NOTE

"ANY WAY YOU WANT IT, THAT'S THE WAY YOU NEED IT": RETHINKING SERVICE OF PROCESS IN TEXAS UNDER ARTICLE 10(a) OF THE CONVENTION*[1]

ABSTRACT

This Casenote discusses courts' analysis of the Hague Convention on Service of Process and the implications of their differing views, concluding that allowing service of process by mail in countries that have not objected to this form of service is the most beneficial solution for all parties involved. Part II starts with an analysis of what Article 10(a) of the Convention purports to accomplish. Part III then discusses the prevailing and countervailing views interpreting the Convention. Part IV continues with a case recitation of a recent Texas case that considered the issue and discussed much of the relevant case law in the area, including the federal circuits. Part V discusses a way to expand the analysis and bolsters the argument about finding that service by mail is acceptable. One argument for allowing service of process by mail is to look to the traditional conception of notice. Under this view, a defendant in a country that allows service of process by mail should be on alert that this is how service might be made to him and should not be surprised. A less compelling argument disallows service by mail due to the fact that it might abrogate the sovereignty of the country; if the state has already accepted service by process of mail it does not abrogate the country's sovereignty. Lastly, in Part VI, this Casenote concludes that in the modern age of international litigation, service of process by mail better suits the needs of litigants.

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1. JOURNEY, *Any Way You Want It*, *on* DEPARTURE (Columbia Records 1980).

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I. INTRODUCTION

Federal Rule of Civil Procedure 4(f) discusses international services of process, allowing for service of process to an individual through "any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ["Convention"]."[2] Courts do not agree, however, on how to interpret what methods of service the Convention actually does allow.[3] In some jurisdictions, courts have found that the Convention allows service of process by mail using the theory that treaties should be construed broadly and align with the understanding of the parties.[4] The countervailing view

2. FED. R. CIV. P. 4(f)(1).

3. *See infra* Part II (discussing the prevailing and countervailing views of interpretation regarding Article 10(a) of the Convention); *see also* Menon v. Water Splash, Inc., 472 S.W.3d 28, 32, 35 (Tex. App.—Houston [14th Dist.] 2015), *cert. granted*, 137 S. Ct. 547 (2016) (noting, in the majority, the countervailing view and discussing, in the dissent, the prevailing view).

4. *See, e.g.*, Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004) (holding that Article 10(a) permits service by mail); Research Sys. Corp. v. IPSOS Publicité, 276 F.3d 914, 926 (7th Cir. 2002) (same); Koehler v. Dodwell, 152 F.3d 304, 307–08 (4th Cir. 1998)

holds that the Convention does not allow for service through mail, and service must be done through each country's Central Authority, which is established through the Convention to receive all forms of international process.[5] The Supreme Court and the Texas Supreme Court have not reviewed this issue.[6] Lower courts throughout the United States deal with the debate around Article 10(a) of the Convention consistently.[7] Because Texas has a robust international community and business economy, it is particularly important for the state to choose the right approach when dealing with international defendants.[8] Resolving the debate would aid one of the fundamental purposes of service, which is to notify the parties of the suit.[9] By not resolving this question, the courts are holding open an issue that could prevent proper notice to parties.[10]

This Casenote discusses courts' analysis of the Convention and the implications of their differing views, and concludes that

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(same); Ackermann v. Levine, 788 F.2d 830, 838–39 (2d Cir. 1986) (same).

5. *See, e.g.*, Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 384 (5th Cir. 2002) (holding that Article 10(a) does not permit service of process by mail); Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (same); *Menon*, 472 S.W.3d at 32 (same); Wuxi Taihu Tractor Co. v. York Grp., Inc., No. 01-13-00016-CV, 2014 WL 6792019, at *6 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, pet. denied) (same).

6. *Menon*, 472 S.W.3d at 35.

7. *See generally* Sulzer Mixpac AG v. Medenstar Indus. Co., 312 F.R.D. 329 (S.D.N.Y. 2015) (debating Article 10(a) of the Convention); Amirault v. Ferrari, No. 1:15CV1621, 2015 WL 6870119 (N.D. Ohio Nov. 6, 2015) (same); Lewis v. Madej, No. 15CV2676 DLC, 2015 WL 6442255 (S.D.N.Y. Oct. 23, 2015) (same); Altos Hornos de Mexico, S.A.B. de C.V. v. Rock Res. Ltd., No. 15 CIV. 1671(JSR), 2015 WL 6437384 (S.D.N.Y. Oct. 19, 2015) (same); Stat Med. Devices, Inc. v. HTL-Strefa, Inc., No. 15-20590-CIV, 2015 WL 5320947 (S.D. Fla. Sept. 14, 2015) (same); Tracfone Wireless, Inc. v. Hernandez, 126 F. Supp. 3d 1357, (S.D. Fla. 2015) (same); Geopolymer Sinkhole Specialist, Inc. v. Uretek Worldwide Oy, No. 8:15-cv-1690-T-36JSS, 2015 WL 4757937 (M.D. Fla. Aug. 12, 2015) (same); Icon DE Holdings LLC v. Eastside Distrib., No. 14 CIV. 2832(PAE), 2015 WL 4557278 (S.D.N.Y. July 28, 2015) (same); Calix, Inc. v. Alfa Consult, S.A., No. 15-CV-00981-JCS, 2015 WL 3902918 (N.D. Cal. June 24, 2015) (same); Graphic Styles/Styles Int'l LLC v. Men's Wear Creations 99 F. Supp. 3d 519 (E.D. Pa. 2015) (same); *Menon*, 472 S.W.3d at 32, 35 (same).

8. Many cities in Texas have an important relationship with international commerce. For example, Houston created a group within the Mayor's office to oversee issues involving international trade and other issues involving the diversity and internationalism of the city. *See* MAYOR'S OFFICE OF TRADE & INT'L AFF., http://www.houstontx.gov/motia/ [https://perma.cc/HS59-RKP8] (last visited Feb. 29, 2016).

9. *See* FED. R. CIV. P. 4(a)(1)(E) (requiring that a summons notify defendant that failure to appear will result in default judgment); Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, pmbl., Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Convention] (noting that the purpose of the Convention is to notify the addressee in sufficient time).

10. Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331, 341–48 (2014) (addressing the various issues that arise due to the Article 10(a) controversy, including the debate between the prevailing and countervailing views as well as arguing that service via the Central authority is cumbersome and unreliable).

allowing service of process by mail in countries that have not objected to this form of service is probably the most beneficial solution for all parties involved. Part II starts with an analysis of what Article 10(a) of the Convention purports to accomplish. Part III then discusses the prevailing and countervailing views interpreting the Convention. Part IV continues with a case recitation of a recent Texas case that considered the issue and discussed much of the relevant case law in the area, including the federal circuits. Part V discusses a way to expand the analysis and bolsters the argument about finding that service by mail is acceptable. One argument for allowing service of process by mail is to look to the traditional conception of notice.[11] Under this view, a defendant in a country that allows service of process by mail should be on alert that this is how service might be made to him and should not be surprised.[12] A less compelling argument disallows service by mail due to the fact that it might abrogate the sovereignty of the country; if the state has already accepted service by process of mail it does not abrogate the country's sovereignty.[13] Lastly, in Part VI, this Casenote concludes that in the modern age of international litigation, service of process by mail better suits the needs of litigants. *Menon v. Water Splash*, the case on which this Casenote is based, was granted certiorari by the U.S. Supreme Court December 2, 2016. The Court heard oral arguments from the parties March 22, 2017. As of writing, the Court has not published its opinion on the case. [14]

II. THE CONVENTION OF SERVICE OF PROCESS ABROAD

The purpose of the Convention was to establish a way to serve court documents internationally, which proved difficult when nations refused to recognize the foreign plaintiff's right to serve international defendants.[15] The Convention purported to solve this concern. The preamble indicates that the Convention has a broader purpose than establishing a process of service.[16] Rather, the Convention's goal was "to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the

11. *Id.* at 333–38 (discussing traditional notice issues).

12. *See infra* notes 108–12 and accompanying text (noting issues of notice and international service of process).

13. *See infra* Part V.B (addressing international sovereignty issues and service of process).

14. Menon v. Water Splash, Inc., 472 S.W.3d 28, 32, 35 (Tex. App.—Houston [14th Dist.] 2015), cert. granted, 137 S. Ct. 547 (Dec. 2, 2016) (No. 16254).

15. Convention, *supra* note 9, at pmbl.; Larry M. Roth, *An Introduction to the Hague Convention on Service of Process Abroad*, TRIAL ADVOC. Q., Fall 2012 at 13, 13–14.

16. Porterfield, *supra* note 10, at 333–38 (discussing traditional notice issues that gave rise to the need for the Convention).

addressee in sufficient time," and "to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure."[17] The Convention details how signatory nations must establish a Central Authority to handle requests for service, service of documents, and proof of service.[18] The Convention applies only in certain instances.[19] Those seeking to serve process on a party in a nation that is a Convention signatory must follow the procedures in the Convention when: (i) a document must be transmitted for service abroad; (ii) the document is a judicial or extrajudicial document; (iii) the case is a civil or commercial matter; and (iv) the address of the recipient is known.[20]

In order to effect the purpose of the Convention, the treaty purports to create avenues that ease the burden on international litigants.[21] The Convention allows for several types of service, the primary one being through the Central Authority.[22] The Central Authority is established by each nation and can be run by the courts or it can be a freestanding organization that accomplishes these functions.[23] There are many requirements for how the service documents must be prepared.[24] The Central Authority has the right to say that a certain type of service is defective.[25] There is no recourse if the Central Authority fails to serve the defendant.[26] Since the Central Authority causes considerable strife to litigants, it does not seem necessary in a modern era where international mail is generally more reliable than in the past.[27]

The Convention also seems to allow for other forms of service, as long as the other country involved in the suit has not objected to that form of service.[28] However, there has been much debate

17. Convention, *supra* note 9, at pmbl.

18. *Id.* at arts. 2–7.

19. Porterfield, *supra* note 10, at 338.

20. *Id.*

21. Convention, *supra* note 9, at pmbl.

22. Porterfield, *supra* note 10, at 339 (citing Convention, *supra* note 9, arts. 2–6, 8–11).

23. *Id.* at 339–40.

24. *Id.* at 340 (citing Convention, *supra* note 9, arts. 3–5).

25. Convention, *supra* note 9, art. 4.

26. Porterfield, *supra* note 10, at 340.

27. *See generally* Jennifer Scullion, Adam T. Berkowitz & Charles Sanders McNew, *International Litigation: Serving Process Outside the US*, PRAC. L. COMPANY (2011), http://www.proskauer.com/files/News/5b04a3dd-34ab-40f4-a64f-3bc52468277a/Presentation/NewsAttachment/db2a546c-d01c-4ce3-815a-43df368f05c8/Proskauer_122011_Practical%20Law%20Company_Scullion_Berkowitz_McNew_International%20Litigation_Serving.pdf (noting common issues and procedures in dealing with the Convention, including the fact that delivery through the Convention's Central Authority could take up to six months).

28. Convention, *supra* note 9, arts. 5, 8–11; Porterfield, *supra* note 10, at 341.

about what other types of service the Central Authority might allow.[29] Particularly at issue is Article 10 of the Convention due to its inconsistent language.[30] The text reads:

> Provided the State of designation 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.[31]

Courts have been in disagreement about the meaning of the different verb choices: "send" versus "serve."[32] The prevailing view is that the different verbs should be read to have the same meaning, and that service by mail is always appropriate under the Convention as long as the nation allows for such service within its borders.[33] The countervailing view finds the difference in verb choice to be noteworthy. Courts using this method of analysis hold that "send" does not have the same meaning as "service," thus disallowing service of process by mail under the Convention.[34] This

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29. *See generally* Sulzer Mixpac AG v. Medenstar Indus. Co., 312 F.R.D. 329 (S.D.N.Y. 2015) (debating Article 10(a) of the Convention); Amirault v. Ferrari, No. 1:15CV1621, 2015 WL 6870119 (N.D. Ohio Nov. 6, 2015) (same); Lewis v. Madej, No. 15cv2676 (DLC), 2015 WL 6442255 (S.D.N.Y. Oct. 23, 2015) (same); Altos Hornos de Mexico, S.A.B. de C.V. v. Rock Res. Ltd., No. 15 Civ. 1671(JSR), 2015 WL 6437384 (S.D.N.Y. Oct. 19, 2015) (same); Stat Med. Devices, Inc. v. HTL-Strefa, Inc., No. 15-20590-CIV, 2015 WL 5320947 (S.D. Fla. Sept. 14, 2015) (same); Tracfone Wireless, Inc. v. Hernandez, 126 F. Supp. 3d 1357 (S.D. Fla. 2015) (same); Geopolymer Sinkhole Specialist, Inc. v. Uretek Worldwide Oy, No. 8:15-cv-1690-T-6JSS, 2015 WL 4757937 (M.D. Fla. Aug. 12, 2015) (same); Icon DE Holdings LLC v. Eastside Distrib., No. 14 Civ. 2832(PAE), 2015 WL 4557278 (S.D.N.Y. July 28, 2015) (same); Calix, Inc. v. Alfa Consult, S.A., No. 15-cv-00981-JCS, 2015 WL 3902918 (N.D. Cal. June 24, 2015) (same); Graphic Styles/Styles Int'l LLC v. Men's Wear Creations 99 F. Supp. 3d 519 (E.D. Pa. 2015) (same); Menon v. Water Splash, Inc., 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015), *cert. granted*, 137 S. Ct. 547 (2016) (same).

30. *Menon*, 472 S.W.3d at 31–32.

31. Convention, *supra* note 9, art. 10 (emphasis added); *Menon*, 472 S.W.3d at 31.

32. For cases that describe the prevailing view, see, e.g., Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004) (holding that Article 10(a) permits service by mail); Research Sys. Corp. v. IPSOS Publicité, 276 F.3d 914, 926 (7th Cir. 2002) (same); Koehler v. Dodwell, 152 F.3d 304, 307–08 (4th Cir. 1998) (same); Ackermann v. Levine, 788 F.2d 830, 838–39 (2d Cir. 1986) (same).

33. *See infra* Part III.A (discussing the prevailing view).

34. *See infra* Part III.B B (discussing the countervailing view).

debate has no clear resolution as it pertains to lawsuits filed in the United States, as the U.S. Supreme Court has not ruled on its interpretation of Article 10 of the Convention.[35]

Modern litigants routinely have international components to their lawsuits. Because of this, the interpretation of the Convention is of utmost importance.[36] The countervailing view creates many issues for litigants due to the often unnecessary transaction costs of utilizing the Central Authority.[37] Many courts look upon the prevailing view with favor because the Central Authority has not addressed many of the important issues raised by the Convention.[38] Service through the Central Authority can add up to six months to the judicial process.[39] Because of these many difficulties, it might be time to modernize the interpretation of the Convention and allow for service of process by mail, a way to avoid the hassle of the Central Authority without creating a need for a new treaty.[40]

III. THE PREVAILING AND COUNTERVAILING VIEWS

To gain an appreciation for the different viewpoints at stake, this Casenote now turns to the two primary views regarding the interpretation of Article 10(a). The so-called prevailing view uses tenets of treaty interpretation in order to allow for service of process by mail.[41] The countervailing view uses statutory interpretation to reach the opposite conclusion.[42] The prevailing view more clearly reflects the modern litigants' relationship to the Convention, while the countervailing view forces litigants to utilize an out-of-date system.[43]

A. The Prevailing View

Under the prevailing view, courts in a variety of U.S. jurisdictions have consistently held that service of process by mail

35. *Menon*, 472 S.W.3d at 35–36 (Christopher, J., dissenting).

36. *See infra* Part V.B (addressing international sovereignty issues and service of process).

37. *See infra* Part III.B (discussing the countervailing views and issues resulting from this interpretation).

38. Porterfield, *supra* note 10, at 344–47 (arguing that service via the Central Authority is cumbersome and unreliable).

39. *Id.* at 345.

40. *See Menon* 472 S.W.3d at 34–36 (Christopher, J., dissenting) (utilizing existing binding precedent in Texas state courts to conclude that the Convention allows for service of process by mail).

41. *Id.* at 36–39.

42. *Id.* at 33 (majority opinion).

43. *Id.* at 44–48 (Christopher, J., dissenting).

is permitted under the Convention.[44] The Supreme Court maintains that compliance with the provisions of the Convention is mandatory, but does not provide guidance as to the interpretation of Article 10(a).[45] The issue presented in these instances is how to interpret the use of "send" instead of "service" in Article 10(a).[46] These cases find that "send" indicates that service of process by mail is acceptable.[47]

As laid out by the *Menon* dissent, the prevailing view uses a combination of approaches to determine the meaning of the treaty and emphasizes a broad interpretation.[48] The dissent incorporates the prevailing view by using binding precedent on the Fourteenth Court of Appeals in Houston, Texas.[49] In *Menon*, the Court considers whether or not service of process by mail is acceptable between a Canadian defendant and an American plaintiff suing in Texas.[50] Canada and Texas both recognize service by mail.[51] There are many cases that determined under Article 10(a) and the prevailing view's analysis that service of process by mail is an acceptable method of service between the nations.[52]

B. The Countervailing View

The countervailing view holds that the use of "send" instead of "service" should not be read to allow for an entirely different method of service of process.[53] This view utilizes statutory interpretation as opposed to treaty-based interpretation, noting

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44. *See, e.g.*, Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004) (holding that Article 10(a) permits service by mail); Research Sys. Corp. v. IPSOS Publicité, 276 F.3d 914, 926 (7th Cir. 2002) (same); Koehler v. Dodwell, 152 F.3d 304, 307–08 (4th Cir. 1998) (same); Ackermann v. Levine, 788 F.2d 830, 838–39 (2d Cir. 1986) (same).

45. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699–700 (1988).

46. *Menon*, 472 S.W.3d at 31–32.

47. *Brockmeyer*, 383 F.3d at 802; *Research Sys. Corp.*, 276 F.3d at 926; *Koehler*, 152 F.3d at 307–08; *Ackermann*, 788 F.2d at 838–39.

48. *See infra* Part IV.C (discussing the dissent's analysis of Article 10(a)).

49. *Menon*, 472 S.W.3d at 36, 44–45, 48 (Christopher, J., dissenting).

50. *Id.* at 30 (majority opinion).

51. Tex. R. Civ. P. 106; *Canada—Central Authority & Practical Information*, HCCH, http://www.hcch.net/index_en.php?Act=authorities.details&aid=248 [https://perma.cc/78PS-25FH] (last updated Dec. 19, 2016).

52. *See, e.g.*, Cook v. Toidze, 950 F. Supp. 2d 386, 394–95 (D. Conn. 2013); Mitchell v. Theriault, 516 F. Supp. 2d 450, 455 (M.D. Pa. 2007); Heredia v. Transp. S.A.S., Inc., 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000); Randolph v. Hendry, 50 F. Supp. 2d 572, 578 (S.D. W. Va. 1999); Taft v. Moreau, 177 F.R.D. 201, 204 (D. Vt. 1997); Cantara v. Peeler, 267 A.D.2d 997, 997 (N.Y. App. Div. 1999).

53. *See, e.g.*, Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 384 (5th Cir. 2002) (holding that Article 10(a) does not permit service of process by mail); Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (same); *Menon*, 472 S.W.3d at 32 (same); Wuxi Taihu Tractor Co. v. York Grp., Inc., No. 01-13-00016-CV, 2014 WL 6792019, at *6 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, pet. denied) (same).

"'[a]bsent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.'"[54] Courts expounding the countervailing view in these cases interpret the Convention's use of a different verb as a reference to an entirely different action—not referring to service of process at all.[55] Under this line of cases, the Convention would not have allowed for another method of service of process because it would disrupt the creation of the Central Authority.[56]

IV. ANALYSIS OF *MENON V. WATER SPLASH, INC.*

In order to gain a greater insight into the issue at hand, this Casenote turns to a discussion of a state appellate opinion written by the Fourteenth Court of Appeals in Houston, Texas. Houston is involved in international commerce and continually attempts to increase its international footprint.[57] The controversy at hand arose between Tara Menon, a citizen of Canada residing in Quebec, and Water Splash, a Delaware corporation with their principle place of business in Champlain, New York.[58] Water Splash attempted to serve Menon, an international defendant, by mail to initiate suit and Menon argued that the service of process was defective and the declaratory judgment against her should be reversed.[59]

A. Factual and Procedural History

Water Splash alleged that while Menon was a regional sales manager for Water Splash, she also took a job with a competitor, South Pool.[60] While working for the competitor, she used Water Splashes' designs to submit a bid to the City of Galveston.[61] Water

54. *Nuovo Pignone, SpA*, 310 F.3d at 384 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

55. *Menon*, 472 S.W.3d at 31–32.

56. *See Nuovo Pignone, SpA*, 310 F.3d at 385 ("It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.").

57. *See* Laura Furr, *Galleria Chamber of Commerce Relaunches to Spur International Business*, HOUS. BUS. J. (Feb. 16, 2016, 1:20 PM), http://www.bizjournals.com/houston/news/2016/02/16/galleria-chamber-of-commerce-relaunches-to-spur.html (indicating that Houston is actively trying to recruit more international businesses). Additionally, on a city-wide level, the Mayor, Sylvester Turner, and his office are attempting to encourage more international business and facilitate the current international companies already in the city. *See* MAYOR'S OFFICE OF TRADE & INT'L AFF., *supra* note 8 ("Houston is a welcoming city, embracing all cultures, ethnicities and nationalities. We are a world-class international city, striving towards an ever more global future.") (quoting Sylvester Turner).

58. *Menon*, 472 S.W.3d at 30.

59. *Id.*

60. *Id.*

61. *Id.*

Splash sued Menon in Galveston, Texas.[62] The plaintiff served process through the mail to Canada.[63] Menon did not respond and the court entered a default judgment against her.[64] Menon initiated an appeal after failing to answer a suit in Galveston County.[65]

B. Majority Opinion

After reviewing the relationship between the parties, the majority opinion discussed the issue of international service. The majority held that the service of process was not effective under the Convention.[66] The court described the Convention and brought up the debate at hand—whether or not Article 10(a) allows mailing because of the use of "send" instead of "service."[67] The court then adopted the countervailing view, using statutory interpretation to show that it was likely that the use of "send" does not automatically create another method of service under the Convention.[68] In this case, Article 10(a) would not justify service of process by mail because Canada has a Central Authority under the Convention.[69] The court spoke to the fact that the Central Authority would encourage notice to be delivered to defendants who are abroad and would not be caught off guard.[70] The court also said that the minority view is the type of analysis that most federal courts in Texas have adopted as well.[71] The majority then concluded that the service by mail was not effective.[72] Accordingly, the court reversed and remanded the case, holding that service was not effective and the default judgment against Menon was not justified.[73]

C. Dissent

Unlike the majority, the dissenting judge found that service of process by mail was effective.[74] First, the dissent analyzed the principles of treaty construction stating these five principles as the guiding principles in order to interpret the statute.[75] These

62. *Id.*
63. Tex. R. Civ. P. 106; *Menon*, 472 S.W.3d at 30.
64. *Menon*, 472 S.W.3d at 30.
65. *Id.*
66. *Id.* at 32.
67. *Id.* at 31 (citing Convention, *supra* note 9, art. 10).
68. *Id.* at 32–33.
69. *Id.* at 31–34.
70. *Id.* at 33–34.
71. *Id.* at 33.
72. *Id.* at 34.
73. *Id.*
74. *Id.* at 34 (Christopher, J., dissenting).
75. *Id.* at 36–37.

principles are: (i) a treaty is not legislation; (ii) a treaty is not construed the same way as legislation; (iii) a treaty instead is construed in the manner of a contract; (iv) a treaty, however, is construed more liberally than a private contract; and (v) such a liberal construction is required to secure equality and reciprocity between the signatories.[76]

After this summary of binding precedent, the dissent applied these five principles of treaty construction.[77] First, the court identified the treaty's purpose.[78] In this case, the purpose was located in the preamble of the treaty and indicated that the purpose of the treaty was to address issues with service abroad.[79] Next, the court identified the signatories' shared expectations.[80] Prior drafts of the Convention contained the understanding that service by mail was permissible.[81] There were also other drafts that would allow for other methods such as telegrams, not limiting postal channels to just registered mail.[82] The delegates of the Convention believed that the Article did allow service by mail.[83] The court then accorded "great weight" to the Executive Branch's interpretation.[84] The Executive Branch has stated that Article 10(a) allows for service by mail.[85] The dissent then accorded considerable weight to the interpretation of the other signatories which note that service by mail is appropriate.[86] The dissent indicated that there was little authority on this matter, but that it seemed to point to a broader interpretation of the treaty, allowing service of process by mail.[87] Finally the dissent considered the analysis of scholars.[88] A review of scholarly writing supported a finding that the Convention allows for service of process by mail.[89] The dissent then analyzed why the majority should not have accepted the countervailing view, based on the argument that it

76. *Id.*
77. *Id.* at 37–39.
78. *Id.* at 37.
79. *Id.* at 39–40.
80. *Id.* at 37–39.
81. *Id.* at 40.
82. *Id.* at 41, 43.
83. *Id.* at 41.
84. *Id.* at 39.
85. *Id.* at 42 (citing Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Admin. Office of U.S. Courts & the Nat'l Ctr. for State Courts (Mar. 14, 1991), *excerpted in* United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan Under Hague Service Convention, 30 I.L.M. 260, 261 (1991)).
86. *Id.* at 39.
87. *Id.* at 43.
88. *Id.* at 43–44.
89. *Id.* at 43.

was probably not the better-reasoned approach due to the above analysis.[90] They also indicated that even though the Fifth Circuit had found the countervailing approach to be persuasive, it was not in binding authority on the state appellate courts.[91]

V. RETHINKING SERVICE OF PROCESS

Two issues become clear when looking at international service of process: (i) the sovereignty of the subject nations and (ii) notice to the defendant allowing them to properly answer in the suit.[92] The majority in *Menon v. Water Splash, Inc.* emphasizes the importance of giving notice to the defendant throughout their analysis.[93] However, as the dissent in *Menon* emphasizes, the assumption that the Central Authority would automatically provide better notice than mail does not necessarily hold water.[94] The effect of this statement is, in a country that has adopted service of process by mail, the defendant should have notice of an impending lawsuit when receiving process documents through the mail.[95] Because of this, the focus of issues regarding international service of process is on protecting the sovereignty of the nations involved.[96] This Casenote first discusses the similarities between interstate service of process and international service.[97] Next, this Casenote analyzes two primary issues in international service of process: notice and sovereignty.[98] This discussion leads to the conclusion that allowing service of process under Article 10(a) not only allows litigants a more accessible form of process, but also does not abrogate national sovereignty rights.[99]

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90. *Id.* at 44.

91. *Id.* at 48.

92. *Id.* at 42, 45 (indicating that the Hague Convention was created in order to provide notice between international defendants and emphasizing the importance of the legislative intent implying sovereignty issues).

93. *Id.* at 31, 33 (majority opinion).

94. *Id.* at 47 (Christopher, J., dissenting) (discussing the contention of the majority that mail is in some way less reliable than other available channels).

95. *Id.* at 47–48.

96. For law review articles that discuss the relationship between service of process and sovereignty concerns, see Harry LeRoy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 534 (1953); Roth, *supra* note 15, at 13; Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 238–39 (2003); Craig R. Armstrong, Comment, *Permitting Service of Process by Mail on Japanese Defendants*, 13 LOY. L.A. INT'L & COMP. L.J. 551, 561–62 (1991).

97. *See infra* Part V.A (discussing intranational service of process in the United States and similarities to international service of process).

98. *See infra* Part V.B (noting the primary concerns with service of process with international litigants: notice and sovereignty).

99. *See infra* Part VI (concluding that interpreting Article 10(a) to allow service of

In order to better understand the sovereignty concerns involving international service of process, the development of service between the states of the United States can serve a contextual and potentially a predictive function.[100] International service is analogous to service within the states in several important ways, including: sovereignty of the states involved, different methods of permissible service among the states and nations, as well as a recognizable trend towards a global community, which mirrors the development of the United States as a more uniform body.[101] By noting the similarities between interstate service of process and international service of process, it becomes clear that a more modern approach to international service is to remove some of the barriers of the Convention and allow service of process by mail under Article 10(a).[102]

Similarly to service between international bodies, states were concerned with other states being able to exercise power over them.[103] Initially, in American jurisprudence, the courts found that states only had power over their citizens or those within their territory and that service of process out-of-state was necessarily abrogating the sovereignty of independent states.[104] The court in *Pennoyer v. Neff* began its analysis by stating "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[105] *Pennoyer* limited this power by recognizing the sovereignty of the independent states.[106] As expanded upon below, the current state of affairs with international service of process is similar to *Pennoyer* and its ilk by presenting service of process as an issue of sovereignty.[107]

Different states have different methods of service, as do different countries.[108] For example, Canada arguably allows

process by mail would benefit international litigants).

100. *See* Porterfield, *supra* note 10, at 332–37 (discussing service issues and the development of service of process within the United States and its implications for the Convention).

101. *See id.*

102. *See infra* Part V.A (analyzing intranational service of process within the United States).

103. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (discussing notice and sovereignty issues in early intrastate service in the United States).

104. *Id.*; *see also* Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 703–06 (1983) (arguing that *Pennoyer*'s abstract concept of sovereignty bridged the gap between State interests and a developing concern for judicial fairness).

105. *Pennoyer*, 95 U.S. at 722.

106. *Id.; see infra* notes 117–21 and accompanying text (discussing similarities between international and interstate service).

107. *See infra* Part V.A (presenting a historical analysis of intranational service of process in the United States).

108. Convention, *supra* note 9.

service by mail and service through the Central Authority.[109] Iceland only indicates a Central Authority.[110] In Texas, service of process includes in-person, mail, and an option for alternative methods of service as prescribed by the court upon petition.[111] California, on the other hand, allows service of process by publication in addition to in-person and mail service.[112] This similarity is important because the states, for the most part, have resolved service between states with different methods and this resolution could be a model for international service.[113]

The trend away from sovereignty concerns at the state level should mirror the global trend of creating an international personal and business community.[114] *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement* and its line of cases emphasize how the United States has changed its focus on service from one of sovereignty to merely notice of an impending lawsuit.[115] As discussed below, international sovereignty is entrenched in the same debate, wrestling with how to maintain sovereignty of the individual nations while advances in technology create a more cohesive and global society.[116]

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109. *Canada—Central Authority & Practical Information*, *supra* note 51. Recent cases have discussed the possibility of service of process to Canada by mail. *See* Cook v. Toidze, 950 F. Supp. 2d 386, 394 (D. Conn. 2013) (holding that service of process by mail to Canada is allowed under the Convention); Menon v. Water Splash, Inc., 472 S.W.3d 28, 34 (Tex. App.—Houston [14th Dist.] 2015), *cert. granted* 137 S. Ct. 547 (2016) (Christopher, J., dissenting) (dissenting from the majority to state that Canada does allow service of process by mail).

110. *Iceland—Central Authority & Practical Information*, HCCH, http://www.hcch.net/index_en.php?Act=authorities.details&aid=804 [https://perma.cc/XXK9-XYBH] (last updated Sept. 13, 2016).

111. Tex. R. Civ. P. 106.

112. CAL. CIV. PROC. CODE §§ 415.10, 415.30, 415.50 (West 2016).

113. *See* Porterfield, *supra* note 10, at 332–37 (discussing the development of interstate service and its implications for service abroad).

114. *See* Lewis, *supra* note 104, at 708 (noting that the court in *International Shoe* ignored state sovereignty interests and posited a method of jurisdiction relating to due process).

115. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945); *see* Lee Hilles Wertheim, *A Funny Thing Happened on the Way to the Forum: Federalism, Jurisdiction, and Choice of Law*, N.J. LAW, Summer 1987, at 34, 37 (commenting on the potential uncertainly arising from determining forum using personal jurisdiction and forum non conveniens but indicating that sovereignty-based principles will not return).

116. *See infra* Part V.B (noting issues in international service of process such as notice and service of process). *See generally* Frank Conley, Comment, *:-) Service with a Smiley: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407 (1997) (discussing service of process through electronic means in connection with an English case, the Federal Rules of Civil Procedure, and the Convention).

A. Historical Analysis of Intranational Service of Process in the United States

Initially service of process initiated two different actions in the eyes of the courts: the notice of the lawsuit and the formal start of the judicial process.[117] This understanding of service necessitated that there was an assertion of power over the defendant through the service document.[118] *Pennoyer v. Neff* stood for the contention that "the laws of one State have no operation outside of its territory, except so far as is allowed by comity" and that no court "can extend its process beyond that territory so as to subject either persons or property to its decisions."[119] The Supreme Court also emphasized that a court gains jurisdiction over a defendant through service of process initially.[120] The Court held that process served out of state and by publication within the state was ineffective as to "establish his personal liability."[121] The outcome of this case cemented the use of state sovereignty as an element of service between different states.[122]

International Shoe is a fundamental case discussing procedure and the acquisition of personal jurisdiction over the defendant.[123] The case represents a complete shift away from a *Pennoyer*-style analysis and overruled doctrines such as "presence" and "implied consent" in favor of minimum contacts with the forum state so as to satisfy "traditional notions of fair play and substantial justice."[124]

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117. *Pennoyer* discusses sovereignty at length, in particular noting the following:

> One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.

Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (emphasis omitted); Lewis, *supra* note 104, at 703–04 (arguing that *Pennoyer*'s abstract concept of sovereignty bridged the gap between State interests and a developing concern for judicial fairness).

118. *Pennoyer*, 95 U.S. at 722; *see* Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation* 84 NOTRE DAME L. REV. 1057, 1064–65 (2009) (commenting on *Pennoyer*'s discussion of state power).

119. *Pennoyer*, 95 U.S. at 722.

120. *Id.* at 724 (quoting *Boswell's Lessee v. Otis*, 50 U.S. 336, 348 (1850)).

121. *Id.* at 727.

122. *See* Lewis, *supra* note 104, at 703–06 (stating that *Pennoyer*'s abstract concept of sovereignty takes into account states' interests).

123. *See* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 864–65 (1991) (discussing the *International Shoe* case and its legacy).

124. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945); Philip B. Kurland, *The*

International Shoe did not present novel facts; it was a familiar situation where a corporation had developed contacts with Washington, but did not have any actual presence in the state.[125] Existing precedent from *Pennoyer* and other cases would have resolved the case in favor of the corporation.[126] The Court found that service was proper whether it had been in person in the state of Washington or whether it had been mailed to the corporation's St. Louis offices.[127] The holding of *International Shoe* emphasized its focus on the concern of "fair play and substantial justice," since the Court enumerated the activities that "make jurisdiction fair to defendants based on their forum contacts."[128] By emphasizing this doctrinal change, the Court mostly removed sovereignty issues from service of process in the state-to-state context.[129] Courts still regularly apply this doctrine to cases, illustrating the lasting effects of this doctrinal shift.[130]

The Supreme Court recanted some of *Pennoyer*'s concerns with service by publication through *Mullane v. Central Hanover Bank & Trust Co*.[131] *Mullane* held that service by publication is constitutional, but emphasized that particularities of different defendants might affect this analysis.[132] The Court analyzed the particularities at hand and further held that service by publication was not reasonably calculated to reach the defendant in a case that would deprive them of substantial rights.[133] This case came after *International Shoe*, a fundamental case in the shift away from state sovereignty; however, *Mullane* used the language of *International Shoe* to discuss the state interests involved in service of process.[134] The Court went on to discuss the state's interest in relation to service, noting:

Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts. From Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 586 (1958) (arguing that, like *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the court in *International Shoe* has not created new legal doctrines but destroyed existing doctrine).

125. *Int'l Shoe*, 326 U.S. at 313–15.

126. Kurland, *supra* note 124, at 586–88.

127. *Int'l Shoe*, 326 U.S. at 320; Kurland, *supra* note 124, at 590.

128. *Int'l Shoe*, 326 U.S. at 320 (1945); Lewis, *supra* note 104, at 706.

129. Lewis, *supra* note 104, at 709.

130. Creative Calling Sols., Inc. v. LF Beauty Ltd., 799 F.3d 975, 981–82 (8th Cir. 2015) (applying the minimum contacts test in a case with an international defendant); Carmouche v. Tamborlee Mgmt., Inc., 789 F.3d 1201, 1204 (11th Cir. 2015) (same); Eddy v. Printers House (P) Ltd., 627 F. App'x 323, 326 (5th Cir. 2015) (using the minimum contacts and traditional notions of fair play and substantial justice to determine personal jurisdiction over a defendant in a diversity action).

131. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 306 (1950).

132. *Id.* at 318.

133. *Id.* at 319–20.

134. *Id.* at 313; Lewis, *supra* note 104, at 709 (positing that several of the Supreme

> [T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[135]

Clearly the Court was considering issues of states' sovereignty and interests, even in the wake of a substantive shift in focus to due process or minimum contacts regarding notice.[136]

Mullane did not only rely on the issue of state interests; the Court also focused on due process and Fourteenth Amendment issues.[137] The Court moved away from the *Pennoyer* analysis that solely looked to state jurisdictional boundaries and began to focus on fairness for individuals involved in the suit.[138] *Mullane* shows the Court responding to changes within the American economy, where states are less autonomous and defendants might not be readily present within the states' jurisdictional boundaries.[139]

After the dawn of the minimum contacts test, the Court attempted to develop the doctrine further, with particular concern for suits that hailed foreign defendants into U.S courts.[140] These cases did not specifically deal with Article 10(a) of the Convention.[141] However, they indicate that sovereignty still plays a role in international court cases even though it seems like American jurisprudence has moved past this concept.[142] Recent cases have read *International Shoe* to contain factors of state interest and sovereignty.[143] Recent international cases have also

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Court's holdings after *International Shoe* actually use the case to support consideration of states interests); *see supra* notes 123–29 and accompanying text (discussing *International Shoe* and state sovereignty).

135. *Mullane*, 339 U.S. at 313.

136. Lewis, *supra* note 104, at 709; *see supra* notes 123–29 and accompanying text (discussing the changes the court in *International Shoe* brought to the discussion of service of process between states).

137. *Mullane*, 339 U.S. at 313.

138. *See Mullane*, 339 U.S. at 319–20; Pennoyer v. Neff 95 U.S. 714, 727 (1877).

139. *Mullane*, 339 U.S. at 319–20. For a discussion of 1940s economics across the nation, see generally GENE SMILEY, *The American Economy During the 1940s*, *in* THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY, http://qc-econ-bba.com/instructors/Edelstein11/ECON224/08.pdf [https://perma.cc/TT2W-2F2V] (last updated May 13, 1993).

140. *See, e.g.*, J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 881 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown 564 U.S. 915 (2011); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 293–94 (1980).

141. *See Nicastro*, 564 U.S. at 883 (focusing on the minimum contacts test as opposed to Convention issues in the international context); *Goodyear*, 564 U.S. at 915 (same); *World-Wide Volkswagen*, 444 U.S. at 293–94 (same).

142. Lewis, *supra* note 104, at 709.

143. *World-Wide Volkswagen*, 444 U.S. at 293–94 (noting that the recent developments

pointed to issues relating to sovereignty in the personal jurisdiction context.[144] The Court in *J. McIntyre Machinery, Ltd. v. Nicastro* highlighted this concern by holding that a court in New Jersey was not able to call an English defendant into its jurisdiction solely because of a good entering the "stream of commerce" in New Jersey.[145] The Court specifically focused on sovereignty issues in bringing international defendants into a U.S court, thus emphasizing its presence in current transnational litigation.[146] In addition to personal jurisdiction, American courts continue to debate sovereignty under the doctrine of forum non conveniens.[147] While sovereignty concerns have fallen out of service of process cases, they are still present in personal jurisdiction and forum non conveniens arguments, especially when international defendants are at issue.[148]

B. International Service of Process, Notice and Sovereignty Concerns

As discussed above, service of process in the traditional sense deals with both a notice and a sovereignty component.[149] International service of process mirrors many of the issues present in service between states.[150] If notice were the only issue at play,

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in notice do not completely dispense with interests); Lewis, *supra* 104, at 706–07 (commenting on *World-Wide Volkswagen* and addressing the Court's reading of *International Shoe*).

144. *See Nicastro*, 564 U.S. at 882 (discussing sovereignty related to an international defendant); *Goodyear*, 564 U.S. at 915 (same).

145. *Nicastro*, 564 U.S. at 883; Greg Saetrum, Note, *Righting the Ship: Implications of* J. McIntyre v. Nicastro *and How to Navigate the Stream of Commerce in its Wake*, 55 ARIZ. L. REV. 499, 506–07 (2013) (discussing the plurality holding and the use of sovereignty in the Court's opinion).

146. *Nicastro*, 873 U.S. at 884; Saetrum, *supra* note 145, at 507 ("With submission to the power of a particular sovereign as a prerequisite to jurisdiction, the plurality concluded that before asserting personal jurisdiction over an alien corporation, there must be a state-by-state analysis of the defendant's conduct.").

147. Moreno v. LG Elecs., USA Inc., 800 F.3d 692, 697–701 (5th Cir. 2015) (affirming trial court's dismissal of case on forum non conveniens grounds due to international nature of tort action); Ranza v. Nike, Inc., 793 F.3d 1059, 1077–79 (9th Cir. 2015) (dismissing a case involving a U.S citizen abroad working for Nike, Netherlands due to forum non conveniens as a more reasonable forum).

148. Markus Petsche, *A Critique of the Doctrine of Forum Non-Conveniens*, 24 FLA. J. INT'L L. 545, 551–53 (2012) (discussing forum non conveniens as a jurisdictional rule); Saetrum, *supra* note 145, 506–07 (discussing the plurality holding and the use of sovereignty in the Court's opinion).

149. *See supra* Part V.A (discussing traditional issues of interstate service and the court's change in emphasis from sovereignty concerns to providing adequate notice for the defendants).

150. Menon v. Water Splash, Inc., 472 S.W.3d 28, 31 (Tex. App.—Houston [14th Dist.] 2015), *cert. granted*, 137 S. Ct. 547 (2016) (noting notice issues in relation to the Convention); *see supra* Part V.A (noting the issues in early interstate service of process).

service through the Central Authority would be inconsequential in nations that allow service by mail; both methods of service would provide an adequate level of notice regarding the suite at hand.[151] However, what is still at issue in international service is the concept of sovereignty.[152] International service still seems to imply jurisdiction based on borders as in *Pennoyer,* leading to national sovereignty.[153]

When serving a defendant internationally the two primary concerns of notice and sovereignty of the nations at issue become competing to a certain extent.[154] Notice and expediency of the legal process might be better served by allowing service of process through the mail in situations as described in *Menon*.[155] There is a significant hassle in using the Central Authority system and an increased potential for service of process to be lost as it travels from point A to B to C instead of just from plaintiff to defendant.[156] Contrary to this concern is the sovereignty of the nations at hand.[157] While notice is easily accomplished through both methods of service, sovereignty might not be so easily protected.[158] Sovereignty is especially a concern when looking at the Convention through the countervailing view, which presupposes that a nation has only accepted service by the Central Authority.[159] Using this assumption, sending process by mail is a significant affront to national sovereignty because the nation has not adopted this form of service, since it is not specifically mentioned in the

151. *See Menon*, 472 S.W.3d at 45–47 (Christopher, J., dissenting) (discussing notice issues in relation to the Convention).

152. Jones, *supra* note 96, at 534–37; Roth, *supra* note 15, at 13; Tamayo, *supra* note 96, at 238–39; Armstrong, *supra* note 96, at 561.

153. *See* Pennoyer v. Neff, 95 U.S. 714, 722–23 (1877) (mentioning that state laws only apply within their territorial jurisdictions); *Menon*, 472 S.W.3d at 31 (discussing the Convention and its importance in the interaction between foreign jurisdictions); Florey, *supra* note 118, at 1064–65 (commenting on *Pennoyer*'s discussion of state power).

154. *See infra* Part V.B (addressing international sovereignty issues and service of process).

155. *Menon*, 472 S.W.3d at 30.

156. Michael O. Eshleman with Judge Stephen A. Wolaver, Prego Signor Postino: *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 296–99 (2010) (explaining service through the Central Authorities established in the Convention); Gary A. Magnarini, Comment, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 670–71 (1988) (explaining the two methods for services of process under the Central Authorities).

157. *See, e.g.*, Jones, *supra* note 96, at 536–37 (discussing sovereignty in relation to the Convention); Roth, *supra* note 15, at 13 (same); Tamayo, *supra* note 96, at 238–39 (same); Armstrong, *supra* note 96, at 561 (same).

158. *See supra* Part V.A (discussing the evolution of interstate service of process and the changes over time relegating sovereignty protections to notice concerns).

159. *Menon*, 472 S.W.3d at 32–33 (explaining the countervailing view not allowing service of process by mail).

treaty.[160] Just because several of these nations have allowed for service by mail within their borders does not necessarily establish that the nation has accepted this method of service internationally.[161] Under the prevailing interpretation of Article 10(a), allowing service by mail, the sovereignty concerns could be triggered by an individual state serving process on another nation.[162] Individual states were not parties to the Convention, only the United States, so service from Texas through the mail on a defendant in Canada might be seen as an affront to national sovereignty.[163] However, as discussed below, mechanisms to protect sovereignty exist outside of service of process and litigants should not be unduly burdened by the Convention.[164]

The question then becomes, if the Convention has only increased the hassle of serving international defendants, should the need for prompt notice override the sovereignty issues presented in international service.[165] Just as the United States changed from a collection of state laws bound by their own borders, the international community is no longer bound by national borders.[166] Businesses are becoming international and product liability suits in the United States should not necessarily include the burden of international litigation and the Convention service.[167] At its core, *Menon* involved a business tort with all acts

160. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (emphasizing that the purpose of the Convention is to provide a more efficient method of service and notice to foreign defendants); Nuovo Pignone, SpA v. Storman Asia M/V, 310 F.3d 374, 383–84 (5th Cir. 2002) (holding that service by mail was not effective to Italy because Article 10(a) did not permit such service).

161. For cases that describe the countervailing view, see, for example, *Nuovo Pignone, SpA*, 310 F.3d at 384; Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989); *Menon*, 472 S.W.3d at 32–33 (same); Wuxi Taihu Tractor Co., Ltd. v. York Group, Inc., No. 01-13-0016-CV, 2014 WL 6792019, at *6 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, pet. denied).

162. For cases that describe the prevailing view, see, for example, Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004) (holding that Article 10(a) permits service by mail); Research Sys. Corp. v. IPSOS Publicité, 276 F.3d 914, 926 (7th Cir. 2002) (same); Koehler v. Dodwell, 152 F.3d 304, 307–08 (4th Cir. 1998) (same); Ackermann v. Levine, 788 F.2d 830, 838–39 (2d Cir. 1986) (same).

163. Convention, *supra* note 9, 20 U.S.T. at 368, 658 U.N.T.S. at 182 (a list of signatories to the convention, including the "United States of America").

164. *See infra* notes 165–74 and accompanying text (analyzing current sovereignty issues in international litigation and proposing the use of alternative forms of sovereignty protections such as forum non conveniens to protect international litigants).

165. Porterfield, *supra* note 10, at 344–47 (addressing the various issues that arise attempting to use the Convention).

166. *Id.* at 333–37 (discussing the changes in service of process throughout the history of the United States).

167. International businesses have been at issue for quite some time, especially in the Convention arena. *See, e.g.*, *Research Sys. Corp.*, 276 F.3d at 918–19; Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989); Menon v. Water Splash, Inc., 472 S.W.3d 28 (Tex.

taking place in Galveston, but because Menon was a citizen of Canada, it became an international law suit.[168] Because of the changing dynamic of international litigation, litigants should have the best possible avenue for commencing their lawsuit.[169] Courts should allow mailings to be a legitimate form of process in the case of Article 10(a) service.[170]

Allowing service through whatever means both nations have accepted facilitates the inception of litigation.[171] However, it does not alleviate concerns regarding wrangling defendants into international court.[172] The United States is not without other means to allow for international defendants to protect themselves from litigation within the United States.[173] As mentioned above, international litigants are highly successful using forum non conveniens or personal jurisdiction doctrines to protect themselves and their nation's sovereignty.[174] Because sovereignty is protected through other means, service of process by mail should be accepted and encouraged under Article 10(a) of the Convention.[175] As noted in *Mullane*, and as discussed above, *Pennoyer* mistakenly conflated the issues of jurisdiction and notice. *Mullane* encouraged courts to separate jurisdictional issues from notice. By separating these problems, the court should focus on service of process as an expression of notice and not jurisdiction because jurisdiction can be handled more effectively by forum non conveniens and other jurisdictional doctrines. Removing the concern for jurisdiction from service of process concerns means that sovereignty concerns are not implicated. If service of process is treated merely as an expression of notice, the courts should not be concerned for national sovereignty. If both countries recognize service of process by mail as legitimate, the litigants are following locally recognized

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App.—Houston [14th Dist.] 2015), *cert. granted*, 137 S. Ct. 547 (2016); Justin Kesselman, Note, *Multinational Corporate Jurisdiction and the Agency Test: Should the United States Be a Forum for the World's Disputes?*, 47 NEW ENG. L. REV. 361, 390–95 (2012) (discussing international comity and jurisdictional issues).

168. *Menon*, 472 S.W.3d at 30.

169. As discussed above, the Convention might create more problems that in solves for modern litigants. *See* Part II (discussing the Convention and its procedures for commencing suit). *See generally* Scullion, Berkowitz & McNew, *supra* note 27 (discussing many issues with service of process through the Convention).

170. *Menon*, 472 S.W.3d at 34 (Christopher, J., dissenting).

171. *Id.* at 39–43.

172. *See supra* Part V.B (discussing international sovereignty and notice concerns).

173. *See supra* notes 144–47 and accompanying text (addressing other options for defendants wrangled into U.S. courts).

174. *See id.* (noting that international litigants are able to use doctrines from the personal jurisdiction context to protect themselves in U.S. courts).

175. *See id.* (proposing that other methods of protection are more adequate for international litigants such as forum non conveniens).

procedural rules and not implicating sovereignty concerns. Because of this, reading the treaty more broadly as permissive of service of process by mail would allow litigants the most opportunity to give notice to defendants and would not create jurisdictional concerns.

VI. CONCLUSION

A modernized interpretation of the Convention allowing for service of process by mail would allow plaintiffs to seek action against defendants without the unnecessary hassle of the Central Authority, and would do away with the confusion regarding international service.[176]

Part II of this Casenote discussed the Convention and its implications for service of process.[177] At the time of the Convention, international mail was presumably unreliable and a cause for consternation for many litigants.[178] Fortunately, international mail has become much more efficient, not to mention that other modern methods of delivery such as e-mail allow for notice and service of process to be effectuated with a near guarantee that the defendant will receive the documents.[179] Next, Part III of this Casenote analyzed the current trends in American jurisprudence related to Article 10(a).[180] The prevailing view utilizes treaty interpretation and international law doctrines in order to show that service by mail is acceptable between jurisdictions that accept this form of service of process.[181] The countervailing interpretation focuses on giving meaning to all parts of the Convention and disallows service by means other than the Central Authority.[182] In order to better illustrate this point, this Casenote then recited a recent case in the Texas appellate

176. For a discussion of the various issues related to the service of process under the Convention, see generally, Porterfield, *supra* note 10; Tamayo, *supra* note 96; Alexandra Amiel, Note, *Recent Developments in the Interpretation of Article 10(a) of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 24 SUFFOLK TRANSNAT'L L. REV. 387 (2001); Patricia N. McCausland, Comment, *How May I Serve You? Service of Process by Mail Under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177 (1992).

177. *See supra* Part II.

178. *See* James Bovard, *The Slow Death of the U.S. Postal Service*, CATO INST. (Apr. 3, 1988), http://www.cato.org/pubs/pas/pa102.html [https://perma.cc.9WN4-FNYW] (discussing unreliable U.S. postal service and issues arising from the mail system).

179. *See generally* Conley, *supra* note 116 (noting modern service of process issues related to electronic communications between international litigants).

180. *See supra* Part III (confronting an Article 10(a) question).

181. *See supra* Part III.A (discussing the prevailing view).

182. *See supra* Part III.B (discussing the countervailing view).

court presenting the issue of service of process.[183] It is clear from the issue at bar that the courts of last resort both at a state and federal level need to resolve the interpretation of Article 10(a) in order to provide litigants more notice of appropriate service processes.[184] Finally, this Casenote addressed underlying policy issues with service of process.[185] The international community is in a similar position that the United States was at its inception.[186] International litigants do not desire to abrogate a nation's sovereignty, however, notice and commencement of a lawsuit are better served by allowing service of process by mail where permitted.[187]

The countervailing interpretation of the Convention is not only outdated, but it neglects to recognize the current state of business and personal affairs.[188] Interpreting the Convention to allow for service of process by mail would not abrogate national sovereignty, but would reaffirm the international community humankind has endeavored to create.[189] While the countervailing view points out an important concern for ensuring accuracy in mailing, modern mail systems are probably up to the task.[190] Allowing service of process by mail not only benefits plaintiffs, but also does not upset the rights of the defendants.[191] Service of process by mail would only be effective in nations that have accepted this form of service for intranational service of process.[192]

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183. *See supra* Part IV (discussing *Menon v. Watersplash, Inc.*).

184. *See* Menon v. Water Splash, Inc., 472 S.W.3d 28, 34–35 (Tex. App.—Houston [14th Dist.] 2015), *cert. granted*, 137 S. Ct. 547 (2016) (Christopher, J., dissenting) (noting that neither the U.S. Supreme Court nor the Texas State Supreme Court have ruled on the interpretation of Article 10(a)).

185. *See supra* Part V (commenting on procedural issues facing defendants dealing with service of process for both interstate and international litigants).

186. *See supra* Part V.A.

187. *See supra* Part V.B (describing how traditional issues with service of process correlate to current debates in international litigation as well as explaining the solution to these concerns lies in allowing for service of process by mail in jurisdictions that support that method of service).

188. *See supra* Part V.B (explaining the issue of national sovereignty and how interpreting the Convention to include service of process by mail does not abrogate national sovereignty).

189. International businesses are highly involved in disputes in American courts. *See, e.g.*, Research Sys. Corp. v. IPSOS Publicité, 276 F.3d 914 (7th Cir. 2002); Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989); *Menon*, 472 S.W.3d at 30; Kesselman, *supra* note 167, at 390–95 (discussing international litigation issues).

190. *See supra* Part III.B (discussing the countervailing view and its concern for putting the defendants on notice).

191. *See supra* Part V.B (noting various reasons why allowing service of process by mail does not abrogate the chief concerns of international defendants: notice and sovereignty).

192. *See Menon*, 472 S.W.3d at 45–47 (Christopher, J., dissenting); *supra* notes 140–47 and accompanying text (commenting on procedural issues with international defendants).

Defendants in these nations are already on notice of potential judicial documents coming through the mail.[193] This presumption, coupled with the decreased burden on the part of the plaintiffs necessitate affirming the prevailing view and allowing service by mail under the Convention.[194]

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193. *See Menon*, 472 S.W.3d at 45–47 (Christopher, J., dissenting); *supra* notes 149–50 and accompanying text.

194. Porterfield, *supra* note 10, at 344–47 (noting the issues that arise from service of process through the Central Authority and the Convention).