"A DELICATE INQUIRY": FOREIGN POLICY CONCERNS REVIVE THE REVENUE RULE IN THE SECOND CIRCUIT AND BAR FOREIGN GOVERNMENTS FROM SUING BIG TOBACCO

INTRODUCTION

In 2004, a pack of cigarettes in France cost approximately $6.40 (U.S.), a fifty percent increase from 2002.[1] This increase reflected, in part, the French government's effort to reduce the ill-effects of smoking by raising cigarette taxes.[2] France was not alone; over the course of the previous decade, other European nations had instituted significant cigarette tax increases of their own.[3] In addition to raising revenue and discouraging consumers from using tobacco, the cigarette tax increases have had the unintended effect of increasing black market activity.[4] According to some experts, as much as twenty percent of cigarettes imported into the domestic markets of some European countries are thought to be lost to illicit transactions.[5] Cigarette smuggling is estimated to have cost European nations $1.5 billion in revenue over the last ten years.[6] Much of this smuggling activity has been blamed on efforts by United States cigarette-makers, who are struggling to earn a profit in an increasingly health-conscious European consumer market.[7]

1. Elaine Sciolino, *For the Tobacconists of France, Life's a Pack of Trouble*, N.Y. TIMES, Nov. 13, 2003, at A4.

2. Peter Ford, *Europe's Smokers Feel Heat*, CHRISTIAN SCIENCE MONITOR, Oct. 24, 2003, at W1, *available at* http://www.csmonitor.com/2003/1024/p01s04-woeu.html. France increased cigarette taxes incrementally over three years. *Id.*

3. *See id.* (noting the cigarette tax increase of 55% over five years in Great Britain); Steven Lee Meyers, *For Europe's Sake, Spotting Moonshine Among Swans*, N.Y. TIMES, Dec. 8, 2005, at A4 (noting the cigarette tax increase of 15% in Lithuanian over one year). Ireland went beyond a tax increase and instituted a ban on smoking in many public areas, including the workplace. Ford, *supra* note 2. Holland and Norway also instituted bans but included many exceptions. *Id.*

4. Anne Macdiarmid, *Black Market Cigarettes May Cloud Future*, BALTIMORE SUN, May 31, 1998, at 4F. The nations that make up the European Union are particularly susceptible to cigarette smuggling because of the nations' close proximity to each other and the wide disparity in cigarette taxes between neighboring countries. Suzanne Daley, *Europeans Suing Big Tobacco in U.S.*, N.Y. TIMES, Nov. 7, 2000, at A1.

5. *See* Daley, *supra* note 4.

6. *See id.* Tax avoidance schemes are estimated to cost foreign governments worldwide over $500 billion annually. Tax Justice Network, *Tax Us If You Can*, http://www.taxjustice.net/cms/front_content.php?idcat=30 (last visited Nov. 12, 2006).

7. *See* Daley, *supra* note 4.

In an effort to recover part of this lost revenue, foreign governments have turned to United States law.[8] The Racketeer Influenced and Corrupt Organizations Act (RICO) criminalizes a wide-range of smuggling schemes, including those designed to evade taxes.[9] RICO also provides a private enforcement mechanism for parties who are injured by conduct that amounts to a RICO violation.[10] As an incentive to individuals and corporations to make use of the private enforcement mechanism, civil RICO entitles a prevailing party to treble damages based on the monetary injury suffered due to the racketeering activity.[11]

But foreign governments are generally barred from recovering tax revenue in federal court. A claim that enforces foreign tax law raises a number of concerns.[12] First, the Constitution assigns the duty of dealing with matters of foreign policy to the executive branch.[13] Therefore, judicial review of a foreign tax claim is said to violate the constitutional principle of separation of powers.[14] Second, assigned the responsibility of deciding matters of domestic law, federal courts are said to have no obligation to clog their dockets with cases based on foreign tax law.[15] Third, because judges in the federal court system are not trained in foreign tax law, federal courts are said to lack competence to review foreign tax claims.[16] In recognition of these concerns, the revenue rule doctrine precludes domestic courts from enforcing foreign tax

8. *Id.* Other than seeking a remedy through U.S. law, foreign governments often lack tenable options. *See* Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 422 (1999) (positing that foreign governments often ignore labor rights violations by American corporations abroad out of economic considerations). Even if extradition proceedings were successful, the odds of recovering a judgment from a U.S. multinational corporation in a court of foreign jurisdiction are slim. *See id.*; *see also* Hanson Hosein, *Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285, 300–01 (1993) (noting that the Indian legal system does not recognize the same injuries to personal rights as the U.S. legal system).

9. 18 U.S.C. §§ 1961–1968 (2000) (as amended by Pub. L. No. 107-56, § 813, 115 Stat. 272, 383 (2001)).

10. § 1964(c).

11. *Id*.

12. *See* Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 137 (2d Cir. 2001) (Calibrisi, J., dissenting).

13. *See* U.S. CONST. art. II, §§ 1–2.

14. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

15. *See infra* notes 109–114 and accompanying text.

16. *See infra* notes 115–120 and accompanying text. Another reason given for barring foreign tax claims is that the federal court system is simply busy enough as it is. *See* John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 435–36 (1986) (blaming court clog on "the continued increase in population, the so-called litigation explosion, the substantial increase in very complex cases involving multiple parties, the influence of inflation on damage verdicts, and the steadily broadening application of the law of torts" (citations omitted)).

law.[17] According to Restatement (Third) of Foreign Relations Law, "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."[18]

It is not clear, however, whether civil RICO claims brought by foreign governments to recover tax revenue are prohibited by the revenue rule.[19] These claims "enforce" a domestic statute as well as a foreign tax law.[20] The revenue rule has never been interpreted to bar a claim that amounts to the enforcement of a domestic statute.[21] Case law reaching back to the doctrine's origins does not provide a clear answer to the question of whether the revenue rule bars a "mixed" claim; that is, a suit enforcing both a domestic statute and a foreign tax law.[22]

The Second Circuit Court of Appeals recently held that the revenue rule does bar a foreign government's civil RICO claim when that claim is based on violations of the foreign government's tax law.[23] The European Community (the E.C.)[24] brought a civil RICO claim against U.S. cigarette-maker R.J.R. Nabisco, Inc.[25] The E.C.'s claim was based on allegations that the cigarette-maker violated foreign tax law by smuggling cigarettes into the plaintiff-governments' territories.[26] The revenue rule applied, according to the court, because the claim violated the separation of powers principle.[27] Furthermore, by characterizing the E.C.'s claim as the extraterritorial enforcement of a foreign tax law, the court was concerned that the suit raised national sovereignty concerns.[28]

This Note argues that the court's reading of the revenue rule was unnecessarily broad and hence the court's separation of powers and national

17. Pasquantino v. United States, 544 U.S. 349, 364 (2005).

18. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987).

19. Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 138 (2d Cir. 2001) (Calibrisi, J., dissenting).

20. *See id.* at 138–39.

21. *Pasquantino*, 544 U.S. at 364.

22. *Id.*

23. European Community v. R.J.R. Nabisco, Inc., 424 F.3d 175 (2d Cir. 2005).

24. The European Community, or the European Economic Community, was formed in 1957 by Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands. Europa: The EU at a Glance: History of the European Union, http://europa.eu/abc/history/1957/index_en.htm (last visited Nov. 12, 2006). Today, the E.C. is made up of 25 democratic nations. *See* Europa: The EU at a Glance: European Governments On-Line, http://europa.eu/abc/governments/index_en.htm (last visited Nov. 12, 2006).

25. European Community v. R.J.R. Nabisco, Inc., 355 F.3d 123, 128–29 (2d Cir. 2004).

26. *Id.*

27. European Community v. R.J.R. Nabisco, Inc., 424 F.3d 175, 181 (2d Cir. 2005).

28. *See id.*; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 448 (1964) (White, J., dissenting on other grounds) ("[O]ur courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign").

sovereignty concerns were overstated. The separation of powers concerns were minimized by the fact that the suit would have furthered the political branches' avowed policies of assisting other nations in eradicating organized crime and terrorism. Furthermore, the Second Circuit mischaracterized the claim as the extraterritorial application of foreign tax law and therefore overstated the national sovereignty concerns raised by the suit. Because the suit only incidentally recognized foreign tax law, the court erred in concluding that the courts of one independent sovereign were being used to further the policy of a foreign sovereign. Finally, this Note will show that the scope of the revenue rule should be reduced in the civil RICO context because the doctrine is an anachronism in today's global economy.

Composed of five parts, this Note examines the revenue rule doctrine and the Second Circuit's decisions in *European Community I* and *II*. Part I delves into the common law origins of the revenue rule. Focusing primarily on Judge Learned Hand's enunciation of the doctrine in *Moore v. Mitchell*,[29] Part I also discusses the early appearances of the revenue rule in the United States. Part II addresses the contemporary justifications for the revenue rule that evolved out of Judge Hand's opinion. Part III focuses on the recent decision in *Pasquantino v. United States*.[30] where the Supreme Court seemed to reduce the scope of the revenue rule by approving of a wire fraud prosecution even though it incidentally recognized a foreign tax law.[31] Part IV discusses the reasoning of the Second Circuit in *European Community I* and *II*. Part V provides a critical analysis of the Second Circuit's decisions.

I. THE REVENUE RULE: COMMON LAW ORIGINS AND EARLY AMERICAN VARIATIONS

The earliest revenue rule decisions indicate that the doctrine is a judge-made rule that has been modified depending on the dominant policy concerns of the time.[32] The revenue rule was originally justified by economic concerns.[33] More recently, the doctrine has been justified by the risk that judicial

29. 30 F.2d 600 (2d Cir. 1929).

30. 544 U.S. 349 (2005).

31. *Id.*

32. *See* Joseph M. West, *Federal Fraud Prosecutions of Schemes to Defraud Foreign Sovereigns of Import Taxes*, 50 WAYNE L. REV. 1061, 1061 (2004) (describing the revenue rule as a prudential consideration).

33. *See, e.g.*, Boucher v. Lawson, 95 Eng. Rep. 53 (K.B. 1734) (Lord Harwicke, C.J.).

evaluation of policy-laden tax laws will have a negative impact on the relationship between foreign and domestic sovereigns.[34] This section examines the evolution of the justifications for the revenue rule in the doctrine's first 150 years.

A. Lord Mansfield's Commercial Justification

The revenue rule made its first appearance in the eighteenth century in a trio of English common law decisions.[35] At that time, England was jockeying with France for the position as the world's superior trading power.[36] "Mercantilism" was the dominant economic policy.[37] In other words, the world's trade powers strove to create a favorable balance of exports and imports.[38] International trade was a subject of increasing taxation by most nations.[39] Some nations grew to rely on the tax revenue generated by trade; others implemented a policy of protectionism through a combination of import tax schemes and outright prohibition on trade with certain foreign nations.[40] Thus, foreign trade and revenue laws posed a potential barrier to England and other nations in search of commercial opportunities abroad.[41]

Boucher v. Lawson[42] exemplifies the judicial response to the threat posed by foreign trade laws to open markets. In an effort to conserve precious metal, Portugal had banned the exportation of Portuguese gold in the early 1700s.[43] The merchant in *Boucher* had formed a contract with a Portuguese carrier for the delivery of a shipload of the protected commodity.[44] After arriving in an English port, however, the carrier refused to deliver the gold to the English merchant.[45] In response to a breach of contract suit by the merchant in a British court, the carrier raised the Portuguese ban on gold exportation as a

34. *See, e.g.*, *Moore*, 30 F.2d at 603–04 (Hand, J., concurring).

35. British Columbia v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979).

36. *See* JOHN BOWLE, THE IMPERIAL ACHIEVEMENT: THE RISE AND TRANSFORMATION OF THE BRITISH EMPIRE 79–82 (1974). For the British Empire, the middle part of the 18th century marked a period of tremendous expansion in international trade. *See* JOHN B. OWEN, THE EIGHTEENTH CENTURY 1714–1815 132 (1974). Between the years of 1714 and 1760, for example, domestic exports are estimated to have increased by more than 80 percent. *Id.*

37. *See* MAURICE ASHLEY, A HISTORY OF EUROPE 1648–1815 47–48 (1973).

38. *Id*. at 47.

39. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L. L.J. 161, 171 (2002).

40. *See* ASHLEY, *supra* note 37, at 48 (noting that nations sought to protect their own industries and thereby increase national wealth by imposing subsidies on production and tariffs on imports).

41. *See* Dodge, *supra* note 39, at 171.

42. 95 Eng. Rep. 53 (K.B. 1734) (Lord Harwicke, C.J.).

43. *See id.*

44. *Id.*

45. *Id.*

defense.[46] Because the contract was illegal according to Portuguese law, the carrier argued, the carrier's performance should be excused.[47] The court in *Boucher* refused to recognize the Portuguese law and ultimately held that the contract was enforceable.[48] As Lord Mansfield, the author of the court's opinion, later put it: "[N]o country ever takes notice of the revenue laws of another."[49] This early application of the revenue rule was justified by commercial concerns.[50] Foreign law that threatened to chill English trade was plainly disfavored in Mansfield's court. As *Boucher* made clear, enforcing oppressive duties or restrictions would have the effect of "cut[ting] off all benefit of such trade from th[e] kingdom, which would be of very bad consequence[s] to the principal and most beneficial branches of . . . trade."[51]

The early commercial justification of the revenue rule was roundly criticized. Early commentators found Mansfield's commercial concerns unprincipled and unimportant.[52] Justice Joseph Story, for example, described this reasoning as "inconsistent with good faith and moral duties of nations."[53] Later criticism has focused on the fact that the revenue rule was mere dicta in *Boucher* and *Holman*.[54] In *Boucher*, for instance, because the Portuguese ban was not a revenue law per se, it has been pointed out that the revenue rule's prohibition on enforcement of foreign revenue law is not essential to decide the case on its merits.[55] Criticism notwithstanding, Mansfield's decisions are generally considered the genesis of the revenue rule.[56]

46. *Id.* at 54.

47. *Boucher*, 95 Eng. Rep. at 54.

48. *Id.*

49. Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775). *Holman* involved another contract dispute. A French merchant had contracted to sell tea in France to an English merchant who planned to smuggle the tea into England without paying English duties. *Id.* When the French merchant sued for payment, the English merchant argued that the contract was void because it violated English tax laws. *Id.* The court held that the contract was enforceable. *Id.* The English law defense was unavailing because the contract was governed by French law and French law did not recognize English tax law. *Id.*

50. *See* Dodge, *supra* note 39, at 170–71.

51. *Boucher*, 95 Eng. Rep. at 54.

52. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 338–39 (8th ed. 1883) (1834).

53. *Id*. at 339.

54. *See* British Columbia v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979); William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 274–76 (Winter 2000).

55. *See* European Community v. R.J.R. Nabisco, Inc., 150 F.Supp.2d 456, 478–79 (E.D.N.Y. 2001).

56. *See, e.g.*, Dodge, *supra* note 39, at 170.

B. Judge Learned Hand's Risk-of-Embarrassment Justification

The early revenue rule decisions in the United States applied the doctrine on the basis that the judiciary might embarrass the political branches of domestic and foreign governments by evaluating the tax laws of the foreign government. Tax laws, like penal laws, are examples of positive law.[57] Positive law is "a system of law promulgated and implemented within a particular political community by political superiors."[58] Tax laws are said to "mirror the moral and social sensibilities of a society."[59] Therefore, the courts determined that the judicial evaluation of tax laws would risk embarrassment of domestic or foreign policy-makers, especially where domestic policy differed measurably from foreign policy.[60]

The revenue rule was first applied in the context of enforcing tax judgments of sister states. For example, a claim by the State of Colorado to collect a transfer tax in a New York state court was ruled impermissible as a matter outside the court's jurisdiction.[61] Colorado's claim violated the "well-settled principle of private international law which precludes one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such."[62] In a later opinion for the Second Circuit Court of Appeals, Judge Learned Hand provided a detailed explanation of the basis for the revenue rule's application in these cases.[63] In assessing a claim brought under another state's penal or revenue laws, the domestic court must necessarily assess the validity of that law.[64] According to Judge Hand:

> This is not a troublesome or delicate inquiry . . . when it concerns the relations between the foreign state and its own citizens or even those who may be tem

57. *See* United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996); Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130, 1133 (1961).

58. BLACK'S LAW DICTIONARY 925 (7th ed. 1999).

59. Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 111 (2d Cir. 2001).

60. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 277 (1935). For example, suppose a foreign government imposed "a tax designed to render it very expensive to sell United States newspapers in that nation[.]" *Att'y Gen. of Canada*, 268 F.3d at 113. A court evaluating the validity of such a law would face a clear dilemma between the conflicting policies of the U.S. Government and the particular foreign government. *Id.* at 112. The risk of embarrassment is therefore credible in such a situation. *Id.*

61. Colorado v. Harbeck, 133 N.E. 357 (N.Y. 1921).

62. *Id.* at 360; *see also* Maryland v. Turner, 132 N.Y.S. 173, 175–76 (Sup. Ct. 1911); Detroit v. Proctor, 61 A.2d 412, 415 (Super. Ct. 1948); Arkansas v. Bowen, 20 D.C. 291, 295–96 (Sup. Ct. 1891); *In re* Bliss' Estate, 202 N.Y.S. Supp. 185, 187 (N.Y. Sur. 1923). *But cf.* Henry v. Sargeant, 13 N.H. 321 (1843) (asserting that New Hampshire state court has jurisdiction over a claim for Vermont taxes).

63. Moore v. Mitchell, 30 F.2d 600, 603–04 (Hand, J., concurring).

64. *Id*. at 604.

> porarily within its borders. To pass upon the provisions of 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.[65]

Thus, by preventing one state from assessing the policy of another state, the revenue rule was thought to preserve relations among the states.

Judge Hand's opinion, drafted in 1929, was likely founded on a respect for state sovereignty. At that time, state borders were considerably more opaque than they are today.[66] Preserving state sovereignty was a particularly important concern for many in the aftermath of the Civil War.[67] Judicial opinions from the era suggest the courts attempted to preserve this sovereignty in the face of a unifying national economy.[68] In this context, there was a credible risk of embarrassment when the courts of one state evaluated the positive laws of another state.[69]

Within a decade of Judge Hand's opinion, however, the Supreme Court began to reassess the balance between the principles of state sovereignty and comity.[70] The Court effectively reduced the scope of the revenue rule in the context of tax judgments between the states in *Milwaukee County v. M.E. White Co.*[71] The Court held that the Full Faith and Credit Clause[72] required states to recognize the tax laws of other states.[73] The Court doubted that the policies of one state would differ dramatically from the policies of another state.[74] Therefore, there was little risk that one state court's decision would embarrass the policy-makers of another state.[75] Despite the reduction of the

65. *Id*.

66. *See* Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1605 (2002).

67. *See id*. at 1606.

68. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 273 (1918).

69. For example, consider that this was the beginning of an era in which state sovereignty was exemplified by Southern states' expressed vehemence towards federal attempts to eradicate Jim Crow laws. *See* Gey, *supra* note 66, at 1606.

70. *See, e.g.*, H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 855 ("The question for the Court had become not whether Congress had impinged on state sovereignty, but only whether congressional action was within the scope of federal power.").

71. 296 U.S. 268 (1935).

72. U.S. CONST. art. IV, § 1 ("[F]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

73. *Milwaukee County*, 296 U.S. at 276.

74. *Id.*

75. *Id.*

> The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under

doctrine in the context of sister state tax judgments, however, the revenue rule could not be totally abandoned. A foreign sovereign could not rely on the constitutional argument to enforce a foreign tax judgment in a U.S. court because "there is no provision similar to the full faith and credit clause in the Constitution which would require that the courts of this country extend full faith and credit to the judgments of a foreign country."[76]

These early decisions suggest the revenue rule is an elastic doctrine that can be stretched or constricted in accordance with contemporary policy preferences. Lord Mansfield recognized that English trade in the eighteenth century would benefit from prudent application of the revenue rule.[77] Similarly, the policy and constitutional arguments employed in the revenue rule cases in the United States in the 1920s and 1930s embody the then-contemporary notion of the opacity of state borders.

II. CONTEMPORARY JUSTIFICATIONS

Judge Hand's risk-of-embarrassment justification for the revenue rule was eventually restated as three distinct but related justifications. They are: (1) the principal concern that enforcement of foreign tax law violates separation of powers; (2) the concern that use of domestic courts for foreign tax issues offends our sense of national sovereignty; and (3) the concern that domestic courts are not competent to interpret foreign tax law issues.[78] This section will examine each of these justifications in turn.

A. Separation of Powers Concerns

The separation of powers principle is fundamental to the Constitution's framework.[79] The Constitution delegates several duties with respect to foreign

> the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of origin.

Id. at 276–77.

76. British Columbia v. Gilbertson, 597 F.2d 1161, 1164–65 n.8 (9th Cir. 1979).

77. Boucher v. Lawson, 95 Eng. Rep. 53 (K.B. 1734) (Lord Harwicke, C.J.).

78. Bradley R. Wilson, *Subtle Indiscretions? International Smuggling, Federal Criminal Law, and the Revenue Rule*, 89 CORNELL L. REV. 231, 240 (Nov. 2003); *see also* Pasquantino v. United States, 544 U.S. 349, 370 (2005).

79. *See* Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers.") (quoting INS v. Chadha, 462 U.S. 919, 946 (1983)).

affairs exclusively to the executive branch.[80] These duties include the power to make treaties and the power to appoint ambassadors.[81] These duties are thought to be vested in the executive so that the government may present a unified face to the international community.[82] Additionally, as a singular entity, the executive is thought to be better able to respond to international events demanding quick and efficient action than a legislative or judicial body.[83] Because foreign policy matters are delegated to the executive branch, the judiciary is barred by the separation of powers principle from deciding cases involving a large measure of foreign policy.[84]

In the revenue rule context, courts have concluded that separation of powers concerns are present where a claim involves direct enforcement of a foreign tax law and the executive branch has no involvement in the case.[85] *United States v. Boots*[86] is an example of a revenue rule case that was decided largely on separation of powers grounds.[87] The First Circuit Court of Appeals held that the revenue rule barred the federal wire fraud prosecution of U.S. citizens charged with violating foreign tax laws.[88] The court was particularly concerned with the risk that "[n]ational policy judgments" might be "undermined" if the court were to give general effect to the foreign tax laws at issue in the prosecution.[89]

80. U.S. CONST. art. II, § 2; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("[T]he President alone has the power to speak or listen as a representative of the nation.").

81. U.S. CONST. art. II, §§ 1–2.

82. *See Curtiss-Wright Export*, 299 U.S. at 320 (stressing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). *Compare* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 579–80 (2004) (arguing that Executive power did not originally include plenary foreign affairs duties), *with* Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1685 (2005) (explaining that foreign affairs duties were assigned to the Executive for the simple reason that the prevalent understanding in the eighteenth century of the Executive power included these duties).

83. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) ("The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains.").

84. *See* Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.").

85. *See, e.g.*, Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001).

86. 80 F.3d 580 (1st Cir. 1996).

87. *Id.*

88. *Id.*

89. *Id.* at 588.

Other courts have held, however, that direct executive branch involvement in the case will diminish separation of powers concerns. The Executive is directly involved in a case, for example, where the federal government prosecutes a defendant under a domestic statute.[90] The federal prosecutor is after all considered an organ of the executive branch.[91] According to the Supreme Court, "by electing to bring [a] prosecution, the Executive has assessed the prosecution's impact on" foreign policy and has "concluded that it poses little danger of causing international friction."[92] Hence, contrary to *Boots*, the Fourth Circuit Court of Appeals concluded that a wire fraud prosecution based on violations of foreign tax law did not implicate separation of powers concerns because the Congress and the Executive were directly involved in the case.[93] The court noted, "Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the Defendants' indictment thereunder."[94] In fact, according to the court, "a significant separation of powers problem would arise were [the court] to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule," to bar the government's wire fraud prosecution.[95] The court further reasoned that even if the prosecution involves some degree of interpretation of foreign tax law, the enforcement of a domestic statute should be characterized as the vindication of a domestic law enforcement interest rather than as the enforcement of a foreign tax law.[96]

Although the separation of powers principle is central to the constitutional framework, the branches of government are not definitively compartmentalized.[97] There exists a permissible measure of overlap among the separate branches.[98] For example, the Executive may employ the treaty power as a mechanism to authorize another branch of government to perform a

90. Pasquantino v. United States, 544 U.S. 349, 364 (2005).

91. *Id.* at 369.

92. *Id.*

93. United States v. Pasquantino, 336 F.3d 321, 331 (4th Cir. 2003).

94. *Id.*

95. *Id.*

96. *Id.* at 330–31.

97. *See* Miller v. French, 530 U.S. 327, 341 (2000) (noting that the "boundaries between the three branches are not '"hermetically" sealed'") (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)); Mistretta v. United States, 488 U.S. 361, 388 (1989) ("[C]onsistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.").

98. *See Mistretta*, 488 U.S. at 380.

duty that impacts foreign policy.[99] Therefore, courts have acknowledged the absence of separation of powers concerns where the United States has entered into a treaty that calls for the enforcement of foreign tax judgments.[100] In *Gilbertson*, the Canadian Province of British Columbia sued in United States federal district court to recover on a judgment for tax revenue originally awarded by a Canadian court.[101] In holding that the revenue rule barred the claim, the Ninth Circuit Court of Appeals noted that Canada and the United States were parties to two extensive tax treaties.[102] The treaties each provided that the governments will exchange information when needed in order to curtail international tax evasion.[103] However, the treaties did not provide for reciprocal enforcement powers.[104] The court noted, "[e]ven though the political branches of the two countries could have abolished the revenue rule between themselves at the time they entered into the treaties, they did not."[105] Therefore, without evidence of executive or legislative consent, enforcement of a foreign tax judgment would implicate the separation of powers concerns of the revenue rule.[106]

In sum, in the absence of evidence of consent from the political branches of government, enforcement of a foreign tax judgment would implicate the separation of powers concerns of the revenue rule. Evidence of sufficient consent has been found where the executive branch is involved directly in the case by prosecuting a U.S. citizen under a domestic statute.[107] Evidence of sufficient consent will also probably be found where the claim or prosecution is brought under the terms of a valid treaty.[108]

99. *See, e.g.*, United States v. Lara, 541 U.S. 193, 201 (2004) ("[T]reaties made pursuant to [the treaty] power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920)).

100. *See* Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 116 (2d Cir. 2001).

101. British Columbia v. Gilbertson, 597 F.2d 1161, 1162 (9th Cir. 1979).

102. *Id.* at 1165–66.

103. *Id.* at 1165.

104. *Id.*

105. *Id.*

106. *See also* Republic of Honduras v. Philip Morris Cos., Inc., 341 F.3d 1253, 1259 (11th Cir. 2003) (holding that the revenue rule barred the Republic's suit to recover tax revenue because "[t]he political branches undisputedly have not entered into any type of tax treaty with any of the Republics that would allow the Republics to enforce their tax claims underlying this suit in this country."); Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 119–22 (2d Cir. 2001) (discussing at length the U.S.–Canada Treaty Framework).

107. European Cmty. v. R.J.R. Nabisco, Inc., 424 F.3d 175, 180–81 (2d Cir. 2005).

108. *See Gilbertson*, 597 F.2d at 1162–65.

B. National Sovereignty Concerns

The revenue rule is also occasionally justified by a respect for national sovereignty.[109] That is, "the rule prevents sovereigns from asserting their sovereignty within the borders of other nations, thereby helping nations maintain their mutual respect and security."[110] The national sovereignty justification is as old as the revenue rule itself. The respect for national sovereignty can be gleaned from Lord Mansfield's earliest enunciations of the revenue rule: "[N]o country ever takes notice of the revenue laws of another."[111]

In holding that the revenue rule barred foreign governments from bringing a civil RICO claim based on foreign tax evasion, the court in *Attorney General of Canada* reasoned that the suit would allow for the extraterritorial application of foreign tax law.[112] According to the court:

> [T]he class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority.[113]

According to this formulation, the court's responsibilities include protecting domestic sovereignty against the assault of an extraterritorial application of foreign tax law.[114]

C. Judicial Competence

A final, less common justification given for the revenue rule is that U.S. courts lack competence to interpret foreign tax law issues. Competence to interpret foreign tax law issues involves the pragmatic consideration of the complexity of the law at issue. Judicial competence concerns arise in cases involving foreign tax law because one party will necessarily argue that the foreign tax law was not violated, that the foreign tax law does not apply to the case at hand, or that the foreign tax law is invalid.[115] Any of these arguments will require the domestic court to "effectively pass[ ] on the validity and

109. *See, e.g.*, *Att'y Gen. of Canada*, 268 F.3d at 111–12.

110. *Id.* at 111; *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 448 (1964) (White, J., dissenting on other grounds).

111. Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

112. *Att'y Gen. of Canada*, 268 F.3d at 106.

113. *Id.* at 111 n.6 (quoting Att'y Gen. of N.Z. v. Ortiz, [1984] A.C. 1 (H.L.)).

114. *See id.* at 112 ("[W]e will not permit the presence in our country of foreign tax men, even if represented by intermediaries; we do not tolerate that any help may be given to them") (quoting QRS 1 APS v. Frandsen, [1999] 3 All E.R. 289, 294–97 (C.A. 1999)).

115. Wilson, *supra* note 78, at 256.

operation of the revenue laws of a foreign country, [thereby implicating] the important concerns underlying the revenue rule."[116]

Domestic judges are not trained to interpret foreign tax law. It might be said, domestic judges are "naïve as to the laws of other nations."[117] Regarding the difficulty of interpreting foreign tax laws, it has been noted:

> [T]here is the difficulty of applying foreign tax law correctly. A mature tax system is likely to be a very intricate network of rules, regulations, and accounting practices administered by a special bureaucracy under judicial supervision by a separate tax court hierarchy, aided by a specialized tax bar and accounting profession. The even-handed application of such a body of law by a foreign court of general jurisdiction is, to say the last, not easy.[118]

This argument is bolstered when one considers the complexity of our own Internal Revenue Code.[119] It has also been pointed out that the difficulty of discovery of evidence in a complicated tax claim will be compounded by the fact that the events at issue occurred in a foreign country, far from where the trial is held.[120] The judicial competence justification therefore implies that a domestic court should refuse to preside over a foreign tax claim involving complex foreign tax issues in fairness to the litigants in a particular case.

III. *PASQUANTINO*: A NARROW READING OF THE REVENUE RULE

The contemporary justifications were examined and applied in the Supreme Court's most recent revenue rule decision. In *Pasquantino*, the Supreme Court resolved a circuit split that had developed over the question whether the revenue rule bars a federal wire fraud prosecution based on foreign tax evasion.[121] *Pasquantino* therefore provides the framework for resolving "mixed" questions of law involving a domestic statute and a foreign tax law.[122] In a 5–4 majority decision penned by Justice Thomas, the Court held that the revenue rule did not bar a federal wire fraud prosecution because such a prosecution only incidentally recognizes a foreign tax law while directly enforcing a domestic statute.[123]

116. United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996).

117. Wilson, *supra* note 78, at 240.

118. Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 483 (1995).

119. *See, e.g.*, Alexander v. Everson, Slip Copy, 2005 WL 2035041 (D. Kan. Apr. 23, 2004) (noting the complexities of the Internal Revenue Code in refusing to impose sanctions on a pro se litigant in a tax related claim).

120. Dodge, *supra* note 39, at 209–10.

121. Pasquantino v. United States, 544 U.S. 349, 354 (2005).

122. *See id*. *Pasquantino* also represents the Court's latest revenue rule decision. The revenue rule was last essential to the holding of a Supreme Court decision in 1935 in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

123. *Pasquantino*, 544 U.S. at 354–55.

Pasquantino involved a federal prosecution under the federal wire fraud statute.[124] The federal wire fraud statute criminalizes the interstate use of wires, radio, or television communications for the purposes of executing any scheme or artifice to defraud.[125] The phrase "scheme to defraud" is broadly construed.[126] For example, each telephone or radio communication constitutes a separate offense under the wire fraud statute even though all of the communications together are part of a single fraudulent scheme.[127]

The government charged the Pasquantinos and an accomplice, Arthur Hilts, with wire fraud for their participation in a scheme to smuggle liquor into Canada without paying Canadian excise taxes.[128] According to the prosecution, the Pasquantinos had placed several phone calls from their homes in New York to liquor retailers located in Maryland.[129] Hilts and other drivers were then employed to transport the liquor across the Canadian border while concealing the contents of each shipment from Canadian customs officials.[130] Following their arrest, the Pasquantinos and Hilts were charged with and eventually convicted of several federal wire fraud statute violations.[131] The defendants argued on appeal that the revenue rule barred the prosecution because the case required the court to interpret Canadian tax law.[132] The Fourth Circuit Court of Appeals affirmed the conviction on the basis that the revenue rule did not apply because the prosecution amounted to the direct enforcement of a domestic statute.[133]

The First and Second Circuit Courts of Appeals had split over the question of whether the revenue rule applied to a prosecution like the one in *Pasquantino*.[134] On similar facts,[135] the First Circuit Court of Appeals in *Boots*

124. *Id.* at 353; 18 U.S.C. § 1343 (2000).

125. § 1343.

126. *See* Ellen M. Faro, Note, *Telemarketing Credit Card Fraud: Is RICO One Answer?*, 1990 U. ILL. L. REV. 675, 694 n.195 (1990) (explaining that the broad construction of the wire fraud statute prevailed in the nineteenth century based on the notions that "use of the mails was a privilege available only to the 'most high-minded'" and the purpose of the statute was to prevent the perversion of the Nation's mail and wire systems).

127. *See, e.g.*, United States v. Calvert, 523 F.2d 895, 914 (8th Cir. 1975) (noting that each use of the wires is a separate offense under the wire fraud statute even though all may be part of a single fraudulent scheme).

128. *Pasquantino*, 544 U.S. at 353.

129. *Id*.

130. *Id.*

131. *Id*.

132. *Id.* at 354.

133. United States v. Pasquantino, 336 F.3d 321, 327–31 (4th Cir. 2003).

134. Pasquantino v. United States, 544 U.S. 349, 354 (2005); *see* United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997); United States v. Boots, 80 F.3d 580 (1st Cir. 1996).

135. *Boots* involved a federal wire fraud prosecution for a scheme to smuggle cigarettes across the Canadian border using a Native American reservation that straddled the border as a conduit. *Boots*, 80 F.3d at 583.

held that the revenue rule barred the government from prosecuting the defendants.[136] Because the prosecution required the court to take cognizance of Canadian tax law, the *Boots* court was concerned that the case would allow the judiciary to interfere and undermine "the legislative and executive branches' exercise of their foreign policymaking powers."[137] The Second Circuit Court of Appeals in *Trapilo* concluded to the contrary, holding that the revenue rule did not bar such prosecutions.[138] According to the *Trapilo* court, these wire fraud prosecutions did not implicate separation of powers concerns at all.[139] No interpretation of foreign tax law was required.[140] Rather, according to *Trapilo*, the Government's prosecution only required the court to determine whether the federal wire fraud statute was violated, that is, whether the defendants possessed the intent to defraud the Canadian government of tax revenue.[141]

In resolving the split, the Court sided with the *Trapilo* conclusion that the revenue rule did not bar federal wire fraud prosecutions of a scheme to evade foreign taxes.[142] Central to the Court's holding was the characterization of the wire fraud prosecution as the direct enforcement of a domestic statute.[143] The defendants had argued that the collection of Canadian taxes was the primary object of the prosecution because the Mandatory Victims Restitution Act of 1996[144] requires an award of restitution of lost tax revenue to the Canadian government.[145] The Court reasoned, however, that "the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct," viz., fraudulent use of interstate wires.[146] Though requiring the Court to incidentally recognize foreign tax law,

136. *Id.* at 588-89.

137. *Id.* at 587–88.

138. *Trapilo*, 130 F.3d at 549. *Trapilo* involved a federal wire fraud prosecution for a scheme nearly identical to the one in *Boots*: the defendants manufactured a scheme in which liquor and cigarettes would be smuggled across the Canadian border through another Native American reservation straddling the Canadian border. *Id.*

139. *Id*. at 552–53.

140. *Id*.

141. *Id*. at 552.

142. *See* Pasquantino v. United States, 544 U.S. 349, 354–53 (2005). Justice Ginsburg's dissenting opinion, joined by three other Justices, argued that the revenue rule applied because the prosecution primarily amounted to the direct enforcement of foreign tax law. *Id.* at 372, 376–77 (Ginsburg, J., dissenting). Ginsburg focused on the fact that under prevailing sentencing guidelines the defendants' sentences were to be determined by a calculation of the damage inflicted by the wire fraud scheme, that is, by a calculation of the amount of foreign tax revenue lost to the scheme. *Id.*

143. *See id.* at 362.

144. 18 U.S.C. §§ 3663A–64 (2000).

145. *Pasquantino*, 544 U.S. at 364.

146. *Id.* at 365.

the case ultimately involved "a domestic sovereign acting pursuant to authority conferred by a criminal statute."[147]

The Court concluded that the justifications for the revenue rule were not triggered by federal wire fraud prosecutions of schemes to evade foreign taxes.[148] Separation of powers concerns were not implicated by the prosecution because the political branches were involved in the case.[149] According to the Court's characterization of the prosecution: "This action was brought by the Executive to enforce a statute passed by Congress."[150] Nothing in the wire fraud statute or the statute's legislative history suggests that Congress intended to exempt these sorts of cases from wire fraud prosecutions.[151] Furthermore, because this case was brought by the federal government, it could be assumed that the executive branch "has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction."[152]

National sovereignty concerns were not implicated because the prosecution did not involve the extraterritorial enforcement of foreign tax law.[153] The prosecution primarily amounted to the direct enforcement of a domestic criminal statute which merely recognized a foreign tax law.[154] The prosecution represents the "policy choice of the two political branches of our Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the object of the fraud."[155] The Court expressed mild bewilderment as to why the Government might wish to divert resources to prosecute a scheme in which another government was the victim.[156] Nevertheless, the Court was convinced that the prosecution's primary objective was the vindication of domestic law enforcement interests.[157]

Finally, judicial competence concerns were not implicated because the case raised no complicated foreign tax issues.[158] The case focused on the question of whether the Pasquantinos possessed the intent to violate foreign tax law, not on whether the foreign tax law was actually violated.[159] The question of whether the scheme would indeed violate foreign tax law was resolved by

147. *Id.* at 364.
148. *Id.* at 368.
149. *Id.* at 369.
150. *Pasquantino*, 544 U.S. at 369.
151. *Id.* at 354–60.
152. *Id.* at 369.
153. *Id.* at 371.
154. *Id.*
155. *Pasquantino*, 544 U.S. at 370.
156. *Id.* at 372.
157. *See id.* at 371–72.
158. *Id.* at 370.
159. *See id.*

the presentation of the testimony of a government witness.[160] A provision of the Federal Rules of Criminal Procedure[161] provides that a court may consider such testimony in interpreting matters of foreign law.[162]

The *Pasquantino* decision therefore adopted the *Trapilo* court's narrow reading of the revenue rule in wire fraud cases. In cases where the political branches are directly involved, foreign policy-related concerns are absent and the revenue rule will not apply. The Court's decision also makes clear the importance of characterization in the revenue rule analysis, especially in those cases involving equal parts domestic and foreign law. Thus, the revenue rule will not apply where, as in *Pasquantino*, the prosecution or claim primarily vindicates domestic interests, even though such a prosecution or claim incidentally furthers foreign interests.

IV. CIVIL RICO AND THE REVENUE RULE IN THE SECOND CIRCUIT

In a footnote, the *Pasquantino* Court expressly refused to decide "whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under [RICO] for a scheme to defraud it of taxes."[163] Foreign governments had already attempted to sue cigarette-makers under the civil provisions of RICO alleging foreign tax evasion.[164] In *Attorney General of Canada* and *European Community I*, each decided prior to *Pasquantino*, the Second Circuit Court of Appeals had held that the revenue rule bars such claims.[165] The Supreme Court vacated and remanded[166] *European Community I* to the Second Circuit for "reconsideration in light of its decision in *Pasquantino*."[167] After providing an overview of civil RICO, this section outlines the reasoning of the Second Circuit's revenue rule analyses in *Attorney General of Canada*, *European Community I*, and *European Community II*.

160. *See Pasquantino*, 544 U.S. at 370.

161. FED. R. CRIM. P. 26.1.

162. *See id.*; *Pasquantino*, 544 U.S. at 370.

163. *Pasquantino*, 544 U.S. at 355 n.1.

164. *See, e.g.*, Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001).

165. *See id.* at 134–35; European Cmty. v. R.J.R. Nabisco, Inc. (*European Cmty. I*), 355 F.3d 123, 139 (2d Cir. 2004).

166. European Cmty. v. R.J.R. Nabisco, Inc., 544 U.S. 1012 (2005).

167. European Cmty. v. R.J.R. Nabisco, Inc. (*European Cmty. II*), 424 F.3d 175, 177 (2d Cir. 2005).

A. Civil RICO

RICO was originally enacted for the purpose of combating organized crime.[168] The elements of a RICO offense are: (1) the commission of a predicate act; (2) direct or indirect involvement in an enterprise; and (3) the enterprise affects interstate or foreign commerce.[169] A wire fraud offense is an example of a RICO "predicate act."[170] Like the federal wire fraud statute, the provisions of RICO are broadly construed to encompass a wide range of conduct.[171] Congress expressly provided that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."[172] Thus, in *Sedima, S.P.R.L. v. Imrex*, the Court rejected attempts to restrict the reach of civil RICO by holding that a defendant need not be prosecuted by the government and convicted of a predicate act before a plaintiff can bring a civil RICO claim.[173]

168. Michele Sacks et al., *Racketeer Influenced and Corrupt Organizations*, 42 AM. CRIM. L. REV. 825, 826 (2005).

169. *Id.* at 828.

170. 18 U.S.C. § 1961(1) (2000); *see, e.g.*, Bank of China, N.Y. Branch v. NBM LLC, 125 S.Ct. 2956 (2005).

171. *Compare* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 526 (1985) (Powell, J., dissenting) ("RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the statute."), *with* La. Power and Light Co. v. United Gas Pipe Line Co., 642 F.Supp. 781, 802 (E.D. La. 1986) ("[T]he crimes of mail and wire fraud are broad in scope, and the interpretation given them must be flexible enough to encompass any conduct falling below the mark of fair play and right dealing."). James P. Kennedy notes:

> [The] broad statutory language coupled with the lure of treble damages and attorneys' fees, has made civil RICO actions very attractive to plaintiffs in a myriad of commercial litigation cases. . . . Included within [the] predicate acts [for a RICO claim or prosecution] are mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343), the broadest criminal statutes in the federal code.

James P. Kennedy, *Civil RICO in the Antitrust Context*, 55 ANTITRUST 463, 463–65 (1986). *See also* Daniel Z. Herbst, Comment, *Injunctive Relief and Civil RICO: After* Scheidler v. National Organization for Women, Inc., *RICO's Scope and Remedies Require Reevaluation*, 53 CATH. U. L. REV. 1125, 1125–26 (2004) (describing the explosion of civil RICO litigation in the 1980s, due in part to a broad construction of the civil RICO provisions along with an equally broad construction of the predicate wire fraud activity provisions); Jerry J. Phillips, *Thinking*, 72 TENN. L. REV. 697, 726 (2005) ("Many feel that Congress cast the net of civil RICO much more broadly than intended or desirable, snaring bankers and lawyers and accountants as well as the Mafia—especially under the mail and wire fraud predicate acts.").

172. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970); *see* Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1100–01 (2d Cir. 1988) (deferring to congressional instructions to liberally construe the civil RICO provisions and holding that lower court erred when it applied an additional standing requirement to the plaintiffs' claim).

173. *Sedima*, 473 U.S. at 524; *see also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 149–50 (1987) (identifying numerous offenses that qualify as "racketeering activity" within the meaning of RICO).

RICO provides a private cause of action to parties injured by conduct amounting to a violation of the statute.[174] "To establish a [civil] RICO claim, a plaintiff must show: '(1) a violation of the RICO statute . . . ; (2) an injury to business or property; and (3) that the injury was caused by the violation of [RICO]."[175] A plaintiff who prevails on a civil RICO claim is entitled to treble damages, filing costs, and attorney's fees.[176] RICO violations often involve complex schemes that test the limits of law enforcement capabilities and resources.[177] Consequently, one purpose of RICO's civil enforcement scheme has been to provide much-needed assistance to federal and state law enforcement agencies.[178]

Few law enforcement provisions were left untouched by the legislation enacted in response to the terrorist attacks of September 11, 2001, and RICO is no exception. RICO was amended to include terrorism-related offenses and predicate acts by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the Patriot Act).[179] RICO predicate acts now include money laundering crimes against foreign nations and financial schemes that might aid terrorist groups.[180]

By expanding the already broad reach of civil RICO, it has been posited that Congress intended to further reduce the scope of the revenue rule.[181] Specifically, it has been argued that Congress intended to reduce the scope of the revenue rule in cases brought by foreign governments under civil RICO against U.S. cigarette-makers for foreign tax evasion.[182] The proponents of this argument point to the legislative history of the Patriot Act amendment.[183] First, the original version of the Patriot Act amendment to RICO included a "rule of construction," a provision pertaining to civil RICO claims and foreign tax laws.[184] According to that original version:

> None of the changes or amendments made by the Financial Anti-Terrorism Act of 2001 shall expand the jurisdiction of any Federal or State court over any civil action or claim for monetary damages for the nonpayment of taxes or

174. 18 U.S.C. § 1964(c) (2000).

175. De Falco v. Bernas, 244 F.3d 286, 305 (2d Cir. 2001).

176. § 1964(c).

177. *See* Brief of the Federal Law Enforcement Officers Ass'n as Amicus Curiae in Support of the Position of the European Community and Member States, and the Reversal of the Judgment of the District Court at 2, European Cmty. v. R.J.R. Nabisco, Inc., 424 F.3d 175 (2d Cir. 2005) (Nos. 02-7330, 02-7325), 2002 WL 32443238 [hereinafter Brief for FLEOA].

178. A.J. Cunningham Packing Corp. v. Cong. Fin. Corp., 792 F.2d 330, 340 (3d Cir. 1986).

179. *See* Pub. L. No. 107-56, 115 Stat. 382 (2001).

180. 18 U.S.C. § 1956(c)(7) (2000).

181. *See European Cmty. I*, 355 F.3d 123, 133 (2d Cir. 2004).

182. *Id.* at 132–33.

183. *See id.* at 133–34.

184. Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. § 106(b) (2001).

> duties under the revenue laws of a foreign state, or any political subdivision thereof, except as such actions or claims are authorized by [a] United States treaty that provides the United States and its political subdivisions with reciprocal rights to pursue such actions or claims in the courts of the foreign state and its political subdivisions.[185]

This provision, which would have clearly exempted cigarette-makers from foreign tax claims brought by most foreign governments, was conspicuously deleted from the final version of the Patriot Act.[186] Second, it has been argued that the section-by-section analyses of the Patriot Act and accompanying legislators' comments indicate that the deletion effectively exposed U.S. cigarette-makers to potential liability under the civil RICO provisions.[187] For example, the section-by-section analyses presented to and approved by both Houses of Congress expressly note that the deletion "dropped [the exemption for] tobacco companies from RICO liability for foreign excise taxes."[188]

B. Attorney General of Canada

The Second Circuit's first civil RICO case involving the revenue rule concerned a suit brought by the Attorney General of Canada against cigarette maker R.J. Reynolds and several of its North American subsidiaries.[189] Canada's suit alleged that the defendants had engaged in a complicated scheme to avoid the Canadian import tax on cigarettes.[190] In perpetrating the smuggling scheme, the defendants had employed the U.S. mails and wires in various transactions.[191] Therefore, the defendants had committed the RICO predicate act of wire fraud.[192] Canada brought suit against the defendants under the civil enforcement provisions of RICO alleging a conspiracy to

185. *Id.*

186. *European Cmty. I*, 355 F.3d at 134.

187. *See* 147 Cong. Rec. 15, 20872 (daily ed. Oct. 29, 2001) (statement of Rep. Wexler) ("I am pleased that a provision earlier included . . . which would have inhibited RICO liability for foreign excise taxes for tobacco companies, has been dropped from the USA PATRIOT Act."); *id.* at 20710 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("[I]t is the intent of the legislature that our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism."); 147 Cong. Rec. 14, 20447 (daily ed. Oct. 23, 2001) (statement of Rep. Conyers) ("I am very proud . . . [that] we dropped the administration proposal that would have . . . prevented RICO liability for tobacco companies.").

188. *European Cmty. I*, 355 F.3d at 134.

189. Att'y Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 105–06 (2d. Cir. 2001).

190. *See id.* at 105.

191. *See id.* at 107.

192. *See id.*

defraud the Canadian government of tax revenue.[193] Canada sought restitution and law enforcement fees.[194]

In *Attorney General of Canada*, the Second Circuit affirmed the lower court's decision that the revenue rule barred Canada's suit.[195] The court characterized Canada's civil RICO claim as a "request for extraterritorial tax enforcement by a foreign sovereign."[196] The court distinguished its own decision in *Trapilo*, where it had held that the revenue rule did not bar a federal wire fraud prosecution of a scheme to violate foreign tax law, by focusing on the identity of the plaintiff.[197] "[T]here is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by [the court in *Trapilo*]."[198] Because the executive branch brought the suit in *Trapilo*, the separation of powers concerns were absent.[199] In *Attorney General of Canada*, however, the Executive was not involved in Canada's civil RICO claim.[200] Therefore, according to the court, the foreign policy-related justifications of the revenue rule, particularly the separation of powers concerns, were implicated by the civil RICO claim.[201]

C. European Community I*: Civil RICO, the Revenue Rule, and the Patriot Act*

The Second Circuit decided *Attorney General of Canada* before the Patriot Act amendments to RICO were enacted. In *European Community I*, the Second Circuit considered another civil RICO claim brought by a foreign government against U.S. cigarette-makers.[202] In holding that the revenue rule barred the foreign government's suit, the court repeated much of its reasoning from *Attorney General of Canada* and rejected the argument that the Patriot Act's legislative history invited foreign governments to bring civil RICO claims against cigarette-makers.[203]

The European Community (E.C.) alleged that the cigarette-makers were involved in black market activities in E.C. territories designed to evade the taxes imposed by those governments on cigarettes.[204] The E.C. imposes a

193. *See id.* at 107–08.
194. *See Att'y Gen. of Canada*, 268 F.3d at 105.
195. *See id.* at 106.
196. *Id.* at 124.
197. *See id.* at 123.
198. *Id.*
199. *Att'y Gen. of Canada*, 268 F.3d at 123.
200. *See id.* at 123–24.
201. *See id.* at 111–16.
202. *See European Cmty. I*, 355 F.3d 123, 127 (2d Cir. 2004).
203. *See id.* at 131–32.
204. *See id.* at 128.

relatively high excise tax as a revenue-raising measure.[205] In order to avoid these taxes, the cigarette-makers allegedly sold to distributors who openly admitted selling to smugglers who then illegally shipped the cigarettes into Europe.[206] The cigarette-makers' executives allegedly enjoyed part of the profits generated by these transactions in the form of bonuses and kickbacks.[207] As a result of such black market activities, the E.C. has estimated that its governments lose over one billion dollars in revenue per year.[208] The E.C. therefore alleged that the cigarette-makers were involved in a smuggling scheme within the meaning of RICO and had committed the predicate act of wire fraud in furthering the conspiracy.[209] The E.C. sought the civil RICO remedy of treble damages based on lost revenue and law enforcement costs.[210]

On appeal, the Second Circuit concluded that the justifications for the revenue rule were implicated by the E.C.'s claim.[211] The case presented separation of powers concerns because neither the executive nor the legislative branch of government was involved in the case.[212] The E.C. argued that the executive branch's consent was implied because that branch had not expressly opposed the suit.[213] Mere "executive inaction," however, was not enough to overcome the court's separation of powers concerns.[214] Neutrality, in the court's opinion, did not amount to evidence of Executive consent.[215] Instead, Executive consent is apparent, for example, where the government has "[brought] suit itself," as in the wire fraud prosecution in *Trapilo*.[216]

The court was also not persuaded by the argument that the legislative history of the Patriot Act evidenced Congressional intent to subject cigarette-makers to civil RICO claims by foreign governments.[217] First, according to the court, the Patriot Act amendments adding additional offenses to RICO in order to expand the statute's reach to include terrorist-related activities did not indicate Congressional intent to do away with the revenue rule in civil RICO cases.[218] The court refused to accept the proposition that the addition of a few

205. *See* Daley, *supra* note 4.
206. *See id.*
207. *European Cmty. I*, 355 F.3d at 128.
208. Daley, *supra* note 4.
209. *See European Cmty. I*, 355 F.3d at 128.
210. *See id.* at 128–29.
211. *See id.* at 132.
212. *See id.* at 137.
213. *See id.*
214. *European Cmty. I*, 355 F.3d at 137.
215. *See id.*
216. *Id.* The court also acknowledged that Executive consent may be indicated by other means, "such as submitting a statement from the State Department or filing an amicus brief." *Id.* at 132.
217. *See id.* at 135–36.
218. *See id.* at 133.

offenses to RICO changed the entire "structure or focus" of the statute.[219] Second, with respect to the deletion of the proposed rule of construction that would have exempted cigarette-makers from civil RICO claims, the court pointed out that the deleted provision was a proposed rule of construction for the Patriot Act and not a part of the legislative history of RICO.[220] The court refused to interpret one statute in light of the legislative history of another statute.[221] In any event, the court concluded that mere deletion of a provision does not suggest that Congress actually intended to overrule revenue rule case law and entirely abrogate the revenue rule in all cases.[222] Finally, with respect to the statements of members of Congress who interpreted the deletion as abrogating the revenue rule in the civil RICO context, the court doubted that the views of only a handful of legislators represented clear evidence of Congressional intent to open federal courts to civil RICO claims like the one brought by the E.C.[223]

The Second Circuit also suggested that the national sovereignty justification for the revenue rule was present because the claim would amount to extraterritorial enforcement of foreign tax law.[224] Again echoing *Attorney General of Canada*, the court characterized the civil RICO claim as the direct enforcement of foreign tax law.[225] The E.C.'s claim was premised exclusively on violations of foreign tax law.[226] "[A]djudicating [the E.C's claim] would . . . requir[e] the court to evaluate the policies behind the relevant foreign tax laws, interpret their provisions, and enforce them by awarding damages."[227] Therefore, according to the Second Circuit's characterization of the claim, the sole object of the suit was to allow the E.C. to enforce its own tax laws through the mechanism of a civil RICO claim.[228]

Beyond the Patriot Act amendments, nothing had changed between *Attorney General of Canada* and *European Community I.* The facts of the cases were nearly identical and the court concluded that it was bound by the precedent established in *Attorney General of Canada*.[229] The changes in civil RICO's legislative history were not persuasive enough to pry the court from this precedent.

219. *European Cmty. I*, 355 F.3d at 133.
220. *Id.* at 134.
221. *See id.*
222. *See id.*
223. *Id.* at 135.
224. *European Cmty. I*, 355 F.3d at 132.
225. *See id.* at 132.
226. *See id.*
227. *Id.*
228. *See id.*
229. *European Cmty. I*, 355 F.3d at 132.

D. European Community II*: Civil RICO and the Revenue Rule 'In Light of* Pasquantino*'*

The Supreme Court vacated and remanded the Second Circuit's decision in *European Community I* for reconsideration in light of the Court's revenue rule decision in *Pasquantino*.[230] Upon remand, the Second Circuit in *European Community II* distinguished *Pasquantino* and reinstated its prior decision.[231] As in *European Community I*, the court concluded that the E.C.'s claim raised separation of powers and national sovereignty concerns.[232]

According to the court, *Pasquantino* did not cast sufficient doubt on its prior decision in *European Community I* to warrant reversal.[233] First, the wire fraud prosecution in *Pasquantino* did not raise the separation of powers concerns that were raised by the E.C.'s claim.[234] The political branches were directly involved in the wire fraud prosecution in *Pasquantino*.[235] "[C]oncerns about separation of powers [are] greatly diminished where the government brings a prosecution within the bounds of a statute created by Congress."[236] On the other hand, executive branch involvement was not apparent in the E.C.'s civil RICO claim.[237] The claim was brought by a foreign government, not by the Executive.[238] Furthermore, the court repeated its assertion from *European Community I* that the Executive had not signaled express consent to the E.C.'s claim.[239]

Second, according to the Second Circuit, the wire fraud prosecution in *Pasquantino* did not raise the national sovereignty concerns that were present in *European Community II*.[240] *Pasquantino* involved a prosecution under the federal wire fraud statute.[241] The "'primary object'" of *Pasquantino* was the enforcement of a domestic statute.[242] Foreign tax law was only enforced in an "attenuated sense."[243] By contrast, the substance of the E.C.'s claim was the collection of foreign revenue.[244] According to the court, it was not enough that the use of the "private prosecutor" mechanism of RICO might further a

230. European Cmty. v. R.J.R. Nabisco Co., 544 U.S. 1012 (2005).
231. *European Cmty. II*, 424 F.3d 175, 181–82 (2d Cir. 2005).
232. *See id.* at 180.
233. *Id.* at 179.
234. *See id.* at 181.
235. *See id.*
236. *European Cmty. II*, 424 F.3d at 181.
237. *See id.*
238. *See id.*
239. *Id.*
240. *See id.* at 180–81.
241. *See European Cmty. II*, 424 F.3d at 180.
242. *Id.* at 181–82.
243. *Id.* at 181.
244. *Id.* at 182.

domestic law enforcement interest.[245] The court's reasoning on this point was succinct: "Whatever the merits of this argument, *Pasquantino* does not endorse it."[246]

V. ANALYSIS OF THE SECOND CIRCUIT'S REVENUE RULE DECISIONS

In *Attorney General of Canada* and *European Community I* and *II*, the Second Circuit adopted an unnecessarily expansive reading of the revenue rule. The court held that the E.C.'s claim implicated separation of powers and national sovereignty concerns. As this section will show, however, these concerns were overstated. The separation of powers concerns were diminished because the political branches have implicitly consented to civil RICO claims against cigarette-makers. The national sovereignty concerns were also diminished because the claim could have been characterized as the direct enforcement of a domestic statute rather than the extraterritorial enforcement of a foreign tax law. This section also addresses the likely isolationist impact of the Second Circuit's decision to expand the scope of the revenue rule. Finally, this section argues that the revenue rule should be reduced in the civil RICO context in recognition of contemporary concerns in a global economy.

A. Separation of Powers Concerns

While neither political branch expressly consented to the E.C.'s claim, both branches have signaled their implied consent to civil RICO claims asserted by foreign governments against cigarette-makers. The legislative history of the Patriot Act indicates that Congress approves of such claims. In addition, the executive branch's consent should be presumed because the E.C.'s claim would have furthered the international law enforcement policy of eradicating organized crime and terrorism.

First, the legislative history of the Patriot Act is strong evidence of Congress's intent to expose cigarette-makers to civil liability under RICO. Granted, legislative intent to depart from a well-settled principle of law must be expressed in unequivocal language.[247] However, the revenue rule is not a well-settled principle of law. As the Supreme Court in *Pasquantino* found, the "line . . . between impermissible and permissible 'enforcement' of foreign revenue law has . . . always been unclear."[248] The Court examined revenue rule jurisprudence beginning with Lord Mansfield's earliest formulation of the doctrine.[249] The Court concluded "that the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled as of 1952,"

245. *See id.*
246. *European Cmty. II*, 424 F.3d at 182.
247. *European Cmty. I*, 355 F.3d 123, 132 (2d Cir. 2004).
248. Pasquantino v. United States, 544 U.S. 349, 367 (2004).
249. *See id*. at 360–68.

the year in which Congress enacted the federal wire fraud statute.[250] RICO was enacted in 1970.[251] Little change in revenue rule jurisprudence occurred between 1952 and 1970.[252] The *Pasquantino* Court's conclusion that the revenue rule was unsettled law should apply as well to the analysis in the civil RICO context. Therefore, because the revenue rule does not qualify as a well-settled principle of law, something less than "unequivocal [statutory] language" should suffice as persuasive evidence of legislative intent.

The deletion of the rule of construction from the Patriot Act is therefore sufficient evidence of legislative intent to reduce the scope of the revenue rule. The Supreme Court has recognized the act of deletion as persuasive evidence of legislative intent. For example, deletion of a statutory definition is persuasive evidence of Congress's intent to leave to the courts the responsibility of providing a definition.[253] Here, Congress considered the issue of civil RICO claims brought by foreign governments against cigarette-makers and decided to delete the rule of construction from the Patriot Act that would have exempted cigarette-makers from such civil liability.[254] Therefore, the Second Circuit should have been more willing to read the deletion of the rule of construction as evidence of legislative intent to approve the E.C.'s claim against the defendant cigarette maker.[255]

The section-by-section analyses, each submitted to one of the Houses of Congress, indicate that the deletion of the rule of construction was studied and intentional.[256] The Supreme Court has previously found such analyses persuasive legislative history, especially where the separate analyses are consistent.[257] The Second Circuit itself had previously observed that it must be presumed that "[t]he legislators . . . knew exactly what they were doing" when both a House and Senate report contain the "same statement."[258] Moreover, more recent and more specific legislative action should prevail as an indicator of legislative intent over earlier, more general legislative action.[259] Because the changes to the Patriot Act speak directly to the issue of civil RICO claims brought by foreign governments against cigarette-makers, the Second Circuit

250. *Id.* at 368.

251. *See* 18 U.S.C. § 1965 (2000).

252. No published federal court opinion mentioning the revenue rule could be found between the years 1952 and 1970.

253. *See, e.g.*, United States v. Louisiana, 394 U.S. 11, 39 (1969); United States v. California, 381 U.S. 139, 150–60 (1965).

254. *European Cmty. II*, 424 F.3d 175, 179–80 (2d Cir. 2005).

255. *See also* Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1177–78 (3d Cir. 1993) (discussing a deletion as evidence of congressional intent).

256. *European Cmty. I*, 355 F.3d 123, 134 (2d Cir. 2004).

257. Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982).

258. Willis v. United States, 719 F.2d 608, 612 (2d Cir. 1983).

259. *See, e.g.*, HCSC-Laundry v. United States, 450 U.S. 1, 7–8 (1981) (holding that a newer exemption prevailed over an older, more generic exemption).

should have been more willing to accept the changes as an expression of legislative intent.

Second, executive consent to the E.C.'s claim should be presumed because the claim was consistent with the government's avowed policies of combating organized crime,[260] terrorism,[261] and the detrimental health effects of smoking.[262] The United States has signed a number of treaties that express the government's policy in favor of providing support to foreign governments on these particular issues. For example, the United States is party to the Palermo Convention,[263] which requires member nations to assist in reducing organized crime that takes place across international borders.[264] The Palermo Convention requires member nations to establish as domestic offenses money laundering, corruption, and conspiracy to commit fraud.[265] The Palermo Convention is an example of an international agreement signed by the executive branch that represents that branch's policy of cooperating with foreign governments in the eradication of racketeering activity of the type alleged by the E.C.'s claim.

Moreover, because civil RICO claims serve important domestic law enforcement interests, it should be presumed that the executive branch would have endorsed the E.C.'s claim.[266] Civil RICO claims, by definition, are

260. *See, e.g.*, Luigi Lauriola, Ambassador, The United Nations Convention against Transnational Organized Crime and Its Protocols, Address at The Millennium Assembly of the United Nations General Assembly (November 2000), 40 I.L.M. 335, *available at* http://www.unodc.org/unodc/crime_cicp_convention.html [hereinafter Palermo Convention].

261. *See, e.g.*, Joint States U.S.-EU Ministerial Statement on Combating Terrorism, Sept. 20, 2001, 40 I.L.M. 1263, *available at* http://ec.europa.eu/comm/external_relations/us/news/minist_20_09_01.htm.

262. *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, S. Treaty Doc. No. 101-4, 28 I.L.M. 493, *available at* http://www.unodc.org/pdf/ convention_1988_en.pdf; WHO Framework Convention on Tobacco Control, 2003, http://www.paho.org/English/AD/SDE/RA/FCTC_Booklet_english.pdf (last visited Nov. 12, 2006).

263. United Nations Convention Against Transnational Organized Crime and Its Protocols, http://www.unodc.org/unodc/en/crime_cicp_signatures.html (last visited Nov. 16, 2006).

264. *See* Palermo Convention, *supra* note 260.

265. Mavis M. Gyamfi, *International Legal Developments in Review: 2000*, 35 INT'L LAW. 637, 637–38 n.162 (2000). Like the definition of racketeering activity provided by RICO, the definition of organized crime provided by the Palermo Convention has been construed to criminalize a broad range of conduct. *See* Alexandra V. Orlova & James W. Moore, *"Umbrellas" or "Building Blocks"?: Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT'L L. 267, 282–83 (2005) (arguing that the Palermo Convention's definition of "organized crime" is overbroad and might be interpreted to criminalize organized protests).

266. *Compare* Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 445 (1988) (arguing for measures that would encourage injured parties to sue under civil RICO), *with* Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 4 (1989) (arguing for the screening of and prior approval from a government prosecutor of civil RICO claims).

brought by private individuals, or "private prosecutors." Civil RICO thereby helps alleviate the significant demands placed on prosecutor resources. Law enforcement interests have argued that barring certain civil RICO claims "is virtually certain to increase the work load of federal law enforcement officers, because, in the fight against organized crime, they will not receive the private support which Congress intended to provide through RICO."[267] In recognition of this important crime-fighting function, civil RICO claims are broadly construed.[268]

Civil RICO claims like the one brought by the E.C. can be used as an aid in the war on terrorism. [269] Cigarette-smuggling operations have been employed to fund terrorist activities.[270] Terrorists often avoid fund-raising efforts that create a "paper trail" and instead focus on black market activities like "cigarette smuggling, credit card fraud and check forgery, to raise cash."[271] The result is millions of dollars for terrorist operations.[272] Therefore, in light of the broad construction of civil RICO and the Executive policy of supporting the international effort to eradicate organized crime and terrorism, the Second Circuit erred in requiring direct Executive involvement or express Executive consent to the E.C.'s claim.

In sum, because the E.C.'s claim fell within a domestic statute and was favored by executive branch policy, the Second Circuit overstated the separation of powers concerns. The claim presented little risk that the judiciary would infringe on the foreign policy duties reserved by the Constitution to the executive branch. The court was asked to interpret the racketeering provisions of a domestic statute. Like the wire fraud prosecution in *Pasquantino*, the E.C.'s claim only incidentally recognized foreign tax law. There was no risk of embarrassment here because the political branches had already signaled their approval of these claims through the amendments and accompanying legislative history of the Patriot Act and through the signing of treaties like the Palermo Convention.

267. Brief for FLEOA, *supra* note 177.

268. *See* discussion *supra* accompanying notes 168–188.

269. *See* Lea Brilmayer & Charles Norchi, *Federal Extraterritorialiy and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1249 (1992); Dean C. Alexander, *Maritime Terrorism and Legal Responses*, 19 TRANSP. L.J. 453, 457 (1991).

270. *See* Don Van Natta, Jr., *Terrorists Blaze a New Money Trail*, N.Y. TIMES, Sept. 28, 2003, § 4, at 1.

271. *Id.*; *see also* Frank Main, *Cigarettes, the CIA and Iran-Contra; Figure in '80s Spy Drama Busted in Indiana Tobacco Smuggling Funds for Terrorists?*, CHI. SUN-TIMES, Sept. 12, 2005, at 26 (describing a black market cigarette-smuggling ring in Indiana that raised millions of dollars for the terrorist organization Hezbollah).

272. *See* Main, *supra* note 271.

B. National Sovereignty Concerns

National sovereignty concerns are acute where a claim or prosecution amounts to the extraterritorial enforcement of a foreign tax law.[273] Therefore, whether these concerns are present depends on the characterization of the suit. The Court in *Pasquantino* characterized the wire fraud prosecution as the direct enforcement of a domestic statute that incidentally recognized foreign tax law.[274] The prosecution was viewed as an exercise of national sovereignty, rather than an "invasion" of the courts by another sovereign's tax laws.[275] In contrast, the Second Circuit in *European Community I* and *II* characterized the civil RICO claim brought by the E.C. as a suit that primarily sought to enforce a foreign tax law.[276] The court focused on the fact that the E.C. sought recovery of lost tax revenue and law enforcement costs.[277] As will be shown below, the court mischaracterized the E.C.'s suit and overstated the national sovereignty concerns.

The E.C.'s claim should have been characterized as the direct "enforcement" of a domestic statute that merely recognized foreign tax law. The Court in *Pasquantino* concluded that a wire fraud prosecution should be characterized as the direct enforcement of a domestic statute even though it incidentally enforced a foreign tax law.[278] Here, the E.C.'s claim fell squarely within the provisions of a domestic statute, civil RICO. The revenue rule should not apply where "American law renders an activity—including the violations of foreign tax laws—an American tort or crime."[279] The revenue rule should not apply then when a claim enforces a domestic statute through the mechanism provided by Congress, even though that claim incidentally enforces a foreign tax law.

Civil RICO requires a calculation of damages based on the economic harm caused by a violation of the statute.[280] That this calculation is based on foreign tax revenue is not sufficient to implicate the revenue rule. In *European Community II*, the court concluded that the "whole object" of a civil RICO claim brought by a foreign government was "to collect tax revenue and the costs associated with its collection."[281] This conclusion is not consistent with

273. *See supra* notes 109–114 and accompanying text.

274. Pasquantino v. United States, 544 U.S. 349, 364 (2004).

275. *See id.*

276. *European Cmty. I*, 355 F.3d 123, 132 (2d Cir. 2004); *European Cmty. II*, 424 F.3d 175, 182 (2d. Cir. 2005).

277. *European Cmty. I*, 355 F.3d at 132.

278. *See Pasquantino*, 349 U.S. at 364.

279. Att'y Gen. of Canada v. R.J. Reynolds, 268 F.3d 103, 137 (2d Cir. 2001) (Calabresi, J., dissenting).

280. *See* 18 U.S.C. § 1964(c) (2000).

281. *European Cmty. II*, 424 F.3d at 182.

Pasquantino.[282] There, the Court considered the argument that the recovery of taxes was the object of the wire fraud prosecution "because restitution of the lost tax revenue [was] required under the Mandatory Victims Restitution Act of 1996."[283] The Court reiterated that the wire fraud prosecution furthered a domestic law enforcement interest stating, "The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct."[284] Likewise, the purpose of awarding treble damages to civil RICO plaintiffs is to mete out punishment for criminal racketeering activity.[285] This proposition is supported by *Sedima* where the Court explained that "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[286] As the Court has elsewhere noted, civil RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages."[287] Congress sought to encourage parties like the E.C. to bring suit under civil RICO through the promise of treble damages based on lost tax revenue. The Second Circuit's decision effectively eviscerates the impact of this "carrot" by holding that the plaintiffs' objective, which is admittedly a recovery of foreign tax revenue, should control the determination of whether a claim is a direct enforcement of a foreign tax law.

Therefore, *European Community II* mischaracterized the E.C.'s civil RICO claim as the direct enforcement of a foreign tax law. Based on the reasoning of *Pasquantino*, a claim that falls within the provisions of a domestic statute does

282. *See* Pasquantino v. United States, 544 U.S. 349, 364 (2004).

283. *See id.* at 365 (citing 18 U.S.C. §§ 3663A–3664 (2000)).

284. *See Pasquantino*, 544 U.S. at 365.

285. *See* Att'y Gen. of Canada v. R.J. Reynolds, 268 F.3d 103, 135 (2d Cir. 2001) (Calabresi, J., dissenting) ("[Foreign] tax laws come into play only indirectly, as a factor to be used in the calculation of damages, and do so entirely because the RICO statute itself makes the [foreign] laws relevant to that calculation."). Elsewhere, in explaining the treble damages provision of civil RICO, the Court has said, "The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." Rotella v. Wood, 528 U.S. 549, 557 (2000). Although admitting that civil RICO is to be broadly construed, the Court in *Rotella* held that the object of "encouraging potential private plaintiffs diligently to investigate" would be hampered if civil RICO were read so as to allow an excessive limitations period. *Id.* at 558 (quoting Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987)); *see also* United States v. Turkette, 452 U.S. 576, 585 (1981) ("The aim [of civil RICO] is to divest the association of the fruits of its ill-gotten gains.").

286. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 498 (1985).

287. *Agency Holding Corp.*, 483 U.S. at 151.

not amount to extraterritorial enforcement of foreign tax law. Although the civil RICO claim might have incidentally recognized foreign tax law, *Pasquantino* makes clear that this is not sufficient to trigger the revenue rule.[288]

C. The Isolationist Impact of a Broad Reading of the Revenue Rule[289]

Not only does an expansion of the revenue rule conflict with the narrow reading of the revenue rule supplied by the Court in *Pasquantino*, but it also limits access to the federal court system because a claim against U.S. cigarette-makers incidentally recognizes foreign tax law will hamper a number of U.S. objectives, including those belonging to law enforcement interests and established foreign policy.

First, expanding the revenue rule to bar civil RICO claims brought by foreign governments will impede domestic law enforcement efforts to fight organized crime and terrorism. As discussed above, the private prosecutor mechanism supplements governmental efforts to fight the war on terrorism and organized crime.[290] Terrorist and organized crime groups enjoy a steady

288. *Pasquantino*, 544 U.S. at 368.

289. Although this section discusses the isolationist impact of *European Cmty. I* and *II*, the response to the Second Circuit's decisions is not likely to be entirely negative. For example, U.S. investors are likely to welcome decisions in which foreign governments are barred from filing civil RICO claims that allege foreign tax evasion. *See* Bruce Zagaris, *Ethical Issues in Offshore Planning*, ALI-ABA INTERNATIONAL TRUST AND ESTATE PLANNING 199, 230 (2005). The *Pasquantino* decision to reduce the scope of the revenue rule was a source of great concern to tax lawyers:

> The decision should concern U.S. professionals, especially accountants, lawyers, bankers, real estate advisers, and security advisers who help advise on foreign laws, especially in countries that have significant tax crimes. Inevitably, they use the U.S. wires or mails in the advice. . . . [C]ertain economic sectors may be more vulnerable than others. For instance, due to the dynamic upsurge in the energy sector, many foreign governments are aggressively trying to extract more revenue from the sector by auditing and bringing criminal actions against foreign operators . . . . Many of these cases lead to lengthy disputes, the outcomes of which are costly and uncertain.

Id. at 230. Rather than expanding the revenue rule to protect investors, the more prudent approach would be to require investors to scrutinize their portfolios to make certain that their investments are free of foreign tax law violations. *See generally* Marian Hagler, *International Money Laundering and U.S. Law: The Need to "Know-Your-Partner"*, 31 SYRACUSE J. INT'L L. & COM. 227, 227 (2004) (detailing the importance of exercising "due diligence" prior to investing in an emerging market in order to comply with the complex and wide-reaching U.S. money laundering laws).

290. *See* Brief for FLEOA, *supra* note 177, at 2.

> Law enforcement personnel obviously cannot be everywhere doing everything necessary to enforce the laws of the United States. Investigative and prosecutorial resources are spread thin as a result of the combination of budget limitations and the widespread, and growing, nature of crime. This is especially so in the realm of organized crime, where the greed for big money inspires cunning minds to engineer complicated criminal strategies to

stream of financial support.[291] Additionally, terrorist groups are more difficult to monitor due to increasing opportunities to conceal fundraising efforts that have developed in the global and Internet age.[292] Civil RICO's private prosecutor provisions are effective in alleviating some of the pressure on government prosecutors because attorneys for private plaintiffs have an ethical duty to pursue with zeal even the most "technical violation" of RICO.[293] The Second Circuit's decisions in *European Community I* and *II* therefore sacrifice the important law enforcement interests that drive civil RICO.

Second, expanding the revenue rule to protect cigarette-makers also undermines joint international efforts to curb the detrimental health effects of tobacco use. Thirty percent of cigarette exports are distributed through "black market" enterprises like the one at the core of the E.C.'s claim.[294] The detrimental health effects of tobacco use are undeniable.[295] Moreover, the detrimental fiscal effects of cigarette smuggling are obvious because the revenue derived from cigarette taxes is often the primary source of funding for social programs in developing nations.[296] For example, cigarette tax revenue is the primary source of funding for schools and hospitals in Colombia, where the government also mounted a civil RICO claim against U.S. cigarette-makers.[297]

> avoid detection and arrest. When organized crime becomes international, as it does in cigarette smuggling and money laundering, . . . the drain on law enforcement resources is severe.

Id.; *see also* Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 532 n.30 (2003) (listing the federal government's "overriding concern for combating terrorism after the tragedy of September 11, 2001," as a major factor in the low federal prosecution rate in domestic abuse cases); Newman Flanagan, 36 FEB PROSECUTOR 6, 12 (2002) ("[L]ocal prosecutors noted that they lacked the experience and training, as well as the resources, to be effective in preventing and detecting terrorism.").

291. *See, e.g.*, Larry D. Newman, *RICO and the Russian Mafia: Toward a New Universal Principle Under International Law*, 9 IND. INT'L. & COMP. L. REV. 225, 227 (1998) (noting that organized crime syndicates in Europe exchange over $350 billion annually).

292. *See* Brief for FLEOA, *supra* note 177, at 2.

293. Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons From Civil RICO*, 50 SMU L. Rev. 33, 36 (1996); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1983).

294. World Bank, Curbing the Epidemic: Governments and the Economics of Tobacco Control (1999), at 63, *available at* http://www1.worldbank.org/tobacco/book/pdf/tobacco.pdf.

295. *See, e.g.*, National Center for Chronic Disease Prevention and Health Promotion, *Health Effects of Cigarette Smoking: Fact Sheet*, http://www.cdc.gov/tobacco/factsheets/HealthEffectsof CigaretteSmoking_Factsheet.htm (last visited Nov. 12, 2006).

296. Brief of World Health Organization as Amicus Curiae In Support of the Position of the European Community and the Member States and Reversal of the Judgment of the District Court, at 7 n.3, European Cmty. v. R.J.R. Nabisco, Inc., 424 F.3d 175 (2d Cir. 2005) (Nos. 02-7330, 02-7325) [hereinafter Brief of WHO].

297. *Id.*

The Framework Convention on Tobacco Control (the FCTC) was created as a response to the health and fiscal damage caused by cigarette smuggling.[298] The FCTC requires participating nations to cooperate in an effort to eliminate "[i]llicit trade in tobacco products."[299] The United States signed the FCTC on May 10, 2004, thereby signaling its endorsement of the international effort to combat cigarette smuggling.[300] Barring a cause of action by foreign governments that fall victim to cigarette smuggling schemes therefore undermines this aspect of U.S. foreign policy.

D. The Scope of the Revenue Rule Should Be Reduced in the Civil RICO Context

The revenue rule should be reduced so as to permit foreign governments to bring civil RICO claims against corporations involved in racketeering activity that deprives foreign governments of tax revenue. The revenue rule is a judge-made doctrine that has been modified in the past to comport with contemporary concerns.[301] For example, as discussed above, the doctrine originally developed out of the judicial interest in protecting English merchants from foreign trade laws.[302] Courts should be willing to adjust the parameters of the revenue rule in recognition of contemporary concerns.

The revenue rule is an archaic common law doctrine that offers little value in a global economy.[303] When Lord Mansfield first enunciated the revenue rule in *Boucher v. Lawson*, the English economy sensed a threat from protectionist foreign tax laws.[304] The revenue rule therefore developed out of "extremely nationalistic legal and tax structures."[305] Two hundred years later,

298. World Health Organization, *WHO Framework Convention on Tobacco Control* (2003), at 5, *available at* http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf.

299. *Id.*

300. World Health Organization, *Updated Status of the WHO Framework Convention on Tobacco Control*, *available at* http://www.who.int/tobacco/framework/countrylist/en/print.html.

301. *See* West, *supra* note 32, at 1065.

302. *Id.*

303. *See* Kovatch, *supra* note 54, at 266; *see also* Att'y Gen. of Canada v. R.J. Reynolds, 268 F.3d 103, 137 n.4 (2d Cir. 2001) (Calabresi, J., dissenting) ("The argument [that domestic courts are incompetent to interpret foreign law] is, to put it mildly, dubious in a global economy, which requires a great amount of interpretation of foreign laws."). *See generally* Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, 22 GA. J. INT'L & COMP. L. 609 (1992).

304. *See supra* 35–51 and accompanying text; Silver, *supra* note 303, at 613.

305. Silver, *supra* note 303, at 613 ("The rule supported these domestic policies [of trade protectionism] because the end result of an English court refusing acknowledgement of a foreign revenue law was often to promote British trade that would otherwise have been unlawful."). In fact, the Missouri Court of Appeals has noted:

> [In the early revenue rule cases] 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

however, globalization has eroded international borders.[306] Fervent nationalism, of the type underlying the first revenue rule cases, could trigger a shock wave that would be felt in many nations in a world where national economies have become so interdependent.[307]

Moreover, the traditional justifications for the revenue rule carry less weight in a global economy.[308] The judicial competence justification asserts that domestic courts are incompetent to interpret foreign tax law.[309] However, globalization has, of course, resulted in an increase in international litigation that necessarily requires courts to interpret foreign laws.[310] In most instances, courts have competently managed this responsibility.[311] Globalization also creates "greater opportunities for criminal organizations to cross borders and function on a global level."[312] Therefore, law enforcement interests are better served by increased cooperation among peer nations in combating racketeering schemes like those at issue in *European Community I* and *II*. An isolationist common law doctrine like the revenue rule is inconsistent with these international law enforcement interests.

> desire to promote commercial convenience. . . . [The revenue rule] was the product of the commercial world, and arose at a time where there was great commercial rivalry and international suspicion.

State ex rel. Oklahoma Tax Comm'n v. Rodgers, 193 S.W.2d 919, 922, 927 (Mo. Ct. App. 1946)

306. *See* Steven V. Melnik, *Corporate Expatriations—The Tip of the Iceberg: Restoring the Competitiveness of the United States in the Global Marketplace*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y. 81, 93 (2004).

307. *See* Silver, *supra* note 303, at 617–18.

308. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483, Reporters' Note 2 at 613 ("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete."); Banco Frances e Brasileiro S.A. v. Doe No. 1, 331 N.E.2d 502, 505–06 (N.Y. 1975) ("[M]uch doubt has been expressed that the reasons advanced for the [revenue] rule, if ever valid, remain so . . . in light of the economic interdependence of all nations.").

309. *Banco Frances e Brasileiro*, 331 N.E.2d at 505–06.

310. *See* Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 581 (1995) ("The global economy has brought an increasing variety of foreign law issues to the federal courts. Indeed, one international commercial transaction may implicate the law of several nations.").

311. *See id.* at 586 ("[F]ederal courts have shown a commendable ability to get their hands around foreign law when fully briefed on the issues."); *see, e.g.*, Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79, 79–80 (2d Cir. 1994) (examining a ruling of the Paris Court of Appeals to determine whether an arbitration award was enforceable under the New York Uniform Foreign Money-Judgments Recognition Act).

312. Newman, *supra* note 291, at 226.

For the foregoing reasons, courts should continue the trend that began with *Milwaukee County v. M.E. White Co.*, and was reinforced most recently by *Pasquantino* and reduce the scope of the revenue rule. The revenue rule should not apply in the civil RICO context where there is a cognizable law enforcement interest furthered by the claim. Because the E.C.'s claim would have furthered the law enforcement interest of eradicating organized crime, the revenue rule should not have applied in *European Community I* and *II*.

CONCLUSION

The Second Circuit in *European Community I* and *II* held that the E.C.'s claim was barred by the revenue rule because the political branches had not given their express consent to the suit and because the suit amounted to the extraterritorial enforcement of foreign tax law.[313] The court's separation of powers and national sovereignty concerns were nevertheless overstated. The executive and legislative branches had both given their *implied* consent to civil RICO claims like the one brought by the E.C. In light of the important domestic law enforcement interests at stake in the E.C.'s claim, such implied consent should have been sufficient to overcome separation of powers concerns. Additionally, the court's national sovereignty concerns were overstated because the claim should have been characterized as the direct enforcement of a domestic statute rather than the direct enforcement of a foreign tax law.

Admittedly, foreign policy concerns might have been triggered to a marginal degree by the E.C.'s suit, but the Second Circuit's broad reading of the revenue rule is in conflict with a number of legal and political considerations: the Supreme Court's narrow reading of the revenue rule in *Pasquantino*, the executive branch's avowed domestic policy of eradicating organized crime and terrorism, and the executive branch's avowed foreign policy of combating the ill-effects of tobacco use on a global scale. In recognition of these considerations, the scope of the revenue rule should be reduced in the civil RICO context.

In any event, *European Community I* and *II* represent a convergence of dual bodies of law. There is the obvious convergence of a domestic statute, civil RICO, and the E.C.'s excise tax on cigarettes, a foreign tax law. At bottom, however, these cases represent the convergence of a statute designed to solve the contemporary dilemmas of organized crime and an archaic common law doctrine that seemed barely to cling to life after *Pasquantino*. In other words, the "delicate inquiry" that once prompted caution now demands reformulation in a world that shares little in common with the world in which Lord Mansfield and Judge Hand developed and inflated the revenue rule

313. *European Cmty. II*, 424 F.3d 175, 177 (2d Cir. 2005); *European Cmty. I*, 355 F.3d 123, 123 (2d Cir. 2004).

doctrine. The Second Circuit in *European Community I* and *II* effectively rejected this important reformulation and turned back the clock on revenue rule jurisprudence.

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