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(Don't) Take Another Little Piece of My Immunity, Baby: The Application of Agency Principles to Claims of Foreign Sovereign Immunity

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**(DON'T) TAKE ANOTHER LITTLE PIECE
OF MY IMMUNITY, BABY: THE APPLICATION
OF AGENCY PRINCIPLES TO CLAIMS OF
FOREIGN SOVEREIGN IMMUNITY**

*Daniel P. Roy III**

This Note examines the split among the federal circuit courts regarding the application of agency principles to claims of foreign sovereign immunity. Specifically, a minority of courts have applied the doctrine of apparent authority in determining whether a sovereign is bound by the acts of its agents. The majority of courts have, however, declined to apply the doctrine, holding that only actual authority is sufficient to bind sovereigns to their agents' acts. This Note examines the policy ramifications of the minority view through the lens of sovereign debt litigation, especially those conducted by so-called vulture funds, and ultimately concludes that the minority view should be explicitly disregarded via congressional revision of the statutory scheme governing claims of foreign sovereign immunity.

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INTRODUCTION

In November of 1983, Loydstone Jacobs, the Antiguan Ambassador to the United Nations (UN), signed a \$250,000 loan agreement with First National State Bank of New Jersey, ostensibly to renovate the Antiguan

Permanent Mission.¹ Rather than make any improvements, he sunk the money into a (seemingly ill-fated) casino venture, in which, perhaps not coincidentally, a number of Antiguan government officials were coinvestors.² After payment on the loan ceased in mid-1985 and settlement negotiations failed, the noteholder, First Fidelity Bank, sued in the Southern District of New York and obtained a default judgment against the Antiguan Government.³

Shortly after First Fidelity tried to collect against Antiguan bank accounts in the United States,⁴ Jacobs agreed to settle the dispute.⁵ But First Fidelity was paid only a fraction of what it was owed under the settlement,⁶ and the bank reinitiated its efforts to attach the Antiguan bank accounts.⁷ In response, the Antiguan Government challenged the original default judgment on the basis of foreign sovereign immunity.⁸ It argued that, under Antiguan law, Jacobs lacked authority to borrow the \$250,000 and to waive its sovereign immunity.⁹ The district court disagreed: agency principles made Antigua liable for Jacobs's acts.¹⁰ Antigua appealed to the Second Circuit.¹¹

While the Second Circuit declined to reach the merits in *First Fidelity Bank v. Government of Antigua and Barbuda*,¹² it held that a sovereign may be bound to a commercial transaction where its agent acts with apparent authority.¹³ Other circuit courts, including the Ninth,¹⁴ Fourth,¹⁵ and Fifth,¹⁶ reject this position. They hold that a sovereign is bound to a commercial agreement only where its agent acts with actual authority.¹⁷

1. *First Fidelity Bank v. Gov't of Antigua & Barbuda*, 877 F.2d 189, 191 (2d Cir. 1989).

2. *Id.* at 197 (Newman, J., dissenting).

3. *Id.* at 191 (majority opinion).

4. *Id.*

5. *Id.* This settlement agreement contained a complete waiver of sovereign immunity. *Id.* Jacobs claimed that the Permanent Secretary to the Antiguan Prime Minister had previously authorized him to enter into such a settlement agreement. *Id.* Thus, Jacobs signed the agreement in his capacity as Ambassador, while Robert Healy, in-house counsel for the Antiguan Permanent Mission to the UN, signed as the government's attorney. *Id.* Antigua denied that Jacobs and Healy were ever authorized to enter into such an agreement. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* This was the first official action taken by the Antiguan Government in the course of the litigation. *Id.*

9. *Id.* at 197 (Newman, J., dissenting).

10. *Id.* at 191 (majority opinion).

11. *Id.*

12. 877 F.2d 189 (2d Cir. 1989). The court vacated the prior default judgment and remanded the case to the district court for further factual proceedings consonant with its rulemaking. *Id.* at 196.

13. *See id.* at 193–95.

14. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997).

15. *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004).

16. *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006).

17. *Id.* at 428–30; *Velasco*, 370 F.3d at 400; *Phaneuf*, 106 F.3d at 307–08.

The ramifications of this circuit split are manifold. For example, sovereign debt litigation over agreements with highly indebted states¹⁸ or with authoritarian regimes frequently turn on the decision to apply actual or apparent authority doctrine.¹⁹ The minority position would extend liability to sovereigns via the doctrine of apparent authority and produce judgments with catastrophic economic effects for many troubled states.²⁰ Moreover, it would have disconcerting doctrinal implications²¹ and threaten U.S. foreign policy goals.²² In contrast, the majority position would result in greater predictability of decisions, as well as the preservation of foreign sovereign immunity.²³ It would, however, function to the detriment of contractual sanctity and global creditors.²⁴

Part I of this Note examines the bedrock principles of agency law, the doctrine of foreign sovereign immunity, and how the two areas of law intersect. Part II then analyzes how courts apply these principles by explicating the methodologies and justifications for adopting the minority or majority position. Part III considers the doctrinal and policy ramifications of the minority and majority positions and ultimately proposes that Congress remedy the split via revision of the current statutory scheme. Absent congressional action, this Note proposes a judicial remedy.

I. STRANGE BEDFELLOWS?: AGENCY PRINCIPALS,
THE DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY,
AND THEIR INTERSECTION

This Note begins, in Part I.A, by examining the general principles of agency law implicated in this circuit split. Part I.B then addresses the historical development of the doctrine of foreign sovereign immunity, up to and including the codification of the modern standard in the form of the Federal Sovereign Immunities Act of 1976 (FSIA). In turn, Part I.C focuses specifically on the FSIA's commercial activity exception, illustrating how commercial transactions may affect claims of sovereign immunity in U.S. courts. Lastly, Part I.D demonstrates how the agency principles identified in Part I.A are applied in the foreign sovereign immunity claims discussed in Parts I.B and I.C, particularly in the context of sovereign debt litigation.

18. See, e.g., *Themis Capital, LLC v. Democratic Republic of Congo (Themis Capital I)*, 881 F. Supp. 2d 508 (S.D.N.Y. 2012) (centering on the renewal of a debt restructuring agreement by government officials of the Democratic Republic of Congo).

19. See, e.g., *Velasco*, 370 F.3d at 392 (involving the issuance of promissory notes by an organ of the Indonesian security apparatus under the Suharto dictatorship).

20. See Elizabeth Broomfield, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 493–94 (highlighting the impact of vulture fund litigation on Liberia, a politically and economically troubled African state that was ordered to pay a sum equivalent to 5 percent of its 2009 annual budget to two funds by a British court).

21. See *infra* Part III.A.

22. See *infra* Part III.B.

23. See *infra* Part III.A–B.

24. See Daniel E. Murray, *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997), 91 AM. J. INT'L L. 738, 739 (1997) (discussing the problematic nature of the Ninth Circuit's refusal to apply the doctrine of apparent authority).

A. Agency Principles

Part I.A.1 of this Note examines general principles of agency law, including how agency relationships are formed and the duties of the actors involved. Having reviewed these foundational principles, Part I.A.2 investigates how agents bind third parties to their actions, specifically via the doctrines of actual and apparent authority. Finally, Part I.A.3 surveys equitable doctrines relating to the binding power of agents, specifically the doctrine of inherent authority and the more modern doctrine of agency by estoppel.

1. The Agency Relationship

The term “agency” refers to the fiduciary relationship wherein one party empowers another party to transact some business on its behalf.²⁵ This relationship, also known as the principal-agent relationship, is essentially consensual.²⁶ It is created when one individual or entity (the principal) manifests assent that another individual or entity (the agent) shall act on the principal’s behalf and remain subject to his control, and the agent manifests his assent to that arrangement as well.²⁷ Once an agency relationship is established, the agent is empowered to bring about, or alter, business and legal relationships between the principal and third persons.²⁸ However, the agent also has a fiduciary duty to act loyally in the principal’s interest in all matters connected to the agency relationship.²⁹

Agency relationships appear within a broad range of industries and under various circumstances.³⁰ Elements of traditional agency law may, for instance, be found in “relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner.”³¹ Indeed, employer-employee relationships generally can be thought of as falling under the wider umbrella of agency law.³² Thus, employees, acting as agents, may bind their employers, as principals, to contracts falling within the scope of their employment,³³ including in certain instances to debt instruments.³⁴

25. 3 AM. JUR. 2D *Agency* § 1 (2014).

26. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006).

27. *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 392 (1982) (quoting RESTATEMENT (SECOND) OF AGENCY § 1 (AM. LAW INST. 1958)); RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006). These manifestations may be written or oral, or communicated via conduct. *Id.* § 1.03; 3 AM. JUR. 2D, *supra* note 25, *Agency* § 1 n.4.

28. 3 AM. JUR. 2D, *supra* note 25, *Agency* § 2.

29. *Id.*

30. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006).

31. *Id.*

32. 27 AM. JUR. 2D, *supra* note 25, *Employment Relationship* § 3.

33. *See, e.g., Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venez.*, 575 F.3d 491 (5th Cir. 2009) (applying Mississippi law in determining whether an attorney acting for the Republic of Venezuela had the authority to enter into a settlement agreement); *Essco Geometric v. Harvard Indus.*, 46 F.3d 718 (8th Cir. 1995) (deciding whether a purchasing agent had sufficient authority to enter into two-year, exclusive contract); *Six Flags, Inc. v. Steadfast Ins. Co.*, 474 F. Supp. 2d 201 (D. Mass. 2007)

2. Actual Authority Vs. Apparent Authority

An agent may act, and consequently bind a principal, pursuant to different types of authority.³⁵ The first is actual authority.³⁶ An agent has actual authority when the principal, either expressly or impliedly, authorizes him to act in a certain matter.³⁷ The existence of actual authority depends on manifestations of consent between the principal and agent, and the agent must reasonably believe that the principal wishes him to act on his behalf.³⁸ An agent has actual authority to take actions reasonably designated or implied by the principal's manifestations.³⁹ Moreover, an agent has actual authority to undertake any acts necessary or incidental to attaining the principal's manifested goals.⁴⁰

Second, an agent may bind a principal under the doctrine of apparent authority, which is based on notions of estoppel.⁴¹ Apparent authority exists where a third party reasonably believes an agent has the authority to act on the principal's behalf, based on the principal's own manifestations to the third party.⁴² In this way, the doctrine requires determinations regarding not only the subjective beliefs of third parties, but also the reasonableness of such beliefs.⁴³

Thus, an agent acting with apparent authority may bind a principal to a transaction with a third party, even where the principal has not actually authorized him to do so.⁴⁴ However, the third party's reliance must be both reasonable and in good faith,⁴⁵ and, consequently, a principal will not be

(concluding that an executive of a water ride manufacturer had the authority to bind the manufacturer to a contract with an amusement park).

34. *See, e.g.*, Themis Capital I, 881 F. Supp. 2d 508 (S.D.N.Y. 2012).

35. *See* RESTATEMENT (THIRD) OF AGENCY §§ 2.01–.02 (AM. LAW INST. 2006) (addressing different types of authority).

36. *Id.* § 2.01.

37. 2A C.J.S. *Agency* § 8 (2014).

38. RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. LAW INST. 2006).

39. *Id.* § 2.02.

40. *Id.*

41. 2A C.J.S., *supra* note 37, *Agency* § 8.

42. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006). The existence of some manifestation to a third party is the essential element to the creation of apparent authority, *id.* § 3.03, as opposed to actual authority, which requires some manifestation between the principal and agent themselves. *Id.* § 2.01.

43. While the application of the doctrine of apparent authority varies slightly by jurisdiction, many jurisdictions explicitly note this requirement of subjective belief. *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 n.2 (9th Cir. 2001) (“A party claiming apparent authority of an agent must prove (1) that the acting party subjectively believed that the agent had authority to act for the principal and (2) that the subjective belief in the agent’s authority was objectively reasonable.”); *Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001). *But cf.* *Ja Dan, Inc. v. L-J, Inc.*, 898 F. Supp. 894, 900 (S.D. Fla. 1995) (“Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent . . .”).

44. RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. a (AM. LAW INST. 2006); 2A C.J.S., *supra* note 37, *Agency* § 8.

45. 2A C.J.S., *supra* note 37, *Agency* § 159.

bound by an unauthorized act if the third party knew, or had actual or constructive notice of, the agent's lack of authority.⁴⁶

3. Inherent Authority Vs. Agency by Estoppel

In limited circumstances, a principal may be bound to a transaction authorized by an agent via the doctrine of inherent agency power.⁴⁷ Inherent agency power refers to the power of an agent to bind a principal that is derived not from authority, actual or apparent, but rather from the agency relationship itself.⁴⁸ Inherent agency power may, consequently, exist in the absence of any manifestation from the principal to a third party,⁴⁹ distinguishing it from apparent authority.⁵⁰ Therefore, inherent agency power works to protect especially innocent or disadvantaged third parties, often in the context of tort liability or the loss of property caused by improper agent action.⁵¹

The Restatement (Third) of Agency has, however, rejected this notion of inherent agency power.⁵² It instead argues that other related aspects of agency law encompass the doctrine's concerns, principally the doctrine of agency by estoppel.⁵³ Specifically, this doctrine provides that the principal will be liable where a third party has justifiably relied, and acted to their detriment, upon the belief that an actor is an agent of the principal.⁵⁴ The principal must, however, have intentionally or recklessly caused this belief, or had notice of such belief and failed to take reasonable steps to notify the third party.⁵⁵ Therefore, "[t]he operative question is whether a reasonable person in the position of the third party would believe such an agent, as the actor appears to be, to have authority to do a particular act."⁵⁶ In this way, the doctrine likewise seeks to protect disadvantaged third parties, absent any concrete manifestations from the principal to a third party.⁵⁷

B. Foreign Sovereign Immunity

Part I.B.1 begins by broadly defining the doctrine of foreign sovereign immunity. Next, Part I.B.2 discusses the traditional theory of foreign sovereign immunity, known as the absolute theory of sovereign immunity, in greater detail. In turn, Part I.B.3 looks to the more modern theory of restrictive foreign sovereign immunity. Finally, Part I.B.4 examines the modern statutory codification of the doctrine of foreign sovereign immunity in the FSIA.

46. *Id.* § 167.

47. *See generally* RESTATEMENT (SECOND) OF AGENCY § 8A (AM. LAW INST. 1958).

48. *Id.*

49. *See id.*

50. *See supra* note 42 and accompanying text.

51. RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (AM. LAW INST. 1958).

52. RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b (AM. LAW INST. 2006).

53. *Id.*

54. *Id.* § 2.05.

55. *Id.*

56. *Id.* § 2.05 cmt. c.

57. *Id.* § 2.05 cmt. d.

1. The Doctrine of Foreign Sovereign Immunity

The doctrine of foreign sovereign immunity embodies the general principle of international law that a foreign government, including its agents and instrumentalities, shall not be subject to the jurisdiction of another state's domestic courts, absent its consent.⁵⁸ This doctrine has deep roots, stretching back to the Treaty of Westphalia in 1648, which itself laid the grounds for the current international, or Westphalian, system.⁵⁹ Sovereign immunity is understood to naturally flow from the bedrock principles of this system,⁶⁰ namely the inviolability and equality of sovereign states,⁶¹ in that it requires a nation's sovereignty, or its "political independence and power to conduct internal matters without outside interference," to be universally respected.⁶²

While the doctrine may have originated in the era of individual monarchs, it has been widely retained across the globe in various forms.⁶³ Some nations adhere rigidly to the traditional formulation of foreign sovereign immunity, but the majority of nations today, including most European nations and the United States, have enacted more flexible versions of the doctrine in order to reflect the realities of the modern globalized world.⁶⁴

2. The *Ancien Régime*: The Absolute Theory of Sovereign Immunity

For much of U.S. history, foreign sovereigns were accorded complete immunity from domestic courts under the theory of absolute sovereign immunity, which in essence provides that "a foreign state [may] not be sued whatsoever without its consent."⁶⁵ The basis for this theory was first elucidated over two centuries ago in *Schooner Exchange v. McFadden*,⁶⁶ where Chief Justice John Marshall concluded that an armed French naval vessel docked in Philadelphia was immune from the jurisdiction of U.S. courts.⁶⁷ The Chief Justice reasoned that such immunity was generally

58. See Andrew B. Pittman, *Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts*, 58 WASH. & LEE L. REV. 645, 647 (2001).

59. See David P. Vandenberg, *In the Wake of Republic of Austria v. Altmann: The Current Status of Foreign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006).

60. See *id.* ("The international law doctrine of foreign sovereign immunity was born as an organic byproduct of the current international system.").

61. Pittman, *supra* note 58, at 650.

62. Vandenberg, *supra* note 59, at 740.

63. See *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 356–58 (2d Cir. 1964) (noting the existence of both a traditional formulation of the doctrine, as well as a more modern version adopted by a number of states).

64. See Vandenberg, *supra* note 59, at 741–42 ("However, courts in many other states—most notably the traditional European powers—began denying immunity in cases where the state was sued for activities of a mere commercial or private nature.").

65. *Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exp. Countries*, 477 F. Supp. 553, 565 (C.D. Cal. 1979).

66. 11 U.S. (7 Cranch) 116 (1812).

67. *Id.* at 147.

recognized under the law of nations.⁶⁸ While this opinion could have been read narrowly to apply only in the realm of governmental or military action, lower courts construed it broadly to extend immunity to commercial transactions.⁶⁹ The Supreme Court later explicitly adopted this expansive theory of immunity in the 1926 case *Berrizi Bros. Co. v. The Pesaro*.⁷⁰

However, the Court also made it clear that the bestowal of immunity was a “matter of grace and comity.”⁷¹ Therefore, a two-step procedure developed for those sovereigns seeking immunity.⁷² The first step required the sovereign’s diplomatic representative to seek a formal suggestion of immunity from the U.S. State Department.⁷³ Secondly, if the State Department granted the request, the court would decline to exercise jurisdiction.⁷⁴ During this period, however, the usual policy of the executive branch was simply to request immunity for all (friendly) nations.⁷⁵

3. Middle of the Road: The Restrictive Theory of Sovereign Immunity

This status quo prevailed for most of the early twentieth century, but was increasingly criticized as foreign governments (and corporations owned or controlled by foreign governments) became more active in international commerce.⁷⁶ It was argued that American business interests required greater protection when dealing with state owned corporations, which would otherwise be able to successfully claim immunity in U.S. courts during disputes.⁷⁷ Moreover, many nations began to abandon the absolute theory of immunity in the early twentieth century, leading to an

68. *Id.* at 125; see also H.R. REP. NO. 94-1487, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

69. Clinton L. Narver, *Putting the “Sovereign” Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT’L L.J. 163, 167–68 (2001).

70. 271 U.S. 562 (1926).

71. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

72. *Samantar v. Yousuf*, 130 S. Ct. 2778, 2284 (2010).

73. *Id.*

74. *Id.*; see also *Ex Parte Republic of Peru*, 318 U.S. 578, 586–87 (1943) (noting that the policy was to generally defer to the executive branch in determining whether to invoke jurisdiction). If the State Department declined to provide guidance, however, the court could decide for itself whether to recognize a claim of immunity. *Id.* at 587. Specifically, the court would analyze whether the ground or grounds of the immunity claim were generally recognized by the State Department. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945).

75. See *Republic of Austria v. Altmann*, 541 U.S. 677, 677 (2004).

76. Narver, *supra* note 69, at 168; see also H.R. REP. NO. 94-1487, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605 (“American citizens are increasingly coming into contact with foreign states and entities owned by foreign states.”).

77. Vandenberg, *supra* note 59, at 744.

asymmetrical situation where the United States was subject to suit in the same nations to which it continually granted blanket immunity.⁷⁸

This state of affairs led the State Department to issue the so-called Tate Letter in 1952.⁷⁹ This letter ushered in the restrictive theory of sovereign immunity, which provides immunity only for a sovereign's public acts, as opposed to its private, commercial ones.⁸⁰ While U.S. courts had previously touched upon this theory, it had never been formally adopted.⁸¹

This new introduction, however, "threw immunity decisions into some disarray."⁸² Specifically, certain foreign states began to utilize their diplomatic influence to pressure the State Department into making a formal suggestion of immunity to the court.⁸³ This in turn led to a number of inconsistencies in the bestowal of immunity, as the merits of a case became secondary to political motivations.⁸⁴ Moreover, when foreign states failed to formally request immunity via the State Department, the judiciary was still required to determine if immunity actually existed, leaving decisions on sovereign immunity split between the two government branches.⁸⁵ This only exacerbated the inconsistencies in sovereign immunity cases, further illustrating the need for a formal mechanism to govern claims of immunity.⁸⁶

4. The Modern Regime: The Federal Sovereign Immunities Act of 1976

In response to this muddled situation, Congress passed the FSIA in 1976.⁸⁷ Congress provided that the dual purposes of the statute were "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to

78. *Id.*; see also H.R. REP. NO. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. 6604, 6605 ("Moreover, [restrictive sovereign immunity] is regularly applied against the United States in suits against the U.S. Government in foreign courts.").

79. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting Att'y Gen. Philip B. Perlman (May 19, 1952), reprinted in 26 DEP'T OF STATE BULL. 984-85 (1952) [hereinafter Tate Letter].

80. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983); Tate Letter, *supra* note 79, at 984 ("[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).").

81. See, e.g., *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921).

82. *Republic of Austria v. Altmann*, 541 U.S. 677, 677 (2004).

83. See H.R. REP. NO. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. 6604, 6606 ("[A] foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination.").

84. See Vandenberg, *supra* note 59, at 745 ("Thus, whether immunity was actually deserved became a secondary consideration in some instances.").

85. *Altmann*, 541 U.S. at 677-78; see also Vandenberg, *supra* note 59, at 746 (noting the possibility of judicial contradictions in sovereign immunity cases).

86. Vandenberg, *supra* note 59, at 746 ("The two layers of potential inconsistency—State Department politics and judicial contradictions—soon gave rise to the need for a method of stabilizing decision-making in determinations of foreign sovereign immunity.").

87. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

immunity' from the State Department to the courts."⁸⁸ In doing so, legislators hoped that the statute would "create uniform and predictable standards for litigation involving foreign governments."⁸⁹ Additionally, the statute was intended to remain consonant with principles of international law⁹⁰ and to "promote harmonious international relations."⁹¹ The FSIA facilitated these objectives by formally establishing when and how parties could initiate and maintain suits against foreign states in U.S. courts and when a sovereign was entitled to immunity.⁹²

The statutory framework of the FSIA remains in force today and "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States]."⁹³ The first portion of the statute grants sovereigns a presumption of absolute immunity, mandating that foreign states—including their agents and instrumentalities—shall be immune from the jurisdiction of U.S. courts.⁹⁴ However, the second portion of the statute carves out three major exceptions to this general rule, in keeping with a restrictive theory of foreign sovereign immunity.⁹⁵ They are termed the waiver, commercial activity, and noncommercial tort exceptions.⁹⁶ When

88. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2285 (2010); *see also* 28 U.S.C. § 1602 (2012) ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.").

89. *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1297–98 (11th Cir. 1999); *see also Verlinden*, 461 U.S. at 488 ("Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that decisions are made on purely legal grounds and under procedures that insure due process." (internal quotations omitted)).

90. *Aquamar*, 179 F.3d at 1294–95; *see also* H.R. REP. NO. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6608 (noting that passage of the FSIA would bring the United States into conformity with the majority of states by transferring decisions regarding immunity to its judicial system).

91. *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998) (citing *Pullman Constr. Indus. v. United States*, 23 F.3d 1166, 1169 (7th Cir. 1994)).

92. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983) ("[T]he Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality."); *see also* H.R. REP. NO. 94-1487, at 6, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("The purpose of the proposed legislation . . . is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.").

93. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); *see also Samantar*, 130 S. Ct. at 2279 (noting that the preexisting common law was entirely displaced by the passage of the statute).

94. 28 U.S.C. §§ 1603–1604 (2012) ("Subject to existing international agreements . . . a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.").

95. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488–89 (1983); *see also Narver*, *supra* note 69, at 169–70.

96. *Narver*, *supra* note 69, at 170 ("The three most significant exceptions to the [FSIA]'s presumptive grant of immunity are waiver, commercial activity, and noncommercial tort."). The waiver exception provides that a foreign state shall not be immune if it has waived its immunity, either explicitly or implicitly. 28 U.S.C. § 1605(a)(1). The commercial tort exception additionally provides that a foreign state shall not be immune where monetary damages are sought in connection with injury, death, or damage, or loss of property in the United States, as the result of tortious acts committed by the state or its actors. *Id.*

any one of these exceptions is triggered, the statute provides that the foreign state shall be subject to the jurisdiction of U.S. courts as if it were a private individual.⁹⁷

C. *The Commercial Activity Exception*

The most significant of the exceptions codified in the FSIA is the so-called commercial activity exception.⁹⁸ In its simplest terms, the exception works to “strip[] a sovereign of immunity when it engages in conduct commercial in nature”⁹⁹ and, therefore, represents the statutory embodiment of the restrictive theory of sovereign immunity.¹⁰⁰ More specifically, the provision stipulates that a foreign state surrenders its jurisdictional immunity where it: (1) carries on a commercial activity in the United States; (2) performs an act in the United States related to its commercial activities elsewhere; or (3) performs an act outside of the United States related to its commercial activities elsewhere that causes a direct effect in the United States.¹⁰¹

In defining “commercial activity,” the FSIA provides that the term may refer to either a particular commercial act or transaction, or “a regular course of commercial conduct.”¹⁰² Moreover, it mandates that, in determining whether an act is “commercial,” courts must look to the nature of the transaction or course of conduct rather than to its purpose.¹⁰³

As the Court has noted, “[t]his definition, however, leaves the critical term ‘commercial’ largely undefined.”¹⁰⁴ Namely, it specifies (1) that commerciality does not depend on whether it is a single or regular occurrence, and (2) which element should be used to determine commerciality, while failing to explain what “commercial” actually

§ 1605(a)(5). This Note deals exclusively with the second exception, the commercial activity exception. *See infra* Part I.C.

97. *See* Weinstein v. Islamic Republic of Iran, 609 F.3d 43, 47 (2d Cir. 2010) (noting that an action against a foreign state “must fall within one of the FSIA’s exceptions to foreign sovereign immunity” in order for the court to exercise subject matter jurisdiction); Narver, *supra* note 69, at 170.

98. *See generally* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992). Indeed, most cases involving plaintiffs’ claims that a foreign sovereign lacks immunity are premised on this exception. George K. Chamberlin, *Exceptions to Jurisdictional Immunity of Foreign States and Their Property Under the Foreign Sovereign Immunities Act of 1976* (28 U.S.C.A. §§ 1602 *et seq.*), 59 A.L.R. Fed. 99 (1986).

99. 44B AM. JUR. 2D *International Law* § 139 (2015).

100. Narver, *supra* note 69, at 170.

101. 28 U.S.C. § 1605(a)(2) (“A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States”); *see also* Rogers v. Petroleo Brasileiro, S.A., 673 F.3d 131, 136 (2d Cir. 2012) (noting the commercial activity exception provides three separate bases for denying sovereign immunity).

102. 28 U.S.C. § 1603(d).

103. *Id.*

104. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992).

means.¹⁰⁵ Consequently, the Court has had to determine precisely what types of activity are “commercial” for the purposes of the statute. In *Republic of Argentina v. Weltover, Inc.*,¹⁰⁶ the Court began this analysis by holding that, because the FSIA codifies the restrictive theory of sovereign immunity, the statute’s meaning is what Congress understood the restrictive theory to require at the time it passed the statute.¹⁰⁷ The Court noted that, per the Tate Letter, the restrictive theory of sovereign immunity was understood to grant immunity only to a state’s public actions, not its commercial activities.¹⁰⁸ Therefore, it concluded that “when a foreign government acts, not as regulator of a market, but in the manner of a private player within [it, the foreign sovereign’s] actions are ‘commercial’ within the meaning of the FSIA.”¹⁰⁹

The Court has further emphasized that determining whether a state acts as a private party “is a question of behavior, not motivation.”¹¹⁰ In other words:

[T]he question is not whether the foreign government is acting with a profit motive or . . . the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in “trade and traffic or commerce.”¹¹¹

Applying these principles to the case at bar, the Court went on to hold that the issuance of government bonds, even where such an issuance is designed to address an economic crisis, is a commercial activity for the purposes of the statutory exception.¹¹² In contrast, in *Saudi Arabia v. Nelson*,¹¹³ the Court held that the plaintiff’s wrongful imprisonment could not trigger the exception, as, under the restrictive theory of sovereign immunity, the exercise of police power is a public, sovereign act.¹¹⁴

D. Tying It Together: Agency Principles and Foreign Sovereign Immunity

Part I.D.1 of this Note begins by examining the general pattern followed in litigation involving agency principles and claims of foreign sovereign immunity. A more specific subset of this litigation is then introduced in Part I.D.2, which gives context for understanding the relatively modern phenomenon of sovereign debt litigation. Part I.D.3 then examines a subcategory of sovereign debt litigation, namely, holdout litigation

105. *Id.*

106. 504 U.S. 607 (1992).

107. *See id.* at 612–13; *see also* *Saudi Arabia v. Nelson*, 507 U.S. 349, 368–70 (1993) (White, J., concurring).

108. *Weltover*, 504 U.S. at 613–14 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976)).

109. *Id.* at 607.

110. *Nelson*, 507 U.S. at 360.

111. *Weltover*, 504 U.S. at 614 (citation omitted).

112. *Id.* at 615–17.

113. 507 U.S. 349 (1993).

114. *Id.* at 361.

conducted by so-called vulture funds. Lastly, Part I.D.4 illustrates how agency principles may be applied within the sovereign debt litigation discussed in Parts I.D.2 and I.D.3 by closely examining a paradigmatic case.

1. Litigation Generally

Pursuant to the commercial activity exception, a sovereign may be bound to commercial agreements via the traditional law of agency.¹¹⁵ In sovereign immunity claims involving agency principles, plaintiffs tend to allege an agency relationship between a sovereign and an actor in order to collect from the (theoretically) deep-pocketed sovereign.¹¹⁶ Because sovereign immunity is a question of subject matter jurisdiction,¹¹⁷ courts must address claims of immunity prior to making any determinations on the merits.¹¹⁸ Therefore, the defendant must first satisfy the court that it is indeed a “foreign state” for the purposes of the FSIA; once it has done so, the burden shifts to the plaintiff to show that the claim “falls within the scope of . . . [the commercial activity] exception.”¹¹⁹

While these cases encompass a range of various commercial activities,¹²⁰ a particularly relevant illustration is found in the field of sovereign debt litigation and, more specifically, holdout litigation conducted by investment funds focusing on sovereign debt.

115. *See* *Sachs v. Republic of Austria*, 737 F.3d 584, 592 (9th Cir. 2013) (“Under traditional agency principles, the foreign state may engage in commerce in the United States . . . indirectly by acting through its agents or subagents.”), *cert. granted*, 135 S. Ct. 1172 (2015).

116. *See, e.g.*, *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Republic of Romania*, 123 F. Supp. 2d 174 (S.D.N.Y. 2000) (seeking to enforce a settlement agreement, stemming from the contractual breach of the Romanian state shipping company, which was signed by the Romanian Minister of Finance).

117. *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“[S]ubject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” (citation omitted)); *see also* *Nelson*, 507 U.S. at 355 (“[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.”).

118. *See* *Best Med. Belg., Inc. v. Belgium*, 913 F. Supp. 2d 230, 236 (E.D. Va. 2012) (citing *Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)) (“A motion to dismiss on sovereign immunity grounds requires a court ‘to satisfy itself of its authority to hear a case’ through pretrial legal and factual determinations.”).

119. *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1061 (C.D. Cal. 2013) (citing *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010)); *see also* *1964 Realty LLC v. Consulate of the State of Qatar-New York*, No. 14 Civ. 6429, 2015 WL 5197327, at *5 (S.D.N.Y. Sept. 4, 2015) (noting that the plaintiff bears the burden of proof on the applicability of an exception, although the “the ultimate burden of persuasion of demonstrating that an FSIA exception does not apply lies with Defendant”).

120. *See, e.g.*, *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enter.*, 307 F. App’x 721 (4th Cir. 2009) (analyzing a breach of contract); *Republic of Benin v. Mezei*, No. 06 Civ. 870 (JGK), 2010 WL 3564270 (S.D.N.Y. Sept. 9, 2010) (concerning a real estate conveyance); *Amorrortu v. Republic of Peru*, 570 F. Supp. 2d 916 (S.D. Tex. 2008) (concerning government confiscation of oil interests).

2. Sovereign Debt Litigation

Sovereign debt litigation is a relatively recent phenomenon, considering that sovereigns were almost entirely immune from suit until the middle of the twentieth century.¹²¹ Following the codification of the restrictive theory of sovereign immunity via the FSIA, sovereigns were, at least theoretically, open to suit for certain commercial activities.¹²² In 1992, the Court clarified in *Weltover* that, for the purposes of the FSIA, a sovereign's issuance of public debt is a commercial activity.¹²³ Almost simultaneously, sovereign debtors began waiving their sovereign immunity, explicitly consenting to U.S. courts' jurisdiction when entering into commercial transactions.¹²⁴ The predictable result of this combination was that creditors increasingly began to utilize litigation in an effort to enforce claims against sovereign debtors.¹²⁵ Litigation only became more alluring for sovereign creditors after a series of favorable decisions in U.S. domestic courts in the wake of the Latin American debt crisis.¹²⁶

3. Holdout Litigation and Investment Funds

This combination of factors has led to the increased popularity of holdout litigation, often conducted by distressed-debt investors, which are more commonly, and less flatteringly, termed "vulture funds."¹²⁷ These funds, usually hedge funds or mutual funds, are commonly based in tax havens and tend to be secretive in nature.¹²⁸ They profit by purchasing the bonds of financially distressed countries on the secondary debt market, often at substantial discounts from their face value because the sovereign is at or near default.¹²⁹ The investors then file suit, typically in creditor-friendly jurisdictions, to enforce the full value of the debt,¹³⁰ often urging courts to take an expansive view of exceptions to sovereign immunity.¹³¹ Because they are entitled to the full amount of the claim, which amounts to principal plus any unpaid interest, vulture funds have a strong incentive to hold out

121. *See supra* Part I.B.1.

122. *See supra* Part I.B.4.

123. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

124. Jill E. Fisch & Caroline M. Gentile, *Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring*, 53 EMORY L.J. 1043, 1076 (2004).

125. *Id.*

126. *See* Broomfield, *supra* note 20, at 481–83. Specifically, the relevant cases include *Libra Bank Ltd. v. Banco Nacional de Costa Rica*, 570 F. Supp. 870 (S.D.N.Y. 1983), and *Allied Bank v. Banco Credito Agricola de Cartago*, 566 F. Supp. 1440 (S.D.N.Y. 1983), which is often referred to as the first case of holdout litigation in the context of sovereign debt. Broomfield, *supra* note 20, at 481–83.

127. *See* Broomfield, *supra* note 20, at 485–86.

128. *Id.*

129. *Id.*; Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna*, 73 L. & CONTEMP. PROBS. 47, 49 (2010). The term "vulture fund" is derived from this practice, as the funds are seen as taking advantage of debtor nations when they are at their most vulnerable. *Id.*

130. Broomfield, *supra* note 20, at 486.

131. *See* Blackman, *supra* note 129, at 50.

for full payment.¹³² Indeed, they are not subject to the same pressures as repeat investors, meaning that they are often successful in obtaining substantial payments via such holdout litigation to the detriment of other investors and the sovereign debtor itself.¹³³

4. Agency Application: The Democratic Republic of the Congo

A paradigmatic example of sovereign debt litigation implicating agency principles can be found in *Themis Capital, LLC v. Democratic Republic of Congo*,¹³⁴ one of a multitude of cases involving the troubled state of the Democratic Republic of the Congo. The litigation can be traced as far back as 1980, when the Republic of Zaire and its national bank entered into a credit refinancing agreement with some of its plethora of creditors.¹³⁵ In the years following the signing of this agreement, Zaire was “plagued with political and social instability,”¹³⁶ and the country eventually defaulted on the credit obligations in 1990.¹³⁷ In May 1997, following the ouster of the country’s infamous and longstanding dictator Joseph-Desire Mobutu in a coup, the self-declared President Laurent-Desire Kabila changed the name of the country to the Democratic Republic of the Congo¹³⁸ (DRC). The DRC later reaffirmed its obligations under the agreement in a series of acknowledgement letters, the most recent of which was signed in 2003 by the interim Minister of Finance, as well as the Governor of the Central Bank¹³⁹ (“the 2003 letter”).

The plaintiffs in the case, Themis Capital and Des Moines Investments, LLC, purchased the debt obligations specified in the agreement from various creditors.¹⁴⁰ They then brought suit in the Southern District of New York, alleging that the DRC had breached its contractual obligations under the credit agreement by failing to pay any of the principal or interest

132. See Fisch & Gentile, *supra* note 124, at 1045 n.2.

133. *Id.* at 1090. Specifically, this is because vulture funds are not repeat players in the international debt market and therefore have little incentive to take actions that are best for the international community, or with the long-term in mind. See James Thuo Gathii, *The Sanctity of Sovereign Loan Contracts and Its Origins in Enforcement Litigation*, 38 GEO. WASH. INT’L L. REV. 251, 267 (2006).

134. 881 F. Supp. 2d 508 (S.D.N.Y. 2012). This case represents only the first decision in a series of litigation that will be discussed throughout this Note. See *Themis Capital II*, 35 F. Supp. 3d 457 (S.D.N.Y. 2014), *aff’d in part, rev’d in part*, 2015 WL 5711815 (2d Cir. Sept. 30, 2015).

135. *Themis Capital I*, 881 F. Supp. 2d at 511.

136. *Id.* at 513.

137. *Themis Capital II*, 35 F. Supp. 3d at 462.

138. *Themis Capital I*, 881 F. Supp. 2d at 513.

139. *Id.* The court noted that the specific intent of these letters was to reassure creditors that the originally refinanced debts were still collectible and that they made specific reference to the inapplicability of New York’s statute of limitations provisions. *Id.* at 513–14.

140. See *id.* at 512.

specified.¹⁴¹ The DRC claimed that neither the interim Minister of Finance nor the Governor of the Central Bank had the requisite authority to sign the 2003 acknowledgement letter reaffirming the DRC's debt obligations and that the plaintiffs' claim was therefore time barred.¹⁴²

The court began its analysis by noting that, per New York law, "apparent authority can bind foreign governments whose acts are private, including enter [sic] into commercial transactions on apparent behalf of a sovereign state."¹⁴³ The court then determined that the act of restructuring debt is a quintessentially commercial, private one that may deprive a sovereign of immunity in the context of the FSIA.¹⁴⁴ Consequently, the court launched into an analysis under the doctrine of apparent authority, looking to "(1) what the general responsibilities were of the persons holding those domestic-government positions at the time of the 2003 [l]etter, and (2) how these responsibilities were communicated to persons outside of the DRC, including counterparties in commerce transactions."¹⁴⁵ The court concluded that further discovery was necessary to make factual determinations on these issues, as well as on the question of whether the plaintiffs had breached their own duty to inquire whether the letter was valid.¹⁴⁶

Following discovery and a bench trial, the court determined that the two state officials had both actual and apparent authority to sign the 2003 acknowledgement letter, and thus the DRC was bound to its debt obligations.¹⁴⁷ In regard to their actual authority, the DRC argued that, per an official decree, only the entire Council of Ministers had the authority to renew debt obligations.¹⁴⁸ The court, however, interpreted this decree to require such approval only where decisions would have "budgetary repercussions."¹⁴⁹ It then went on to hold that the 2003 acknowledgement letter did not involve any such repercussions, as it merely constituted a routine tolling agreement, and that, consequently, the two lone officials had actual authority to sign the letter.¹⁵⁰

141. *Id.* at 514. The court noted that the original creditors had not brought any claims themselves alleging a breach of the agreement prior to transferring their rights to the plaintiffs. *Id.* at 513.

142. *Id.* at 518. The DRC had originally made a blanket claim of sovereign immunity, but the court determined that a waiver clause in the original credit agreement was enforceable and stripped the DRC of a presumption of immunity. *See id.* at 516–17.

143. *Id.* at 526; *Themis Capital II*, 35 F. Supp. 3d 457, 471 (S.D.N.Y. 2014) (noting that the court in *Themis Capital, LLC v. Democratic Republic of Congo (Themis Capital I)* rejected the DRC's arguments of sovereign immunity, because the DRC could be bound, in principle, under the doctrine of actual and apparent authority), *aff'd in part, rev'd in part*, 2015 WL 5711815 (2d Cir. Sept. 30, 2015).

144. *See Themis Capital I*, 881 F. Supp. 2d at 526 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1992)).

145. *Id.* at 527.

146. *Id.* at 531–32.

147. *Themis Capital II*, 35 F. Supp. 3d at 494.

148. *Id.* at 476.

149. *Id.*

150. *Id.* at 477–78.

The court also determined that the DRC was bound by virtue of its agents' apparent authority.¹⁵¹ Specifically, the court found that it was "eminently reasonable" for creditors to believe that the acting Minister of Finance and Governor of the Central Bank possessed sufficient authority to sign the letter.¹⁵² First, it found that the belief was justified based on the two officials' status as national-level officers, charged with maintaining the DRC's monetary policy and fiscal stability.¹⁵³ Second, the court noted that previous Finance Ministers and Governors of the Central Bank had signed two earlier acknowledgement letters without objection.¹⁵⁴ It therefore found that it would be reasonable for creditors to assume that "these same two officials had the authority to sign a substantively identical letter in 2003."¹⁵⁵ The court additionally determined that creditors' duty of inquiry was not triggered, because the transaction was not extraordinary and there were no factual circumstances that should have put creditors on notice of a danger of fraud.¹⁵⁶

Having determined that the agents' signing of the 2003 acknowledgement letter bound the DRC, the court held that the plaintiffs' claim was not barred by the New York statute of limitations provision and entered judgment in their favor.¹⁵⁷ The court awarded Themis damages of \$38,711,890.27 and Des Moines \$30,826,825.24.¹⁵⁸

II. LET'S GET READY TO RUMBLE: DIVERGENT APPLICATIONS OF APPARENT AUTHORITY IN THE LOWER COURTS

This part investigates the conflicting views of the federal circuits in applying the legal principles and theories discussed in Part I. Specifically, Part II.A examines the minority rule, as crafted by the Second Circuit in *First Fidelity*. Part II.B looks to the rule adopted by the majority of circuit courts by walking through decisions of the Ninth, Fourth, and Fifth Circuits.

151. *Id.* at 479–80.

152. *Id.*

153. *Id.*

154. *Id.* at 480.

155. *Id.*

156. *Id.* at 481. The court's conclusions on authority seem to have been much influenced by the fact that the two older acknowledgement letters, from 1991 and 1997 respectively, had not been discovered at the time of the first decision. *Id.* at 472. Indeed, in that case, the court noted the somewhat suspicious signing of the 2003 letter, which, on "behalf of a cash-poor country, renewed a financial obligation, now totaling approximately \$80 million, against which claims were long barred by the statute of limitations, and evidently for no consideration whatsoever." Themis Capital I, 881 F. Supp. 2d 508, 529 (S.D.N.Y. 2012).

157. *Themis Capital II*, 35 F. Supp. 3d at 494.

158. *Id.* The Second Circuit recently affirmed almost the entirety of the Court's holding, reversing only a portion of the decision related to the calculation of damages. Themis Capital, LLC v. Democratic Republic of Congo, Nos. 14-4016-cv(L), 14-4168-cv(XAP), 2015 WL 5711815, at *3 (2d Cir. Sept. 30, 2015).

A. The Minority Position

Part II.A.1 examines, at greater length, the Second Circuit's elucidation of the minority rule in its decision in *First Fidelity*. Part II.A.2 surveys the dissenting opinion in *First Fidelity*, as well as subsequent disagreements with, or reinterpretations of, this minority rule.

1. The Second Circuit

Most simply put, the minority position holds that the doctrine of apparent authority applies to sovereigns and their agents in the context of foreign sovereign immunity claims.¹⁵⁹ As previously noted, the Second Circuit first elucidated this rule in its landmark decision, *First Fidelity*.¹⁶⁰ The plaintiff in the case, First Fidelity, contended that the Antiguan Ambassador to the UN, Loydstone Jacobs, had actual authority to bind Antigua to a loan agreement and waive its sovereign immunity in a settlement agreement.¹⁶¹ First Fidelity argued in the alternative that even if Jacobs lacked actual authority, he had sufficient apparent authority to bind Antigua.¹⁶² Specifically, First Fidelity emphasized that the authority inherent in Jacobs's position as Ambassador Extraordinary and Plenipotentiary was, standing alone, sufficient to render his actions binding.¹⁶³ In response, the Antiguan Government contended that, under Antiguan law, "the authority to borrow funds requires the prior approval of the cabinet and a delegation of authority to the Minister of Finance[] and that neither had occurred in this case."¹⁶⁴ Therefore, because Jacobs acted without authority, Antigua asserted that it had retained its sovereign immunity under the FSIA.¹⁶⁵

The court began its analysis of these claims by reviewing principles of international law, citing to the Restatement (Third) of Foreign Relations for the basic proposition that an Ambassador's powers include the authority to sign international agreements.¹⁶⁶ As such, it noted that an Ambassador has the authority to bind the state he represents and that, under certain circumstances, "a state can be bound by [a] representative's unauthorized actions where the lack of authority is not obvious."¹⁶⁷

159. See generally *First Fidelity Bank v. Gov't of Antigua & Barbuda*, 877 F.2d 189 (2d Cir. 1989); see also *1964 Realty LLC v. Consulate of the State of Qatar-New York*, No. 14 Civ. 6429, 2015 WL 5197327, at *9 (S.D.N.Y. Sept. 4, 2015) ("However, regardless of how other courts have ruled, this Court is bound by the Second Circuit's case law and is thus required to apply the doctrine of apparent authority as the Circuit has instructed."). But cf. *Republic of Benin v. Mezei*, 06 Civ. 870, 2010 WL 3564270, at *6 (S.D.N.Y. Sept. 9, 2010) ("[A]pparent authority is insufficient in dealing with the federal or state governments.").

160. For a more detailed discussion of the factual circumstances of the case, see *supra* INTRODUCTION.

161. *First Fidelity*, 877 F.2d at 191–92.

162. *Id.*

163. *Id.* at 192.

164. *Id.* at 197 (Newman, J., dissenting).

165. *Id.* at 191 (majority opinion).

166. *Id.* at 192 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 311 (AM. LAW INST. 1987)).

167. *Id.* The court pointed to the example of *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5), where the Permanent Court of International

However, the court went on to reject First Fidelity's implied argument that Antigua was bound by Jacobs's actions solely by virtue of his position.¹⁶⁸ The court based this conclusion on principles governing the validity of international agreements.¹⁶⁹ The court reasoned that if the circumstances surrounding an Ambassador's signing of an international agreement could render it void, then the mere act of signing such an agreement could not automatically bind a sovereign either.¹⁷⁰

The court also looked to section 207 of the Restatement (Third) of Foreign Relations, which provides that a state is liable for an agent's violation of international legal obligations when the agent is acting in the scope, or under color, of authority.¹⁷¹ While facially this would seem to bolster First Fidelity's position, the court concluded that the provision applied only to violations of international law and not to commercial agreements.¹⁷² Therefore, the court held that "an ambassador's actions under color of authority do not, as a matter of law, automatically bind the state."¹⁷³

The court did, however, note that section 207 included elements of agency law in requiring consideration of all the circumstances in assessing the scope of authority.¹⁷⁴ This was particularly relevant to the facts of the case at bar, because it required investigation of "whether the affected parties reasonably considered the action to be official[] [and] whether the action was for public purpose or for private gain."¹⁷⁵ Therefore, the court concluded that the law of agency provided the appropriate analytical framework¹⁷⁶—the proper question was whether Jacobs, by virtue of his ambassadorial position, had the apparent authority to borrow funds and/or waive sovereign immunity via a settlement agreement.¹⁷⁷

The court began its discussion of this question by citing to the general principles of the Restatement (Second) of Agency, noting that "[t]he

Justice held that Norway was bound by the Norwegian Foreign Minister's oral statement that the country would not contest Danish control of Eastern Greenland. *Id.*

168. *See id.* ("[T]he possession of authority does not, *ipso facto*, validate every exercise of it.").

169. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 331(2)(a) (AM. LAW INST. 1987)).

170. *See id.* at 192–93 ("If the circumstances surrounding an ambassador's signature of a treaty may be grounds for invalidating that treaty, then surely a state cannot *automatically* be bound by its ambassador's settlement of a lawsuit by a non-sovereign third party arising from a commercial transaction.").

171. *Id.* at 193 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 207(c) (AM. LAW INST. 1987)).

172. *Id.* The court noted that a breach of a commercial agreement could violate this section if it was discriminatory, or it if occurred for official reasons, but neither was at issue in the case. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712(2) cmt. h, Reporters' n.8 (AM. LAW INST. 1987)).

173. *Id.*

174. *Id.*

175. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 207 cmt. d (AM. LAW INST. 1987)).

176. *Id.*

177. *Id.*

appointment of a person to a position with generally recognized duties may create apparent authority.”¹⁷⁸ It found that the use of these agency principles would ensure a requisite level of flexibility in its analysis.¹⁷⁹ Specifically, it noted that these principles would give “appropriate weight” to the authority of the relevant ambassadorship.¹⁸⁰ It reasoned that agency law would allow for consideration of Jacobs’s position, a factual circumstance relevant in determining the reasonability of First Fidelity’s reliance, but would not make his ambassadorship inevitably determinative.¹⁸¹

The court, however, declined to make a determination on the merits, holding that it would be impossible to make a decision where the facts were “susceptible of two opposing interpretations.”¹⁸² Namely, it concluded that First Fidelity had sufficiently alleged that Jacobs had possessed apparent authority and, therefore, that Antigua was bound by his actions.¹⁸³ However, the court also determined that there was some evidence that First Fidelity had mistrusted Jacobs, which would impact the reasonability of its reliance.¹⁸⁴ The court thus vacated the default judgment, remanded the case to district court, and required that Antigua post a bond in the amount claimed by First Fidelity.¹⁸⁵

2. The Second Circuit: Dissents and Attempts at Reconciliation

In his dissenting opinion in *First Fidelity*, Judge Newman rejected the majority’s decision on the grounds that it would severely impair U.S. foreign relations.¹⁸⁶ While he agreed that an Ambassador would not be able to bind his or her government in every case, he noted that this finding alone “does not inevitably lead to a conclusion that only apparent authority furnishes the appropriate standard.”¹⁸⁷ Rather, he advocated for the application of the doctrine of inherent agency power as elucidated in the Restatement (Second) of Agency.¹⁸⁸ He justified this choice by asking

178. *Id.* at 193; see *Jota v. Texaco*, 157 F.3d 153, 162 (2d Cir. 1998) (holding that an Ambassador generally has the power to bind the state he represents); see also *Themis Capital I*, 881 F. Supp. 2d 508, 527 (S.D.N.Y. 2012) (“[O]fficials have apparent authority to bind foreign sovereigns when the obligation to which by the official committed is of the sort of commitment that such an official ordinarily has the authority to make.”).

179. *First Fidelity*, 877 F.2d at 194.

180. *Id.*

181. *Id.*

182. *Id.* at 195.

183. *Id.*

184. *Id.* Under New York law, a party claiming the existence of apparent authority must show that he or she fulfilled the “duty of inquiry” or, in other words, that they had no notice of the need to inquire further into the agent’s authority. See *Gen. Overseas Films v. Robin Int’l, Inc.*, 542 F. Supp. 684, 689 (S.D.N.Y. 1982).

185. *First Fidelity*, 877 F.2d at 196.

186. *Id.* at 196–97 (Newman, J., dissenting).

187. *Id.* at 198.

188. *Id.* For a discussion of general principles of inherent agency power, see *supra* Part I.A.3.

whether U.S. government relations would be better served by allowing Ambassadors to promptly obtain goods or services, or by requiring third parties to verify, in each instance, whether the Ambassador had the actual authority to do so.¹⁸⁹ Strongly advocating for the former, Judge Newman highlighted that the majority's rule could have a chilling effect, in that vendors would be less willing to extend services or credit to embassies under the shadow of litigation.¹⁹⁰ Therefore, Judge Newman concluded that Antigua should have been bound by Jacobs's actions.¹⁹¹

In the same vein, other courts within the Second Circuit have questioned the rule elucidated in *First Fidelity*. In *Republic of Benin v. Mezei*,¹⁹² Judge John G. Koeltl referred to the holding in *First Fidelity* as a mere suggestion that apparent authority could bind a foreign sovereign to a commercial transaction.¹⁹³ Therefore, he concluded that “[i]n general, apparent authority is insufficient in dealing with the federal or state governments. A person who contracts with a government agent . . . does so at the individual's peril if the agent is unauthorized.”¹⁹⁴

Meanwhile, in *Themis Capital*, Judge Paul A. Engelmayer concluded that “[a]lthough this Court is under no illusion that it can *fully* harmonize the decisions in this area,” the circuit decisions were actually consistent with one another.¹⁹⁵ Specifically, the court found that the cases actually turned

on whether the specific legal commitment made by [an agent on] behalf of the foreign government was (1) a public act, in which case apparent authority has generally been held unavailable, except in the discrete context presented by waivers of sovereign immunity by ambassadors; or (2) a private act, in which case apparent authority has generally been held available.¹⁹⁶

In other words, Judge Engelmayer has concluded that the circuit split is not a split at all. Rather, the application of apparent authority depends on whether the agent's act is “public” or “private.”¹⁹⁷ The court defined private acts as those in which “a private party engages in trade and traffic or

189. *First Fidelity*, 877 F.2d at 198–99 (Newman, J., dissenting).

190. *Id.* at 199.

191. *Id.* at 200.

192. No. 06 Civ. 870, 2010 WL 3564270 (S.D.N.Y. Sept. 9, 2010).

193. *Id.* at *6.

194. *Id.* However, the court did go on to analyze the facts of the case applying the doctrine of apparent authority, concluding that “even if a foreign government can be bound by its agent acting with apparent authority, the defendants could not reasonably rely on [the agent's] purported authority.” *Id.* at *7.

195. *Themis Capital I*, 881 F. Supp. 2d 508, 523 (S.D.N.Y. 2012) (emphasis added).

196. *Id.*; accord *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 538 (S.D.N.Y. 2013) (“[C]ourts have interpreted that rule to permit apparent authority to bind a sovereign engaged in private conduct but to demand actual authority to bind a sovereign engaged in public conduct.”).

197. *Themis Capital I*, 881 F. Supp. at 524. Other courts within the Second Circuit have, however, declined to follow this analysis. See, e.g., *1964 Realty LLC v. Consulate of the State of Qatar-New York*, No. 14 Civ. 6429, 2015 WL 5197327, at *10 (S.D.N.Y. Sept. 4, 2015) (“While this Court finds *Themis* to be persuasive, it notes that in *First Fidelity* the Second Circuit made no distinction between ‘public’ or ‘private’ acts . . . [a]ccordingly, the Court declines to follow *Themis*.”).

commerce.”¹⁹⁸ Public acts, meanwhile, are those acts available to sovereigns alone, such as a waiver of sovereign immunity.¹⁹⁹ However, the line between these two types of acts can be blurred. Specifically, an act may be superficially private, because it deals with a commercial activity, when it is actually public, because the underlying action is a waiver of sovereign immunity.²⁰⁰

Having defined these categories of acts, Judge Engelmayer characterized the Ninth, Fourth, and Fifth Circuits’ cases as dealing with public acts, which explained why apparent authority was rejected.²⁰¹ He argued that while the acts in these cases seemed to be commercial in nature on their faces, they actually concerned a waiver of sovereign immunity.²⁰² Judge Engelmayer then turned to Second Circuit decisions applying apparent authority, concluding that they all dealt with either private acts of government agents or *ambassadorial* waivers of sovereign immunity.²⁰³ Thus, Judge Engelmayer concluded that, in the instant case, which dealt with the signing of an acknowledgement letter renewing certain state debt obligations, the doctrine of apparent authority would apply because it centered on the private, commercial act of restructuring sovereign debt.²⁰⁴

B. The Majority Position

Part II.B.1 examines the Ninth Circuit’s response to *First Fidelity*, in which the majority rule denying the applicability of the doctrine of apparent authority was first announced. Part II.B.2 then analyzes the Fourth Circuit’s decision to adopt this majority rule, and Part II.B.3 does the same as to the Fifth Circuit’s adoption.

1. The Ninth Circuit

In the aftermath of *First Fidelity*, the Ninth Circuit addressed the issue of apparent authority in the context of foreign sovereign immunity claims in *Phaneuf v. Republic of Indonesia*.²⁰⁵ The plaintiff in the case, Curtis Phaneuf, held certain promissory notes issued by members of the National Defense Security Council of Indonesia²⁰⁶ (NDSC). These notes were part of a greater issuance that was collectively valued at three billion dollars.²⁰⁷ The notes bore the crest of the NDSC and signatures of two NDSC

198. *Themis Capital I*, 881 F. Supp. 2d at 524 (quoting *NML Capital v. Republic of Argentina*, 680 F.3d 254, 258 (2d Cir. 2012)).

199. *Id.*

200. *Id.*

201. *Id.* at 524–25 (collecting cases from the Ninth, Fourth, and Fifth Circuits).

202. *Id.*

203. *Id.* at 525.

204. *Id.* at 526.

205. 106 F.3d 302 (9th Cir. 1997).

206. *Id.* at 304. The NDSC was an advisory body formed by a decree of the Indonesian President. *Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 401 (4th Cir. 2004). The NDSC was tasked with, among other things, conducting studies on national security. *Id.*

207. *Phaneuf*, 106 F.3d at 304.

members.²⁰⁸ The primary creator of these notes, Ibnu Hartomo, later traded them for promissory notes issued by a Syrian financier.²⁰⁹ At a subsequent signing ceremony in Damascus, the Indonesian Ambassador to Syria, H.A. Chalid Mawardi, certified that Hartomo represented the Indonesian government and that the notes were “Official/Governmental.”²¹⁰ The Syrian notes later proved to be worthless.²¹¹

The Indonesian Government claimed that it had no knowledge of the notes until 1985, when it declared them invalid.²¹² In 1986, the Secretary General of the NDSC alerted Bank Indonesia as to the invalidity of the notes.²¹³ The NDSC then issued a press release disavowing the notes and stating that responsibility lay with their individual creators.²¹⁴

After Bank Indonesia refused to honor Phaneuf’s notes, he sued the Republic of Indonesia, the NDSC, and Mawardi in U.S. district court.²¹⁵ The district court denied the defendants’ motion to dismiss on the grounds of sovereign immunity, holding that they had failed to establish a prima facie case for immunity under the FSIA.²¹⁶ The court relied on a footnote in *Siderman de Blake v. Republic of Argentina*,²¹⁷ which required that, in order to establish a presumption of immunity, a sovereign defendant must establish that it is a sovereign state and that the plaintiff’s claim arises out of a public act.²¹⁸

The Ninth Circuit reversed this decision, holding that a sovereign defendant need only prove they are a foreign state to be entitled to a presumption of immunity under the FSIA.²¹⁹ The court then launched into a burden-shifting analysis,²²⁰ holding Phaneuf met the initial burden of pleading that the commercial activity exception applied to the case.²²¹

208. *Id.*

209. *Id.* Hartomo and Soebagyo Soedewo, the other primary creator of the notes, were NDSC Deputies for Development and Long-Term Planning. *Velasco*, 370 F.3d at 395. Hartomo later admitted that he knew he was unauthorized to issue the notes and that the former Secretary General of the NDSC had declared his two purported letters of authorization to be forgeries. *Id.* at 395–96.

210. *Phaneuf*, 106 F.3d at 304. The President of the Central Bank of Syria attended the signing ceremony, and an official of the Syrian Ministry of Foreign Affairs also notarized Mawardi’s signature on the notes. *Velasco*, 370 F.3d at 395.

211. *Phaneuf*, 106 F. at 304.

212. *Id.*

213. *Id.* He stated that the NDSC and its members lacked the authority to issue any such promissory notes. *Id.*

214. *Id.* The international press widely reported on the forged notes and the consequent Indonesian repudiation. *Velasco*, 370 F.3d at 396–97.

215. *Phaneuf*, 106 F.3d at 304.

216. *Id.* at 305.

217. 965 F.2d 699 (9th Cir. 1992).

218. *Id.* at 708 n.9.

219. *Phaneuf*, 106 F.3d at 305. The court also separately considered Mawardi’s entitlement to immunity per the standard applied to individual foreign officials under the FSIA. *Id.* at 306–07.

220. See *supra* Part I.D.1 for a general discussion of this burden-shifting framework.

221. *Phaneuf*, 106 F.3d at 307. Specifically, the court concluded that Phaneuf had submitted sufficient evidence that the members of the NDSC had actual or apparent authority to issue the notes. *Id.*

Therefore, the burden shifted to the defendants to rebut this showing.²²² The defendants argued that the exception could not apply because “there was no ‘commercial activity of the foreign state.’”²²³ Specifically, the defendants contended that they could not be bound by the NDSC members’ or Mawardi’s actions because those individuals acted outside the scope of their authority in issuing the notes.²²⁴ The question therefore was narrowed to “whether an agent of a foreign state must have acted with *actual* authority to invoke the commercial activity exception against a foreign state, or whether *apparent* authority suffices.”²²⁵

The court interpreted the FSIA to conclude that only “actual authority can be used to invoke the [commercial activity] exception.”²²⁶ Specifically, the court first noted that all three clauses of the exception require “a commercial activity of the foreign state.”²²⁷ The plain meaning of this provision, then, is that the state *itself* must be engaged in the commercial activity for the exception to apply.²²⁸

The court then looked at the commercial activity exception through the lens of agency law, reasoning that “[b]ecause a foreign state acts through its agents, an agent’s deed which is based on the actual authority of the foreign state constitutes activity ‘of the foreign state.’”²²⁹ Thus, where an agent acts beyond the scope of his authority, the agent is not engaging in any business the sovereign has authorized him to do.²³⁰ Therefore, the court concluded, “If the foreign state has not empowered its agent to act, the agent’s unauthorized act cannot be attributed to the foreign state[, because] there is no ‘activity of the foreign state.’”²³¹

The court bolstered this conclusion by turning to a number of supplementary considerations. First, it referenced the rules of statutory construction, including the rule of ordinary meaning and the rule against implying exceptions.²³² It also invoked the canon of *expressio unius est exclusio alterius*, reasoning that if Congress had intended the exception to

222. *Id.*

223. *Id.* (emphasis in original) (quoting 28 U.S.C. § 1605(a)(2) (2012)).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* (quoting 28 U.S.C. § 1605(a)(2)). The statutory language of the commercial activity exception states,

A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

228. *Phanuef*, 106 F.3d at 307.

229. *Id.* at 307–08.

230. *Id.* at 308.

231. *Id.*

232. *See id.* (citing *Export Grp. v. Reef Indus.*, 54 F.3d 1466, 1473 (9th Cir. 1995)).

encompass acts committed without actual authority, it could have said so explicitly.²³³

The court also reinforced its “conclusion that evidence of apparent authority should not be sufficient to invoke the FSIA’s commercial activity exception” with precedent.²³⁴ For example, in *Chuidian v. Philippine National Bank*,²³⁵ the Ninth Circuit ruled that an agent acting outside the scope of his authority was not entitled to individual immunity under the FSIA²³⁶ and that the natural corollary of this must be that a state retains its immunity when an agent so acts.²³⁷ Additionally, in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*,²³⁸ the Ninth Circuit held that the defendant’s acts were not entitled to immunity because they were taken without official sanction.²³⁹ The court analogized that unofficial acts, likewise, could not be considered “acts of a foreign state,” as required by the plain language of the statute.²⁴⁰

Finally the court examined U.S. domestic immunity principles.²⁴¹ The court noted that when an actor deals with a putative agent of the United States, it bears the risk that the agent is acting outside the scope of authority, even if the actor reasonably believes the agent has sufficient authority.²⁴² Moreover, it observed that the United States can be estopped from claiming immunity only where its agent acted within the scope of his or her authority.²⁴³ The court concluded that these principles further supported its conclusion that apparent authority is insufficient to invoke the commercial activity exception.²⁴⁴

Thus, the court remanded the case for further proceedings consistent with its ruling.²⁴⁵ On remand, the district court granted the defendant’s motion to dismiss, finding that the issuers of the promissory notes lacked actual authority, and, on appeal, the Ninth Circuit affirmed.²⁴⁶

233. *See id.*

234. *Id.*

235. 912 F.2d 1095 (9th Cir. 1990).

236. *See id.* at 1106.

237. *Phaneuf*, 106 F.3d at 308.

238. 978 F.2d 493 (9th Cir. 1992).

239. *Id.* at 498. The defendants in the case included the notorious ex-Philippine dictator President Ferdinand Marcos and his daughter Imee Marcos-Manotoc. *Id.* at 495. The latter claimed she was entitled to sovereign immunity under the FSIA, which divested federal courts of jurisdiction over actions taken by a foreign government against its citizens (namely, torture and execution). *Id.*

240. *Phaneuf*, 106 F.3d at 308.

241. *Id.*

242. *Id.* (citing *Fed. Crop Ins. Co. v. Merrill*, 332 U.S. 380, 384 (1947); *Bollow v. Fed. Reserve Bank*, 640 F.2d 1093, 1100 (9th Cir. 1981)).

243. *Id.* (citing *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981)).

244. *Id.*

245. *Id.* at 309.

246. *See Phaneuf v. Gov’t of Indonesia*, 18 F. App’x 648 (9th Cir. 2001), *cert. denied*, 535 U.S. 987 (2002).

2. The Fourth Circuit

In *Velasco v. Government of Indonesia*,²⁴⁷ the Fourth Circuit expressly adopted the Ninth Circuit's holding.²⁴⁸ The case concerned more of the same promissory notes dealt with in *Phanuef*.²⁴⁹ The plaintiff, George Velasco, purchased the notes in Panama from an Italian businessman for consideration equivalent to \$2.1 million.²⁵⁰ He sued the Indonesian government, the NDSC, Mawardi, and Hartomo in district court after the Bank of Indonesia refused to honor payment of the notes.²⁵¹ The district court granted the defendants' motion to dismiss, holding that the plaintiff failed to prove that the individuals in question possessed apparent or actual authority to issue the promissory notes.²⁵²

The Fourth Circuit began its analysis by noting that, while courts generally extend immunity to agents acting within their authority, the "FSIA . . . does not immunize an official who acts beyond the scope of his authority."²⁵³ It observed that the FSIA mirrors federal common law dealing with derivative sovereign immunity, where courts "held [consistently] that the act of an agent beyond what he is legally empowered to do is not binding upon the government."²⁵⁴ The Fourth Circuit also noted that persons dealing with U.S. agents have a duty to determine if the agent has the requisite authority to bind the government²⁵⁵ and that the mere belief an agent has authority is insufficient.²⁵⁶

The court then explicitly referenced both *Phanuef* and *First Fidelity*, criticizing the Second Circuit's determination as one made "without substantial explanation."²⁵⁷ The Fourth Circuit reasoned that whether a third party reasonably believes that an agent is authorized to engage in a transaction is irrelevant when the state's laws proscribe or do not authorize

247. 370 F.3d 392 (4th Cir. 2004).

248. *Id.* at 400.

249. *See id.* at 397.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 399.

254. *Id.* (citing *The Floyd Acceptances*, 74 U.S. 666, 676 (1869)); *see also* *Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enter.*, 307 F. App'x 721, 724 (4th Cir. 2009) (noting that the court in *Velasco* recognized that foreign sovereign immunity is analogous to the United States's sovereign immunity and the derivative immunity it extends to its contractors and agents).

255. *Velasco*, 370 F.3d at 399 (citing *Fed. Ins. Corp. v. Merrill*, 332 U.S. 380, 383–84 (1947)) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.").

256. *Id.*

257. *Id.* at 400. The court also cited to *Storr v. National Defense Security Council of Indonesia*, No. 95 CIV. 9663, 1997 WL 633405 (S.D.N.Y. Oct. 14, 1997), which dealt with yet another plaintiff attempting to enforce these promissory notes. *Id.* In that case, the court applied the doctrine of apparent authority, but ultimately concluded that the issuers of the notes lacked such authority to issue the notes and, moreover, that the plaintiffs had not fulfilled their required duty of inquiry. *Id.* at *3–4.

the action taken.²⁵⁸ Therefore, it concluded that “a foreign official’s manifestation of authority to bind the sovereign is insufficient,”²⁵⁹ expressly adopting the majority rule requiring actual authority.

Turning to the merits of the case, the court upheld the district court’s dismissal.²⁶⁰ It held that the NDSC Secretary General’s statements that he never signed letters of authorization undermined the letters Hartomo claimed empowered him to issue the promissory notes.²⁶¹ Moreover, the court held that even if the letters were authentic, the Secretary General and the NDSC itself lacked the authority to issue promissory notes under Indonesian law.²⁶² Specifically, the court noted that the NDSC was established in order to advise on national security and defense matters and that only the Ministry of Finance and Central Bank could incur debt on behalf of the government.²⁶³ Moreover, the court found that while Ambassadors could engage in commercial transactions in certain circumstances under Indonesian law, Mawardi never obtained the necessary authorization.²⁶⁴ Therefore, the court held that the issuance of the notes was not a “commercial activity of a foreign state which divest[ed] the NDSC or the Government of Indonesia of their sovereign immunity” and, consequently, that the case was properly dismissed.²⁶⁵

3. The Fifth Circuit

Finally, the Fifth Circuit adopted the majority rule, as espoused by the Ninth and Fourth Circuits, in *Dale v. Colagiovanni*.²⁶⁶ The plaintiffs were receivers²⁶⁷ for a number of insurance companies, which were acquired and looted by a con artist, Martin Frankel, over a nine-year period.²⁶⁸ The plaintiffs alleged that Monsignor Emilio Colagiovanni, a member of the papal curia and president of the Monitor Ecclesiasticus Foundation (MEF), aided Frankel in these criminal activities.²⁶⁹ Specifically, they contended that Frankel pitched Colagiovanni a plan to create a charitable organization capitalized with \$55 million, \$50 million of which would be used for acquiring insurance companies and \$5 million for charitable purposes.²⁷⁰ Colagiovanni eventually allowed the MEF to serve as the settlor of record

258. *Velasco*, 370 F.3d at 400.

259. *Id.*

260. *Id.* at 402.

261. *Id.* at 401.

262. *Id.*

263. *Id.*

264. *Id.* at 401–02.

265. *Id.* at 402.

266. 443 F.3d 425 (5th Cir. 2006).

267. “A receiver is a neutral party appointed by the court to take possession of property and preserve its value for the benefit of the person or entity subsequently determined to be entitled to the property.” 75 C.J.S., *supra* note 37, *Receivers* § 1.

268. *Colagiovanni*, 443 F.3d at 426.

269. *Id.* at 426–27.

270. *Id.* at 427.

for Frankel's charitable front organization, the St. Francis of Assisi Foundation²⁷¹ (SFAF).

In 1999, the Mississippi Department of Insurance investigated Frankel's insurance acquisitions in the state.²⁷² In response, Frankel had SFAF purchase the trust that had participated in the investments, causing the Department of Insurance to call an emergency meeting.²⁷³ Colagiovanni attended this meeting and represented that "Vatican-related entities had contributed over \$1 billion to SFAF."²⁷⁴ Meanwhile, Frankel prepared to flee the country, and regulators in Mississippi and four other states froze his assets.²⁷⁵

The plaintiff-receivers eventually filed suit against Colagiovanni and the Vatican in district court. The defendants in turn filed a motion to dismiss on the grounds of foreign sovereign immunity.²⁷⁶ The plaintiffs countered that Colagiovanni had acted with actual and apparent authority in engaging in these fraudulent activities, exposing the Vatican to suit under the FSIA's commercial activity exception.²⁷⁷ The district court agreed with the plaintiffs, denying the defendants' motion based on the theory of apparent authority.²⁷⁸ The defendants appealed, arguing that apparent authority was insufficient to bind the Vatican under the FSIA.²⁷⁹

The Fifth Circuit began its analysis²⁸⁰ by citing to the Ninth Circuit's decision in *Phaneuf* for the proposition that the commercial activity exception "makes clear that the activity must be that 'of the foreign state.'"²⁸¹ It noted that this conclusion was bolstered by the Fourth Circuit's utilization of precedent illustrating that foreign sovereign immunity extends to agents only when they are acting in an official capacity.²⁸² Finally, the court rejected the plaintiffs' reliance on two additional cases dealing with the judicial status of government "instrumentalities," noting that the inquiries are "analytically distinct."²⁸³ Therefore, the court "agree[d] with the Fourth and Ninth Circuits that an agent's acts conducted with the apparent authority of the state is insufficient to trigger the commercial exception to FSIA."²⁸⁴

271. *Id.* In other words, Frankel donated funds to the MEF, which would in turn be given to the SFAF. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 428.

277. *Id.*

278. *Id.*

279. *See id.*

280. The district court declined to consider any issues of actual authority, and the Fifth Circuit consequently limited its review to a discussion of apparent authority. *Id.* at 428 n.1.

281. *Id.* at 428 (citing *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 307-08 (9th Cir. 1997)).

282. *Id.* at 429.

283. *Id.*

284. *Id.*

C. Summarizing the Circuit Split

Thus, one can plainly see that the circuits “have taken varying positions on whether—and if so, when—a foreign government may be bound on a theory of apparent authority.”²⁸⁵ Courts within the Second Circuit have generally applied the doctrine of apparent authority in determining whether a sovereign is bound by the actions of its agent.²⁸⁶ The Ninth, Fifth, and Fourth Circuits have, however, declined to apply the doctrine. They have instead held that, based on the text of the FSIA as well as various policy considerations, only actual authority can serve to bind a sovereign to the actions of its agents.²⁸⁷

III. THE (IDEAL) RESOLUTION: THE MAJORITY RULE(S)

This part ultimately argues for the adoption of the majority rule in the context of sovereign debt litigation via congressional revision of the FSIA or, in the alternative, via judicial review. Specifically, Part III.A discusses how the minority rule works to undermine one of the main purposes behind the FSIA, namely uniformity and predictability of decisions. In a similar vein, Part III.B then examines how the minority view negatively impacts U.S. foreign relations. Part III.C in turn argues that modern sovereign debt creditors neither require nor deserve the added protection of the equitable doctrine of apparent authority under the current sovereign immunity framework. Part III.D then illustrates these concerns through the lens of the *Themis Capital* litigation originally discussed in Part I.D. Finally, Part III.E proposes a statutory revision of the FSIA endorsing the majority view, or, failing such action, that the minority rule be explicitly overruled by the U.S. Supreme Court.

A. Applying the Equitable Doctrine of Apparent Authority to Sovereign Debt Disputes Undermines the Purpose of the FSIA

The application of apparent authority in sovereign debt disputes serves to undermine one of the fundamental purposes of the FSIA, namely, uniformity and predictability of decisions in foreign sovereign immunity cases.²⁸⁸ As previously discussed, Congress intended the FSIA to function as a comprehensive framework, bringing consistency and predictability to actions involving claims of foreign sovereign immunity where there had previously been none.²⁸⁹

285. *Themis Capital I*, 881 F. Supp. 2d 508, 523 (S.D.N.Y. 2012).

286. *Id.* at 522–23 (citing *Skanga Energy & Marine v. Arevenca S.A.*, 875 F. Supp. 2d 264, 270 (S.D.N.Y. 2012); *Bitumenes Orinoco, S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617 (S.D.N.Y. Feb. 13, 2007)).

287. *See id.* at 523.

288. *See supra* Part I.B.4.

289. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 408 (D.D.C. 2014) (discussing the general framework of the FSIA in the context of international treaties); H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (“A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive

This professed statutory purpose is necessarily at odds with the application of the doctrine of apparent authority. The doctrine is, by its very nature, based on notions of estoppel²⁹⁰ and requires determinations regarding not only the subjective beliefs of third parties, but also the reasonableness of such beliefs.²⁹¹ Thus, decisions concerning the existence of apparent authority must necessarily be made on an ad hoc, case-by-case basis, involving substantial factual inquiry.²⁹² Indeed, this is evidenced in the circuit court cases discussed in Part II, all of which entail complicated factual scenarios.²⁹³

The use of such an ephemeral standard is manifestly contrary to the FSIA, considering that “uniformity of jurisprudence” was one of the prime motivations behind congress’s passage of the FSIA.²⁹⁴ This desirability for uniformity of decisions stems from the fact that “disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.”²⁹⁵ Indeed, the FSIA was designed, in part, to do away with the “ambiguous and politically charged standards”²⁹⁶ which had governed foreign sovereign immunity prior to its enactment and produced disparate outcomes. The application of an equitable doctrine requiring individualized, case-by-case analysis logically would work to decrease any uniformity of decisions, as well as to increase the very ambiguity the statute was designed to remedy.

Application of actual authority likewise requires courts to make determinations on an individualized basis contrary to the aforementioned statutory scheme.²⁹⁷ But this contention overlooks the fact that actual authority is a relatively bright-line standard when compared to the doctrine of apparent authority. Actual authority requires either express or implied

branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations . . .”).

290. See *supra* Part I.A.2.

291. See *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1033 (7th Cir. 1997) (observing that a multitude of factors applied in determining the reasonability of a student’s subjective belief on whether a school employee had apparent authority); *United States v. McIntosh*, 612 F.2d 835, 838 (4th Cir. 1979) (Phillips, J., concurring) (concluding that there was no basis for the existence of apparent authority in light of the subjective and objective factors applied); *1964 Realty LLC v. Consulate of the State of Qatar-New York*, No. 14 Civ. 6429, 2015 WL 5197327, at *12 (S.D.N.Y. Sept. 4, 2015) (“Since the factual record is not sufficiently developed, the Court cannot determine whether Plaintiff’s reliance was reasonable.”); see also *supra* Part I.A.1.

292. See *First Fidelity Bank v. Gov’t of Antigua & Barbuda*, 877 F.2d 189, 197–99 (2d Cir. 1989) (Newman, J., dissenting) (noting that the majority’s rule requiring the application of apparent authority in turn necessitates adjudication on a case-by-case basis); *1964 Realty LLC*, 2015 WL 5197327, at *12 (“Ultimately, the Second Circuit has stressed that ‘reasonable reliance is often a question of fact for the jury rather than a question of law for the court.’”); Pittman, *supra* note 58, at 683–84 (discussing the difficult application of apparent authority within the context of the waiver exception to the FSIA).

293. For a detailed discussion of the factual circumstances of each case, see *supra* Part II.

294. *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 159 (3d Cir. 2000).

295. H.R. REP. NO. 94-1487, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6611.

296. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (citations omitted).

297. See Pittman, *supra* note 58, at 681 (concluding that inquiries into actual authority also erode uniformity and predictability to an unacceptable degree).

authorization from a principal to an agent.²⁹⁸ In the context of foreign sovereign immunity claims, this generally necessitates that courts look to the law of the foreign sovereign to determine whether an agent was actually authorized to take the action in question.²⁹⁹ While this may entail some level of analysis, the evaluation of statutory text is a less circumstantial inquiry than asking whether an individual had subjective, reasonable beliefs concerning the existence of authority.³⁰⁰ The application of actual authority therefore strikes the proper balance in maintaining the uniformity of decisions under the FSIA, while maintaining the essence of the restrictive theory of sovereign immunity.³⁰¹

*B. Applying the Equitable Doctrine of Apparent Authority
to Sovereign Debt Disputes Undermines the Maintenance
of Harmonious International Relations*

The application of the doctrine of apparent authority also has serious ramifications for U.S. foreign relations. Courts have long been cognizant of foreign policy concerns in the context of sovereign immunity claims.³⁰² These very concerns represent yet another fundamental reason for Congress's passage of the FSIA.³⁰³

The application of apparent authority to foreign sovereign immunity claims endangers this statutory purpose. Most generally, the unpredictability of the doctrine could strain relations with foreign sovereigns, which would no longer be able to rely on U.S. courts for the

298. *See supra* Part I.A.2.

299. *See, e.g.*, Themis Capital I, 881 F. Supp. 2d 508, 520–21 (S.D.N.Y. 2012) (concluding that the court would evaluate whether the agents in question were vested with the actual authority by looking to the law of the DRC).

300. *See* Adam F. Hulbig, *Aquamar v. Del Monte Fresh Produce: Expanding the Scope of Ambassadors' Rights Under the Foreign Sovereign Immunities Act*, 25 N.C. J. INT'L L. & COM. REG. 597, 618 (2000) (determining that a better rule for regulating the waivers of sovereign immunity would closely examine local law regulating an Ambassador's actions); *see also* Republic of Benin v. Mezei, No. 06 Civ. 870, 2010 WL 3564270, at *5 (S.D.N.Y. Sept. 9, 2010) (citing FED. R. CIV. P. 44.1) ("Matters of foreign law are questions of law for the court."). *But cf.* *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1298 (11th Cir. 1999) (concluding that looking to the law of foreign sovereigns requires "lengthy, unpredictable, and frequently inconclusive inquiries" that undercut the utility of the FSIA); Pittman, *supra* note 58, at 688 (noting the dangers of "inexperienced courts attempt[ing] to interpret strange and foreign laws" in sovereign immunity cases).

301. The other side of the spectrum would be the application of the doctrine of inherent agency power, as was proposed in the dissenting opinion in *First Fidelity*. 877 F.2d 189, 196–201 (2d Cir. 1989) (Newman, J., dissenting). This would seem to require that acts of official government agents, such as Ambassadors, automatically bind sovereigns as long as those acts are generally within the scope of the position. *See id.* This Note, however, focuses on the conflict between the two competing rules adopted by circuits and, thus, does not deliberate at length on this alternative proposition.

302. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964)) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.")

303. *See* *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003) (noting that the court should remain cognizant of the congressional goal of "avoiding impairing foreign relations" evidenced in the FSIA); *see also supra* Part I.B.4.

uniform adjudication of claims with an implicit guarantee of fair treatment.³⁰⁴ Moreover, the application of apparent authority spurs “potentially intrusive and resented inquiries of foreign governments” by third parties seeking to contract with government officials,³⁰⁵ as well as by domestic courts.³⁰⁶ This resentment would be magnified where, under the guise of apparent authority, courts in effect ignore the law of the foreign sovereign by applying equitable principles.³⁰⁷ Indeed, by requiring more intensive analysis of sovereign actions, the Second Circuit moves further from English and Canadian courts, which have been reluctant to interfere or undermine foreign sovereign functions.³⁰⁸ These unwarranted investigations, as well as consequent judicial determinations, thus strain U.S. diplomatic relations³⁰⁹ and intrude on the responsibilities and interests of the executive and legislative branches.³¹⁰

These intrusive inquiries would also have practical geopolitical results, amplifying their impact on U.S. interests abroad. Specifically, they would spark a chilling effect on the provision of services to foreign nations as third party vendors become increasingly reluctant to extend credit to sovereigns

304. See H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (“[The FSIA will] assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.”); see also *supra* Part I.B.4.

305. *First Fidelity*, 877 F.2d at 199 (Newman, J., dissenting); Michael D. Anderson, *First Fidelity Bank v. Government of Antigua & Barbuda*, 877 F.2d 189 (2d Cir. 1989), 14 SUFFOLK TRANSNAT’L L.J. 286, 296 (1990) (“[T]he decision may ultimately offend foreign sovereigns whose diplomatic missions to the United States will have to establish that they have the authority to act on behalf of their sovereign to complete even the most basic of day to day transactions.”).

306. See, e.g., *Themis Capital I*, 881 F. Supp. 2d 508 (S.D.N.Y. 2012); see also Vandenberg, *supra* note 59, at 740–41 (noting that these concerns regarding the issuance of judgments against state officials originally prompted courts to simply refuse to hear cases implicating sovereign states).

307. See *Velasco v. Gov’t of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004) (“Whether a third party reasonably perceives that the sovereign has empowered its agent to engage in a transaction, however, is irrelevant if the sovereign’s constitution or laws proscribe or do not authorize the agent’s conduct and the third party fails to make a proper inquiry.”).

308. Gathii, *supra* note 133, at 307–08; see also Vandenberg, *supra* note 59, at 740 (“In the legal realm it is clear that an adverse judgment entered in the courts of *Nation A* against *Nation B* or its high officials in their sovereign capacity could seriously affect *Nation B*’s conduct of internal matters.”).

309. Pittman, *supra* note 58, at 684; see also Gathii, *supra* note 133, at 308 (“[T]he extinction of any regard for the sovereign or regulatory functions of sovereigns in managing public functions such as refinancing sovereign debt results in an unbalanced projection of the authority of the United States over coequal sovereigns.”).

310. See *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1298 (11th Cir. 1999) (“A judicial inquiry into a foreign ambassador’s authority to perform traditional diplomatic functions can infringe upon the authority of our own executive and legislative branches to manage the foreign relations of the United States.”); see also *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1495–96 (11th Cir. 1986) (noting that the U.S. government urged the court to refrain from deciding a bond default case implicating China, based on the country’s understanding of absolute sovereign immunity and its ability to undertake economic retaliations). *But cf.* Carolyn J. Brock, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT’L L. 795, 825–26 (1990) (concluding that the State Department has remained too active in sovereign immunity cases, contrary to the legislative intent of Congress in passing the FSIA).

in light of increased litigation uncertainty.³¹¹ This reluctance would have an especially strong impact on those states which can ill afford it, namely developing nations which already lack sufficient, affordable access to credit and services.³¹² Indeed, an increase in debt servicing costs, reflecting increased litigation volatility, would further destabilize the fragile economic situation in many of these troubled states.³¹³ This destabilization would not only be a negative result in practical terms, but would also be contrary to the wider interest of the United States in maintaining global financial security.³¹⁴

*C. Sovereign Debt Creditors Do Not Need the Protection
of the Equitable Doctrine of Apparent Authority*

This section illustrates that modern sovereign creditors are more than adequately protected under a sharply circumscribed doctrine of foreign sovereign immunity. Part III.C.1 examines the gradual erosion of the doctrine of foreign sovereign immunity and how this has resulted in increased protections for sovereign creditors. Part III.C.2 bolsters this argument by examining the practices of sovereign creditors, especially hedge funds, to conclude that these actors do not require, nor in fact deserve, the application of an equitable doctrine such as apparent authority.

1. The FSIA's Circumscription of Foreign Sovereign Immunity
Adequately Protects Sovereign Debt Creditors

Modern creditors have already secured significant, and indeed sufficient, protections through the continued erosion of the doctrine of foreign sovereign immunity.³¹⁵ At the most fundamental level, the FSIA alone represents a substantial level of protection for creditors via its codification of the restrictive theory of sovereign immunity, which was designed, in part, to protect U.S. creditors.³¹⁶ Moreover, subsequent judicial decisions interpreting the FSIA, and especially its commercial activity exception,

311. See *First Fidelity Bank v. Gov't of Antigua & Barbuda*, 877 F.2d 189, 199 (2d Cir. 1989) (Newman, J., dissenting) ("The majority's [opinion] . . . will, I fear, have the unfortunate consequences of making some vendors unwilling to extend credit for goods and services."). It could, however, be argued that the added protections of an equitable doctrine would actually spur the provision of such services. But this assertion overlooks the fact that third party vendors will logically shy away from the perceived future costs of litigation generally, rather than entering into transactions betting on the outcome of future litigation.

312. See Gathii, *supra* note 133, at 310 ("Debt servicing, however, makes it extremely difficult for these countries to afford imports to generate growth or development.").

313. See *id.* ("Investment in highly indebted countries is particularly risky as reflected by its highly speculative nature making it hard for indebted economies to benefit from it.").

314. See Anne Krueger, *Should Countries Like Argentina Be Able to Declare Themselves Bankrupt?*, EL PAIS (Jan. 18, 2002), <http://www.imf.org/external/np/vc/2002/011802.htm> ("[If] a country's debts become truly unsustainable, it is in everyone's interest that the problem is addressed promptly and in an orderly way.") [<http://perma.cc/7CXQ-HGL3>].

315. See Broomfield, *supra* note 20, at 479–83 (noting the continued erosion of immunity under the FSIA, especially in relation to defaulting sovereign debtors).

316. See *supra* Part I.B.3.

have strengthened this baseline protection, largely by eroding the traditional immunity defenses available to sovereigns.³¹⁷

The single greatest example of this doctrinal attrition is the Supreme Court's extension of the commercial activity exception to the refinancing of sovereign debt in *Weltover*. In holding that the purpose behind a sovereign's engagement in commercial bond markets is secondary to the commercial nature of the action, the Court sanctioned judicial review of an act which can plainly be seen as public in nature.³¹⁸ For instance, in *Weltover* itself, the Argentine government had only turned to the bond market to alleviate a grievous foreign exchange shortage brought about by a domestic credit crisis.³¹⁹ Thus, Argentina was not entering into commercial agreements merely to raise extra funds or invest abroad, but instead to stabilize its domestic economy as a whole, which could quite readily be viewed as a public act.³²⁰

Moreover, lower courts have interpreted the Court's ruling in *Weltover* in an even broader fashion.³²¹ Take, for example, the Second Circuit's conclusion that "a breach of a contractual agreement arising from the exercise of powers peculiar to sovereigns and not exercisable by private citizens does not immunize a foreign sovereign's conduct."³²² In effect, this means "there is no room under New York law to make the point that a state has an inherent authority as a sovereign to act to safeguard vital interests even though such acts may modify or abrogate the rights of creditors under existing contracts."³²³

Other traditional protections available to sovereigns have likewise been eroded during this period. For instance, the scope of the act of state doctrine, which historically barred judicial review of the lawfulness of a sovereign's action within its territory, has been significantly narrowed in light of an emerging commercial activity exception.³²⁴ The principle of

317. See generally Gathii, *supra* note 133 (discussing the general collapse of sovereign immunity defenses and its impact on sovereign debt litigation); see also Aaron L. Warren & Ryan E. Avery, *Investors of Prey: Seeking Relief in Distressed Debt Markets*, 18 U. MIAMI INT'L & COMP. L. REV. 213, 229–30 (2011) (highlighting that in attempting to define "commercial activity," federal courts have chipped away at many traditional aspects of immunity); Yilin Ding, *Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?*, 26 EMORY INT'L L. REV. 997, 1019 (2012) (concluding that the continued erosion of sovereign immunity in creditor-friendly nations has made it easier for creditors to bring suit).

318. See Gathii, *supra* note 133, at 307–08; Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 155–56 (2001) ("[It is] impossible to pin down, depending as it does on the level of specificity at which one characterizes the act that determines whether it appears to be public or private, sovereign or commercial.").

319. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 616–17 (1992).

320. See *id.*

321. Gathii, *supra* note 133, at 308.

322. *Id.*

323. *Id.* at 308–09.

324. See Joseph B. Frumkin, *The Act of State Doctrine and Foreign Sovereign Defaults on United States Bank Loans: A New Focus for a Muddled Doctrine*, 133 U. PA. L. REV. 469, 492 (1985) ("But just as certainly there is a range of governmental acts that might be characterized as commercial and yet involve serious noncommercial sovereign interests.").

comity, which “limit[s] domestic jurisdiction to hear claims or apply [foreign] law,”³²⁵ has likewise been eroded via judicial review.³²⁶

Therefore, modern creditors are already adequately protected in the field of sovereign debt via the continued erosion of the doctrine of foreign sovereign immunity. Indeed, some have suggested that the current legal situation is too favorable to creditors.³²⁷ Regardless, the protections offered under the status quo illustrate that there is no need for imposition of the equitable doctrine of apparent authority in claims of sovereign immunity.

2. Sovereign Debt Creditors, Particularly Sophisticated Hedge Funds, Are Sufficiently Capable of Protecting Their Investors

Moreover, modern sovereign creditors are not the sort of disadvantaged third parties envisioned by the doctrine of apparent authority.³²⁸ Certainly, there are unique risks in dealing with foreign sovereigns, in that the debtor may simply refuse to make payments on a loan or opportunistically default.³²⁹ But sovereign creditors today include some of the largest, and most sophisticated, financial and corporate institutions in the world.³³⁰ As sophisticated actors, these investors have the ability to adequately investigate and weigh the creditworthiness of sovereign debt.³³¹ This capability, along with their relative economic clout, means that they cannot plead a lack of bargaining power with highly indebted sovereign states.³³²

Moreover, on a more basic level, these investors are not involuntary creditors. They have not been forced against their will into a financial arrangement, but, rather, have actively and carefully chosen to invest in certain sovereigns with full knowledge of their financial issues.³³³ In light of this assumption of risk,³³⁴ it simply does not follow that modern sovereign creditors need an equitable doctrine, such as apparent authority, to protect them.

325. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 2 (1991).

326. Gathii, *supra* note 133, at 307–08; *see also* Warren, *supra* note 317, at 232 (noting that the courts have effectively stripped foreign sovereigns of immunity by denying claims of comity).

327. *See* Gathii, *supra* note 133, at 319 (“New York law is too favorable to creditors.”).

328. *See supra* Part I.A.2.

329. Fisch & Gentile, *supra* note 124, at 1048–49. “Opportunistic default” refers to situations where a debtor is not unable, but only unwilling, to make payments on its debt. *Id.* at 1044.

330. *See id.* at 1070 (“[Sovereign bond holders include] large commercial banks . . . [,] investment banks, insurance companies, pension funds, mutual funds, retail funds, hedge funds, nonfinancial companies, and retail investors.”). *But cf.* Gathii, *supra* note 133, at 267 (discussing the differing motivations of banking institutions, which, as repeat players, have greater incentives to act in the wider interest of the international community, and hedge funds, which have little or no pressure to refrain from litigating).

331. *See* Gathii, *supra* note 133, at 304.

332. *Id.*

333. *See id.* (“These holdouts are not in the position of involuntary lenders unaware of the fact that sovereign borrowers are often unable to bare the risk of borrowed monies.”).

334. *See id.* (“[I]t would therefore be reasonable to assume that these holdouts are often aware of the financial handicaps of sovereign debtors and by buying bonds underwritten by such indebted sovereigns they are assuming the risk of non-payment.”).

This conclusion is most clearly supported by the example of vulture funds. These funds intentionally purchase debt issued by some of the most financially and politically distressed countries in the world.³³⁵ Indeed, they often target states that are parties to the Heavily Indebted Poor Countries Initiative (HIPCI), which was founded in 1996 by the World Bank in order to assist countries with unsustainable levels of foreign debt.³³⁶

Moreover, the debt these funds purchase is often already in default, which explains why it trades at a significant discount from its face value.³³⁷ But the funds then bring suit in creditor-friendly nations to enforce the full value of the defaulted debt, in effect seeking, and many times receiving, a windfall payment.³³⁸ Therefore, it can fairly be said that in targeting “sovereigns ravaged by civil war, political upheaval, and social chaos, vulture funds nonetheless enjoy court protection in seeking to gain a monetary judgment against both their interest and the interest of others through international markets.”³³⁹ It cannot be argued that such actors are in need of any additional judicial protections, especially those originally intended to benefit innocent third parties.

D. Themis Capital Illustrates Why the Majority Position Is Superior

The decision in the second *Themis* case, imposing a roughly \$100 million judgment against the DRC, is illustrative of many of these concerns. The DRC is readily termed a failed or even nonexistent state.³⁴⁰ The country has been wracked by civil war for well over twenty years, and it consistently ranks last or next to last in failed state and development

335. See Warren, *supra* note 317, at 222–23 (“[V]ulture funds have become notorious for being litigious against not only distressed nations, but also against some of the poorest and most unstable economies in the world.”); see also *supra* Part I.D.3.

336. Broomfield, *supra* note 20, at 490–91. Specifically, countries within the HIPCI work toward a completion stage by meeting identifiable financial benchmarks. *Id.* at 491. Once this completion stage is reached, the state receives complete and irrevocable debt relief. *Id.* However, creditors retain the ability to litigate during this process and may refuse to cooperate with the HIPCI process. *Id.* at 492. Countries within the HIPC represent the lowest echelon of developing states, but, nonetheless, vulture funds have targeted at least seventeen of them in litigation. Warren, *supra* note 317, at 225.

337. Warren, *supra* note 317, at 223.

338. Indeed, these funds have been phenomenally successful, at least in purely financial terms. In the United Kingdom, vulture fund litigation cases have led to favorable judgments totaling \$236.1 million on debt with a face value of only \$65.3 million. Broomfield, *supra* note 20, at 504. The returns have been even higher in the United States, with investors receiving favorable judgments totaling \$659.4 million on debt with a face value of \$195.9 million. *Id.* at 507. This figure represents almost 95 percent of claimed damages. Warren, *supra* note 317, at 229.

339. Warren, *supra* note 317, at 225; see also Broomfield, *supra* note 20, at 492 (“Vulture creditors therefore pose a special risk to countries undergoing the HIPC process. . . . Creditor failure to take part in the HIPC Initiative (let alone their decision to litigate) could result in HIPC countries failing to reach debt sustainability, undermining . . . their movement toward[] economic prosperity.”).

340. See Jeffrey Herbst & Greg Mills, *The Invisible State: It’s Time We Admit the Democratic Republic of Congo Does Not Exist*, FOREIGN POLICY (June 24, 2013), http://www.foreignpolicy.com/articles/2013/06/24/the_invisible_state [http://perma.cc/DTQ7-VU73].

indices.³⁴¹ In finding that the DRC was bound to its debt obligations by its governmental official's signing of the acknowledgement letter, the court imposed a weighty financial penalty on this already economically fragile state to the detriment of both the DRC and its other creditors, but to the benefit of opportunistic investors.³⁴²

Moreover, the court's findings regarding the existence of apparent authority were based on arguments that are, at best, colorable in either direction.³⁴³ Specifically, the court determined that it was "eminently reasonable" for the parties to have believed the signing of the 2003 letter was legitimate, regardless of DRC law governing the issue.³⁴⁴ But this conclusion seems to be an almost complete reversal from the first *Themis* litigation, where the court specifically noted the inherently suspicious circumstances of a situation in which, on "behalf of a cash-poor country, [government officials] renewed a financial obligation, now totaling approximately \$80 million, against which claims were long barred by the statute of limitations, and evidently for no consideration whatsoever."³⁴⁵ The court also blithely ignored the duty of creditors to investigate any such suspicious situation under the duty of inquiry.³⁴⁶

E. Remedial Propositions

Therefore, the Second Circuit's rule requiring the application of the doctrine of apparent authority should be expressly rejected. Because the split in authority essentially derives from a statutory provision of the FSIA,³⁴⁷ and because the legislative branch has a vested interest in regulating sovereign immunity cases,³⁴⁸ Congress itself should enact a statutory revision of the commercial activity exception to reflect a rejection of apparent authority. In the alternative, however, considering the risk of congressional inaction or legislative capture, the Supreme Court should be prepared to grant certiorari and endorse the majority view as elucidated by

341. *Id.*

342. *See supra* Part I.D.4.

343. *See supra* Part I.D.4. Indeed, it is also arguable that the court's decision in regard to actual authority was similarly questionable. Specifically, the court interpreted DRC law to require the approval of the entire cabinet of ministers only where there were "budgetary repercussions" to an action. *See supra* Part I.D.4. The court then held that the signing of the acknowledgement letter had no budgetary repercussions and that, therefore, cabinet approval was not required. *See supra* Part I.D.4. Not only does the court's interpretation of DRC law itself seem conclusory, but the court's holding also entirely ignores that the signing of the 2003 acknowledgement letter left the DRC on the hook for \$100 million. If that cannot be said to be a "budgetary repercussion," then the author would question what could or would fit the court's definition.

344. *Themis Capital II*, 35 F. Supp. 3d 457, 479 (S.D.N.Y. 2014); *see also supra* Part I.D.4.

345. *See supra* Part I.D.4.

346. *See supra* Part I.D.4.

347. *See supra* Part II.B.1–3.

348. *See supra* note 310.

the Ninth, Fourth, and Fifth circuits, expressly overruling the Second Circuit's application of apparent authority as laid out in *First Fidelity*.³⁴⁹

CONCLUSION

While Loydstone Jacobs's Antiguan-casino venture may be long past, the circuit split regarding the application of agency principles to claims of foreign sovereign immunity remains in force. The Second Circuit continues to adhere to the minority view as elucidated in *First Fidelity*, which holds that apparent authority is sufficient to bind a sovereign to a transaction for the purposes of the commercial activity exception. The Ninth, Fifth, and Fourth Circuits, however, steadfastly hold that only actual authority is sufficient to bind a sovereign.

In light of the foregoing analysis, it is evident that the minority rule requiring the application of the doctrine of apparent authority to claims of foreign sovereign immunity should be rejected, at least in the context of sovereign debt disputes. This is primarily because of the troubling doctrinal implications entailed in its utilization—that it would result in increased unpredictability of decisions, as well as imperil U.S. foreign relations.³⁵⁰ But secondary concerns likewise push against endorsing the minority position. Most modern sovereign creditors are already adequately protected via the current, eroded doctrine of foreign sovereign immunity.³⁵¹ Moreover, these same creditors are sophisticated investors, who have knowingly assumed the risk of investing in sovereign states—and often troubled ones at that.³⁵² Therefore, they do not require the protection of an equitable doctrine, which was originally intended to assist disadvantaged third parties.³⁵³

In sum, Congress should revise the FSIA to explicitly disavow the minority position in this context. If, however, Congress proves unable or unwilling to act, the Supreme Court itself should overrule the minority view.

349. See generally *First Fidelity Bank v. Gov't of Antigua & Barbuda*, 877 F.2d 189 (2d Cir. 1989).

350. See *supra* Part III.A–B.

351. See *supra* Part III.C.1.

352. See *supra* Part III.C.2.

353. See *supra* Part I.A.2.