No.

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1965, the member states of the Hague Conference on Private International Law, including the United States, adopted a treaty known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). The Hague Service Convention enables service of process from one member state to another without the use of consular or diplomatic channels. This case presents the following federal question on which state and federal courts have been divided for over 25 years:

Does the Hague Service Convention authorize service of process by mail?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Water Splash, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals, Houston, Texas.

OPINION BELOW

The opinion of the court of appeals (App. 1a-46a) is reported at 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). The order of the Supreme Court of Texas denying review (47a) is unpublished.

PARTIES TO THE PROCEEDING

The caption includes the names of all parties in the court of appeals.

RULE 29.6 STATEMENT

The petitioner does not have a parent corporation or shares held by a publicly traded company.

JURISDICTION

The court of appeals entered judgment on June 30, 2015. App. 1a. Petitioner filed a timely motion for rehearing en banc, which was denied on October 6, 2015. App. 47a. Petitioner filed a timely petition for review, which the Supreme Court of Texas denied on May 27, 2016. App. 48a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

TREATY PROVISION INVOLVED

Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in

Civil or Commercial Matters, 20 U.S.T. 361 (1969) provides in full:

> Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

STATEMENT

A. Background

Petitioner Water Splash, Inc. makes aquatic playground systems known as "splash pads" that are popular in municipalities. Petitioner sued respondent Tara Menon, a citizen of Canada, in state district court in Galveston, Texas for unfair competition and tortious interference with business relations. App. 2a-3a. Petitioner specifically alleged that Menon, once a sales rep for Water Splash, went to a competitor who then used Water Splash's designs and drawings in

submitting a bid to the City of Galveston for the construction of splash pads at two city parks. Ibid.

The trial court authorized Water Splash to effectuate service of process on Menon in Canada by several forms of service, including certified mail, which Water Splash accomplished. Id. at 3a.

After Menon failed to answer or otherwise appear, Water Splash moved for default judgment. Ibid. The trial court granted the motion and awarded actual and exemplary damages and attorneys' fees. Ibid. Menon filed a motion for new trial seeking to set aside the default judgment based on the argument that service had not been accomplished consistent with the requirements of the Hague Service Convention. Ibid. The trial court denied Menon's motion. Ibid.

B. Appellate History

1. The Panel Majority

On appeal, the court addressed whether the Hague Service Convention allows service of process by mail. Article 10(a) of the Hague Service Convention states that:

> Provided the State of designation does not object, the present Convention does not interfere with . . . the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad . . . .

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters ("Hague Service Convention"), art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (emphasis added). The determinative question was therefore whether "send" includes "service of process" or, alternatively, only covers transmittal of other judicial documents (*e.g.*, after service of process has already been effectuated).

The panel majority followed a federal Fifth Circuit case and held that "send" does not include "service of process":

> "In [*Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002)], plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term 'send' in connection with the delivery of judicial documents, but used 'serve,' 'service,' and 'to effect service' in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed 'send' and determined that, because 'service' was used throughout the Hague Convention while 'send' was confined solely to article 10(a), this demonstrated that the drafters did not 'intend to give the same meaning to "send" that they intended to give to "service." ' *Id.* at 384.
>
> . . .

> We conclude that the better-reasoned approach is to follow the so-called 'minority view' which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail."

App. 6a, 8a.

In reaching the result above, the panel majority (like the Fifth Circuit) relied primarily on the following principle of statutory construction:

> " 'Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" through the Hague Convention, while confining use of the word "send" to article 10(a), we will not presume that the drafters intended to give the same meaning to "send" that they intended to give to "service." '
>
> *Nuovo*, 310 F.3d at 384 . . . ."

App 8a. The panel majority also noted that the Eighth Circuit had reached the same result for essentially the same reason. Id. at 8a-9a (citing *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989)).

The panel majority secondarily relied on the assumption (also expressed by the Fifth Circuit) that

it was unlikely for the drafters of the Hague Service Convention to have put in place specific methods of service in Articles 2 through 7 (through central authorities or diplomatic channels) "'while simultaneously permitting the uncertainties of service by mail.'" App. 9a (quoting *Nuovo Pignone*, 310 F.3d at 385). The panel majority then vacated the trial court's judgment and remanded for further proceedings. App. 11a.

2. The Panel Dissent

Justice Tracy Christopher dissented. The crux of her reasoning was that treaties are not statutes: they are contracts between sovereigns whose interpretation is governed by different legal principles. In turn, state courts must follow these principles because they are based on controlling precedent from the Supreme Court:

> "[T]he majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention."

App. 11a.

The dissent noted the two lines of cases on the

issue. The prevailing view – adopted by federal courts of appeals for the Second, Fourth, Seventh, and Ninth Circuits (and some district courts in the First, Third, Sixth and Eleventh Circuits)[1] – holds that "send" includes "service of process." The minority view – adopted by the Fifth and Eighth Circuits (and some older cases from district courts in the Third and Eleventh Circuits)[2] – holds that it does not. App. 14a. The dissent then explained that the job of the court was to choose the most persuasive view based on controlling principles of treaty interpretation:

> "This provision [Hague Service Convention, Article 10(a)] had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp.* v.

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[1] See *Ackermann* v. *Levine,* 788 F.2d 830, 838-39 (2d Cir.1986); *Koehler* v. *Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp.* v. *IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); *Brockmeyer* v. *May,* 383 F.3d 798, 802 (9th Cir. 2004); *Dierig* v. *Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012) (mem. op.); *TracFone Wireless, Inc.* v. *Does*, No. 11-cv-21871-MGC, 2011 WL 4711458 (S. D. Fla. Oct. 4, 2011) (mem. op.); *Girafa.com, Inc.* v. *Smartdevil Inc.*, 728 F.Supp.2d 537 (D. Del. 2010); *Borschow Hospital & Medical Supplies, Inc.* v. *Burdick–Siemens Corp.*, 143 F.R.D. 472 (D.P.R. 1992).

[2] *Nuovo Pignone SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston* v. *Toyota Motor Corp.,* 889 F.2d 172, 174 (8th Cir. 1989); *Raffa* v. *Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Arco Elec. Control Ltd.* v. *Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992).

> *Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts 'are *obligated* to follow only higher Texas courts and the United States Supreme Court')."
>
> "Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, ***there is binding precedent that tells us how to find that answer for ourselves***. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles."

App. 14a-15a.

The dissent then listed over a dozen principles of treaty interpretation that are binding on state and federal courts under Supreme Court precedent:

- A treaty is not legislation.
- A treaty is not construed in the same way as legislation.
- A treaty is construed in the manner of a contract.
- A treaty is construed more liberally than a private contract

- Such a liberal construction is required to secure equality and reciprocity between the signatories.

- Although the construction of a treaty begins with its text, courts are not permitted to end the inquiry there.

- The text of the treaty must be read with a view to making effective the purposes of the high contracting parties.

- The treaty must be read in a manner consistent with the shared expectations of the contracting parties.

- To identify those shared expectations, courts must consider the treaty's negotiating and drafting history.

- Where the official text of the treaty is written in two languages, courts should consider both languages in analyzing the parties' shared expectations.

- In addition to considering the text, courts must consider the way the text was interpreted by the delegates involved in negotiating and drafting the treaty.

- The interpretation of a treaty by the Executive Branch of the United States is entitled to great weight.

- The opinions of other signatories are entitled to considerable weight.

- Courts should consider the analysis of scholars.

App. 15a-22a. Based on the above, the dissent concluded that the term "send" includes "service of process":

First, the dissent determined that the Hague Service Convention's purpose was limited to service of process issues. This indicated that the term "send" in Article 10(a) meant "service of process" because non-service transmittals were not within the scope of the Convention in the first place:

> "By agreeing with Menon's argument that 'she was not served pursuant to the Hague Convention service of process provisions,' the majority necessarily has concluded that there are non-service provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 'eliminate[d] the possibility' that the Service Convention could apply to transmissions abroad 'that do not culminate in service'[.]
>
> . . .
>
> In accordance with the United States Supreme Court's analysis, I would conclude

> that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to 'send[ing] judicial documents' means 'serv[ing] judicial documents.' "

App. 23a-25a (citing *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988)).

Second, the dissent considered the negotiation and drafting history of the treaty and stated that she "would give considerable weight to the fact that '[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail.' " App. 25a. The dissent also would have considered a Convention report:

> "The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."

App. 25a-26a. From this, the dissent concluded that "[i]f Article 10(a) was considered to include service by telegram, and not to be 'limited to registered mail,' then it cannot be said, as the majority now holds, that this provision does not permit service by mail." *Id.* at 26a.

Third, the dissent noted the understanding of

Philip Amram (part of the United States delegation to the Hague Conference that drafted the Service Convention). *Id.* Amram's understanding was clear: "Article 10 permits direct service by mail . . . unless [the receiving] state ***objects*** to such service." *Id.* at 27a (quoting Philip Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965)) (emphasis added).

Fourth, the Executive Branch "has unwaveringly maintained that Article 10(a) permits service by mail." App. 27a; see also *id.* ("In accordance with the instructions from the United States Supreme Court, I would give such views 'great weight.' ").

Fifth, the dissent relied on a Hague Report which established the signatories' post-ratification understanding that service by mail was allowed. App. 29a ("[T]heoretical doubts about the legal nature of the procedure were unjustified."); *id.* ("I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail.").

Sixth, the dissent noted that it "would follow the example of the United States Supreme Court in consulting the writings of [noted scholar] Bruno Ristau as to the intentions of the Service Convention's drafters":

> " ' Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that ... every participant in the debates concerning Article 10(a) ... understood the provision as referring to

> ... the use of postal channels for the purpose of service." Another analysis said "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention ... believe that to be the case." Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object." ' "

App. 31a (quoting Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010)).

Finally, the dissent noted analytical problems with the majority's analysis. Most notably, the dissent criticized the majority's reliance on *Nuovo Pignone* because in that case, the Fifth Circuit relied on principles of statutory interpretation, not treaty interpretation. App. 33-35a; *id.* at 34a ("[T]he Fifth Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. . . . This approach follows none of the governing precepts of treaty construction."). The dissent also criticized the Fifth Circuit's reliance on unsupported assumptions, such as the assumption that the drafters of the Hague Service Convention would not have permitted service by mail when other, ostensibly more reliable methods of service were

available. App. 36-39a.[3]

REASONS FOR GRANTING THE PETITION

I. The question presented implicates a longstanding and deep split of authority on a fundamental question of civil procedure.

The question presented is the subject of a 4-2 split in the federal appellate courts, with the majority view favoring petitioner. See *supra* notes 1-2. The question presented is also the subject of a 4-4 split among state appellate courts, including the appellate courts of seven of the ten largest States.[4] Finally, the split of authority on this federal question has persisted for over 25 years without showing any sign of resolving on its own. See *supra* notes 1-2.

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[3] The dissent also criticized the majority's reliance on recent Texas federal district court cases because those courts were bound to follow *Nuovo Pignone*. App. 42a. In addition, the dissent criticized the majority's reliance on decisions by other Texas courts because in "none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court." App. 43a-45a.

[4] Compare *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 22 (N.Y. App. Div. 2012); *Nicholson* v. *Yamaha Motor Co., Ltd.*, 566 A.2d 135, 141 (Md. App. 1989); *Hayes* v. *Evergo Tel. Co., Ltd.*, 397 S.E.2d 325, 328 (N.C. App. 1990); and *Sandoval* v. *Honda Motor Co., Ltd.*, 527 A.2d 564, 566 (Pa. Super. 1987) (each holding that "send" includes "service of process"), with *Meek* v. *Nova Steel Processing, Inc.*, 706 N.E.2d 374, 377 (Ohio App. 1997); *Frankenmuth Mut. Ins. Co. v. ACO, Inc.*, 484 N.W.2d 718 (Mich. App. 1992); *Honda Motor Co.* v. *Superior Court*, 10 Cal. App. 4th 1043 (Cal. Ct. App. 1992); and the instant case (each holding the opposite).

II. The question presented arises frequently.

The question presented potentially arises in any state or federal lawsuit with a defendant who is a citizen of another signatory to the Hague Service Convention. By way of example, a recently updated ALR cites over 120 state and federal decisions (from district and appellate courts in 11 federal circuits and 16 states) implicating the propriety of mail for service of process on foreign defendants under the Hague Service Convention. See Beverly L. Jacklin, *Service of process by mail in international civil action as permissible under Hague Convention*, 112 A.L.R. FED. 241 (1993 & 2013 Supp.).[5] And going forward, one would expect this issue to arise with increasing frequency as globalization leads to more cross-border disputes.

III. The question presented implicates fundamental principles of treaty interpretation whose proper application is of widespread importance.

The question presented may seem simple on its face, but if it were a deep split would not persist. Moreover, the question implicates principles of treaty interpretation that are not only important but also so basic and fundamental that their correct application in a case like the present would resolve not only this matter, but also would influence judicial analysis of similar questions by lower courts in other cases.

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[5] Not all cases cited therein address the specific question whether "send" includes "service of process," but the number of decisions does reflect the prevalence of the overarching issue (service of process by mail on foreign defendants).

IV. This case is a good vehicle to address the issue.

This case is a good vehicle to address the question presented, as it is the only issue in the case. App. 12a (Christopher, J., dissenting) (explaining that the case "present[s] only a single narrow question of law").

Against this, respondent will argue that the question presented is somehow moot because, even if service of process had been proper under the Hague Service Convention, it was somehow improper under Canadian domestic law. But even assuming that were correct for the sake of argument, it is a red herring for two reasons:

First, although the propriety of service under Canadian law might be relevant in other circumstances (such as a post-judgment enforcement proceeding in Canada), it has no bearing on whether service of process was proper in this case under federal law, the only issue of relevance in a domestic lawsuit.

Second, in the court of appeals, respondent conceded that the only question at issue in this case was the federal question presented here. App. 13a (Christopher, J., dissenting) ("[Menon] concedes that [i]f Article 10(a) authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good." (internal quotation marks omitted)).

All that said, one factor that ordinarily would counsel against review in this particular case is that

it originates from an intermediate state court rather than a state supreme court or an intermediate federal court. And certainly, that might be determinative if the split were recent or highly lopsided, or the case implicated the majority view or was unpublished, or if there otherwise were a lack of lower court analysis supporting petitioner. But none of that is the case here: the split is deep, over 25 years old, and the present case implicates the minority view. In addition, Justice Christopher's published dissent is one of the most detailed and thorough analyses supporting petitioner's position.

In addition, the longstanding nature of the split coupled with the fact that the issue has already been addressed by so many federal courts means that, as a practical matter, the question presented is likely to continue reaching this Court from state intermediate courts given the discretionary review of most state high courts.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Because this case implicated no split *within Texas*, it was perhaps unsurprising that the state high court denied review.

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AUGUST 25, 2016

APPENDIX

472 S.W.3d 28

Court of Appeals of Texas,

Houston (14th Dist.).

Tara Menon, Appellant

v.

Water Splash, Inc., Appellee

NO. 14–14–00012–CV

|

Opinions filed June 30, 2015

|

Rehearing En Banc Overruled October 6, 2015

Synopsis

Background: Employer sued its former employee, who now worked for competitor, and competitor, alleging unfair competition, conversion, tortious interference with business relations, and conspiracy. After employee did not file an answer or otherwise appear, employer moved for default judgment . The District Court granted motion for default judgment against employee. Employee filed motion for new trial to set aside the default judgment. The 212th District Court, Galveston County, denied employee's motion, and employee appealed.

[Holding:] The Court of Appeals, John Donovan, J., held that service by mail to a defendant, namely former employee, in Canada was not permitted by Hague Convention.

Reversed and remanded.

Christopher, J., filed dissenting opinion.

***29 On Appeal from the 212th District Court, Galveston County, Texas, Trial Court Cause No. 13–CV–0205, Susan Elizabeth Criss, Judge.**

Attorneys and Law Firms

***30** Timothy A. Hootman, Houston TX, for Appellant.

Andrew K. Meade, Jeremy Jason Gaston, Houston TX, for Appellee.

Panel consists of Justices Christopher, Donovan, and Wise

OPINION

John Donovan, Justice

****1** Appellant, Tara Menon ("Menon"), appeals the trial court's default judgment granted after she failed to answer the suit filed by appellee, Water Splash, Inc. ("Water Splash"). In four issues, Menon contends that the trial court erred in refusing to set aside the default judgment because state law cannot allow service of process in foreign nations where the service does not comport with the requirements of the Hague Service Convention. We reverse and remand.

I. BACKGROUND

Menon is a citizen of Canada, residing in Quebec. Water Splash is a Delaware corporation with its principal office located in Champlain, New York. Water Splash sued Menon in Galveston, Texas. In its original petition, Water Splash alleged that Menon was its regional sales representative and that Menon also began to act as a sales manager for South Pool, a competitor of Water

Splash. Sometime in 2012, Water Splash discovered that South Pool had used some of Water Splash's designs and drawings when submitting a bid to the City of Galveston for the construction of splash pads at two parks. A year later, Water Splash sued South Pool and Menon for unfair competition, conversion, tortious interference with business relations, and conspiracy.

To effectuate service, Water Splash filed a motion for alternative service of process pursuant to Texas Rule of Civil Procedure 108a. *See* Tex. R. Civ. P. 108a. The motion requested that the trial court order service on Menon in Quebec, Canada, by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." The trial court granted the motion.

After Menon did not file an answer or otherwise appear, Water Splash moved for default judgment alleging it had diligently sought service on Menon utilizing the methods allowed for substituted service. The motion stated that service was accomplished by sending a letter to Menon's Quebec address by certified mail, return receipt requested and first class mail, and Water Splash introduced evidence of those attempts at service. Water Splash also alleged that Menon's emails proved she knew of the existence of the suit. The trial court granted the motion for default judgment against Menon and awarded actual and exemplary damages and attorneys' fees.

Menon filed a motion for new trial seeking to set aside the default judgment because service was not accomplished pursuant to the terms of article 10(a) of the Hague Service Convention. Water Splash responded, arguing Rule 108a was an acceptable form

of alternative service. The trial court denied Menon's motion for new trial.

II. ANALYSIS

In four interrelated issues involving the interpretation of particular words in the Hague Service Convention, appellant attacks the trial court's grant of default judgment and denial of her motion for new trial.

*31 A. Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma,* 288 S.W.3d 922, 925 (Tex.2009). A trial court abuses its discretion if it reaches a decision without reference to any guiding rules or principles, or acts in an arbitrary or unreasonable manner. *Cire v. Cummings,* 134 S.W.3d 835, 838–39 (Tex.2004); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.,* 231 S.W.3d 71, 76 (Tex.App.–Houston [14th Dist.] 2007, pet. denied).

**2 [1] [2] [3] [4]Absent waiver, a trial court lacks personal jurisdiction over a defendant to whom citation has not been "issued and served in a manner provided for by law." *See Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex.1990). In a direct appeal from a no-answer default judgment, there is no presumption of valid issuance, service, and return of citation. *See id.* (quoting *Uvalde Country Club v. Martin Linen Supply Co.,* 690 S.W.2d 884, 886 (Tex.1985)) (per curiam). Thus, a default judgment cannot withstand a direct attack unless the record affirmatively shows strict compliance with the rules for service of citation. *Primate Constr., Inc. v. Silver,* 884 S.W.2d 151, 152 (Tex.1994) (per curiam). Whether a trial court has personal jurisdiction over a defendant is a question of law, which we review *de novo.*

Haaksman v. Diamond Offshore (Bermuda), Ltd., 260 S.W.3d 476, 479 (Tex.App.–Houston [14th Dist.] 2008, pet. denied).

B. Hague Convention

Articles 2 through 7 of the Hague Convention require a signatory nation to establish a "Central Authority" which acts as an agent to handle various matters regarding requests for service, service of documents and proof of service. Article 10(a) of the Hague Convention, at issue here, states:

> Provided the State of designation does not object, the present Convention does not interfere with
>
> (a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent person of the State of origin to effect *service* of judicial documents directly through the judicial officer, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect *service* of judicial document directly through the judicial officers, officials, or other competent persons of the State of destination.

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, *available at* http:www.hcch.net/index_en.php?act=conventions.text & cid=17 (last visited June 22, 2015) ("Hague Convention"). The question before us turns on the meaning attributed to "send" and "service."

[5] [6]Where it applies, compliance with the provisions of

the Hague Convention is "mandatory." *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 698–99, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). Its purpose is to provide a more efficient and effective manner of service of process abroad and to ensure that defendants sued in foreign jurisdictions receive timely notice of suit. *Id.* at 699, 108 S.Ct. 2104; *see also Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374, 383 (5th Cir.2002). In *Nuovo,* plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo,* 310 F.3d at 383. Arguing that service by mail violated Federal Rule of Civil Procedure. 4(f)(1) ***32** because it did not comply with the Hague Convention, the defendant urged that the drafters used the term "send" in connection with the delivery of judicial documents, but used "serve," "service," and "to effect service" in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed "send" and determined that, because "service" was used throughout the Hague Convention while "send" was confined solely to article 10(a), this demonstrated that the drafters did not "intend to give the same meaning to 'send' that they intended to give to 'service.' " *Id.* at 384. In short, the drafters intended to attach meaning to the specific word used. *See id.*

[7]The Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361, art. 1. The Hague Convention "preempts any inconsistent methods of service prescribed by Texas law in all cases where the Convention applies." *Wuxi Taihu Tractor Co, Ltd. v. York Group, Inc.,* No. 01–13–00016–CV, 2014 WL 6792019, at *5 (Tex.App.–Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem.op.) (citing

Paradigm Entm't Inc. v. Video Sys. Co., No. Civ. A. 3.99–CV–2004P, 2000 WL 251731, at *4 (N.D.Tex. Mar. 3, 2000)) (concluding service was effective where secretary of state forwarded a copy of service of process to defendant pursuant to Texas law, and Japan did not object to this manner of service).

C. Application of article 10(a)

**3 Menon argues the default judgment should not have been rendered because she was not served with process. *See* Tex. R. Civ. P. 124 ("In no case shall judgment be rendered against any defendant unless upon service...."). Menon further asserts that Water Splash did not effectuate service under Rule 108a, providing for service in a foreign country "pursuant to the terms of any treaty or convention," because she was not served pursuant to the Hague Convention service of process provisions. She argues "the drafters use the words 'serve,' 'service,' and 'to effect service' in other sections, including subparts (b) and (c) of article 10," but they only used the word "send" in subsection (a), which applies only to sending judicial documents. *See Nuovo,* 310 F.3d at 383.

Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does not object.[1] Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.[2]

[1]Canada has not objected to the use of the mail for service of process. *See* Canada—Central Authority & Practical Information, HAGUE CONF. OF PRIVATE INT'L. L., http://www.hcch.net/index_en.php?act=authorities.details & aid=248 (last updated Aug. 19, 2014)

(listing the text of Canada's declarations, including those to "[t]ransmission through postal channels," and stating that "Canada does not object to service by postal channels" as permitted in article 10(a)); *see also Dierig v. Lees Leisure Indus., Ltd.,* CIV.A. 11–125–DLB, 2012 WL 669968, at *19 (E D.Ky. Feb. 28, 2012) (mem.op.).

[2]*Ackermann v. Levine,* 788 F.2d 830, 838–39 (2nd Cir.1986); *Koehler v. Dodwell,* 152 F.3d 304, 307–08 (4th Cir.1998); *Research Sys. Corp. v. IPSOS Publicite,* 276 F.3d 914, 926 (7th Cir.2002); and *Brockmeyer v. May,* 383 F.3d 798, 802 (9th Cir.2004).

[8]We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.

> ***33** 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' throughout the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'

Id. at 384 (relying on canons of statutory interpretation and adopting the reasoning of the courts which concluded that article 10(a) of the Hague does not permit service of process by mail); *see also Bankston v. Toyota Motor Corp.,* 889 F.2d 172, 174 (8th Cir.1989) (stating that language used should be regarded as conclusive and concluding that article 10(a) prohibits

service of process by registered mail); *see also Wuxi,* 2014 WL 6792019, at *6 (citing *Nuovo,* 310 F.3d at 384). *Wuxi* involved service on a defendant located in China attempted under Rule 108a. 2014 WL 6792019, at *6,. The *Wuxi* court held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served throughout the Central Authority pursuant to the specific language of the Hague Convention. *Id.*

Because the purpose of the Hague Convention is to "ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation," we are not persuaded that the drafters did not intend what they wrote, particularly where the Hague Convention describes other methods of service. *See Nuovo,* 310 F.3d at 385. Specifically, articles 2 through 7 provide for service of process through a central authority and, under articles 8 and 9, through diplomatic channels. "It is unlikely that the drafters would have put in place these methods of service ... while simultaneously permitting the uncertainties of service by mail." *Id.*

**4 Further, other federal district courts in Texas which considered whether service of process by mail, under article 10(a) as involved here, or under article 5 which allows service through a central authority, have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention. *See Duarte v. Michelin N. Am., Inc.,* No. 2:13–CV–00050, 2013 WL 2289942, at *4–6 (S.D.Tex.2013) (considering question of service by mail on the secretary of state and determining, following *Nuovo,* that service by mail not authorized under the Hague Convention) (citing *Berezowsky v. Ojeda,* No.

4:12–CV–03496, 2013 WL 150714, at *7 (S.D.Tex.2013) (holding service was not effectuated under articles 2–5 which allows service of process under the Hague Convention through Mexico's Central Authority, demonstrating court's adherence to the specific meaning of the words used in the Hague Convention); *L.K. v. Mazda Motor Corp.,* No. 3:09–cv–469–M, 2009 WL 1033334, at *2 (N.D.Tex.2009) (holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met); *Albo v. Suzuki Motor Corp.,* No. 3:08–0139–KC, 2008 WL 2783508, at *2 (W.D.Tex.2008) (holding service not effective because, under article 5, the Hague Convention required full translation of documents into Japanese and without complying with specific Hague Convention requirements, service was insufficient)).

Further, in addition to *Wuxi,* two other state courts have considered whether the specific words used in the Hague Convention have specific meanings regarding service ***34** of process or sending of judicial documents. *See In re J.P.L.,* 359 S.W.3d 695, 706 (Tex.App.–San Antonio, 2011, pet. denied) (holding that service of process in a child custody matter must be accomplished through the provisions of the Hague Convention and service on the Central Authority in Mexico); *Velasco v. Ayala,* 312 S.W.3d 783, 794 (Tex.App.–Houston [1st Dist.] 2009, no pet.) (relying on article 10(a) and *Nuovo* and concluding that service of process must be accomplished pursuant to the requirements of the Hague Convention).

In sum, we conclude the specific provisions set forth in the Hague Convention govern service, whether through article 5 and its reliance on a central authority, or on the

language expressed in article 10(a).

For these reasons, we sustain appellant's four issues, reverse the trial court's default judgment and permanent injunction against Tara Menon, and remand for further proceedings consistent with this opinion.

(Christopher, J., dissenting).

Tracy Christopher, Justice, dissenting.

The only question that appellant Tara Menon presents for our review is whether service by mail to a defendant in Canada is permitted under Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Service Convention").[1] The majority concludes that it is not.[2] In reaching this result, the majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention. I accordingly would affirm.

[1] *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[2] *But see Cook v. Toidze,* 950 F.Supp.2d 386, 394 (D.Conn.2013) ("[S]ervice by regular mail is proper under the Hague Convention where the party served is a resident of Canada."); *Mitchell v. Theriault,* 516 F.Supp.2d 450, 455 (M.D.Pa.2007) (holding that service of process by mail on a resident of Québec is not prohibited by the Service Convention); *Heredia v.*

Transp. S.A.S., Inc., 101 F.Supp.2d 158, 161 (S.D.N.Y.2000) ("[S]ervice by registered mail in Quebec is adequate service under the Convention."); *Randolph v. Hendry,* 50 F.Supp.2d 572, 578 (S.D.W.Va.1999) ("Because Canada does not object to service by postal channels, service of process by mail is authorized in this case."); *Taft v. Moreau,* 177 F.R.D. 201, 204 (D.Vt.1997) ("Plaintiffs' use of registered mail, return receipt requested, to transmit the summons and complaint [to defendants in Québec] was in compliance with the Hague Convention."); *Cantara v. Peeler,* 267 A.D.2d 997, 701 N.Y.S.2d 556, 557 (1999) (holding that Article 10(a) permits service by mail upon residents of Canada because Canada has not objected to service through postal channels).

I. ISSUES PRESENTED

****5** It is unnecessary to detail the facts in this case, because although Menon's brief lists four issues, she has presented only a single narrow question of law. That question is presented in her third issue, in which she asks, "Did the drafters of the Hague Service Convention intend for the word 'send' contained in Article 10(a) to mean 'serve'?" She restates the question in her fourth issue, asking, "May a litigant serve a Canadian citizen and resident of Québec with process in a Texas civil proceeding (bypassing traditional diplomatic channels and the Central Authority under the Hague Service Convention) by sending ***35** citation directly to the Canadian citizen ... by mail, private delivery service, or e-mail?"

Menon's first two issues do not raise any other questions. Her briefing of her first stated issue ("Did the

trial court err in denying the motion for new trial and refusing to set aside the default judgment?") contains no argument, but instead consists solely of an introduction and a single statement, with citations, regarding the standard of review.[3] In her second issue, she asks, "Can state law provide a procedure for service of process in foreign nations that does not comport with traditional international law (e.g. letters rogatory) or the Hague Service Convention?" As stated, this issue begs the question of whether service by mail comports with the Service Convention.

[3]*See* TEX.R. APP. P. 38.1(i); *Archer v. DDK Holdings LLC,* 463 S.W.3d.597, 603 (Tex.App.–Houston [14th Dist.] 2015, no pet.) (where appellants stated an issue challenging the judgment and the trial court's findings on two grounds, but only briefed one ground, they waived appellate review of the unbriefed ground).

Menon has not briefed any other grounds for reversing the trial court's denial of her motion for new trial or setting aside the default judgment. 1 *See* TEX. R. CIV. P. 108a(1)(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made ... pursuant to the terms and provisions of any applicable treaty or convention...."). But, before reaching this question, it is first necessary to clarify the standard of review.

II. STANDARD OF REVIEW

We review the trial court's ruling on a motion for new trial for abuse of discretion, but "abuse of discretion" means different things in different contexts. *See Schuring v. Fosters Mill Vill. Cmty. Ass'n,* 396 S.W.3d 73, 76 (Tex.App.–Houston [14th Dist.] 2013, pet. denied). Here, the relevant facts are undisputed, and

Menon moved for a new trial on the ground that Article 10(a) of the Service Convention does not permit service by mail. We accordingly are presented only with a question of law, not with a matter within the trial court's discretion. *See Walker v. Packer,* 827 S.W.2d 833, 840 (Tex.1992) (orig. proceeding) ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts."). Courts review questions of law de novo. *Pinnacle Premier Props., Inc. v. Breton,* 447 S.W.3d 558, 563 (Tex.App.–Houston [14th Dist.] 2014, no pet.) (sub.op.).

III. GOVERNING LAW

In this country, there are at least two competing lines of authority interpreting Article 10(a) of the Service Convention. The prevailing view holds that Article 10(a) permits service by mail. *See, e.g., Brockmeyer v. May,* 383 F.3d 798 (9th Cir.2004); *Research Sys. Corp. v. IPSOS Publicité,* 276 F.3d 914 (7th Cir.2002); *Koehler v. Dodwell,* 152 F.3d 304 (4th Cir.1998); *Ackermann v. Levine,* 788 F.2d 830 (2d Cir.1986). The countervailing view holds that Article 10(a) does not permit service by mail. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374 (5th Cir.2002); *Bankston v. Toyota Motor Corp.,* 889 F.2d 172 (8th Cir.1989). This provision had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent ***36** for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp. v. Williams,* 868 S.W.2d 294, 296 (Tex.1993) (per curiam) (explaining that Texas courts "are *obligated* to follow only higher Texas courts and the United States Supreme Court").

**6 Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, there is binding precedent that tells us how to find that answer for ourselves. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles. *See Life Partners, Inc. v. Arnold,* 464 S.W.3d 660, 670 (Tex.2015) ("We have described the Supreme Court's decisions in some detail here, however, because in addition to providing the relevant test, they also describe the proper *approach* to the term's construction.").

A. Principles of Treaty Construction

In construing Article 10(a) of the Service Convention, this court is bound by the following principles.

1. A treaty is not legislation. *See Lozano v. Montoya Alvarez,* ——U.S. ——, 134 S.Ct. 1224, 1232–33, 188 L.Ed.2d 200, (2014) (" 'A treaty is in its nature a contract between ... nations, not a legislative act.' " (quoting *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829))); *id.* at 1233 ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make ...." (quoting 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson))).

2. A treaty is not construed in the same way as legislation. *See id.* at 1233 ("That distinction [between a legislative act and a contract] has been reflected in the way we interpret treaties."); *Nielsen v. Johnson,* 279 U.S. 47, 51, 49 S.Ct. 223, 73 L.Ed. 607 (1929) ("The

narrow and restricted interpretation of the treaty ..., while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties.").

3. A treaty instead is construed in the manner of a contract. *See Lozano,* 134 S.Ct. at 1232–33; *see also BG Grp., PLC v. Republic of Argentina,* ——U.S. ——, 134 S.Ct. 1198, 1208, 188 L.Ed.2d 220 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Santovincenzo v. Egan,* 284 U.S. 30, 40 & n. 2, 52 S.Ct. 81, 76 L.Ed. 151 (1931) ("[T]reaties are contracts between independent nations....").

4. A treaty, however, is construed more liberally than a private contract. *See Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431, 63 S.Ct. 672, 87 L.Ed. 877 (1943) ("[T]reaties are construed more liberally than private agreements ...."); *see also Valentine v. United States ex rel. Neidecker,* 299 U.S. 5, 10, 57 S.Ct. 100, 81 L.Ed. 5 (1936) ("[T]reaties should be liberally construed so as to give effect to the apparent intention of the parties."); *Factor v. Laubenheimer,* 290 U.S. 276, 293–94, 54 S.Ct. 191, 78 L.Ed. 315 (1933) (explaining that "[c]onsiderations which should govern the diplomatic relations between nations, and the good faith of treaties" require that "if a treaty fairly admits of two constructions, one restricting the ***37** rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred"); *Todok v. Union State Bank of Harvard, Neb.,* 281 U.S. 449, 454, 50 S.Ct. 363, 74 L.Ed. 956 (1930) (explaining that it is a

"fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose").

5. Such a liberal construction is required to secure equality and reciprocity between the signatories. *See Factor,* 290 U.S. at 293, 54 S.Ct. 191 (explaining that treaties are "liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Jordan v. K. Tashiro,* 278 U.S. 123, 127, 49 S.Ct. 47, 73 L.Ed. 214 (1928) (same); *see also Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 80 (Tex.2000) ("As treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it." (citing *Asakura v. City of Seattle,* 265 U.S. 332, 342, 44 S.Ct. 515, 68 L.Ed. 1041 (1924)).

B. Steps in Applying the Principles of Treaty Construction

****7** As the foregoing principles show, we are required to construe a treaty more liberally than a private contract to implement the apparent intention of the parties to secure equality and reciprocity between them. And although the construction of a treaty begins with its text, we are not permitted to end the inquiry there. *See, e.g., Abbott v. Abbott,* 560 U.S. 1, 9–10, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010) ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of 'rights of custody' in courts of other contracting states; and the purposes of the Convention."); *Choctaw Nation,* 318 U.S. at 431–32, 63 S.Ct. 672 ("[T]o ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted

by the parties." (citing *Factor,* 290 U.S. at 294, 295, 54 S.Ct. 191)).

As a practical matter, then, how do we apply the principles that govern treaty construction? To answer this question, I would again look to the precepts set forth by the United States Supreme Court. *See Life Partners, Inc.,* 464 S.W.3d at 670.

1. Identify the Treaty's Purpose.

The text must be read "with a view to making effective the purposes of the high contracting parties." *Sullivan v. Kidd,* 254 U.S. 433, 439, 41 S.Ct. 158, 65 L.Ed. 344 (1921); *see also El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 169, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (identifying a treaty's "cardinal purpose"). The treaty's purpose may be expressly stated in its preamble, *see Tseng,* 525 U.S. at 169, 119 S.Ct. 662, and the role played by a specific provision may be gleaned from the treaty's structure and the context in which the provision appears. *See Olympic Airways v. Husain,* 540 U.S. 644, 650, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004) (noting that the Court considers the treaty's "text, structure, and history"); *Tseng,* 525 U.S. at 169, 119 S.Ct. 662 (identifying the treaty interpretation that "is most faithful to the Convention's text, purpose, and overall structure"); *Santovincenzo,* 284 U.S. at 37, 52 S.Ct. 81 (considering "the context of the provision in question").

2. Identify the signatories' shared expectations.

The treaty must be read "in a manner 'consistent with the shared expectations of the contracting parties.' " *Lozano,* 134 S.Ct. at 1233 (quoting *Husain,* 540 U.S. at 650, 124 S.Ct. 1221); *Tseng,* 525 U.S. at 167, 119 S.Ct. 662 (same); *Air France v. Saks,* 470 U.S. 392, 399, 105

S.Ct. 1338, 84 L.Ed.2d 289 (1985) ***38** ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."); *see also Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 223–25, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996) (rejecting the petitioners' interpretation of a phrase as "implausible" and "unlikely" in view of "the shared expectations of the contracting parties," and instead concluding that "an equally plausible reading ... that leads to a more comprehensible result" was the only "realistic" alternative). Adherence to the parties' shared expectations is required because—unlike legislation—a treaty is "necessarily the product of consensus." Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection,* 93 Geo. L.J. 1885, 1923 (2005). "Contrary to the majoritarian premise of statutory adoption, there is no means of imposing treaty obligations on a dissenting minority. If the product of negotiations is not satisfactory, a disaffected nation may simply not ratify the treaty." *Id.*

It therefore is no surprise that to identify those shared expectations, courts must consider the treaty's negotiating and drafting history. *See, e.g., Medellín v. Texas,* 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008); *Tseng,* 525 U.S. at 167, 119 S.Ct. 662; *Zicherman,* 516 U.S. at 226, 116 S.Ct. 629; *Choctaw Nation,* 318 U.S. at 431–32, 63 S.Ct. 672; *Factor,* 290 U.S. at 294–95, 54 S.Ct. 191; *Nielsen,* 279 U.S. at 52, 49 S.Ct. 223. The construction of the Service Convention is no exception to this rule. *See Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 700, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988) (examining the Service Convention's drafting history and negotiations).

**8 To understand a treaty's negotiating and drafting history, its provisions must be considered in the language used by the drafters in the official text. *See Zicherman,* 516 U.S. at 221, 116 S.Ct. 629 (considering the meaning of the French word *dommage* where the official text of the treaty was in French, and rejecting the contention "that we simply look to English dictionary definitions of 'damage' and apply that term's 'plain meaning' "); *Saks,* 470 U.S. at 399, 105 S.Ct. 1338 ("We look to the French legal meaning for guidance as to [the signatories' shared] expectations because the Warsaw Convention was drafted in French by continental jurists."); *Todok,* 281 U.S. at 454, 50 S.Ct. 363 ("The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling."). Where the official text of the treaty was drawn up in two languages, then courts consider both languages when analyzing the parties' shared expectations. *See United States v. Percheman,* 32 U.S. (7 Pet.) 51, 88–89, 8 L.Ed. 604 (1833) (where a treaty was drawn up in both Spanish and English, the Court considered the text in both languages, explaining that "[n]o violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other").

The Service Convention was drafted "in the English and French languages, both texts being equally authentic." *Schlunk,* 486 U.S. at 699, 108 S.Ct. 2104; *see also* Service Convention, *supra* note 1, at closing paragraph (stating that the Service Convention was drafted "in the English and French languages, both texts being equally authentic, in a single copy"). Thus, the negotiating and drafting history of the Service Convention's text in both languages must be considered. *See Schlunk,* 486 U.S. at

700–01, 108 S.Ct. 2104 (considering French terms that were proposed for inclusion in the Service Convention and comparing the meanings given to the terms "in some countries, such as *39 France" and "in others, such as the United States"). This negotiating and drafting history may be documented by the conference's rapporteur. *See United States v. Louisiana,* 394 U.S. 11, 43, 89 S.Ct. 773, 22 L.Ed.2d 44 (1969).

In addition to considering the text itself, courts consider the way in which the text was interpreted by the delegates involved in negotiating and drafting the treaty. *See Schlunk,* 486 U.S. at 703, 108 S.Ct. 2104 (considering statements and articles by Philip Amram, the head of the United States delegation to the Convention); *id.* at 709–10 & n.1, 714, 716, 108 S.Ct. 2104 (Brennan, J., concurring) (same). The delegates' views also may be memorialized by the conference rapporteur. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court,* 482 U.S. 522, 530 n. 13, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).

3. Accord "great weight" to the Executive Branch's interpretation.

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.' " *Abbott,* 560 U.S. at 15, 130 S.Ct. 1983 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)); *Medellín,* 552 U.S. at 513, 128 S.Ct. 1346 (same); *Tseng,* 525 U.S. at 168, 119 S.Ct. 662 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

4. Accord "considerable weight" to the interpretation of the other signatories.

Finally, the parties' shared expectations are shown by their post-ratification understanding and conduct. *See Medellín,* 552 U.S. at 507, 128 S.Ct. 1346; *Husain,* 540 U.S. at 649–50, 124 S.Ct. 1221; *Tseng,* 525 U.S. at 167, 119 S.Ct. 662; *Zicherman,* 516 U.S. at 227, 116 S.Ct. 629; *see also O'Connor v. United States,* 479 U.S. 27, 33, 107 S.Ct. 347, 93 L.Ed.2d 206 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."). These may be documented in an organizational handbook or report. *See Sale v. Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 182 n. 40, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (quoting Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979)). The United States Supreme Court instructs us that, when interpreting a treaty, " '[t]he opinions of our sister signatories ... are entitled to considerable weight.' " *Abbott,* 560 U.S. at 16, 130 S.Ct. 1983 (*Tseng,* 525 U.S. at 176, 119 S.Ct. 662); *Saks,* 470 U.S. at 404, 105 S.Ct. 1338 (same).

5. Consider the analysis of scholars.

**9 *See Abbott,* 560 U.S. at 18, 130 S.Ct. 1983 ("Scholars agree that there is an emerging international consensus on the matter.").

IV. APPLICATION

Having identified the governing precepts in the construction of treaties and the way in which they are applied, I would pursue the same approach in this case.

A. The Service Convention's Purpose

The Service Convention's two purposes are stated in its

preamble:

> The States signatory to the present Convention,
>
> 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 organisation of mutual judicial assistance *for that* ***40** *purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions

Service Convention, *supra* note 1, at preamble (emphasis added); *see also Schlunk,* 486 U.S. at 702–04, 108 S.Ct. 2104 (looking to the Service Convention's preamble for the identification of its purpose). Consistent with those purposes, the Service Convention's scope is set forth in Article 1: "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.*" Service Convention, *supra* note 1, at Art. 1 (emphasis added).

This is a more specific purpose than that found by the majority in this case. By agreeing with Menon's argument that "she was not served pursuant to the Hague Convention service of process provisions,"[4] the majority necessarily has concluded that there are *non-service* provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 "eliminate[d]

the possibility" that the Service Convention could apply to transmissions abroad "that do not culminate in service":

> The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad. [3 1964 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 65 (1965) (3 Actes et Documents)] ("La présente Convention est applicable dans tous les cas où il y a lieu *de transmettre ou de notifier* un acte judiciaire ou extrajudiciaire en matière civile ou commerciale à une personne se trouvant à l'étranger") (emphasis added). To be more precise, the delegates decided to add a form of the juridical term "signification" (service), which has a narrower meaning than "notification" in some countries, such as France, and the identical meaning in others, such as the United States. *Id.,* at 152–153, 155, 159, 366. *The delegates also criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. Id., at 165–167. The final text of Article 1, supra, eliminates this possibility and applies only to documents transmitted for service abroad. The final report (Rapport Explicatif) confirms that the Convention* does not use more general terms, such as delivery or transmission, to define its scope because it *applies 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.,* at 366.

**10 *Schlunk,* 486 U.S. at 700–01, 108 S.Ct. 2104 (emphasis added).

[4] *Ante,* at ——

In accordance with the United States Supreme Court's analysis, I would conclude that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to "send[ing] judicial documents" means "serv[ing] judicial documents." Service Convention, *supra* note 1, at Art. 10(a).

*41 B. The Shared Expectations of the Signatories to the Service Convention

To ascertain the parties' shared expectations, I would consider the actual and proposed language of Service Convention's bilingual text, its negotiating and drafting history, and the understanding of the delegates.

1. Negotiating and Drafting History of the Text

In addition to the text and the negotiating and drafting history previously described, I would give considerable weight to the fact that "[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail." *See* Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities,* 12 Or. Rev. Int'l L. 283, 333 (2010).

I additionally would consider the following history:

> The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service

> is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."[5]

[5]Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,* 12 PACE L.REV. 177, 186 n.67 (1992) (translated from 3 Actes et Documents de la Dixième Session (Conférence de la Haye de Droit International Privé) 90 (1964)).

If Article 10(a) was considered to include service by telegram, and not to be "limited to registered mail," then it cannot be said, as the majority now holds, that this provision does not permit service by mail.

2. The Understanding of the Delegates

I next would consider the statements of Philip W. Amram, a member of the United States delegation to the Hague Conference that drafted the Service Convention. Indeed, in his concurring opinion in *Schlunk,* Justice Brennan identified Amram as "[t]he head of the delegation" and its "chief negotiator." *Schlunk,* 486 U.S. at 710, 714 (Brennan, J., concurring). Amram also was the only English-speaking member of the Service Convention's drafting committee. *See* Eshleman & Wolaver, *supra,* at 325 (citing Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7–28, 1964, 52 Dep't State Bull. 265, 265–66 (1965)). Amram "told the Senate Foreign Relations Committee that 'unless the requested State objects, direct service by mail' was allowed under Article 10 and 'use of the

central authority is not obligatory.' " *Id.* at 325–26 (footnotes omitted).

**11 Because the United States Supreme Court cited Amram's statement to the Senate in the Court's only opinion construing the Service Convention, *see Schlunk,* 486 U.S. at 703, 108 S.Ct. 2104, I would consider this statement in ascertaining the signatories' shared expectations. *See also* Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A. J. 650, 653 (1965) ("Article 10 permits direct service by mail ... unless [the receiving] state objects to such service.").

*42 C. The Executive Branch's Interpretation of Article 10(a)

The Executive Branch has unwaveringly maintained that Article 10(a) permits service by mail. "Dean Rusk, the American secretary of state at the time the convention was negotiated, signed, and ratified, stated in his official report to President Johnson: 'Article 10 permits direct service by mail ... unless [the receiving] state objects to such service.' " Eshleman & Wolaver, *supra,* at 325. The State Department subsequently produced a circular stating that unless a nation " 'has made a specific reservation ... objecting to service by registered mail ... [service] may be made by international registered mail.' " *Id.* (citing U.S. Dep't of State, Bureau of Consular Affairs, Overseas Citizen Services, Office of Citizen Consular Services, Service of Legal Documents Abroad, *excerpted in* Judicial Assistance: Service: International Registered Mail, [2] 1981–1988 Digest § 6, at 1441–45). And, when the first federal appellate court held to the contrary, "the State Department formally said the ... ruling was wrong ... [in

suggesting] that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country.' " *Id.* at 326 (citing Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1991), *excerpted in United States Department of State Opinion Regarding the* Bankston *Case and Service by Mail to Japan Under Hague Service Convention,* 30 I.L.M. 260, 261 (1991)).[6]

[6]Kreczco's name actually is spelled "Kreczko"; his title was Deputy Legal Adviser; and the referenced letter was dated Mar. 14, 1990.

Regarding the specific application of Article 10(a) in this case, the State Department's website shows its view that Canada accepts "service of process by mail."[7]

[7]U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Country Information: Canada,* TRAVEL.STATE.GOV, http://travel. state.gov/content/travel/english/legal-considerations/judicial /country/canada.html (last visited June 26, 2015) (parentheses added).

In accordance with the instructions from the United States Supreme Court, I would give such views "great weight."

D. The Interpretation of Article 10(a) by Other Signatories

The post-ratification understanding of the parties can be seen in a Hague Conference report on the signatories' response to the following question:

Question D: Have there been any court decisions in

your country interpreting Article 10(a) of the Hague Service Convention which reads as follows:

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

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

**12 [Answer] It was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a) in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America in opinions cited in the "Checklist" had concluded that service of process abroad *43 by mail was not permitted under the Convention.[8]

[8]PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 4–5 (Apr. 1989), *available at* http://www.hcch.net/upload/scrpt89e_20.pdf (italics omitted).

The significance of this unanimity in the interpretation of a convention that has now existed for fifty years and has been signed or ratified by sixty-eight countries cannot be overstated, because as our highest court has

explained, the judiciary's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty ... agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Avagliano,* 457 U.S. at 184–85, 102 S.Ct. 2374.

Despite a diligent search, I have found no authority that our fellow signatories have interpreted Article 10(a) to pertain only to the "sending" of documents and not to the "service" of documents. Because the required "extraordinarily strong contrary evidence" is lacking, I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail. *See Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 259, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) ("We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence." (referring to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502)); *see also In re Morgan Stanley & Co.,* 293 S.W.3d 182, 189–90 (Tex.2009) (orig. proceeding) (rejecting the Fifth Circuit's interpretation on a question of law "[g]iven the overwhelming weight of authority" reaching a contrary result).

E. The Interpretation of Article 10(a) by Leading Scholars

I also would follow the example of the United States Supreme Court in consulting the writings of Bruno Ristau as to the intentions of the Service Convention's

drafters. *See Schlunk,* 486 U.S. at 698, 700, 703, 108 S.Ct. 2104 (citing 1 B. Ristau, International Judicial Assistance (Civil and Commercial) (1984 and 1 Supp.1986)). Like all of our sister signatories and our own government, Ristau states that Article 10(a) permits service by mail:

> Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that ... every participant in the debates concerning Article 10(a) ... understood the provision as referring to ... the use of postal channels for the purpose of service." Another analysis said "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention ... believe that to be the case."
>
> **13 Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object."

Eshleman & Wolaver, *supra,* at 331–32 (footnotes omitted).

*44 Based on all of the foregoing, I would conclude that Article 10(a) of the Service Convention permits service by mail.

V. THE COUNTERVAILING VIEW

The majority concludes that "the better-reasoned approach" is to follow the countervailing view espoused by the Fifth Circuit in *Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374 (5th Cir.2002). The

majority, however, has not explained why an approach that eschews the principles of treaty construction laid down by the United States Supreme Court is "better-reasoned," or even how those following the prevailing view have arrived at a different result.

The majority's opinion constitutes binding precedent on this court until it is overruled by a higher court or by our own court, whether in response to a motion for rehearing or for rehearing en banc or in a different case. And because it is binding, I believe it is important for the analysis to be transparent. This is especially so in this case, given that the majority adopts an interpretation contrary to that of the American delegation, the American government, most American courts, and those of our sister signatories—including, as the majority admits, Canada.[9] I accordingly have applied the governing precepts to illustrate how they necessarily lead to the conclusion that Article 10(a) of the Service Convention permits service by mail. Respectfully, I believe that the majority's differing analysis, like the analyses in the cases on which it relies, is flawed.

[9] *Ante,* at, —— n.1; *see also* Hague Conference on Private Int'l Law, List of Central Authorities Designated by Canada, HCCH, 6, *http://www.hcch.net/upload/authl4ca20 14en.pdf* (list up-to-date as of August 2014) (identifying the Ministère de la Justice as the Central Authority for Québec and identifying that office's website). On that website, Québec's Central Authority states, "The Convention also sets out other methods of transmitting documents that do not require processing through a Central Authority [including] postal service.... Under the Convention, a State may object to those methods

although Canada did not declare any opposition when it ratified the Convention." Gouvernement du Québec, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Other Methods of Transmission,* JUSTICE QUÉBEC, http://www.justice.gouv.qc.ca/english/programmes/sneaie/transmission-a.htm (last updated Feb. 26, 2004).

A. The Majority's Adoption of the Reasoning of *Nuovo Pignone*

As previously explained, the first precept of treaty construction is that a treaty is not construed as legislation, but instead is construed more liberally than a private contract, drawing on a wide variety of sources in order to implement the signatories' shared expectations. In *Nuovo Pignone,* however, the Fifth Circuit did the opposite. As the court stated it,

> We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail. In doing so, we rely on the canons of statutory interpretation rather than the fickle *presumption* that the drafters' use of the word "send" was a mere oversight. "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not *presume* that the drafters intended to give the same meaning to "send" that they intended to give to "service."

**14 *45 *Id.* at 384 (emphasis added). Thus, the Fifth

Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. *But see* Eshleman & Wolaver, *supra,* at 333–34 (discussing use of the same language in the Conventions of 1954, 1905, and 1896, all of which used the French word translated as "send" in referring to service of process by mail).

This approach follows none of the governing precepts of treaty construction. The majority in this case, like the authors of the cases on which the majority relies, instead have followed a canon of statutory interpretation, despite the United States Supreme Court's contrary directive in a case decided just last year. *See Lozano,* 134 S.Ct. at 1232–33 ("The Hague Convention ... is a treaty, not a federal statute.... 'A treaty is in its nature a contract between ... nations, not a legislative act.' ... That distinction has been reflected in the way we interpret treaties. It is our 'responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties.") (citations and internal quotations omitted, emphasis in original). The majority in this case neither treats the United States Supreme Court's discussion of how a Hague Convention is to be construed as binding precedent, nor explains its reasons for failing to do so. The majority instead follows *Nuovo Pignone,* in which the Fifth Circuit approached the question of treaty construction as though the only alternative to the application of "canons of statutory construction" was a "fickle presumption that the drafters' use of the word "send" was a mere oversight." *Nuovo Pignone,* 310 F.3d at 384. But, the drafters' intent is well-established without the need for a presumption. As previously explained, there is no dispute among the signatories

that Article 10(a) permits service by mail. Like the majority in this case, the *Nuovo Pignone* court did not even mention most of the precepts that govern treaty construction, or the fact that the Service Convention's predecessors dating back more than a hundred years used the word "send" even when referring to service of process by mail.

As reasons for rejecting the interpretation of Article 10(a) that is followed by all of the other Service Convention's signatories, the United States government, and a majority of courts in this country, the Fifth Circuit stated as follows:

> Nuovo Pignone's contention that the broad purpose of the Hague Convention is furthered if article 10(a) is interpreted to allow service by mail is problematic. As noted, the purpose of the Hague Convention is not only to simplify the service of process, but to ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation. Indeed, FED. R. CIV. P. 4(f)(1) presumes that the Hague Convention provides methods of service "reasonably calculated to give notice."
>
> We are not confident, nor should the drafters have been confident in 1967 [sic],[10] that mail service in the more than forty signatories [sic][11] is sufficient to ***46** ensure this goal. [In an accompanying footnote, the court added, "Indeed, the advisory committee notes to the 1963 amendments to FED.R.CIV.P. 4 recognize that '[s]ervice of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service.'"] Under Nuovo Pignone's interpretation of article 10(a), the fact that a signatory could object to service by mail is

> unconvincing. There is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a).
>
> **15 Finally, we note that other provisions of the Hague Convention describe more reliable methods of effecting service. Service of process through a central authority under articles 2 through 7 and service through diplomatic channels under articles 8 and 9 require that service be effected through official government channels. It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.

Id. at 384–85 & n. 17. For several reasons, the stated rationale cannot withstand scrutiny.

[10]The Convention was not drafted in 1967; it was drafted in 1964. *See Schlunk,* 486 U.S. at 698, 108 S.Ct. 2104 ("The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law.").

[11]There were twenty-three member States when the Service Convention was drafted. *See Schlunk,* 486 U.S. at 698, 108 S.Ct. 2104 ("Representatives of all 23 countries that were members of the Conference approved the Convention without reservation."); Kurt H. Nadelmann & Willis L. M. Reese, *The Tenth Session of the Hague Conference on Private International Law,* 13 AM. J. COMP. L. 612, 612 n.1 (1964) (listing the twenty-three member States when the Service Convention was drafted).

First, the Fifth Circuit implies that in the Federal Rules of Civil Procedure in effect when the Service Convention

was drafted, the advisory committee anticipated that service abroad *by mail* involved difficulties not present in domestic service. To the contrary, however, the advisory committee's only example of difficulties in service abroad was that "a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein."[12] The 1963 amendment to Federal Rule of Civil Procedure 4(i) was intended to ameliorate such difficulties by providing for five "alternative provisions for service in a foreign country"—including service by mail. *See Amendments to Rules of Civil Procedure for the U.S. Dist. Courts,* 31 F.R.D. 587, 595 (1963). That provision, "permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country."[13] The Fifth Circuit cites neither evidence nor authority for its contrary assumption.

[12]*See* ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 11 (July 18, 1962), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rulescivil-procedure-july-1962.

[13]ADVISORY COMM. ON CIVIL RULES, *supra* note 12, at 12.

Second, the court's statement that "[t]here is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a)" is contrary to the statutory textual analysis that the authoring court

purports to apply. Specifically, Article 21 of the Service Convention *requires* that "[e]ach Contracting State shall similarly inform the Ministry, where appropriate, of ... opposition to the use of methods of transmission pursuant to Articles 8 and 10." Service Convention, *supra* note 1, at Art. 21; *see also United States v. Caldera–Herrera,* 930 F.2d 409, 411 (5th Cir.1991) ("Where possible, statutes must be read in harmony with one another so as to give meaning to each provision." (citing *Fed. Aviation Admin. v. Robertson,* 422 U.S. 255, 261, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975))). Not only ***47** must we presume that signatories that voluntarily chose to sign the agreement intended to comply with Article 21, but such compliance is objectively verifiable by the signatories' post-ratification conduct: approximately half of the Service Convention's signatories have either qualified their acceptance of Article 10 or have opposed it entirely.[14]

[14] *See* Hague Conference on Private Int'l Law, *Table Reflecting Applicability of Articles 8(2), 10(a),(b), and (c), 15(2) and 16(3) of the Hague Service Convention,* HCCH (Feb. 2013), http://www.hcch.net/upload/applicability14e.pdf.

****16** Third, the Fifth Circuit makes the unsupported assumption that the drafters would not have permitted service by mail when two "more reliable" methods of service (through a Central Authority and through diplomatic channels) were available. In doing so, the court assumes not only that mail is less reliable, but also that the drafters would not have included both a more reliable and a less reliable method. If this were true, however, then the drafters would have included only the single most reliable method of service, whether that was service through a Central Authority or service through

diplomatic channels, but not both. *But see* Philip W. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law,* 59 AM. J. INT'L L. 87, 90 (1965) ("Use of the Central Authority is purely optional with the applicant for service."). And if mail is presumed unreliable, then how are the service documents to be transmitted to a foreign Central Authority *without* the use of mail? *See* Service Convention, *supra* note 1, at Art. 2 ("Each Contracting State shall designate a Central Authority which will undertake to *receive requests for service coming from other Contracting States* ....) (emphasis added); *id.* at Art. 3 ("The authority or judicial officer competent under the law of the State in which the documents originate *shall forward to the Central Authority* of the State addressed a request conforming to the model annexed to the present Convention ....") (emphasis added). And how, without using mail, is the foreign Central Authority to communicate directly with the applicant as required? *See id.* at Art. 4 ("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 to the request.") (emphasis added); *id.* at Art. 6 ("The Central Authority of the State addressed ... shall complete a certificate ... [stating] that the document has been served ... [or stating] the reasons which have prevented service. The certificate *shall be forwarded directly to the applicant.*") (emphasis added).

Because the Fifth Circuit in *Nuovo Pignone* did not apply the correct precepts of treaty construction but instead relied on unsupported assumptions, I would decline to follow it. The majority states that "other federal district courts in Texas ... have ruled

consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention."[15] But, *all* courts agree that if the Hague Service Convention applies, then service must be effectuated by a means permitted under the treaty's terms. As phrased, this statement begs the question of whether service by mail is permitted under Article 10(a). If the majority intended to suggest that federal district courts in the Fifth Circuit have consistently stated that Article 10(a) does not permit service by mail, then that implication is wrong. *See, e.g., Chattem Chems., Inc. v. Akzo Nobel Chems. B.V.,* 229 F.Supp.2d 555, 556 (M.D.La.2002) ("The Court, having ***48** reviewed conflicting authorities, finds that service made pursuant to Article 10(a) comports with the purpose, meaning and intent of the Hague Convention."); *Brown v. Bandai Am., Inc.,* No. 3–01–CV–0442–R, 2002 WL 1285265, at *4 (N.D. Tex. June 4, 2002) ("[T]he Court determines that service of process by mail is permissible under Article 10(a) of the Hague Convention."); *Lafarge Corp. v. M/V MACEDONIA HELLAS,* No. Civ.A. 99–2648, 2000 WL 687708, at *11 (E.D.La. May 24, 2000) ("[T]his court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Friede & Goldman, Ltd. v. Gotaverken Arendal Consultants,* No. CIV A 99–1970, 2000 WL 288375, at *3 (E.D.La. Mar. 16, 2000) ("[T]his Court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Paradigm Entm't, Inc. v. Video Sys. Co.,* No. Civ.A. 3:99–CV–2004P, 2000 WL 251731, at *7 (N.D.Tex. Mar. 3, 2000) ("[T]his Court finds that Article 10(a) provides for service by mail in the current situation."); *Ortega Dominguez v. Pyrgia Shipping*

Corp., No. Civ.A. 98–529, 1998 WL 204798, at *2 (E.D.La. Apr. 24, 1998) ("[T]his Court finds that Artide 10(a) of the Hague Convention permits service of process by mail."); *Smith v. Dainichi Kinzoku Kogyo Co.,* 680 F.Supp. 847, 851 (W.D.Tex.1988) ("Plaintiffs' service of process directly upon Dainichi–Japan by registered mail was sufficient to comport with Art. 10(a) of the Hague Convention."); *Great Am. Boat Co. v. Alsthom Atl., Inc.,* Civ. A. Nos. 84–0105 & 84–5442, 1987 WL 4766, at *3 (E.D.La. Apr. 8, 1987) ("Mailing a summons and a copy of the complaint with a return receipt ... creates personal jurisdiction ... against a FSIA corporation [i.e, a corporation whose ownership is vested in a foreign state] ... in a Hague Service Convention state....").

[15] *Ante,* at ——.

**17 The majority cites several opinions that were issued by federal district courts in Texas after the Fifth Circuit Court of Appeals decided *Nuovo Pignone,* but these decisions add nothing to the discussion. The authoring courts had no choice but to follow *Nuovo Pignone,* because the opinion constitutes binding precedent over the lower courts in the Fifth Circuit. The distinction between a court that is merely following precedent and one that makes an independent determination of an issue can hardly be overemphasized: the Fifth Circuit's trial courts are *required* to treat the Fifth Circuit Court of Appeals' decisions as binding precedent, whereas Texas state courts—including this one—are *forbidden* to treat them as binding precedent. As the Texas Supreme Court has explained:

> The court of appeals' discussion of [a

> Fifth Circuit case] and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case.... By focusing so exclusively on [the Fifth Circuit case], the court of appeals overlooks the ... the weight of ... federal court decisions from other jurisdictions.

Penrod Drilling Corp., 868 S.W.2d at 296. The majority's failure to discuss the governing precepts of treaty construction or to address the reasoning of courts that have reached a conclusion contrary to that of the Fifth Circuit suggests that the majority has fallen into the same error here.[16]

[16]This is not the only problem with the majority's discussion of federal district court decisions. The only case that it cites for the proposition that the Service Convention does not permit service by mail is *Duarte v. Michelin North America, Inc.,* No. 2:13–CV–00050, 2013 WL 2289942 (S.D.Tex. May 23, 2013). The majority cites the remaining cases only in connection with articles of the Service Convention that are not at issue here. And although *Duarte* does indeed cite *Berezowsky v. Ojeda,* No. 4:12–CV–03496, 2013 WL 150714 (S.D.Tex. Jan. 14, 2013) that opinion has since been vacated. 765 F.3d 456 (5th Cir.2014).

The majority cites *L.K. v. Mazda Motor Corp.,* No. 3:09–cv–469–M, 2009 WL 1033334, at *2 (N.D.Tex. Apr. 15, 2009) with the parenthetical, "holding service under article 5 was not effective because Japanese

requirement that service be transmitted to the Central Authority was not met." That is not the case's holding. To the contrary, the authoring court did not analyze the adequacy of service at all, but said only that "Plaintiffs' counsel admits that he failed to comply with the requirements of the Hague Convention,"

Finally, the majority cites *Albo v. Suzuki Motor Corp.,* No. 3:08–0139–KC, 2008 WL 2783508 (W.D.Tex. July 2, 2008) with the parenthetical, "holding service not effective because, under article 5, the Hague [Service Convention] required full translation of documents into Japanese and without complying with specific Hague [Service Convention] requirements, service was insufficient." But as the authoring court explains, the Service Convention itself has no such requirement; it simply provides that " 'the Central Authority *may* require [the] document be written in, or translated into, the official language or one of the official languages of the State.' " *Id.* at *2 n.2 (quoting Service Convention, *supra* note 1, at Art. 5) (emphasis added).

*49 B. The Majority's Reliance on State Court Decisions

The majority's treatment of state court decisions appears to me to be similarly flawed. For example, the majority cites *Wuxi Taihu Tractor Co. v. York Group, Inc.,* stating that the authoring court "held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention."[17] If that were the court's holding, then the case would be merely inapposite, because only Article 10(a) is at issue in this case. But that was not the court's holding, as can be seen

from the fact that the *Wuxi Taihu* court *affirmed* the post-answer default against the foreign defendant. No. 01–13–00016–CV, 2014 WL 6792019, at *1 (Tex.App.–Houston [1st Dist.] Dec. 2, 2014, pet. pending) (mem.op.). In describing this as the court's holding, the majority fails to follow the standard for distinguishing between dicta and an alternative holding. *See State Farm Mut. Auto. Ins. Co. v. Lopez,* 156 S.W.3d 550, 554 (Tex.2004) (op. on reh'g) (granting petitioner's motion for rehearing because "we failed to apply the standard for distinguishing between alternative holdings and dicta"); *Tex. Natural Res. Conservation Comm'n v. White,* 46 S.W.3d 864, 868 (Tex.2001) (explaining that a court's statement is not dicta but instead is an alternative holding if "the court could have relied on either determination to reach its ultimate conclusion"). Moreover, the construction of Article 10(a)—the only issue presented for our review—is never mentioned in *Wuxi Taihu.* Indeed, the issue could not have arisen on the facts in that case, because the defective-service complaint in *Wuxi Taihu* concerned service in the People's Republic of China,[18] which—in accordance with Article 21 of the Service Convention—has formally declared its opposition to "the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention."[19] But ***50** what the *Wuxi Taihu* court actually held was that, regardless of the appellant's claims of defective service, the appellant nevertheless "chose to answer, and it cannot now, after voluntarily appearing, avoid the consequences of its choice." *See Wuxi Taihu,* 2014 WL 6792019, at *10 n.6 (citing *Onda Enters., Inc. v. Pierce,* 750 S.W.2d 812, 813 (Tex.App.–Tyler 1988, orig. proceeding) (per curiam)). As a result, the entirety of the *Wuxi Taihu* court's discussion of the Service Convention

is dicta.

[17]*Ante,* at. ——

[18]*See Wuxi Taihu,* 2014 WL 6792019, at *1.

[19]A courtesy translation of that country's declarations are available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment=393=resdn (last visited June 26, 2015).

**18 The other Texas cases cited by the majority and decided by our sister courts also do not concern Article 10(a). *See In re J.P.L.,* 359 S.W.3d 695 (Tex.App.– San Antonio 2011, orig. proceeding [mand. denied]); *Velasco v. Ayala,* 312 S.W.3d 783 (Tex.App.–Houston [1st Dist.] 2009, no pet.).[20] As in *Wuxi Taihu,* the issue in *Velasco* and in *J.P.L.* concerned service of process in a country that has made a formal declaration of opposition to Article 10. Specifically, both *Velasco* and *J.P.L.* concerned service in Mexico.[21] Like the *Wuxi Taihu* opinion, the *Velasco* opinion cites Article 5 as authority for the proposition that service by mail does not comply with the Service Convention. *See Velasco,* 312 S.W.3d at 794. In *J.P.L.,* the authoring court interpreted Article 19 of the Service Convention. *See J.P.L.,* 359 S.W.3d at 707. Thus, in none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court. These cases accordingly add nothing to the majority's analysis—which make its failure to address the reasoning of the cases that actually do address that question and follow the prevailing view and all the more puzzling.

[20]*See ante,* at ——.

[21]A courtesy translation of Mexico's "declarations made at the moment of accession" is available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment=412=resdn (last visited June 26, 2015).

VI. CONCLUSION

For the reasons stated herein, I would conclude that Article 10(a) of the Service Convention permits service by mail in Canada. Because the majority does not, I respectfully dissent.

FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon
v. Water Splash, Inc.

Please be advised that on this date the court **DENIED APPELLEE'S** motion for rehearing en banc in the above cause.

T. C. Case # 13-CV-0205 Christopher Prine, Clerk

Jeremy Jason Gaston
Hawash Meade Gaston Neese & Cicack, LLP
2118 Smith Street
Houston, TX 77002
DELIVERED VIA E-MAIL

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. *v.* MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

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