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I. Introduction

In an increasingly global marketplace, in which international economic transactions are growing in prominence, there is greater potential for suits involving foreign parties and governments.[1] Technological advancements and transportational improvements are making the world a much smaller place, further increasing overall levels of contact between private parties and the governments of foreign nations.[2] These heightened levels of interaction and the corresponding increase in potential litigation between private parties and foreign entities have created a greater need for uniformity and predictability in the law of sovereign immunity.[3] Foreign state enterprises engage in commercial activities with U.S. businesses and corporations on a daily basis.[4] In the event of a foreign government's breach of contract, such U.S. businesses and corporations would need to know the requirements for seeking redress in domestic courts.[5] For example, U.S. businesses may seek judicial recourse to settle price disputes concerning goods sold to foreign state trading companies.[6] An American property owner who sells real estate to a foreign government entity may desire to sue the foreign government entity in the event of a breach of the contract of sale.[7] A U.S. motorist injured in a traffic accident involving a foreign embassy's vehicle may seek recovery for damages in a local court.[8] There are numerous examples of such litigation between private parties and foreign governments.[9] Such litigation often

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1. *See* H.R. REP. NO. 94-1487, at 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-07 (providing congressional rationale underlying codification of U.S. substantive sovereign immunity law).

2. *See* Virginia Morris, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 17 DENV. J. INT'L L. & POL'Y 395, 395 (1989) (noting increased interaction between private parties and foreign states). In her article, Morris discussed the development of sovereign immunity law in the United States and the role of the International Law Commission in the codification and development of customary international law. *Id.*

3. *See id.* (examining ramifications of increased interaction between private parties and foreign states).

4. *See* H.R. REP. NO. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (providing examples of increased interaction between domestic entities and foreign states).

5. *See* Morris, *supra* note 2, at 395 (examining ramifications of increased interaction between private entities and foreign states).

6. *See* H.R. REP. NO. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (contemplating manner of litigation likely to result from increased interaction between domestic entities and foreign states).

7. *Id.*

8. *Id.*

9. *See, e.g.*, Soudavar v. Islamic Republic of Iran, 186 F.3d 671, 673 (5th Cir. 1999) (dismissing shareholder suit against Islamic Republic of Iran for expropriation and national-

involves the issue of whether the foreign sovereign is immune from domestic adjudication.[10]

The doctrine of sovereign immunity conceptualizes the fundamental principle of international law that the foreign government of a nation, state, political subdivision, or agent or instrumentality thereof shall not be subjected to domestic adjudication without the foreign government's consent.[11] Sovereign immunity is different from diplomatic immunity.[12] Under diplo-

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ization of shareholder's corporation); *In re* Tamimi, 176 F.3d 274, 276 (4th Cir. 1999) (dismissing plaintiff's garnishment claim against Saudi state-owned airline that employed plaintiff's spouse); McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 343 (8th Cir. 1985) (affirming grant of McDonnell Douglas's motion for summary judgment in declaratory action that McDonnell Douglas did not breach basic ordering agreement to sell military aircraft parts to Iran when McDonnell Douglas complied with United States Air Force order to cease shipment of parts after Islamic takeover of Iranian Republic); MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1327 (9th Cir. 1984) (concluding that Bangladesh possessed sovereign immunity from Oregon corporation's suit for wrongful termination of licensing agreement for export of rhesus monkeys); Letelier v. Republic of Chile, 748 F.2d 790, 791-93 (2d Cir. 1984) (involving suit by personal representatives of former Chilean ambassador and his aide against Republic of Chile and Chilean intelligence agency for car bomb assassination of decedents); Gilson v. Republic of Ireland, 682 F.2d 1022, 1023-26 (D.C. Cir. 1982) (concerning Massachusetts plaintiff's suit against Republic of Ireland and three Irish corporations for allegedly stealing plaintiff's expertise and equipment and unjustly profiting therefrom); Perez v. The Bahamas, 652 F.2d 186, 188-89 (D.C. Cir. 1981) (dismissing for lack of jurisdiction appellant's cause of action for injuries incurred when Bahamian governmental gunboats fired upon appellant's fishing vessel in Bahamian territorial waters); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 275 (3d Cir. 1980) (holding Mexican government-owned airline not immune from American passenger's suit alleging injuries suffered during extended, unanticipated, and unexplained delay); Greenpeace, Inc. (U.S.A.) v. State of France, 946 F. Supp. 773, 777, 790 (C.D. Cal. 1996) (dismissing without prejudice environmental group's suit against France for seizure of vessels, Rainbow Warrior II and M/V Greenpeace, during protest of French nuclear testing); Berdakin v. Consulado De La Republica De El Salvador, 912 F. Supp. 458, 460 (C.D. Cal. 1995) (involving lessor's suit against consulate of El Salvador and its Consul General for breach of commercial contract); Sales v. Republic of Uganda, 828 F. Supp. 1032, 1034 (S.D.N.Y. 1993) (considering construction worker's claims against Republic of Uganda for injuries incurred when construction worker fell from ladder while working at Ugandan Mission); Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1057 (E.D.N.Y. 1979) (dismissing plaintiff's suit against two Russian state-owned travel agencies and U.S.S.R. to recover damages for alleged wrongful death of American tourist in Moscow hotel fire on grounds that U.S.S.R. was immune from suit under Foreign Sovereign Immunities Act (FSIA)).

10. *See generally* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity, Part I*, 85 COM. L.J. 167 (1980) (discussing implications of sovereign immunity in suits against foreign governments and their state-owned corporations).

11. *See* Thomas H. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 158 (1981) (analyzing basic conceptual framework of sovereign immunity law).

12. *See* H.R. REP. NO. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606-07 (providing background of U.S. sovereign immunity law).

matic immunity, the sending nation's diplomatic agent is immune from the civil jurisdiction of the receiving state and shall not be compelled to give evidence as a witness.[13] The sending state may waive its diplomatic agent's immunity only through an express waiver.[14] Sovereign immunity is also different from head of state immunity, which involves the immunity from suit of a foreign government's legitimate and constitutional leadership.[15]

Under the U.S. Foreign Sovereign Immunities Act (FSIA),[16] foreign governments are entitled to sovereign immunity from suit unless one of the FSIA's exceptions allows a U.S. court to assert jurisdiction.[17] One such exception is waiver of immunity.[18] The FSIA provides in pertinent part that the government of a foreign nation shall not be immune from litigation in the courts of the United States or in the courts of any of its individual states when the foreign government either expressly or implicitly waives its sovereign immunity.[19] Such an expressed or implied waiver is valid even though the foreign government may attempt to withdraw the waiver at a later date, unless such withdrawal complies with the terms of the original waiver of immunity.[20] The Supreme Court generally has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."[21] For a court to give effect to an explicit waiver, the waiver must express the "'clear, complete, unambiguous, and unmistakable'" manifestation of the foreign sovereign's intent to waive its immunity.[22]

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13. *See* Republic of Philippines v. Marcos, 665 F. Supp. 793, 798-800 (N.D. Cal. 1987) (considering whether Philippine solicitor general is diplomatic agent and thus entitled to diplomatic immunity).

14. *Id.*

15. *See* United States v. Noriega, 117 F.3d 1206, 1211-12 (11th Cir. 1997) (concluding that deposed Panamanian leader Manuel Noriega was not entitled to head of state immunity from U.S. prosecution for his alleged cocaine trafficking activities); *see also Marcos*, 665 F. Supp. at 797-98 (examining whether Philippine solicitor general was entitled to head of state immunity).

16. 28 U.S.C. §§ 1330, 1602-1611 (1994).

17. *See id.* § 1605 (providing general exceptions to jurisdictional immunity of foreign state from U.S. domestic litigation).

18. *See id.* § 1605(a)(1) (stating that "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication").

19. *Id.*

20. *See id.* (providing that expressed or implied waiver of sovereign immunity is valid "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver").

21. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (defining waiver).

22. *See* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1292 (11th Cir. 1999) (discussing requirements for validity of express waiver) (quoting Aquinda v. Texaco,

In the international arena, ambassadors traditionally have possessed broad powers to bind the governments they represent.[23] Such powers include the authority to represent the official position of the ambassador's nation before foreign tribunals and to waive or assert sovereign immunity from suit.[24] At least one U.S. court has held that domestic tribunals should presume that foreign ambassadors possess authority to appear before them and waive their nation's sovereign immunity absent compelling evidence to the contrary.[25] Ambassadorial waiver of a foreign nation's sovereign immunity to domestic adjudication in United States courts is therefore an important issue because it significantly impacts a foreign government's amenability to suit in a United States forum.[26]

This Note addresses what standards a U.S. court should use in determining whether a foreign ambassador possesses authority to waive the sovereign immunity of the nation the ambassador represents in domestic adjudication before U.S. courts. Part II of this Note begins with an examination of the doctrine of sovereign immunity from its origins in early American jurisprudence to its contemporary policy rationales.[27] Part III explores the legislative history of the FSIA,[28] with particular emphasis on congressional policies underlying enactment of the statute.[29] Part IV examines recent case law involving ambassadorial waivers of sovereign immunity.[30] Part V analyzes this case law in light of the underlying policies of the FSIA.[31] Finally, Part VI concludes by recommending a rule that U.S. courts should presume that foreign ambassadors possess authority to waive their nations sovereign immunity from suit in domestic litigation absent compelling evidence to the contrary.[32]

Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (collecting cases), *vacated on other grounds sub nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)).

23. *See id.* at 1296 (analyzing traditional ambassadorial authority).

24. *Id.*

25. *See id.* at 1299 (holding that under FSIA courts should presume ambassador possesses authority to waive sovereign immunity absent compelling evidence making it obvious ambassador does not possess such authority).

26. *See id.* at 1293-99 (exploring approaches to and analyzing dynamics of ambassadorial waiver of foreign nation's sovereign immunity from domestic adjudication).

27. *See infra* Part II (discussing doctrine of sovereign immunity).

28. 28 U.S.C. §§ 1330, 1602-1611 (1994).

29. *See infra* Part III (discussing legislative history and underlying policies of FSIA).

30. *See infra* Part IV (examining ambassadorial power to waive sovereign immunity through case law study).

31. *See infra* Part V (analyzing case law in light of underlying policies of FSIA).

32. *See infra* Part VI (recommending that courts should presume ambassador possesses authority to waive sovereign immunity absent compelling evidence to contrary).

II. Sovereign Immunity

In the international arena, the doctrine of sovereign immunity embodies the fundamental principle that the government of a nation, state, political subdivision, or an agency or instrumentality thereof may not be subject to domestic adjudication without its consent.[33] Subject to certain exceptions and qualifications, a private litigant generally may not compel an immune foreign sovereign to adjudicate claims against it, regardless of the legitimacy of the litigant's claims or the wrongfulness of the foreign sovereign's conduct giving rise to those claims.[34] The principle of sovereign immunity is based upon the notions of the sovereign independence of states and the equality and dignity of coequal sovereigns.[35] The sovereign immunity doctrine originated in an era of personal sovereignty, when kings could theoretically do no wrong and when the exercise of authority by one sovereign over another signified hostility or superiority.[36] "Because all nations are considered equal, one foreign state cannot exercise its sovereign power over another."[37] Additionally, nations traditionally have been reluctant to adjudicate claims against foreign states for fear of detrimentally impacting valuable economic and political ties with those foreign states.[38]

The doctrine of sovereign immunity has become part of the very fabric of U.S. law.[39] In fact, the U.S. Supreme Court made the earliest judicial pronouncement of the sovereign immunity doctrine by the highest court of any nation.[40] In *The Schooner Exchange v. M'Faddon*,[41] Chief Justice Marshall advanced the classic formulation of sovereign immunity in the international

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33. *See* Hill, *supra* note 11, at 158 (analyzing conceptual framework of sovereign immunity law).

34. *See id.*

35. *See* Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSNAT'L L. 1, 1-2 (1986) (analyzing history and codification of sovereign immunity in national and international law).

36. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357 (2d Cir. 1964) (examining historical origination of sovereign immunity concept).

37. *See* Catherine M. Beresovski, *A Proposal to Deny Foreign Sovereign Immunity to Nations Sponsoring Terrorism*, 6 AM. U. J. INT'L L. & POL'Y 77, 86 (1990) (suggesting that nations should re-examine sovereign immunity doctrine in context of political terrorism so that legitimate claims under international law may be satisfied).

38. *See id.* (analyzing underlying policies of sovereign immunity doctrine).

39. *See* Kevin F. Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and Its Impact on International Aviation Litigation*, 46 J. AIR L. & COM. 687, 690 (1981) (exploring historical background of U.S. sovereign immunity doctrine).

40. *See* Riesenfeld, *supra* note 35, at 2 (discussing history of sovereign immunity doctrine).

41. 11 U.S. (7 Cranch) 116 (1812).

legal system.[42] Marshall reasoned that the principle of sovereign immunity was based on the presumed independence, equality, and dignity of sovereign nations.[43] Although the nations of the world possessed exclusive and absolute sovereignty within their territorial boundaries, they mutually agreed to relinquish their sovereignty to a certain extent in respect of the sovereignty of coequal states.[44] Because the world's nations were regarded as equals in the international arena, one nation could not adjudicate the rights of another nation without implying superiority over the adjudicated nation and thus degrading that nation's dignity as a coequal sovereign.[45] Finally, Marshall reasoned that nations that sent their official representatives abroad did not intend to subject them to the authority of the receiving state.[46] If the receiving state subjected another nation's foreign ministers to its authority, the foreign representatives would owe their temporary allegiance to the receiving state and lack the requisite independence to represent their own country's national interests adequately.[47]

The contemporary policy rationales underlying the doctrine of sovereign immunity have transformed significantly since Chief Justice Marshall's opinion in *The Schooner Exchange*.[48] Although equality and respect among nations

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42. *See* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 144 (1812) (concluding that French military vessel docked in Philadelphia port was immune from suit in admiralty attachment proceeding). In *The Schooner Exchange*, Chief Justice Marshall considered "whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States." *Id.* at 135. After experiencing rough seas, the French warship Sieur Begon sought refuge and repairs in the port of Philadelphia. *Id.* at 118. Plaintiffs attempted to attach the Sieur Begon while it was docked in Philadelphia's harbor. *Id.* at 117. Plaintiffs alleged that they were the true owners of the schooner, formerly known as the "Exchange." *Id.* Plaintiffs further alleged that French government forces, following the orders of Emperor Napoleon, forcibly and unlawfully seized the Exchange while in route to Spain. *Id.* In concluding that the French warship was immune from suit in the attachment proceedings, Chief Justice Marshall noted that the world was composed of distinct and independent sovereigns which possessed equal rights. *Id.* at 136. Marshall recognized that nations exercised absolute and exclusive jurisdiction within their own territorial boundaries. *Id.* Citing the foreign policy considerations underlying head of state and diplomatic immunity, Marshall reasoned that governments frequently relaxed their absolute and exclusive territorial sovereignty to promote international relations with foreign states through the "interchange of those good offices which humanity dictates and its wants require." *Id.* at 136.

43. *See id.* (developing fundamental framework of sovereign immunity analysis).

44. *Id.*

45. *Id.* at 137; *see also* Hill, *supra* note 11, at 163 (analyzing policy considerations underlying Supreme Court's opinion in *The Schooner Exchange*).

46. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 139 (exploring policies supporting sovereign immunity doctrine).

47. *Id.*

48. *See* Hill, *supra* note 11, at 165 (discussing modern policy concerns behind sovereign immunity doctrine); J. S. Davidson, *State Immunity in the English Courts: A Lingering Death*, 33 N. IR. LEGAL Q. 171, 171 (1982) (same).

were essential for political stability during the time of Marshall's opinion, the modern policy considerations underlying sovereign immunity focus on the mutual protection of "essential governmental functions from harassing and interfering litigation."[49] A government's military, economic, and political activities need protection from any undue infringement that may occur when private litigants bring claims against government agencies and instrumentalities.[50] On the other hand, as government-owned enterprises increase their involvement in traditionally private commercial activities, private parties need available recourse to the judicial process in the event that the government unduly trammels on their rights and interests in the economic arena.[51] An absolute grant of sovereign immunity to such government entities would give them "an unfair advantage in their dealings with the private sector."[52]

These concerns led to the abandonment of the absolute theory of sovereign immunity, under which a foreign state was completely immune from domestic adjudication without its consent, and to the adoption of the restrictive theory of sovereign immunity.[53] The restrictive theory of sovereign immunity accords a foreign state immunity for public or governmental activity (*jure imperii*), while rendering the foreign state amenable to domestic adjudications for its private or commercial activities (*jure gestionis*).[54] In 1952 the U.S. Department of State announced its adoption of the restrictive theory of sovereign immunity through publication of the Tate Letter, an official correspondence from the State Department's Acting Legal Adviser, Jack B. Tate, to the Justice Department's Acting Attorney General, Phillip B. Perlman.[55] The Tate Letter explained that future U.S. foreign policy concerning the sovereign immunity of foreign nations in domestic courts would adhere to the principles embodied in the restrictive theory.[56]

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49. Hill, *supra* note 11, at 165.

50. *Id.*

51. *See supra* notes 1-9 and accompanying text (asserting greater likelihood of suits between foreign governments and private litigants because of increased governmental participation in commercial transactions).

52. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 303 (1986) (examining policy considerations underlying formulation and implementation of FSIA).

53. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357 (2d Cir. 1964) (analyzing historical development of U.S. sovereign immunity law).

54. *Id.* at 358.

55. *See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T ST. BULL., May 1952, at 984-85 (reprinting entire text of State Department letter announcing change in fundamental State Department policy concerning sovereign immunity of foreign nations from domestic adjudication).

56. *Id.*

The purpose of the restrictive theory of sovereign immunity is to attempt to balance the competing interests of private individuals and parties in having the courts determine their legal rights, with the interests of independent and sovereign states in possessing the freedom to perform certain political and public acts "without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign" tribunals.[57] Because the State Department was the executive branch agency responsible for the conduct of foreign affairs, the courts quite naturally deferred to its policy pronouncements.[58] To avoid the politically embarrassing consequences that a court's rejection of a foreign state's claim of sovereign immunity could have on diplomatic relations, the judiciary normally followed the State Department's suggestion that a particular foreign state be granted immunity from domestic litigation.[59] Conversely, when the State Department had either expressly or implicitly indicated that a foreign state should not be granted immunity, the courts typically denied the foreign nation immunity from local litigation.[60] When the State Department remained silent on the issue of sovereign immunity in a particular case, the courts had a duty to determine, in accordance with the State Department's general policy, whether the foreign state was entitled to sovereign immunity from suit.[61]

However, the application of the restrictive theory "proved troublesome" in practice.[62] The State Department's Tate Letter did not provide the courts with any guidelines to differentiate between a foreign state's public and private acts.[63] Even though the State Department announced the restrictive theory to

57. *See Victory Transp.*, 336 F.2d at 360 (examining applicability of restrictive theory of sovereign immunity where State Department remains silent on issue of foreign nation's sovereign immunity in particular litigation).

58. *See id.* at 358 (delineating scope of restrictive theory of sovereign immunity) (citing Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 360-61 (1955) (holding Republic of China not immune from U.S. bank's counterclaim seeking affirmative judgment of defaulted treasury notes when China initiated suit against bank to recover funds Chinese governmental agency deposited in bank)).

59. *See Nat'l City Bank*, 348 U.S. at 360-61 (discussing judiciary's deference to Department of State concerning foreign policy matters) (citing Ex Parte Peru, 318 U.S. 578, 581 (1943) (deferring to State Department request to grant sovereign immunity to Peruvian government vessel in domestic admiralty proceeding)).

60. See Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d. Cir. 1964) (asserting judiciary's deference to State Department suggestions of immunity).

61. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945) (expounding guiding principles to assist court in determining whether foreign state possesses immunity from domestic litigation).

62. *See* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983) (analyzing history of restrictive theory of U.S. sovereign immunity law).

63. *See Victory Transp.*, 336 F.2d at 359-60 (discussing conceptual difficulties in application of Tate Doctrine).

be the official U.S. foreign policy position regarding domestic adjudication of suits involving foreign states, the courts still deferred to the State Department's suggestions of immunity.[64] This judicial deference gave foreign nations the opportunity to manipulate the process by placing diplomatic pressure on the State Department to obtain immunity from suit.[65] Sometimes "political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[66] To further exacerbate inconsistent application of the restrictive theory, courts frequently would rely on prior State Department decisions to resolve sovereign immunity questions in cases where the State Department refrained from making suggestions of immunity.[67]

Courts soon began to develop their own tests to determine sovereign immunity under the restrictive theory.[68] Some courts looked to the nature of the underlying transaction and categorized as public only those activities that individuals could not perform themselves.[69] Other courts sought to determine the purpose of the underlying transaction, "categorizing as public all activities in which the object of performance was public in nature."[70] Because any government activity necessarily serves some type of government purpose, this test was particularly unhelpful.[71] Additionally, the test often led to arbitrary results when courts projected onto the litigation their own subjective notions about the proper sphere of government activity.[72] To reduce the uncertainty and disuniformity that characterized application of the restrictive theory of sovereign immunity, Congress sought to formally codify the restrictive theory in the FSIA.[73]

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64. *See supra* notes 58-61 and accompanying text (discussing judiciary's deference to executive branch determinations of foreign government's sovereign immunity from domestic adjudication).

65. *See Verlinden*, 461 U.S. at 487 (examining problematic application of restrictive theory of sovereign immunity before codification of restrictive theory in FSIA).

66. *Id.*

67. *Id.*

68. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (proposing categorical approach to distinguish between foreign sovereign's public and private acts).

69. *See* Cook, *supra* note 39, at 691-92 (probing shortcomings of sovereign immunity jurisprudence prior to enactment of FSIA).

70. *Id.*

71. *Id.* at 692.

72. *Id.*

73. 28 U.S.C. §§ 1330, 1602-11 (1994).

III. Legislative History of Foreign Sovereign Immunities Act

The United States became the first nation to codify its substantive law of sovereign immunity in statutory form.[74] The codification of U.S. substantive sovereign immunity law in the FSIA was "a great improvement over the state of the law which existed prior to its enactment."[75] The primary purpose of the FSIA was to establish "the sole and exclusive standards" for determining whether a foreign sovereign was immune from suit in U.S. federal and state courts.[76] With the exception of foreign treaties and other valid international agreements, the FSIA preempts any other state or federal law.[77] The FSIA also was designed to bring U.S. sovereign immunity doctrine into conformity with the laws of the general international community as most other nations had adopted the restrictive theory and had placed sovereign immunity determinations into the exclusive domain of the judiciary.[78]

Congress recognized that in the modern world American citizens have increased contact with foreign entities engaged in commercial activities.[79] Congress reasoned that firm standards outlining a foreign nation's amenability to suit were necessary because increased contact enhances the potential for litigation between private parties and foreign sovereigns.[80] In establishing these firm guidelines, Congress outlined several objectives.[81] The first objective was to codify the restrictive theory of sovereign immunity.[82] This would bring U.S. law into conformity with the laws of the majority of nations in the international community.[83] These nations routinely applied the

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74. *See* Mark B. Feldman, *Foreign Sovereign Immunity in United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 19, 19 (1986) (discussing congressional enactment of FSIA); *see also* Beresovski, *supra* note 37, at 90 (same); Feldman, *supra* note 52, at 303 (same).

75. *See* Gerard Lacroix, *The Theory and Practice of the Foreign Sovereign Immunities Act: Untying the Gordian Knot*, 5 INT'L TAX & BUS. LAW. 146, 146 (1987) (suggesting systematic guide to theoretical and practical intricacies of FSIA); *see also supra* notes 33-73 and accompanying text (describing U.S. substantive law of sovereign immunity prior to codification of restrictive theory in FSIA).

76. *See* H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 (providing legislative history and purpose of FSIA).

77. *Id.*

78. *Id.*

79. H.R. REP. NO. 94-1487, at 6-7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

80. *See* H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06 (providing congressional reasoning for development of firm standards to guide judicial decisionmaking on questions of foreign state's sovereign immunity from domestic adjudication).

81. *Id.*

82. *Id.*

83. *Id.*

restrictive theory in their courts in suits against the United States.[84] Additionally, the FSIA would insure the uniform and predictable application of the restrictive principle in U.S. courts.[85] Removal of the determination of a foreign nation's sovereign immunity from the executive to the judicial branch reduced the ability of foreign governments to manipulate the decision through diplomatic channels.[86] The FSIA therefore eliminates the arbitrariness that resulted from pre-FSIA court decisions based upon the State Department's Tate Doctrine.[87] The FSIA also augments confidence in the American judicial process because it provides assurance to "litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."[88]

The firm guidelines Congress established through enactment of the FSIA contain clear exceptions to the foreign state's ability to assert sovereign immunity in U.S. courts.[89] Especially pertinent for purposes of this Note, the FSIA establishes that a foreign state may expressly waive its sovereign immunity from suit in U.S. courts.[90] Congress provided examples of explicit waivers of sovereign immunity.[91] Specifically, the House Report on FSIA states that a foreign nation may renounce its immunity in a treaty or waive its immunity in a contract with a private party.[92] Neither of these examples directly refers to ambassadorial waiver of sovereign immunity.

Because the drafters of the FSIA recognized that modern transactions and events are often very complex and assume an infinite variety of shapes and sizes, the drafters were reluctant to codify these transactions and events into a rigid statutory form.[93] The FSIA therefore resembles a constitution more than a tax code.[94] The FSIA allows the law of sovereignty immunity to "develop on a case-by-case basis within a framework of general principles

84. *Id.*

85. *Id.*

86. *Id.*

87. *See supra* notes 62-72 and accompanying text (discussing criticisms of pre-FSIA application of restrictive theory of sovereign immunity in U.S. courts).

88. H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

89. *See* 28 U.S.C. § 1605 (1994) (establishing general exceptions to jurisdictional immunity of foreign state before domestic courts).

90. *See id.* § 1605(a)(1) (providing for express or implied waiver of sovereign immunity from suit in domestic adjudication).

91. *See* H.R. REP. NO. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 (listing examples of explicit waivers).

92. *Id.*

93. *See* Feldman, *supra* note 52, at 311 (examining policy considerations underlying formulation and implementation of FSIA).

94. *Id.*

laid down by statute."[95] This Note thus turns to an examination of recent case law to address the implications of ambassadorial waiver of a foreign state's sovereign immunity to domestic adjudication in United States courts.[96]

IV. Case Law

A. Eleventh Circuit Approach: Aquamar, S.A. v. Del Monte Fresh Produce, N.A.

In *Aquamar, S.A. v. Del Monte Fresh Produce, N.A.*,[97] the Court of Appeals for the Eleventh Circuit considered whether the Ambassador of Ecuador waived Ecuador's sovereign immunity in a suit concerning the contamination of Ecuadoran shrimp with fungicides and herbicides used on the banana farms of the state-run "Programa Nacional de Banano," or National Banana Program (PNB).[98] Ecuadoran commercial shrimp farmers brought suit

95. *Id.*

96. *See infra* Parts IV-V (examining and analyzing case law concerning issue of ambassadorial waiver of foreign state's immunity in domestic adjudications).

97. 179 F.3d 1279 (11th Cir. 1999).

98. *See* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1299 (11th Cir. 1999) (holding that "under the FSIA, courts should assume that an ambassador possesses the authority to appear before them and waive sovereign immunity absent compelling evidence making it 'obvious' that he or she does not"). In *Aquamar*, the Court of Appeals for the Eleventh Circuit addressed the issue of whether the Ecuadoran ambassador to the United States waived his nation's sovereign immunity in litigation involving the state-run PNB. *Id.* at 1283-85. Ecuadoran commercial shrimp farmers brought suit in a Florida state court against the producers of certain fungicides and herbicides, alleging that the use of these products on Ecuadoran banana farms had killed their shrimp. *Id.* at 1282. The defendant producers brought third-, fourth-, and fifth-party complaints against PNB, a department within the Republic of Ecuador's Ministry of Agriculture and Livestock, because it employed the allegedly harmful fungicides and herbicides as part of its banana cultivation operations. *Id.* The shrimp farmers, arguing that the federal district court lacked jurisdiction because PNB was immune from suit, moved to strike the producers' complaints against PNB in an effort to defeat PNB's motion to dismiss for forum non conveniens. *Id.* PNB's attorneys responded by filing documents on behalf of their client purporting to waive PNB's sovereign immunity. *Id.* at 1283. In addition to these documents, the Ecuadoran ambassador filed an affidavit in which he stated that he waived PNB's sovereign immunity on behalf of PNB and the government of Ecuador. *Id.*

The Eleventh Circuit held that PNB waived its sovereign immunity from suit under the FSIA. *Id.* at 1289. Because PNB qualified as an agency or instrumentality of the Republic of Ecuador, the court reasoned that PNB should be treated as a foreign state for purposes of the FSIA. *Id.* at 1290. The court found the ambassador's affidavit to be a complete and unambiguous waiver of the sovereign immunity of both PNB and the Republic of Ecuador. *Id.* at 1293. The Eleventh Circuit relied on the congressional policies underlying FSIA and on principles of international law to conclude that when a duly accredited head of a diplomatic mission, such as an ambassador, "files a waiver of his or her sovereign's immunity in a judicial proceeding, the court should assume that the sovereign has authorized the waiver absent extraordinary circumstances." *Id.* at 1294.

in a Florida state court against the producers of certain fungicides and herbicides, alleging that the use of these products on Ecuadoran banana farms had killed their shrimp.[99] The defendant producers brought third-, fourth-, and fifth-party complaints against the PNB, a department within the Republic of Ecuador's Ministry of Agriculture and Livestock, because it employed the allegedly harmful fungicides and herbicides as part of its banana cultivation operations.[100]

Pursuant to 28 U.S.C. § 1441(d), PNB removed the cases to federal district court, where it joined in the fungicide and pesticide producers' motion to dismiss the complaints of the shrimp farmers on the grounds of forum non conveniens.[101] The plaintiff shrimp farmers moved to strike the defendant producers third-, fourth-, and fifth-party complaints against PNB in an effort to defeat the motion to dismiss for forum non conveniens.[102] The plaintiffs argued, inter alia, that the federal district court lacked jurisdiction over PNB "because PNB had sovereign immunity from suit under the FSIA."[103] The PNB's attorneys responded by filing documents on behalf of their client purporting to waive PNB's sovereign immunity.[104] Additionally, Edgar Teran, Ecuador's Ambassador to the United States, filed an affidavit in which he stated that he waived PNB's sovereign immunity on behalf of PNB and the government of Ecuador "[w]ithout waiving any other defense of law or fact to the claims asserted against" PNB in the pending litigation.[105] The ambassador further stated that PNB's immunity was waived "for the purposes of these litigations only and in connection with the pending forum non conveniens motions."[106]

The plaintiff shrimp farmers countered that Ecuadoran law authorized only Ecuador's attorney general to act in judicial matters, that the constitution of Ecuador "did not allow *anyone* to waive Ecuador's sovereign immunity," and that the Ambassador of Ecuador acted under the influence of improper motives when he purported to waive PNB's sovereign immunity.[107] The federal trial court found that PNB had not waived its sovereign immunity because the Ecuadoran ambassador's affidavit purporting to waive immunity on behalf of PNB was explicitly limited to the litigation of the forum non

99. *See Aquamar*, 179 F.3d at 1282 (providing factual background and procedural history).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1283.
105. *Id.*
106. *Id.*
107. *Id.* at 1284.

conveniens motion to dismiss pending before the court.[108] The trial court subsequently granted defendants' motion to dismiss for forum non conveniens, dismissed the complaints against the PNB, and remanded the remaining cases to the Florida state court on the grounds that "without PNB as a party, it no longer had subject matter jurisdiction over the action."[109]

On appeal, the Eleventh Circuit reversed and held "that PNB waived its sovereign immunity and therefore is not immune from suit under the FSIA."[110] The court ruled that PNB was to be treated as a foreign state for purposes of the FSIA because it was an agency of the Republic of Ecuador.[111] The court further ruled that the attempts of PNB's attorneys to waive immunity did not constitute a waiver because they failed to qualify under the test of "a 'clear, complete, unambiguous, and unmistakable' manifestation of the sovereign's intent to waive its immunity."[112] However, the court found that the ambassador's affidavit waived PNB's immunity completely and unambiguously because the "word 'only,' in the phrase 'for the purposes of these litigations only and in connection with the pending forum non conveniens motions,' modifies the expression 'these litigations,' but not the words 'in connection.'"[113]

The court relied upon the congressional policies underlying FSIA and principles of international law to conclude that when a duly accredited head of a diplomatic mission, such as an ambassador, "files a waiver of his or her sovereign's immunity in a judicial proceeding, the court should assume that the sovereign has authorized the waiver absent extraordinary circumstances."[114] The Eleventh Circuit found that Ecuador's ambassador had in fact waived his nation's sovereign immunity as it pertained to the state-run PNB.[115] Specifically, the court held that "under the FSIA, courts should assume that an ambassador possesses the authority to appear before them and waive sovereign immunity absent compelling evidence making it 'obvious' that he or she does not."[116]

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108. *Id.*

109. *Id.*

110. *Id.* at 1289.

111. *Id.* at 1290.

112. *Id.* at 1292 (quoting Aquinda v. Texaco, Inc., 175 F.R.D. 50, 52 (S.D.N.Y. 1997), *vacated on other grounds sub nom.* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)).

113. *See Aquamar*, 179 F.3d at 1293 (analyzing ambassadorial affidavit).

114. *Id.* at 1294.

115. *See id.* at 1289 (holding that PNB is immune from suit under FSIA because Ecuador's ambassador waived PNB's sovereign immunity).

116. *Id.* at 1299.

1. Underlying Policy in Aquamar

In reaching its conclusion in *Aquamar*, the court relied in part on the policy considerations of the United States Congress underlying the FSIA.[117] Congress sought to create uniform and predictable standards applicable to suits concerning foreign governments and their agencies.[118] Such uniform standards seek to eliminate the need for the non-judicial branches of government to become mired in case-by-case diplomatic determinations and inquiries into waivers of immunity.[119] They also help ensure procedural and substantive due process to the litigants of a suit involving a foreign sovereign as an actual or potential party to the proceedings.[120] For example, the FSIA provides foreign governments with notice of when they may become amenable to suit within the United States.[121] Foreign governments may exercise an option to elect to litigate in U.S. courts by expressly or implicitly waiving sovereign immunity under FSIA § 1605(a)(1).[122] The FSIA also provides those who conduct business with foreign governments with a predictable and uniform method to determine jurisdiction when a dispute arises between them.[123] Requiring courts to inquire into the local law of the foreign state in making a determination whether a foreign ambassador possesses the authority of his or her nation to waive sovereign immunity in domestic U.S. adjudications would frustrate the goals and purposes of the FSIA.[124] Lengthy, unpredictable, and inconclusive examinations into conflicting interpretations of the foreign sovereign's diplomatic law would at best create significant impediments to all FSIA actions.[125]

In the worst case scenario, the litigants and foreign sovereigns involved in litigation could manipulate and abuse such a requirement.[126] The foreign sovereign negatively affected by the outcome of such litigation may attempt to invoke sovereign immunity "'even after it has unsuccessfully defended [its position] on the merits.'"[127] The foreign sovereign would thus have an unfair

117. *See id.* at 1297 (finding additional support in congressional intent underlying FSIA for court's holding that courts should presume ambassador's authority to waive sovereign immunity absent compelling contrary evidence).

118. *Id.* at 1297-98.

119. *See id.* at 1298 (discussing reasons supporting congressional intent to create uniform and predictable standards applicable to suits concerning foreign governments and their agencies).

120. *Id.*

121. *See id.* (noting benefits to foreign governments derived from provisions of FSIA).

122. *See id.* (discussing options of foreign government under FSIA).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (quoting George Kahale III, *State Loan Transactions: Foreign Law Restrictions on Waivers of Immunity and Submissions to Jurisdiction*, 37 BUS. LAW. 1549, 1561 n.70 (1982)).

advantage over the other parties to the proceedings through exploitation of the foreign sovereign's ability to "'reap the benefits of our courts while avoiding the obligations of international law.'"[128]

Other parties to the litigation, in addition to the foreign sovereign, may also attempt to manipulate the process under a rule requiring the court to inquire into the foreign sovereign's domestic law to resolve immunity issues involving ambassadorial waivers.[129] Under the FSIA, a foreign sovereign desiring to participate in a domestic U.S. adjudication may explicitly or implicitly waive its immunity.[130] However, if courts regularly inquired into the authority of an ambassador to effect such a waiver, a party to the litigation opposed to the presence of the foreign sovereign might oppose the foreign sovereign's waiver of its own immunity on the grounds that the foreign sovereign's domestic laws prevent the ambassador from doing so.[131]

There are additional concerns related to the judiciary's "role in the sensitive area of international relations [which] mitigate against questioning an ambassador's representations . . . before [domestic] courts."[132] A rule mandating judicial investigation of an ambassador's authority to waive immunity would potentially increase the frequency of "intrusive and resented inquiries of foreign governments."[133] A court's investigation into a foreign ambassador's authorization to engage in traditional diplomatic duties can impede upon the purview of the U.S. executive and legislative branches in the realm of U.S. foreign relations.[134] Whether a foreign ambassador has authority to represent and act on behalf of his nation is a matter for the political branches of government to determine.[135] The judiciary should defer to the executive and legislative branches to provide the answer to such political

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128. *Id.* (quoting First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 634 (1983)).

129. *Id.*

130. *Id.*

131. *See Aquamar*, 179 F.3d at 1298 (arguing against proposed requirement of judicial investigation into domestic law of foreign ambassador to determine whether ambassador has authority under his or her sovereign's law to waive immunity in domestic U.S. adjudication).

132. *Id.*

133. *Id.* (quoting First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 199 (2d Cir. 1989) (Newman, J., dissenting)).

134. *See id.* (noting potential negative impact of inquiry into domestic law of foreign ambassador to determine whether ambassador has authority under his or her sovereign's law to waive immunity in domestic U.S. adjudication).

135. *See id.* (noting that judicial inquiry into foreign ambassador's domestic law to determine if such ambassador has authority to waive his or her nation's sovereign immunity intrudes upon foreign relations sphere of powers belonging to executive and legislative branches) (citing Agency of Canadian Car & Foundry Co. v. Am. Can Co., 258 F. 363, 368-69 (2d Cir. 1919) (holding certificate of Russian ambassador as authoritative representation by Russian government and binding and conclusive in courts of U.S. against Russian government)).

questions.[136] Finally, judicial investigation into foreign ambassadorial authorization to waive sovereign immunity may implicate the act of state doctrine.[137] The act of state doctrine limits the ability of U.S. courts to inquire "'into the validity of a recognized foreign sovereign's public acts committed within its own territory.'"[138]

The *Aquamar* court was careful to emphasize that courts should not automatically "deem an ambassador to be authorized to waive a sovereign's immunity under all circumstances."[139] A court may face a situation in which "an ambassador may so clearly lack authority that his or her representations to a court do not bind the sovereign."[140] For example, an ambassador's statements may not bind the nation the ambassador represents when the ambassador's statements plainly contradict the official position of that nation.[141] Therefore, to reiterate the *Aquamar* court's holding, under the FSIA, "courts should assume that an ambassador possesses the authority to appear before them and waive sovereign immunity absent compelling evidence making it 'obvious' that he or she does not."[142]

2. Aquamar *Court Looks to International Law*

In addition to the congressional policy considerations underlying the FSIA, the *Aquamar* court examined a variety of sources to ascertain principles of international law, including international conventions, customs, treaties, and judicial decisions rendered in this and other countries.[143] The court employed these principles of international law to facilitate its understanding of the FSIA and its applications.[144] The *Aquamar* court recognized that prior to passage of the FSIA, the United States Department of State usually made the determination of whether a foreign sovereign possessed immunity from suit in domestic U.S. litigation.[145] The State Department gen-

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136. *Id.*

137. *See id.* at 1299 (noting judicial inquiry into domestic law of foreign ambassador to determine ambassadorial authorization to waive sovereign immunity may implicate act of state doctrine).

138. *Id.* (quoting Hond. Aircraft Registry, Ltd. v. Gov't of Hond., 129 F.3d 543, 550 (11th Cir. 1997) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964))).

139. *See id.* (emphasizing that presumption of foreign ambassador's authority to waive his or her nation's sovereign immunity in domestic U.S. adjudication is not absolute).

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 1294-95 (reasoning that courts may look to international law as guide to understanding meaning of FSIA's provisions).

144. *See id.* at 1294-97 (employing principles of international law to facilitate understanding of FSIA provisions).

145. *See id.* at 1294 (recognizing U.S. State Department's role in determination of whether

erally relied upon traditional international law principles in formulating its policies on sovereign immunity.[146] Therefore, enactment of the FSIA did not eliminate the relevance of international law to sovereign immunity inquiries in domestic adjudications.[147] Instead, the FSIA codified pre-existing international and federal common law when it transferred the determination of sovereign immunity from the purview of the executive branch to the less politicized realm of the judiciary.[148]

The fundamental principles of international law indicate "that a sovereign's chief diplomatic representative to a foreign nation possesses an extraordinary role and powers."[149] The important role of the ambassador as a diplomatic agent has been recognized throughout history.[150] Primary ambassadorial functions include representation of the sending sovereign in the receiving nation, protection of the interests of the sovereign state and its nationals abroad, and representation of the sovereign state in international organizations.[151] Ambassadors also possess expansive authority to make decisions that bind the nations they represent.[152] In fact some nations, such as the United Kingdom and Australia, "have codified a rule that a diplomatic representative always has authority to waive sovereign immunity on behalf of his or her sovereign."[153] International tribunals traditionally have presumed that the powers of an ambassador or diplomatic representative include the authority to represent officially his or her nation's positions and interests before foreign judiciaries.[154] For example, if a foreign ambassador signs "an application to initiate proceedings before the International Court of Justice" on behalf of the nation the foreign ambassador represents, the court will accept the ambassador's signature without authentication.[155] Moreover, the United Nations Inter-

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foreign nation possessed immunity from suit in U.S. courts previous to enactment of FSIA) (citing Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486-87 (1983)).

146. *See id.* (noting that U.S. State Department policy on sovereign immunity generally reflected customary international law).

147. *See id.* (analyzing relevancy of international law to sovereign immunity inquiries after passage of FSIA).

148. *Id.* (citing Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1234 (2d Cir. 1995)).

149. *Id.* at 1295.

150. *See id.* at 1295-96 (acknowledging that "from ancient times" peoples of all nations have recognized status of diplomatic agents) (quoting Vienna Convention on Diplomatic Relations, Apr. 18, 1961, pmbl., 23 U.S.T. 3227, 500 U.N.T.S. 95).

151. *See id.* (noting broad powers of ambassador traditionally recognized under fundamental principles of international law).

152. *Id.* at 1296.

153. *Id.*

154. *See id.* (discussing traditional role and authority of ambassador in context of fundamental principles of international law).

155. *See id.* (providing specific examples of foreign ambassador's traditional roles and au-

national Law Commission has stated that courts should presume that a foreign ambassador has the represented nation's authority to waive the diplomatic immunity of the foreign nation's agents and representatives.[156]

The *Aquamar* court further recognized that the jurisprudence of many U.S. jurisdictions reflects the presumption of international law that a foreign ambassador possesses the authority to represent the foreign ambassador's nation in domestic legal proceedings.[157] Such presumed ambassadorial authority includes both the power to assert and the power to waive the sovereign immunity of the nation-state the ambassador represents.[158] The long-established presumption of ambassadorial authority to assert or waive sovereign immunity originates from the practical needs of the U.S., foreign, and international court systems.[159] A foreign nation's embassy, located in the forum state, is typically much more accessible to litigants and domestic courts than are members of the foreign nation's home government.[160] This more immediate availability of a foreign sovereign's ambassador in a domestic forum increases the convenience of litigants to domestic adjudication involving the foreign sovereign or interests which the foreign sovereign seeks to protect.[161] The *Aquamar* court speculated that "[p]erhaps for this reason, the transmission of a state's decision whether to invoke or claim immunity is one of the traditional functions of an embassy" and its ambassador.[162]

B. Second Circuit Approach

1. First Fidelity Bank, N.A. v. Government of Antigua & Barbuda – Permanent Mission

In *First Fidelity Bank, N.A. v. Government of Antigua & Barbuda – Permanent Mission*,[163] the Court of Appeals for the Second Circuit employed New York agency law principles to determine whether a foreign ambassador

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thority) (citing I.C.J. Rules of Court, art. 38 ("If the application bears the signature of someone other than [the] diplomatic representative [to the forum country], the signature must be authenticated by the latter or by the competent authority of the applicant's foreign ministry.")).

156. *Id.*

157. *Id.* at 1297 (citing Lehigh Valley R.R. Co. v. State of Russia, 21 F.2d 396, 400 (2d Cir. 1927)).

158. *See id.* (acknowledging U.S. presumption of foreign ambassadorial authorization both to assert and to waive sovereign immunity on behalf of nation foreign ambassador represents).

159. *See id.* (recognizing practical importance of presumption of foreign ambassadorial authority to waive or to assert sovereign immunity on behalf of nation foreign ambassador represents).

160. *Id.*

161. *Id.*

162. *Id.*

163. 877 F.2d 189 (2d Cir. 1989).

possessed apparent authority to borrow money and to enter a consent order which purported to obligate the government of Antigua to repay borrowed funds and to waive Antigua's sovereign immunity.[164] Ambassador Lloydstone Jacobs, Antigua's ambassador to the United Nations, borrowed $250,000 from the First National State Bank of New Jersey, the predecessor to First Fidelity Bank, N.A.[165] Ambassador Jacobs signed for the loan in his official capacity as the Ambassador of Antigua, representing the "Government of Antigua & Barbuda – Permanent Mission."[166] The given purpose of the loan was "to pay for the renovation of Antigua's Permanent Mission to the United Nations in New York."[167] In reality, the borrowed funds were invested in an Antiguan casino.[168] After payments on the loan ceased and efforts to reach a settlement to repay the financial obligation failed, First Fidelity sought and obtained a default judgment against the government of Antigua.[169] When First Fidelity instituted efforts to levy upon Antigua's bank accounts, Ambassador Jacobs formally acknowledged the debt and sought a settlement.[170] First Fidelity and

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164. *See* First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 193 (2d Cir. 1989) (employing agency law principles to determine whether Antigua's ambassador possessed apparent authority to borrow money and to enter consent order which waived Antigua's sovereign immunity and obligated government of Antigua to repay borrowed funds). In *First Fidelity*, the Court of Appeals for the Second Circuit considered whether Antigua's ambassador to the United Nations, Lloydstone Jacobs, possessed the authority to bind the government of Antigua to a consent order waiving Antigua's sovereign immunity from suit and obligating the government to repay borrowed funds. *Id.* at 190-91. Ambassador Jacobs, purporting to act in his official ambassadorial capacity, procured a loan for $250,000 from First Fidelity, a U.S. bank, for the stated purpose of financing renovations to Antigua's mission to the United Nations. *Id.* at 191. Instead of using the loan proceeds to renovate the mission, Antiguan officials diverted the funds to invest in an Antiguan casino. *Id.* Ambassador Jacobs agreed to the consent order waiving Antigua's sovereign immunity as part of an effort to relieve Antigua's outstanding financial obligations to First Fidelity Bank. *Id.*

The Second Circuit applied traditional agency law principles to determine whether Ambassador Jacobs "possessed the apparent authority to borrow the money and to waive Antigua's sovereign immunity." *Id.* at 193. The court reasoned that the Ambassador's inherent authority should not be dispositive of the validity of his actions. *Id.* at 192. The court noted that the circumstances surrounding an ambassador's signature to a treaty may be grounds for invalidating the treaty. *Id. at* 192-93. For example, such a signature would be invalid if it was the result of either coercion or corruption. *Id.* at 192. The Second Circuit directed the trial court, on remand, to make a factual inquiry into the government of Antigua's manifestations to First Fidelity to determine Ambassador Jacob's apparent authority to enter the consent order and to waive Antigua's sovereign immunity. *Id.* at 193.

165. *Id.* at 191.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

Ambassador Jacobs eventually "agreed to a settlement and signed a consent order."[171] This consent order "included a complete waiver of Antigua's sovereign immunity from jurisdiction, attachment, and execution."[172] The consent order was "signed on behalf of the Government of Antigua and Barbuda by Lloydstone Jacobs, 'Ambassador Extraordinary and Plenipotentiary,' and by Robert Healey as the Government's attorney."[173]

After payments again ceased, First Fidelity sought to attach bank accounts that Antigua's U.S. embassy maintained in Washington, D.C.[174] The government of Antigua responded with a motion to dismiss the bank's complaint for lack of subject matter jurisdiction or, in the alternative, to vacate the consent order on grounds that it was invalid because Ambassador Jacobs had acted without Antigua's authority in borrowing money and in consenting to the settlement.[175] Antigua therefore argued that it had not waived its sovereign immunity to the action instituted by First Fidelity to recover the debt.[176] The trial court denied Antigua's motion, applying the domestic agency law of New York to hold that the government of Antigua was responsible for the actions of Ambassador Jacobs.[177] Because the loan transaction fell within the commercial activity exception of the FSIA, the trial court ruled that Antigua could not claim sovereign immunity.[178]

On appeal, the Second Circuit reversed the decision of the trial court, concluding "that the default judgment should have been set aside."[179] The court found the real issue to be whether Ambassador Jacobs, in the role of Antigua's official representative to the United Nations, possessed the requisite apparent authority to borrow the money, to agree to the consent order, and thus to waive Antigua's sovereign immunity.[180] The court recognized that "an ambassador to the U.N. possesses the same privileges and immunities as diplomatic envoys accredited to the United States."[181] While an ambassa-

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *See id.* at 193 (applying traditional agency law principles to determine central issue of case to be whether ambassador possessed apparent authority to act on behalf of Antiguan government).
181. *See id.* at 192 (recognizing authority possessed by foreign ambassador to United Nations as equivalent to privileges and immunities of United States envoys (citing Agreement Between the United Nations and the United States of America Regarding the Headquarters of

dor's representations typically are authorized by the sovereign the ambassador represents, a sovereign "can be bound by the representative's unauthorized actions where the lack of authority is not obvious."[182] However, the court reasoned that the powers inherent in an ambassador's position are not dispositive in determining whether an ambassador possesses the requisite authorization to waive the sovereign immunity of the nation the ambassador represents.[183] The "possession of authority does not, ipso facto, validate every exercise of it."[184]

The court analyzed the context surrounding Ambassador Jacobs's signature to the consent decree and its accompanying waiver of Antigua's sovereign immunity, distinguishing Ambassador Jacobs's pure commercial transactions with First Fidelity from more traditional international agreements which "have considerably more dignity."[185] The Second Circuit reasoned that the mere signature of an ambassador does not automatically make an international agreement binding upon the nation the ambassador represents.[186] An example of a situation in which international agreements do not bind the foreign sovereign occurs when the ambassador signs the document signifying the agreement as the direct result of third party coercion or corrupt motives possessed by the foreign ambassador.[187] The court concluded that if the surrounding circumstances of an ambassador's signature to a treaty may be grounds for invalidation of 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."[188] The Court of Appeals for the Second Circuit directed the trial court, on remand, to conduct a factual inquiry into whether the government of Antigua made manifestations to First Fidelity Bank that Ambassador Jacobs possessed Antigua's authorization to enter into the commercial transaction with the

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the United Nations, June 26, 1947, art. V, §15, 61 Stat. 3416, 3427-28, T.I.A.S. No. 1676, at 13-15, *authorized by* S.J. Res. of Aug. 4, 1947, Pub. L. No. 80-357, 61 Stat. 756, *set out in* 22 U.S.C. § 287 note (1982))).

182. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 311 reporter's n.4 (1987)).

183. *See First Fidelity*, 877 F.2d at 192 (noting that powers inherent in ambassador's position are not dispositive in and of themselves of whether ambassador possesses requisite authority to waive his or her nation's sovereign immunity).

184. *Id.*

185. *See id.* (noting distinction between commercial transactions and traditional international agreements).

186. *Id.*

187. *See id.* (providing examples of events that render ambassador signature to international agreement invalid (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 331(1)(c), 331(2)(a) (1987))).

188. *Id.* at 192-93.

bank and to represent officially the government of Antigua in the lawsuit initiated by First Fidelity Bank.[189]

Judge Newman dissented on grounds that the majority's decision fashions a rule of law that risks impairment of international relations between the United States and those foreign nations that send their duly accredited ambassadors to head diplomatic missions within the United States.[190] Application of the forum state's agency law may negatively affect the uniformity of laws which is so essential to the smooth operational flow of foreign relations in the international arena.[191] Relationships with foreign governments are jeopardized as vendors may become "unwilling to extend credit for goods and services ordered by embassies and impelling others to make potentially intrusive and resented inquiries of foreign governments."[192]

In *Aquamar*, the Court of Appeals for the Eleventh Circuit distinguished its ruling from the Second Circuit's decision in *First Fidelity*.[193] The *Aquamar* court recognized that it did not engage in a "traditional apparent authority inquiry because a finding of apparent authority requires reliance."[194] Such reliance rarely occurs when the "court first considers an explicit waiver made in the course of judicial proceedings," as the Eleventh Circuit did in its *Aquamar* decision.[195] Even though the Second Circuit in *First Fidelity* "analyzed the waiver under state agency law, rather than the federal and international law principles" that the Eleventh Circuit examined in *Aquamar*, the Eleventh Circuit reasoned that the rule arrived at in *First Fidelity* paralleled its own ruling in *Aquamar*.[196] Both cases ruled that domestic courts should accept a foreign ambassador's authority to waive the sovereign immunity of the represented nation absent "obvious" evidence that the ambassador lacks such authority.[197]

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189. *See id.* at 193-94, 196 (remanding case for factual inquiry into whether Ambassador Jacobs possessed apparent authority to represent Antiguan government in transaction and lawsuit).

190. *See id.* at 197 (Newman, J., dissenting) (arguing that majority court's ruling may have deleterious impact upon United States foreign relations).

191. *See id.* (Newman, J., dissenting) (arguing that inquiries into local agency law to determine ambassadorial authorization to waive or assert sovereign immunity on behalf of nation ambassador represents will hamper much desired uniformity of laws and will possibly detract from normalized diplomatic relations).

192. *Id.* at 199 (Newman, J., dissenting).

193. *See* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1299 (11th Cir. 1999) (stating that nature of ambassador's activities distinguishes cases).

194. *Id.* at 1299 n.42 (citing RESTATEMENT (SECOND) OF AGENCY § 8 cmt. d (1958)).

195. *Id.*

196. *See id.* (acknowledging parallel between *Aquamar* and *First Fidelity* rulings).

197. *Id.* (citing First Fid. Bank v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 192 (2d Cir. 1989).

2. Jota v. Texaco, Inc.

In a recent decision, the Court of Appeals for the Second Circuit adjudicated a matter involving the Republic of Ecuador and Ambassador Teran, the very same nation and ambassador at the heart of the dispute in *Aquamar*.[198] In *Jota v. Texaco, Inc.*,[199] indigenous residents of Ecuador's Oriente region and nearby Peruvian communities brought suit against Texaco in the Southern District of New York alleging that Texaco's oil extraction techniques polluted the rainforests and rivers of Oriente and caused physical harm to the region's inhabitants.[200] The plaintiffs alleged that Texaco polluted the rainforests and

198. *See* Jota v. Texaco, Inc., 157 F.3d 153, 155-56 (2d Cir. 1998) (concerning consolidated class actions brought by residents of Ecuador's Oriente region and nearby Peruvian communities alleging that Texaco subsidiary polluted nearby rain forests and rivers causing residents and their families to experience various physical maladies).

199. 157 F.3d 153 (2d Cir. 1998).

200. *See* Jota v. Texaco, Inc., 157 F.3d 153, 155-56, 158 (2d Cir. 1998) (concluding that Ecuadoran ambassador possessed apparent authority to assert Ecuador's sovereign immunity from suit in U.S. domestic adjudication). In *Jota*, members of indigenous tribes residing in the Oriente region of Ecuador and Peruvian residents living downstream from the Oriente region brought suit against Texaco in the Southern District of New York alleging that Texaco's oil extraction techniques polluted the rainforests and rivers of Oriente and caused physical harm to the region's inhabitants. *Id.* at 155. The plaintiffs alleged that Texaco's improper oil extraction and petroleum waste disposal techniques caused environmental harm to the Oriente region for a period of nearly thirty years, from 1964 to 1992. *Id.* Texaco countered with a motion to dismiss the complaint on grounds of forum non conveniens, comity, and failure to join the Republic of Ecuador as an indispensable party. *Id.* at 156. PetroEcuador, Ecuador's state-owned oil agency, acquired a 25% share of ownership in the consortium in 1974 and became the sole owner of the consortium by 1992. *Id.* Ecuador's ambassador to the United States formally objected to U.S. jurisdiction of the suit, asserting that the trial was an affront to the national sovereignty of Ecuador and interfered with Ecuador's "paramount interests" in the formulation of its own environmental and industrial policies. *Id.* Plaintiffs responded with various documents signed by members of the Ecuadoran legislature indicating their support for U.S. jurisdiction over the suit against Texaco. *Id.* at 157. In spite of the support of several prominent members of the Ecuadoran National Congress for U.S. adjudication of the plaintiffs' claims, the trial court granted Texaco's motion to dismiss on all three grounds. *Id.*

On appeal, the Court of Appeals for the Second Circuit vacated the orders of the trial court dismissing the complaint, the Ecuadoran plaintiffs' motion for reconsideration, and the Republic of Ecuador's motion to intervene and remanded the case for further consideration. *Id.* at 155. The Second Circuit noted that the district court should have dismissed only those equitable claims which required Ecuador's participation in order to grant relief. *Id.* at 161. The court found the district court's denial of Ecuador's motion to intervene to be justified. *Id.* at 163. The court reasoned that even though the Ecuadoran Attorney General and members of the Ecuadoran legislature sought intervention in the suit, "the official position of the Ecuadoran Ambassador to the United States remained opposed to the litigation and especially to Ecuador's role in it." *Id.* at 162. The court recognized that in general, an ambassador may exercise his authority to "'bind the state that he represents.'" *Id.* (quoting First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 192 (2d Cir. 1989) (explaining traditional ambassadorial authority)). The court further reasoned that even if Ecuador's ambassador did not possess actual authority to assert Ecuador's sovereign immunity, the ambassador "en-

rivers of the Oriente region for a period of nearly thirty years, from 1964 to 1992.[201] Specifically, the plaintiffs asserted that Texaco's improper disposal of toxic oil extraction by-products and oil leakages from the Texaco-constructed Trans-Ecuadoran Pipeline polluted the local environment and caused its residents to suffer various physical maladies, including poisoning and precancerous growths.[202] Additionally, the plaintiffs contended that Texaco dumped large amounts of toxic petroleum by-products from the oil extraction process into local rivers, instead of pumping the toxins back into the emptied wells in accordance with the prevailing industry standards and practices.[203] The plaintiffs also alleged that Texaco engaged in other improper techniques to eliminate the toxic petroleum by-products, "such as burning them, dumping them directly into landfills, and spreading them on the local dirt roads."[204] The plaintiffs sought money damages to remedy the various physical injuries Texaco's environmental pollution allegedly caused.[205] In addition to money damages, the plaintiffs sought widespread "equitable relief to remedy the contamination and spoilation of their properties, water supplies and environment."[206] Texaco countered with a motion to dismiss the complaint on grounds of forum non conveniens, comity, and failure to join the Republic of Ecuador as an indispensable party.[207]

Texaco's subsidiary, Texaco Petroleum Company (TexPet), began drilling for oil in Ecuador's Oriente region in 1965.[208] Once oil was discovered in 1969, TexPet began extracting the petroleum through a consortium jointly owned with Gulf Oil.[209] PetroEcuador, the state-owned oil agency of the Ecuadoran government, began acquiring an ownership interest in the consortium in 1974, becoming the sole owner of the consortium by 1992.[210] Edgar

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joyed apparent authority, and Texaco and the District Court were entitled to rely on his representations unless they were actually aware that he lacked such authority." *Id.* at 163 (citing *First Fidelity*, 877 F.2d at 193 n.2, 194 (employing agency law principles to determine whether Antigua's ambassador possessed apparent authority to borrow money and to agree to consent order that waived Antigua's sovereign immunity and obligated government of Antigua to repay borrowed funds)). Finally, the Second Circuit noted that the district court on remand may "reconsider the issue before it in light of Ecuador's changed litigating position." *Id.* at 155.

201. *Id.* at 155.

202. *Id.* at 155-56.

203. *Id.* at 155.

204. *Id.*

205. *Id.* at 156.

206. *Id.*

207. *Id.*

208. *See id.* (providing brief history of Texaco Petroleum Company's involvement in oil extraction operations in Oriente region of Ecuador).

209. *Id.*

210. *Id.*

Teran, Ecuador's ambassador to the United States, sent a letter to the U.S. Department of State explicitly asserting Ecuador's sovereign immunity from suit in these proceedings.[211] Specifically, Ambassador Teran claimed that the pendant litigation was "an affront to Ecuador's national sovereignty."[212] Ambassador Teran indicated that U.S. adjudication of the Oriente residents' suit against Texaco would impede Ecuador's "paramount interest in formulating its own environmental and industrial policies."[213]

Additionally, counsel representing the Republic of Ecuador filed an amicus brief supporting Texaco's motion to dismiss the complaint of the Oriente residents.[214] The amicus brief informed the trial court of Ecuador's objection to U.S. jurisdiction over the Oriente oil pollution dispute and was accompanied by an affidavit signed by Ambassador Teran reiterating Ecuador's sovereign immunity in this matter.[215] The Ecuadoran ambassador also indicated that the courts in Ecuador were available to adjudicate the disputes in question.[216] Texaco submitted a copy of Ambassador Teran's letter to the court.[217]

Members of Ecuador's legislature apparently disagreed with their nation's assertion of sovereign immunity.[218] Plaintiffs filed three documents signed by representatives of the Ecuadoran National Congress supporting the Oriente residents' complaint against Texaco.[219] The first document was a copy of a letter in which the President of the Ecuadoran National Congress and four committee presidents "wrote to Ecuador's President and Foreign Minister expressing their 'concern' over the position that Ambassador Teran had taken."[220] In particular, the President of the Congress and four committee leaders disapproved of the Ecuadoran administration's bias in favor of the interests of Texaco.[221] The second document was an "official announcement" from Ecuador's President of the Special Permanent Commission on Environmental

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211. *See id.* (discussing Texaco's effort to bolster its motion to dismiss through submission to court of Ambassador Teran's letter asserting Ecuador's sovereign immunity from suit).

212. *Id.*

213. *Id.*

214. *See id.* at 157 (discussing Ecuador's amicus brief filed in support of Texaco's motion to dismiss plaintiffs' complaint).

215. *Id.*

216. *Id.* at 156.

217. *Id.*

218. *See id.* at 157 (noting support of certain members of Ecuadoran National Congress for plaintiffs' action).

219. *Id.*

220. *Id.*

221. *Id.* (quoting letter from high-ranking members of Ecuadoran Congress to Ecuadoran President and Foreign Minister).

Defense.[222] The announcement proclaimed the commission's position that U.S. adjudication of the Oriente plaintiffs' dispute with Texaco was essential in order to ensure a just resolution of the plight of the Oriente plaintiffs.[223] The final document contained a resolution of the Special Permanent Commission on Environmental Defense, stamped with the official seal of the "General Secretaryship of the National Congress," supporting the Oriente plaintiffs in their litigation in the U.S. forum.[224]

In addition to evidence indicative of Ecuadoran congressional intent, there was evidence suggesting that the Ecuadoran executive branch changed its position on Ecuador's sovereign immunity from suit in the Oriente adjudication as well.[225] In an affidavit accompanying Ecuador's motion to intervene after the trial court dismissed the Oriente plaintiffs' complaint, the Attorney General of Ecuador stated that Ecuador sought to intervene in order "to protect the interests of the indigenous citizens of the Ecuadorian Amazon who where seriously affected by the environmental contamination attributed to [Texaco]."[226] The apparent change in Ecuador's position on its sovereign immunity to the Oriente adjudication was reflective of the different policies of Ecuador's newly elected administration.[227]

Notwithstanding the purported intent of members of Ecuador's legislative and executive branches to waive Ecuador's sovereign immunity from suit, the trial court granted Texaco's motion to dismiss on all three grounds.[228] In particular, the trial court noted that plaintiffs' failure to join PetroEcuador and the Republic of Ecuador as indispensable parties constituted an "independently-sufficient reason" for dismissal.[229] The Ecuadoran plaintiffs subsequently filed a motion to reconsider on grounds that the newly elected administration of Ecuador was willing to waive sovereign immunity and intervene in the suit.[230] Counsel for Ecuador filed a motion to intervene accompanied with an affidavit from Ecuador's Attorney General stating his nation's "official judicial position."[231] The trial court dismissed plaintiffs' motion to recon-

222. *Id.*

223. *Id.* (quoting announcement of Special Permanent Commission on Environmental Defense proclaiming its position on proper forum of Oriente litigation).

224. *Id.*

225. *See id.* at 158 (discussing Republic of Ecuador's motion to intervene).

226. *See id.* (describing changed position of Ecuadoran government regarding Ecuador's sovereign immunity in Oriente litigation).

227. *See id.* (noting plaintiffs' contention that Ecuador was now willing to waive sovereign immunity due to election of new administration).

228. *Id.* at 157.

229. *Id.*

230. *Id.* at 158.

231. *Id.*

sider.[232] The court also denied Ecuador's motion to intervene on grounds of untimeliness.[233] Furthermore, because Ecuador was unwilling to be amenable to any potential counterclaims and cross-claims from Texaco and the Peruvian plaintiffs, the trial court found that the Republic of Ecuador had not expressly and unequivocally waived its sovereign immunity.[234]

On appeal, the Court of Appeals for the Second Circuit vacated the orders of the trial court, dismissing the Peruvian and Ecuadoran plaintiffs' complaint and the Ecuadoran plaintiffs' motion for reconsideration.[235] The court also denied the Republic of Ecuador's motion to intervene and remanded the case for further consideration.[236] The court held that the trial court's dismissal of plaintiffs' complaint on grounds of forum non conveniens and comity "was erroneous in the absence of a condition requiring Texaco to submit to jurisdiction in Ecuador."[237] The court reasoned that dismissal on such grounds is warranted only where an alternate forum is available.[238] Without Texaco's submission to jurisdiction in Ecuador, an alternate forum would not exist.[239] The court further held that the trial court erred when it dismissed plaintiffs' complaint for failure to join Ecuador as an indispensable party.[240] The trial court reasoned that "it would be impossible to achieve the extensive equitable relief sought by the plaintiffs" in light of Ecuador's absence as a party to the litigation.[241] The Second Circuit held that the trial court's dismissal of the complaint was erroneous because only those claims which required Ecuador's participation should have been dismissed.[242]

The Second Circuit commented upon the unusual nature of this case, noting that the Republic of Ecuador "initially expressed vigorous opposition to the maintenance of this litigation in a United States Court and now, after a change in government, just as vigorously urges that the litigation proceed here."[243] In spite of evidence indicating that the Ecuadoran legislature and the newly elected administration favored at least a partial waiver of Ecuador's sovereign immunity, the Second Circuit found that "Ecuador's previously

232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.* at 155.
236. *Id.* at 162-63.
237. *Id.* at 155.
238. *Id.* at 158-60.
239. *Id.* at 159.
240. *Id.* at 155.
241. *Id.* at 157.
242. *Id.* at 161.
243. *Id.* at 155.

asserted position on waiver of sovereign immunity justified the earlier denial of intervention."[244] In support of this proposition, the court noted that ambassadors traditionally possess the authority to represent their nation's interests and official positions before foreign judiciaries.[245] Even though members of the Ecuadoran National Congress and the Attorney General of Ecuador expressed their support for a waiver of Ecuador's immunity, "the official position of the Ecuadoran Ambassador to the United States remained opposed to the litigation and especially to Ecuador's role in it."[246] Counsel for the Republic of Ecuador maintained that, under the constitution of Ecuador, the attorney general is "the only judicial representative of the State."[247] The Second Circuit interpreted this provision of Ecuador's constitution to apply only to domestic legal matters within the borders of Ecuador.[248] Finally, the court reasoned that, even if Ambassador Teran was not authorized to assert or waive Ecuador's sovereign immunity, he "enjoyed apparent authority, and Texaco and the District Court were entitled to rely on his representations unless they were actually aware that he lacked such authority."[249]

The court concluded its opinion by noting that on remand the trial court may "reconsider the issue before it in light of Ecuador's changed litigating position."[250] The Republic of Ecuador should be allowed the opportunity to revise its position if it so chooses, even "though Ecuador's previously asserted position on waiver of sovereign immunity justified the earlier denial of intervention."[251]

3. Heaney v. Government of Spain

In a pre-FSIA decision, the Court of Appeals for the Second Circuit recognized the authority of a foreign ambassador to assert the sovereign's immunity

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244. *See id.* at 163 (finding that trial court was justified in its decision to deny Ecuador's motion to intervene on basis of Ecuadoran ambassador's previously asserted position declaring Ecuador's sovereign immunity from suit).

245. *See id.* at 162-63 (noting traditional authority of ambassador to represent ambassador's nation's interests and to assert official positions before foreign courts).

246. *Id.* at 162.

247. *Id.* at 162-63.

248. *See id.* at 163 (interpreting provision of Ecuadoran constitution).

249. *See id.* (declaring that Ambassador Teran possessed apparent authority to waive Ecuador's sovereign immunity) (citing First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 193 n.2, 194 (2d Cir. 1989) (employing agency law principles to determine whether Antigua's ambassador possessed apparent authority to borrow money and to agree to consent order which waived Antigua's sovereign immunity and obligated government of Antigua to repay borrowed funds)).

250. *Id.* at 155.

251. *Id.* at 163.

from suit in domestic U.S. adjudications.[252] The court, in *Heaney v. Government of Spain*,[253] decided the issue concerning whether the government of Spain and its consular representative were immune from suit in a United States court based upon a breach of contract cause of action.[254] The plaintiff was an American attorney who represented a group of Northern Ireland residents in civil rights litigation against the United Kingdom before the Human Rights Commission of the Council of Europe.[255] The plaintiff alleged that the government of Spain, desiring to embarrass Great Britain through the exposure of alleged civil rights abuses as part of a Spanish effort to expel the British government from neighboring Gibraltar, contracted for the services of plaintiff.[256] Specifically, the plaintiff alleged that the Spanish government hired plaintiff to publicize "on a world wide basis" the British government's suppression of civil rights and the lack of free elections in Northern Ireland, targeting in particular the United Nations, the Council of Europe, and the United States Congress.[257] When the Spanish government refused to reimburse the plaintiff for his services, the plaintiff brought an action against Spain and its Consular General for breach of contract in the Western District of New York.[258]

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252. *See* Heaney v. Gov't of Spain, 445 F.2d 501 (2d Cir. 1971) (concluding that Spanish government and its consular representative were immune from suit by virtue of sovereign and consular immunity for breach of contract with American attorney to reimburse attorney $50,000 for his efforts to publicize British suppression of civil rights in Northern Ireland).

253. 445 F.2d 501 (2d Cir. 1971).

254. *See* Heaney v. Gov't of Spain, 445 F.2d 501, 506 (2d Cir. 1971) (affirming that Spanish government and its consular representative were immune from suit by virtue of sovereign and consular immunity for breach of contract with American attorney to pay $50,000 in return for his efforts to publicize British suppression of civil rights in Republic of Northern Ireland). In *Heaney*, the Spanish government allegedly contracted for the services of the plaintiff, an American attorney, to globally publicize British civil rights abuses in Northern Ireland in order to further Spanish efforts to expel the United Kingdom from neighboring Gibraltar. *Id.* at 502. When the Spanish government refused to reimburse the plaintiff for his services, the plaintiff brought an action against Spain and its Consular General for breach of contract in the Western District of New York. *Id.* at 501-02. In an affidavit, Spain's ambassador to the United States officially declined to waive his nation's sovereign immunity from U.S. adjudication of the plaintiff's claim. *Id.* at 502 n.1. The trial court subsequently granted Spain's motion to dismiss due to lack of jurisdiction over the matter. *Id.* at 502.

On appeal, the Court of Appeals for the Second Circuit affirmed the district court's dismissal of the complaint. *Id.* at 501. The court found the contract between the Spanish government and the plaintiff to be a diplomatic activity falling within the traditional realm of public and political acts protected by sovereign immunity principles. *Id.* at 503 (citing Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964)). Additionally, the Second Circuit noted that the Spanish ambassador's affidavit "was more than sufficient to raise the issue of immunity by motion." *Id.* at 506 n.5.

255. *See id.* at 501-02 (providing background and procedural history).

256. *Id.* at 502.

257. *Id.*

258. *Id.* at 501-02.

In the lower court proceedings, Spain moved to dismiss on grounds that the court lacked subject matter jurisdiction based upon the doctrines of sovereign and consular immunity.[259] In support of the Spanish government's motion to dismiss, Spain's ambassador to the United States, His Excellency Jaime de Arguelles y Armada, submitted an affidavit asserting the Spanish government's sovereign immunity from suit.[260] Specifically, the Spanish ambassador's affidavit stated that "I have been instructed, as Ambassador of my country, to make known to the Court that Spain most respectfully declines to waive its sovereign immunity or to consent to the jurisdiction of the Court."[261] The ambassador's affidavit also asserted that the Consul General of Spain was acting in his official capacity as a representative of the Spanish government during any meetings held with plaintiff.[262] The trial court subsequently granted Spain's motion to dismiss on sovereign and consular immunity grounds.[263]

On appeal, the Court of Appeals for the Second Circuit affirmed the order of the trial court.[264] The court recognized that "the contemporary rationale for sovereign immunity is the avoidance of possible embarrassment to those responsible for the conduct of the nation's foreign relations."[265] The Second Circuit, in the pre-FSIA era, followed the pre-FSIA practice of granting deference to the U.S. Department of State's policy pronouncements in its determination of a foreign sovereign's scope of immunity in domestic adjudications.[266] The court recognized, however, that there are several categories of "strictly political or public acts" which plainly fall into the traditional realm protected by sovereign immunity principles.[267] Such acts include internal administrative acts, legislative acts, acts concerning the armed forces and diplomatic activity, and public loans.[268] The court regarded the contract between the Spanish government and plaintiff as clearly falling within the diplomatic activity category.[269] In upholding the district court's dismissal of the American attorney's complaint on grounds of Spanish sovereign and consular immunity, the

259. *Id.* at 502.

260. *Id.* at 502 n.1.

261. *Id.*

262. *Id.*

263. *Id.* at 502.

264. *Id.* at 506.

265. *Id.* at 503.

266. *Id.*

267. *Id.* (citing Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964)).

268. *Id.*

269. *Id.*

Second Circuit noted that the Spanish ambassador's affidavit "was more than sufficient to raise the issue of immunity by motion."[270]

C. Ninth Circuit: Phaneuf v. Republic of Indonesia

In *Phaneuf v. Republic of Indonesia*,[271] the Court of Appeals for the Ninth Circuit expressed disagreement with the Second Circuit's holding in *First Fidelity* "that jurisdiction existed over the foreign state if the district court found that the foreign state's ambassador acted with apparent authority."[272] The *Phaneuf* court addressed whether Indonesia's ambassador to Syria, Ambassador Mawardi, impliedly waived Indonesia's immunity from suit under the commercial activities exception to the FSIA when he certified the validity of promissory notes that Indonesia's National Defense Security Council (NDSC) had purportedly issued.[273] Members of NDSC created approximately 505 promissory notes worth an estimated value of over three billion U.S. dollars.[274] Each note bore the official NDSC crest and the signature of two members of the NDSC.[275] Hartomo, the principal maker of the promissory

270. *Id.* at 506 n.5.

271. 106 F.3d 302 (9th Cir. 1997).

272. *See* Phaneuf v. Republic of Indonesia, 106 F.3d 302, 308 n.4 (9th Cir. 1997) (holding that foreign state's agent must have acted with actual authority in order to invoke commercial activity exception to sovereign immunity against foreign state (citing First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 194-96 (2d Cir. 1989))). In *Phaneuf*, the plaintiff brought suit in the District Court of Arizona to recover payment on several promissory notes that the Republic of Indonesia's National Defense Security Council (NDSC) purportedly issued. *Id.* at 304. Each note bore the official NDSC crest and the signature of two members of the NDSC. *Id.* While participating in a signing ceremony in Damascus, Indonesia's ambassador to Syria allegedly confirmed the authenticity of the NDSC promissory notes. *Id.* However, because the NDSC notes were actually worthless, the government of Indonesia instructed its banks to refuse to honor them. *Id.* The Republic of Indonesia asserted sovereign immunity from suit under the FSIA. *Id.* at 305. The district court subsequently dismissed the complaint for lack of jurisdiction. *Id.*

On appeal, the Court of Appeals for the Ninth Circuit examined the plain meaning of the FSIA's language to determine whether the commercial activity exception applied. *Id.* at 307. The court concluded that Indonesia's ambassador must have acted with the actual authority of the Indonesian government in order to trigger the exception. *Id.* The commercial activity exception to sovereign immunity requires an act of the foreign state. *Id.* The court reasoned that because "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.'" *Id.* at 307-08. Because unofficial acts are not acts of the foreign state, mere apparent authority will not suffice. *Id.* at 308. The Ninth Circuit remanded to the district court in part to determine whether the ambassador of Indonesia acted with the actual authority of his government when he certified the validity of the purported NDSC promissory notes. *Id.*

273. *See id.* at 304, 306 (addressing issue of whether Indonesian ambassador acted with actual authority of Indonesian government).

274. *Id.* at 304.

275. *Id.*

notes, traded the NDSC notes for promissory notes that a Syrian financier had issued.[276] In August 1985, Mawardi, the Republic of Indonesia's ambassador to Syria, participated in a Damascus signing ceremony.[277] During the signing ceremony, Ambassador Mawardi allegedly "confirmed that Hartomo represented the Indonesian government and that the 'NDSC notes' were 'Official/Governmental.'"[278] The promissory notes obtained from the Syrian financier in exchange for the NDSC promissory notes "were later discovered to be worthless."[279] The plaintiff held several of these promissory notes purportedly issued by the NDSC.[280]

The government of Indonesia claimed that it was unaware of the existence of the NDSC notes until late 1985.[281] The Indonesian government, having become aware of the existence of the illicit notes, "promptly determined that these notes were unauthorized and invalid under Indonesian law."[282] Subsequently, the Secretary General of NDSC notified Bank Indonesia that the notes in question were invalid because "neither the NDSC nor any of its officials had authority to issue promissory notes."[283] "[T]he NDSC issued a press release which disavowed NDSC responsibility for the notes, stating that responsibility lay with the persons who signed the notes."[284] Bank Indonesia consistently declined to honor the promissory notes in question.[285]

Plaintiff Phaneuf brought an action in the District of Arizona to recover payment on the promissory notes he allegedly obtained from the NDSC.[286] The Republic of Indonesia moved to dismiss Phaneuf's complaint on sovereign immunity grounds under the FSIA.[287] The trial court denied the Indonesian government's motion to dismiss because "defendants had not established a prima facie case of immunity under the FSIA."[288]

On appeal, the Court of Appeals for the Ninth Circuit recognized that "[t]he FSIA is the sole basis of subject matter jurisdiction over suits involving foreign states and their agencies and instrumentalities."[289] The court noted

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 304.
289. *Id.* (citing Randolph v. Budget Rent-A-Car, 97 F.3d 319, 323 (9th Cir. 1996)).

that foreign sovereigns are immune from suit under the FSIA unless one of the FSIA's exceptions applies to the sovereign.[290] By examining the plain language of the FSIA, the court reasoned that foreign nations are entitled to a presumption of immunity in U.S. courts.[291] Therefore, the Indonesian government and NDSC were not required to establish a prima facie case of immunity under the FSIA.[292]

The court found the FSIA's reference to "'a commercial activity *of the foreign state*'" to be a prerequisite to invocation of the commercial activities exception.[293] Thus, for the commercial activities exception to apply, the foreign state must engage in commercial activity.[294] In order to determine whether the commercial activities exception applied, the court examined the plain meaning of the statutory language employed in the FSIA.[295] The court reasoned 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.'"[296] When a foreign official acts beyond the scope of actual authority, the official's acts are not authorized by the sovereign.[297] An ambassador or other government official acts beyond the scope of his official authority when the ambassador or official engages in any activity or performs any function that the foreign sovereign has not empowered the ambassador or official to do.[298] Because the foreign sovereign does not authorize such diplomatic ultra vires actions, there can be no official foreign state activity for FSIA purposes.[299] Because unofficial acts do not constitute official activities of the foreign state under the FSIA, mere apparent authority is not sufficient to bind the sovereign to the agent's actions.[300]

The Ninth Circuit therefore concluded "that the foreign state retains its immunity when its agent acts outside the scope of his authority."[301] The court further recognized that a foreign nation's issuance of public debt is a com-

290. *Id.* at 305-06.

291. *Id.* at 306.

292. *Id.*

293. *Id.* (quoting 28 U.S.C. § 1605(a)(2)(1994)).

294. *Id.*

295. *Id.* at 307 (citing Straw v. A P Green, Inc., 38 F.3d 448, 452 (9th Cir. 1994)).

296. *Id.* at 307-08.

297. *Id.* at 308 (citing Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).

298. *See id.* at 306 (citing Trajano v. Marcos, 978 F.2d 493, 497 (9th Cir. 1992) (holding FSIA applicable to foreign official acting in official capacity but not to official acting beyond scope of official's authority)).

299. *See id.* at 308 (discussing scope of agent actions that constitute activity of foreign state).

300. *Id.*

301. *Id.*

mercial act falling under the commercial activities exception.[302] Foreign government's engage in various activities through their agents.[303] An action of a governmental agent or representative constitutes official foreign state activity when the agent or representative acts within the scope of government sanctioned actual authority.[304] Thus, if Ambassador Mawardi did not possess the Indonesian government's actual authority to certify the validity of the bogus promissory notes, then the Indonesian government retained its sovereign immunity from suit.[305]

V. Analysis

A. Eleventh Circuit

The Eleventh Circuit's approach in *Aquamar*, recognizing a presumption of ambassadorial authority to waive sovereign immunity absent compelling contrary evidence, best comports with the policy considerations underlying the FSIA.[306] The FSIA was designed to provide clear standards as to when a foreign nation may assert sovereign immunity as an affirmative defense to suit in U.S. courts.[307] These clear standards augment the potential for uniform and predictable results by eliminating the ad hoc arbitrariness that frequently characterized sovereign immunity determinations during the pre-FSIA reign of the Tate Doctrine.[308] Acknowledgment of an ambassador's inherent powers to assert or waive immunity would provide a clear rule for courts to follow.[309] Even if there was evidence that Ecuador's ambassador had received permission from his government to waive sovereign immunity in *Aquamar*, the Eleventh Circuit did not rely on the ambassador's actual or apparent authority in making its ruling, but based its decision upon the recognized presumption.[310]

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302. *Id.* at 307 (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612-17 (1992)).

303. *Id.*

304. *See id.* at 307-08 (discussing agent actions that constitute activity of foreign state).

305. *See id.* (holding that agent must act within actual authority of foreign state in order for commercial activity exception of FSIA to apply).

306. *See generally* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279 (11th Cir. 1999) (holding that under FSIA, courts should presume that ambassador possesses authority to appear before them and waive sovereign immunity absent compelling evidence to contrary).

307. *See* H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (providing legislative history of FSIA).

308. *See generally supra* notes 53-73 and accompanying text (describing U.S. substantive sovereign immunity law pre-FSIA).

309. *See Aquamar*, 179 F.3d at 1298 (discussing congressional intent to create uniform and predictable standards applicable to suits involving foreign governments and their agencies).

310. *See id.* at 1300 (noting that President Duran Ballen of Ecuador filed affidavit with court confirming Ambassador Teran's authorization to waive Ecuador's sovereign immunity from suit in present case).

Requiring courts to examine the domestic law of a foreign nation to determine whether its ambassador may waive sovereign immunity in U.S. adjudications would greatly hinder the uniformity and predictability so highly valued by the framers of the FSIA.[311] Such a judicial inquiry into the local laws of other countries would create a significant "roadblock" in the middle of the FSIA superhighway, impeding the progress of the American judicial system towards the achievement of uniform and predictable results.[312] Because individual courts are likely to be unfamiliar with the nuances of any given foreign nation's domestic laws, hearings to interpret the meaning and applicability of such laws would result in protracted and "frequently inconclusive inquiries into conflicting interpretations of foreign law."[313] Such inconclusive inquiries would create the very same arbitrariness and ad hoc decisionmaking in the judiciary that Congress sought to eliminate through the FSIA's removal of sovereign immunity determinations from the executive to the judicial branch.[314]

Various policy considerations appear to support the Eleventh Circuit's position. Prolonged and unpredictable inquiries into whether a foreign nation's ambassador possesses authority to waive immunity would decrease judicial economy and efficiency while raising the costs of litigation for litigants. Increased litigation costs, coupled with the lack of predictable results, would likely chill potential private litigants from bringing suit against foreign governments and their state-owned enterprises. This chilling effect would disproportionately deter private parties with limited resources, such as small businesses, entrepreneurs, and individual plaintiffs who lack the time, money, and expertise to investigate the domestic law of a foreign nation before initiating suit.

The Eleventh Circuit further argued that requiring an examination of an ambassador's actual authority in a sovereign immunity determination would allow litigants to manipulate the process and thus functionally defeat the FSIA's goal to eliminate party manipulation of sovereign immunity determinations at the diplomatic level.[315] A foreign state could wait until after it has

311. *Id.* at 1298.

312. *Id.*

313. *Id.*

314. *Cf.* H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (stating that principal purpose of FSIA is to transfer determinations of sovereign immunity from executive to judicial branch order to to reduce foreign policy implications of immunity determinations and to assure litigants that such determinations are made on purely legal grounds and under procedures that insure due process).

315. *See* Aquamar, S.A.V. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1298 (11th Cir. 1999) (citing George Kahale III, *State Loan Transactions: Foreign Law Restrictions on Waivers of Immunity and Submissions to Jurisdiction*, 37 BUS. LAW. 1549, 1561 n.70 (1982)

unsuccessfully defended on the merits to attempt to invoke immunity.[316] The foreign state would thus possess an unfair advantage over private litigants, reaping the fruits of the availability of adjudicating its claims in U.S. courts while avoiding the concomitant obligations.[317] The Eleventh Circuit further reasoned that private parties opposed to the presence of a foreign state in the litigation may attempt to persuade the court to deny the foreign state the opportunity to appear and defend itself on the merits because the foreign state's own law prohibits it from doing so.[318] However, while private parties may occasionally use this tactic,[319] they typically seek the court to obtain jurisdiction over foreign states so that the private parties may litigate their claims against them.[320]

The Eleventh Circuit's *Aquamar* decision also furthers the FSIA's goal to bring U.S. sovereign immunity law into conformity with the laws of the majority of nations in the international community.[321] Fundamental international law principles deem an ambassador to possess "an extraordinary role and powers."[322] Such ambassadorial powers include representation of the sending sovereign in the receiving state, protection of the interests of the sovereign state and its nationals abroad, and representation of the sovereign state in international organizations.[323] Ambassadors have also traditionally possessed expansive authority to make decisions that bind the nations they represent.[324] The Eleventh Circuit further noted that international tribunals have traditionally presumed an ambassador to possess the authority to officially represent the sending sovereign's positions and interests before foreign judiciaries.[325] Through its refusal to conduct intrusive inquiries into the domestic laws of foreign states to determine an ambassador's authority to

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(asserting that foreign state must authorize governmental officer to represent foreign state's interests in breach of contract disputes)).

316. *Id.*

317. *See id.* (noting disadvantages from reliance on actual authority to determine whether ambassador is authorized to waive sovereign immunity).

318. *Id.*

319. *See id.* at 1282 (noting that plaintiff shrimp farmers sought prevention of Ecuador and PNB from joining suit to prevent removal of case to federal court).

320. *See supra* note 9 (collecting cases).

321. *Cf.* H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606, 6610 (providing goals and purpose of FSIA).

322. *See* Aquamar, S.A.V. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1295 (11th Cir. 1999) (analyzing traditional role and authority of ambassador in context of fundamental principles of international law).

323. *Id.* at 1295-96.

324. *Id.* at 1296.

325. *Id.*

waive immunity, the Eleventh Circuit promoted the FSIA goals of fostering harmonious international relations[326] and according foreign nations treatment in U.S. courts similar to the treatment the U.S. government would prefer to receive in the courts of those foreign nations.[327]

B. Second Circuit

The Second Circuit's approach to ambassadorial waiver of immunity, however, does not further FSIA policies of uniform and predictable application of U.S. sovereign immunity law. The *First Fidelity* court's application of the forum's agency law principles to determine whether an ambassador has apparent authority to waive immunity significantly impairs the FSIA's goal of uniform application of U.S. sovereign immunity law.[328] For example, under New York agency law, to establish apparent authority a plaintiff must demonstrate that the plaintiff fulfilled the duty of reasonable inquiry as well as demonstrate reliance on the principal's manifestations of the agent's authority.[329] Thus, whether an ambassador possesses authority to explicitly waive his nation's sovereign immunity may entirely depend upon the forum of the litigation or the situs of the event giving rise to suit.[330] Uniformity and predictability are destroyed as courts resolve questions of ambassadorial authority to assert or waive immunity on an ad hoc case by case basis.[331] Private litigants may be chilled from bringing suit against foreign governments and their instrumentalities due to the uncertainty of whether they can meet the elements of apparent authority in a particular forum.[332] As Justice Newman indicated in his dissenting opinion, a party who contracts with a foreign nation's ambassador to supply goods or services "expects payment, not an op-

326. *See id.* at 1295 (stating that one purpose of FSIA is to promote harmonious international relations) (citing Pere v. Nuovo Pignone, Inc., 150 F.3d 477, 480 (5th Cir. 1998) (discussing purposes of FSIA in context of wrongful death cause of action against Italian state-owned manufacturer)).

327. *See id.* (citing Williams v. Shipping Corp. of India, 489 F. Supp. 526, 528 (E.D. Va. 1980) (noting that FSIA accords foreign nations same type of sovereign immunity U.S. government receives in U.S. courts as well as reciprocal immunity U.S. expects before foreign tribunals), *aff'd*, 653 F.2d 875 (4th Cir. 1981)).

328. *Cf.* First Fid. Bank, N.A. v. Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 197 (2d Cir. 1989) (Newman, J., dissenting) (arguing for creation of uniform body of federal law to determine authority of ambassador to waive sovereign immunity).

329. *See id.* at 193-94 (discussing New York agency law).

330. *Cf. id.* at 197 (Newman, J., dissenting) (arguing for creation of uniform body of federal law to determine authority of ambassador to waive sovereign immunity).

331. *Cf. id.* (Newman, J., dissenting) (stating that foreign states are entitled to expect uniform body of law).

332. *Cf. id.* at 197-99 (Newman, J., dissenting) (concluding that majority's ruling will impose hardships on third parties).

portunity to persuade a trial court that its ignorance of an ambassador's lack of actual authority was not willful."[333]

The Second Circuit's approach in *First Fidelity* also impedes the FSIA's underlying policies of promoting harmonious international relations and comity.[334] Suppliers of goods and services are likely to become unwilling to extend credit to foreign governmental instrumentalities without making "potentially intrusive and resented inquiries" into ambassadorial authority.[335] The court's ruling will jeopardize diplomatic relations with foreign governments because such "foreign governments generally will not appreciate inquiries from American vendors as to the authority of their ambassadors to obtain goods or services."[336] After all, foreign governments send their ambassadors to the United States, just as the United States sends its ambassadors to foreign countries, in the expectation that their ambassadors can carry out the normal incidents of living in the host country without undue infringement.[337]

While the *Aquamar* court distinguished itself from *First Fidelity* on grounds that the latter case involved a waiver of immunity as part of a loan agreement and consent order, both cases are in reality very similar.[338] Both *Aquamar* and *First Fidelity* revolve around a foreign ambassador's waiver of his nation's sovereign immunity to domestic adjudication before a U.S. court.[339] Both contemplate how to determine a foreign ambassador's authority to *explicitly waive* sovereign immunity.[340] Thus, the distinction between these two cases truly is without a difference. In fact, the FSIA specifically states that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication."[341]

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333. *See id.* at 199 (Newman, J., dissenting) (asserting that majority's application of apparent authority principles in determination of ambassadorial authorization to raise or waive immunity will create uncertainty for potential litigants).

334. *See supra* notes 321-27 and accompanying text (discussing FSIA policy).

335. *See* First Fid. Bank, N.A. v. Antigua & Barbuda – Permanent Missions, 877 F.2d 189, 199 (2d Cir. 1989) (Newman, J., dissenting) (exploring ramifications of application of apparent authority to determination of ambassadorial power to waive immunity and to enter consent decree obligating foreign state to repay loan).

336. *Id.*

337. *Id.*

338. *See* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1299 (11th Cir. 1999) (distinguishing case from Second Circuit opinion in *First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission*, 877 F.2d 189 (2d Cir. 1989)).

339. *See supra* notes 97-116, 163-78 (discussing background and procedural history of *Aquamar* and *First Fidelity* cases).

340. *See supra* notes 97-116, 163-78 (discussing background and procedural history of *Aquamar* and *First Fidelity* cases).

341. 28 U.S.C. § 1605(a)(1) (1994).

Nowhere in this waiver provision does the statute mention the context surrounding the explicit or implied waiver. In the FSIA's legislative history, Congress provides two examples of an explicit waiver of sovereign immunity.[342] A foreign state may renounce its immunity by treaty with the U.S. or waive its immunity in a contract with a foreign party.[343] The first example, waiver by treaty, involves one of an ambassador's traditional international functions.[344] The second example, waiver by contract, represents an ordinary commercial matter.[345] Congress recognized the validity of the express waivers in both examples without distinguishing between them or suggesting different standards for the applicability of the waivers in each scenario.[346]

The Second Circuit's reasoning in *First Fidelity* is therefore "flawed" because it is based upon an irrelevant distinction.[347] The Second Circuit's opinion "neither comports with the functions of ambassadors, for they conduct affairs in the international and domestic forums, nor does it comport with the public's view" of traditional ambassadorial powers.[348] The paradoxical result of the court's decision is that the ambassador possesses the authority to conclude international treaties but may or may not possess authority to procure a loan to finance embassy repairs.[349]

The *Jota* case is very similar to *Aquamar* because both cases involve the Ecuadoran ambassador's authority to represent his nation's position on immunity to a domestic U.S. adjudication.[350] The main difference between

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342. *See* H.R. REP. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 (providing examples of explicit waivers).

343. *Id.*

344. *Id.*; *see* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1294-95 (11th Cir. 1999) (exploring traditional roles and powers of ambassador).

345. *See* H.R. REP. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 (providing examples of explicit waivers); *see also* First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 197 (2d Cir. 1989) (Newman, J., dissenting) (arguing for development of federal common law on foreign states' United Nations ambassadorial authority to bind foreign state in ordinary commercial matters).

346. *See* H.R. REP. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 (providing examples of explicit waivers).

347. *Cf.* Michael D. Anderson, Comment, *Ambassador Status Is One Factor in Determining Agent's Authority to Waive Immunity,* First Fidelity v. Government of Antigua & Barbuda, *877 F.2d 189 (2d Cir. 1989)*, 14 SUFFOLK TRANSNAT'L L. REV. 286, 298 (1990) (critiquing Second Circuit's decision in *First Fidelity* because it does not comport with traditional conceptions of ambassadorial authority).

348. *Id.*

349. *Id.*

350. *Compare* Jota v. Texaco, Inc., 157 F.3d 153, 163 (2d Cir. 1998) (concluding Ecuadoran ambassador possessed apparent authority to assert Ecuador's sovereign immunity from suit in U.S. domestic adjudication), *with* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179

Jota and *Aquamar* is that the Second Circuit in *Jota* considered whether Ambassador Teran could assert Ecuador's sovereign immunity from suit, not whether he could waive it.[351] The Second Circuit in *Jota* appeared close to adopting inherent agency principles in its determinations of Ecuador's ambassador's authorization to waive sovereign immunity.[352] In fact, the *Jota* court acknowledged Ambassador Teran as representing the "official position" of the Ecuadoran government in spite of the Ecuadoran legislature's and attorney general's expressed intent to the contrary.[353] However, regardless of whether Ambassador Teran's power to assert immunity derived from actual authorization or from authority inherent in his position as ambassador, the Second Circuit concluded that he enjoyed apparent authority to assert sovereign immunity from suit on behalf of the government of Ecuador.[354] The Second Circuit thus acknowledged that apparent authority principles applied to an ambassador's traditional international role as well as the ambassador's engagement in commercial matters.[355] The Second Circuit's opinion in *Jota* is thus further evidence that the *First Fidelity* distinction between traditional international ambassadorial authority and commercial activities is flawed in the context of explicit waivers. Furthermore, under the FSIA, explicit waivers are valid regardless of whether they are made in a treaty or as part of a commercial transaction.[356]

Through reliance on apparent authority principles to determine ambassadorial authority to waive sovereign immunity in *Jota*, the Second Circuit continues to undermine FSIA policies.[357] Reliance on the agency law of the forum increases the probability for disuniformity and unpredictable results. The Second Circuit's adherence to an apparent authority analysis also negatively impacts the FSIA objectives to promote harmonious international relations and reciprocal legal treatment abroad.

F.3d 1279, 1299 (11th Cir. 1999) (applying presumption under FSIA principles to conclude that Ecuadoran ambassador possessed authority to waive Ecuador's sovereign immunity from suit in U.S. domestic adjudication).

351. *See Jota*, 157 F.3d at 155-58 (providing historical background and procedural history).

352. *See id.* at 162-63 (recognizing ambassador's traditional authority to represent foreign state's position before domestic tribunals).

353. *Id.*

354. *See id.* at 163 (concluding ambassador possessed apparent authority to assert sovereign immunity).

355. *See id.* (stating that ambassador has authority to bind state that ambassador represents).

356. *See supra* notes 342-46 and accompanying text (discussing explicit waiver exception to general rule of sovereign immunity).

357. *See supra* notes 328-37 and accompanying text (exploring implications of *First Fidelity* decision on FSIA policies).

Perhaps the Second Circuit will soon follow the Eleventh Circuit's lead in *Aquamar* and apply inherent agency law principles to future determinations. In the Second Circuit's pre-FSIA *Heaney* decision, the court recognized the authority of an ambassador to assert his nation's sovereign immunity from suit.[358] The court noted that the Spanish ambassador's affidavit claiming sovereign immunity from suit "was more than sufficient to raise the issue of immunity by motion."[359] The Second Circuit thus has a long history of recognizing ambassadorial authority to waive or assert sovereign immunity.[360]

C. Ninth Circuit

In *Phaneuf*, the Ninth Circuit expressed disagreement with the Second Circuit's decision in *First Fidelity* to apply apparent authority principles to the determination of an ambassador's authorization to waive sovereign immunity on behalf of the nation the ambassador represents.[361] Specifically, the court asserted that an ambassador must act with actual instead of apparent authority to implicitly waive the sovereign's immunity from suit under the FSIA's commercial activities exception.[362] However, *First Fidelity* did not involve an implied waiver of immunity.[363] Antigua's ambassador to the United Nations *expressly* waived Antigua's sovereign immunity in a domestic judicial proceeding.[364] Therefore, the Antiguan ambassador's conduct fell under the waiver provisions of the FSIA.[365]

The *Phaneuf* court's inquiry into the actual authority of an ambassador to bind the nation the ambassador represents undermines FSIA policies.[366]

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358. *See* Heaney v. Gov't of Spain, 445 F.2d 501, 502-06 (2d Cir. 1971) (affirming immunity of Spanish government and consular representative from suit for breach of contract with American attorney allegedly hired to publicize British suppression of civil rights in Northern Ireland).

359. *Id.* at 506 n.1.

360. *See id.* (citing cases in agreement).

361. *See* Phaneuf v. Republic of Indonesia, 106 F.3d 302, 308 n.4 (9th Cir. 1997) (holding that foreign state's ambassador must act with actual authority to invoke commercial activity exception to sovereign immunity against foreign state) (expressing disagreement with First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 194-96 (2d Cir. 1989)).

362. *Id.*

363. *See* First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda – Permanent Mission, 877 F.2d 189, 190-91 (2d Cir. 1989) (stating that ambassador explicitly waived immunity).

364. *Id.*

365. *See* 28 U.S.C. § 1605(a)(1) (codifying waiver exception to sovereign immunity).

366. *See supra* notes 307-20 and accompanying text (examining effect on FSIA of judicial inquiry into actual authority of ambassador to waive sovereign immunity).

Such intrusive inquiries into another nation's laws detract from the uniformity and predictability of the judicial process. Protracted and prolonged proceedings would result as inexperienced courts attempt to interpret strange and foreign laws. Because different courts are likely to reach different conclusions on the meaning of foreign laws, judicial determinations into an ambassador's actual authority are likely to be arbitrary and unpredictable. Additionally, parties to the litigation may attempt to exploit the process and thus functionally defeat the FSIA's goal to eliminate overbearing diplomatic manipulation in sovereign immunity determinations.

VI. Conclusion

This Note concludes with a recommendation that the federal and state judiciaries adopt the Eleventh Circuit's approach in *Aquamar* when making determinations into ambassadorial waiver of a foreign state's sovereign immunity to adjudication in U.S. courts. Specifically, courts should presume that an ambassador possesses the sending state's authorization to waive sovereign immunity in domestic adjudications.[367] Such presumption of an ambassador's authority to waive sovereign immunity best comports with the policy considerations underlying the FSIA.[368]

Judicial recognition of an ambassador's inherent powers to assert or waive immunity will provide a clear rule for courts to follow and will facilitate the FSIA goal of establishing unambiguous standards for determining a foreign nation's amenability to suit in a domestic forum. These clear and unambiguous rules and standards will buttress the FSIA's pursuit of uniformity and predictability in U.S. substantive sovereign immunity law. Finally, the *Aquamar* approach furthers the FSIA's goal to bring U.S. sovereign immunity law into conformity with the laws of most foreign states comprising the international community of nations. This conformity will augment the U.S. ability to establish and maintain harmonious relations abroad while according to foreign nations back home in the United States the same type of treatment the United States would expect to be accorded under their laws.

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367. *See* Aquamar, S.A. v. Del Monte Fresh Produce, N.A., 179 F.3d 1279, 1299 (11th Cir. 1999) (holding that under FSIA courts should presume that foreign ambassador possesses authority to waive sovereign immunity absent compelling evidence to contrary).

368. *See supra* notes 74-95 and accompanying text (discussing congressional policy underlying enactment of FSIA).