

## Article

# ***No Sirve*: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention<sup>+</sup>**

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Service of process abroad by mail or private process server on parties in Mexico is invalid under the Hague Service Convention.<sup>1</sup> The other alternative methods of service abroad listed in Article 10 of the Convention are invalid, as well. As one might say in Spanish, such alternative service *no sirve*—i.e., is useless—in Mexico.<sup>2</sup> Accordingly, service of process abroad by United States litigants and courts on parties in Mexico should proceed through Mexico’s Central Authority in accordance with Articles 3 through 7 of the Convention.

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<sup>+</sup> Future updates and author correspondence pertaining to this Article will be available on the Minnesota Journal of International Law’s web site, <http://www.minnjil.org>.

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1. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention or Convention]. The authentic English text of the Convention is reprinted following 28 U.S.C.A. FED. R. CIV. P. 4 (West 2008). Both authentic texts (English and French) are available at the web site of the Hague Conference on Private International Law, <http://www.hcch.net>.

As used above and in the title, “private process server” refers to a person (usually an attorney) retained in Mexico “to effect service of judicial documents” on a party under Article 10(b) or (c) of the Convention. I do not mean to suggest that a private process server in the United States is not a proper forwarding authority under Article 3 of the Convention. See *infra* note 39.

2. In this context, the Spanish *servir* is a false cognate for the English “to serve.” As used above, the Spanish *servir* means “to be useful,” and *no sirve* means “it is useless.” See THE OXFORD SPANISH DICTIONARY 759, 1854 (4th ed. 2008).

## INTRODUCTION

Mexico acceded to the Hague Service Convention in 1999, with entry into force in 2000.<sup>3</sup> In its instrument of accession, Mexico designated the Directorate-General of Legal Affairs of its Ministry of Foreign Affairs<sup>4</sup> as its Central Authority to receive and forward requests for service of judicial and extrajudicial documents from other contracting States,<sup>5</sup> and objected to alternative methods of serving documents under Articles 8 and 10 of the Convention.<sup>6</sup> Unfortunately, a mistake occurred in the English courtesy translation of Mexico's Article 10 declaration, making it appear that Mexico's opposition applies only to the alternative methods of service of process under Article 10 when attempted "through diplomatic or consular agents."<sup>7</sup> The original Spanish declaration relating to Article 10 contains no such qualification. It instead expresses across-the-board opposition to all of the alternative methods of service provided in Article 10.<sup>8</sup> When a contracting State objects to all of the alternative

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3. Accession (with Declarations) of Mexico to the Hague Service Convention, 2117 U.N.T.S. 318 (2000) [hereinafter Accession (with Declarations)] (Spanish text of declarations, followed by English and French translations); Decreto Promulgatorio del Convenio sobre la Notificación o Traslado en el Extranjero de Documentos Judiciales o Extrajudiciales en Materia Civil o Comercial [Decree promulgating the Hague Service Convention], Diario Oficial de la Federación [D.O.] 7, 16 de febrero de 2001 (Mex.) (Spanish text of declarations); see also Permanent Bureau of the Hague Conference on Private Int'l Law, *Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, available at [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=17](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=17) (last visited Nov. 1, 2009) [hereinafter *Status Table 14*] (English translation); Bureau Permanent de la Conférence de la Haye de Droit International Privé, *Etat Présent 14: Convention du 15 Novembre 1965 Relative à la Signification et la Notification à l'Étranger des Actes Judiciaires et Extrajudiciaires en Matière Civile ou Commerciale*, available at [http://www.hcch.net/index\\_fr.php?act=conventions.statusprint&cid=17](http://www.hcch.net/index_fr.php?act=conventions.statusprint&cid=17) (last visited Sept. 30, 2009) [hereinafter *Etat Présent 14*] (French translation).

4. That is, the *Dirección General de Asuntos Jurídicos de la Secretaría de Relaciones Exteriores*.

5. Accession (with Declarations) of Mexico, *supra* note 3, at 319, ¶ I (Spanish text), 321, ¶ I (English trans.).

6. *Id.* at 319, ¶¶ IV, V (Spanish text), 321, ¶ IV, V (English trans.). In accordance with Article 8(2) of the convention, Mexico did not object to service in Mexico on nationals of the requesting State under Article 8. *Id.* at 319, ¶ IV (Spanish text), 321, ¶ IV (English trans.).

7. See *id.* at 321, ¶ V (English trans.).

8. *Id.* at 319, ¶ V (Spanish text). The declaration does recognize that, after the Mexican Central Authority forwards documents for service to the competent Mexican Judicial Authority, the Judicial Authority may use simplified procedures in ef-

methods of service in Articles 8 and 10 of the Convention, “service through the Central Authority is, in effect, the exclusive means.”<sup>9</sup> Accordingly, United States courts are bound to refrain from alternative methods of service of process on parties in Mexico and must use Mexico’s Central Authority.<sup>10</sup>

The mistake in the English translation of Mexico’s opposition to alternative methods of service under Article 10 has led state and federal courts in the United States to conclude that alternative forms of service are appropriate in Mexico under the Hague Service Convention. Until October 2009, the U.S. Department of State circular on service of process likewise suggested that service of process by international registered mail on parties in Mexico was appropriate, at least if a party did not anticipate enforcing the judgment in Mexico.<sup>11</sup>

This Article briefly describes the options for service of process on Mexican parties in Part I and the principal methods of service of process pursuant to the Hague Service Convention in Part II. In Part III, this Article points out the error in the English translation of Mexico’s Article 10 declaration. The Article then explains in Part IV how the mistake is misleading courts and other authorities in the United States. Part V concludes that service of process in U.S. litigation on parties in Mexico pursuant to the Hague Service Convention should always proceed through Mexico’s Central Authority in accordance with Articles 3 through 7 of the Convention.

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fecting service under the Convention in certain circumstances. *Id.* at 319, ¶ V (Spanish text), 321, ¶ V (English trans.).

9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. e (1987); *see also id.* reporter’s notes 2, 4.

10. *See id.* § 471 reporter’s note 4 (citing *Richardson v. Volkswagenwerk, A.G.*, 552 F. Supp. 73, 78–79 (W.D. Mo. 1982); *Rivers v. Stihl, Inc.*, 434 So. 2d 766, 769 (Ala. 1983); *Dr. Ing. H.C.F. Porsche A.G. v. Super. Ct.*, 177 Cal. Rptr. 155, 158–59 (Cal. Ct. App. 1981)).

11. U.S. Dep’t of State, *Circular: International Judicial Assistance Mexico*, [http://travel.state.gov/law/info/judicial/judicial\\_677.html](http://travel.state.gov/law/info/judicial/judicial_677.html) (last visited Nov. 1, 2009) [hereinafter *International Judicial Assistance Mexico* (Oct. 2009)] (emphasis removed). The Department of State revised its circular on judicial assistance in Mexico in October 2009. The October 2009 circular states that “Mexico’s accession to the Hague Service Convention indicates that service through the Mexico Central Authority is the exclusive method available.” U.S. Dep’t of State, *Circular: International Judicial Assistance Mexico*, [http://travel.state.gov/law/info/judicial/judicial\\_677.html](http://travel.state.gov/law/info/judicial/judicial_677.html) (last visited Sept. 30, 2009), available at [http://web.archive.org/web/20080328041048/http://travel.state.gov/law/info/judicial/judicial\\_677.html](http://web.archive.org/web/20080328041048/http://travel.state.gov/law/info/judicial/judicial_677.html) (last visited Nov. 1, 2009) [hereinafter *International Judicial Assistance Mexico* (pre-Oct. 2009)].

## I. OPTIONS FOR SERVICE OF PROCESS ON MEXICAN PARTIES

At the outset, it bears mention that the Hague Service Convention is not the only option available to United States litigants for service of process on Mexican parties. If a foreign party's address is unknown, the Hague Service Convention does not apply.<sup>12</sup> If a party can serve a domestic subsidiary or agent of a foreign entity, resort to the Convention may likewise be unnecessary.<sup>13</sup> Similarly, if the defendant travels to the United States, a party may be able to serve the defendant under ordinary, domestic rules of service.<sup>14</sup> For litigants in federal court, requesting a foreign defendant to waive service of process is another option that can avoid the substantial time and expense of formal service and translation of legal documents.<sup>15</sup>

If service abroad on parties in Mexico is required, however, compliance with the Hague Service Convention "is mandatory."<sup>16</sup> Various provisions of the Convention nonetheless permit the use of so-called "derogatory channels" pursuant to other treaties to which contracting States may be parties.<sup>17</sup> Thus,

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12. Hague Service Convention, *supra* note 1, art. 1(2) ("This Convention shall not apply where the address of the person to be served with the document is not known."); BP Prods. N. Am. v. Dagra, 236 F.R.D. 270, 271 (E.D. Va. 2006); 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE: CIVIL AND COMMERCIAL § 4-1-4(5) (2000).

13. See, e.g., Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988) (service pursuant to Convention is unnecessary "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause..."); Frank G. Jones, *Service and Citation on Foreign Parties, in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS § 1.1.3 (David J. Levy ed., 2004) (advising U.S. litigants to "[a]void service abroad by locally serving a foreign defendant who maintains a domestic presence and whose local assets will satisfy the potential judgment."); see generally DAVID EPSTEIN ET AL., INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY § 4.04[5] (3d ed. 2008) (discussing the exclusive nature of the Hague Service Convention); 1 RISTAU, *supra* note 12, § 4-1-4(3); Marjorie A. Shields, Annotation, *When Is Compliance with Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Art. 1 et seq., Required*, 18 A.L.R. FED. 2D 185, 199-202 (2007).

14. See *Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (upholding service on Taiwanese citizen served at residence in California); *In re Gonzalez*, 993 S.W.2d 147, 151-52 (Tex. App. 1999) (upholding service on a Mexican defendant when his plane landed in Texas to refuel).

15. See FED. R. CIV. P. 4(d); FED. R. CIV. P. 4 advisory committee's note to 1993 amend.

16. *Schlunk*, 486 U.S. at 699.

17. See Hague Service Convention, *supra* note 1, arts. 11, 24, 25; PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRACTICAL HANDBOOK

U.S. litigants have an alternative to service pursuant to the Hague Convention when serving process on parties in Mexico—service pursuant to the Inter-American Convention on Letters Rogatory and its Additional Protocol,<sup>18</sup> to which the United States and Mexico are parties.<sup>19</sup>

Ordinarily, service under the Inter-American Convention's Additional Protocol requires a U.S. party to request the court to transmit documents to the U.S. Central Authority for forwarding to the Mexican Central Authority for service, thus making service under the Additional Protocol more cumbersome than service under the Hague Convention.<sup>20</sup> Moreover, the Inter-American Convention and Additional Protocol do not provide for service of process by mail.<sup>21</sup>

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ON THE OPERATION OF THE HAGUE CONVENTION OF NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR CRIMINAL MATTERS ¶ 236 (3d ed. 2006) [hereinafter PRACTICAL HANDBOOK]; see *id.* ¶¶ 237–44 (describing derogatory channels); *id.* at XXXVIII Chart 2.

18. Inter-American Convention on Letters Rogatory, *done* Jan. 30, 1975, S. TREATY DOC. NO. 98-27 (1984), 1438 U.N.T.S. 287 [hereinafter Inter-American Convention]; Inter-American Convention on Letters Rogatory, Additional Protocol, *done* May 8, 1979, S. TREATY DOC. NO. 98-27 (1984), 1438 U.N.T.S. 287 [hereinafter Additional Protocol]. For a list of parties to the Inter-American Convention and its Additional Protocol, see U.S. DEP'T OF STATE, TREATIES IN FORCE 382 (2009). The United States only has a treaty relationship with those states that are parties to both the Inter-American Service Convention and its Additional Protocol. *Id.*; see 132 Cong. Rec. 29885 (1986) (U.S. reservations upon ratification), *reprinted in* 1761 U.N.T.S. 325.

19. See PRACTICAL HANDBOOK, *supra* note 17, ¶ 294 (stating that, pursuant to Article 25 of the Hague Service Convention and Article 15 of the Additional Protocol to the Inter-American Convention, either treaty may be used to effect service); see also EPSTEIN ET AL., *supra* note 13, § 4.05.

20. See EPSTEIN ET AL., *supra* note 13, § 4.05; 1 RISTAU, *supra* note 12, § 7-2-1; U.S. Dep't of State, *Circular: Inter-American Convention on Letters Rogatory and Additional Protocol (Inter-American Service Convention)*, [http://travel.state.gov/law/info/judicial/judicial\\_687.html](http://travel.state.gov/law/info/judicial/judicial_687.html) (last visited Nov. 1, 2009) [hereinafter *Inter-American Service Convention Circular*] (“Requests are prepared on a Convention form and transmitted via the U.S. Central Authority in the Department of Justice.”). Compare Hague Service Convention, *supra* note 1, art. 3(1) (permitting a party to send its request for service directly to a foreign Central Authority, without proceeding through the party's domestic Central Authority) with Additional Protocol, *supra* note 18, art. 1 (requiring service requests to proceed through the party's domestic Central Authority before going to the foreign Central Authority).

21. See *Inter-American Service Convention Circular*, *supra* note 20 (“Neither the Convention nor the Additional Protocol expressly provide for service by mail. Local (foreign) law would determine whether service by mail is acceptable in that country.”) (citing *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 644 (5th Cir. 1994)); *United States v. Padilla*, 89 A.F.T.R.2d (RIA) 2002-1411, 2002-1412 (E.D. Cal. 2002) (“This treaty provides one method of service, letters rogatory, on defendants residing in Mexico, but it does not preempt all other means of service.”).

In “border areas,” however, service under the Inter-American Convention may be less cumbersome than under the Hague Convention. Article 7 of the Inter-American Convention provides that “[c]ourts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.”<sup>22</sup> Unfortunately, neither the Inter-American Convention nor its Additional Protocol defines the term “border areas,”<sup>23</sup> and there are no published decisions interpreting the term.<sup>24</sup> Nonetheless, the U.S. Department of Justice “advises that border states such as Texas and even Florida have transmitted requests directly to foreign Central Authorities.”<sup>25</sup> Others have even reported using “direct court-to-court transmission of letters rogatory” from U.S. courts to Mexican courts.<sup>26</sup> The propriety of such direct transmission by courts is disputed for states that are parties to the Additional Protocol, however.<sup>27</sup>

With the possible exception of courts in “border areas,” service under the Hague Service Convention is less cumbersome than service under the Inter-American Service Convention and Additional Protocol<sup>28</sup> and ordinarily much faster.<sup>29</sup> Thus, parties in the United States increasingly resort to the Hague Ser-

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22. Inter-American Convention, *supra* note 18, art. 7.

23. See Inter-American Convention, *supra* note 18; Additional Protocol, *supra* note 18.

24. A search of Westlaw’s All State and Federal Cases Database with the query “border areas” revealed 147 cases total, but none dealing with service abroad. See Westlaw search, Sept. 30, 2009 (records on file with the Minnesota Journal of International Law).

25. *Inter-American Service Convention Circular*, *supra* note 20.

26. D. Michael Mandig & David Epstein, *An Actual Case: Collateral Security in Automobiles Manufactured in the United States and Mexico and Held by a Dealer in Sonora*, 5 U.S.-MEX. L.J. 101, 105 (1997).

27. See *id.* at 105–06 & nn.20–21 (citing but disagreeing with DAVID MCCLEAN, INTERNATIONAL JUDICIAL ASSISTANCE 71 (1992)); DAVID MCCLEAN, INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS 68–69 (2002) (Article 1 of the Additional Protocol “makes mandatory as between parties to the Protocol the use of Central Authorities both for the outward transmission and inward receipt of letters rogatory. . . .”); PRACTICAL HANDBOOK, *supra* note 17, ¶ 291 (“[A]mong States party to the Protocol, only the use of the Central Authority system now appears to be permitted . . . .”); *id.* at 103 n.365 (citing MCCLEAN, INTERNATIONAL CO-OPERATION, *supra*, at 69). Nonetheless, one practitioner reports having “served process by letters of request addressed by the Superior Court in Arizona directly to the State Courts in [Mexico]. This approach has presented no problems thus far, and the Mexican Courts accept the Letters even though not submitted through the circuitous route of the Central Authority.” Mandig & Epstein, *supra* note 26, at 106.

28. See *supra* note 20 and accompanying text.

29. See *infra* notes 46–50 and accompanying text.

vice Convention when service of process on parties in Mexico is necessary.<sup>30</sup>

## II. SERVICE OF PROCESS UNDER THE HAGUE SERVICE CONVENTION

Signed in 1965, the Hague Service Convention entered into force in 1969 with three contracting States—the United States, the United Kingdom, and Egypt.<sup>31</sup> Since that time, the number of contracting States has grown to sixty,<sup>32</sup> making it the fourth most widely ratified of the Hague Conventions.<sup>33</sup>

Prior to the Hague Service Convention, service of process abroad generally proceeded through diplomatic or consular channels or via various less formal modes, such as by mail or agent, as provided in numerous bilateral agreements.<sup>34</sup> Major innovations introduced by the Convention included:

- (a) the introduction of a new preferred mode, service through a designated Central Authority in each Contracting State, using prescribed forms and procedures;
- (b) the giving of some obligatory quality to the new Convention;
- (c) the addition of ‘guarantees’ to safeguard the position of defendants who remained in ignorance of the proceedings being taken against them.<sup>35</sup>

According to one scholar, “[t]here is little doubt that the Convention has not only produced an orderly framework within

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30. See Ministry of Foreign Affairs of Mex., *Response of Mexico to Questionnaire of July 2008 Relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ¶ 9(a) (2008), available at <http://hcch.e-vision.nl/upload/wop/2008mexico14.pdf> [hereinafter *Response of Mexico*] (showing steady increase in number of incoming requests for service from 2003 to 2007, with U.S. listed each year as one of the countries from which the most requests were received).

31. See Hague Service Convention, *supra* note 1, art. 27(1); see also *id.* 20 U.S.T. at 372; 658 U.N.T.S. at 165 n.1.

32. See *Status Table 14*, *supra* note 3.

33. See Permanent Bureau of the Hague Conference on Private Int’l Law, *The Hague Conventions: Signatures, Ratifications and Accessions* (Sept. 22, 2009), available at [http://www.hcch.net/upload/statmtrx\\_e.pdf](http://www.hcch.net/upload/statmtrx_e.pdf). If the Statute of the Hague Conference is included, the Hague Service Convention is the fifth most widely ratified Hague convention. See *id.*; Statute of the Hague Conference on Private International Law, adopted Oct. 31, 1951, 15 U.S.T. 2228, 220 U.N.T.S. 121, amended June 30, 2005, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=29](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=29).

34. See McCLEAN, INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS, *supra* note 27, at 18–22.

35. *Id.* at 24; see also RISTAU, *supra* note 12, § 4-1-1.

which the various forms of procedure can operate but has also, in the Central Authority system, produced a very successful and increasingly well-used mechanism.”<sup>36</sup>

#### A. SERVICE THROUGH A CONTRACTING STATE’S “CENTRAL AUTHORITY”

The heart of the Hague Service Convention is its default method or “main channel of transmission”<sup>37</sup> of service requests through a country’s “Central Authority.”<sup>38</sup> The process is conceptually simple. A competent judicial officer or authority (“forwarding authority,” “requesting authority,” or “applicant”)<sup>39</sup> in the “requesting State” forwards a “Request” for service using one of the model forms attached to the Convention to the Central Authority of the “requested State” together with copies of the documents to be served.<sup>40</sup> The requested State’s Central Authority then examines the request and, if in order, serves the documents or arranges to have them served.<sup>41</sup> When service is

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36. MCCLEAN, INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS, *supra* note 27, at 55.

37. PRACTICAL HANDBOOK, *supra* note 17, ¶ 81.

38. *See id.* ¶¶ 82–182 (describing service through the Convention’s “main channel” in detail); *see also id.* at XXXVII Chart 1; EPSTEIN ET AL., *supra* note 13, § 4.04[1] & [2]; 1 RISTAU, *supra* note 12, §§ 4-2-1 to -4-3-4.

39. The Department of State interprets the terms “authority or judicial officer competent under the law of the State in which the documents originate” in Article 3(1) of the Convention to “include any court official, any attorney, or any other person or entity authorized by the rules of the relevant court” in the United States. U.S. Dep’t of State, *Response of the United States of America to the Questionnaire of July 2008 Relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, ¶ 8, available at <http://hcch.e-vision.nl/upload/wop/2008usa14.pdf> (last visited Nov. 1, 2009). At least one court has held that a private process server is a competent forwarding authority. *Greene v. Le Dorze*, No. CA 3-96-CV-590-R, 1998 WL 158632, at \*1–2 (N.D. Tex. Mar. 24, 1998); *see also* PRACTICAL HANDBOOK, *supra* note 17, ¶¶ 103–04 (noting that most private process servers in the United States feel they are entitled “to act as applicants on request forms of the Convention,” but some “instead have the plaintiff’s attorney execute the [r]equest forms.”).

40. Hague Service Convention, *supra* note 1, art. 3. Many states require the request and document to be translated into the requested state’s official language. *See id.* art. 5(3); 1 RISTAU, *supra* note 12, § 4-2-3(5); Accession (with Declarations) of Mexico, *supra* note 3, ¶ 2, at 319 (Spanish text), ¶ 2, at 321 (English trans.).

41. Hague Service Convention, *supra* note 1, art. 5. The Convention does not authorize the requested State’s Central Authority

to screen the documents and assess or appraise their content or the merits of the case. The power of the Central Authority is limited to verify (i) that the Request is properly filled in . . . , (ii) that the matter relates to a ‘civil or commercial matter’ . . . , and (iii) that compliance with the Request will not



complete, the Central Authority fills out a “Certificate,” using another model form attached to the Convention, giving the details of service and returns it to the applicant.<sup>42</sup> “The Certificate creates a rebuttable presumption of valid service allowing the proceedings to continue before the [requesting State’s] court.”<sup>43</sup>

Under Article 5, the requested State’s Central Authority may effect service in one of three ways:

- (i) a method provided under the law of the requested State (formal service), (ii) a particular method requested by the applicant, unless it is incompatible with the law of the requested State (service by a particular method), or by (iii) delivery to the addressee who accepts the document voluntarily (informal delivery).<sup>44</sup>

According to the Permanent Bureau, “[i]n general, the Convention has shortened significantly [the] time for execution of requests for service transmitted from abroad . . . .”<sup>45</sup> Indeed, the U.S. Department of State advises litigants that service of process by conventional letters rogatory entails “habitual time delays of up to a year or more,”<sup>46</sup> that service pursuant to the Inter-American Service Convention “[g]enerally . . . can take 6 months to a year,”<sup>47</sup> but that “the Hague Conference on Private

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infringe the requested State’s sovereignty or security . . . .

PRACTICAL HANDBOOK, *supra* note 17, ¶ 124; *see also* 1 RISTAU, *supra* note 12, §§ 4-4-1 to -2.

42. Hague Service Convention, *supra* note 1, art. 6(1); *see also* 1 RISTAU, *supra* note 12, § 4-3-4. The Central Authority may also designate another authority, such as the local court that effects service, to complete the certificate. Hague Service Convention, *supra* note 1, art. 6(1). If the document cannot be served, the Certificate “shall set out the reasons which have prevented service.” *Id.* art. 6(2).

43. PRACTICAL HANDBOOK, *supra* note 17, ¶ 170 (emphasis removed).

44. *Id.* ¶ 127; Hague Service Convention, *supra* note 1, art. 5(1) & (2); *see also* 1 RISTAU, *supra* note 12, § 4-3-1.

45. PRACTICAL HANDBOOK, *supra* note 17, ¶ 157.

46. U.S. Dep’t of State, *Circular: Service of Legal Documents Abroad*, [http://travel.state.gov/law/info/judicial/judicial\\_680.html](http://travel.state.gov/law/info/judicial/judicial_680.html) (last visited Nov. 1, 2009) (emphasis removed); U.S. Dep’t of State, *Circular: Preparation of Letters Rogatory*, [http://www.travel.state.gov/law/info/judicial/judicial\\_683.html](http://www.travel.state.gov/law/info/judicial/judicial_683.html) (last visited Nov. 1, 2009) (“Execution of letters rogatory may take a year or more worldwide.”) (emphasis removed); *see also* 7 U.S. DEPT OF STATE, FOREIGN AFFAIRS MANUAL § 931.1(c) (2007), available at <http://www.state.gov/m/a/dir/regs/fam> (last visited Nov. 1, 2009) (“Letters rogatory typically take from 6 months to a year to execute.”); *see also* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1134 (3d ed. 2001) (when transmitted through diplomatic channels, letters rogatory “clearly are the most time consuming, cumbersome, and expensive method of service provided for in Rule 4(f)” and “should be used only if the foreign country will not permit any other means of service within its territory or a foreign court’s assistance otherwise is necessary. . . .”).

47. *Inter-American Service Convention Circular*, *supra* note 20.

International Law advises that most [Hague Service] Convention central authorities generally accomplish service within two months.”<sup>48</sup>

Recent statistical data support these statements regarding the speed of service of process under the Hague Convention. For its 2009 Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions, the Permanent Bureau of the Hague Conference reported that “the vast majority of both incoming and outgoing [service of process] requests were processed in four months or less,” and that “66% of incoming requests were issued with a certificate [of service] within two months.”<sup>49</sup> The statistics reported by Mexico for the 2009 Special Commission were not quite as good, but still far better than the time frames reported by the Department of State for either conventional letters rogatory or requests for service under the Inter-American Convention on Letters Rogatory. In 2007, Mexico served over half of its incoming requests for service under the Hague Service Convention within four months and over three quarters within six months.<sup>50</sup> Thus, the Hague Service Convention has established itself as one of the most expeditious means of service of process abroad, and this no doubt largely explains its increasing use in U.S. litigation for service abroad on parties in Mexico.

## B. OPTIONAL, ALTERNATIVE METHODS OF SERVICE

The Convention also permits various “alternative channels of transmission”<sup>51</sup> in Articles 8, 9, and 10. These “alternative

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48. U.S. Dep’t of State, *Circular: Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters*, [http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://travel.state.gov/law/info/judicial/judicial_686.html) (last visited Feb. 19, 2009) available at [http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://web.archive.org/web/20080212013227/http://travel.state.gov/law/info/judicial/judicial_686.html) (last visited Nov. 1, 2009) [hereinafter *Hague Service Convention Circular*]. (The Department of State removed the *Hague Service Convention Circular* from its web site, but it remains available at the Internet Archive.)

49. Permanent Bureau of the Hague Conference on Private Int’l Law, *Summary of Responses to the Questionnaire of July 2008 Relating to the Service Convention, with Analytical Comments (Summary and Analysis Document)* ¶ 12 (Jan. 2009), available at <http://hcch.e-vision.nl/upload/wop/2008pd14e.pdf>.

50. See *Response of Mexico*, *supra* note 30, ¶ 9(b), at 11 (chart showing 4.5% of incoming requests served less than 2 months after receipt, 47.8% served between 2 and 4 months, 23.9% served between 4 and 6 months, and 23.9% served between 6 and 12 months after receipt). It took over a year, however, to complete service of process through Mexico’s Central Authority in *Griffin v. Mark Travel Corp.*, 296 Wis. 2d 642, (Wis. App. 2006).

51. PRACTICAL HANDBOOK, *supra* note 17, ¶ 81.

channels” include:

consular or diplomatic channels (direct and indirect) (Arts. 8(1) and 9), postal channels (Art. 10(a)), direct communication between judicial officers, officials or other competent persons of the State of origin and the State of destination (Art. 10(b)), and direct communication between an interested party and judicial officers, officials or other competent persons of the State of destination (Art. 10(c)).<sup>52</sup>

Article 8 expressly authorizes contracting States to declare their opposition to service through direct diplomatic or consular channels.<sup>53</sup> Article 10 likewise makes service via postal channels or direct communication contingent on the State of destination not objecting.<sup>54</sup> Such opposition or objection functions as a

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52. *Id.* ¶ 184 (emphasis removed); see *id.* ¶¶ 185–235 (describing each of these “alternative channels” in detail); see *id.* at XXXVIII Chart 2; see also 1 RISTAU, *supra* note 12, § 4-3-5.

53. Article 8 of the Convention provides:

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

*Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.*

Hague Service Convention, *supra* note 1, art. 8 (emphasis added). For a list of countries objecting under Article 8(2), see Permanent Bureau of the Hague Conference on Private Int'l Law, *Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of the Hague Service Convention* (Mar. 2008), available at <http://www.hcch.net/upload/applicability14e.pdf> [hereinafter *Table Reflecting Applicability*]. Service through consular or diplomatic officials under Articles 8 and 9 is generally not an option for litigants in United States litigation due to State Department regulations that prohibit officers of the U.S. Foreign Service from serving process or appointing others to do so unless specifically directed by the State Department. See 22 C.F.R. §§ 92.85, 92.92 (2009).

54. Article 10 of the Convention states:

*Provided the State of destination does not object, the present Convention shall not interfere with—*

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Hague Service Convention, *supra* note 1, art. 10 (emphasis added). For a list of countries objecting under Article 10, see *Table Reflecting Applicability*, *supra* note 53.

reservation against the use of the alternative forms of service that are the subject of the opposition or objection.<sup>55</sup> As already noted, when a State objects to all of the alternative methods of service in Articles 8 and 10 of the Convention, “service through the Central Authority is in effect the exclusive means.”<sup>56</sup> Thus, “American courts have consistently held that international mail service of civil summonses is not proper in the case of States party to the Hague Service Convention which have entered an appropriate reservation under Article 10 thereof.”<sup>57</sup>

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55. See PRACTICAL HANDBOOK, *supra* note 17, ¶¶ 207–09 (characterizing objections under Article 10 as reservations); Permanent Bureau of the Hague Conference on Private Int'l Law, *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions* ¶ 79 (2003) in PRACTICAL HANDBOOK, *supra* note 17, at 156 [hereinafter *2003 Special Commission Conclusions and Recommendations*] (characterizing declarations under Articles 8 and 10 as reservations); Permanent Bureau of the Hague Conference on Private Int'l Law, *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, ¶ 16 (1989), available at <http://www.hcch.net/upload/scrpt1989.pdf> [hereinafter *1989 Special Commission Report*] (“Article 10 *a* in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty.”); see also Vienna Convention on the Law of Treaties, arts. 2(d), 20(1), done May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

56. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. e; see also *id.* § 471 reporter’s notes 2, 4.

57. *Hague Service Convention Circular*, *supra* note 48; 1 RISTAU, *supra* note 12, § 4-1-6 (collecting cases) (“American courts have uniformly held that service of process in the territory of a Convention state that violates that state’s declarations under the Convention is invalid.”); see, e.g., *Brockmeyer v. May*, 383 F.3d 798, 803 (9th Cir. 2004) (“We therefore hold that the Convention permits . . . service of process by international mail, so long as the receiving country does not object.”); *Research Systems Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), (certified mail is “permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object.”); *Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986) (“Since the United States has made no objection to the use of ‘postal channels’ under Article 10(a), service of process by registered mail remains an appropriate method of service [on defendants] in this country under the Convention.”); *In re LDK Solar Sec. Litig.*, No. C 07-05182 WHA, 2008 WL 2415186, at \*1 (N.D. Cal. June 12, 2008) (because of China’s Article 10 objection, service “cannot be effected ‘by postal channels’ or through the judicial officers, officials or other individuals of the state of destination.”); *Arista Records LLC v. Media Services LLC*, No. 06 Civ. 15319(NRB), 2008 WL 563470, at \*2 n.5 (S.D.N.Y. 2008) (“The Russian Federation has also formally objected to Article 10 of the Convention, thus precluding reliance on the three alternate service methods . . . .”); *Mones v. Commercial Bank of Kuwait, S.A.K.*, 502 F. Supp. 2d 363, 371 (S.D.N.Y. 2007) (because Kuwait objected to service by mail, petitioner’s service of respondent bank in Kuwait “by mail does not meet the service standards set forth in the Convention, nor of Rule 4(f) of the Federal Rules of Civil Procedure.”); see also Memorandum from Leonidas Ralph Mecham, Director, Admin. Office of the U.S. Courts to All Clerks, U.S. Dist. Courts (Nov. 7, 2000), available at

Some courts in the United States, most notably the Fifth and Eighth Circuits, have gone further and held that service by mail is never permitted under Article 10(a) of the Hague Service Convention because Article 10(a) uses the term “send” rather than “serve” or “service.”<sup>58</sup> The State Department has disagreed, suggesting that the Eighth Circuit’s decision was “incorrect to the extent that it suggest[ed] that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.”<sup>59</sup> A 1989 Special Commission on the operation of the Hague Service Convention rejected the Eighth Circuit’s interpretation of Article 10(a) as well.<sup>60</sup> A 2003 Special Commission “reaffirmed its clear understanding that the term ‘send’ in Article 10(a) is to be understood as meaning ‘service’ through postal channels.”<sup>61</sup> The Second and Ninth Circuits have similarly disagreed with the Fifth and Eighth Circuits’ restrictive interpretation of Article 10(a).<sup>62</sup> According to the Ninth Circuit, interpreting Article 10(a) to permit service by mail is “the essentially unanimous view of other member countries of

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[http://www.laed.uscourts.gov/process\\_abroad.pdf](http://www.laed.uscourts.gov/process_abroad.pdf) (“clerks should refrain from effecting service by mail addressed to those countries who have protested such service or who have entered reservations to mail service under Article 10(a).”).

58. See *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002) (“[Article 10(a)] does not permit service by mail” because “we will not presume that the drafters intended to give the same meaning to ‘send’ that they intended to give to ‘service.’”); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173–74 (8th Cir. 1989) (same). But see *Brockmeyer*, 383 F.3d at 802 (Article 10(a) allows service of process by mail, provided the receiving State does not object, because “the meaning of ‘send’ in Article 10(a) includes ‘serve.’”); *Ackermann*, 788 F.2d at 839 (same); 1 RISTAU, *supra* note 12, § 4-3-5(2) (“[T]he draftsmen of the Convention intended the language ‘to send judicial documents, by postal channels’ to include the service of process. The use of different terms in the several paragraphs of Article 10 may well be attributed to careless drafting.”). See generally EPSTEIN ET AL., *supra* note 13, § 4.04[3] (citing divisions in the courts); Beverly L. Jacklin, Annotation, *Service of Process by Mail in International Civil Action as Permissible Under Hague Convention*, 112 A.L.R. Fed. 241 (1993).

59. Letter from Alan J. Kreczko, Deputy Legal Adviser, U.S. Dep’t of State to Admin. Office of U.S. Courts and the Nat’l Ctr. for State Courts (Mar. 14, 1990), in 30 I.L.M. 260, 261 (1991).

60. 1989 *Special Commission Report supra* note 55, at 9.

61. 2003 *Special Commission Conclusions and Recommendations, supra* note 55, at 153; see also PRACTICAL HANDBOOK, *supra* note 17, ¶¶ 213–25 (discussing United States cases).

62. See *Brockmeyer*, 383 F.3d at 801–03 (“The purpose and history of the Hague Convention, as well as the position of the U.S. State Department, convince us that ‘send’ in Article 10(a) includes ‘serve.’”); *Ackermann*, 788 F.2d at 839 (“[T]he word ‘send’ in Article 10(a) was intended to mean ‘service.’”).

the Hague Convention.”<sup>63</sup> Regardless of the circuit split on the propriety of service by mail under Article 10(a), however, it is undisputed that service by mail or private process server (or other alternative method under Article 10) is improper when a State party has objected to that method of service under Article 10.<sup>64</sup>

### III. MEXICO'S ACCESSION TO THE HAGUE SERVICE CONVENTION AND THE MISTRANSLATION OF ITS DECLARATION OBJECTING TO ALTERNATIVE METHODS OF SERVICE UNDER ARTICLE 10

Mexico acceded to the Hague Service Convention in 1999, with entry into force in 2000.<sup>65</sup> The Mexican Senate approved the Convention with numerous declarations on April 29, 1999, and the Mexican government officially published the decree of approval, along with the declarations, the following month in the *Diario Oficial de la Federación* (Official Gazette of the Federation).<sup>66</sup> The President of Mexico signed the instrument of accession on June 2, 1999, and deposited it with the depositary for the Hague Service Convention, the Ministry of Foreign Affairs of the Netherlands, in accordance with Article 28 of the Convention on November 2, 1999.<sup>67</sup> The Ministry of Foreign Affairs of the Netherlands transmitted a depositary notification to the States party to the Convention on November 30, 1999, in accordance with Article 31 of the Convention.<sup>68</sup> The depositary noti-

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63. Brockmeyer, 383 F.3d at 802 (citing Case C-412/97, *E.D. Srl v. Italo Fenocchio*, 1999 E.C.R. I-3845, ¶ 6, 3 C.M.L.R. 855, ¶ 6; *Integral Energy & Envtl. Eng'g Ltd. v. Schenker of Canada Ltd.*, [2001] 295 A.R. 233, ¶ 36 (Alta. Q.B., Can.), *rev'd on other grounds*, [2001] 293 A.R. 327 (Alta. C.A., Can.); *Efeteia Thessaloniki* [ET] [Thessaloniki Court of Appeal], 3299/2000, [2002] I.L.Pr. 15, 168 ¶ 4 (Greece); *see also* *Noirhomme v. Walklate*, (1992) 1 Lloyd's Rep. 427, 429-30 (Q.B.) (U.K.); PRACTICAL HANDBOOK, *supra* note 17, at 77 n.275 (“Space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process.”).

64. *See* 1 RISTAU, *supra* note 12, § 4-1-6 (“American courts have uniformly held that service of process in the territory of a Convention state that violates that state's declarations under the Convention is invalid.”) (collecting cases).

65. Accession (with Declarations) of Mexico, *supra* note 3, at 318.

66. Decreto por el que se aprueba el Convenio sobre la Notificación o Traslado en el Extranjero de Documentos Judiciales o Extrajudiciales en Materia Civil o Comercial [Decree Approving the Hague Service Convention], *Diario Oficial de la Federación* [D.O.] 5, 27 de mayo de 1999 (Mex.).

67. Accession (with Declarations) of Mexico, *supra* note 3, at 318; Decreto Proulgatorio, *supra* note 3, at 8.

68. Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention on the*

fication included a copy of Mexico's original Spanish declarations, an English "courtesy translation" of the declarations, and a French *traduction* (translation) of the declarations.<sup>69</sup> After the Convention entered into force for Mexico on June 1, 2000,<sup>70</sup> the Dutch Foreign Ministry sent another depositary notification to the States party on June 23, 2000, again accompanied by Mex-

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*Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965) Notification in Conformity with Article 31 of the Convention*, Depositary Notification (Nov. 30, 1999) [hereinafter Depositary Notification (Nov. 30, 1999)] (on file with author) (according to the Ministry of Foreign Affairs of the Kingdom of the Neth., at the time of this notification, notifications of a new accession seemingly were treated differently than notifications after accession and thus were not given a reference number. E-mail from Noortje van Rijssen, Treaties Div., Ministry of Foreign Affairs of the Kingdom of the Neth., to author (Oct. 26, 2009, 02:13 CDT) (on file with author)).

69. The *United Nations Treaty Series* states that the translations were "supplied by the Government of the Netherlands." Accession (with Declarations) of Mexico, *supra* note 3, at 321 n.1, 322 n.1. In response to a request for comment on a prepublication draft of this Article, which had attributed the English courtesy translation to the Ministry of Foreign Affairs of the Netherlands, the Dutch Foreign Ministry explained that,

when on 2 November 1999 the Ministry of Foreign Affairs received the instrument of accession of Mexico to the Service Convention, including declarations in the Spanish language only, the Embassy of Mexico was requested to provide the declarations in either English or French. As a result, the Mexican embassy provided what was headed a "courtesy translation" of the declarations into English. The translation of the declarations from Spanish into French was made by the translation division of the Ministry. This explains the discrepancy between the English text and the French version.

Letter from Gerard Limburg, Head, Treaties Div., Ministry of Foreign Affairs of the Kingdom of the Neth., to author, at 1 (Oct. 12, 2009) (on file with author). Consistent with this, the Netherlands' depositary notification referred to the English translation as a "Courtesy translation." Depositary Notification (Nov. 30, 1999), *supra* note 68. The English version of the declarations on the web site of Hague Conference of Private International Law uses the term "*Courtesy translation*," as well. See *Status Table 14*, *supra* note 3. The French version of the depositary notification and the Hague Conference web site both refer to the French translation simply as a *Traduction* (Translation). See Depositary Notification (Nov. 30, 1999), *supra* note 68; *Etat Présent 14*, *supra* note 3.

As this Article went to press, the Foreign Ministry of Mexico had not yet responded to a request for confirmation that the Mexican embassy or the Foreign Ministry of Mexico prepared the English courtesy translation. See Letter from author to Joel Antonio Hernández García, Legal Adviser, Ministry of Foreign Affairs of Mex. (Oct. 13, 2009) (on file with author). Resolution of this issue does not affect this Article's analysis, however. Regardless of which government prepared the English courtesy translation, the original Spanish text of Mexico's declarations prevails over the English courtesy translation. See *infra* notes 80–88 and accompanying text.

70. Accession (with Declarations) of Mexico, *supra* note 3, at 318; see Hague Service Convention, *supra* note 1, art. 28(3).

ico's Spanish declarations and the same English and French translations.<sup>71</sup> The Netherlands registered the instrument of accession with the Secretariat of the United Nations on July 10, 2000.<sup>72</sup> Mexico officially published a Spanish translation of the entire Hague Service Convention, together with Mexico's declarations (in the original Spanish), in the *Diario Oficial* on February 16, 2001.<sup>73</sup> The United Nations published Mexico's declarations, along with the English and French translations, in the *United Nations Treaty Series* in 2003.<sup>74</sup>

A side-by-side comparison of the original Spanish text and the English and French translations of Mexico's declarations regarding Articles 8 and 10 reveals the error in the English translation of the declaration with respect to Article 10.

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71. Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965) Notification in Conformity with Article 31 of the Convention*, Depositary Notification No. 3/2000 (June 23, 2000) (on file with author), reprinted in part in Defendant-Appellant's Appendix Volume 1 of 2 at App. 294-95, *Griffin v. Mark Travel Corp.*, 2006 WI App 213, 2006 Wis. 2d 642, 724 N.W.2d 900 (No. 2005AP2298).

72. Accession (with Declarations) of Mexico, *supra* note 3, at 318. Under Article 102 of the U.N. Charter: "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it." U.N. Charter, art. 102, para. 1. Subsequent treaty actions, such as accessions and ratifications, can also be registered. TREATY SECTION, U.N. OFFICE OF LEGAL AFFAIRS, TREATY HANDBOOK § 5.5.4 (2006), available at <http://treaties.un.org/doc/source/publications/THB/English.pdf>; see also Registration and Publication of Treaties and International Agreements: Regulations to Give Effect to Article 102 of the Charter of the United Nations, arts. 2(1), 12(1), 859 U.N.T.S. XII (1980).

73. Decreto Promulgatorio, *supra* note 3. According to the *Diario Oficial*, the Spanish translation used by Mexico was a "[t]ext revised in the meeting of representatives of Spanish-speaking countries held at The Hague in October 1989," which "utilized as a working document the translation made in Spain and published in the *Boletín Oficial del Estado* of August 25, 1987." *Id.* at 8 n.2 (author's translation).

74. See Accession (with Declarations), *supra* note 5; *id.* at I-II.



## SPANISH TEXT

IV. En relación con el artículo 8, los Estados Parte no podrán realizar notificaciones o traslados de documentos judiciales directamente, *por medio de sus agentes diplomáticos o consulares*, en territorio mexicano, salvo que el documento en cuestión deba ser notificado o trasladado a un nacional del Estado de origen, siempre que tal procedimiento no sea contrario a normas de orden público o garantías individuales.

V. En relación con el artículo 10, los Estados Unidos Mexicanos no reconocen la facultad de remitir directamente los documentos judiciales [†] a las personas que se encuentren en su territorio conforme a los procedimientos previstos en los incisos a), b) y c); salvo que la Autoridad Judicial conceda, excepcionalmente, la simplificación de formalidades distintas a las nacionales, y que ello no resulte lesivo al orden público o a las garantías individuales. La petición deberá contener la descripción de las formalidades cuya aplicación se solicita para diligenciar la notificación o traslado del documento.<sup>75</sup>

## ENGLISH TRANSLATION

IV. In relation to Article 8, the contracting States shall not be able to effect service of judicial documents directly *through its diplomatic or consular agencies* in Mexican territory, unless the document is to be served upon a national of the State in which the documents originate and provided that such a procedure does not contravene public law or violate individual guarantees.

V. In relation to Article 10, the United Mexican States are opposed to the direct service of documents *through diplomatic or consular agents* to persons in Mexican territory according to the procedures described in subparagraphs a), b) and c), unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.<sup>76</sup>

## FRENCH TRANSLATION

IV. Se référant à l'article 8, les États contractants ne pourront pas faire procéder directement, *par les soins de leurs agents diplomatiques ou consulaires* sur le territoire mexicain, à des significations ou notifications d'actes judiciaires sauf si l'acte doit être signifié ou notifié à un citoyen de l'État d'origine et à condition que la procédure ne contrevienne pas à l'ordre public ni aux garanties individuelles.

V. Se référant à l'article 10, les États Unis Mexicains ne reconnaissent pas la faculté d'adresser directement les actes judiciaires [†] aux personnes se trouvant sur leur territoire conformément aux procédures prévues aux paragraphes a), b), et c), sauf si autorité judiciaire accepte, de façon exceptionnelle, la simplification de formalités différentes des formalités nationales et que ceci ne contrevienne pas à l'ordre public ni aux garanties individuelles. La demande devra contenir la description des formalités dont l'application s'impose pour exécuter la signification ou la notification de l'acte.<sup>77</sup>

75. Accession (with Declarations) of Mexico, *supra* note 3, at 319 (emphasis added).

76. *Id.* at 321 (emphasis added).

77. *Id.* at 322 (emphasis added).

The parallel phrases highlighted above in Paragraph IV demonstrate what one would expect to find. The Spanish phrase “*por medio de sus agentes diplomáticos o consulares*” is translated into English (“through its diplomatic or consular agencies [sic]”)<sup>78</sup> and French (“*par les soins de leurs agents diplomatiques ou consulaires*”), where the translated phrases appear in roughly the same position in Paragraph IV of the translations.

The highlighted portion of Paragraph V above tells a different story, however. In Paragraph V, the only place where the phrase “through diplomatic or consular agents” appears in any language is in the English translation. The bracketed daggers [†] in Paragraph V of the Spanish text and French translation above show where one would expect to find phrases in Spanish (*por medio de agentes diplomáticos o consulares*) and French (*par les soins de agents diplomatiques ou consulaires*) corresponding to the English. The corresponding Spanish and French phrases do not appear there, or anywhere in the Spanish text or French translation of Paragraph V. In short, the English translation is the only place where the modifier “through diplomatic or consular agents” appears in Paragraph V of Mexico’s declarations concerning Article 10 of the Hague Service Convention.

The side-by-side presentation of Paragraphs IV and V of the Mexican declarations also suggests how the phrase “through diplomatic or consular agents” may have been inserted in the English translation of Paragraph V. Almost identical language does appear in Paragraph IV, and it seems the eye of the English translator may have mistakenly caught this phrase in Paragraph IV and inserted it again in Paragraph V. Thus, the repetition of “through diplomatic or consular agents” in Paragraph V may be a case of what textual critics might call dittography.<sup>79</sup>

From a legal perspective, the importance of this translation error is that when a conflict arises between an authentic or offi-

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78. A better translation for the Spanish *agentes* would be “agents” rather than “agencies.” See THE OXFORD SPANISH DICTIONARY, *supra* note 2, at 23, 889.

79. See EMANUEL TOV, TEXTUAL CRITICISM OF THE HEBREW BIBLE 240 (2d rev. ed. 2001) (“Dittography, ‘writing twice’ (δύτως, ‘twice,’ and γραφή, ‘writing’), is the erroneous doubling of a letter, letters, word, or words.”); LÉON VAGANAY & CHRISTIAN-BERNARD AMPHOUX, AN INTRODUCTION TO NEW TESTAMENT TEXTUAL CRITICISM 53 (Jenny Heimerdinger trans., 2d ed. 1991) (characterizing dittography as “most common error” in New Testament textual criticism); see also 4 THE OXFORD ENGLISH DICTIONARY 881 (2d ed. 1989) (defining dittography as “Double writing; the unintentional repetition of a letter or word, or series of letters or words, by a copyist.”).

cial *text* and a non-authentic *translation*, such as a “courtesy translation” or even an “official translation,” the authentic or official *text* must prevail. “Whether prepared by the contracting parties themselves, by an international body, or by a single contracting or non-contracting State, [official translations] have in principle no value at the international level and in case of divergence between authentic or official texts and official translations the former must automatically prevail.”<sup>80</sup> Thus, “if a treaty provides for two authentic languages, it is not permissible to interpret it in case of dispute by reference to a third, non-authentic text.”<sup>81</sup>

Article 33 of the Vienna Convention on the Law of Treaties reinforces this point.<sup>82</sup> That provision, which governs the interpretation and reconciliation of treaties “authenticated in two or more languages,” only applies when *both* language versions have the status of authentic texts.<sup>83</sup> In drafting the Vienna Convention, the International Law Commission (ILC) did not “think that it would be appropriate to formulate any general

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80. Jean Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. INT'L L. 72, 136 (1961).

81. 1 OPPENHEIM'S INTERNATIONAL LAW § 634, at 1283 n.4 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (citing *X v. Federal Republic of Germany* 28 I.L.R. 201, 207 (1959)); see *X c/ République Fédérale d'Allemagne*, Requête No. 222/56, 1958-1959 Y.B. Eur. Conv. on H.R. 344, 351 (Eur. Comm'n H.R. 1959), translated in 28 I.L.R. 201, 207 (1963) (“As to the applicant’s argument based on the German text of Article 26 of the Convention, it is enough to point out that the only authoritative texts are the English and French texts of the Convention . . . . Consequently, the Commission can only base itself on the English and French texts in interpreting and applying the Convention.”); *Flegenheimer Case*, 14 R. Int'l Arb. Awards 327, 382 (Ital.-U.S. Conciliation Comm'n 1958) (“It cannot be denied that the interpretation of the text of a treaty can be made only by using the versions that have been declared to be authenticated originals by the Treaty itself.”).

82. Vienna Convention, *supra* note 55, art. 33. “Although the United States is not a party to the Vienna Convention, it regards the substantive provisions of the Vienna Convention as codifying the international law of treaties.” *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 638 n.9 (5th Cir. 1994) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, introductory note, at 145); see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, introductory note, at 145. The Second Circuit has “treat[ed] the Vienna Convention as an authoritative guide to the customary international law of treaties.” *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 309 (2d Cir. 2000); see also *Busby v. State*, 40 P.3d 807, 813–14 (Alaska Ct. App. 2002).

83. See Vienna Convention, *supra* note 55, art. 33 (“Except where a particular text prevails in accordance with paragraph 1, when a comparison of the *authentic texts* discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”) (emphasis added).

rule regarding recourse to non-authentic versions, though these are sometimes referred to for such light as they may throw on the matter.”<sup>84</sup> The ILC deleted a draft rule “concerning the possible use of non-authentic texts when all other methods of interpretation had failed to yield a meaning . . . on the grounds that it might open the door to too wide a reference to secondary versions of the treaty.”<sup>85</sup>

This principle of treaty interpretation also applies to reservations.<sup>86</sup> Mexico prepared, approved, published, and submitted its declarations in Spanish; the original Spanish version is thus the “authentic text” of those declarations.<sup>87</sup> As noted, Mexico’s

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84. *Commentary on Article 29 of the 1966 Draft Convention*, [1966] 2 Y.B. INT'L L. COMM'N 226, ¶ 9, U.N. Doc. A/CN.4/SER.A/1966/Add.1, *quoted in part in* FRANK ENGELEN, INTERPRETATION OF TAX TREATIES UNDER INTERNATIONAL LAW 397 (2004).

85. *Summary Records of the 770th Meeting*, [1964] 1 Y.B. INT'L L. COMM'N 319, ¶ 57, U.N. Doc. A/CN.4/SER.A/1964, *quoted in part in* ENGELEN, *supra* note 84, at 397.

86. *See* Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion 3/83, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 62 (Sept. 8, 1983) (“Reservations must of necessity . . . be interpreted by reference to relevant principles of general international law and the special rules set out in the Convention itself.”); 1 OPPENHEIM’S INTERNATIONAL LAW, *supra* note 81, § 614, at 1242 (“A treaty and any reservations to it have to be interpreted together, and reservations themselves are therefore subject to interpretation in accordance with international law.”).

87. *See* 1 European Inter-State Co-operation in Criminal Matters XXVI (Eckehart Müller-Rappard & M. Cherif Bassiouni eds., 2d ed. 1993) (“The only authentic text of declarations and reservations being the text in the language in which they were originally formulated, special mention is made of translations.”).

According to the Ministry of Foreign Affairs of the Netherlands, “All incoming instruments, letters and notes concerning these [Hague] Conventions should be in English or French (the authentic languages of the Conventions), or should be accompanied by a translation into English or French.” Letter from Gerard Limburg to author, *supra* note 69, at 1. The Hague Conference apparently takes this a step further, stating that “the relevant authentic texts of the declarations are those submitted in English or French, not those submitted in the language of the State making the declarations (in this case Spanish).” Letter from Christophe Bernasconi, First Secretary, Hague Conference on Private Int’l Law, to G.H.W.M. [Gerard] Limburg, Hoofd Afdeling Verdragen (DJZ/VE), Ministerie van Buitenlandse Zaken Dienst Juridische Zaken [Head, Treaties Div., Ministry of Foreign Affairs, Legal Affairs Service] (Oct. 30, 2009) (on file with author); *see also* E-mail from Christophe Bernasconi, First Secretary, Hague Conference on Private Int’l Law, to author (Nov. 2, 2009, 04:55 CST) (on file with author).

For the reasons stated above in text, this Article disagrees that “the relevant authentic texts of the declarations are those submitted in English or French,” rather than the original Spanish. Letter from Christophe Bernasconi to author, *supra*. Because Mexico prepared and approved its declarations in Spanish, the original Spanish text is the “authentic text” of those declarations, regardless of whether the Ministry of Foreign Affairs of Mexico also prepared the English courtesy translation of

declaration with respect to Article 10 of the Hague Service Convention operates as a reservation against the use of Article 10's alternative methods of service.<sup>88</sup> Thus, in interpreting Mexico's declaration, the original Spanish text must prevail over the English translation. The original Spanish declaration with respect to Article 10 does not limit Mexico's objection to alternative methods of service of process "through diplomatic or consular agents." Mexico's objection is instead an across-the-board objection to any use of the Article 10 alternative channels of service. United States courts should read the English translation of Mexico's declaration with respect to Article 10 of the Hague Service Convention without any reference to diplomatic or consular agents, as follows: "In relation to Article 10, the United Mexican States are opposed to the direct service of documents . . . to persons in Mexican territory according to the procedures described in sub-paragraphs a), b) and c) . . . ."

#### IV. UNITED STATES AUTHORITIES MISINTERPRETING MEXICO'S OBJECTION TO SERVICE OF PROCESS BY MAIL OR PRIVATE PROCESS SERVER

Unfortunately, several United States courts and other authorities have been misled by the error in the English translation of Mexico's Article 10 declaration. For example, until October 2009, the U.S. Department of State circular on judicial assistance in Mexico stated: "There is no provision in Mexico law specifically prohibiting service by international registered mail, if enforcement of a judgment in Mexico courts is not anticipated."<sup>89</sup> The circular similarly stated that "[t]here is no provi-

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them, *see supra* note 69. If anything, the designation of the English version as a "courtesy" translation underscored that the original Spanish text should prevail over the English translation. *See supra* note 80 and accompanying text.

88. *See supra* note 55 and accompanying text.

89. *International Judicial Assistance Mexico* (pre-Oct. 2009), *supra* note 11. A district court cited this circular in noting that "Mexico does not appear to have a prohibition on service by registered mail," but that such service "will not get the plaintiff a judgment that is enforceable in Mexico." *NSM Music, Inc v. Villa Alvarez*, No. 02 C 6482, 2003 WL 685338, at \*2 & n.1 (N.D. Ill. Feb. 25, 2003) (holding service invalid for other reasons); *see also* Kenneth B. Reisenfeld, "The Usual Suspects": *Six Common Defense Strategies in Cross-Border Litigation*, in *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE* 75, 77 & 87 nn.6-7 (Barton Legum ed., 2005) ("Mexico . . . does not prohibit service of process by registered international mail as long as the judgment is not to be enforced in Mexico.") (citing U.S. Dep't of State, *Circular: International Judicial Assistance*, [http://www.travel.state.gov/law/judicial\\_assistance.html](http://www.travel.state.gov/law/judicial_assistance.html)).

sion in Mexican law specifically prohibiting service by agent, if enforcement of a judgment in Mexico courts is not anticipated.”<sup>90</sup> A few years ago, another State Department circular listed Mexico among the countries that objected to service by mail,<sup>91</sup> but the Department removed Mexico from the list in 2007.<sup>92</sup> The State Department’s *Foreign Affairs Manual* nonetheless listed Mexico as objecting to service by mail.<sup>93</sup> The State Department revised its circular on judicial assistance in Mexico in October 2009 to acknowledge that “Mexico’s accession to the Hague Service Convention indicates that service through the Mexico Central Authority is the exclusive method available.”<sup>94</sup>

Courts have shown similar confusion due to the mistranslation of Mexico’s Article 10 declaration. In 2002, a federal district court in Texas upheld substituted service on a Mexican defendant through the Secretary of State of Texas because “the Secretary of State properly forwarded service of process on [the defendant] via registered mail.”<sup>95</sup> The court noted the plaintiff’s contention that “Mexico did not make an outright objection to Article 10(a), which allows service of process by mail.”<sup>96</sup>

In 2003, a New York trial court noted that “the declaration by Mexico regarding Article 10 addresses only direct service of documents *through diplomatic or consular agents* to persons in Mexican territory, and is silent as to any other form of service

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90. *International Judicial Assistance Mexico* (pre-Oct. 2009), *supra* note 11.

91. See *Saysavanh v. Saysavanh*, 2006 UT App 385, ¶ 18, 145 P.3d. 1166, 1170 (quoting U.S. Dep’t of State, *Circular: Service of Legal Documents Abroad*, [http://travel.state.gov/law/info/judicial/judicial\\_680.html](http://travel.state.gov/law/info/judicial/judicial_680.html) (last visited by the court Sept. 18, 2006) as “stating that ‘[s]ervice by registered mail should not be used [in Mexico], which notified the treaty repository that it objected to the method described in Article 10(a) (postal channels)’”) (alteration in original).

92. A review of archived copies of the State Department’s *Service of Legal Documents Abroad* circular at the Internet Archive, <http://www.archive.org>, shows that Mexico was removed from the list between August 2 and October 11, 2007. Compare U.S. Dep’t of State, *Circular: Service of Legal Documents Abroad*, [http://web.archive.org/web/20070802022500/http://www.travel.state.gov/law/info/judicial/judicial\\_680.html](http://web.archive.org/web/20070802022500/http://www.travel.state.gov/law/info/judicial/judicial_680.html) (Aug. 2, 2007) (listing Mexico) (last visited Nov. 1, 2009), with U.S. Dep’t of State, *Circular: Service of Legal Documents Abroad*, [http://web.archive.org/web/20071011205612/http://travel.state.gov/law/info/judicial/judicial\\_680.html](http://web.archive.org/web/20071011205612/http://travel.state.gov/law/info/judicial/judicial_680.html) (Oct. 11, 2007) (omitting Mexico) (last visited Nov. 1, 2009).

93. 7 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, *supra* note 46, § 953.5(c).

94. *International Judicial Assistance Mexico* (Oct. 2009), *supra* note 11 (emphasis removed).

95. *Int’l Transactions, Ltd. v. Embotelladora Agral Regionmontana S.A. de C.V.*, 277 F. Supp. 2d 654, 663 (N.D. Tex. 2002).

96. *Id.* at 662.

under Article 10[b] and [c] of the Hague Convention.”<sup>97</sup> The court concluded that because “Mexico did not expressly prohibit the private service of process through a privately-retained agent/attorney in its declaration regarding Article 10 of the Hague Convention, . . . such service was proper under Article 10[b] or [c] of the Hague Convention.”<sup>98</sup> A federal court in New York reached the same conclusion in 2008 with respect to service by mail under Article 10(a).<sup>99</sup> A California court of appeals similarly observed that “Mexico apparently does not prohibit service on a person by registered mail.”<sup>100</sup> The California court found service ineffective, however, because notice by ordinary mail and telephone were insufficient under both California and Mexican law.<sup>101</sup>

In a 2006 decision, a Northern District of Illinois bankruptcy court noted that “the parties agreed that the Mexican government has never indicated any objection to service on its citizens by mail from a foreign country,” so the court held “that service by registered mail is sufficient.”<sup>102</sup> The same year, however, the Utah Court of Appeals, citing the conflicting State Department circulars, noted that it was “unclear . . . whether Mexico is categorically opposed to service via postal channels from individuals or entities that are not diplomatic or consular agents.”<sup>103</sup>

The 2006 Wisconsin Court of Appeals decision in *Griffin v. Mark Travel Corp.*<sup>104</sup> is particularly noteworthy because the Mexican defendant in that case noticed the error in the English

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97. *Casa de Cambio Delgado, Inc. v. Casa de Cambio Puebla, S.A. de C.V.*, 763 N.Y.S.2d 434, 437 (N.Y. Sup. Ct. 2003) (emphasis added). Service by mail was not at issue in *Casa de Cambio*. *Id.*

98. *Id.* at 438 (citations omitted).

99. *UNITE Nat'l Ret. Fund v. Ariela, Inc.*, No. 06-cv-0055 (BSJ), 2008 U.S. Dist. LEXIS 66717, at \*12–13 (S.D.N.Y. June 24, 2008). The plaintiffs also served the Mexican defendants through Mexico's Central Authority. *Id.* at \*14–15.

In 2001, another federal court in New York noted that Mexico is a party to the Hague Service Convention and that “service of process by registered mail on a foreign defendant located in a signatory country is permissible.” *Hein v. Cuprum, S.A. de C.V.*, 136 F. Supp. 2d 63, 70 (N.D.N.Y. 2001). The record did not disclose whether plaintiff had served defendant by registered mail or ordinary mail, so the court held that service was perfected if made by registered mail and allowed plaintiff 60 days to perfect service by registered mail if it had not already done so. *Id.* at 71. The *Hein* court did not mention Mexico's declarations, however. *See id.* at 70–71.

100. *In re Alyssa, F.*, 6 Cal. Rptr. 3d 1, 5 (Cal. Ct. App. 2003) (dictum).

101. *Id.* at 5–6.

102. *In re GGS Liquidation, Inc.*, 351 B.R. 529, 601 (Bankr. N.D. Ill. 2006).

103. *Saysavanh v. Saysavanh*, 2006 UT App 385, ¶ 18, 145 P.3d. 1166, 1170.

104. 2006 WI App 213, 724 N.W.2d 900.

courtesy translation and brought it to the Wisconsin court's attention.<sup>105</sup> The defendant submitted a certified English translation taken from the *Decreto Promulgatorio* published in the Mexican *Diario Oficial* on February 16, 2001, along with a copy of the Spanish original.<sup>106</sup> The plaintiffs, on the other hand, submitted a copy of the consular notification regarding Mexico's accession that counsel received from the Ministry of Foreign Affairs of the Netherlands, which contained the English courtesy translation, as well as a copy of the same English translation from the web site of the Hague Conference on Private International Law.<sup>107</sup> The court of appeals held that there was "no evidence in the Record that the purported convention-objections set out in the February 16, 2001, issue of the Bulletin of the Constitutional Government of the United Mexican States submitted to the trial court by [defendant], were filed with the Netherlands's ministry."<sup>108</sup> Thus, the court refused to consider the Mexican defendant's translation argument.

In fact, the Mexican defendant had pointed out in its reply brief that the *Decreto Promulgatorio* it had submitted to the trial court stated that Mexico's Spanish declarations had been deposited with the Ministry of Foreign Affairs of the Netherlands,<sup>109</sup> but this apparently did not move the court. The copy of

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105. See Brief of Defendant-Appellant at 16, 18–23, *Griffin v. Mark Travel Corp.*, 2006 WI App 213, 724 N.W.2d 900 (No. 2005AP2298), available at <http://libcd.law.wisc.edu/~wb/will0115/4877879c.pdf>.

106. Defendant-Appellant's Appendix, *supra* note 71, at App. 199–218 (certified English trans.), App. 270–88 (Spanish text, with apostille).

107. *Id.* at App. 290–330. The relevant English translations appear at pages App. 294 and App. 317.

108. *Griffin*, 2006 WI App 213, ¶ 15, 724 N.W.2d at 907.

109. *Decreto Promulgatorio*, *supra* note 3, at 8. The English translation submitted in *Griffin* stated:

The adhesion instrument, signed by the Federal Executive on June 2 of 1999, was deposited before the Ministry of Foreign Affairs of the Netherlands, on November 2 of the same year, according to the provisions in article 26 [sic] of the Agreement on the Notification or Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters, *with the afore indicated Declarations*.

Defendant-Appellant's Appendix, *supra* note 71, at App. 202 (emphasis added), quoted in Reply Brief of Defendant-Appellant at 9, *Griffin v. Mark Travel Corp.*, 2006 WI App 213, 724 N.W.2d 900 (No. 2005AP2298), available at <http://libcd.law.wisc.edu/~wb/will0115/487787a1.pdf>. The mistaken reference to Article 26 appears in the original Spanish text, and is accurately translated in English; the reference should be to Article 28 of the Convention. Article 26 addresses the deposit of instruments of ratification, while Article 28 addresses the deposit of instruments of accession. See Hague Service Convention, *supra* note 1, arts. 26, 28. Mex-



Mexico's accession document published in the *United Nations Treaty Series* (U.N.T.S.) confirms that the Spanish text of Mexico's declarations in the *Decreto Promulgatorio* is identical to the Spanish text of the declarations received by the Ministry of Foreign Affairs of the Netherlands and registered with the United Nations,<sup>110</sup> but the U.N.T.S. version escaped notice in *Griffin*. Unfortunately, *Griffin* represents a missed opportunity to correct the confusion created by the erroneous English translation of Mexico's Article 10 declaration.<sup>111</sup>

As this brief survey shows, the mistranslation of Mexico's Article 10 declaration has led to confusion among litigants, state and federal courts, and even within the U.S. State Department. To prevent further errors, a permanent solution is necessary. Courts in the United States need not wait for a permanent solution, however.

## V. PERMANENT AND INTERIM SOLUTIONS

The only satisfactory permanent solution to the mistranslation of Mexico's Article 10 declaration is a corrected English translation. This might be accomplished simply through a rectification to the contracting States.

The Foreign Ministry of the Netherlands, as depositary for all of the Hague conventions, issues rectifications of errors in depositary notifications, including errors in declarations, each

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ico's instrument was an instrument of accession. See Accession (with Declarations), *supra* note 3, at 318; Depositary Notification (Nov. 30, 1999), *supra* note 68.

110. Compare Accession (with Declarations) of Mexico, *supra* note 3, at 319–20, with *Decreto Promulgatorio*, *supra* note 3, at 7–8.

111. It should be noted that the plaintiffs in *Griffin* also provided formal service through Mexico's Central Authority. See Brief of Respondent at 21–22, *Griffin v. Mark Travel Corp.*, 2006 WI App 213, 724 N.W.2d 900 (No. 2005AP2298), available at <http://libcd.law.wisc.edu/~wb/will0115/4877879f.pdf>. Formal service through Mexico's Central Authority was eventually successful, but the process took over a year. See E-mail from Rick Hamilton, Director of Operations, Process Forwarding International, to author (Feb. 10, 2009, 11:44 CST) (on file with author) (indicating service of process on Mar. 20, 2006); Affidavit of Rick Hamilton, Director of Operations, Process Forwarding International (May 24, 2005), reprinted in Defendant-Appellant's Appendix, *supra* note 71, at App. 163–69 (indicating delivery of request for service to Mexican Central Authority in January 2005); see also Dirección General de Asuntos Jurídicos, Secretaría de Relaciones Exteriores de México, *Exhortos y Cartas Rogatorias Internacionales: Consulta via Internet*, <https://webapps.sre.gob.mx/rogatorias/> (last visited Nov. 1, 2009) (click “Continuar” button; then enter “David Griffin” in the “Promovente” field and click “Buscar”; then click “mostrar” under “Ver detalle”) (showing details of service returned to U.S. on June 15, 2006).

year.<sup>112</sup> According to the Foreign Ministry, however, it “cannot simply rectify the English text concerned on its own initiative. . . . In this case a request for rectification should come from the Mexican authorities, after which a rectification from the depositary will automatically follow.”<sup>113</sup> In response to a request for comment on a prepublication draft of this Article, the Legal Adviser of the Ministry of Foreign Affairs of Mexico indicated that the Foreign Ministry of Mexico had noted the translation conflict and had “taken the first steps toward its modification. The new text in English of Mexico’s declarations concerning the Convention will be published in the near future.”<sup>114</sup>

A rectification of the English courtesy translation could simply strike the words “through diplomatic or consular agents”

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112. See, e.g., Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention on the Law Applicable to Traffic Accidents (The Hague, 4 May 1971) Notification Pursuant to Article 21 of the Convention*, Depositary Notification No. 1/2008 (Feb. 15, 2008), available at <http://www.minbuza.nl/binaries/verdragen/depositaire-notificaties/2008/ipr-19-2008-01-19-bn.pdf> (rectification of declaration of Serbia); Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (The Hague, 5 October 1961) Notification Pursuant to Article 15 of the Convention*, Depositary Notification No. 3/2008 (Feb. 15, 2008), available at <http://www.minbuza.nl/binaries/verdragen/depositaire-notificaties/2008/ipr-12-2008-03-12-bn.pdf> (rectification of declaration of Serbia); Ministère des Affaires Étrangères du Royaume des Pays-Bas, *Convention Sur la Protection des Enfants et la Coopération en Matière d'Adoption Internationale (La Haye, le 29 mai 1993) Notification Conformément à l'Article 48 de la Convention*, Depositary Notification No. 9/2007 (Aug. 17, 2007), available at <http://www.minbuza.nl/binaries/verdragen/depositaire-notificaties/2007/ipr-33-2007-09-33-bn.pdf> (rectification of incorrect date in French version of earlier depositary notification); Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980) Notification in Accordance with Article 45 of the Convention*, Depositary Notification No. 16/2007 (July 27, 2007), available at <http://www.minbuza.nl/binaries/verdragen/depositaire-notificaties/2007/ipr-28-2007-16-28-bn.pdf> (rectification of incorrect date); Ministry of Foreign Affairs of the Kingdom of the Neth., *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (The Hague, 29 May 1993) Notification in Accordance with Article 48 of the Convention*, Depositary Notification No. 6/2007 (June 27, 2007), available at <http://www.minbuza.nl/binaries/verdragen/depositaire-notificaties/2007/ipr-33-2007-06-33-bn.pdf> (rectification of incorrect date).

113. Letter from Gerard Limburg to author, *supra* note 69, at 2. Mexico used a diplomatic note to transmit a rectification of its declaration regarding the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S.T.S. No. 62, 24 I.L.M. 460, to the depositary, the Organization of American States. See Dep't of Int'l Law, Org. of Am. States, *B-48: Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (Signatories and Ratifications)*, available at <http://www.oas.org/juridico/english/signs/b-48.html> (last visited Nov. 1, 2009).

114. Letter from Joel Hernández to author, *supra* note 69.

from the translation or it could provide a completely new English translation. The latter solution would be preferable. Although the current English translation of Mexico's declaration with respect to Article 10 conveys the meaning of the Spanish original (after the errant "through diplomatic or consular agents" is removed), a more precise translation is possible.<sup>115</sup>

In particular, a revised translation should take into account how key terms in the authentic English text are rendered in the Spanish translation of the Hague Service Convention utilized and published by Mexico. For example, in the Spanish translation of the Convention, Article 10's English term "freedom" is translated *facultad* and "send" is translated *remitir*.<sup>116</sup> Mexico uses both Spanish terms in its declarations.<sup>117</sup> A more precise translation of the first part of Mexico's declaration with respect to Article 10 might be the following: "In relation to Article 10, the United Mexican States do not recognize the freedom to send judicial documents directly to persons in their territory according to the procedures described in subparagraphs a), b) and c) . . ."<sup>118</sup> Thus, a review of the entire English courtesy transla-

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115. Although possible and, I believe, preferable, a completely new English translation is not absolutely essential.

Although all translation is inadequate in the eyes of a linguist, only some of them must be regarded as faulty from the perspective of a lawyer. For lawyers, a faulty translation is an erroneous translation that so deforms the text of origin that it injures those who trust the translation. Mistranslation leads a judge to decide a case differently.

Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT'L L. 41, 56 (2005). As it now stands, the English courtesy translation qualifies as "faulty from the perspective of a lawyer," using Dean Cachard's definition, because "it injures those who trust" it, and it is leading judges to decide cases differently in the United States. *Id.* Simply striking "through diplomatic or consular agents" from the translation would prevent the translation from "injur[ing] those who trust" it, *id.*, and thus would be a sufficient rectification. Because some rectification is in order, however, I offer the observations above in favor of a fresh English translation.

116. Compare Hague Service Convention, *supra* note 1, art. 10(a) ("the freedom to send") with Decreto Promulgatorio, *supra* note 3, at 9, art. 10(a) ("*la facultad de remitir*").

117. See Accession (with Declarations), *supra* note 3, at 319, ¶ V, reprinted *supra* in text accompanying note 75.

118. Perhaps the best English translation to date of Mexico's entire Article 10 declaration appeared in an American Translators Association journal. It reads:

In relation to Article 10, the United Mexican States does not recognize the freedom to directly send judicial documents to persons who are in its territory using the procedures indicated in Subdivisions a), b), and c); unless the Judicial Authority, as an exception, grants a simplification of formalities, different from those of Mexico, and provided that it is not harmful to

tion is in order.

In fact, according to the First Secretary of the Permanent Bureau of the Hague Conference on Private International Law, such a review has been underway for some time.<sup>119</sup> The Hague Conference has been working with the Ministry of Foreign Affairs of Mexico on the issue, and in 2009 the Ministry “revised the Mexican declarations in both English and Spanish, on the basis of detailed suggestions from the Permanent Bureau.”<sup>120</sup> Among the most important changes, “Declaration V has been reformulated so as to clearly express the plain fact that Mexico opposes the alternative channels of Article 10(a), (b) and (c); the previous text referring to ‘diplomatic or consular agents’ and judicial authorities exceptionally granting a simplification has simply been deleted.”<sup>121</sup> Unfortunately, however, “the revised declarations cannot be filed immediately: Due to recent changes to the Mexican Constitution, the revised declarations will need to be approved by the Mexican Senate before they are filed with the Depository. This process is likely to take several months.”<sup>122</sup>

In the meantime, United States courts should not wait for a corrected English translation or revised declarations to be published; the current, erroneous English courtesy translation must yield to the Spanish text of Mexico’s declaration with respect to Article 10. Courts in the United States, and other English-speaking countries party to the Convention, should immediately recognize that the phrase “through diplomatic or consular agents” was mistakenly inserted into the English courtesy translation and interpret Mexico’s declaration with respect to Article 10 of the Convention without reference to that phrase.<sup>123</sup>

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the public order or individual guarantees to do so. The request must contain a description of the formalities whose application is sought for purposes of effecting service of the document.

Madeline Newman Ríos, *Researching Legal Translations: The Whys and Hows*, ATA CHRON., Oct. 2004, at 16, 20–21 (emphasis removed).

119. Letter from Christophe Bernasconi to author, *supra* note 87, at 2.

120. *Id.* at 1–2.

121. *Id.* at 2.

122. *Id.* The “recent changes to the Mexican Constitution” appear to be the 2007 amendments to Article 76, pt. I of the Mexican Constitution. See Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, artículo 76, fracción I, Diario Oficial de la Federación [D.O.] 2, 12 de febrero de 2007 (Mex.) (“Exclusive powers of the Senate are . . . to approve the international treaties and diplomatic conventions that the Federal Executive may sign, as well as its decision to terminate, denounce, suspend, modify, amend, withdraw reservations and formulate interpretive declarations concerning the same.”) (emphasis added) (author’s translation).

123. See discussion *supra* Part II. Alternatively, a court could follow one of the

Interpreted properly, Mexico's declaration reflects opposition to service of process via any of the alternative channels in Article 10 of the Convention.

Fortunately, this interim solution is already under way. In *OGM, Inc. v. Televisa, S.A. de C.V.*,<sup>124</sup> a federal district court in California acknowledged the error in the English courtesy translation of Mexico's declaration and quashed service by international registered mail on a Mexican defendant.<sup>125</sup> Citing and quoting a prepublication draft of this article,<sup>126</sup> the court concluded that it was

bound by the original Mexican declaration, not the "courtesy translation," the U.S. State Department's website, or the state or district court decisions relying on the courtesy translation and/or the U.S. State Department's website. Accordingly, based on the original Mexican declaration, the Court concludes that Mexico has in fact objected to service through the alternative methods specified in Article 10 of the Hague Convention, and that service through Mexico's Central Authority is the exclusive method by which Plaintiff can serve Televisa in Mexico.<sup>127</sup>

Because the plaintiffs had already requested service through Mexico's Central Authority, the court properly denied the defendant's request for a Fed. R. Civ. P. 12(b)(5) dismissal and instead simply quashed the service by mail, effectively retaining the case to await the return of a certificate of service from the Central Authority under Article 6 of the Convention.<sup>128</sup>

*OGM v. Televisa* has attracted press attention<sup>129</sup> and is already cited in two treatises.<sup>130</sup> With the Department of State

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translations in note 118, *supra*, or the text accompanying it.

124. No. CV 08-5742-JFW (JCx), 2009 WL 1025971 (C.D. Cal. Apr. 15, 2009).

125. *Id.* at \*2-4.

126. *Id.* at \*2-3 (citing and quoting with approval, *inter alia*, a prepublication version of the present article).

127. *Id.* at \*3 (citations omitted).

128. *Id.* at \*3-4 (quoting *Stevens v. Sec. Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976) and *Umbenhauer v. Woog*, 969 F.2d 25, 30-31 (3d Cir. 1992)). The parties later stipulated to dismiss the case. See Order on Stipulation of Dismissal, *OGM, Inc. v. Televisa, S.A. de C.V.*, No. CV 08-5742-JFW (JCx) (C.D. Cal. July 28, 2009).

129. See Pat Murphy, *U.S. District Court in California Says Mexican Defendants Must Be Served Via Mexico*, LAWYERS USA, Apr. 20, 2009, available at LEXIS, News & Business, Individual Publications Library, Lawyers USA file; Gina Keating, *U.S. Plaintiffs Must Serve Mexicans Via Mexico: Court*, REUTERS, Apr. 16, 2009, <http://www.reuters.com/article/worldNews/idUSTRE53G02A20090417>.

130. See 3 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 21:2 (2d ed. 2009) ("Notwithstanding contradictory materials on the State Department's Web site, service by registered mail to Mexico under Article 10(a) was not permitted, Mexico having objected thereto."); 1 Paul R.

now also recognizing that service through Mexico's Central Authority "is the exclusive method available" under the Hague Service Convention,<sup>131</sup> other courts are sure to follow.

### CONCLUSION

Mexico has objected to the alternative methods of service of process permitted under Articles 8 and 10 of the Hague Service Convention. Unfortunately, a translation mistake obscured the scope of Mexico's objection and has misled courts and others in the United States to permit service by international registered mail or private process server in several cases. Service through Mexico's Central Authority is effectively the exclusive means of service of process abroad on parties in Mexico under the Hague Service Convention. Accordingly, such service of process abroad should proceed through Mexico's Central Authority in accordance with Articles 3 through 7 of the Convention.

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KIESEL ET AL., MATTHEW BENDER PRACTICE GUIDE: CALIFORNIA PRETRIAL CIVIL PROCEDURE § 8.16[2][a] (2009) ("Mexico has in fact objected to service through the alternative methods specified in the Hague Convention, Art. 10. Therefore, service through Mexico's Central Authority is the exclusive method by which a plaintiff can serve a defendant in Mexico.")

131. *International Judicial Assistance Mexico* (Oct. 2009), *supra* note 11.