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\$314M and Sovereign Immunity Are At Stake in Upcoming High Court Case

Even if the U.S. were amenable to accepting service at its foreign embassies, adherence to the Second Circuit's statutory interpretation could upend customary international law and the executive branch's reading of sovereign immunity.

By **Peter B. "Bo" Rutledge and Amanda W. Newton** | November 01, 2018 at 11:58 AM

The Nov. 7 Supreme Court arguments in *Republic of Sudan v. Harrison* will implicate issues of civil procedure, sovereign immunity, and statutory interpretation. At stake for the Republic of Sudan is \$314 million in Sudanese assets. More broadly, however, the court's decision could have ramifications for any nation, including the United States, that enjoys sovereign immunity.

Issues related to international affairs occupy much of the court's attention. In this year's November sitting, the court will examine whether international organizations are owed sovereign immunity under the Foreign Sovereign Immunities Act. Last year, the court determined that foreign corporations could not be named in suits brought under the Alien Tort Statute and that the FSIA's terrorism exception does not provide a free-standing basis for parties to attach a foreign state's property in order to satisfy a judgment.

In *Harrison*, survivors of the 2000 bombing of the USS Cole filed suit under the FSIA, alleging that the Republic of Sudan provided material support to al-Qaida bombers. The FSIA generally prohibits lawsuits against foreign countries in U.S. courts, but excepts, among others, designated state sponsors of terrorism.

Service is proper under the FSIA if sent "to the head of the ministry of foreign affairs." In *Harrison*, the clerk of the U.S. District Court for the District of Columbia served defendants by addressing the documents to the minister of foreign affairs and mailing them to the Sudanese Embassy in Washington.

The district court found that the minister was properly served because the statute does not specify a particular location for service. On appeal, the U.S. Court of Appeals for the Second Circuit found that, although it was a "close call," service through the embassy was sufficient because it "could reasonably be expected to result in delivery to the intended person."

The Second Circuit's decision arguably conflicts with the decisions of its sister courts, which have found that a broad interpretation of the FSIA is inconsistent with Article 22 of the Vienna Convention on Diplomatic Relations. The VCDR provides that "the premises of the mission shall be inviolable" and that a "diplomatic agent shall ... enjoy immunity from [the host state's] civil and administrative jurisdiction." The Fourth and Seventh circuits determined that any attempt to serve a foreign entity through an embassy is prohibited by the VCDR.

By contrast, the Second Circuit in *Harrison* distinguished service *on* an embassy by mail from service on a minister of foreign affairs *via* an embassy, finding that the latter was consistent with the VCDR. The Second Circuit also found that acceptance of the documents by a mailroom clerk constituted “consent” under the VCDR.

Should the court accept the Second Circuit’s broad statutory reading of the VCDR, the implications for the U.S. could be staggering. At any given time, the U.S. is represented in approximately 1,000 lawsuits in 100 different countries. The U.S. currently refuses to accept service through mail or personal delivery to a U.S. embassy.

Even if the U.S. were amenable to accepting service at its foreign embassies, adherence to the Second Circuit’s statutory interpretation could upend customary international law and the executive branch’s reading of sovereign immunity. U.S. courts have long strived to avoid violating foreign law if possible, and the State Department has found that creating a diplomatic mission in a foreign state did not empower that mission to act as an agent for service.

The bar should watch carefully for how much import the court places on the threat of reciprocal consequences. The court could weigh heavily the concerns of the United States, Libya, Saudi Arabia, and the UAE, all of which filed amicus briefs arguing that allowing service of process via an embassy would create “international discord.” The decision could ultimately affect not only how foreign entities are subjected to service abroad, but more generally how treaties and principles of international law are interpreted in a variety of international civil litigation contexts.

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