UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TECO GUATEMALA HOLDINGS, LLC,

Petitioner,

- against -

REPUBLIC OF GUATEMALA,
8va Avenida de 10-43, Zona 1
Cuidad de Guatemala
Republica de Guatemala 01001

Respondent.

Civil Action No. 17-00102 (RBW)

MEMORANDUM OF LAW IN SUPPORT OF THE REPUBLIC OF GUATEMALA'S MOTION TO DISMISS THE PETITION

Respondent the Republic of Guatemala ("the Republic"), through undersigned counsel, makes this limited appearance to dismiss Petitioner TECO Guatemala Holdings, LLC's ("Petitioner") petition pursuant to Rules 12(b)(1), (2), and (5). Petitioner has not complied with the service requirements of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a). Under the FSIA, proper service is a predicate to this Court having both subject matter jurisdiction and personal jurisdiction over the Republic.

- The Republic is a sovereign entity and a signatory to the Inter-American Convention on Letters Rogatory and Additional Protocol. As such, Rule 4 of the Federal Rules of Civil Procedure and the FSIA require that Petitioner strictly comply with the service requirements set forth in that treaty.
- Petitioner did not attempt service under the Inter-American Convention on Letters Rogatory and Additional Protocol.
- There is no "special arrangement" that would excuse Petitioner's non-compliance with this treaty. Petitioner has provided no evidence that the Republic and Petitioner enjoy a "special arrangement" regarding the service of process regarding civil lawsuits whereby Petitioner can mail documents via DHL to a member of the Republic's Ministry of Economics.
- Without proper service, the Court also lacks subject matter jurisdiction and personal jurisdiction over the Republic. 28 U.S.C. § 1330 (a), (b).

Thus, Petitioner's claims should be dismissed without prejudice and the Clerk's Entry of Default should be set aside.

I. Alleged Facts and Procedural History

On January 16, 2017, Petitioner initiated a civil suit in the United States District Court for the District of Columbia by filing a Petition to Confirm Arbitration Award. Doc. No. 1. On April 4, 2017, Petitioner filed an "Affidavit for Default," alleging that the Republic had been properly served but failed to defend this case. Doc. No. 5. Contemporaneously with filing the request for default, Petitioner filed the Return of Service Affidavit, stating for the first time on the record that it had attempted to serve the Republic. Doc. No. 4.

According to the affidavit, Petitioner mailed a copy of the Summons and Petition to Confirm Arbitral Award to the Republic's Ministry of Economics via DHL on January 23, 2017. *Id*. The document was signed for by Karla Valiente, who appears to be an administrative assistant in that department. Petitioner ostensibly alleges that it had a special arrangement with the Republic for this method of service. *Id.* However, Petitioner provides no evidence of any arrangement between Petitioner and the Republic regarding the service of documents to enforce any judgment in any local court.

The Clerk's Entry of Default was entered against the Republic on April 5, 2017. Doc. No. 7.

II. Legal Standard

Service of process is a fundamental requirement for the initiation of any suit. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). If the respondent challenges service, "[b]y the plain text of Rule 4," the petitioner bears the burden of demonstrating "that the procedure employed to deliver the papers satisfies the requirement of the relevant portions of Rule 4.'" *Mann v. Castiel*, 681 F.3d 368, 372 (D.C.

Cir. 2012) (quoting 4A Charles Wright & Arthur Miller, *Federal Practice and Procedure* § 1083 (3d ed. 2002 & Supp. 2012)).

"[A] rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or the lack of delivery of the summons and complaint." *Candido v. District of Columbia*, 242 F.R.D. 151, 162 (D.D.C. 2007).

III. Petitioner Has Not Properly Served the Republic

Section 1608(a) of the FSIA is the exclusive means for service of process on a foreign state. FED. R. CIV. PRO 4(j) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. §1608."); *Sabbithi v. Al Saleh*, 623 F. Supp. 2d 93, 98 (D.D.C. 2009) (same).

Section 1608(a) sets forth a hierarchy of acceptable methods of service:

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

> and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

The D.C. Circuit requires "strict adherence to the terms of 1608(a)." *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015) (internal marks omitted); *see also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (quotations omitted) (noting that "Leniency [] would disorder the statutory scheme."). Importantly, "[n]either substantial compliance with §1608(a)'s requirements nor actual notice of the suit excuses [a petitioner's] deviation from the section's mandates." *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 102 (D.D.C. 2005) (citing *Transaero*, 30 F.3d at 153-54).

A. The Republic Must Be Served Pursuant to the Inter-American Convention on Letters Rogatory and Additional Protocol

The Republic is a sovereign entity and a signatory to the Inter-American Convention on Letters Rogatory and Additional Protocol ("IACAP").[1] As such, it is entitled to the benefits and the procedural requirements for service set forth in the treaty. 28 U.S.C. §1608(a)(2). Specifically, in the absence of a special arrangement, a plaintiff or petitioner must attempt service on the Republic pursuant to the IACAP's mandatory convention form. This special form must be submitted to the Republic's Central Authority designated for acceptance and transmittal of such documents. Before it is submitted to the Republic's Central Authority, the document must go through a two-part certification process: It must be signed and stamped by (1) the judicial authority and (2) Central Authority.

Importantly, proof of service is not completed by the serving attorney. Instead, proof of service is to be provided by the Republic's Central Authority *after* it effects service. IACAP has

[1] The United States is also a signatory to the IACAP.

several additional requirements designed to ease the service process and to ensure accuracy of delivery, namely the documents must be translated into the country's native language.

Petitioner does not claim to have followed any of these requirements.

B. Petitioner Has Not Met Its Burden of Demonstrating Strict Compliance

As Petitioner did not serve the Republic pursuant to IACAP, its petition must be dismissed unless the Petitioner meets its burden of showing that service through DHL strictly complied with the dictates of FSIA. Petitioner cannot meet this burden.

1. Petitioner has not identified a special arrangement.

Petitioner has not even identified a contractual provision or other agreement through which the Republic agreed to forego service under the IACAP. This omission is significant. In analyzing whether a specific agreement has been made, courts focus on the specific wording of the contract or agreement. *See Hardy Exploration & Prod. (India), Inc. v. Gov't of India*, 2016 U.S. Dist. LEXIS 164956, *24 (D.D.C. Nov. 30, 2016) ("parties and their experts agree that any analysis of the agreement must begin with the language of the contract"). Therefore, Petitioner must identify not only the source of the purported agreement but also the specific language of the agreement. As it has done neither, it cannot carry its burden.

2. *There is no special arrangement regarding the service of process.*

Petitioner states that the method of service was "agreed upon and effected by Petitioner and Respondent in TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, the international arbitration proceeding before the International Centre for Settlement of Investment Disputes from which enforcement is sought in this case." Doc. No. 4 at 1. While Petitioner provides no explanation for this assertion, it appears that Petitioner's argument is that a procedural order from a tribunal in an arbitration regarding the manner of

delivery of documents in that arbitration applies not only to the arbitration proceedings but also to the *initiation of a separate lawsuit in domestic court*. This assertion cannot be the case.

A "special arrangement" effectively waives a sovereign's right to receive foreign service via a validly executed treaty. Therefore, courts ensure that the purported agreement was specifically meant to waive such rights in the context of a lawsuit. To that end, courts require that the purported agreement demonstrates the parties' intention that it would govern service of process *for the specific suit at issue*. *See Hardy Exploration & Prod. (India), Inc. v. Gov't of India*, 2016 U.S. Dist. LEXIS 164956, *24 (D.D.C. Nov. 30, 2016) (granting in part specially-appearing respondent's motion to dismiss on the grounds that "the plain language of [the service provision] appears to be limited to notices and communications specifically prescribed in the [contract] itself").

In light of these demanding requirements, special arrangements most commonly arise in the context of a contract dispute in which, as part of the bargained-for exchange in the contract, the state agreed to waive the requirement of service through an applicable treaty and accept service via some other means. Even in those cases, however, courts take care to ensure that the special arrangement actually relates to service in the context of the specific lawsuit at issue. *Orange Middle E. & Afr. V. Republic of Eq. Guinea*, 2016 U.S. Dist. LEXIS 65147, *9 (D.D.C. May 18, 2016) (stressing the distinction between broad language designed to cover service of documents in subsequent lawsuits and limited language regarding service under the contract).[2] For instance, in *Underwood v. United Republic of Tanzania*, 1995 U.S. Dist. LEXIS 1333, *6, 1995 WL 46383 (D.D.C. Jan. 27, 1995), this court held that a contractual provision requiring that

[2] Laura G. Ferguson and Charles F.B. McAleer, *Playing the Sovereign Card: Defending Foreign Sovereigns in U.S. Courts*, 43 A.B.A. LIT. J. 1, 1, available online athttps://www.millerchevalier.com/sites/default/files/news_updates/attached_files/Playing-the-Sovereign-Card-Defending-Foreign-Sovereigns-in-US%20Courts_Ferguson,McAleer.pdf ("Courts require a definite manifestation of agreement when determining that a special arrangement has been made, such as a contract provision specifying a method of service in the event of suit.")

any notices "required or permitted" under the contract would be effective when mailed was not a valid special arrangement for service in a lawsuit regarding that same contract. The court explained that parties' agreement regarding contractual notices did not encompass all notices between those parties, especially in the context of a civil action. Rather, that provision covered only those notices that were required to be made in the context of the specific contract. *See also Orange Middle E. & Afr.*, 2016 U.S. Dist. LEXIS at *8 (holding that a contractual provision allowing for the transmission of "notices, agreements, waiver declarations, and other communications made *under this Agreement*" was limited to the specific agreement and did not constitute a special arrangement for FSIA purposes).

Similarly, in *Hardy Exploration & Prod.*, this court held that the following language did not constitute a special arrangement because it did not "specifically contemplate[] . . . service of process":

> All notices, statements, and other communications to be given, submitted or made hereunder by any Party to another shall be sufficiently given if given in writing in the English Language and sent by registered post, postage paid . . . to the address or addresses of the other Party or Parties . . . .

2016 U.S. Dist. LEXIS at *15, 26 (granting motion to dismiss in part).

Here, too, any purported agreement or order made regarding submission of documents in an *international arbitration* have no bearing on the service in a *civil suit.*

A contrary holding would lead to absurd results as it would eviscerate FSIA and all conventions regarding service in investor-state disputes. Every action to enforce an investor-state arbitration award is necessarily preceded by an arbitration in which the foreign sovereign likely participated. In order to effectively participate, the two parties would need to agree upon a specific method by which documents are exchanged. Were these agreements sufficient to constitute a special arrangement, the enforcement of all arbitration awards would be exempt from

all treaty requirements regarding service merely because the state participated in the underlying arbitration.

FSIA's requirements for serving a foreign sovereign are not formalities. They are important procedural protections that reflect Congress's careful balancing in the "delicate area of international affairs." *Flanagan v. Islamic Rep. of Iran*, 190 F. Supp. 3d 138, 151-52 (D.D.C. 2016). Strict and orderly compliance with FSIA also encourages cooperation among foreign sovereigns. *See Acree v. Iraq*, 658 F. Supp. 2d 124, 127 (D.D.C. 2009) (recognizing in other contexts the court's role in supporting the "State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework") (internal marks omitted).

Petitioner's failure to strictly comply with FSIA has already led to the "disorder" that the Circuit has feared. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (quotations omitted) ("Leniency [in following and enforcing FSIA] would disorder the statutory scheme."). Rather than receive service of process through the IACAP, as the Republic would have expected, documents were sent via DHL and received by Karla Valiente—an administrative assistant—at the Ministry of Economics, a department that has wholly different functions from the Central Authority. The Republic would have no reason to believe that a receipt of documents via DHL was an attempt to effectuate service. In addition, it appears that Petitioner waited until after the response to the Petition was purportedly due before filing its proof of service. Thus, even had Republic received actual notice of the suit and diligently watched this Court's docket, it would not have received any indication that the DHL package was an official attempt at service until Respondent sought a default judgment.

The Petition must accordingly be dismissed for lack of personal jurisdiction and subject matter jurisdiction. Under the FSIA, courts cannot have subject matter jurisdiction and personal jurisdiction over a sovereign until that sovereign has been validly served. 28 U.S.C. §§ 1330(a)-(b). Thus, this Court also lacks subject matter jurisdiction and personal jurisdiction over the Republic as a result of the failed service. *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 172 (D.D.C. 2006) ("interlocking provisions" of 28 U.S.C. §§ 1330(a)-(b) "compress subject-matter jurisdiction and personal jurisdiction into a single, two-pronged inquiry: (1) whether service of the foreign state was accomplished properly, and (2) whether one of the statutory exceptions to sovereign immunity applies").

IV. Conclusion

The Republic intends to vigorously defend this attempted enforcement if and when Plaintiff serves the Republic in accordance with FSIA. Having failed to do so, the Court must grant the Republic's motion to dismiss.

Respectfully submitted this 17th day of April 2017:

By: /s/ Edward Baldwin

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