

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SALINI COSTRUTTORI, S.P.A.,)	
Plaintiff.)	
)	
v.)	D. D.C. No. 14-2036
)	
KINGDOM OF MOROCCO,)	
Defendant.)	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

BENJAMIN C. MIZER
Acting Assistant Attorney General

Of Counsel:

JEANNE E. DAVIDSON
Director

MICHAEL S. COFFEE
Attorney-Adviser
Office of the Private
International Law
Office of the Legal Adviser
Department of State

ADA E. BOSQUE
Senior Litigation Counsel
Office of International Judicial
Assistance
Civil Division
Department of Justice
1100 L Street, N.W.
Room 11000
Washington, D.C. 20530
Tel: (202) 353-0807
Fax: (202) 514-7965
Attorneys for the United States

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STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

At the invitation of the Court, and pursuant to 28 U.S.C. § 517, the United States Department of Justice respectfully informs the Court of the interest of the United States in this proceeding. The United States respectfully submits that, to date, the Kingdom of Morocco has not been properly served; thus, at this juncture, the Court does not possess jurisdiction, but service may yet be perfected. The United States does not address Morocco’s substantive objections to judgment enforcement at this time. In support of its interest, the United States sets forth as follows:

The Office of International Judicial Assistance (OIJA) of the Department of Justice serve as the United States Central Authority for incoming requests for international judicial assistance in civil or commercial matters involving service of process or the obtaining of evidence under

several treaties, including the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (Hague Convention). *See* 28 C.F.R. § 0.49. In addition, the Department of Justice and the Department of State have a significant interest in the proper interpretation of the Foreign Sovereign Immunities Act (FSIA).

STATEMENT OF PERTINENT FACTS

Salini Costruttori S.P.A. (Salini), an Italian company, entered into a contract with the Kingdom of Morocco, guaranteed by the European Union. Petition (Pet.) ¶ 5-6. The contract contained an arbitration clause, and when disputes arose, an arbitration proceeding was held in Paris, France.¹ Pet. ¶ 1. On December 5, 2011, the arbitration panel rendered its decision. *See* Exhibit D to Salini's Request. Thereafter, Salini initiated court proceedings in Morocco to obtain recognition of the arbitral award. *See* Docket No. 20 (May 22, 2015 letter from the Kingdom of Morocco to district court); Morocco Brief (Br.) at 14. In 2014, part of the arbitral award was stricken as an infringement upon the sovereign's tax powers. *Id.* On July 9, 2014, Salini appealed that decision. *Id.* While that appeal was pending, Salini

¹ The dispute between the parties appears to date back to 2008, and related litigation may have occurred in Morocco before Salini invoked the arbitration provision of the contract. *See* Exhibit D to Docket No. 20 (translation of arbitral award).

filed this petition. Salini asserted the court possessed jurisdiction over Morocco pursuant to 28 U.S.C. §§ 1605(a)(1) (waiver) and (6) (arbitration).² *See* Pet. ¶ 19. On December 22, 2014, its appeal in Morocco was denied, and on April 24, 2015, Salini sought further review of that decision by the Moroccan Court of Cassation, the highest court of appeal, which appeal remains pending. Docket No. 20; Morocco Brief (Br.) at 14.

Salini has made several attempts to serve Morocco. First, on January 22, 2015, it requested the Clerk of the Court serve “the Kingdom of Morocco c/o Ministry of Equipment and Transport,” by DHL, pursuant to FRCP 4(f)(2)(C)(ii), which applies to service upon individuals in a foreign country, not a foreign sovereign like Morocco. *See* Docket Nos. 7-8. Pursuant to that request, the Court mailed the initiating petition, along with supporting documents, to the Ministry of Transport, Directorate of Roads and Road Traffic, not the Ministry of Foreign Affairs, on January 23, 2015. *See* Docket No. 10. Second, on February 25, 2015, Salini moved the Court to effectuate service pursuant to the Hague Convention in accordance with 28 U.S.C. § 1608(a)(2) of the FSIA. *See* Docket Nos. 11-12. The Court granted the request, and on March 6, 2015, the Court transmitted a service request to the “Moroccan Central Authority,” consistent with Article 5 of the

² In its brief, Salini focuses upon jurisdiction pursuant to 28 U.S.C. § 1605(a)(6). *See* Salini Brief (Br.) at 4-5.

Hague Convention. Docket Nos. 13-14. Third, on May 6, 2015, Salini sought to serve pursuant to FRCP 4 and “28 U.S.C. § 1608.” *See* Docket Nos. 17-18. Pursuant to that request, the Court transmitted documents to the Ministry of Equipment and Transport, not the Ministry of Foreign Affairs, per FRCP 4(f)(2)(C)(ii). *See* Docket No. 19. Finally, on July 8, 2015, Salini sought to serve Morocco pursuant to section 1608(a)(3) of the FSIA. Docket No. 30. Proof of service was lodged on July 20, 2015, but the proof did not bear a signature. *See* Docket No. 38.

Relying upon its January 22, 2015, attempt to serve Morocco pursuant to FRCP 4(f)(2)(C)(ii), Salini moved for default judgment, which the Clerk granted on April 23, 2015. Docket No. 15-16. By letter dated May 22, 2015, and without submitting to the court’s jurisdiction, Morocco objected to Salini’s efforts to enforce the arbitral award despite the Moroccan courts’ nullification of part of the award, and asserted an objection to the efforts to serve it by way of the Hague Convention pursuant to Article 13 of that convention. Docket No. 20.

By Order dated May 28, 2015, the Court invited the United States to file a statement of interest and Morocco to file a brief, detailing its objections, and ordered Salini to address Morocco’s objections. *See* Docket No. 21. On June 29, 2015, Salini and Morocco filed briefs.

Salini argued in its brief that the Court possesses personal jurisdiction under 28 U.S.C. § 1605(a)(6). Salini Br. at 4-5. Citing its efforts to serve the Ministry of Equipment and Transport, pursuant to FRCP 4(f)(2)(C)(ii), Salini maintained it had served Morocco “in accordance” with the Hague Convention and section 1608(a)(2) of the FSIA. Salini Br. at 7. Service upon a sovereign is, however, governed by FRCP 4(j), not FRCP 4(f)(2)(C)(ii). Though conceding this Court lacks jurisdiction to consider Morocco’s invocation of Article 13 of the convention, *id.* at 8, Salini maintained Morocco could not invoke Article 13 on an *ad hoc* basis. *Id.* at 9. Finally, Salini indicated it would proceed to effectuate service under section 1608(a)(3) of the FSIA, and, if necessary, section 1608(a)(4). *Id.* at 10-12.

In its brief, Morocco renewed its objections to service and judgment enforcement. Morocco argued dismissal of this action was warranted because, in its view, its invocation of Article 13 can only be remedied through diplomatic channels. Morocco Br. at 3. Morocco maintained that its invocation of Article 13 prevents Salini from proceeding to serve under the remaining FSIA subsections. *Id.* at 9. Notably, Morocco acknowledged that, given its invocation of Article 13, “Salini cannot accomplish service under the Hague Convention, precluding it from satisfying section

1608(a)(2) of the FSIA.” Morocco Br. at 9. Alternatively, Morocco argued that Salini’s most recent service attempt, made under section 1608(a)(3) of the FSIA, was ineffective because the statute of limitations has lapsed. *Id.* at 10 (citing 9 U.S.C. § 207). The remainder of Morocco’s brief focused upon its substantive defense to the petition. Morocco Br. 11-15 (citing *Termorio S.A.E.S.P. et al. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007)), which is binding Circuit precedent). That is, Morocco argued this Court should not recognize the arbitral award where Moroccan courts have nullified part of the award and Morocco has paid the monies due under the remaining part of the arbitral award. *Id.* at 11-12; *see also* Exhibit A to Ambassador’s letter.

DISCUSSION

The FSIA sets forth the only ways in which a foreign sovereign may be served.³ *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 688 (1989); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); *Bleier v. Bundesrepublik Deutschland*, 2011 WL 4626164 (N.D. Ill. Sep. 30, 2011); *Davoyan v. Republic of Turkey*, 2011 WL 1789983 (C.D. Cal. May 5, 2011). Because Salini’s first attempt to serve

³ An integral part of a foreign state is a foreign state for purposes of the FSIA. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994); *Doe I v. State of Israel*, 400 F.Supp. 2d 86, 101 (D.D.C. 2005). Accordingly, a suit against the Ministry of Equipment and Transport is a suit against Morocco.

Morocco was not pursuant to the FSIA, but pursuant to Rule 4(f)(2)(C)(ii), service was not effective. *See* Docket Nos. 7-8; *cf. Transaero*, 30 F.3d at 153 (attempts to serve Ambassador, Consul General, First Minister, and Air Force insufficient). Accordingly, in our view, a default judgment should not have been entered.

The FSIA requirements must be “adhered to rigorously.” *Transaero*, 30 F.3d at 154. In pertinent part, 28 U.S.C. § 1608(a) provides for service:

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

channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

There is no “special arrangement” between the United States and Morocco. Accordingly, as the options are hierarchical,⁴ Salini attempted service under the applicable international service convention, namely the Hague Convention.

I. A Sovereign May Be Served Pursuant To Article 5 Of The Hague Convention, But Morocco’s Invocation Of Article 13 Renders Service Ineffective

The United States entered into the Hague Convention in 1969; Morocco acceded to the convention in 2011. The convention requires each member state to designate a Central Authority, which will endeavor to effectuate service in a manner consistent with its internal law. Article 5; *see also Richardson v. Att’y Gen. of BVI*, 2013 WL 44947 *10-12 (D. V.I. Aug. 20, 2013) (service through Central Authority required; service upon Ministry clerk insufficient); *Davoyan*, 2011 WL 1789983 *2; *Doe I v. State of Israel*, 400 F.Supp. 2d 86, 102 (D.D.C. 2005). Service by way of the Central Authority is the principal method of service under the convention. *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004); *Compass Bank v. Katz*, 287 F.R.D. 392, 396 (S.D. Tx. 2012); *Julien v. Williams*, 2010 WL

⁴ *Transaero*, 30 F.3d at 153-54; *Doe*, 400 F.Supp.2d at 101.

5174545 (M.D. Fl. Dec. 15, 2010). Significantly, transmitting a service request to the Central Authority is not, itself, service; rather, the Central Authority then effectuates service and is obligated to provide a “Certificate” confirming process has been affected. Article 6; *see, e.g., Paracelsus Healthcare Corp. v. Philips Medical Systems*, 384 F.3d 492, 494-95 n.2 (8th Cir. 2004); *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1077 (9th Cir. 1999); *Day v. Corn*, 789 F.Supp.2d 136, 146 (D.D.C. 2011). Whether, and when, a default judgment may be entered is addressed by Articles 15 and 16 of the convention.

When a Central Authority refuses to execute a service request, the convention requires it to “promptly inform the applicant and state the reasons for the refusal.” Article 13. A member state may refuse to comply with a service request that otherwise conforms with convention requirements only if compliance with the service would infringe that state’s sovereignty or security.⁵ Article 13; *see In re South African Apartheid Litigation*, 643 F. Supp.2d 423, 432 (S.D.N.Y. 2009). An Article 13 refusal “is not a declaration that the lawsuit itself violates its sovereignty or security.” *Jian Zhang v. Baidu.com Inc. et al.*, 293 F.R.D. 508, 513 (S.D.N.Y. 2013).

⁵ Salini’s assertion that Morocco cannot invoke Article 13 on an *ad hoc* basis reflects a misunderstanding of that provision. By necessity, Article 13 is invoked as to particular requests.

Salini's attempt to serve Morocco, through its Central Authority, in accordance with Article 5 of the convention, is consistent with section 1608(a)(2) of the FSIA, service through an applicable international convention on service of judicial documents. *See also* Rule 4(j)(1). Morocco, however, rejected service under Article 13 of the convention, as contrary to its "sovereignty or security." Docket No. 20 (May 22, 2015 letter from the Kingdom of Morocco to district court). Whether execution of a service request so infringes upon a member state's sovereignty or security is a matter for the requested state, here Morocco. Accordingly, the draft Practical Handbook on the Operation of the Hague Service Convention (Handbook) cautions that the "requesting state (here the United States) should avoid reviewing a decision by the authorities of the requested State to refuse compliance." *See* Exhibit A (Para. 223).⁶ Consistent with that caution, district courts have held, and Salini does not contest, that courts are without jurisdiction to revisit a member state's invocation of Article 13. *See Jian Zhang v. Baidu.com Inc. et al*, 932 F.Supp. 2d 561 (S.D.N.Y. 2013);

⁶ Although the Handbook has not been published, it has been drafted by the Permanent Bureau of the Hague Conference on Private International Law (Hague Conference), reviewed by a Special Commission convened to review the practical operation of the Hague Convention as well as related conventions, and approved by the Council on General Affairs and Policy of the Hague Conference. *See* Para. 12 at http://www.hcch.net/upload/wop/gap2015concl_en.pdf.

Davoyan, 2011 WL 1789983; *cf. Gurung v. Malhotra*, 279 F.R.D. 215, 218-19 (S.D.N.Y. 2011) (holding refusal to serve not proper under Article 13 where Central Authority’s rejection cited not India’s sovereignty or security, but diplomatic immunity). Given the potential negative impact upon foreign relations of a United States court rejecting the sovereignty and security concerns of a foreign sovereign, or vice versa, a foreign court’s reweighing our sovereignty and security concerns, this Court should follow *Baidu* and *Davoyan*.

II. Salini’s Attempts To Serve The Moroccan Ministry Of Equipment And Transport Were Not In Accordance With The Hague Convention

To the extent Salini contends its attempts to serve Morocco through postal channels were made “in accordance with an applicable international convention on service of judicial documents,” the United States disagrees. First, as noted above, Salini’s attempts to serve Morocco through postal channels were not made pursuant to the convention, but pursuant to FRCP 4(f)(2)(C)(ii).⁷ *See* Docket Nos. 7-8, 17-18.

⁷ The applicable provision of the FRCP 4(j) cross-references section 1608 of the FSIA, and only subsection 1608(a)(3) of the FSIA permits service through postal channels and, then, only where addressed to the “head of the ministry of foreign affairs,” not as Salini requested to an individual agency within a foreign state. As the court in *Transaero* noted, unlike miscellaneous agencies or departments of a foreign state, the Ministry of

Second, in our view, a sovereign cannot be properly served through postal channels, except as detailed in section 1608(a)(3) of the FSIA.

Salini's reliance upon Article 10 of the convention is misplaced. In acceding to the Hague Convention, Morocco, like the United States, made no Article 10 reservation. Therefore, service through postal channels is permissible where it is in accordance with otherwise applicable law.⁸

Accordingly, private litigants in Morocco may be served through "postal channels." Service upon a sovereign, however, is generally a matter of customary international law. At the time the Hague Convention was ratified, absolute sovereign immunity was commonly recognized, and service through diplomatic channels was the norm. *See* H.R. Rep. 94-1487, 1976 U.S.C.C.A.N. 6004, 6624 (FSIA legislative history recognizing

Foreign Affairs is best position to understand our legal system and procedures. 30 F.3d at 154.

⁸ The Hague Convention recognizes "the freedom" to serve by other means, including through postal channels. Article 10(a). Some courts have therefore concluded that Article 10(a) neither authorizes nor forbids service by process by mail. *Julien*, 2010 WL 5174545 at 2; *Doe I*, 400 F.Supp. 2d at 103. That is, "Article 10(a) does not create an affirmative right . . . , it simply does not prohibit," service by postal channels. *Doe I*, 400 F.Supp. 2d at 103. "A court must look to the internal law of the receiving nation, under which the type of service contemplated by Article 10(a) – if any – must be permitted." *Doe I*, 400 F.Supp. 2d at 103; *cf. Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 f. Supp.2d 1273 (S.D. Fl. 1999) ("As long as the nation concerned has not, in its ratification or in any other part of its law, imposed any limits on particular methods . . . other methods . . . may be resorted to).

“[s]ervice through diplomatic channels is widely used in international practice, and the “accepted and indeed preferred” manner of service upon a sovereign). In 2009, the Permanent Bureau sought comments regarding service upon sovereigns “using the *main* channel” of communication. Emphasis added. Some member states reported service under Article 5,⁹ and most reported using/recognizing service by diplomatic channels. *See, generally*, <http://www.hcch.net/upload/wop/2008pd14e.pdf> and http://www.hcch.net/index_en.php?act=publications.details&pid=5470&dtid=33. Most recently, the Handbook identifies the following methods of service upon a sovereign: Article 5, the Central Authority, or Article 9(2), which addresses service through diplomatic channels under certain circumstances. Exhibit A (Para. 23-24). No suggestion is made in the Handbook that a foreign state may be served through such informal means as mail.

The United States, for example, accepts service through Article 5 of the Hague Convention or through diplomatic channels. But, because no provision of United States law permits service in a foreign proceeding

⁹ *See also Scheck v. Republic of Argentina*, 2011 WL 2118795 (S.D.N.Y. May 23, 2015) (outlining Article 5 process to effectuate service upon Argentina); *NML Capital, Ltd. v. Republic of Argentina*, 2011 WL 524433 (S.D.N.Y. Feb. 11, 2011) (service by way of Central Authority under 1608(b)(2)); *Daly v. Llanes*, 1999 WL 1067876 (S.D.N.Y. Nov. 24, 1999).

through postal channels, *compare* Rule 4(i), an attempt to serve the United States through postal channels pursuant to Article 10 of the Hague Convention is ineffective. Therefore, Salini's assertion that Morocco can be served through postal channels, because it lodged no Article 10(a) reservation against service through postal channels upon private litigants in Morocco, is not consistent with the Hague Convention and United States practice. *Doe I*, 400 F.Supp.2d at 102 (no jurisdiction over Israel where not served by way of Central Authority); *but see Great Amer. Boat Co., Inc. v. Alsthom Atlantic, Inc.*, 1987 WL 4766 (E.D. La. 1987)(permitting service by mail under 28 U.S.C. § 1608(b)(2)). In any event, neither of Salini's attempts to serve Morocco were made pursuant to the convention, and thus neither attempt at service is effective.

III. It Is Unclear Whether Morocco Has Been Served Under Section 1608(a)(3) Of The FSIA, Where Evidence Of Signed Receipt Is Pending

Most recently, Salini has sought to serve Morocco through the third subsection of the FSIA, by a transmission from the Clerk of the Court to the head of the Ministry of Foreign Affairs. Docket No. 34. Although Salini has proffered proof of service by Federal Express, the document proffered does not, to date, reflect the signed receipt as provided by section 1608(a)(3) of the FSIA. *See* Docket No. 38. According, the strict requirements of

section 1608(a)(3) have, to date, not been met. *See Transaero*, 30 F.3d at 154. In our view, however, this does not warrant dismissal.

Morocco contends these proceedings must be dismissed because Salini cannot proceed under section 1608(a)(3) of the FSIA given Morocco's invocation of Article 13. Morocco Br. at 9. Morocco points to Article 14, which provides for member states to resolve "[d]ifficulties which may arise in connection with the transmission of judicial documents for service" through diplomatic channels." The Handbook advises that Article 14 "does not prevent the application of the Convention by a State from being reviewed internally by way of appeal or judicial review." Exhibit A (Para. 104).¹⁰ Here, it is uncontested that Morocco's invocation of Article 13 prevents service by way of the convention. Morocco Br. at 9. As established above, this Court lacks jurisdiction to revisit Morocco's invocation, and the United States has not questioned that invocation. Accordingly, in our view, Article 14 is not implicated. The FSIA, however, expressly provides that where "service cannot be made" by special arrangement or under the convention, a plaintiff can proceed to section (a)(3), as Salini has done.

¹⁰ According to the Handbook, Article 14 has "never been used in practice." Exhibit A (Para. 105).

We know of no precedent for Morocco's position. The plaintiffs in *Doe I* could not proceed to serve under section 1608(a)(3) of the FSIA because they had failed to attempt to serve Israel through its Central Authority. 400 F.Supp.2d at 102. The Court in *Davoyan* noted the plaintiff had made no effort to proceed under section 1608(a)(3) of the FSIA following the invocation of Article 13, not that Article 14 prohibited the plaintiff from proceeding to the next permissible method of service under the FSIA. 2011 WL 1789983 at *2. And, in *Bleier*, the Court dismissed the complaint because the plaintiffs failed to "proceed[] to the third method of service," but rather elected to serve Germany and its Ministry of Finance by emailing their counsel. 2011 WL 4626164 *6. Unlike in those cases, Salini has attempted to serve Morocco in accordance with section 1608(a)(3) of the FSIA by requesting the Court transmit the documents to the Ministry of Foreign Affairs. If service cannot be accomplished consistent with section 1608(a)(3) of the FSIA, the FSIA authorizes service through diplomatic channels. 28 U.S.C. § 1608(a)(4). Accordingly, in our view, dismissal at this juncture is unwarranted.

CONCLUSION

For these reasons, the United States respectfully submits that Morocco has not been properly served but that dismissal at this juncture is unwarranted.

Respectfully Submitted,

BENJAMIN C. MIZER
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

Of Counsel:

MICHAEL S. COFFEE
Attorney-Adviser
Office of the Private
International Law
Office of the Legal Adviser
Department of State

/s/ Ada E. Bosque
ADA E. BOSQUE
Senior Litigation Counsel
Office of International Judicial
Assistance
Civil Division
Department of Justice
1100 L Street, N.W.
Room 11000
Washington, D.C. 20530
Tel: (202) 353-0807
Fax: (202) 514-7965

August 10, 2015

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 10th day of August, 2015, a copy of the foregoing STATEMENT OF INTEREST OF THE UNITED STATES was filed electronically.

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to the following address:

Peter J.W. Sherwin
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036-6522

Evan Mark Tager
MAYER BROWN
1999 K Street NW
Washington, DC 20006-1101

/s/ Ada E. Bosque
Senior Litigation Counsel
Office of International Judicial Assistance