

Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments

Barbara A. Silver*

I. INTRODUCTION

Under present judicial principles, United States courts may give conclusive effect to virtually all types of final judgments issued by foreign jurisdictions. However, pursuant to a concept called the "revenue rule," American tribunals refuse to acknowledge revenue laws of other countries.¹ The revenue rule prevents recognition or enforcement² of a wide range of judicial rulings. It can prevent a forum from entertaining a suit to enforce a foreign decree for taxes,³ for collection of the assessments themselves,⁴ for recovery of debts

* Barbara A. Silver is a law clerk to the Honorable Richard W. Goldberg, of the United States Court of International Trade. She received her J.D. degree from the University of California, Hastings College of the Law in June, 1983 and her LL.M. in International Legal Studies from New York University School of Law in May, 1992.

¹ Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979); Banco Frances E Brasileiro S.A. v. Doe, 331 N.E.2d 502 (N.Y. 1935), *cert. denied*, 423 U.S. 867 (1975); Banco Do Brasil, S.A. v. A. C. Israel Commodity Co., 190 N.E.2d 235 (N.Y. 1963), *cert. denied*, 376 U.S. 906 (1964); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1986) [hereinafter RESTATEMENT].

² There is a distinction between the notions of recognition and enforcement of a judgment. A foreign decision must be entitled to recognition in order to be enforced in the United States. However, recognition of an adjudication affects a variety of other situations as well, such as the res judicata effect of the initial ruling, habitual criminal statutes, or double jeopardy issues. RESTATEMENT, *supra* note 1, § 481 cmt. b. This difference is not of essential importance in the context of the revenue rule since courts decline both recognition and enforcement of foreign revenue laws.

³ E.g., *Gilbertson*, 597 F.2d at 1161. In *Gilbertson*, a Canadian province sought collection in the United States on a judgment for logging taxes assessed against U.S. citizens acting in Canada.

⁴ See *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929) (L. Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930); *Colorado v. Harbeck*, 133 N.E. 357 (N.Y. 1921); *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946) (all discussing collection of tax assessments in connection with actions between two U.S. states). In *Moore*, a county treasurer in Indiana attempted to recover taxes in New York from the estate of a decedent who had previously lived in Indiana. The New York circuit court affirmed the district court's dismissal of the complaint. *Harbeck* involved a suit in New York by Colorado for transfer taxes

arising out of other fiscal claims,⁵ as well as limit defenses which are based on alien revenue laws.⁶

Under this doctrine, United States courts⁷ also generally decline recovery by other nations on final decisions for taxes⁸ issued abroad.⁹ The scarce state case law available indicates that state tribunals feel that enforcement is not mandated,¹⁰ as does the Uniform Laws

against an estate of a resident who died while temporarily in New York. The plaintiff in *Rodgers* sought to collect income taxes previously incurred in Missouri, while defendants resided in Oklahoma.

See, for example, *Government of India v. Taylor*, [1955] App. Cas. 491 (appeal taken from H.L. (E)), in which a Commonwealth court determined that India could not bring a suit for a capital profits assessment in England due from a British company carrying on business in Delhi.

⁵ See, e.g., *Banco Do Brasil*, 190 N.E.2d at 235, where an action by Brazil against a New York importer of coffee for fraudulently circumventing Brazilian foreign exchange regulations was held to be contrary to New York public policy despite the Bretton Woods agreement between the two countries which demonstrated a favorable policy toward exchange laws.

⁶ E.g., *Ludlow v. Van Rensselaer*, 1 Johns. 94 (N.Y. 1806). In *Ludlow*, the defendant executed a promissory note in France to an agent of Randall who resided in New York where the agreement was to be paid. The court held that the plaintiff, a trustee for the creditors of Randall, could recover despite that under French laws, the note would have been unenforceable.

Compare *Banco Frances E Brasileiro S.A. v. Doe*, 331 N.E.2d 502 (N.Y. 1935), *cert. denied*, 423 U.S. 867 (1975), where the court permitted a private Brazilian bank to recover in tort and rescind currency exchange transactions against a private plaintiff who had fraudulently induced the bank to engage in the bargains which were in violation of Brazilian exchange laws. The opinion distinguished itself from the revenue rule based on the United States' membership in the International Monetary Fund and the fact that a private plaintiff was involved.

⁷ Since *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), United States courts have assumed that the acknowledgment of foreign-country judgments in a state action or a federal tribunal sitting in diversity are governed by the law of the forum state. E.g., *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885 (N.D. Tex. 1980).

⁸ Tax adjudications to which jurisdictions refuse conclusive effect include decisions based on assessments of levies for income, transfer of wealth, property, or transactions in the taxing state in favor of the foreign sovereign or a subdivision. RESTATEMENT, *supra* note 1, § 483 cmt. c (1986).

⁹ The United States Supreme Court, however, has never ruled directly on the issue of whether United States jurisdictions must grant effect to foreign tax decrees, although references to the revenue rule in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-414 (1964) suggest that the United States Supreme Court would support continued denial of validation.

¹⁰ E.g., *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *City of Detroit v. Proctor*, 61 A.2d 412 (Del. 1948); *Colorado v. Harbeck*, 133 N.E. 357 (1921); *Bullen v. Her Majesty's Gov't of the U.K.*, 553 So.2d 1344 (1989).

Annotated¹¹ and the Restatement on the Law of Foreign Relations (the Restatement).¹² The Uniform Foreign Money Judgments Recognition Act provides, with limited exceptions, that all foreign rulings are conclusive between parties.¹³ Section 1(2) of the Act specifically limits the definition of these alien decisions to those other than that for taxes.¹⁴ As of 1992, twenty-two states have adopted this Act.¹⁵ The Restatement provides that courts are not required to acknowledge foreign adjudications for the collection of revenues.¹⁶

Continued adherence to the revenue rule has been questioned on several occasions.¹⁷ This article will first examine the arguments both for and against the revenue rule and conclude that contemporary United States interests would be served best if the policy were relaxed to permit enforcement of final foreign tax judgments. Next, it will explore options concerning which law should govern the recognition of these tax rulings and propose a solution.

II. ARGUMENTS AGAINST LIMITING THE REVENUE RULE

The considerations moderating against limiting the revenue rule to provide recognition of foreign tax decrees, while myriad, generally have been discussed in actions for enforcement in American courts of foreign or sister state taxes or the tax laws themselves,¹⁸ or other fiscal debts,¹⁹ or rulings discussing the admissibility of defenses to

¹¹ UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 265 (1986) [hereinafter FOREIGN MONEY JUDGMENTS].

¹² RESTATEMENT, *supra* note 1, § 483 (1986).

¹³ FOREIGN MONEY JUDGMENTS, § 3, 13 U.L.A. 265 (1986).

¹⁴ FOREIGN MONEY JUDGMENTS, § 1(2), 13 U.L.A. 265 (1986).

¹⁵ These states are Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington. FOREIGN MONEY JUDGMENTS, § 3; 13 U.L.A. 265 (1986).

¹⁶ RESTATEMENT, *supra* note 1, § 483.

¹⁷ RESTATEMENT, *supra* note 1, § 483 reporter's note 2; Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968); Richard E. Smith, Note, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, 1981 U. ILL. L. REV. 241 (1981); Banco Frances E Brasileiro S.A. v. Doe, 331 N.E. 2d 502 (1935); see also L.F.E. Goldie, *Annuaire de l'Institut de Droit International*, Vol. 57, *Tomes I and II, Session d'Oslo 1977. Travaux preparatoires*, 74 AM. J. INT'L L. 476 (1980) (book review) (noting book's criticism of the "anachronistic principle" that nations are internationally prevented from asserting claims based on their own public law, including that jurisdiction's tax law).

¹⁸ *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929).

¹⁹ *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963).

litigation arising out of foreign revenue laws.²⁰ With the exception of *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*,²¹ there have not been any suits in the United States to recognize a final judgment for taxes rendered abroad. *Gilbertson* appears to remain the single case in the United States that has directly addressed enforcement of an assessment adjudication. However, *Gilbertson's* adoption of the revenue rule should not be viewed as definitive on the issue of the recognition of foreign tax judgments since it arose well after the domestic development and adoption of the rule in the context of the enforcement of tax laws or other debts, rather than in the context of final judgments.

The primary reasons advanced for the continuance of the revenue rule in connection with judgments for levies are: (1) the belief that historical precedent weighed against recognizing alien revenue laws;²² (2) the belief that tax rulings are similar to traditionally unenforced penal laws;²³ and, (3) as illustrated by Judge Learned Hand's concurring opinion in *Moore v. Mitchell*,²⁴ that while states are reluctant to enforce a ruling which conflicts with their own public policy, judicial scrutiny of foreign law is incompatibly injurious to international relations.²⁵ An examination of these arguments, in view of

²⁰ *Ludlow v. Van Rensselaer*, 1 Johns. 94 (N.Y. 1806).

²¹ 597 F.2d 1161.

²² *Id.*

²³ *E.g.*, *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J. concurring); *Banco Frances E Brasileiro v. Doe*, 331 N.E.2d 502 (N.Y. 1935); *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W. 2d 919 (Mo. Ct. App. 1946); *City of Detroit v. Proctor*, 61 A.2d 412 (Del. 1948).

²⁴ 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring).

²⁵ See also *Proctor*, 61 A.2d at 412; *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979). The *Gilbertson* court also advanced two other reasons in support of the revenue rule. First, that the judicial branch as a whole was not the proper forum in which to modify the revenue rule. Any such revision of policy was essentially a political decision, and should be left to appropriate legislation making branches of government. 597 F.2d 1161. The second reason rested on reciprocity concerns in that Canada failed to recognize United States tax judgments. However, a requirement for this type of reciprocity has steadily lost favor as a basis for denial of validation since its introduction in *Hilton v. Guyot*, 159 U.S. 113 (1894), and is now rarely endorsed. See *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); RESTATEMENT, *supra* note 1, § 481 reporter's note 1.

In *Hilton*, the United States Supreme Court, refused to enforce a judgment issued in France against an United States national because, in part, French policy generally forbade acknowledgement of a similar American decision. The court found that since recognition of foreign adjudications was based on the concept of "comity of nations," true comity required equality, and consequently, reciprocity was an essential element. 159 U.S. at 140.

present day considerations, throws their validity into question.

A. Why Historical Justification is Not Sufficient

Maintaining the revenue ruling for historical reasons is unpersuasive in light of the circumstances which gave birth to the rule. The economic conditions underlying the creation of the revenue rule no longer exist, and even at the time of its inception, did not dictate that final tax judgments should be included within its purvey.

The revenue rule traces its formation to England during the height of mercantilism in the eighteenth century. This period was highlighted by intense commercial rivalry between nations, epitomized by the struggle between Great Britain and France.²⁶ British political and economic policy was characterized by the promotion, sustenance, and extension of English commerce.²⁷ One avenue England used in obtaining an advantage in this competition was its development of extremely nationalistic legal and tax structures, part and parcel of which was the revenue rule. The rule supported these domestic policies because the end result of an English court refusing acknowledgment of a foreign revenue law was often to promote British trade that would otherwise have been unlawful.²⁸ For example, the English court could hold a contract for the purchase or sale of goods valid despite a foreign revenue statute rendering it void on the grounds that British courts exclude recognition of foreign revenue laws. As a result, alien revenue laws were viewed as inherently repressive.²⁹

Specifically, the rule first appeared in a series of early English cases, including *Attorney General v. Lutwyd*,³⁰ *Boucher v. Lawson*,³¹ *Holman v. Johnson*,³² and *Planche v. Fletcher*.³³ In these initial

²⁶ Recent Case, *Canadian Court Will Not Entertain Suit to Enforce United States Tax Judgment*, 77 HARV. L. REV. 1327, 1328 (1964) [hereinafter *Canadian Court*].

²⁷ J.M. ROBERTS, *THE PELICAN HISTORY OF THE WORLD* 625 (Penguin Books 1980) (1976).

²⁸ *Canadian Court*, *supra* note 27, at 1328.

²⁹ *Id.*

³⁰ 145 Eng. Rep. 674 (Ex. 1729). In *Lutwyd*, the court considered whether a bond executed in Scotland was within its jurisdiction.

³¹ 95 Eng. Rep. 53 (K.B. 1779). In *Boucher*, the captain of a ship transporting Portuguese gold to England in violation of the laws of Portugal, claimed that he could retain the gold according to custom. The owner of the gold sued the ship's owner who asserted that the only action lay against the captain.

³² 98 Eng. Rep. 1120 (K.B. 1775). The defendant in *Holman* challenged the verdict in favor of the plaintiff in the underlying suit. The defendant argued that a contract to purchase tea from the plaintiff in France was illegal, and therefore voidable, because the plaintiff was aware that defendant intended to smuggle the tea into

actions, the issues before the court generally concerned the effect of foreign revenue laws on the validity of private commercial contracts. Parties in these suits often tried to avoid performance of a trade contract by arguing that the agreement was void based on its violation of foreign law. By refusing to examine the alien legislation, and hence finding the contract valid, English courts were in essence promoting British commerce.³⁴

The most well-known and frequently cited of the early English cases, *Holman v. Johnson*,³⁵ is typical of this type of action. In *Holman*, a French plaintiff brought suit to recover on a contract to sell tea to the defendant in France, while aware that the defendant intended to smuggle the tea into England in violation of British import rules. In dismissing the defendant's claim that the agreement was illegal, Lord Mansfield held that the defendant had acted solely in France, and that foreign legislation was inapplicable "[f]or no country ever takes notice of the revenue laws of another."³⁶

In a similar case, *Boucher v. Lawson*,³⁷ the plaintiff arranged to ship a cargo of Portuguese gold to England in violation of the laws of Portugal. After the vessel arrived in London, the captain refused to deliver the freight to the plaintiff, asserting that when the gold was illegally transported from Portugal to Great Britain, it was customary for the ship's master to retain the gold for his own. The plaintiff, however, sued only the ship's owner who argued that any action properly lay against only the captain.

The importance of this case is shown in several comments which exemplify how the revenue rule worked to sustain vital British commerce. The Court initially noted that "[t]his case seemed at the trial of very great consequence, as it concerns on the one side, *one of*

England in violation of British law. The court denied defendant's request for a new trial because the parties had acted solely in France.

³³ 99 Eng. Rep. 164 (K.B. 1779); see *infra* text accompanying note 35.

³⁴ *Planche*, 99 Eng. Rep. 164 (K.B. 1779), does, however, vary somewhat from this type of factual pattern. In *Planche*, the plaintiff insured goods on board a vessel which sailed from London to France. The ship, however, was cleared for Belgium. At the time, England and France were at war, and the craft was captured. The plaintiff sued the underwriters, who defended on the ground that the clearance of the vessel for Ostend was fraudulent since that was never its intended port. The court held for the plaintiff on the grounds that this was the common, widely known practice of the trade.

³⁵ 98 Eng. Rep. at 1120.

³⁶ *Id.* at 1121.

³⁷ 95 Eng. Rep. 53 (K.B. 1734).

the most beneficial branches of the English trade, as it relates to the security that persons have in the trusting their gold on board English ships . . . (emphasis added).³⁸ In asserting that Portugal's export laws should have no effect on the issue of whether liability exists against the captain or the defendant, the opinion continued:

The carrying on, indeed, of a trade prohibited by the laws of England is of material consequence, and it is said that the parties in that case shall receive no relief, as they are both participes criminis . . . *But if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principle and most beneficial branches of our trade . . .*³⁹

At the same time as British courts completed the development of the revenue rule in this line of cases, the United States declared its independence from England. Notwithstanding this newfound independence, individual states adopted the English revenue rule policy wholesale.⁴⁰ State courts initially interpreted the revenue rule to bar enforcement of sister state tax judgments. However, the Supreme Court ruled in 1935 that the Full Faith and Credit Clause of the United States Constitution required acknowledgement of these assessment decisions.⁴¹ The states remained free, however, to individually evaluate whether or not to entertain actual suits to recover taxes levied under the statutes of another state, or to recognize revenue laws of another jurisdiction.⁴² The recent trend continues toward recognition of sister state tax claims. Some states have enacted statutes requiring reciprocal enforcement,⁴³ while others simply acknowledge

³⁸ *Id.* at 55.

³⁹ *Id.* at 55-56 (emphasis added).

⁴⁰ For a thorough history of the revenue rule and its adoption by individual U.S. states, see *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946).

⁴¹ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

⁴² *E.g.*, *White*, 296 U.S. at 268; *City of Philadelphia v. Cohen*, 184 N.E. 2d 167 (N.Y. 1962), *cert. denied* 371 U.S. 934 (1962); *City of Detroit v. Proctor*, 61 A.2d 412 (1948); *Colorado v. Harbeck*, 133 N.E. 357 (1921); *Rodgers*, 193 S.W.2d at 919.

⁴³ An example of a state codified reciprocity statute is Mo. REV. STAT. § 143.871 (1990), which provides:

Income tax claims of other states

1. The courts of this state shall recognize and enforce liabilities for income

these tax claims on the grounds of "comity" and "justice."⁴⁴

Individual states also embraced the English revenue rule in regard to foreign, rather than sister state, claims for taxes or final adjudications. The first United States case to follow the British doctrine in regard to a foreign claim for taxes was *Ludlow v. Van Rensselaer*.⁴⁵ As in the older English suits, *Ludlow* did not concern enforcement of a tax judgment. Rather, the tribunal simply sought to promote commerce by refusing to find that a French promissory note was invalid in the United States, as it would have been under French revenue rules.⁴⁶

This theory that foreign revenue laws were inherently repressive to the implementing country survived into the modern age.⁴⁷ Nevertheless, although the United States policy regarding final tax judgments is rooted in the early English revenue cases,⁴⁸ no United States court expressly acknowledged the revenue rule's application to foreign tax adjudications until the *Gilbertson* case in 1979.⁴⁹ *Gilbertson* denied

taxes lawfully imposed by any other state which extends a like comity to this state, and the duly authorized officer of any such state may sue for the collection of such a tax in the courts of this state.

See also OR. REV. STAT. § 118.810 (1991) which affords reciprocal enforcement of foreign death taxes. For a comprehensive discussion of interstate treatment of sister state tax claims in the United States, see generally Smith, *supra* note 17, at 253-55.

⁴⁴ See, for example, *Rodgers*, 193 S.W.2d at 919, 927 where the court concluded after a review of historical and public policy considerations that there was "no valid justification for not permitting a suit in [Missouri] for a tax lawfully levied by another [state]. The simplest ideas of comity would seem to compel such a result." Both *Ohio v. Arnett*, 234 S.W.2d 722 (Ky. 1950) and *Buckley v. Huston*, 291 A.2d 129 (N.J. 1972) followed the *Rodgers* decision.

⁴⁵ 1 Johns. 94 (N.Y. 1806). *Ludlow* expressly adopted the English revenue rule in noting that "[i]f a contract, on the face of it, appears to be valid, our courts will not undertake to enforce the revenue laws of a foreign country by declaring it void." *Id.* at 95.

⁴⁶ *Id.*

⁴⁷ *Banco Do Brasil S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting) (both noting that no country has an obligation to further the governmental interests of another foreign sovereignty by enforcing the alien penal and revenue legislation).

⁴⁸ Current opinions still often cite directly to the early English cases. See, e.g., *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *City of Detroit v. Proctor*, 61 A.2d 412 (Del. 1948); *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946). See also the British and Canadian cases in *Government of India v. Taylor*, [1955] App. Cas. 491 (appeal taken from H.L. (E)) and *United States v. Harden*, 1963 S.C.R. 366 (Can. 1963).

⁴⁹ *Gilbertson*, 597 F.2d at 1161.

recognition, in part, due to the long standing survival of the rule.⁵⁰

From an historical perspective, then, there is a strong argument that the United States adherence to the revenue rule is not well-founded. United States courts recognize that the principle was developed to promote Britain's eighteenth century nationalistic policies.⁵¹ While the rule's value may have been apparent in the eighteenth century — when refusal to acknowledge foreign laws resulted in a gain of local economic prominence — modern commercial considerations dictate otherwise.

With the world's economies now far more intertwined and interdependent, the health of one country depends in great measure on that of others.⁵² When one nation experiences a significant decrease in commercial activity, such as a recession, the world economy is affected adversely. For example, importing territories to which the

⁵⁰ *Gilbertson* observed in its conclusion that "[t]he revenue rule has been with us for centuries and as such has become firmly embedded in the law. There were sound reasons which supported its original adoption, and there remain sound reasons supporting its continued validity." *Id.* at 1166.

Gilbertson also cited a fear of impermissible interference with international affairs, along with a lack of reciprocal recognition of American tax judgments by Canada as further support for its exclusion. *Id.* These concerns will be discussed in §C *infra* in this article.

The opinion in the underlying Oregon district court decision in *Gilbertson*, likewise, acknowledged the importance of the rule's longevity. It indicated that the recognition of foreign country judgments was:

... one of first impression. Apparently this is first time in American legal history that a foreign government has sought enforcement of a tax judgment in a court of the United States. The best explanation for this seems to be that the 'well established rule' that it cannot be done has deterred all attempts.

Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson, 433 F. Supp. 410, 411 (D. Or. 1977).

⁵¹ This concept was alluded to in *State ex rel. Olka. Tax Comm'n v. Rodgers*, 193 S.W. 2d 919 (Mo. Ct. App. 1946), where the court, after examining the early British cases, commented that:

in each case the question presented was whether a contract made to evade a foreign revenue law or which did not comply with the revenue laws of the locus contractus, was enforceable in England; and, in each case, the ruling was based upon a desire to promote commercial convenience.

Id. at 922.

Rodgers further buttressed its decision not to extend the revenue rule to sister state tax claims with the note that the doctrine "was the product of the commercial world, and arose at a time where there was great commercial rivalry and international suspicion." *Id.* at 924.

⁵² See Economic Report of the President (Feb. 1992), Tables B-102, B-103 which demonstrate the dramatic increase of merchandise importations into the United States from countries throughout the world, as well as United States exports abroad.

United States exports its products can no longer afford to purchase United States goods.⁵³ Particularly in a recessionary period, the rest of the world's ability to absorb United States exports is critical. The substantial increase in domestic exportation within the last ten years has been essential in enabling the United States to lessen its current account deficit and to reach its present balance of payments.⁵⁴ Thus, the effect of the revenue rule as a whole to encourage domestic commerce at the expense of other jurisdictions arguably has the long-term harmful effect of reducing United States markets abroad.

Additionally, the expansion of the revenue rule itself from its original premise of excluding evidence of foreign revenue laws which encouraged domestic commerce to prohibiting recognition of final tax decrees is historically unwarranted.⁵⁵ Whether or not a sovereign

⁵³ See *Export Trends: Mulford Says Slowdown in U.S. Exports Due to Slower Growth of Trading Partners*, INT'L TRADE REP. (BNA), at 1645 (Nov. 13, 1991) which assessed the importance of exports to the health and development of the American economy. The article indicated that "a slowdown in the economies of the major U.S. trading partners . . . has held down sales this year." *Accord*, Sylvia Nasar, *World's Appetite for U.S. Products is Still Increasing*, N.Y. TIMES, Nov. 11, 1991, at A1. In addition to describing the detrimental effect on U.S. exports due to the international recession, the commentary further illustrated the present day interdependency of the world's countries. The article discussed several economies which have shown improvement, and noted that "the mere fact that lots of countries are getting richer and more sophisticated means that they now want—and can afford—American brands." *Id.* at D2 (quoting Stephen M. Peterson, vice president at Giddings & Lewis, a domestic machine tool manufacturer).

Conversely, for an example of the effect of the 1990-1991 commercial downturn on another nation's economy, see Sebastian Moffett, *U.S. Recession Pulls Profits Down at Japanese Electronic Companies*, S.F. SUN. EXAM. & CHRON., Oct. 27, 1991, at E-13, where the injury to Japan's electronic industry which historically exported 70 percent of its computer chip production was evaluated.

⁵⁴ Economic Report of the President, *supra* note 52, Table B-100, B-102, and B-103.

⁵⁵ See *Rodgers*, 193 S.W.2d at 919, which questioned the expansion of the revenue rule to exclusion of tax decrees. *Rodgers* stated that the principle as set forth in the early British cases:

has been applied to situations far beyond the probable anticipation of those learned judges. The [doctrine] did not originate with cases involving an attempt to collect a tax, but had its inception in cases raising the question of whether a contract which did not comply with the revenue laws of the place where made was enforceable in the courts of the forum. Considerations of commercial convenience led to its adoption. The next step was to apply it to suits brought to collect a tax, but, in doing so, the courts have, [with one exception], merely repeated the time-worn axiom, without considering whether the reasons which made it desirable to apply it to the early cases were applicable to the new situation presented.

Id. at 926.

state gives conclusive effect to a final foreign assessment decision (such as that for income, property, or inheritance taxes), it is doubtful that business in that state is affected, much less encouraged. Moreover, it is particularly irrelevant to the type of trade that formed the linchpin for the development of the revenue rule: commerce which would have been illegal under the levying jurisdiction.

B. Penal Legislation Is Critically Dissimilar

The second approach forums have traditionally employed when reiterating their continued allegiance to the revenue rule is to analogize to, or even wholly justify the rule by, the similar but rarely questioned "penal law exception." This exception provides that foreign penal laws, whether of a sister state or another country, are never enforced.⁵⁶ However, this comparison with penal legislation presents an imprecise view of the relationship between revenue laws and penal laws, which impairs any analysis involving the recognition of foreign tax adjudications.

It has been frequently noted that there is an intrinsic difference between revenue and penal judgments. In *State ex rel. Okla. Tax Comm'n v. Rodgers*, the court stated: "A penal law is punitive in nature, while a revenue law defines the extent of the citizen's pecuniary obligations to the state, and provides a remedy for its collection."⁵⁷ Additionally, the Restatement defines a penal decision as primarily punitive rather than compensatory in nature⁵⁸ and a revenue ruling as one "in favor of a foreign state . . . based on a claim for an assessment of a tax."⁵⁹ In evaluating whether a sister state judgment for levies must be recognized, the Supreme Court has indicated that the obligation to pay taxes is not penal in nature but is rather a "statutory liability, quasi-contractual in nature".⁶⁰

In *Rodgers*,⁶¹ the court emphasized that the major reasons for declining to enforce penal rulings were the "sovereign nature of

⁵⁶ See *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929); *Banco Frances E Brasileiro S.A. v. Doe*, 331 N.E.2d 502 (N.Y. 1935); *Rodgers*, 193 S.W.2d at 919; *City of Detroit v. Proctor*, 61 A.2d 412 (Del. 1948).

⁵⁷ 193 S.W.2d at 926. While *Rodgers* made this observation in the context of whether sister state tax claims should be recognized, the reasoning applies equally to international rulings.

⁵⁸ RESTATEMENT, *supra* note 1, § 483 cmt. b.

⁵⁹ *Id.* § 483 cmt. c.

⁶⁰ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 271 (1935).

⁶¹ *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946).

independent states" along with "the fear that the enforcement of penal laws of another state would be considered an interference with the prerogatives of that state, which might produce disagreeable international complications."⁶² These concerns are not readily relevant in the revenue sphere. Unlike a penal action, in a revenue action the foreign sovereign state itself sues for recovery on the judgment in the recognizing forum. No "unwarranted interference with the prerogatives of the foreign state" occurs because the foreign government is the "motivating party asking for relief and undertaking to submit itself to the jurisdiction of the [other] state."⁶³

Courts have refused to enforce penal rulings of foreign states on other grounds, including the non-availability in the enforcing jurisdiction of a remedy equivalent to that in the original forum, and the doctrine of retributive justice which provides that the state whose laws were violated and the punishing nation must be the same.⁶⁴ Both of these considerations are extraneous to tax decisions since the equivalent remedy—a money judgment—is obviously available, and revenue laws are theoretically not enacted to punish citizens.⁶⁵

The *Rodgers* court noted additional reasons for excluding penal adjudications, including inconvenience to the defendant by being forced to appear in an alien jurisdiction as well as excessive burden placed on the enforcing state since it must conduct the trial in another location.⁶⁶ However, these hindrances have been generally regarded as superfluous in revenue adjudications because they are "common to all transitory civil actions and have never been considered as a reason to bar them," and because the delinquent taxpayer chose to leave the more convenient home forum.⁶⁷ Moreover, the implementing state does not really suffer harm, because it receives the monetary benefit when its own tax judgments are recognized in other jurisdictions.

C. *International Affairs are Not Unduly Affected*

United States tribunals refuse to give conclusive effect to any type of decision issued abroad if it conflicts with the public policy of that

⁶² *Id.* at 926.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 926; *Buckley v. Huston*, 60 N.J. 472, 291 A.2d 129 (1972).

⁶⁶ *Id.*

⁶⁷ *Id.* See also *Buckley v. Huston*, 60 N.J. 472, 291 A.2d 129 (1972) where the court permitted the City of Philadelphia to bring an action to recover wage taxes.

enforcing jurisdiction.⁶⁸ Additionally, jurisdictions place further limits by declining legitimacy where "the cause of action on which the judgment was based is repugnant to [the relevant] public policy".⁶⁹ These public policy concerns can be divided into two categories: the relationship of tax judgments as a whole to relevant policy and specific injurious effects created by the application itself of the civic analysis.

In respect to the first consideration, *Gilbertson* suggests that any validation given to a revenue assessment ruling would "have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do."⁷⁰ In forming this contention, the *Gilbertson* court relied primarily on Justice White's dissent in *Banco Nacional de Cuba v. Sabbatino*,⁷¹ the decision which is considered the parent of the modern Act of State doctrine.⁷² The

⁶⁸ See *Stein v. Siegel*, 377 N.Y.S. 2d 580, 50 A.D.2d 916 (1975) where a plaintiff filed a personal injury action for injuries suffered in Austria against an American defendant in both Austria and New York. The plaintiff later discontinued the Austrian action. However, Austrian law provided that filing of the discontinuance waived all further claims against the defendant. The New York court denied defendant's motion to dismiss the complaint on the grounds it was barred by virtue of the Austrian statute. The court held that a "foreign country judgment will not be recognized by our courts insofar as it contravenes the public policy of this state." *Id.* at 582, citations omitted. Because such a discontinuance was without prejudice under New York law, the court held that the action was not barred. *Accord Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972), *Neporany v. Kir*, 173 N.Y.S.2d (N.Y. App. Div. 1958); see also RESTATEMENT, *supra* note 1, § 482(2)(d); FOREIGN MONEY JUDGMENTS § 4(3), 13 U.L.A. 268 (1986).

⁶⁹ RESTATEMENT, *supra* note 1, § 482; see also FOREIGN MONEY JUDGMENTS § 4(3), 13 U.L.A. 268 (1986). For examples of causes of actions repugnant to public policy, see *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) where the court noted that Pennsylvania's public policy considerations would likely prevent the enforcement of judgments involving "unreasonable restraints of marriage or of trade, collusive arrangements for obtaining divorces, suppression of bids for public contracts, interference with freedom of conscience or religion." *Id.* at 169, (citation omitted). (For a discussion of the facts of *Somportex*, see *infra* text accompanying note 88.) See also, Restatement, *supra* note 1, § 482, reporter's note 1, which provides that "a judgment in implementation of racial laws would be denied recognition or enforcement in the United States."

⁷⁰ *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979).

⁷¹ *Id.* at 1164 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (White, J., dissenting)).

⁷² In *Sabbatino*, the owners of a Cuban sugar estate, which had been expropriated by the government of Cuba, brought an action in New York for title to sugar exported from their estate. The United States Supreme Court rejected the plaintiff's argument that Cuba's seizure of the estate was contrary to international law because the Act of State doctrine precluded review of Cuba's expropriation done within its own territory. *Id.* at 398.

Act of State doctrine, as outlined in *Sabbatino*, prevents any inquiry into the validity of a foreign sovereign's taking of property within its own country, and, in limited circumstances, it prevents scrutiny of the sovereign's acts done within its own territory and applicable in that country.⁷³

In his dissenting opinion, Justice White argued that foreign law should not remain immune from examination in certain circumstances. In noting that international law was historically open to scrutiny, he pointed out that United States courts refuse to enforce foreign laws, including revenue legislation, for public policy reasons "since no country has an obligation to further the governmental interests of a foreign sovereign."⁷⁴

The majority opinion, however, rejected Justice White's position and determined that under the Act of State doctrine foreign law remains sacrosanct. As a result, when the United States gives effect to another jurisdiction's laws by virtue of the Act of State doctrine, it frequently aids the other nation's concerns. Moreover, many United States courts traditionally find no problem entertaining decisions

⁷³ *Sabbatino*, 376 U.S. at 398. For a comprehensive discussion of the Act of State doctrine, see RESTATEMENT, *supra* note 1, § 443 and accompanying text.

The actual nexus between the revenue rule and the Act of State doctrine has not been frequently considered. In the past, it was unnecessary for courts to determine whether a foreign tax decree fell within the doctrine's protected "governmental acts" because the foreign revenue rule itself forbade enforcement of any revenue-related law or judgment. However, the issue could arise in the event the rule were relaxed to permit recognition of foreign tax decrees. Conceivably, the tax evader may assert that United States law requires a public policy analysis before validating alien decisions. Since the Act of State doctrine precludes just this type of inspection, tax decrees should remain unenforceable. Alternatively, the foreign jurisdiction might contend that a revenue judgment is a protected "act" performed within its home territory and applicable there. Therefore, while the ruling must be entertained, a public policy examination may not be performed because the Act of State doctrine prevents this inquiry.

Use of the Act of State doctrine in either of these hypotheticals is unwarranted, however, because tax decrees are not the class of "act" meant to be shielded by the doctrine. The Restatement notes that whether a particular act of a foreign nation falls within the doctrine's parameters "depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government." RESTATEMENT, *supra* note 1, § 443 cmt. c. As extensively discussed later in this section of this article, any evaluation of foreign policies that may arise would be limited in scope to a traditionally permissible level, rendering the doctrine inapplicable.

⁷⁴ *Sabbatino*, 376 U.S. at 448 (White, J., dissenting).

which directly benefit other governments. For example, many jurisdictions enforce foreign orders for payment of court costs which were incurred during litigation in that country.⁷⁵

In addition, a review of other aspects within the international affairs arena suggests that *Gilbertson's* theory that the mere acknowledgment of tax judgments, in effect, would controvert relevant public policy is not universally revered. The overall concept of enforcement of tax adjudications from other nations is not without precedence in the United States. The United States is a party to several, albeit older, bilateral treaties for the avoidance of double taxation in connection with various types of taxes. In these treaties, the United States, in effect, gives limited recognition to certain foreign revenue judgments⁷⁶ or even agrees under narrow circumstances to aid in the collection of taxes.⁷⁷

Further, most taxes on their own rarely conflict with the enforcing state's public policy since virtually all sovereigns impose levies.⁷⁸ Moreover, a refusal to enforce revenue rulings allows the delinquent taxpayer to obtain the benefit of the assessing institution while avoiding the cost of its maintenance.⁷⁹ As a result, the recognition of a foreign tax decision would generally not controvert a state's public policies because it serves a goal shared by both the taxing and

⁷⁵ *E.g.*, *Indiana Refining Co. v. Valvoline Oil Co.*, 75 F.2d 797 (7th Cir. 1935); *Coulborn v. Joseph*, 25 S.E.2d 576 (Ga. 1943).

⁷⁶ See Convention and Protocol Respecting Double Taxation, Mar. 23, 1939, U.S.-Swed., art. XVII, 54 Stat. 1759, 1770-71, where the contracting states agreed to "lend assistance and support in the collection of the taxes." Further, applications for enforcement of taxes or revenue claims which are "finally determined" shall be "accepted for enforcement by the other contracting State and collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes."

The United States has entered into similar treaties with Denmark, France, and the Netherlands. See Convention Respecting Double Taxation and Taxes on Income, May 6, 1948, U.S.-Den., art. XVIII, 62 Stat. 1730, 1736; Convention Between the United States of America and the French Republic with Respect to Taxes on Income and Property, July 28, 1967, U.S.-Fr., art. 27, 19 U.S.T. 5280, 5314-15; Convention Respecting Double Taxation and Taxes on Income, Apr. 29, 1948, U.S.-Neth., art. XXII, 62 Stat. 1757, 1766.

⁷⁷ See *e.g.*, Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, U.S.-F.R.G., art. XVI, para. 2, 5 U.S.T. 2768, 2802.

⁷⁸ RESTATEMENT, *supra* note 1, § 483, reporter's note 2.

⁷⁹ *City of Detroit v. Proctor*, 61 A.2d 412 (Del. 1948); *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946).

enforcing jurisdictions: ensuring that those who receive the forum's advantages pay for them.

The dissimilarity between penal and revenue laws also illustrates why the notion that the enforcement of final tax judgments, like most other types of non-tax rulings, is not antithetical to the public policies of most territories. The burden on the levying nation of conducting its trial elsewhere is not unfair since the country itself submits to the recognizing jurisdiction when it brings the action in that forum.⁸⁰ Nor is the taxpayer unacceptably inconvenienced by appearing in an alien tribunal because the delinquent subject presumably left the assessing forum voluntarily.⁸¹ Due to the fact that all relevant aspects of the underlying tax could be challenged in the home country, the taxpayer's available defenses and remedies are not restricted.⁸²

The second category of public policy considerations underlying the non-recognition of final tax adjudications is the fear that the public policy analysis itself would involve the enforcing state too closely in the internal processes of the taxing location.⁸³ This concern has not

⁸⁰ Should the taxing state determine that the cost or inconvenience of bringing the action in the enforcing jurisdiction is unreasonable, that jurisdiction may simply choose not to pursue the suit.

⁸¹ See *Rodgers*, 193 S.W. at 919, which provides that most inconveniences that occur to a party compelled to conduct a defense in a foreign jurisdiction "have never been considered as a reason to bar" the action. *Id.* at 927.

⁸² For example, a taxpayer could challenge the amount of tax assessed, the basis of the levy, or the legitimacy of the tax. See, e.g., *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979) (defendant successfully contested the amount of tax due in the assessing location of Canada and received a levy reduction); *Benaglia v. Commission*, 36 B.T.A. 838 (1937) (plaintiff challenged whether a hotel manager's meals were properly taxed as income); *Bob Jones University v. United States*, 461 U.S. 574 (1982) (plaintiff objected to denial by Internal Revenue Service of tax-exempt status).

If the enforcing state determined that an objection to an aspect of the tax, such as the amount, could not be made in the home country, the taxpayer could assert that the judgment should not be enforced in the recognizing United States court. The taxpayer could argue that the denial of the ability to challenge that portion of the tax was significant, and the underlying decision was therefore rendered in "judicial system that does not provide . . . procedures compatible with due process of law." RESTATEMENT, *supra* note 1, § 482(1)(a). See also discussion contained in section III, *infra*, of this article, which provides guidelines for the non-recognition of rulings that do not comport with United States principles of due process.

⁸³ A cognizance that enforcement affects international affairs can even be dated to the seminal case of *Hilton v. Guyot*, 159 U.S. 113 (1895), which noted that enforceability is a matter of "comity of nations". *Id.* at 163.

This belief that review of final tax adjudications would involve the enforcing state

proven as worrisome as it may appear. It is arguable that in submitting themselves to the laws of the implementing state, any attendant interference in related foreign affairs is implicitly accepted when another country asks for relief.⁸⁴

The reasoning in *Moore* that a "scrutiny of the [tax] liability"⁸⁵ underlying the ruling could impermissibly intrude into foreign relations loses some persuasiveness because it is discussed in the context of the application of foreign revenue laws rather than final judgments. The necessary examination of relevant foreign policies involved in recognizing a final tax decision is far less intrusive than that required to implement an alien revenue law. Unlike implementing an alien revenue law, when a United States court acknowledges an adjudication rendered abroad it does not require one state to administer the complex tax system of another. The Court must simply determine whether the nature of the assessment is contrary to its own civic policies or fundamental notions of decency and justice.⁸⁶

too closely in the affairs of the taxing nation is best illustrated by the *Gilbertson* tribunal's application of the reasoning in Judge Learned Hand's concurrence in *Moore v. Mitchell* to the international arena.

Judge Hand argued in *Moore* that a strong foundation for the revenue rule existed:

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J. concurring).

⁸⁴ See *State ex rel. Okla. Tax Comm'n v. Rodgers*, 193 S.W.2d 919 (Mo. Ct. App. 1946).

⁸⁵ *Moore*, 30 F.2d at 604.

⁸⁶ RESTATEMENT, *supra* note 1, § 482 cmt. f; Willis L.M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950).

Moreover, the public policy inquiry engaged in by enforcing jurisdiction is narrow and few decisions "fall within the category of judgments that need not be recognized because they violate the public policy of the forum."⁸⁷ Courts have generally granted effect to adjudications even though the enforcing state may not provide recovery on, or has affirmatively rejected, the underlying cause of action.⁸⁸

The fact that any encroachment into international affairs which may actually exist is relatively minor and tolerable is illustrated in another framework as well. There is a strong argument that an inquiry into whether an alien tax judgment is repugnant to the public policy of the forum is no more intrusive into foreign relations than that frequently involved, and sanctioned, every time a non-tax decision is considered for recognition.

Public policy evaluations in *non-tax* actions permit a court to refuse to validate repugnant decisions,⁸⁹ thereby giving judicial leeway to deny application of foreign decrees.⁹⁰ When refusing recognition on public policy grounds, the tribunal may in fact be excluding a suit, for example, where another sovereignty itself was a party. The jurisdiction may be passing judgment on another government's legal system itself by denying recovery for specific causes of actions of which it does not approve.⁹¹ Such ability to pick and choose no doubt

⁸⁷ RESTATEMENT, *supra* note 1, § 482 reporter's note 1; von Mehren & Trautman, *supra* note 17.

⁸⁸ See, for example, *Neporany v. Kir*, 173 N.Y.S.2d (N.Y. App. Div. 1958) where the New York court permitted enforcement of a Canadian money judgment based on causes of action for seduction and criminal conversion barred by New York statutes because the claims were "recognized in the jurisdiction where the acts took place, and the comity of nations calls for giving full effect to this foreign judgment." *Id.* at 147. See also *Spann v. Compania Mexicana Radiodifusora Fronteriza*, 41 F. Supp. 907 (N.D. Tex 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942). In *Spann*, the court affirmed enforcement of a Mexican judgment for costs calculated at a rate of 12 percent even though the defendant asserted the amount of costs awarded was "grossly excessive in light of, and obnoxious to, the public policy of Texas." *Id.* at 609. *Accord Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F.Supp. 161 (E.D. Pa. 1970), *aff'd* 453 F.2d 435 (3d Cir.1971), *cert. denied* 405 U.S. 1017 (1972). In *Somportex*, the court noted in response to defendant's argument that Pennsylvania did not recognize recovery for loss of good will and attorney fees that "merely because the forum has a different rule of law, whether legislatively or judicially founded, does not automatically render the foreign law contrary to the public policy of the forum." *Id.* at 168-169 (citations omitted).

⁸⁹ See *supra* text accompanying notes 68 and 69.

⁹⁰ For a discussion of public policy considerations that prevent recognition, see *supra* text accompanying notes 68 and 69.

⁹¹ See, for example, *Caldwell v. Caldwell*, 81 N.E.2d 60 (N.Y. 1948), where the

results in significant international repercussions which have repeatedly been deemed acceptable.⁹²

Further, when analyzing whether to enforce any type of decision, courts consider several other factors in addition to conducting the public policy inquiry.⁹³ These factors, which include investigations of whether the decree was rendered under a system with impartial tribunals or with procedures compatible with due process of law,⁹⁴ can also lead the implementing state to interfere with federal interests in a seemingly appropriate manner. A jurisdiction may simply view the case before it as a dispute between two private parties and apply only its own local public policy concepts, thereby disregarding relevant national objectives. The investigation may also involve a weighing of the impartiality or credibility of foreign officials.⁹⁵

Likewise, the foreign tribunal's holding itself may implicate international affairs and recognition nevertheless has been permitted. For example, if a forum considers a naturalization action, it may have to determine the effect to be given to a foreign adjudication concerning the moral character of the petitioner.⁹⁶

court examined the effect to be given to the Mexican "valueless . . . mail order divorce[]" of the defendant and his previous wife in a New York action for separation and child support brought by plaintiff, defendant's subsequent wife.

⁹² For example, a jurisdiction whose decision was declined enforcement may feel intentionally slighted. The country could view the denial as a politically motivated statement regarding its legal or governmental system. The jurisdiction could choose to retaliate and refuse to recognize United States judgments, or it could determine that political or economic sanctions are appropriate.

⁹³ The enforcing jurisdiction may evaluate whether the foreign court had jurisdiction over the defendant, whether the defendant received sufficient notice of the proceedings in order to prepare a defense, and whether the judgment was obtained by fraud. See *Bank of Montreal v. Kough*, 430 F. Supp. 1243 (N.D. Cal. 1977), *aff'd*, 612 F.2d 467 (9th Cir. 1980). In *Montreal*, the court held that a default judgment for money obtained in Canada could be enforced because the Canadian court had personal jurisdiction over the defendant. The defendant had argued that the claim was invalid because he never appeared in the Canadian proceedings and had not been served within Canada. See also *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd.*, 470 F. Supp. 610 (D.C.N.Y. 1979) where the court noted that a judgment must be obtained by a fraud on the court before the action will be denied recognition. *Accord Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). For an inventory of the other factors considered by courts in determining whether to enforce a judgment, see RESTATEMENT, *supra* note 1, § 482 and FOREIGN MONEY JUDGMENTS § 4, 13 U.L.A. 268 (1986).

⁹⁴ RESTATEMENT, *supra* note 1, § 482(1)(a); FOREIGN MONEY JUDGMENTS § 4(a)(1), 13 U.L.A. 268 (1986).

⁹⁵ E.g., *Caldwell*, 81 N.E.2d at 60.

⁹⁶ See Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 238 n.115 (1972).

Jurisdictional and reciprocal prerequisites to recognition of foreign rulings also illustrate the depth of impingement into the international sphere which has been permitted. Courts generally confirm that foreign tribunals possess personal jurisdiction over the defendant before granting a ruling valid in the United States.⁹⁷ In this analysis, the issues of whether jurisdiction was proper under the home forum's procedural standards and under United States notions of due process are examined.⁹⁸ Inherent then is a finding on the merits of other nations' adjudication methods— an action with clear international ramifications. Also, those states that require reciprocity⁹⁹ must inquire into the extent to which the foreign country respects United States courts' judgments, a determination with similar international repercussions.¹⁰⁰

Not only have individual states accepted that the enforcement of any type of alien decision may intrude on foreign affairs, but these effects have been deemed so limited that a national standard for the recognition of these rulings has never been mandated.¹⁰¹ States are

⁹⁷ See *Bank of Montreal v. Kough*, 430 F. Supp. 1243 (N.D. Cal. 1977), *aff'd* 612 F.2d 467 (9th Cir. 1980) where the court indicated that a foreign judgment is not conclusive in California if the foreign court did not have personal jurisdiction over the defendant. *Accord Somportex*, 318 F. Supp. 161; *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885 (N.D. Tex. 1980); see also FOREIGN MONEY JUDGMENTS § 4, 13 U.L.A. 268 (1986); RESTATEMENT, *supra* note 1, § 482 (1)(b).

⁹⁸ In *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885 (N.D. Tex. 1980), the court found that an English judgment against an American citizen barred that party from bringing a later action in the United States. The court determined that the English decision was binding because the English tribunal had personal jurisdiction over the plaintiff as measured by both British and American law. Similarly, in *Somportex*, 318 F. Supp. 161, the court granted recognition in Pennsylvania to a default judgment obtained in England because the American defendant voluntarily appeared in the British action. The court determined that recognition was appropriate because the English court had personal jurisdiction in the international sense and British civil procedure was compatible with United States goals of justice and concepts of due process. *Accord Montreal*, 430 F. Supp. 1243; see also FOREIGN MONEY JUDGMENTS § 4(a), 13 U.L.A. 268 (1986); RESTATEMENT, *supra* note 1, § 482 (1)(b).

⁹⁹ A declining number of jurisdictions mandate that the country issuing the judgment must reciprocally recognize rulings from the enforcing state before permitting validation of the decision. See *supra* text accompanying note 25.

¹⁰⁰ See *supra* text accompanying note 25. But see *Zschernig v. Miller*, 389 U.S. 429 (1968) (state could not impose reciprocity limitations on the ability of a non-resident alien to inherit property because it involved the state in foreign affairs).

¹⁰¹ See *supra* text accompanying note 7. An example of an impingement into international affairs caused by the lack of national standards for the recognition of foreign decisions is shown by the comparison of *Hunt v. BP Exploration Co. (Libya)*,

permitted to individually determine their own specific guidelines for validation.¹⁰²

In summary, it is clear that the concept of the recognition of foreign tax decisions would not be adverse to the public policy of most jurisdictions. Further, the public policy analysis undertaken by a forum when determining whether enforcement is appropriate does not cause an unreasonable interference into foreign affairs. Consequently, public policy considerations should not remain a justification for the continued refusal to acknowledge foreign tax rulings.

III. WHICH LAW THE COURT SHOULD USE IN ENFORCING TAX JUDGMENTS

Once a jurisdiction concludes that the reasons barring validation of foreign tax judgments are insufficient to rationalize continued adherence to the revenue rule, the forum must next address the issue of which law should govern the recognition of these tax decisions.

In the United States, modification of the revenue rule should be limited to permit recognition of final tax decisions issued abroad, while still excluding actions for the collection of assessments themselves, lawsuits involving the use or recognition of alien revenue laws to limit defenses and suits to facilitate recovery for debts arising out of other fiscal claims. There is a convincing contention that any further easing of the revenue rule to permit recognition of these other actions might run afoul of the Act of State doctrine.¹⁰³ An investigation into whether to acknowledge a foreign revenue *law* versus a *judgment* more likely involves an impermissibly intrusive analysis of foreign motivations and policies.

492 F. Supp. 885 (N.D. Tex. 1980) with *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied* 405 U.S. 1017 (1972). In *Hunt*, the recognizing jurisdiction permitted a challenge by the plaintiff to the factual basis of the issuing court's finding of personal jurisdiction over him, while in *Somportex*, the enforcing forum prohibited such an examination.

Nevertheless, some writers have suggested that a national standard is advisable due to the intrusion into foreign relations. See Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53 (1984); Reese, *supra* note 86.

¹⁰² See *supra* text accompanying note 7.

¹⁰³ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (discussing the Act of State doctrine).

In an action to enforce a final tax decree, which is in essence a proceeding for recovery upon a money judgment, any inquiry into the validity of the underlying claim is severely limited to two considerations: whether jurisdictional requirements were met and to the narrow evaluation of public policy considerations.¹⁰⁴ As a result, the pitfalls involved when United States tribunals are called upon to enforce foreign tax laws, and thereby administer the complex tax system of another sovereignty, are avoided and intrusions into international affairs are lessened to a satisfactory level.

In assessing whether to entertain a particular final tax adjudication, tribunals can utilize standard legal principles applicable to the evaluation of whether any other type of foreign judgment should be acknowledged. Although state precepts governing the recognition of non-United States judgments differ to a certain extent, most subscribe to similar general tenets.¹⁰⁵ These rules originated in the seminal case of *Hilton v. Guyot*.¹⁰⁶ *Hilton* introduced the view that the enforcement of foreign judgments is based on the concept of "comity", which was seen as less than an obligation, but more than mere courtesy. Comity mandated that underlying rulings must be the result of a full and fair trial before a court of competent jurisdiction which conducted the lawsuit in accordance with regular proceedings with due citation of or voluntary appearance of the defendant. Further, it was deemed necessary that the trial was managed under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of that sovereignty and those of other nations, along with absence of prejudice in the forum itself or in the system of laws under which it sat. Moreover, comity required an absence of fraud in the procurement of the decree, along with the lack of any remaining reason which would preclude the principle from being allowed its full effect.¹⁰⁷

Subsequently, the Restatement refined the definition of comity to promote recognition only where the judgment was rendered under a system with impartial tribunals and circumstances in which all relevant procedures were compatible with due process of law.¹⁰⁸ Further, the

¹⁰⁴ See *supra* text accompanying note 93.

¹⁰⁵ See *supra* text accompanying note 93.

¹⁰⁶ 159 U.S. 113 (1894).

¹⁰⁷ *Id.* at 202-03. *Hilton* also found that reciprocity between the forum state and the country issuing the judgment was required in order for comity to be present. This limitation is now rarely followed. See *supra* text accompanying note 25.

¹⁰⁸ See RESTATEMENT, *supra* note 1, § 482(1).

Restatement distillation mandated the presence of personal jurisdiction over the defendant according to the law of the rendering forum and under United States standards of due process.¹⁰⁹

Under the Restatement, enforcement was discretionary where the original forum lacked subject matter jurisdiction or the defendant was not accorded adequate notice of the proceeding.¹¹⁰ Similarly, validation was again viewed as discretionary if certain elements could be shown: (1) if the decision was obtained by fraud; (2) if the cause of action underlying the lawsuit was repugnant to the public policy of the United States or of the implementing state; (3) if the ruling conflicted with another final decree entitled to acknowledgment; or (4) if the proceeding in the foreign country was contrary to an agreement between the parties to submit the controversy to another tribunal.¹¹¹ Likewise, the Uniform Laws Annotated enumerated virtually identical grounds for determining that a foreign adjudication was non-conclusive in states which have adopted it.¹¹²

The comity standards which have developed since *Hilton* furnish sound guidelines for determining which final revenue rulings should be granted recognition. In addition to providing uniformity in the enforcement of tax and non-tax decisions, all other concerns specific to these judgments raised by *Moore*¹¹³ and *Gilbertson*¹¹⁴ can be fully

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² FOREIGN MONEY JUDGMENTS § 4, 13 U.L.A. 265 (1986) provides:

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
(2) the foreign court did not have personal jurisdiction over the defendant; or
(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
(2) the judgment was obtained by fraud;
(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

¹¹³ *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929).

¹¹⁴ *Her Majesty the Queen in the Right of the Province of B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979).

addressed within this stricture. Those decrees based on levies which jurisdictions regard as wholly unfair, impermissible in the United States, or otherwise repugnant to United States judicial precepts could be excluded under the provisions refusing validation on public policy grounds.¹¹⁵

If tribunals were to feel that the Restatement or Uniform Laws Annotated principles, for example, were insufficient guards against heightened concerns raised by tax rulings specifically, there are options available to supply additional security. Since there is less assurance that a levying state's causes of action are accurate or fair in a default judgment, as opposed to a decision in a contested suit,¹¹⁶ a court could initiate a policy to exclude enforcement of default tax decrees. Alternatively, a jurisdiction may decide to require reciprocity before recognition of any assessment decision, or perhaps of only default judgments since these include the strongest potential for jurisdictional overreaching or denial of basic due process protections. While reciprocity along these lines is rarely required in modern day non-revenue adjudications,¹¹⁷ the *Gilbertson* court found it was an essential element.¹¹⁸ In addition to encouraging recognition of United States tax judgments abroad, mutuality of enforcement also may help reduce the likelihood of injustice in some cases.¹¹⁹

IV. CONCLUSION

When viewed in the light of the birth of the revenue rule along with the United States' present economic and political position, continuance of the tax judgment exclusion seems anachronistic and destructive. A revamping of the rule along the lines described in this article would benefit the United States in a number of ways. Foremost, the United States would realize long term financial gains due to today's highly integrated international markets and economies. Enforcement would additionally provide a secondary, albeit more in-

¹¹⁵ Conceivably, a recognizing tribunal could even refuse validation on public policy grounds—that the adjudication itself was repugnant to policy of that state—if it finds that the civic analysis necessitated in that particular case excessively invaded international relations.

¹¹⁶ See Casad, *supra* note 101.

¹¹⁷ See *supra* text accompanying note 25.

¹¹⁸ *Id.*

¹¹⁹ See *Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson*, 596 F.2d 1161, 1166 (9th Cir. 1979) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 412 (1964)).

direct, increase in capital. As it stands now, some foreign nations maintain a revenue rule similar to that of the United States and decline to give conclusive effect to alien tax rulings for similar reasons.¹²⁰ Nevertheless, virtually all sovereign states assess levies, and recognition of final decisions by United States courts would strongly encourage reciprocal conduct by other countries. This type of mutual acknowledgment by other nations would allow domestic jurisdictions to recoup tax revenue now irretrievably lost.

Moreover, validation of these decisions would result in a variety of other prolonged benefits, such as the discouragement of tax evasion. The present system effectively provides immunity to careful evaders since, as it stands now, a foreign state that has obtained an assessment decree is prevented from securing recovery against a person whose assets may be solely within the United States or are easily transferred outside the home country once a judgment has been issued. Further, a tax evader is permitted to enjoy the various benefits of the levying government while escaping the cost of maintaining that institution.¹²¹

¹²⁰ *E.g.*, Canada (United States v. Harden, 1963 S.C.R. 366) and England (Government of India v. Taylor, [1955] App. Cas. 491 (appeal taken from H.L. (E))).

¹²¹ The court in *State ex rel. Okla. Tax Comm'n v. Rodgers* was aware of this potential. It commented that "[t]he taxpayer who enjoys the protection of government should bear his share of the expense of maintaining the government, and should not be permitted to escape his obligation by crossing states lines," when deciding to entertain a sister state suit for taxes. 193 S.W.2d 927 (Mo. Ct. App. 1946).

