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STOPPING THE BANDIDOS: PASQUANTINO
AND THE PROSECUTION OF TAX FRAUD IN LATIN AMERICA

JAIME GUTTMAN*

INTRODUCTION

Usually, private litigants who obtain a judgment from a foreign court can seek enforcement of that judgment in the United States legal system.¹ Foreign judgments are presumptively valid and enforceable, and the party opposing U.S. enforcement bears the burden of proving why the court should not enforce the foreign judgment.² However, this rule does not apply to the enforcement of foreign tax obligations.³ Instead, under the common law revenue rule, U.S. courts may not enforce other nations' tax and revenue laws.

Enter Carl and David Pasquantino, two brothers who were prosecuted in the United States under the federal wire fraud statute for smuggling liquor into Canada to avoid Canadian excise taxes. In their defense, the Paquantinos invoked the revenue rule by claiming that the United States government "lacked a sufficient interest in enforcing the revenue laws of Canada."⁴ The United States Supreme Court, considering the interplay between the revenue rule and the wire fraud statute, concluded that "a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute"⁵

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¹ William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: an Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 266 (2000). The general rule of enforceability of foreign judgments exists independent of any international treaty; rather, foreign judgments generally are recognized under the doctrine of international comity. *Id.*

² *Id.* at 266.

³ *Id.* at 267.

⁴ *Pasquantino v. U.S.*, 544 U.S. 359, 125 S.Ct. 1766, 1770 (2005) (*Pasquantino III*)

⁵ *Id.*

But plots to defraud governments of tax revenue include activities even more common than smuggling. Tax evasion is a crime, and one that occurs in countries all over the world. If the activities that constitute foreign tax evasion occur in the United States with the use of interstate wires, then foreign tax evasion may constitute a violation of the federal wire fraud statute.

In Part I, this article considers the legal and international climate in which the Pasquantino decision was made, including consideration of the scope of tax evasion in Latin America. Part II of this article analyzes the Pasquantino decision in detail, including a presentation of the facts, the underlying proceedings, and a summary of the Supreme Court decision. Part III of this article considers whether, and to what extent, Pasquantino will be helpful in addressing the problem of tax evasion in Latin American countries.

I. TAX EVASION AND THE REVENUE RULE

By definition, tax evasion is “the willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability.”⁶ As a practical matter, tax evasion can occur when a taxpayer lies about his income and when a taxpayer hides income and structures transactions so that the taxpayer’s government is unaware of that income.

A. Tax Evasion in Latin American in the 21st Century

Despite the fact that the “tax culture in Latin America has matured” over the past few years, and the level “of brazen tax evasion has declined substantially,”⁷ tax evasion remains a common problem in the region.⁸ Tax evasion results, in part, from a lack of national consensus

⁶ Black's Law Dictionary (8th ed. 2004).

⁷ Peter D. Byrne, *Foreign Tax Problems of U.S. Companies Doing Business in Latin America*, 50 U. MIAMI L. REV. 483, 484 (1996).

⁸ C. Gruben, *The United States and the Future of Free Trade in the Americas*, 6 NAFTA: L. & BUS. REV. AM. 457, 460.

regarding the proper expenditure of the collected revenues⁹ combined with a culture of deep political corruption and mistrust for the government.

New tax systems have been put into place in several Latin American countries, helping to reduce tax evasion.¹⁰ Among these new tax systems' features are lower tax breaks, which have helped create a more stable economic environment and helped generate lower inflation rates, and improved infrastructure.¹¹ However, these measures have not completely resolved the tax evasion issue, resulting in fraud levels above those found in developed countries including the United States.¹²

Tax evasion thus remains a common problem in Latin America.¹³ The extent of the evasion, the techniques used, and the level of local enforcement, varies from country to country. Several reasons help explain why tax evasion is such a prevalent problem in Latin America, but those issues are beyond the scope of this writing.¹⁴ This article will focus on the possible foreign-political implications of the availability of the United States judicial system to assist in foreign tax-law enforcement.¹⁵

One way to evade taxes is through the investment of monies overseas, usually in tax havens but also in developed countries with large economies. Income is derived from such

⁹ *Id.*

¹⁰ Byrne, *supra* note 7, at 484.

¹¹ *Id.*

¹² Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573 (2000)

¹³ *Id.* at 1584.

¹⁴ See Gruben, *supra* note 8, at 460 (stating that "[t]he tax evasion problem appears to result from a lack of national consensus as to appropriate tax or expenditure levels, a problem whose roots are easy to understand in a context of income, and wealth inequalities.").

¹⁵ "These problems, however, create a tension or 'political fiscal gap' politicians promise to close when campaigning for office and often fail to fulfill upon election." *Id.* (citation omitted).

investments, not subject to tax by the host country and not, usually, declared in the country of citizenship.¹⁶

According to Avi-Yonah, “Latin American countries provide a prime example: after the enactment of the portfolio interest exemption,¹⁷ about \$300 billion fled from Latin American countries to bank accounts and other forms of portfolio investment in the United States.”¹⁸

Provided that these funds arrived in the United States via wire transfers, or pursuant to telephone, fax or email communications, between the foreign national and the U.S. bank, the transaction, if intended to create undeclared which is untaxed income, to evade foreign tax, could be construed as subject to §1343 prosecution for wire fraud.¹⁹

B. The Revenue Rule

According to the Restatement (Third) of Foreign Relations Law of the United States, “[c]ourts 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.”²⁰ This principle is widely known as the “revenue rule” and has been present in the common law system since it was first enounced by Lord Mansfield in the case of *Holman v. Johnson* in 1775.²¹ In that case a French seller of tea sued his English buyer in England to recover the purchase price of the

¹⁶ Avi-Yonah, *supra* note 12, at 1576 (“individuals can generally earn investment income free of host-country taxation in any of the worlds major economies.”).

¹⁷ *Id.* at 1579-580 (emphasis added). (“In 1984, the United States unilaterally abolished its withholding tax of 30% on foreign residents who earned portfolio interest income from sources within the United States. n4. ‘Portfolio interest’ was defined to include interest on U.S. government bonds, on bonds issued by U.S. corporations (unless the bondholder held ten percent or more of the shares of the corporation), and on U.S. bank accounts and certificates of deposit. n5. This ‘portfolio interest exception’ is available to any nonresident alien (that is, any person who is not a U.S. resident for tax purposes) and does not require any certification of identity or proof that the interest income was subject to tax in the investor’s country of residence.”)

¹⁸ *Id.* at 1584-85.

¹⁹ Another possibility not explored in this paper is the making of these deposits from cash sources. Given the tightening of anti-money-laundering laws, including bank-reporting regulations, it is very unlikely that nowadays this scenario would be prevalent. Additionally, those types of transactions usually involve “dirty” funds that have to be “laundered,” implicating another host of law violations not covered by this paper.

²⁰ Restatement (Third) of Foreign Relations Law §483 (1987). [hereinafter “Restatement (Third)”].

²¹ Restatement (Third), *supra* note 20, at Reporters’ Notes 1 (citing *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775)).

contract.²² The English buyer argued in his defense that that contract was illegal because the tea was to be smuggled into England without paying English duties. The English court held in favor of the French plaintiff, “on the ground that he had committed no immoral act, for revenue rules are only positive and not moral law; and he could not have committed a criminal act, for he had acted only in France, and ‘no country ever takes notice of the revenue laws of another.’”²³ This famous quote by Lord Mansfield has been applied in later cases in which government authorities have sought to enforce tax claims or foreign judgments based on tax claims.²⁴

The revenue rule reflects a “reluctance of courts to subject foreign public law to judicial scrutiny, combined with reluctance to enforce law that may conflict with the public policy of the forum state.”²⁵ This rule also reflects an inherent mistrust of foreign criminal procedures.²⁶ In the criminal context, “[e]ven where those procedures have by implication been recognized to be adequate, e.g., where a state has signed an extradition treaty with another state, there has been no disposition to enforce penal judgments of the other state.”²⁷ Of course, despite the similarities in policy, “the considerations concerning foreign tax judgments are different from those for penal judgments.”²⁸

Judge Learned Hand justified the revenue rule as necessary to avoid the examination of the revenue laws and policies of other nations by U.S. courts.²⁹ Moreover, courts generally can refuse to recognize and enforce foreign judgments, citing public policy concerns and reasoning

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at Reporters’ Note 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Kovatch, Jr., *supra* note 1, at 277.

that enforcement would entail a review of foreign tax policy that might cause serious embarrassment to the foreign nation.³⁰

Although the revenue rule remains alive today, as acknowledged by the court in *Pasquantino*, some authors have called for its abrogation.³¹ However, as a practical matter, *Pasquantino* illustrates that the aspect of the revenue rule dealing with the enforcement of foreign tax claims has been abrogated by the majority of the Supreme Court by allowing the indirect enforcement of the Canadian claim.³²

II. THE PASQUANTINO DECISION: A WARNING TO WOULD-BE FOREIGN TAX EVADERS?

A. Background: *Pasquantino* Arrives at the Supreme Court

Prior to 1996, the Canadian government increased its sin taxes on alcohol and cigarettes to levels that greatly exceeded comparable United States taxes.³³ As a consequence, a Canadian black market emerged when unscrupulous entrepreneurs began smuggling alcohol and cigarettes into Canada without paying the required import taxes.³⁴ David and Carl *Pasquantino* (collectively “Defendants” or “Petitioners”), residents of Niagara Falls, New York, began to exploit this market by purchasing large quantities of liquor from discount stores in Maryland and smuggling it into Canada.³⁵ The defendants paid all required U.S. federal and state taxes on the liquor when they bought it in the United States, but paid no Canadian taxes on the liquor when

³⁰ *Id.*

³¹ For example, Kovatch calls the revenue rule “an anachronism in American law,” and argues that its rationale is “suspect.” *Id.* at 287.

³² See *Pasquantino v. United States*, 125 S. Ct. 1766 (2005); see also *infra*.

³³ *United States v. Pasquantino (Pasquantino I)*, 305 F.3d 291, 292 (4th Cir. 2002).

³⁴ *Id.* at 292-93.

³⁵ *Id.* at 293.

they smuggled it into Canada.³⁶ The Pasquantinos began this scheme in 1996 and ran it until May 2000.³⁷

The Bureau of Alcohol, Tobacco and Firearms (“BATF”) discovered that some retail stores in Maryland were placing unusually large orders with distributors.³⁸ Two of the retail store owners cooperated with BATF agents by recording telephone conversations and advising BATF when the Pasquantinos called or visited the stores.³⁹ U.S. authorities then contacted the Royal Canadian Mounted Police and jointly monitored the Pasquantinos’ operations in the United States and in Canada.⁴⁰ The Pasquantinos and their associates were arrested and indicted in the United States.⁴¹ Two of these associates eventually testified against the Pasquantinos.⁴²

The defendants were indicted on six counts of wire fraud. The federal wire fraud statute, 18 U.S.C. §1343, prohibits the use of interstate wires to conduct “any scheme or artifice to defraud, or obtain money or property by means of false or fraudulent pretenses, representations, or promises.”⁴³ The defendants filed a motion to dismiss, claiming that a scheme to defraud a foreign government of tax revenue was not actionable under the wire fraud statute⁴⁴ and that accrued tax revenue did not constitute property under the statute.⁴⁵ The district court denied the motion and the case went to trial. At trial, the government’s case included the testimony of a seventeen-year veteran Canadian Customs employee who explained that the Canadian tax on the

³⁶ *Id.*

³⁷ *Id.*

³⁸ Pasquantino I, 305 F.3d at 293.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ 18 U.S.C § 1343 (2005).

⁴⁴ Pasquantino I, 305 F.3d at 293.

⁴⁵ United States v. Pasquantino (Pasquantino II), 336 F.3d 321, 325 (4th Cir. 2003).

liquor was twice what a consumer would pay for the liquor itself in the United States.⁴⁶ The jury convicted the defendants of wire fraud.

The defendants appealed their convictions to the Fourth Circuit Court of Appeals, claiming that “their prosecution contravened the common-law revenue rule, because it required the court to take cognizance of the revenue rules of Canada.”⁴⁷ The panel reversed the conviction, holding that, although Canadian taxes can be property for purposes of a wire fraud charge, the revenue rule precluded this prosecution.⁴⁸ The government successfully sought rehearing en banc and, on rehearing, the Fourth Circuit reinstated the convictions.⁴⁹

On rehearing, the Fourth Circuit examined the history behind the revenue rule and sided with the Second Circuit, deepening a circuit split.⁵⁰ The Second Circuit, faced with an essentially identical scheme,⁵¹ held the revenue rule inapplicable and ruled that the wire fraud statute did not preclude prosecution of a scheme to defraud a foreign government of tax revenue.⁵² In contrast, the First Circuit had vacated convictions where the defendants had been convicted of wire fraud for their participation in a scheme, using interstate wires, to defraud Canada of duties and tax revenues due on imported tobacco.⁵³ The First Circuit had reasoned that “upholding defendants’ section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws.”⁵⁴ The First Circuit also had noted that

⁴⁶ Pasquantino II, 336 F.3d at 326.

⁴⁷ *Id.*

⁴⁸ Pasquantino II, 336 F.3d at 326.

⁴⁹ Pasquantino III, 125 S.Ct. at 1771.

⁵⁰ *Id.* at 331 (citing *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997)).

⁵¹ *Id.*

⁵² *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997).

⁵³ *United States v. Boots*, 80 F.3d 580, 583 (1st Cir. 1996).

⁵⁴ *Id.* at 587.

“[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated.”⁵⁵

The Supreme Court granted certiorari to review the Fourth Circuit case and resolve the circuit split.

B. Pasquantino v. United States: The Supreme Court Opinion

Justice Thomas delivered the opinion of the Court⁵⁶ joined by Justices Stevens, O’Connor, Kennedy and Rehnquist. Justice Ginsburg authored a dissenting opinion joined by Justices Breyer and, in parts II and III, by Justices Scalia and Souter.⁵⁷

The Court first concluded that the defendants’ conduct fell within the terms of the wire fraud statute, notwithstanding any impact of the revenue rule. The wire fraud statute prohibits using interstate wires to effect “any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations or promises.”⁵⁸ According to the majority, the defendants’ smuggling operations satisfied the two elements of the crime, (1) that the defendant engage in a “scheme or artifice to defraud[;]”⁵⁹ and (2) that the “object of the fraud...be [money or] property’ in the victim’s hands.”⁶⁰ The first prong of the statute, the scheme or artifice to defraud Canada of duties and taxes, was uncontroverted, so only the property requirement was in dispute.

The Court relied on its own precedent to conclude that “Canada’s right to uncollected excise taxes on the liquor petitioners imported into Canada is ‘property’ in its hands.”⁶¹ The

⁵⁵ *Id.*

⁵⁶ Pasquantino III, 125 S.Ct. at 1769.

⁵⁷ Pasquantino III, 125 S.Ct. at 1769.

⁵⁸ *Id.* at 1771 (citing 18 U.S.C. § 1343 (2000)).

⁵⁹ Pasquantino III, 125 S.Ct. at 1771.

⁶⁰ *Id.*

⁶¹ Pasquantino III, 125 S.Ct. at 1771 (citing *McNally v. United States*, 483 U.S. 350 (1987)); *see, e.g.*, *Leocal v. Ashcroft*, 125, S.Ct 377 (2004).

Court also cited Blackstone⁶² and the common law definition of fraud, both of which include depriving a victim of entitlement to money.⁶³ Finally, the Court noted that “the fact that the victim of the fraud happens to be the Government, rather than a private party, does not lessen the injury.”⁶⁴

After disposing of the property question, the Court turned its attention to the revenue rule, concluding that the revenue rule did not preclude the Pasquantinos’ prosecution. The common-law revenue rule—that courts will not enforce the tax laws of another sovereign—is first defined as the corollary of the rule that “[t]he courts of no country execute the penal laws of another.”⁶⁵ In a two-part analysis, the Court first considered the revenue rule as it was understood when the wire fraud statute was enacted and then examined the purposes of the revenue rule.

The Court began its consideration of the common-law revenue rule by examining the rule’s meaning as of 1952, the year Congress enacted the wire fraud statute at issue in this case.⁶⁶ The Court sought evidence that the revenue rule would have barred prosecution under the statute at the time the statute was enacted because, the Court reasoned, only that evidence would prove Congressional intent to exempt the present prosecution from the broad reach of the wire fraud statute.⁶⁷ The Court concluded that as of that date there were no common-law cases that held, or clearly implied, that the “revenue rule barred the United States from prosecuting a *fraudulent*

⁶² Pasquantino III, 125 S.Ct. at 1772, (“The right to be paid money has long been thought to be a species of property.”); see WILLIAM BLACKSTONE, 3 COMMENTARIES 153-155 (1768) (classifying a right to sue on a debt as personal property).

⁶³ Pasquantino III, 125 S.Ct. at 1772 (“For instance, a debtor who concealed his assets when settling debts with his creditors thereby committed common-law fraud.”).

⁶⁴ Pasquantino III, 125 S.Ct. at 1772. In so holding, the Court distinguished *Cleveland v. United States*, 521 U.S. 12 (2000). In *Cleveland*, the Court had found that a State’s interest in an unissued poker license was not property because the State’s interest in choosing licensees was not economic, but rather “purely regulatory.” In contrast, the Pasquantino III Court noted that “Canada could hardly have a more ‘economic’ interest than the receipt of tax revenue.”

⁶⁵ Pasquantino III, 125 S.Ct. at 1774 (citing *The Antelope*, 10 Wheat. 66, 123 (1825)).

⁶⁶ Pasquantino III, 125 S.Ct. at 1774.

⁶⁷ *Id.*

scheme to evade foreign taxes.”⁶⁸ In discerning legislative intent, the Court disregarded all cases that had been decided after 1952.⁶⁹

The majority then examined the “common-law principle that crimes could only be prosecuted in the country in which they were committed,”⁷⁰ and analogized foreign revenue laws to foreign penal laws. A number of cases support the proposition that the common-law revenue rule forecloses a prosecution similar to that of Pasquantino because such a prosecution indirectly enforces foreign revenue laws. However, the Pasquantino majority viewed the domestic conduct of the defendants as the reason for their prosecution.⁷¹

The Court described the Pasquantino case as one of sovereign enforcement of the “sovereign’s own penal law,”⁷² and rejected the argument that the Pasquantino prosecution’s true purpose was the collection of foreign tax claims, an improper purpose under the revenue rule.⁷³ Rather, here, the “link between this prosecution and foreign tax collection [was] incidental and attenuated at best, making it not plainly [a case] in which ‘the whole object of the suit is to collect tax for a foreign revenue’.”⁷⁴

Further, the revenue rule never banned all enforcement of foreign revenue law.⁷⁵ Rather, in decisions dating back to the 18th century, courts, by voiding certain contracts, effectively

⁶⁸ *Id.* at 1773 (emphasis added). “The traditional rationales for the revenue rule, moreover, do not plainly suggest that it swept so broadly. *Id.*”

⁶⁹ Pasquantino III, 125 S.Ct. at 1776 (in support of a broad reading of the revenue rule to exclude the non-collection of taxes and enforcement of other laws by a foreign government).

⁷⁰ Pasquantino III, 125 S.Ct. at 1774.

⁷¹ *Id.* (The prosecution here was unlike the classic examples of actions traditionally barred by the revenue rule. It was not a suit that recovers a foreign tax liability, like a suit to enforce a judgment. This was a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct.)

⁷² Pasquantino III, 125 S.Ct. at 1776 (Moreover, the court added “A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law.”) (emphasis in original).

⁷³ *Id.* at 1777.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1778.

enforced the revenue laws of other states.⁷⁶ Courts also had required the satisfaction of foreign taxes due out of property of a decedent's estate.⁷⁷ The Pasquantino Court concluded that "[t]hese cases demonstrate that the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled as of 1952."⁷⁸ Hence, the Court continued, Congress could have intended courts to enforce the wire fraud statute, even if doing so would incidentally recognize Canadian revenue laws.⁷⁹

The Court also grappled with the Mandatory Victims Restitution Act of 1996,⁸⁰ which required that the United States government actually collect these taxes on behalf of Canada. Faced with this apparent conflict, the Court first suggested that such "enforcement" would be merely incidental, and then concluded that "the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than assume that the later enacted restitution statute impliedly repealed §1343 as applied to frauds against foreign sovereigns."⁸¹

Defending its decision against the critique that it improperly gave extraterritorial effect to the wire fraud statute, the Pasquantino Court stated that "[u]nlike the treaties and the antismuggling statute [cited by the defense], the wire fraud statute punishes fraudulent use of

⁷⁶ Pasquantino III, 125 S. Ct. at 1778 (citing *Alves v. Hodgson*, 101 Eng. Rep. 953 (K.B. 1797), *Clegg v. Levy*, 170 Eng. Rep. 1343 (N.P. 1812)).

⁷⁷ *Id.* (citing *In re Hollins*, 139 N.Y.S. 713, 716-17 (Sur.Ct.) *aff'd* 144 N.Y.S. 1121 (1913); *aff'd* 212 N.Y. 567 (App. 1914)) ("While it is doubtless true that this court will not aid a foreign government in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws." *Id.* at 717.).

⁷⁸ Pasquantino III, 125 S. Ct. at 1778.

⁷⁹ *Id.*

⁸⁰ 18 U.S.C. §§ 3663A-3664 (2000 ed. And Supp. II) ("(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." *Id.*).

⁸¹ Pasquantino III, 125 S.Ct. at 1777.

domestic wires, whether or not such conduct constitutes smuggling, occurs aboard a vessel, or evades foreign taxes.”⁸²

The Court stressed the domestic nature of the offense for which the defendant was being punished, noting that the defendants’ crime “was completed the moment they executed the scheme inside the United States.”⁸³ Finally, the Court also pointed out that “[i]n any event, the wire fraud statute punishes frauds executed ‘in interstate or foreign commerce,’⁸⁴ so this is surely not a statute in which Congress had only ‘domestic concerns in mind.’”⁸⁵

The Pasquantino Court also opined that its ruling neither would intrude on the interests of the other branches of the government nor would damage foreign relations.⁸⁶ Citing the traditional concern that courts lack competence interpreting foreign law, especially “unfamiliar foreign tax schemes,”⁸⁷ the Court conceded that “[w]ithout proof of foreign law, it is impossible to tell whether the scheme had the purpose of depriving the foreign corporation or individual of valuable property interest as defined by foreign law.”⁸⁸ Because, however, the District Court had before it “uncontroverted testimony of a Government witness that [Defendants] scheme aimed at violating Canadian tax law,” the court found no “unmanageable complexity” here.⁸⁹

Moreover, the Court noted that the Federal Rules of Criminal Procedure provide for the interpretation of foreign law.⁹⁰ Concededly, the Pasquantino prosecution required a court to

⁸² *Id.* at 1773.

⁸³ Pasquantino III, 125 S.Ct. at 1780 (“[t]his domestic element of petitioners’ conduct is what the Government is punishing in this prosecution, no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant.”).

⁸⁴ *Id.* at 1780-81 (citing 18 U.S.C §1343).

⁸⁵ Pasquantino III, 125 S.Ct. at 1781 (citing *Small v. United States*, 125 S.Ct. 1752, 1755 (2005)).

⁸⁶ Pasquantino III, 125 S.Ct. at 1779 (“The present prosecution creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns”).

⁸⁷ Pasquantino III, 125 S.Ct. at 1780.

⁸⁸ *Id.* at 1781 n.13..

⁸⁹ Pasquantino III, 125 S.Ct. at 1780.

⁹⁰ *Id.*

“recognize foreign law to determine whether the defendant violated U.S. law.”⁹¹ However, the Court stressed that this action was brought by the Executive branch of the government, the branch in charge of international relations.⁹² Thus, allowing the prosecution imposes no risk of intruding on the executive’s power over international relations.⁹³ Further, by combining the previous point with the fact that the prosecution was brought pursuant to a wire fraud statute enacted by Congress, the Court characterized this case as one that “embodies 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.”⁹⁴

The majority carefully bracketed the question of whether its holding should extend to the situation in which a foreign government, based on the wire or mail fraud predicate offense, brought a civil action based on RICO⁹⁵ for a scheme to defraud it of taxes.⁹⁶

C. The Pasquantino Dissent

The dissent opined that the common-law revenue rule does not allow a reading of the wire fraud to allow a prosecution charging, in effect, that the revenue laws of another country have been violated.⁹⁷ Additionally, the dissent argued, the majority would wrongly give the wire fraud statute extraterritorial effect.⁹⁸

⁹¹ Pasquantino III, 125 S.Ct. at 1779.

⁹² *Id.* (citing *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (“[The Executive branch] is the sole organ of the federal government in the field of international relations”)); *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (“and has ample authority and competence to manage ‘the relations between the foreign state and its own citizens’ and to avoid ‘embarrass[ing] its neighbor[s]’”).

⁹³ *Id.* (“But we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution’s impact on this Nation’s relationship with Canada, and concluded that it poses little danger of causing international friction.”).

⁹⁴ Pasquantino III, 125 S.Ct. at 1780.

⁹⁵ Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961 *et seq.* (2006).

⁹⁶ Pasquantino III, 125 S.Ct. at 1771 *cf.* *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001) (holding that the government of Canada cannot bring a civil RICO suit to recover for a scheme to defraud it of taxes); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1255 (11th Cir. 2003)(same with respect to other foreign governments).

⁹⁷ Pasquantino III, 125 S.Ct. at 1781 (Ginsburg, J., dissenting).

⁹⁸ *Id.*

The dissent defined the common-law revenue rule as the principle that “one nation generally does not enforce another’s tax laws.”⁹⁹ Indeed, the dissent argued that the revenue rule was implicated in this case because the court had to recognize foreign tax law “to determine whether the defendant violated U.S. law,” as charged in the indictment.¹⁰⁰ The dissent rejected the argument that the enforcement was only “attenuated,”¹⁰¹ stating instead that the defendant’s conduct arguably fell within the scope of §1343 only because of their purpose to evade Canadian customs and tax laws; shorn of that purpose, no other aspect of their conduct was criminal in this country.”¹⁰²

Justice Ginsburg buttressed the argument by examining the Mandatory Victims Restitution Act of 1996.¹⁰³ The Government acknowledged that: “[it] did not urge the district court to order restitution in this case on the theory that it was not ‘appropriate... since the victim is a foreign government and the loss derives from a tax law of the foreign government.’”¹⁰⁴

Justice Ginsburg concluded that, when this statute and the wire fraud statute are read together, it is clear that Congress did not intend the statute to apply to cases like this.¹⁰⁵

The dissent argued that the holding by the majority would extend the wire fraud statute beyond the prosecution of domestic crimes, and improperly give it extraterritorial effect. The dissent noted the existence of laws and treaties designed specifically to deal with transnational,

⁹⁹ Pasquantino III, S.Ct. at 1781 (*citing* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (White, J., dissenting) (“our courts customarily refuse to enforce the revenue and penal laws of a foreign state”).

¹⁰⁰ Pasquantino III, 125 S.Ct. at 1786 (Ginsburg, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Pasquantino III, 125 S.Ct. at 1787 (Ginsburg, J., dissenting), (“... applies to all offenses against property”).

¹⁰⁴ Pasquantino III, 125 S.Ct. at 1787 (*citing to* Brief for the United States 19-20).

¹⁰⁵ Pasquantino III, 125 S.Ct. at 1787 “Congress, however, has expressed with notable clarity a policy of mandatory restitution in all wire fraud prosecutions. In contrast, Congress was ‘quite ambiguous’ concerning §1343’s coverage of schemes to evade foreign taxes. *See* Tr. of Oral Arg. 38. The Mandatory Victims Restitution Act, in my view, is an additional indicator that ‘Congress... [did not] envision foreign taxes to be the object of [a] scheme to defraud. *Id.*

criminal activities, none of which apply to these particular facts.¹⁰⁶ For example, 18 U.S.C. §546, provides “for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the United States...[c]urrently, Canada has no such reciprocal law.”¹⁰⁷

The dissent acknowledged that the Court has read the wire fraud statute expansively in the past, extending it to “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”¹⁰⁸ But Justice Ginsburg noted that the Court has also recognized the need for careful analysis to prevent “dramatically expand[ing] the reach of federal criminal law,” as in *McNally v United States*, where the Court declined to extent the reach of the mail fraud statute beyond congress expressed intent.¹⁰⁹ In particular, she cited to *EEOC v. Arabian American Oil Co. (“Aramco”)*¹¹⁰ which held that “Congress, in most of its legislative endeavors, ‘is primarily concerned with domestic conditions,’”¹¹¹ and argued that this concern should apply to construing the wire fraud statute, criticizing the majority for giving it “such extraordinary extraterritorial effect.”¹¹² It argued that, the inclusion of “foreign commerce” in the statute, “does not in itself indicate a congressional design to give the statute extraterritorial effect.”¹¹³ The dissent recognized that §1343 has been properly applied to schemes to defraud a foreign governments acting as a market participant, or foreign individuals

¹⁰⁶ Pasquantino III, 125 S.Ct. at 1782.

¹⁰⁷ *Id.*

¹⁰⁸ Pasquantino III, 125 S.Ct. at 1784 (Ginsburg, J., dissenting) (citing *Durland v. United States*, 161 U.S. 306, 313 (1896)).

¹⁰⁹ Pasquantino III, 125 S.Ct. at 1784 (refusing to construe 18 U.S.C. §1341, the mail fraud statute, to reach corruption in local governments, stating: “[W]e read §1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has”) (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).

¹¹⁰ 499 U.S. 244 (1991).

¹¹¹ Pasquantino III, 125 S.Ct. at 1785 (Ginsburg, J., dissenting) (“common sense notion” that Congress ordinarily intends statutes to have only domestic application) (citing *Small v. United States*, 125 S.Ct. 1752 (2005)); ([T]his Court ordinarily does not read statutes to reach conduct that is “the primary concern of a foreign country” (citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S.138, 147 (1957)).

¹¹² Pasquantino III, 125 S.Ct. at 1784.

¹¹³ *Id.* at 1785 n.7.

or corporations, but contended that those situations were distinguishable as they did not necessarily depend on any determination of foreign law.¹¹⁴

Moreover, Justice Ginsburg explained that the prosecution here had to rely on proof that Canadian laws had been broken in order to prosecute and convict under 18 U.S.C §1343.¹¹⁵ Additionally, the penalty imposed relied on Canadian customs and tax laws because it reflected the amount defrauded from the Canadian Government.¹¹⁶ The dissent also emphasized that the information regarding the violation of Canadian laws was provided by an “intelligence officer with Canadian Customs,” who testified “based on her experience in working at the border.”¹¹⁷ Justice Ginsburg also noted that “[t]he Customs officer was not offered as an expert witness and ‘[t]he [D]istrict [C]ourt never determined whether [her] calculations were accurate as a matter of Canadian law.’”¹¹⁸

The dissent noted that Congress has enacted specific statutes for the prosecution of offenses of the type committed by the defendants.¹¹⁹ None of these statutes apply, however, to the defendant’s specific activities. The most relevant statute, the anti-smuggling statute,¹²⁰ is conditioned by the other country’s reciprocity with the United States.¹²¹ “The reciprocity limitation reflects a legislative determination that this country should not provide other nations with greater enforcement assistance than they give to the United States.”¹²²

¹¹⁴ Pasquantino III, 125 S.Ct. at 1785 n.8 (Ginsburg, J., dissenting).

¹¹⁵ Pasquantino III, 125 S.Ct. at 1783 (Ginsburg, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1784 (Ginsburg, J., dissenting).

¹¹⁸ *Id.* at 1784 n.4..

¹¹⁹ *Id.* at 1785.

¹²⁰ “prohibits transporting goods ‘into the territory of any foreign government in violation of the law there in force.’”

¹²¹ Pasquantino III, 125 S.Ct. at 1786 (Ginsburg, J., dissenting) (“Section 546’s application, however, is expressly conditioned on the foreign government’s enactment of reciprocal legislation prohibiting smuggling into the United States.”).

¹²² Pasquantino III, 125 S.Ct. at 1786 (Ginsburg, J., dissenting).

Similarly, the dissent noted that a comprehensive tax treaty exists between the United States and Canada, under which both nations have committed to provide collection assistance with respect to each other's tax claims.¹²³ The treaty only applies to adjudicated tax liabilities, thus eliminating the problem of each country interpreting the other's tax laws. Furthermore, the treaty would not apply to this case since it "bars assistance in collecting any claims against a citizen, corporation or 'the requested state.'"¹²⁴ In the conclusion to this section of her analysis, Justice Ginsburg stated that she "would not assume that Congress understood §1343 to provide the assistance that the United States, in the considered foreign policy judgment of both political branches, has specifically declined to promise."¹²⁵

In analyzing the question of the relation between the tax treaty and the proper interpretation of §1343, the dissent referred to the tax treaties of which the United States is a party as set forth in the Second Circuit case of *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*¹²⁶ This case was brought by the Canadian government, which sought to use United States civil processes to collect taxes which, it alleged, had been evaded by smuggling. The dissent recognized the risks that such actions might be permitted under the majority's holding in conflict with the principle of avoiding extraterritoriality and the revenue rule. Instead, it suggested actions where the Pasquantinos should be dealt with by specific established means such as tax treaties or extradition to stand trial in Canada."¹²⁷

¹²³ *Id.*

¹²⁴ *Id.* ("Significantly, the Protocol does not call upon either nation to interpret or calculate liability under the other's statute; it applies only to tax claims that have been fully and finally adjudicated under the law of the requesting nation. Further, the Protocol bars assistance in collecting any claims against a citizen or corporation or 'the requested state.'").

¹²⁵ Pasquantino III, S.Ct. at 1786 (Ginsburg, J., dissenting).

¹²⁶ Pasquantino III, S.Ct. at 1782 (Ginsburg, J., dissenting) (referencing tax treaties to which the United States is a party) (citing *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 115-119 (2nd Cir. 2001)).

¹²⁷ Pasquantino III, S.Ct. at 1782 (Ginsburg, J., dissenting).

Finally, the dissent noted that wire fraud “is a predicate offense under the Racketeering Influenced and Corrupt Organizations Act (RICO)¹²⁸ and the money laundering statute.”¹²⁹ A “finding that particular conduct constitutes wire fraud therefore exposes certain defendants to the severe criminal penalties and forfeitures provided in both RICO... and the money laundering statute.”¹³⁰ As highlighted by *Reynolds*, this could extend to civil RICO actions as well.

III. PASQUANTINO: A NEW WEAPON IN THE OLD FIGHT AGAINST TAX EVASION?

Given the large Latin American population traveling to the United States, it is not beyond the realm of possibility that many could be subject to Pasquantino-type prosecutions. Consider the following hypothetical scenario: a Venezuelan citizen who resides in Venezuela travels to the United States to conduct several financial transactions. Among these transactions is the opening of a brokerage account investing in high-yield securities. This individual provides all the required proof of non-U.S. residency to prevent local taxation. However, she does not intend to report the earnings in Venezuela, effectively depriving the Venezuelan government of taxes due. According to Pasquantino, the taxes owed to Venezuela, on the income earned by a Venezuelan national, are property of the Venezuelan government. Since this Venezuelan citizen has devised a scheme to deprive the Venezuelan government of property (taxes due), and carried out the scheme in the United States through the use of the wires, she could be subject to prosecution in the United States.

A.. New Possibilities for Fighting Foreign Tax Fraud

As in Pasquantino, this prosecution could begin through an investigation by U.S. authorities *sua sponte*,¹³¹ or through a tip, or in response to a request for investigation by the

¹²⁸ 18 U.S.C. § 1961(1) (2000).

¹²⁹ Pasquantino III, 125 S.Ct. at 1787 (citing § 1956(c)(7)(A)(2000 ed.)).

¹³⁰ Pasquantino III, 125 S.Ct. at 1787.

¹³¹ Of its own volition.

Venezuelan government. It is established that she engaged in the activities of opening the account and the investment of the funds through the use of interstate wires with the intent to evade Venezuelan taxes. To establish that the conduct indeed deprived Venezuela of property due, the government simply would have to produce someone familiar with the Venezuelan revenue code, although apparently not necessarily an expert. This witness, would simply state that taxes were owed to the Venezuelan government on the underlying activities, and the Pasquantino requirements would have been fulfilled. At this point, the United States Department of Justice could bring the prosecution. However, the discussion of whether to do so raises complex political issues.

This problem is not restricted to individuals. Corporations (both domestic and international) often engage in operations designed to minimize their tax exposure,¹³² which, if pursued too aggressively, might constitute evasion of taxes due in their country of origin.

Alternatively, the U.S. government and, in this hypothetical, the Venezuelan government have other legal tools that they might use to deal with such conduct. For example Venezuela might seek to prosecute the individual¹³³ under Venezuelan law. If the potential defendant were located within the United States territory, Venezuela could seek extradition under the relevant

¹³² Avi-Yonah, *supra* note 12, at 1587 (“much of the income earned by multinationals from cross-border transactions is likely to escape the income tax altogether.”).

¹³³ If the evading entity is a Venezuelan corporation, Venezuela could, by definition, reach it. Though the Venezuelan government would be unable to collect any criminal fees out of the assets in the United States under the parallel to the revenue rule for adding recognition and enforcement of penal judgments.

extradition treaty.¹³⁴ Tax evasion is not explicitly covered by the treaty, but Venezuela might charge some kind of fraud, which is one of the enumerated crimes of Article II of the treaty.¹³⁵

In summary, there are several different possible avenues under which this conduct could be punished. The propriety and/or availability of these may depend on where the defendant is located. If she is in the United States, the U.S. Government either could prosecute under Pasquantino or, if extradition is sought by Venezuela, could extradite. As noted below, the U.S. would have to assess the political implications prior to acting in either way. Conversely, if the defendant is captured in Venezuela, the case would be prosecuted there in accordance with local laws, or a civil action could be commenced in Venezuela. A third option might be a civil RICO action in the U.S. by the Venezuelan government, but as discussed below, this option might be ineffective.

B. Political Implications

A problem would arise when a country seeks to have the United States bring a Pasquantino-type prosecution, but such a decision is in conflict with the foreign policy interests

¹³⁴ Treaty of Extradition, U.S.-Venez., Jan. 19, 1922, 12 Bevans 1128. Article I states that “[t]he Government of the United States of America and the Government of . . . Venezuela agree to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person was actually within such jurisdiction when the crime was committed, and . . . who shall be found within the territories of the other.”

¹³⁵ *Id.* One of the crimes specified in Art. II is “[e]mbezzlement or criminal malversation committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1.000 in . . . Venezuela.” *Id.* at Art. II, § 14; “Obtaining money, valuable securities or other property by false pretenses or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained . . .” *Id.* at Art. II, § 18; “Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position . . .” *Id.* at Art. II, § 20.

of the United States.¹³⁶ As an example, we will use again Venezuela, which after the election of Hugo Chavez as president, has taken a position antagonistic to the U.S.¹³⁷

Given the political climate in Venezuela, there has been a strong opposition movement, which the Chavez regime characterizes as “terrorist” and “rebel.” Moreover, some monetary support has flowed from the United States to some of these opposition groups, especially those that have monitored recent elections to ensure their fairness. This in turn has prompted vociferous complaints from the Venezuelan government, claiming that such funding constitutes meddling into the internal affairs of the country, and/or plotting to destabilize the government.¹³⁸ Additionally, the Chavez regime has charged the United States with involvement in a coup to overthrow Chavez and with trying to destabilize the Chavez government.¹³⁹ A further example of the conflict between enforcement of the law and foreign relations is the case of Posada-Carrilles. Venezuela sought his extradition but a U.S. judge denied his extradition based on the possible torture that Posada-Carrilles would suffer if extradited.¹⁴⁰

¹³⁶ *Jama v. Immigration and Customs Enforcement*, 125 S.Ct. 694, 704 (2005) (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“[R]elation with foreign powers...require consideration of ‘changing political and economic circumstances.’”)).

¹³⁷ *Chavez puts the blame squarely on Bush*, CHI. TRIB., Aug. 28, 2005, at 10 (“Venezuelan President Hugo Chavez declared Friday that if anything happens to him it will be President Bush’s fault.... [Chavez] has repeatedly accused the Bush administration of plotting to overthrow him”). *Authorities in Venezuela Accused of Collaboration in Drug-Trafficking Networks*, World Markets Analysis, Sept. 15, 2005 (“U.S. officials have often designated Venezuela’s National Guard as a chief collaborator in the drug business. The news comes at a time of tense relations between the U.S. Drug Enforcement Agency (DEA) and Venezuela’s president Hugo Chavez. In July 2005 the Venezuelan government decided to investigate the DEA’s operations in the country, fearing that spying activities were being carried out under the guise of counter-drug programmes.”).

¹³⁸ *U.S. Eyes on Venezuela*, Morning Star, Dec. 2, 2005, http://www.morningstaronline.co.uk/index2.php/free/comment/us_eyes_on_venezuela.

¹³⁹ *Venezuela Starts Deliveries of Cheap Heating Oil to New York*, World Market Analysis, Dec. 7, 2005.

¹⁴⁰ *Caricom-Cuba: Summit Opens With Call for End to Embargo*, http://www.caribbeanatoday.com/index.php?option=com_content&task=view&id=125&Itemid=31 (“[T]he United States . . . has been holding Luis PosadaCarrilles, the anti-Castro Cuban émigré who is alleged to have plotted the 1976 bombing and the murder of the Chilean ambassador to the US in Washington, a few weeks before the Cubana explosion. Last April, Posada, a naturalized Venezuelan citizen who developed a relationship with the U.S. Central Intelligence Agency (CIA), sought political asylum in the United States. An American judge has ruled that he cannot be deported to Venezuela, which has formally requested Posada’s extradition, upholding Posada’s claims that he would be tortured on his return.” *Id.*).

The executive branch has the authority to conduct U.S. foreign relations.¹⁴¹ It is also the branch that must decide what matters to prosecute.¹⁴² “A prosecutor is invested with inquisitorial powers and where he is informed that a crime has been committed, but no complaint has been made, it is his duty to inquire into the facts, with care and accuracy, examining the available evidence, the law and the facts, and the applicability of each to the other”¹⁴³ “In a proper case it is his duty to take the initiative in commencing prosecution, but he will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion.”¹⁴⁴

This discretion regarding which cases to prosecute could lead to further deterioration of bilateral relations with a country like Venezuela. It is not inconceivable that Venezuela could request the prosecution of its opposition leaders if Venezuela had probable cause to believe that those leaders had engaged in tax evasion reachable under *Pasquantino*.¹⁴⁵ The U.S. might refuse to conduct such prosecutions as it would go against its foreign policy and interests in the region. Such failure to prosecute could in turn be construed as discriminatory by Venezuela, particularly if it saw the U.S. bringing similar prosecutions against some of its officials and high-ranking military officers for other reasons, such as drug-related offenses.¹⁴⁶ Venezuela also could perceive discrimination if it observed a pattern of initiating such prosecutions in regards to tax

¹⁴¹ *Pasquantino III*, 125 S.Ct. at 1769.

¹⁴² USAM 9-2.000, Authority of the United States Attorney in Criminal Division Matters/Prior Approvals, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm.

¹⁴³ Paul Coltoff, J.D. District and Prosecuting Attorneys, C.J.S. DIST. AND PROSEC. ATTOR. § 29.

¹⁴⁴ *Id.*

¹⁴⁵ *cf.* Eric M. Zolt, *Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1670 (2005) (“[P]erception of fairness plays a large role in tax evasion behavior. Recent studies of tax morale suggest that a sustainable tax system rests on widely held perceptions of both a fair tax system and a government that effectively and responsibly provides goods and services.”).

¹⁴⁶ *Authorities in Venezuela Accused of Collaboration in Drug-Trafficking Networks*, World Markets Analysis, Sept. 15, 2005. “U.S. officials have often designated Venezuela’s National Guard as a chief collaborator in the drug business. The news comes at a time of tense relations between the U.S. Drug Enforcement Agency (DEA) and Venezuela’s president Hugo Chavez. In July 2005 the Venezuelan government decided to investigate the DEA’s operations in the country, fearing that spying activities were being carried out under the guise of counter-drug programmes.”

evasion by citizens of States with whom the United States enjoys good diplomatic relations, such as Canada, Colombia or Brazil.¹⁴⁷

However, the type of crimes prosecuted under *Pasquantino* might be restricted to cases in which the tax laws of the foreign country are to a certain extent compatible with the United States. Foreign countries' laws creating certain civil obligations or even government rights to invade private property that are incompatible with those of the United States might not be recognized under *Small v. United States*.¹⁴⁸ In *Small*, the defendant was prosecuted in the United States for "unlawful gun possession," because he had been convicted of a felony in Japan.¹⁴⁹ The court there recognized that some countries might punish certain conduct that U.S. law would permit and that society might encourage.¹⁵⁰ It is not inconceivable, then, that certain countries could create obligations that are "inconsistent with an American understanding of fairness"¹⁵¹ precluding perhaps a *Pasquantino*-type prosecution.¹⁵² Thus, there would be a need for both the prosecution and the court to determine whether the foreign law is so egregious, discriminatory, and/or confiscatory to preclude enforcement under *Small*. For example, laws that deprive of

¹⁴⁷ *Bush Pushes for Free Trade*, Albany Times Union, Nov. 7, 2005. "Bush met with Lula [Brazilian President], and afterwards both men described the U.S.-Brazilian relationship as strong and mutually beneficial." *EIU ViewWire Colombia*, Economist Intelligence Unit, Nov. 9, 2005. "Maintaining strong ties with the US will remain Colombia's main foreign policy priority, as this brings important political and economic benefits. The administration of the US president, George W. Bush, regards the Uribe government as one of its closest allies in Latin America."

¹⁴⁸ *Small v. United States* (*Small*), 125 S.Ct 1752 (2005).

¹⁴⁹ *Small*, 126 S.Ct. at 1755.

¹⁵⁰ *Id.* at 1755-56; *cf.* SOVIET CRIMINAL LAW AND PROCEDURE art. 153, 171-72 (H. Berman & J. Spindler trnsls. 2d ed. 1971) ("[Soviet Criminal Law] criminalizing "Private Entrepreneurial Activity. [C]riminalizing "Speculation," which is defined as "the buying up and reselling of goods or any other articles for the purpose of making a profit."); *see e.g.*, GACETA OFICIAL DE LA REPUBLICA DE CUBA, ch. 11, art. 103, 68 (Dec. 30, 1987) ("[Cuba] forbidding propaganda that incites against the social order, international solidarity, or the Communist State.").

¹⁵¹ *Small*, 126 S.Ct. at 1756.

¹⁵² Nonetheless, *see Small*, 125 S.Ct. at 1761 (Thomas, J., dissenting) ("Though foreign as well as domestic convictions trigger §922(g)(1)'s prohibition, the statute criminalizes gun possession in this country, not abroad. In prosecuting *Small*, the Government is enforcing a domestic criminal statute to punish criminal conduct." *Pasquantino III*, 125 S.Ct. 1766.).

property without due process or discriminate based upon race,¹⁵³ political views,¹⁵⁴ or any other standard that violates equal protection might not be enforced.

Another hypothetical scenario can be used to illustrate the point above. A Venezuelan citizen, belonging to the political opposition, owns land in Venezuela. President Chavez's land reform is being used to appropriate land belonging to members of his opposition. The landowner is located in the United States for fear of personal attacks, and from there, using interstate wires, arranges for the land to be placed under someone else's name to prevent confiscation. She has circumvented a Venezuelan law using interstate wires, but this law might be found discriminatory, precluding prosecution in the United States under the previously-discussed theories.

C. Pasquantino and RICO Claims

Although, the Supreme Court left the issue of civil RICO claims unresolved,¹⁵⁵ the Second Circuit recently dealt with this question in *The European Community v. RJR Nabisco, Inc.*¹⁵⁶ That case was a consolidation of separate actions commenced by the European Community, various of its member states and Colombia.¹⁵⁷ The complaints included claims that the tobacco companies directed and facilitated the smuggling of contraband cigarettes into these

¹⁵³Fin Gaz, *Three Million in Need of Food Aid by January*, http://www.zimbabwesituation.com/dec8b_2005.html (“... Zimbabwe, a former bread basket of southern Africa now reduced a basket-case partly due to the drought and the country's chaotic land reform, which saw the government grabbing farms from white commercial farmers for redistribution to landless blacks.”).

¹⁵⁴Digest, South Florida Sun-Sentinel (Fort Lauderdale), Broward Metro Ed., Nov. 18, 2005, at A20. “The reform, led by [Venezuela's] President Hugo Chavez, is being carried out under a 2001 law allowing the government to seize lands that officials determine are not being put to adequate use. Authorities also have been taking ranches from those the government says cannot prove ownership through documents. The state has so far claimed almost 1.5 million acres as part of the land reform, according to the National Lands Institute. Next year, the government is expected take at least 3.7 million acres of land deemed to be "idle," said Richard Vivas, the agency's director. The National Cattleman's Association claims officials have not given ranchers opportunities to prove ownership in courts before soldiers arrive to claim control of their lands.” *Id.*

¹⁵⁵ Pasquantino III, 125 S.Ct. at 1771 n1. (“We express no view on the related question whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act for a scheme to defraud it of taxes.”).

¹⁵⁶ *The European Community v. RJR Nabisco*, 424 F.3d 175 (2d Cir. 2005).

¹⁵⁷ *Id.* at 177.

States.¹⁵⁸ “The plaintiffs claimed that the defendants had participated in a smuggling enterprise within the meaning of RICO and committed various predicate acts of racketeering, including mail and wire fraud, money laundering and others.”¹⁵⁹ The plaintiffs argued that the revenue rule had been abrogated in the context of civil RICO claims when the USA Patriot Act¹⁶⁰ amended RICO in 2001. “The Patriot Act added certain smuggling or export control violations to the list of RICO predicate acts.”¹⁶¹ The district court rejected the argument and held that “neither the amendments nor their legislative history evidence Congress’s intent to abrogate the revenue rule to allow claims such as the plaintiff’s.”¹⁶²

The plaintiffs also argued that *Pasquantino* had significantly narrowed the scope of the revenue rule. Again, the *RJR Nabisco* Court disagreed, holding that “the involvement of the United States government was a key factor in determining the outcome of *Pasquantino*.”¹⁶³ The *RJR Nabisco* lawsuit, by contrast, was brought by foreign governments and the United States gave no signal that it wished to see this litigation proceed.¹⁶⁴ Therefore, according to *RJR Nabisco*, it appears that so long as the action is criminal and the executive branch is involved, these types of actions will be permitted.¹⁶⁵ “As we held in *Canada*, “[w]hat matters is not the form of the action, but the substance of the claim.”¹⁶⁶ Here, the substance of the claim is that the defendants violated foreign tax laws. “When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes

¹⁵⁸ *Id.* at 178.

¹⁵⁹ *Id.* (The damages sought were measured by the lost tax revenue, and thus the defendants argued that the revenue rule applied to bar the action.)

¹⁶⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

¹⁶¹ *RJR Nabisco*, 424 F.3d at 180.

¹⁶² *Id.*

¹⁶³ *Id.* at 181.

¹⁶⁴ *Id.*

¹⁶⁵ *See* *RJR Nabisco*, 424 F.3d at 182.

¹⁶⁶ *Id.* (citing *AG of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001)).

of foreign relations policy that are assigned to--and better handled by--the political branches of government."¹⁶⁷ In *Pasquantino*, this concern was alleviated by the direct participation of the political branches in the litigation.¹⁶⁸ Here we have no such assurance. "We therefore see no reason why *Pasquantino's* analysis should disturb our conclusion that the revenue rule bars civil RICO suits by foreign governments against smugglers."¹⁶⁹

CONCLUSION

The increased globalization of the world in which we live in has been accompanied by a number of crimes that transcend borders, such as drug-trafficking, terrorism, money laundering, and tax evasion. The *Pasquantino* decision has provided not only the U.S. government, but also some of its allies, with tools to help combat the deprivation of their coffers of tax revenue when the conduct has taken place within the U.S. borders and through the use of interstate wires. However, given the requirements to commence such prosecution, *Pasquantino's* impact is rather modest, and the traditional tools to combat these crimes remain viable.

¹⁶⁷ *Canada*, 268 F.3d at 114.

¹⁶⁸ *See Pasquantino III*, 125 S.Ct. at 1779-80.

¹⁶⁹ *RJR Nabisco*, 424 F.3d at 182.