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Notice Due to Stealth and other Foreign Defendants after Volkswagenwerk Aktiengesellschaft v. Schlunk and under the Hague Service Convention

Gregory S. Richardson

Notice Due to Stealth[1] and other Foreign Defendants after *Volkswagenwerk Aktiengesellschaft v. Schlunk*[2] and under the Hague Service Convention[3]

I. INTRODUCTION

A foreign corporation may extract profits, control resources, and expand its market share by operating in the United States through affiliated domestic corporations.[4] Quite often, such activity meets the "doing business"[5] or "minimum contacts"[6] tests and subjects the foreign corporation to the in personam[7] jurisdiction of United States

1. Multinational corporations operate in the United States by stealth. They are not unlike the stealth bomber, which furtively flies over enemy territory, invisibly approaching its target, all the while being immune to the defenses of its opponent. Likewise, the foreign parent assembles goods overseas, sells them through United States "affiliates," all the while avoiding stepping inside the United States. By not being located here, the multinational corporation remains immune to domestic service of process.

2. 108 S. Ct. 2104 (1988).

3. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention or Convention].

4. An affiliated domestic corporation means a subsidiary, distributor, or other corporate entity which allows the foreign defendant to operate in the forum without being located there.

5. With respect to service of process statutes on foreign corporations, "doing business" means the equivalent of carrying on, conducting, or managing business. A foreign corporation is "doing business," and thus amenable to service within the state, if the activities of the foreign corporation within the state warrant the inference that it is present in the state. BLACK'S LAW DICTIONARY 433 (5th ed. 1979).

6. "Minimum contacts" is the personal jurisdiction doctrine under which a court may exert in personam jurisdiction over a foreign corporation if that foreign corporation conducts certain minimum levels of business activity in the forum which seeks to assert jurisdiction. *See* International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

7. In personam jurisdiction is the power which a court exerts over the defendant itself, in contrast to the court's power over the defendant's property (in rem). BLACK'S LAW DICTIONARY 711 (5th ed. 1979).

courts. Yet, a foreign corporation meeting the in personam jurisdiction requirements of the United States Constitution is not necessarily subject to service of process within the United States.

The situation described above may surprise the United States plaintiff[8] when she discovers that a foreign defendant cannot be compelled to appear in a suit. Thus, the term *caveat emptor*, buyer beware, frequently turns into *caveat plaintiff*. A plaintiff may buy merchandise from what appears to be a United States company only to find out later that the manufacturer she wants to sue is a foreign corporation. This fact may seriously affect her ability to press her case before a court in the United States. The situation envisaged here can best be illustrated with the following scenario:

The plaintiff may purchase a Brand X car under state sales laws, pay United States dollars to her local dealership,[9] and drive her vehicle on United States roads. She will register it under state regulations and have it repaired locally under a warranty guaranteed under United States law.[10] Finally, if she is in an accident in the U.S., her liability will be determined under United States law. Considerations of international service of process, which can be complicated even in the simplest of cases, are the furthest from her mind.[11] Yet, if the car is defective, causing injury or death, our consumer-turned-plaintiff may suddenly discover lurking in the background a foreign manufacturer who can avoid service within the U.S. While this defendant may be subject to the in personam jurisdiction of U.S. courts, the plaintiff may find it difficult or impossible to serve the foreign defendant within the United States or even abroad.

Current United States law typically forces the plaintiff to chase this elusive foreign manufacturer abroad in order to serve it with process.[12] Why should this be so, given that our plaintiff did not

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8. For purposes of this Comment, the plaintiff may be either an individual or a business.

9. For example, Honda of America distributes automobiles made in Japan by Honda; Geick v. American Honda Motor Co., 117 F.R.D. 123 (C.D. Ill. 1987); and Volkswagen of America distributes automobiles made in Germany by Volkswagen of Germany.

10. For purposes of this Comment, United States laws may be either federal or state laws.

11. In Cippolla v. Picard Porsche Audi, Inc., 496 A.2d 130 (R.I. 1985), Anita, the plaintiff, bought a car distributed by Volkswagen of America, the wholly owned U.S. subsidiary of Volkswagen of Germany. Anita sustained personal injuries when her Rabbit "stuck" in reverse while she was driving. The court noted, "It is safe to say that as Anita 'barreled rapidly in reverse across the road,' the supremacy clause of Article VI of the United States Constitution never crossed her mind." *Id.* at 131.

12. This hypothetical situation is similar to that of the plaintiff in Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988). In *Schlunk*, the parents of the United

consciously engage in any international transactions? How can it be that the foreign defendant, who has purposefully availed himself of the benefits and protections of the laws of the United States, suddenly becomes unavailable for domestic service of process? What is the logic of United States laws, such as the Rule of *Cannon v. Cudahy* (hereinafter Rule of *Cannon* or *Cannon*), which give certain types of foreign defendants, *i.e.*, foreign parents of domestic subsidiaries, immunity from being served domestically under United States service statutes?[13]

A plaintiff may have to serve one of several different types of foreign defendants.[14] However, for purposes of this discussion, the defendants are classified into five types. The Type (A) defendant is not operating in the United States and does not have sufficient "minimum contacts" to be subject to in personam jurisdiction, but through special circumstances, such as consent, the court may assert jurisdiction anyway.[15] The Type (B) defendant operates in the United States only occasionally and sporadically, such as by filling a single or limited number of orders initiated by a U.S. buyer; this activity

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States plaintiff were killed in a car accident while driving a German-made car in Illinois. The plaintiff originally filed a wrongful death action against Volkswagen of America (hereinafter VWOA), alleging that VWOA had designed and sold the defective, uncrashworthy car which had caused the deaths of his parents. Plaintiff successfully served process on VWOA through its registered agent for service of process in Illinois, C.T. Corporation. VWOA filed a timely answer which denied it had designed or assembled the allegedly defective automobile. *Id.* at 2106. Then the plaintiff attempted to use the service on VWOA as substituted service on Volkswagen of Germany (hereinafter VWAG), which owned and controlled Volkswagen of America. *Id.*

13. *Cannon* is often cited for the general rule that the mere fact that a foreign parent has a wholly owned, closely controlled subsidiary in the forum is insufficient to subject the foreign parent to the in personam jurisdiction of the forum's courts. Cannon Manufacturing Co. v. Cudahy Co., 267 U.S. 333, 336-37 (1925). Later courts analogized *Cannon* to hold that the wholly owned, closely controlled subsidiary was not necessarily a proper "agent for service of process." *Schlunk*, 108 S. Ct. at 2111 n.**; *Geick*, 117 F.R.D. at 127. Consequently, the Japanese foreign parent of a domestic wholly owned subsidiary escaped domestic service of process within Illinois, even though Honda of Japan sold cars in Illinois. *Id.* at 124. Honda of Japan probably should be subject to domestic service within Illinois since it sold cars in that state. *See Crose* factor discussion *infra* notes 26-56 and accompanying text.

14. This Comment assumes that the defendant is located in one of the following countries which have signed the Hague Service Convention: Antigua and Barbuda, Belgium, Botswana, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Israel, Italy, Japan, Luxembourg, Malawi, Netherlands, Norway, Portugal, Seychelles, Spain, Sweden, Turkey, United Kingdom, or the United States. For defendants in nonsignatory countries, *see Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 67-69 (1988) [hereinafter *Service of Process Abroad*]. The type of defendant discussed in this Comment is either an individual or a foreign corporation, but most likely the latter. If the target defendant is a foreign state or a political subdivision, *see id.* at 63.

15. This situation arose in Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456 (E.D.N.Y. 1986), discussed *infra* notes 34-47 and accompanying text.

incurs only the limited, specific jurisdiction for those causes of action related to defendant's activities in the forum.[16] Type (C) defendants are those who conduct continuous and systematic operations in the United States, such as distributing products through U.S. distributors or salesmen. Maintaining a distribution network incurs the general jurisdiction of the forum under which the plaintiff may sue on any cause of action.[17] Type (D) defendants are foreign parents of closely controlled, wholly owned United States subsidiaries.[18] Type (E) defendants are those foreign corporations who operate in the United States through partially owned (less than 100%) United States affiliates. It is assumed that in personam jurisdiction may be constitutionally obtained over any of these types of foreign defendants.[19]

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16. *See* Newport Components v. NEC Home Electronics, 671 F. Supp. 1525, 1531-32 (C.D. Cal. 1987). Specific jurisdiction is a special, limited form of personal jurisdiction:

> Specific jurisdiction is present where the cause-of-action relates to or "arises out of" the defendant's contact with the forum state, and the minimum contacts requirement is satisfied, even if the contact is a single act, as long as the contact resulted from the defendant's purposeful conduct and not the unilateral activity of the plaintiff or third person.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985). A forum may exert specific jurisdiction over a nonresident defendant if the defendant has "purposefully directed" his activities at a resident of the forum, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and the cause of action arises from alleged injuries that arise out of or relate to those activities in the forum. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

17. *Newport Components*, 671 F. Supp. at 1533-34. "General jurisdiction" over nonresident defendants may be exercised even when the cause of action does not arise from or relate to the defendant's purposeful contacts with the forum if the defendant's contacts with the forum are "substantial" or "continuous and systematic." *Helicopteros*, 466 U.S. at 415. General jurisdiction may come about when the defendant makes sales, solicits or engages in business, has employees, is incorporated in the forum, or designates an agent for service of process. *Newport Components*, 671 F. Supp. at 1534 (citations omitted).

18. This situation arose in Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988), where a German multinational parent, Volkswagen of Germany, operated in the United States through Volkswagen of America, a wholly owned, closely controlled United States subsidiary. *Id.* at 2106-07.

19. The foreign defendant must have minimum contacts with the U.S. forum in order to be subjected to the personal jurisdiction of a U.S. court. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945). The U.S. Supreme Court in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 113-16 (1987), specified the fairness factors a court must consider in determining whether the foreign defendant has sufficient minimum contacts with the forum to be subject to personal jurisdiction: 1) the burden on the defendant; 2) the interests of the forum state; and 3) the plaintiff's interest in obtaining relief. *Id.* A court must also consider: 4) the interstate and international judicial system's interest in obtaining the most efficient resolution of the controversies; *id.* at 1034-35; and 5) the procedural and substantive policies of other nations whose interest will be affected. *Id.*

In *Asahi*, the issue was whether the mere awareness on the part of a foreign manufacturer that its components reached California in the stream of commerce constituted sufficient minimum contacts with the forum state for personal jurisdiction. *Id.* at 1029. After considering the international context, the heavy burden on the foreign defendant in requiring him to defend himself in a suit in California, and the slight interests of the plaintiff and California in resolving this controversy, "the exercise of personal jurisdiction by a California court over [the foreign defendant] . . . would be unreasonable and unfair." *Id.* at 1035.

Even where the foreign defendant is subject to in personam jurisdiction of a United States forum, the court must still go through a three-step process to determine whether service of process is legally effective. First, under the Due Process Clause,[20] would it be fair to subject the foreign defendant to the service rules of the plaintiff's forum?[21] Second, does the service method comport with international law under the Hague Service Convention?[22] Third, was the method reasonably calculated to give the defendant actual notice of the pending suit in time to defend as required by the Due Process Clause of the United States Constitution?[23]

Under the Due Process Clause, every instance of service of process must be reasonably calculated, under all the circumstances, to give actual notice to the defendant of the pending suit in time to defend.[24] Importantly, the notice must inform the defendant of the charges against him and must indicate what he can do to avoid a default judgment.[25] Since the plaintiff is unlikely to travel abroad to perfect

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20. The Fifth Amendment to the United States Constitution provides that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ." U.S. CONST. amend. XIV. There are two aspects to due process: procedural, which guarantees a person fair procedures; and substantive, which protects a person's property from unfair interference or taking by the government. BLACK'S LAW DICTIONARY 448 (5th ed. 1979).

21. The court in Crose v. Volkswagenwerk Aktiengesellschaft stated that it was a matter of fairness to the parties whether the foreign defendant should be subjected to domestic service of process. 88 Wash. 2d 50, 558 P.2d 764, 768 (1977).

22. Hague Service Convention, *supra* note 3.

23. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

24. Under United States law, service of process refers to a formal delivery of the complaint and summons which are sufficiently informative to charge the defendant with legal notice of the pending suit and which are given in "sufficient time" to allow the defendant an opportunity to defend and be heard. Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946). The Due Process Clause of the United States Constitution has been interpreted to guarantee to all domestic and foreign defendants either personal service of process, which invariably gives actual notice of the pending suit, or substituted service of process, which must be reasonably calculated to give actual notice. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988); *Mullane*, 339 U.S. at 314.

25. For service on a foreign defendant, special problems arise if the defendant does not conduct business in or understand English. Serving process on a defendant who the plaintiff knows does not comprehend English is similar to the situation in Covey v. Somers, 351 U.S. 141 (1956). The plaintiff served process on a person known by the plaintiff to be incompetent and unable to understand the summons and complaint. Since the defendant could not comprehend the written word, she defaulted. The United States Supreme Court set aside the default judgment, holding that the circumstances of the individual recipient of service must

personal service on the foreign defendant, this Comment discusses two practical alternatives for substituted service: service through the mail and service upon a domestic affiliate. This Comment investigates the problems the plaintiff will face in serving each of the five types of foreign defendants while maintaining consistency with United States law and the Hague Service Convention.

II. Fairness of Subjecting a Foreign Defendant to United States Service of Process Statutes

As indicated by the Washington State Supreme Court in *Crose v. Volkswagenwerk Aktiengesellschaft*,[26] whether the foreign defendant should be subject to domestic service or whether the plaintiff must resort to international service abroad is a question of "fairness to the parties." This fairness determination is based on procedural Due Process requirements of the United States Constitution, which guarantee that any court procedure determining the defendant's rights be fair.[27]

The *Crose* court specified the following factors (hereinafter the *Crose* factors) to be considered in determining whether it is fair to subject a foreign defendant to domestic service of process: 1) the interest of the forum in providing a place for its residents to resolve legal disputes;[28] 2) the ease with which the plaintiff could gain access to another forum;[29] 3) the amount, kind, and continuity of the

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be taken into account. *Id.* at 145-48. Similarly, if the plaintiff knows that the foreign defendant does not comprehend English, then she should not be allowed to serve a summons and complaint written only in English. *See* Adams, *"Citado A Comparecer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?*, 61 Calif. L. Rev. 1395 (1973) [hereinafter Adams]. A possible alternative is to serve a translated summary of the summons or to translate the whole summons.

26. 88 Wash. 2d 50, 558 P.2d 764 (1977).

27. Procedural due process guarantees that persons whose rights are to be affected are entitled to reasonable notice and an opportunity to be heard to present any claim or defense. *Mullane*, 339 U.S. at 313-15.

28. *Crose*, 558 P.2d at 768. *See also* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (it is sufficient for purposes of due process that a suit against an out-of-state mail order firm was based on a contract which had a substantial connection with the state. "Since the contract was delivered in the state, the premiums were mailed there and the insured was a resident when he died, the state had a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.") *Id.* at 223-24.

29. *Crose*, 558 P.2d at 768. *See also* Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1952). Where the nonresident defendant's business activities reach beyond the border of one state and create continuing relationships and obligations with residents of another state, the state has a legitimate interest in protecting its residents against risks from outside the state and may subject the nonresident defendant to personal jurisdiction. Where the amount in dispute is small so that the plaintiff would not be likely to travel far to pursue it, the suits on alleged losses can be more conveniently tried in the plaintiff's forum since witnesses live there and the claims could be investigated, the "Due Process Clause does not forbid a state to protect its citizens from such injustice." *Id.* at 647-49.

activities carried on by the foreign defendant in the forum;[30] 4) the significance of the economic benefits the foreign defendant derives from the activities purposefully conducted within the forum;[31] and 5) the foreseeability of injury as a result of using the foreign defendant's products in the forum.[32] Finally, before reaching a conclusion, the court must weigh these *Crose* factors against two international interests: the foreign defendant's right to the procedural protections of the Hague Service Convention and the destination country's sovereignty, which may be infringed on by giving extraterritorial legal effect to a United States service statute.[33]

Generally, systematic and continuous activities which result from maintaining a distribution network or owning subsidiaries in the forum are sufficient to subject the Type (C), (D), and (E) defendants to in personam jurisdiction as well as to service of process under domestic statutes. However, for Type (A) and (B) defendants, United States courts should longer assume that the power to exert personal jurisdiction automatically brings with it the power to subject the foreign defendant to domestic service statutes.

To understand why the court must decide whether the foreign defendant can be fairly subjected to United States service statutes, consider applying the *Crose* factors to the circumstances of the Type (A) defendant who has no minimum contacts with the United States.

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30. *Crose*, 558 P.2d at 768. *See also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 447-49 (1952). In *Perkins*, a Phillippine mining company had its main operations and properties in the Phillippines; during World War II it ceased operations in the Phillippines, but its president maintained an office, carried on correspondence, paid salaries, and kept substantial bank accounts in Ohio. Because of these continuous and systematic activities inside Ohio, Ohio courts could exert personal jurisdiction over the Phillippine company for causes of action relating to activities entirely unrelated to its conduct in Ohio.

31. *Crose*, 558 P.2d at 768. *See also* Hanson v. Denkla, 357 U.S. 235, 253 (1958) (minimum contacts must have, as a basis for personal jurisdiction, some act by which the defendant purposefully avails himself of the benefits of the forum).

32. *Crose*, 558 P.2d at 768 (citations omitted). *See also* Worldwide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980) (due process not violated when forum state exerts personal jurisdiction over foreign corporation which served market with products that caused foreseeable injury).

33. Article 13 of the Hague Service Convention provides:

> Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.
>
> It may not refuse to comply soley on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.
>
> The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Hague Service Convention, *supra* note 3, at art. 13; 20 U.S.T. at 364.

In *Lemme v. Wine of Japan Import, Inc.*,[34] Konishi, a Japanese corporation, guaranteed the contractual performance of Wine of Japan, a New York corporation.[35] Konishi was not "doing business" or "transacting business" in New York.[36] There was no agency relationship between Konishi and Wine of Japan which would subject Konishi to the in personam jurisdiction of New York courts,[37] as Wine of Japan did not act for the primary benefit of Konishi,[38] and Konishi, owning only 27% of Wine of Japan, did not exert any control over Wine of Japan.[39] There was no in personam jurisdiction based on Konishi performing a contract in New York, as a guarantee of a contract to be performed in Japan is not a contract to be performed in New York.[40]

Personal jurisdiction was proper only because Konishi, in guaranteeing the performance of Wine of Japan, had accepted the contract's consent-to-jurisdiction clause.[41] Consequently, the *Lemme* court held that Konishi had also consented to the jurisdiction of the New York courts.[42] Then, without first determining whether it was fair to subject Konishi to New York's postal service statute, the *Lemme* court immediately analyzed the sufficiency of postal service on Konishi in Japan.[43]

Although the contractual guarantee involving the performance of a New York corporation may allow the New York courts to exert in

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34. 631 F. Supp. 456 (E.D.N.Y. 1986).

35. *Id.* at 458. "Konishi, a major shareholder of Wine of Japan, lent its credit to the deal by guaranteeing 'the performance of each and every term and condition of [the Agreement] as if said obligations, representations and warranties were of and made by it, or the conditions and terms of said Agreement were to be performed . . .' " by Konishi. *Id.* Konishi signed the contract guarantee in Japan. *Id.* The contract was to be performed by Wine of Japan (a New York corporation) in Japan, as all sales were f.o.b. Japan. *Id.*

36. *Id.* at 459. "Konishi is a Japanese corporation with its principal place of business in Japan. It is not licensed to do business in New York. Konishi maintains no offices, employees or bank accounts in New York, owns no property [in New York], and never solicits business or advertises its products [in New York]." *Id.* at 458.

37. *Id.* at 459-60. "In sum, plaintiff has shown only that Wine of Japan sold products originally distributed by Konishi in Japan, that Konishi knew of the Agreement between Wine of Japan and plaintiff, and that Konishi guaranteed it. This is simply not enough to establish agency." *Id.* at 460.

38. *Id.*

39. *Lemme*, 631 F. Supp. at 460 ("Nothing in plaintiff's allegations demonstrates that Konishi exercised any control over Wine of Japan.") *Id.*

40. *Id.* at 459. "Because Wine of Japan was to perform its contract in Japan, no personal jurisdiction exists over Konishi on the basis of the 'contracts anywhere' clause of" New York's personal jurisdiction statute. *Id.*

41. *Id.* at 461. "In these circumstances Konishi could 'reasonably anticipate being hauled into court [in New York]' . . . and it would be unfair to allow it now to evade jurisdiction there." *Id.* (citing Worldwide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980)).

42. *Id.* at 460-61.

43. *Id.* at 462-64.

personam jurisdiction over the Japanese guarantor,[44] that guarantee may not, under a *Crose* analysis, justify subjecting Konishi to federal or state service of process statutes. Failure to first determine the fairness of subjecting Konishi to service of process under internal U.S. statutes deprived the Japanese defendant of the procedural protections it was entitled to under both the U.S. Constitution and the Hague Service Convention.

The *Crose* factors weigh against subjecting the *Lemme* Type (A) defendant to United States service statutes, because the defendant does not operate continuously in the United States. The Japanese defendant, Konishi, merely guaranteed the contractual performance of Wine of Japan, a New York corporation[45] (actual performance of the contract would have occurred in Japan).[46] Konishi did not purposefully avail itself of economic benefits from New York as opposed to a distributor (a Type (C) defendant) who consciously serves foreign markets. While service through the Central Authority of Japan would take longer and be slightly more expensive, the interest of New York in providing a forum for its residents, and the plaintiff's ability to "haul"[47] the defendant into a New York court, would not have been seriously impaired by requiring service through Japan's Central Authority.

The Type (B) defendant, who operates only occasionally in the United States and who may be sued on causes of action related to its purposeful activities within the forum under specific jurisdiction,[48] presents another close case. Even though the defendant is subject to specific jurisdiction, it may well be unfair to subject this same defendant to service of process under a United States service statute. At first glance, a defendant with sufficient minimum contacts for specific jurisdiction may appear to be automatically subject to the forum's service statutes. However, the Due Process analysis for personal jurisdiction and for service of process is separate and distinct.[49] Substantive due process[50] for personal jurisdiction prevents

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44. *Lemme*, 631 F. Supp. at 460-61.
45. *Id.* at 458.
46. *Id.* at 459.
47. Worldwide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).
48. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985); Smith v. Dainichi Kinzoku Kogyo Co., 680 F. Supp. 847, 852 (W.D. Tex. 1988).
49. Geick v. American Honda Motor Co., 117 F.R.D. 123, 128 (C.D. Ill. 1987) ("This court adheres to the belief that minimum contacts [for personal jurisdiction] and service of process are two distinct concepts, which require the application of differing standards when determining whether each has been met.") *Id.* Although the *Geick* court was discussing the

a state from making a binding judgment against a defendant "with which the state has no contacts, ties, or relations."[51] Procedural Due Process[52] for service of process requires that any form of service be reasonably calculated to give the defendant actual notice of the pending suit in time to defend.[53] Courts cannot ignore the distinction[54] as the results of the two distinct due process analyses are not necessarily coextensive.[55]

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sufficiency of service of process, the same distinction applies when determining under the *Crose* factors whether the foreign defendant should be subjected to domestic service of process. *See* Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wash. 2d 50, 558 P.2d 764, 768 (1977).

50. The Due Process Clause of the Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Whether subjecting a foreign defendant comports with Fifth Amendment substantive due process depends on "traditional notions of fair play and substantial justice." International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) (citations omitted).

51. Schaffer v. Heitner, 433 U.S. 186, 216 (1977) (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). Due Process "requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citations omitted). For the factors used by the U.S. court to determine whether it would be fair to subject the foreign defendant to personal jurisdiction, *see supra* note 19 discussing Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 113-116 (1987).

52. Under the Fourteenth Amendment Due Process Clause, a foreign national is entitled to either: 1) personal service, which typically requires service abroad and triggers the procedural requirements of the Hague Service Convention; or 2) substituted service that provides notice reasonably calculated, under all the circumstances, to give actual notice to the defendant in time for him to present his objections. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2111 (1988).

53. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

54. *See* Geick v. American Honda Motor Co., 117 F.R.D. 123, 128 (C.D. Ill. 1987), where the federal court was discussing the two prerequisites to an Illinois court's exercise of personal jurisdiction over a defendant: 1) the defendant must have sufficient activity within Illinois to have submitted to jurisdiction; and 2) the defendant must have been served according to the formal, statutory requirements of Illinois law. *Id.* The *Geick* court, a federal court applying Illinois state law, stated: "Although the *Schlunk* court made note of this distinction, it then seemingly disregarded it in its analysis." *Id.* at 128. The *Geick* court stated that it would have applied a different analysis than the Illinois state court did in Schlunk v. Volkswagenwerk Aktiengesellschaft, 745 Ill. App. 3d 594, 495 N.E.2d 1114, 1118, 99 Ill. Dec. 379 (1986). *Geick*, 117 F.R.D. at 127-28.

55. Although the due process fairness determination for exerting in personam jurisdiction is based on several of the same factors used to determine the fairness of subjecting the defendant to domestic service of process, the final weighing of the *Crose* factors for domestic service of process may not lead to the same result as for personal jurisdiction. In another context, a defendant in an antitrust suit could be found immune to service of process in a district even though the same district had in personam jurisdiction and proper venue:

> Although difference of that sort may appear to be generally incongruous, since ordinarily it would seem that susceptibility to suit in a district should be accompanied by amenability to process there, such things are of course for Congress' determination as matters of policy relating to the scope and correlation, or lack of it, of venue and service provisions. There is certainly no constitutional requirement that the two be coextensive.

United States v. Scophony Corp. of America, 333 U.S. 795, 810 n.21 (1948).

Given that there are two systems available for service of process, one domestic and the other international, the *Crose* factors compel the judge to consciously decide whether it would be unfair, under the circumstances, to subject the Type (B) defendant who has derived benefits from a single sale in the forum, to service of process under a United States statute. Arguably, the plaintiff could as easily serve process under the Central Authority as under a domestic postal service statute. Even though the single order may meet the minimum contact threshold for exerting specific jurisdiction over the defendant, the single order may not meet the requirements under *Crose* for subjecting the defendant to domestic service of process. If most of the orders were initiated by United States customers, or if the defendant is far back in the distribution chain, the defendant's level of purposefully seeking economic benefits from the forum may not justify taking away the procedural protections it is entitled to under the Hague Service Convention, leaving it with only the due process protections under the United States Constitution. The sporadic nature of the Type (B) defendant's operations in the United States may make it unforeseeable to the defendant that it could be "haled" into court under a United States service statute.

Obligations under international law require that United States courts be vigilant in protecting the procedural rights that foreign defendants have under the Hague Service Convention, just as U.S. courts must protect the rights of foreign defendants guaranteed by the United States Constitution.[56]

III. The Hague Service Convention

A. *The Central Authority*

If under the *Crose* analysis the defendants may not be fairly subjected to the service of process statutes of the forum, the plaintiff may serve process through the Central Authority of the defendant's country as provided by the Hague Service Convention.[57] Prior to the

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56. *Schlunk*, 108 S. Ct. at 2111 (1988) (foreign defendants are assured of the protections of the Due Process Clause of the United States Constitution).

57. Article 2 of the Hague Service Convention provides:

> Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.
>
> Each State shall organize the Central Authority in conformity with its own law.

Hague Service Convention, *supra* note 3, at art. 2; 20 U.S.T. at 362.

Convention, default judgments were common because there was no efficient or mutually compatible system for serving process abroad.[58] Many of the problems with international service stemmed from differences in judicial practice between civil and common law countries. The multi-state federal system of the United States was particularly troublesome.[59] Consequently, in 1965, several nations adopted the Hague Service Convention, a multilateral international treaty designed to overcome many of the obstacles to international service of process.[60] The Convention provides for service of judicial and extrajudicial documents between signatory countries.[61]

The purpose of the Convention, as stated in the Preamble, is to ensure that foreign defendants receive notice of pending suits in "sufficient time"[62] to defend, thereby resembling the Due Process Clause of the United States Constitution.[63] According to Article 1, the Convention applies in all cases "where there is occasion to transmit . . . service abroad."[64] Under Article 2, the Convention creates the primary channel for service abroad by establishing a Central Authority in each signatory country.[65] The Convention allows

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58. Magnarini, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 653-54 (1988) [hereinafter Magnarini].

59. DeJames v. Magnificience, 654 F.2d 280, 288 (3d Cir. 1981).

60. Magnarini, *supra* note 58, at 652.

61. Hague Service Convention, *supra* note 3; 20 U.S.T. at 361.

62. The Preamble to the Hague Service Convention states:

> Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect . . . .

Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362.

63. The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Articles 15 and 16 of the Hague Service Convention have been held to provide equivalent assurances of actual notice and protections against default judgments for foreign defendants. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2116 (1988) (Brennan, J., concurring) (equating "in due time" as the Hague Service Convention requires with "due process of law" as the United States Constitution requires); Shoei Kako Co., Ltd. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973) (holding that Article 15 of the Convention is the equivalent of our national due process concept, and it was so recognized in the Senate). Article 15 of the Hague Service Convention provides that the service of process documents are to be delivered in "sufficient time to enable the defendant to defend," while Article 16 protects foreign defendants from default judgments entered in foreign courts. Hague Service Convention, *supra* note 3, at arts. 15-16; 20 U.S.T. at 364-65.

64. Article 1 of the Hague Service Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Hague Service Convention, *supra* note 3, at art. 1; 20 U.S.T. at 362.

65. *Id.* at arts. 2, 20; 20 U.S.T. at 362, 365.

for other forms of service, arguably including postal service, under Article 10(a).[66] Signatory countries may object to certain forms of transmission, especially postal service,[67] but no signatory country may object to service under the Central Authority.[68]

The most significant innovation of the Convention is the creation of Central Authorities who are empowered to receive service documents from abroad.[69] The Central Authority may require translation of some or all the service documents.[70] Once the Central Authority receives a proper request for service, it must serve the documents either by a method prescribed by the internal laws of the receiving country or by a method requested by the plaintiff, as long as that method does not conflict with the internal laws of the receiving country.[71] The Central Authority may decline a request for service that does not conform to the terms of the Convention under Article 4,[72] or if the request infringes upon the destination country's sovereignty under Article 13.[73] The Convention restricts the authority of the Central Authority to object to a service request, to technical compliance with the terms of the Convention.[74]

The Hague Service Convention does not affect the internal laws of signatory countries regarding the receipt of service of process

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66. *See infra* notes 89-117 and accompanying text.
67. Hague Service Convention, *supra* note 3, arts. 8, 10; 20 U.S.T. at 363.
68. *Id.* at art. 2; 20 U.S.T. at 362.
69. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2107 (1988).
70. Article 5 of the Hague Service Convention provides:

> The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —
>
> (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
>
> (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the state addressed.
>
> Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.
>
> If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
>
> That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Hague Service Convention, *supra* note 3, at art. 5; 20 U.S.T at 362-63.
71. *Id.*
72. *Id.* at art. 4; 20 U.S.T. at 362. Article 4 provides: "If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections." *Id.*
73. *Id.* at art. 13; 20 U.S.T. at 364.
74. *Id.*

from abroad.[75] However, the Convention does limit or control the plaintiff's use of her forum's domestic statutes which authorize transmitting service of process abroad.[76] One problem that frequently occurs is that a statute of the originating country may authorize a method of serving process which is not allowed in the receiving country.[77] For example, while substituted service[78] both through the mail[79] and on agents[80] is authorized under United States laws, the internal laws of some destination countries do not authorize either method.[81]

IV. International Service of Process Sent Through the Mail: Does It Comport with the Hague Service Convention and the Due Process Clause?

The Hague Service Convention controls the sending of judicial documents abroad through the mail under Article 10(a), which declares that the Convention does not "interfere . . . with the freedom to send judicial documents, by postal channels, directly to persons abroad."[82] Controversy over Article 10(a) revolves around whether

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75. Article 19 of the Hague Service Convention provides: "To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within it territory, the present Convention shall not affect such provisions." Hague Service Convention, *supra* note 3, at art. 19; 20 U.S.T. at 365.

76. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2111 (1988); *Service of Process Abroad*, *supra* note 14, at 71 (service of process in contravention of the Convention is invalid).

77. *Service of Process Abroad*, *supra* note 14, at 71. "[I]s service that is neither prohibited nor expressly permitted by the Convention or by the law of the foreign nation permissible—that is, does the Convention set forth the only permissible methods of extraterritorial service in countries that are parties to the Convention?" *Id.*

78. Substituted service is any method of service other than personal service. The United States Constitution requires that any form of substituted service of process be that method, other than personal service, most likely to give actual notice of the suit to the defendant. "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." Shaffer v. Heitner, 433 U.S. 186, 218 n.* (1977) (Stevens, J., concurring) (citing Donald v. Mabee, 243 U.S. 90, 92 (1917)).

79. Fed. R. Civ. P. 4(i).

80. Fed. R. Civ. P. 4(e).

81. Moreover, if the plaintiff wants to enforce a personal judgment obtained in the United States in a foreign court, the foreign court may require proper service on the defendant under the Convention. *See* Hatley, *The Enforcement of Judgments and the Requirement of Proper Service Under 27(2)*, 12 Eur. L. Rev. 2207 (1987); Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2111 (1988) ("parties that comply with the Convention ultimately may find it easier to enforce their judgments abroad").

82. Article 10 provides:

Provided the State of destination does not object, the present Convention shall not

the phrase "*send* judicial documents" refers to "service of process." If the term "send" does mean "service," then, unless the signatory country objects to Article 10(a), plaintiffs may use domestic postal service statutes to serve foreign defendants in that country.[83] However, if the phrase "send" does not refer to "service," then the Convention does not expressly authorize plaintiffs to serve process abroad through the mail.[84] Many countries, including West Germany, have objected to the postal provisions of Article 10(a).[85] Consequently, the plaintiff cannot serve process through the mail on a defendant located in West Germany.[86] Other countries, including Japan, have not objected to Article 10(a),[87] thereby implying that plaintiffs may serve process into Japan through the mail.[88]

A. *Article 10(a) Authorizes Postal Service*

A substantial number of United States federal and state courts have interpreted the word "send" as referring to "service."[89] The

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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 states of destination.

Hague Service Convention, *supra* note 3, at art. 10; 20 U.S.T. at 363.

83. *See infra* notes 89-99 and accompanying text.

84. *See infra* notes 100-08 and accompanying text.

85. Cintron v. W & D Machinery Co., 182 N.J. Super. 126, 440 A.2d 76, 81 (1981).

86. *See Service of Process Abroad, supra* note 14, at 80 n.99 and cases cited therein. If a signatory country has objected to the service by mail under Article 10(a), then any attempted service by mail is invalid. *Id.*

87. Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 1480, 249 Cal. Rptr. 376 (1988).

88. *See* Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 821, 109 Cal. Rptr. 402 (1973) (Article 10(a) refers to sending of documents abroad for the purpose of service). In any case, when sending service documents through the mail to a signatory country, there is no need to translate the service documents unlike the translation requirements where service is made through the Central Authority. Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456, 464 (E.D.N.Y. 1986); Weight v. Kawasaki Heavy Industries, Ltd., 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984).

89. Meyers v. ASICS Corp., 711 F. Supp. 1001 (C.D. Cal. 1989); Smith v. Dainichi Kinzoku Kogyo Co., Ltd., 680 F. Supp. 847 (W.D. Tex. 1988) (service of process directly upon Japanese defendant in Japan by registered mail was sufficient according to Article 10); Newport Components v. NEC Home Electronics, 671 F. Supp. 1525, 1541 (C.D. Cal. 1987); Sandoval v. Honda Motor Corp., Ltd., 364 Pa. Super. 136, 527 A.2d 564, 566 (1987); Ackermann v. Levine, 788 F.2d 830, 830-40 (2d Cir. 1986); Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456 (E.D.N.Y. 1986); Weight v. Kawasaki Heavy Industries, Ltd., 597 F.

California First District Appellate Court, in *Shoei Kako v. Superior Court*,[90] looked at the Convention as a whole and concluded that the distinction between "send" and "service" is not appropriate given the overall purpose of the Convention to facilitate international service.[91] Since Japan had not objected to Article 10(a) when it adopted the Convention,[92] the *Shoei Kako* court concluded that Japan intended to allow service coming from abroad to be sent through the mail.[93] Moreover, interpreting the term "send" as referring to "service" fulfills an important cannon of statutory interpretation, that of giving statutes a positive legal purpose. If Article 10(a) is to fulfill a positive legal purpose, the Convention's drafters must have meant "service" when they used the term "send."[94] Were "send" simply to mean sending documents without legal effect, Article 10(a) would have the nebulous legal effect of merely authorizing the transmittal of documents abroad, which was possible before the Convention.[95]

In another approach, a New York federal district court, in *Lemme v. Wine Import of Japan*,[96] decided that interpreting "send" to refer

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Supp. 1082, 1085-86 (E.D. Va. 1984); Zisman v. Sieger, 106 F.R.D. 194 (N.D. Ill. 1985); Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182, 1206 (D.D.C. 1984); DeJames v. Magnificence Carriers, Inc. 654 F.2d 280, 288 (3d Cir. 1981); Shoei Kako Co., Ltd. v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973) (service of process from United States by registered mail on Japanese corporation in Japan having sufficient minimum contacts with California to uphold personal jurisdiction held to comply with Hague Service Convention).

90. 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

91. *Id.* at 821. The court stated: "Although there is some merit to the proposed distinction [between "send" and "service"] it is outweighed by consideration of the entire scope of the convention." *Id.*

92. Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1469, 1479, 249 Cal. Rptr. 376 (1988).

93. Several courts have followed the *Shoei Kako* reasoning. In *Newport Components*, a federal district court sitting in California followed the *Shoei Kako* decision after looking at the entire context of Article 10. *Newport Components*, 671 F. Supp. at 1541 (citing *Shoei Kako*, 33 Cal. App. 3d at 822; *Ackermann*, 788 F.2d at 839-40; and *Lemme* 631 F. Supp. at 463). In *Newport Components*, the plaintiff had used the California postal service statute to send service to Japan by first class mail. The court noted that the three subdivisions of Article 10 are exclusively devoted to setting out alternative provisions for service of process. *Newport Components*, 671 F. Supp. at 1542. Since subdivisions (b) and (c) refer to "service" when authorizing both personal service and service through consular and diplomatic channels, it is fair to assume that subdivision 10(a) also refers to postal service when it uses the phrase "send judicial documents, by postal channels, directly to persons abroad, . . ." *Id.* In *Ackermann*, the court looked to the frequent use of the term "service" throughout the Convention, and concluded that the ambiguity of the phrase *send* was due to "careless drafting." *Ackermann*, 788 F.2d at 839.

94. *Shoei Kako*, 33 Cal. App. 3d at 821; *Lemme*, 631 F. Supp. at 463.

95. Sandoval v. Honda Motor Co., 364 Pa. Super. 136, 527 A.2d 564, 566 (1987), reasoned that "[p]ersons do not need an international convention on the service of judicial documents to give them the right to 'send' mail." *Id.*

96. *Lemme*, 631 F. Supp. at 464.

to "service" actually protects the sovereignty of the destination country since mail service is the least intrusive of all methods authorized in Article 10.[97] The *Lemme* court reasoned that Japan, by expressly objecting only to subdivisions 10(b) and 10(c), which provide for service personally and through judicial officers, was "promoting the use of the least intrusive means of notifying its citizens of lawsuits filed against them" in foreign countries.[98] Since service through the mail under Article 10(a) intrudes less upon the destination country's sovereignty than does personal service by a foreigner or by foreign officials, the *Lemme* court reasoned that Japan was giving maximum protection from foreign law to Japanese nationals.[99]

B. *Article 10(a) Does Not Authorize Postal Service Abroad*

While many United States courts follow *Shoei Kako*, there is substantial authority which holds that "send" in Article 10(a) does not mean "service."[100] In *Suzuki Motor Co., Ltd. v. Superior Court of San Bernardino County*,[101] the California Fourth District Appellate Court noted that "the record before us indicates that Japan does *not* have an internal legal system which allows service of process by registered mail."[102] Consequently, the *Suzuki Motor* court concluded

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97. *Id.*

98. *Id.* The court stated that "Japan may have rejected sections 10(b) and 10(c) because it is more concerned with who is arriving on the doorstep of its citizens to serve process than with how that process is served." *Id. See also* Newport Components v. NEC Home Electronics, 671 F. Supp. 1525, 1542 (C.D. Cal. 1987). The Hague Service Convention "need not be utilized first in every case" and direct mail service is allowed unless such service intrudes upon Japanese sovereignty. *Id.*

99. *Lemme*, 631 F. Supp. at 464. The court noted that if "Japan's interest is in promoting the use of the least intrusive means of notifying its citizens of lawsuits filed against them, it would be logical to permit [service only through] the Central Authority . . . ." *Id.*

100. Bankston v. Toyota Motor Corp., 123 F.R.D. 595 (W.D. Ark. 1989); Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988); Reynolds v. Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985); Ormandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984); Hantover, Inc. v. Omet, S.N.C. of Volentieri & Co., 688 F. Supp. 1377 (W.D. Mo. 1988) (service into Italy; the Hague Service Convention's repeated references to "service" of documents implies that when drafters use "send," they did not intend to allow postal service of process); Popchop v. Toyota Motor Co., 111 F.R.D. 464, 466 (S.D. Miss. 1986) (service of process by direct mail not permitted under Convention); Mommsen v. Toro Co., 108 F.R.D. 444, 446 (S.D. Iowa 1985) (Article 10(a) does not "expressly allow" service of judicial process by postal channels in signatory nations; it merely permits one to "send" judicial documents by mail to persons abroad).

101. Suzuki Motor Co. v. Superior Court, 200 Cal. App. 3d 1476, 249 Cal. Rptr. 376 (1988). The *Suzuki Motor* court did not consider itself bound by the holding in *Shoei Kako*, since appellate decisions among different California districts are not binding on one another. *Id.* at 1478-79.

102. *Id.* at 1480. The *Suzuki Motor* court explained that "[i]n his declaration [for the Japanese defendant], Mr. Asakura expounded on the acceptable methods of service of process

that Japan was unlikely to have interpreted or understood Article 10(a) to refer to service of process.[103] Other courts have looked to the drafters' original intent as evidenced in both the Convention's provisions and the ordinary meaning of the words used.[104] For example, since "service" appears in over fifteen other places in the Convention,[105] using the term "send" must not mean "service." The New York Supreme Court, in *Reynolds v. Koh*,[106] felt that allowing postal service would improperly relegate the Central Authority of the destination country to an insignificant role.[107] Allowing postal service of process would circumvent the Central Authority and would negate the fundamental intent of the drafters to establish more formal modes of service of process.[108]

C. *Critical Analysis*

The absence of internal laws expressly authorizing postal service should not be determinative of the obligations a signatory country

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in Japan and concluded that plaintiff here had failed to conform to these methods, and thereby had also failed to conform to the requirements of the Hague Convention for service of process in the Convention's signatory states." *Id.* at 1478. The plaintiff did not contest this declaration but instead relied upon *Shoei Kako*. *See also* Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 576-79 (1985) (unlike California, Japan does not allow either attorneys or lay people to serve process by mail); Reynolds v. Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295, 298 (1985) ("the law of Japan is apparently incompatible with the law of New York, which provides for direct service by one litigant upon another, because under Japanese law service of process is the court's responsibility.") *Id.* (citations omitted).

103. *Suzuki Motor*, 200 Cal. App. 3d at 1482. "However, whether the phrase 'to send' was used because of careless drafting or not, it appears that Japan understood it to mean 'to send,' not 'to serve,' as it is implausible that a country which does not use basic postal channels for service of process by its own nationals on their fellows, and which objected to the more rigorous methods of service set out in Article 10, subsidivisions (b) and (c), would have failed to object to subdivision (a) if it had understood that section to relate to service of process." *Id.*

104. Maximov v. United States, 299 F.2d 565 (2d Cir. 1962), *aff'd*, 373 U.S. 49 (1963).

105. Hague Service Convention, *supra* note 3, mentions "*service*" in the following articles: art. 1, "*service* abroad"; art. 2, "requests for *service*"; art. 3, "document to be *served*"; art. 5, "*serve* the document or shall arrange to have it *served*"; art. 6, "the document has been *served*"; art. 8, "effect *service* of judicial documents"; art. 9, "forward documents, for the purpose of *service*"; art. 10 (b) and (c), "effect *service* of judicial documents"; art. 11, "for the purpose of *service* of judicial documents"; art. 12, "*service* of judicial documents"; art. 13, "request for *service*"; art. 14, "transmission of judicial documents for *service*"; art. 15 and art. 16, "transmitted abroad for the purpose of *service*"; art. 17, "purpose of *service*." *Id.* (emphasis added).

106. Reynolds v. Koh, 109 A.D.2d 97, 490 N.Y.S.2d 295 (1985).

107. *Id.* at 298. The court noted that to allow service under Article 10(a) would "relegate the role of the Japanese Minister of Foreign Affairs [as Japan's Central Authority] in a way that seems contrary to the intent of the Hague [Service] Convention." *Id.*

108. Ormandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274, 275 (1984). In this case there was service on the Japanese defendant, Toyota Motor Corporation, by registered mail. This court concluded that a liberal reading of "send" to include effective service of legal process would vitiate the fundamental intent of the parties to establish more formal modes of service such as through the Central Authority. *Id.*

has assumed to recognize international postal service under the Hague Service Convention.[109] It is not unusual for a country to incur international obligations under a treaty and subsequently modify its internal laws to comply with that treaty. Japan and other countries which have not expressly objected to Article 10(a) could not have been unaware of the opportunity to object to Article 10(a). Even now, Japan could easily object to Article 10(a) if it did not wish its nationals served from abroad by mail. The fact that countries such as West Germany have expressly objected to Article 10(a) and disallow postal service, and that other countries such as the United States have expressly recognized postal service coming from abroad under Article 10(a),[110] strongly suggests that the countries signatory to the Convention have understood "send" to mean "service of process." Moreover, one of the remarkable achievements of modern times has been the advances made in international communications. The postal service remains one of the enduring pillars of global communications. Given that there is no express statement to the contrary, it seems odd that a convention devoted to facilitating communication between the parties to a lawsuit should be interpreted as not including service by post.

One objection to allowing postal service under Article 10(a) is that service through the mail infringes on the sovereignty of the destination country.[111] This infringement occurs when service of process by mail is not authorized under the internal laws of the defendant's country and when the United States gives legal effect to postal service into that country. The effect is that any judgment pursuant to that service

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109. In Cartwright v. Fokker Aircraft U.S.A., Inc., 713 F. Supp. 389 (N.D. Ga. 1988), the court considered the validity of postal service by the Central Authority of the Netherlands, a country which does not allow service of process by mail under its internal law. *Id.* at 395. The *Cartwright* court did not consider the existence or nonexistence of an internal law authorizing postal service of process to be a decisive factor in determining whether the postal service from abroad was compatible with internal Netherlands law. However, in adopting the Convention, the Netherlands indicated no objection to receiving postal service from abroad through the mail. *Id.* The Netherlands defendant did not point to any provision in the internal law of the Netherlands which would suggest that postal service violates one of that country's "deep-rooted" national policies. *Id.* The *Cartwright* court determined that the absence of provisions for postal service of process was an insufficient indication that postal service is incompatible with Netherlands law. *Id.* at 395-96 (citing Ackermann v. Levine, 788 F.2d 830, 838-40 (2d Cir. 1986)). The *Cartwright* court noted that the Central Authority of the Netherlands used mail in complying with the service request, and concluded that postal service by the Central Authority of the Netherlands was compatible with the internal law of the Netherlands, even though the Netherlands lacked any other postal service statute. *Cartwright*, 713 F. Supp at 396.

110. Ackermann v. Levine, 788 F.2d 830, 838-40 (2d Cir. 1986).

111. Hague Service Convention, *supra* note 3, at art. 13; 20 U.S.T. at 363.

would violate the prerogative of the destination country to prescribe its own methods for regulating service of process. This is one of the reasons West Germany has objected to Article 10(a).[112] However, there are several reasons for considering that postal service into a country causes only a de minimis infringement on that country's sovereignty.

Subdivisions (b) and (c) of Article 10[113] provide for methods such as personal service and service through diplomatic channels, both of which are much more intrusive than service by mail.[114] Foreign governments would be more likely to prefer having a summons and complaint issued from a foreign court come into its territory through the relatively unintrusive means of post, rather then having a foreigner or diplomat execute service.[115] In today's world of crumbling national borders brought on by instant world-wide communication and greater economic, political and legal integration, the old arguments of territorial integrity contain a hollow ring when voiced in objection to a commonly used means of communication, *i.e.*, international mail.

Recognition by the courts of the validity of international postal service under Article 10(a) would only advance the Hague Service Convention's objective of facilitating liberal methods of service of process abroad.[116] In today's interconnected world, international litigation may grind to a halt without postal service abroad.[117] The enduring split of authority chills the use of international postal service of process even in those jurisdictions which follow *Shoei Kako* and interpret the term "send" as referring to "service." U.S. plaintiffs are likely to be reluctant to serve by mail into Japan if there is any doubt as to the validity of this method. Resolving the dilemma over "send" in Article 10(a) depends on a definitive interpretation of Article 10(a) by the United States Supreme Court. Meanwhile, consistent with the objectives of the Convention, U.S. courts should find that the Convention permits both postal service under Article

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112. *Ackermann*, 788 F.2d at 838-40.

113. *See supra* note 82 for text of Articles 10(b) and 10(c).

114. Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456, 464 (E.D.N.Y. 1986).

115. *Id.* at 464 n.9 (citations omitted).

116. Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362; *see Service of Process Abroad*, *supra* note 14, at 82-84 (describing postal service abroad pursuant to Rule 4(i)(1)(D).

117. If "send" does not mean "serve" then parties could not use mail to conduct international litigation, a "prospect [that] would render foreign litigation in [signatory countries] nigh impossible. . . ." *Service of Process Abroad*, *supra* note 14, at 80; Rich v. Kis California, Inc., No. C-87-801 (M.D.N.C. April 25, 1988) (1988 WL 47605).

10(a) and the use of the Central Authority under Article 2.

D. *Postal Service of Process Must Be Reasonably Calculated to Reach the Foreign Defendant and Give Actual Notice of the Pending Suit*

Accomplishing service through the post under Article 10(a) is not the end of the plaintiff's task. The plaintiff must still show that the postal service was both "reasonably calculated" to reach the defendant in time to defend himself,[118] and "informative" of the action pending against the defendant.[119] In the United States, postal service of process by registered mail, requiring a signed receipt, is generally considered reasonably calculated to reach the defendant, the standard imposed by the Due Process Clause.[120] However, some care must be taken to make sure that postal service gives the defendant notice in "sufficient time."[121]

Once the defendant has received the service, the summons and complaint must still give actual notice to the defendant of the legal proceedings against him.[122] A serious problem may occur if the defendant does not understand English.[123] In considering whether service of a summons and complaint written in English is sufficiently "informative"[124] of the pending legal proceedings, the court must look to the type of defendant and the surrounding circumstances.[125]

For example, due process may be violated if a court gave legal validity to postal service on a Type (A) defendant, who does not understand English and has no minimum contacts with the United States. The Type (A) foreign defendant who is a small, localized foreign manufacturer, may not conduct business operations in English

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118. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

119. Julen v. Larson, 25 Cal. App. 3d 325, 328, 101 Cal. Rptr. 796 (1972) ("Notice to be effective must be informative").

120. *Mullane*, 339 U.S. at 313-14. If the mail service between the plaintiff's and defendant's countries is irregular or undependable, the defendant may be able to successfully quash postal service sent to him as not being reasonably calculated to give him actual notice. This Comment assumes that the mail service between the United States and the signatory country of the defendant is dependable.

121. Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362; *Julen*, 25 Cal. App. 3d at 327.

122. *Mullane*, 339 U.S. at 314-15. *See also* Shoei Kako v. Superior Court, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973).

123. *Julen*, 25 Cal. App. 3d at 328. United States courts protect American defendants from service coming from foreign countries written in a foreign language, unless the U.S. defendant understands the foreign language. *Id.*

124. *Id.*

125. Adams, *supra* note 25, at 1402.

and may not be accustomed to receiving and translating communications in English. Even if it is fair under a *Crose* analysis to subject the defendant to service under a U.S. statute,[126] the defendant may object that the English-written summons and complaint fails to give him actual notice of the legal proceedings.[127] A foreign defendant who does not understand English may move to quash a summons and complaint written in English, especially if the plaintiff knew of the defendant's lack of capacity to understand English.[128] Under these circumstances, it would be wise for the plaintiff to translate at least the summons into the native language of the defendant.[129]

The plaintiff's burden may be easier to meet when serving the Type (B) defendant, who has unsystematic and uncontinuous activity in the United States and is subject to specific jurisdiction. Take, for example, a small foreign manufacturer who executes a single sale in the United States. The manufacturer may conduct all of his business in the German language. If the plaintiff negotiated the single sale in German, and had no other basis for knowing that the defendant spoke English, then at a minimum the plaintiff should be required to translate the summons or provide a summary of the legal proceedings into German.[130] However, if the defendant sends out brochures in English[131] or is known to be accustomed to receiving and

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126. *See supra* notes 26-56.

127. *See* Lemme v. Wine of Japan Import, Inc., 631 F. Supp. 456, 464 (E.D.N.Y. 1986), for a case where the court discussed this issue.

128. Adams, *supra* note 25, at 1403. *See also* Covey v. Somers, 351 U.S. 141 (1956) (the Court considered the fact that the serving party knew the recipient was mentally incompetent, so that even though the service statute was complied with, service was invalid because the defendant could not understand the summons and complaint).

129. *See Lemme*, 631 F. Supp. at 464. The summons in this case was translated, so the Japanese defendant, Konishi, had actual notice of the existence of the proceeding against it. *Id. See also* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (if the form of service used "is reasonably calculated to give [the defendant] actual notice of the proceedings [against him] and an opportunity to be heard . . . the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied"). *Id.*

130. *See Lemme*, 631 F. Supp. at 464 (plaintiff translated the summons into Japanese, served it through the mail into Japan, and the U.S. court held that the Japanese defendant had "actual notice of the proceeding against it" because Japanese companies typically are accustomed to receiving and translating communications in English). *Id.* A summary might include, in the language of the jurisdiction where service takes place: the location of the pending action, the amount involved, the date the defendant is required to respond, and the consequences of not responding or defaulting. Julen v. Larson, 25 Cal. App. 3d 325, 328, 101 Cal. Rptr. 796 (1972).

131. Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 823-24, 109 Cal. Rptr. 402 (1973) (since the Japanese defendant authorized the use of brochures written in English to further sales of its products, the court concluded that service of documents written in English did not violate Due Process as the defendant probably understood them).

translating English language communications,[132] then the defendant has no grounds to challenge service of a summons and complaint written in English.[133]

In serving the Type (C) defendant, who is subject to general jurisdiction through its systematic and continuous contacts with the United States, the plaintiff should be able to meet her burden in showing that a summons and complaint in English would inform[134] the Type (C) defendant of the pending legal proceedings against it.[135] A typical Type (C) defendant would have conducted its U.S. business activities in English.[136] Generally, it would be rare for a foreign defendant who controls a distribution network in the U.S. not to conduct its business and receive communications in English.[137] Thus, the plaintiff should easily meet her burden of showing that a summons and complaint written in English adequately informed the defendant of the proceedings against it.

For Type (D) defendants, who operate through closely controlled, wholly owned subsidiaries, and Type (E) defendants, who operate through partially owned and controlled subsidiaries, the plaintiff may have an easier time meeting its burden of showing that the defendant understands English and knows the importance of the summons and complaint. This is likely due to the level of integration of the domestic, English oriented subsidiary into the business organization of the parent. Justice Stevens has indicated that international investments may justify requiring the foreign investor to foresee being subjected to domestic service of process in those countries where it has invested.[138] Accordingly, the Type (D) and (E) defendants could

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132. *Id.*

133. *Id.*

134. *Julen*, 25 Cal. App. 3d at 328.

135. *See Shoei Kako*, 33 Cal. App. 3d at 823, for an example.

136. A difficult case would be a foreign manufacturer whose domestic distributors conduct business with the foreign defendant only in the defendant's native language. If the defendant deals with its domestic affiliates only in German or Japanese, for example, the plaintiff's burden may not be met.

137. The record in *Shoei Kako* stated that "all Japanese companies involved in trade with other countries carry on correspondence with enterprises in such other countries relating to such trade in the English language, and almost all Japanese companies involved in trade with other countries are accustomed to receiving communications in English and have facilities for the interpretation and translation of the same." *Shoei Kako*, 33 Cal. App. 3d at 823-24 (citations omitted). The same may be true of other multinational corporations operating in international trade.

138. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring). Justice Stevens stated that perhaps some activity, such as purchasing stock of a corporation organized under the laws of a foreign nation, would subject the international investor to the jurisdiction of that foreign sovereign. *Id.* To some limited extent one's property and affairs then become

be required to carry the burden of translation of any summons and complaint served upon them.[139]

V. Service of Process on Affiliates of Foreign Defendants

If the plaintiff is unable to serve the foreign defendant through the mail for any of the reasons discussed above, the next potential option to avoid serving overseas is to find a domestic affiliate that may qualify as a representative of the foreign defendant.[140] Any service by a U.S. plaintiff on a domestic affiliate of a foreign defendant potentially implicates the Hague Service Convention[141] and the Due Process Clause.[142] In the following discussion, the question of whether any of the five types of foreign defendants may be compelled to appear after service upon its domestic affiliate will be examined.

A. *Agency*

1. *Ownership and Control and the Rule of Cannon*

Domestic service might be possible if there is a domestic affiliate that is considered to be an "agent for service of process" of the foreign defendant. Various tests have been used by United States

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subject to the laws of the nation of domicile of the corporation. *Id.* As a matter of international law, requiring the foreign investor to become subject to the law of the nation of domicile of the corporation is reasonably foreseeable. *Id.* This suggestion might be acceptable because foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision. *Id.*

139. Alternatively, the plaintiff may provide a translation in the native language of the defendant of either the summons, as in *Lemme*, or of a summary containing the location of, amount, and consequences of not responding to the legal proceeding. Julen v. Larson, 25 Cal. App. 3d 325, 328, 101 Cal. Rptr. 796 (1972).

140. Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wash. 2d 50, 558 P.2d 764, 768-69 ("Service of process on an agent of a foreign corporation doing business within the state must be on an agent representing the corporation with respect to such business"). *Id.* (citations omitted). Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 444-45 (1952) ("Actual notice of the proceeding was given to the [foreign] corporation . . . through regular service of summons upon its president while he was in [the state] acting in that capacity. Accordingly, there can be no jurisdictional objection based upon a lack of notice to a responsible *representative* of the corporation") *Id.* (emphasis added).

141. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2107 (1988). The Hague Service Convention requires that service reach the defendant in "sufficient time" to defend. Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362.

142. The Due Process Clause of the United States Constitution requires that substituted service on an agent be reasonably calculated to give actual notice of the pending suit to the defendant in time to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

courts to determine what constitutes an "agent for service of process."[143] Generally, the purported "agent" must fill a "representative capacity"[144] for the defendant in its business operations in the forum.[145] The representative capacity is determined by considering whether the affiliate is integrated into the manufacturing, marketing, and sales operations of the defendant.[146] Traditionally, these tests have revolved around ownership and control. A typical set of factors used to show control by the foreign defendant over the domestic affiliate is the "doing business" analysis by the Illinois State Appellate Court in *Schlunk v. Volkswagenwerk Aktiengesellschaft*.[147]

In *Schlunk*, the state appellate court focused on five factors in its "doing business" analysis: 1) whether the affiliate existed predominantly to promote the sale and distribution of the defendant's goods; 2) whether the affiliate was contractually bound to sell the defendant's goods; 3) whether the defendant dominated the board of directors of the affiliate and held meetings in its own domicile; 4) whether there was a detailed importer agreement, whereby the affiliate became the sole distributor of the defendant's goods; and 5) whether the defendant could terminate the importer agreement without notice to the affiliate, if the affiliate experiences financial or business difficulties.[148]

One great impediment to the plaintiff serving process domestically on an affiliate of the foreign multinational corporations is the Rule

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143. "The term 'agent', as used in the jurisdictional sense, is broader than the meaning given in the normal 'principal-agent' concept." Merkel Assoc., Inc. v. Bellofram Corp., 437 F. Supp. 612, 617 n.2 (W.D.N.Y. 1977). Similarly, the term "agent", as used in the context of service of process, has a broader meaning than in the personal jurisdiction sense.

144. *Crose*, 558 P.2d at 769.

145. *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d 881, 885 (Ala. 1983) (Torbert, C.J., specially concurring) (quoting *Crose*, 558 P.2d at 769). "Establishing that the subsidiary has 'such a responsible representative status in the relationship' to the parent makes it reasonably certain that the subsidiary will turn over the process to the defendant parent." *Id.*

146. *Crose*, 558 P.2d at 769.

147. 745 Ill. App. 3d 594, 495 N.E.2d 1114 (1986). In this case, the domestic affiliate was a wholly owned, closely controlled subsidiary and the foreign defendant was the parent corporation. *Id.*

148. *Id.* The detailed importer agreement was of special significance to the Illinois state court. In holding that the wholly owned subsidiary, Volkswagen of America, was an "agent for service of process" for its parent, Volkswagen of Germany, the court considered the following facts: 1) the parent made all the decisions regarding the method of ordering; 2) the subsidiary had no claim against the parent arising from a rejection of orders; 3) the parent corporation had no liability to the subsidiary for early, late, or non-deliveries; 4) the subsidiary had to consult with the parent corporation before establishing dealerships and setting sales goals; 5) the subsidiary was required to protect the parent's service and trademark by suing in the parent's name; and 6) the subsidiary was required to keep the parent fully informed about all aspects of its business. *See* discussion of "doing business" factors in Geick v. American Honda Motor Co., 117 F.R.D. 123, 126-27 (C.D. Ill. 1987).

of *Cannon*.[149] *Cannon* held that mere ownership of a subsidiary, without more, does not subject the foreign parent to the jurisdiction of the state in which the subsidiary "does business."[150] In the absence of complete control and domination by the parent, *Cannon* precludes considering the subsidiary from being an "agent" for personal jurisdiction or service of process.[151] Consequently, unless the foreign parent exerted a great deal of control over its domestic subsidiary in the United States, the U.S. plaintiff could not serve the foreign parent through substituted service on the U.S. subsidiary.[152] The application of *Cannon* to service of process, however, is unjustified.[153]

What U.S. courts have frequently ignored is that there is a distinction between procedural due process for service of process, which requires adequate notice,[154] and substantive due process[155] for personal jurisdiction which is determined by the quality and quantity of the contacts between the defendant and the forum.[156] This distinction

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149. Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333, 336-37 (1925).

150. Newport Components v. NEC Home Electronics, 671 F. Supp. 1525 (C.D. Cal. 1987).

151. *Id.* at 1535; Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2111 n.** (1988) ("In the only case in which it has considered the question, this Court held that the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction, for service of process or otherwise.") *Cannon*, 267 U.S. at 336-37; *Geick*, 117 F.R.D. at 127.

152. *See Geick*, 117 F.R.D. at 123. The plaintiff brought a strict products liability action against Honda of Japan, the Japanese car manufacturer, and Honda of America, its wholly owned U.S. subsidiary. *Id.* at 123-24. The plaintiff attempted to serve Honda of Japan through substituted service on Honda of America as Honda of Japan's "agent for service of process." *Id.* at 124. Since Honda of Japan exerted only limited direct control over Honda of America, the *Geick* court held that Honda of America was not an "agent for service of process." *Id.* at 127. Since the *Geick* court used the same "doing business" factors applied to Volkswagen of Germany in *Schlunk* to find that its wholly owned U.S. subsidiary was in fact its parent's "agent for service of process," it appears that the agency status for U.S. subsidiaries of foreign manufacturers depends upon the parent's nationality.

153. *Cannon* has been criticized by many modern courts. *See* Brunswick Corp. v. Suzuki Motor Co., Ltd., 575 F. Supp. 1412, 1418-21 (E.D. Wis. 1983); Consolidated Engineering Co., Inc. v. Southern Steel Co.,, 88 F.R.D. 233, 237-38 (E.D. Va. 1980); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 502-03 (D. Kan. 1978); Newport Components v. NEC Home Electronics, 671 F. Supp. 1525, 1534-35 n.10 (C.D. Cal. 1987) and cases cited therein. The decline of the "presence" requirement for personal jurisdiction under *International Shoe* and under long-arm statutes indicates that *Cannon* is no longer relevant to personal jurisdiction. *Cannon* was decided in 1926 before any state long-arm statutes were enacted. Moreover, the *Cannon* Court itself noted that it was making a decision only about personal jurisdiction, not service of process. *Cannon*, 267 U.S. at 335.

154. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-15 (1950).

155. *See supra* note 19 discussing the fairness factors used by the U.S. Supreme Court in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 113-16 (1987).

156. International Shoe Co. v. State of Washington, 326 U.S. 310, 319 (1945). *See also* Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Com., 360 F.2d 103, 109 (2d. Cir. 1966) which stated: "we do not equate 'presence,' or amenability to suit, with service of process. Federal Rule of Civil Procedure 4 speaks to service alone, and not to both service and amenability to personal jurisdiction." *Id.*

was recognized by a federal district court sitting in the central district of Illinois in *Geick v. American Honda.*[157] A different analysis was not implemented, however, because the court was bound by Illinois state law which did not distinguish between proceedural and substanitive due process.[158]

2. *The* Copperweld *Theory of Single Enterprise*

As an alternative theory to the principal-agent analysis, the courts may ask whether the foreign defendant and its domestic affiliate form a "single enterprise," so that service on the domestic affiliate is deemed actual service on the foreign defendant. Since knowledge of service on one part of the "single enterprise" is automatically imputed to the other parts, service on the domestic affiliate would be service on the parent defendant. There would be no need to transmit the service abroad as the foreign defendant is located inside the forum. The theory of the "single enterprise" was applied in the antitrust context by the United States Supreme Court to the relationship between a wholly owned subsidiary and its parent in *Copperweld Corp. v. Independence Tube Corp.*[159]

The issue in *Copperweld* was whether a parent and its wholly owned subsidiary are capable of conspiring to violate the Sherman Antitrust Act.[160] The Supreme Court found that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a "single enterprise."[161] The primary reason that the *Copperweld* court concluded that the parent and its wholly owned subsidiary form a "single enterprise" is that they have a "unity of purpose or a common design."[162] Their objectives are common, not

157. 117 F.R.D. 123 (C.D. Ill. 1987).

158. *Id.* This federal court was reluctantly following the rules of decision of the Illinois state court in Schlunk v. Volkswagenwerk Aktiengesellschaft, 745 Ill. App. 3d 594, 495 N.E.2d 1114 (1986): "This court adheres to the belief that minimum contacts and service of process are two distinct concepts, which require the application of differing standards when determining whether each has been met. However, for reasons previously set forth, this Court adopts and applies *Schlunk* in this case." *Id. Geick* ultimately found under the *Schlunk* state court's analysis that the United States subsidiary, Honda of America, was not the "agent for service of process" of its foreign parent, Honda of Japan. *Geick,* 117 F.R.D. at 127. The result may have been different, and Honda of America might have been considered to be an "agent for service of process" for Honda of Japan, if the federal district court sitting in Illinois was not bound to use the that state's "doing business" test based on the personal jurisdiction analysis. *Id.* at 127-28.

159. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

160. *Id.* at 767.

161. *Id.* at 771.

162. *Id.*

disparate.[163] "They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver."[164]

There are three factors which courts use to determine the amount of control the foreign defendant exerts over its domestic subsidiaries and the strength of their common interest. The first factor is the type of corporate form. Frequently, the multinational corporation (hereinafter MNC) uses wholly owned sales subsidiaries to exercise greater control over foreign operations both directly and indirectly.[165] The second factor is the number of products in the MNC's product line. Where a sales and marketing subsidiary handles a single product of the parent, such as do Honda of America and Volkswagen of America, the subsidiary tends to be under close control by the foreign parent.[166] The third factor is the age of the subsidiary and the state of development of the parent.[167] After a time, a domestic subsidiary may take on a life of its own.[168] When and if the sales-marketing subsidiary evolves into an existence independent from that of the parent, then perhaps the wholly owned subsidiary would no longer form a "single enterprise" with the parent.[169] The independence of the subsidiary at that point would break up the "single enterprise," and the plaintiff would be required to fall back on an agency theory.

B. *Compliance with the Hague Service Convention*

Aside from fulfilling the requirements of U.S. law, when serving a domestic affiliate to reach a foreign defendant, the plaintiff must also consider whether she must comply with the Hague Service Convention.[170] Article 1 of the Hague Service Convention provides that the "Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. . . ."[171] When analyzing the validity of

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163. *Id.*
164. *Copperweld*, 467 U.S. at 771.
165. Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1336 (E.D.N.Y. 1981).
166. *Id.* at 1337 ("sales subsidiaries tend to be under especially close control where a company produces a limited number of products.") *Id.*
167. *Id.*
168. *Id.* (quoting C. KINDLEBERGER, AMERICAN BUSINESS ABROAD 183 (1969)).
169. *Id.* ("While many thousands of corporations are at the first export stage, only a handful have developed into advanced multinational enterprises each of whose elements can be said to be significant in its own right.") *Id.*
170. This Comment assumes that the foreign defendant resides in a country signatory to the Hague Service Convention.
171. Hague Service Convention, *supra* note 3; 20 U.S.T. at 362.

domestic service on a foreign defendant, the court must determine whether the transmission abroad of the service of process is required, thus invoking the Convention. The problem the court faces in this determination is where to find the standard that determines when service on a foreign defendant requires transmitting the service documents abroad.[172]

Substituted service on domestic agents of foreign defendants has long been recognized by United States courts as complying with the Due Process Clause requirement of being reasonably calculated to give actual notice to the foreign principal.[173] However, it was not until recently, in *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[174] that the United States Supreme Court considered the issue of whether substituted service of process on domestic agents of foreign defendants complies with the Hague Service Convention.

In *Schlunk*, Volkswagenwerk Aktiengesellschaft, A.G. (Volkswagen of Germany or VWAG), a West German based multinational corporation, had been served through its wholly owned, closely controlled United States subsidiary, Volkswagen of America (VWOA).[175]

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172. The majority in *Schlunk* considered that the standard determining whether "service abroad" was required was ultimately contained in the U.S. Due Process Clause, not the Hague Service Convention. Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104, 2112 (1988). The concurrence, written by Justice Brennan, held that the Convention imposes a "substantive standard" which determines whether a particular form of service on a foreign defendant requires "service abroad" under the terms of the Convention. *Id.* at 2112 (Brennan, J., concurring).

173. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (notice must be reasonably calculated under all the circumstances to give actual notice to the defendant); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 444-45 (1952) (substituted service on president of foreign corporation while he was acting in that capacity gave actual notice of the pending suit to the foreign corporation since the president was a responsible representative of the corporation); *Schlunk*, 108 S. Ct. at 2116 (Brennan, J., concurring) (substituted service of process on foreign corporation permitted under U.S. law long before adoption of the Hague Service Convention).

174. 108 S. Ct. 2104 (1988). Whether substituted service of process on agents of foreign defendants invoked the Hague Service Convention was a matter of disagreement which had split the lower federal and state courts. Some courts held that the Convention did not apply when the foreign defendant was served properly through its domestic agent. Zisman v. Sieger, 106 F.R.D. 194, 198-200 (N.D. Ill. 1985); Lamb v. Volkswagenwerk A.G., 104 F.R.D. 95, 97 (S.D. Fla. 1985). Other courts held that the Convention is the exclusive means of serving a foreign defendant. Cippolla v. Picard Porsche Audi, 496 A.2d 130, 131-32 (R.I. 1985). *See Schlunk*, 108 S. Ct. at 2107.

175. *See Schlunk*, 108 S. Ct. at 2106-07. The parents of the plaintiff were killed in an automobile accident involving a car made by Volkswagen of Germany [VWAG]. *Id.* at 2106. The plaintiff alleged that Volkswagen of America [VWOA] had designed and sold the car in which his parents were killed, and that the defects in the car either caused or contributed to their deaths. *Id.* The plaintiff successfully served his complaint on VWOA; but VWOA denied that it had designed or assembled the car. The plaintiff then amended the complaint to add VWAG. *Id.* The plaintiff served the amended complaint on VWAG by serving VWOA as VWAG's "agent for service of process." *Id.* The Illinois state court then held that VWAG and VWOA are "so closely related" that VWOA is VWAG's "agent for service of process." *Id.* at 2107.

VWAG sought review by the United States Supreme Court for a definitive interpretation of the scope of Article 1 of the Convention, which would determine whether substituted service of process on its U.S. subsidiary was valid under the Convention.[176] The *Schlunk* majority[177] held that a decision on whether the Convention is invoked by a required transmission abroad is determined by the domestic, internal laws of the originating country, *i.e.*, the Due Process Clause and the Illinois service statute.[178]

The *Schlunk* majority began its interpretation of "occasion to transmit" a complaint "for service abroad"[179] in Article 1 by considering both the text of the Convention and the context in which the words were used,[180] as well as the negotiating history of the Convention and the practical construction adopted by the signatory countries.[181] The majority found that the Convention does not explicitly determine when the circumstances require that the service documents be transmitted abroad for service,[182] but that the words "service of process" have a well-established "technical" meaning.[183] This meaning, the Court stated, is the "formal delivery of documents that is legally sufficient to charge the defendant with notice of the pending suit."[184]

Whether a particular form of delivery of the service documents is sufficient without transmission abroad must be determined according to some standard.[185] As the *Schlunk* majority noted, the Convention does not prescribe a standard against which to measure the sufficiency of service, so the courts must necessarily refer to the internal law of the requesting state to find a standard.[186] Moreover, according to the majority, the negotiating history of Article 1 suggests that whether service abroad was necessary would be determined according to the

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176. *Id.*
177. Justice O'Connor delivered the opinion of the Court, in which Rehnquist, C.J., and White, Stevens, Scalia, and Kennedy, JJ., joined. Justice Brennan filed a concurring opinion, in which Marshall and Blackmun, JJ., joined.
178. *Schlunk*, 108 S. Ct. at 2112.
179. Hague Service Convention, *supra* note 3, at art. 1; 20 U.S.T. at 362.
180. "When interpreting a treaty we begin 'with the text of the treaty and the context in which the written words were used.'" *Schlunk*, 108 S. Ct. at 2108 (quoting Societe Nationale Industrielle Aeorspaciale v. United States Dist. Court, 107 S. Ct. 2452, 2550 n.15 (1987)).
181. *Id.* at 2108 (citing Air France v. Saks, 470 U.S. 392, 396 (1985)).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Schlunk*, 108 S. Ct. at 2108.
186. *Id.*

law of the requesting state.[187] After extensively analyzing the history of the phrasing of Article 1, the *Schlunk* majority concluded that the evidence sufficiently demonstrated that the Convention was not intended to define when service of process abroad is required.[188]

Under this interpretation, the Convention is invoked only if the internal law of the originating forum defines the applicable method of serving process as requiring that the service of process be transmitted abroad.[189] The majority assumed that the internal communications between the domestic agent and the foreign principal were beyond the considerations of the court, even though as a practical matter the "agent" was certain to transmit the service documents abroad to its principal.[190] Consequently, where service on a domestic agent is "valid and complete under both state law and the Due Process Clause," the Convention has no further implications and is not invoked.[191]

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187. *Id.*

188. *Id.* To support this technical interpretation of the phrase "service abroad" in Article 1, the *Schlunk* Court looked to the negotiating history over Article 1. *Id.* In its preliminary draft, Article 1 said the Convention would apply in all cases in which there are grounds "*to transmit or to give formal notice* of a judicial or extrajudicial document . . . to a person saying abroad." *Id.* (emphasis in original). The delegates criticized the language of the preliminary draft because it suggested that the Convention would be invoked even when "transmissions abroad would not culminate in service." *Id.* at 2109. The final text of Article 1 eliminates this possibility, and the Convention now applies only to "documents transmitted for service abroad." *Id.* Moreover, the Final Report of the drafters confirms that the Convention is invoked only when there is both "transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended." *Id.*

Further, the Convention's negotiating history indicates that whether service abroad is required is to be determined by reference to the law of the requesting state. *Id.* The drafting committee realized that the phrase "where there are grounds" to transmit a judicial document to a person staying abroad implied that the forum's internal law would govern whether service abroad was required. *Id.* Yet the delegates did not change the meaning of Article 1.

Several delegates wanted to amend Article 1 to make explicit that service abroad would be defined according to the law of the requesting state. *Id.* The phrase "according to the law of the requesting state" was proposed by the Yugoslavian delegate. *Id.* Although several delegates agreed with this principle, the phrasing was submitted to a drafting committee for revision. The drafting committee then composed the final version of Article 1, which states that the Convention applies "where there is occasion" to transmit a judicial document for service abroad. *Id.* The Official Report again explained that the laws of the requesting state still determined when a document must be served abroad since there was no objective test within the Convention for measuring the sufficiency of service, other than the law of the requesting state. *Id.*

189. *Id.* at 2108. It had been argued that the Hague Service Convention would apply even in the case of substituted service on a domestic agent of a foreign defendant. *Id.* at 2111-12. Under the Due Process Clause of the U.S. Constitution, the agent would then have to transmit the service documents abroad to the foreign-based defendant, thus invoking the Convention. *Id.* This argument was rejected by the United States Supreme Court in *Schlunk* since U.S. internal laws may consider substituted service of process on a domestic agent to be complete upon serving the "agent." *Id.*

190. *Schlunk*, 108 S. Ct. at 2112.

191. *Id.*

In his concurrence, Justice Brennan agreed with the majority that the Convention does not prohibit substituted service on a wholly owned, closely controlled subsidiary of a foreign parent.[192] According to Justice Brennan, this is because such service was not "service abroad" within the meaning of Article 1.[193] Justice Brennan believed, however, that the internal laws of the originating country should not alone determine whether any form of substituted service was complete as against a foreign defendant. Brennan declared that the evidence cited by the majority for its "technical"[194] interpretation of the Convention was insufficient to hold that the Convention does not play a role in determining whether a service statute must require transmission of service abroad.[195] Rather, according to Justice Brennan, the Convention sets some "substantive limit" on the ability of the originating country to not require "service abroad" pursuant to the Convention.[196] Although the Convention never delineates the exact nature of a substantive standard that might require "service abroad" under certain circumstances,[197] it does expressly require that the service reach the defendant in "due time."[198] Accordingly, the Convention limits the ability of a signatory country to design its internal service statutes to deem a domestic form of service complete against a foreign defendant without transmitting for "service abroad."[199]

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192. *Id.* (Brennan, J., concurring). "Even so, the [majority] holds, and I agree, that a litigant may, consistent with the Convention, serve process on a foreign corporation by serving its wholly owned domestic subsidiary. . . ." *Id.*

193. *Id.* at 2112.

194. *Id.* at 2108 ("The negotiating history supports our view that Article I refers to service of process in the technical sense." That is, that the Convention sets no substantive standard which domestic service must meet if the statute does not require "service abroad" under the Convention.) *Id.*

195. Justice Brennan believed that the overall purposes of the Convention contradicted the modicum of evidence cited by the majority for its technical reading of Article 1. *Schlunk*, 108 S. Ct. at 2114 (Brennan, J., concurring). For example, the Convention's Final Report stated that deference to the Convention was obligatory without reference to a possible role for the internal laws of the signatory states in determining sufficiency of service. *Id.* at 2114. Justice Brennan argued that "[e]ven assuming any quantum of evidence from the negotiating history would suffice to support an interpretation so fundamentally at odds with the Convention's primary purpose [of imposing a mandatory method of service], the evidence the Court amasses in support of its reading—two interim comments by the reporter on initial drafts of the Convention suggesting that the forum's internal law would dictate whether a particular form of service implicates the Convention—falls short." *Id.*

196. *Id.* at 2115 (Brennan, J., concurring).

197. *Id.* at 2114 (Brennan, J., concurring). Justice Brennan notes that "[a]dmittedly . . . the Convention's language does not prescribe a precise standard to distinguish between 'domestic' service and 'service abroad.' But the Court's solution leaves contracting nations free to ignore its terms entirely, converting its command into exhortation." *Id.*

198. *Id.* at 2115 (Brennan, J., concurring).

199. *Id.* at 2112 (Brennan, J., concurring). Justice Brennan states "[r]ather in my view,

C. *Implications for Foreign Defendants*

Since the majority ignores the internal communications between the agent and principal,[200] its opinion fails to address the case in which a domestic affiliate is appropriately deemed an agent for service of process only because it could be reasonably expected to retransmit the service documents abroad to the principal.[201] By considering the communications between a domestic affiliate and its overseas owner, U.S. courts may recognize a wider range of potential agents for service of process than the wholly owned, closely controlled subsidiary.

The majority is attempting to achieve a just and logical result: subjecting a foreign multinational corporation to domestic service of process in forums where it fully owns a closely controlled subsidiary.[202] The basic tenet of law that the majority depends upon is that the relationship between a wholly owned, closely controlled subsidiary and its parent is one of principal-agent.[203] But using the principal-agent theory leads to an unnecessarily broad holding. It seems that the majority goes too far in saying that internal laws of the U.S., limited only by the Due Process Clause, may define all forms of substituted service on a domestic "agent" of a foreign defendant as not requiring subsequent retransmission of service abroad.[204] In fact, the majority's use of the phrase "beyond the concerns of *this case*,"[205] indicates that the majority was not making a general statement about principal-agent relationships.

The inherent logic that the majority reaches results only from the cozy relationship between the wholly owned, closely controlled subsidiary and its parent. The majority appeared to want to allow state

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the words 'service abroad,' [in Article 1] read in light of the negotiating history, embody a substantive standard that limits a forum's latitude to deem service complete domestically." *Id.* Justice Brennan noted "[t]hat substantive standard is captured in the *Rapport's* admonition that 'all the transmission channels (prescribed by the convention) *must have as a consequence the fact that the act reach the addressed in due time. . . .*'" *Id.* at 2115 (emphasis in original) (citations and footnote omitted).

200. *Schlunk*, 108 S. Ct. at 2112.

201. *See* Crose v. Volkswagenwerk Aktiengesellschaft, 50 Wash. 2d 50, 558 P.2d 764, 769 (1977), where the court indicates that a proper "agent for service of process" would turn over the process to the principal. *Id.*

202. *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d 880, 886 (Ala. 1983) (Torbert, C.J., specially concurring).

203. *Schlunk*, 108 S. Ct. at 2112.

204. *Id.*

205. *Id.* (emphasis added).

law to consider certain forms of domestic service on foreign defendants to be complete without any service abroad.[206] Thus, the majority had to conclude that substituted service on the wholly owned, closely controlled subsidiary would reach the foreign parent in "sufficient time" or "due time,"[207] without requiring the subsidiary to subsequently retransmit the service documents abroad under the terms of the Convention.[208] Otherwise, the Hague Service Convention would have been invoked, and its terms would supersede state law.[209]

In order to avoid invoking the Convention, the *Schlunk* majority ignored the internal communications between the parent and subsidiary and held that once the Due Process Clause and state law are satisfied by service on a domestic agent, the Convention is neither invoked nor applicable.[210] The majority's rationale of ignoring the internal communications between all types of domestic agents and foreign principals should not be followed. As it is, other signatory countries may object to the majority's methodology, which seems to allow the U.S. and other signatory countries to "arbitrarily designate a domestic agent for any foreign defendant and deem service complete upon receipt domestically by the agent,"[211] even though it is unlikely that the service would reach the foreign defendant in "sufficient time."[212] The *Schlunk* majority would have been better able to avoid the problem of accounting for the communications between the parent and subsidiary if they had considered the wholly owned subsidiary and the parent as a "single enterprise."[213] Since the parent and wholly owned subsidiary form a "single enterprise," there is no need for the court to consider their internal communications.

The concurrence makes a plausible contention that substituted service of process on a wholly owned, closely controlled subsidiary

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206. *Id.* at 2111. The Illinois long-arm statute authorized the plaintiff to serve Volkwagen of Germany, the German defendant, by substituted service of process on Volkwagen of America, its wholly owned, closely controlled subsidiary, without sending the service documents to Germany. *Id.*

207. *Id.* at 2111 n.**.

208. *Schlunk*, 108 S. Ct. at 2112.

209. *Id.* "By virtue of the Supremacy Clause, U.S. Const., Art. VI, the [Hague Service] Convention pre-empts inconsistent methods of service prescribed by state law in all cases in which [the Convention] applies." *Id.* at 2108.

210. *Id.* at 2112. "Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications." *Id.*

211. *Id.* at 2114 (Brennan, J., concurring).

212. *Id. See also* Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362.

213. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

meets the substantive standard[214] of the Convention since it is reasonably calculated to reach the parent in "due time" as the Convention requires.[215] A major problem with the concurrence is that it does not tell us when a form of substituted service, which meets U.S. Due Process standards, nonetheless violates the substantive standard of the Convention by not requiring service abroad. The concurrence's contention that service on a wholly owned, closely controlled subsidiary is reasonably calculated to give actual notice to the parent in due time[216] becomes self-evident under the "single enterprise" theory.[217] Service on any wholly owned subsidiary is reasonably calculated to inform the parent since actual service on one part of the enterprise is also actual service on the whole. As long as the domestic affiliate is part of the "single enterprise"[218] of the foreign defendant, then service on the domestic affiliate meets the substantive standard set by the Convention and there is no requirement under Article 1 to transmit service abroad to the parent.[219]

A distinction must be drawn between the limits the Convention places on the internal laws of signatory countries in deeming service domestic,[220] and whether a domestic service statute invokes the Convention by requiring "service abroad."[221] The Convention limits the ability of a signatory country to design its laws without requiring service abroad by prohibiting any mode of service that would fail to reach the defendant in "sufficient time."[222] However, as long as the domestic form of service meets the Convention's substantive requirements of reaching the foreign defendant in "sufficient time" without

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214. *Schlunk*, 108 S. Ct. at 2115 (Brennan, J., concurring).
215. *Id.*
216. *Id.* at 2116.
217. *Copperweld*, 467 U.S. at 771.
218. *Id.*
219. The loose language of the concurrence, which seems to imply that any type of substituted service that meets the U.S. Due Process standard does not violate the Convention, is tightened up by applying the "single enterprise" test of *Copperweld*. Not every form of service that is reasonably calculated to reach the foreign defendant in due time would be allowed under the Convention. But service on those domestic affiliates which are part of a "single enterprise" with the foreign defendant would not violate the Convention even if subsequent service abroad were not statutorily required.
220. The Convention, "read in light of its negotiating history, sets some substantive limit on the forum state's latitude to deem service under one of its service statutes to be 'domestic' without requiring service abroad." *Schlunk*, 108 S. Ct. at 2115 (Brennan, J., concurring).
221. *Id.* at 2108. "If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." *Id.*
222. Hague Service Convention, *supra* note 3, at Preamble; 20 U.S.T. at 362; *Schlunk*, 108 S. Ct. at 2115 (Brennan, J., concurring).

requiring service abroad,[223] service under that law should not invoke the Convention.

1. *Type (A) and Type (B) Defendants*

Neither the Type (A) defendant, who has insufficient minimum contacts with the United States but has consented to personal jurisdiction, nor the Type (B) defendant, who has only unsystematic and intermittent operations in the United States, is likely to have a domestic agent for service of process. The Due Process Clause would require that any agent for substituted service have a high level of contacts with the principal in order to attain representative status for the principal. Otherwise, substituted service on an insufficiently related entity could not be reasonably calculated to give timely actual notice to the defendant. Nonetheless, under the interpretation of the *Schlunk* majority, the Hague Service Convention imposes no limit on the ability of the U.S. to design its internal service statutes so that an unrelated, or insufficiently related, entity may be deemed to be an agent for service of process. According to the *Schlunk* concurrence, the substantive standard set by the Convention would not be met by domestic substituted service on an unrelated entity because the service would not reach the foreign defendant in sufficient time to defend, if at all. The only way that an unrelated entity could be considered to be an agent for service of process is when the service statute requires the agent to retransmit the service documents abroad, thus invoking the Convention.

2. *Type (C) Defendants*

The Type (C) defendant, such as the foreign manufacturer who has systematic and continuous contacts with the United States by operating through domestic distributors, may find that one of its distributors is its agent for service of process. In order to reach this conclusion, the court must look at internal communications between the Type (C) principal and its distributor. The distributor is an agent for service of process only if the agent could be reasonably expected to forward the service documents to the foreign defendant.[224] The substantive standard set by the Convention also would require that

223. *Schlunk*, 108 S. Ct. at 2115.
224. Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wash. 2d 50, 558 P.2d 764, 769 (1977).

such service reach the foreign manufacturer in sufficient time to defend.

The distributor and Type (C) defendant probably would not have the "unity of purpose or a common design" as required by *Copperweld*.[225] For example, the distributor may not exclusively distribute the defendant's products, or the business with the Type (C) defendant may comprise such a small percentage of the distributor's business, that the distributor would not always pursue the interests of the defendant. The other interests that the distributor must pursue to protect its own economic livelihood may delay its handling of any service of process it receives. Since the distributor and Type (C) defendant cannot be considered a single enterprise, the substantive standard of the Convention would require the U.S. distributor to retransmit the service documents abroad.

3. *Type (D) Defendants*

The Rule of *Cannon* may still prevent many wholly owned, closely controlled subsidiaries from being considered agents for service of process.[226] However, considering Justice Brennan's concurrence, *Cannon* should be overruled to the extent that service on the subsidiary is reasonably calculated to give actual notice to the parent in due time to defend.[227] According to both the majority[228] and the concurrence,[229] the Hague Service Convention does not prohibit substituted service on wholly owned, closely controlled subsidiaries. Moreover, using the *Copperweld* analogy, to hold the wholly owned subsidiary and the parent to be a single enterprise for purposes of service of process, is consistent with both the Due Process Clause and the Hague Service Convention. Service on the wholly owned subsidiary is actual service on the entire single enterprise and there is no occasion to serve process abroad under the terms of the Convention.

4. *Type (E) Defendants*

Service on the partially owned subsidiary of the Type (E) defendant may be reasonably calculated to give actual notice to the foreign

225. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

226. The Supreme Court has held "that the activities of a subsidiary are not necessarily enough to render a parent to a court's jurisdiction, for service of process or otherwise." *Schlunk*, 108 S. Ct. at 2111 n.**; Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333, 336-37 (1925).

227. *Schlunk*, 108 S. Ct. at 2116 (Brennan, J., concurring).

228. *Id.* at 2112.

229. *Id.* at 2116 (Brennan, J., concurring).

parent under the Due Process Clause. However, given that the less than wholly owned subsidiary and its parent are arguably separate corporations, service on the partly owned subsidiary is not necessarily service on the foreign parent under the *Copperweld* analogy.[230] In order for the United States to act within the spirit of the Convention, a U.S. service statute cannot consider domestic service on the partly owned subsidiary to be sufficient per se.

The essential question is whether the *Copperweld* analogy, which is limited to wholly owned subsidiaries, could be extended to partly owned subsidiaries.[231] Arguably the 51% owned subsidiary could still be considered a single enterprise with its parent, since with 51% of the stock the parent may still exert actual control at any time. Moreover, the majority owned subsidiary would still primarily fulfill the interests of the parent rather than its own interests or the interests of its other minority owners. If the majority owned subsidiary is considered to be part of a single enterprise, the substantive standard of the Convention would not require retransmission of service abroad.

Minority ownership is more problematic. The minority owned subsidiary may not be part of a single enterprise with the parent. Conflicting interests could arise as the minority owned subsidiary pursues its own interests or those of its majority owners.[232] Depending

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230. *Copperweld* held that only the wholly owned subsidiary was to be considered a single enterprise with its parent. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984). The Court did not address the question of whether the partly owned subsidiary was also to be considered a single enterprise with its parent. *Id.* at 767.

231. *Id. See also* Novatel Communications v. Cellular Telephone Supply, 1986-2 Trade Cas. (CCH) ¶ 67,412 (N.D. Ga. 1986) (a 51% owned subsidiary cannot conspire with its parent if the parent is assured of full control over the subsidiary and also that the subsidiary will act in the best interest of the parent). The determinative quesion is whether there is a unity of purpose and interest between the parent and the subsidiary, both of which may occur with less than 100% ownership. *See* Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987).

232. For example, in *Lemme*, the Japanese distilling parent, Konishi, owned only 27% of Wine of Japan, the New York distributor-subsidiary. Lemme v. Wine Import of Japan, 631 F. Supp. 456, 459-60 (E.D.N.Y. 1986). Konishi guaranteed the contractual performance of Wine of Japan. *Id.* at 461. When Wine of Japan (the New York corporation) failed to perform and the plaintiff went after Konishi, the interests of the parent and subsidiary came into conflict. Unlike the case of a wholly owned subsidiary, the minority owned subsidiary here, Wine of Japan, has an incentive to avoid legal liability. This divergence of legal interests prevents, in this case, the 27% owned subsidiary to be considered as a "single enterprise" with the parent. As a result of not being considered part of the parent's enterprise, the internal law of the United States in this case could not have considered service of process on Wine of Japan in New York to be complete without subsequent retransmission abroad to Konishi in Japan. Importantly, the retransmission abroad would have to comply with the Convention.

But a 5% ownership in what is essentially a "branch" operation may produce a single enterprise if the minority-parent exerts significant control over the affiliate and the majority shareholders are friendly. *See* United States v. Citizens & Southern National Bank, 422 U.S.

upon the surrounding circumstances, service on a minority owned subsidiary may not reach the parent in a timely manner. Accordingly, a U.S. statute which considers the minority owned subsidiary to be an agent for service of process may have to require the minority subsidiary to retransmit the service documents abroad for service, thereby invoking the Convention.

VI. The Stealth Defendant-Conclusion

Today a multinational corporation (MNC) spreads itself throughout the world by controlling affiliated corporations. For example, the MNC may own subsidiaries in each of the countries in which it operates, shuttling resources from one country to another under the dictates of the parent's management. The subsidiary "spokes" are legally separate and independent from the parental "hub," which, oftentimes, unfairly insulates the parent from domestic service of process within the forum of the subsidiary. Given that the parent-subsidiary relationship in the MNC is one built upon close parental control over world-wide operations, the MNC and its subsidiaries should be considered a single enterprise.

Under the theory of *Copperweld*, the U.S. plaintiff would not have to chase a stealth multinational defendant across the globe. The MNC defendant no longer would be able to avoid domestic service of process in forums in which it owns a majority interest of a subsidiary.[233] Since the local subsidiary and the foreign parent are part of the single enterprise, the stealth defendant automatically is available for domestic service of process. The plaintiff who did not engage in any international transactions may avoid the perils of international service of process abroad, a burden which cannot be justly imposed upon her.

In spite of the Hague Service Convention, current developments in corporate structure and international business operations have made it more difficult for local plaintiffs to sue foreign corporations. Ironically, it is easier for a foreign corporation to extract economic

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86, 119-23 (1975). *See also* City of Mt. Pleasant, Iowa v. Assoc. Elec. Co-Op, 838 F.2d 268, 276-78 (8th Cir. 1988) (members of a cooperative may form a single enterprise and thus cannot "conspire" or "sell" amongst themselves).

233. Lamb v. Volkswagenwerk Aktiengesellschaft, 104 F.R.D. 95, 101 (S.D. Fla. 1985) (citing *Ex parte* Volkswagenwerk Aktiengesellschaft, 443 So. 2d, 880, 886 (Ala. 1983) (Torbert, C.J., specially concurring)). "In this age of multinational corporations doing business in almost every country of the world, formal corporate structures should not be used to shield the realities of underlying parent-subsidiary relationships." *Id.*

and legal benefits from the local forum while enjoying immunity from that forum's service laws. Just as jurisdictional rules should not be manipulated against individual consumers in order to cripple their defenses, service of process rules should not be manipulated by corporations to stunt the plaintiff's case.[234] As a matter of public and judicial policy, nonresident foreign corporations who own a majority interest in a local subsidiary should be subject to the domestic forum's procedural service of process rules because of the benefits the corporation receives from operating within the forum.

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234. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 318 (1964) (Black, J., dissenting) (jurisdictional rules may not be employed against small consumers so as to cripple their defense). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985) (jurisdictional rules are not to be employed in a way which will make litigation so difficult that it will severely disadvantage a party.).