCLUSION

Although the FSIA does not state that its service provisions are the exclusive means of service on foreign sovereign entities, many grounds support that conclusion. Congressional concern for the special handling of foreign states and subdivisions evidenced in section 1608(a) supports the argument for exclusivity. Further, the FSIA's legislative history includes statements that both explicitly and implicitly support exclusivity. Finally, various policy and constitutional considerations also support the conclusion that courts may not formulate alternatives to the FSIA.

Andrew G. Bradley