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THE ROLE OF INTERNATIONAL LAW AND PRACTICE IN ADDRESSING INTERNATIONAL TAX ISSUES IN THE GLOBAL ERA

CHARLES H. GUSTAFSON*

I. INTRODUCTION: THE PURSUIT OF REVENUE

THE government of every country is concerned to find ways to finance its operations. The question of appropriate and effective tax law and policy is at the heart of this quest. The evolution of electronic commerce and sophisticated financial arrangements has made it easier in many instances for corporations and individuals to avoid and/or evade taxes. The administration of tax laws in an increasingly globalized economy presents daunting challenges as tax administrators seek to pursue taxpayers involved in international transactions who are, unsurprisingly, somewhat less interested in the challenges of effective tax administration.

Governments around the world have discovered that international law and practice provide important tools for addressing these complex issues. This paper will explore some of the reasons for the peculiar difficulties of tax policy and administration in the context of international law norms and practice, describe some of the ways in which the tools of international law have been used to overcome the special challenges of international tax administration and endeavor to anticipate ways in which international tax administration might evolve to increase effectiveness of revenue collection.

Professor John F. Murphy, to whom this symposium is so appropriately dedicated, has written extensively about successes and failures of international legal arrangements. Some of the most challenging and contentious issues arise in situations when a country seeks to apply its laws extraterritorially. This paper deals with such circumstances. However, the paper tells a necessarily abbreviated story of the relatively successful use of the implements of modern international law in advancing an objective, shared by virtually all governments, to increase the effectiveness of international tax administration and enforcement. The story is well known to tax professionals, but is less familiar to international law scholars and practitioners whose efforts are not focused on issues of tax law and policy.

II. WHEN LEGAL WORLDS COLLIDE: UBS, THE IRS, AND SWITZERLAND

The challenges of international tax administration are dramatically reflected in the widely reported saga of the United Bank of Switzerland (UBS) as the inconsistent laws of two countries were applied to it. The

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Internal Revenue Service (IRS) had received widely publicized reports that UBS employees in the United States and Switzerland were actively engaged in the encouragement of tax evasion by U.S. citizens and residents through the use of bank accounts whose secrecy would be protected by Swiss banking laws. In June 2008, the IRS filed a "John Doe" summons in the U.S. District Court for the Southern District of Florida.[1] The summons sought permission for the IRS to obtain the names of U.S. taxpayers who had been hiding assets in UBS accounts.[2] It was originally estimated that there were about 52,000 such accounts. UBS resisted the summons in part on the ground that such disclosure would be a violation of Swiss bank secrecy laws.

UBS entered into a deferred prosecution agreement in early 2009. The agreement included consent to be charged with a one-count criminal information charging conspiracy to defraud the IRS, coupled with a further agreement that the charge would be dropped if UBS cooperated with the IRS request.[3] UBS further agreed to terminate the activities under scrutiny and to pay substantial fines and penalties, but reserved the right to challenge the summons without being considered to have violated the agreement. Thus, the legal contest continued.

In August 2009, an agreement was concluded between the United States and Switzerland (the U.S.-Swiss Agreement). In exchange for dismissing enforcement action of the summons, the Swiss Government agreed to procedures by which the IRS would receive a substantial portion of the information it was seeking.[4]

A classic confrontation ensued. The district court judge postponed the enforcement of the summons while Swiss and U.S. officials sought to negotiate a resolution of the issue. Eventually, Swiss authorities agreed that UBS would provide the names of about 4,450 account holders (out of a revised estimated total of at least 40,000).[5] Meanwhile, the IRS an-

1. A "John Doe" summons is "any summons where the name of the taxpayer under investigation is unknown and therefore not specifically identified," and can only be served with the approval of a federal court. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 25.5.7.2 (2006).

2. Press Release, Dep't of Justice, Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records (June 30, 2008), *available at* http://www.justice.gov/opa/pr/2008/June/08-tax-579.html.

3. *Tax Haven Banks and U.S. Tax Compliance: Obtaining the Names of U.S. Clients with Swiss Accounts: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. 2 (2009) (statement of John DiCicco, Acting Assistant Att'y Gen., Tax Division, United States Department of Justice), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:49492.wais.pdf.

4. Press Release, Internal Revenue Serv., IRS to Receive Unprecedented Amount of Information in UBS Agreement (Aug. 19, 2009), *available at* http://www.irs.gov/newsroom/article/0,,id=212124,00.html.

5. Kevin McCoy, *UBS Must Release Data on 4,500 Suspected Tax Cheats*, USA TODAY, Aug. 20, 2009, at B1, *available at* http://www.usatoday.com/money/perfi/taxes/2009-08-19-ubs-tax-irs_N.htm. Further, the Swiss "agreed to review and process additional requests for information for other banks regarding their account

nounced an amnesty program in which taxpayers were invited to make a voluntary disclosure of the existence of foreign accounts in return for a relaxation of certain penalties that would otherwise be imposed. The result was a kind of "Swiss Roulette" as account holders weighed the probability that their names would be among those that would be disclosed. The response was rather dramatic. During the seven-month period in which the IRS granted full amnesty, over 15,000 foreign account holders, including many holding accounts with UBS, voluntarily disclosed their status and made arrangements to pay back taxes.[6]

Not all UBS account holders were so quiescent. Some initiated litigation in Switzerland seeking to enjoin disclosure to the IRS on the ground that the U.S.-Swiss Agreement violated the existing tax treaty between Switzerland and the United States. The Swiss Federal Administrative Court held that the Swiss Government could only provide assistance to the IRS in cases involving "tax fraud," but that this case involved only "tax evasion."[7] In March 2010, the United States and Switzerland signed a protocol to amend the existing tax treaty to allow for the disclosure of the UBS account information, even in cases of tax evasion, effectively overruling the decision of the Swiss court.[8] After the protocol was ratified by the Swiss Parliament in June 2010, the Administrative Court agreed that there was no further basis to prohibit the disclosure of UBS account information to the IRS.[9] By September 2010, when this paper was prepared for the symposium, the processing of the accounts and transmittal of information to the IRS was under way, and the summons to UBS was finally withdrawn.[10]

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holders to the extent that such a request is based on a pattern of facts and circumstances equivalent to those of the UBS case." *Id.*

6. Kim Dixon, *Nearly 15,000 Americans Admit to Offshore Tax Cheating*, REUTERS, Nov. 17, 2009, http://www.reuters.com/article/idUSN17519920200911 17.

7. "Swiss law distinguishes between tax evasion—the nonreporting of income, including failure to file W-9 disclosures of offshore accounts with the I.R.S.—and tax fraud, which is defined as the use of corporate structures to hide money and ill-gotten gains." Swiss law does not consider tax evasion to be a crime. Lynnley Browning, *Swiss Ruling Jeopardizes Deal for UBS Clients' Names*, N.Y. TIMES, Jan. 22, 2010, at B2, *available at* http://www.nytimes.com/2010/01/23/business/23tax.html?_r=1&dbk.

8. *U.S.-Switzerland Protocol Will Allow Handover of UBS Account Holder Information*, J. OF ACCT., Mar. 31, 2010, http://www.journalofaccountancy.com/Web/2010 2754.htm.

9. Silke Koltrowitz & Lisa Jucca, *Swiss Court Backs UBS Client Data Transfer to U.S.*, REUTERS, July 19, 2010, http://www.reuters.com/article/idUSTRE66I3PZ 20100719.

10. Marie Sapirie & David D. Stewart, *Swiss Complete Processing of Undisclosed UBS Accounts*, 128 TAX NOTES 926, 926 (2010). There may be more chapters in the story. The President of Switzerland, Micheline Calmy-Rey said in January 2011, that relations with the United States "have never been so good", but that "we can't exclude the possibility of a continuation of problems." Daniel Pruzin, *Swiss President Declines to Rule Out New Battles with U.S. Over Bank Accounts*, 11 Daily Tax Rep. (BNA), at I-2 (Jan. 18, 2011).

This brief recitation of the principal elements of the UBS saga provides a rather dramatic illustration of a recurring and troublesome problem of international tax administration. Several countries are entitled under international law norms to exercise tax and other jurisdiction over the same individuals, entities, and transactions. The laws of the several countries vary considerably and are often inconsistent. In this case, the conflict was between U.S. enforcement authority and Swiss bank secrecy laws. The reconciliation of these inconsistent legal prescriptions is obviously a very complex challenge. Potential costs and risks to individuals and entities are substantial, thereby threatening the efficacy of international trade and investment.

III. INTERNATIONAL LAW: THE JURISDICTION TO TAX

The evolution of the customary international law of jurisdiction is well known. As a general matter, the permissible exercise of legal authority by a nation-state depends upon a nexus between the nation-state and the individual, entity, transaction, or property with respect to which the law is being applied.[11] Two of those nexuses are citizenship (or residence) and territoriality.[12] As a result, while the legitimate authority of a nation-state to exercise taxing power is not infinite, it is permissible to tax income realized anywhere by its citizens, and it is legitimate to tax income realized within the territory of the taxing state. In circumstances in which a government chooses to tax the extraterritorial income of its domestic taxpayers, there is a very high probability that at least double taxation of the same income of the same taxpayer will result because some other country is exercising permissible taxing power on the basis of territoriality, and both countries are acting within the jurisdictional bounds established by customary international law.

The prospect of double taxation raises the interesting question: What does customary international law have to say about the mitigation of double (or more) taxation? What are the jurisdictional priorities between the country taxing on the basis of citizenship or residence and the country taxing on the basis of territoriality (or "source" in tax jargon)? It may surprise some to learn that customary international law has remained silent on this question. This means that double taxation of international transactions is clearly permissible under customary international law even though the long-term economic consequences of multiple taxation will have an adverse effect on the economic development of all countries involved.

The problem of double (or more) taxation of international transactions is more troublesome for some countries than for others. As is often

11. An exception to the nexus requirement arises, of course, in situations in which universal jurisdiction has been recognized.

12. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 411, 412 (1987).

the case, the United States is an enthusiastic practitioner of extraterritoriality as it famously applies the rule of worldwide taxability to its domestic taxpayers (principally U.S. citizens, resident aliens as specially defined for income tax purposes, U.S. corporations, U.S. trusts, and U.S. estates). Under this approach, all income realized by the domestic taxpayer, wherever derived, is immediately subject to potential U.S. tax.[13] Many other countries impose income taxes in whole or in part on the basis of territoriality. In some such countries the foreign income of domestic taxpayers may not be subject to tax. The problem of double taxation is, therefore, much more acute for the United States and other countries that would tax the foreign income of their domestic taxpayers. Countries that tax only on the basis of territoriality do not generally confront a risk of double taxation.

A. *Comity and Collecting Taxes Abroad: No Laughing Matter*

Several hundred years ago, Lord Mansfield ruled that British courts were not available for the enforcement of the tax laws of another country. Interestingly, this conclusion did not derive from the enforcement of a foreign tax liability. The case concerned a contract for the sale of goods. One defense to the contract was that certain French export duties had not been paid.[14] In his widely cited opinion, Lord Mansfield stated that "no country ever takes notice of the revenue laws of another." The issue of foreign tax collections in the courts of another country has often been compared to the absence of comity in the enforcement of foreign criminal laws.

Lord Mansfield's rather general observation was used over time to deny recognition of foreign tax judgments and to deny access to local courts for the enforcement of foreign tax laws. The results of such decisions as part of common law jurisprudence came to be characterized as the "revenue rule." Given the result, it might more sensibly have been called the "no revenue rule."

The common law legacy of the United States has included the revenue rule. It has been applied by U.S. courts in a number of different instances. The Third Restatement of the Foreign Relations Law of the United States includes a clear and definitive formulation about the posture and consequences of the revenue rule in United States jurisprudence: "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

13. The Supreme Court upheld the rule of worldwide taxability for domestic persons in *Cook v. Tait*, 265 U.S. 47 (1924). The practice had been challenged by a U.S. citizen who was a permanent resident and domicile of Mexico on the ground that the practice was unconstitutional and violated international law.

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

courts of other states."[15] Efforts by foreign governments to sue in U.S. courts to collect taxes have thus been consistently rejected.

B. *Too Much Jurisdiction, Not Enough Comity: Treaties Can Help*

The intersection of a jurisdictional formulation under customary international law that permits double taxation and the inability to enforce tax laws in another country have strained international economic relations among nation-states. Efforts to alleviate such strain have led to the evolution of hundreds of bilateral income tax treaties among the countries of the world and a few multilateral income tax treaties, of which the most well-known is the "Nordic Treaty" among Scandinavian countries.[16] These treaties advance several important objectives in attempting to deal with both double taxation and the difficulty of enforcement in the context of international transactions.

The bilateral tax treaties advance several important objectives. They establish jurisdictional priorities between the treaty countries. They commit the treaty partners to engage in various forms of mutual cooperation in the administration of their respective taxing laws. Further, the bilateral tax treaties effectively commit the parties to use their best efforts to bring about a resolution of situations in which there is a difference of interpretation or application of the treaty provisions. Each of these functions is discussed below.

1. *Bilateral Income Tax Treaties—A Brief History of U.S. Practice*

The modern federal income tax was enacted in 1913, just after the adoption of the Sixteenth Amendment to the U.S. Constitution. A famous Report on Double Taxation, prepared by tax experts from four countries and published under the auspices of the League of Nations in 1923, was a very influential element in the development of international tax policy in many countries.[17] The report contemplated the evolution of tax treaties as a key mechanism for reducing double taxation of international transactions. Prior to the 1930s, however, the U.S. government evidenced little interest in concluding tax treaties, even though their development in other countries, and especially Europe, was well known. Some reports suggested that the great prosperity of the pre-depression 1920s seemed to minimize concern for double taxation. Further, as is well known, one of the legacies of World War I was the evolution of a strong isolationistic

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15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483.

16. All of the official languages of the treaty are Scandinavian. The data base of the International Bureau of Fiscal Documentation refers to the treaty as the Convention Between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital.

17. *Report on Double Taxation Submitted to the Financial Committee by Professors Vruins, Einaudi, Seligman and Sir Josiah Stamp,* League of Nations Doc. E.F.S. 73.F.19 (1923).

strain in U.S. foreign policy. In any event, the United States did not conclude its first income tax treaty until 1932, when a treaty with France was signed.[18] That treaty did not come into force until 1936.

The evolution of the treaty with France did not represent a dramatic new interest in the idea of bilateral tax treaties on the part of the U.S. government. France had begun to impose a tax on dividends distributed by U.S. corporations with French subsidiaries. A U.S. delegation to France protested this policy. French representatives responded by insisting upon their position unless a tax treaty could be concluded. The result was the treaty signed in 1932.[19]

Under the terms of the treaty, the source country (using territoriality as the basis for exercising tax jurisdiction) was permitted to tax specific categories of income. As importantly, the treaty prohibited the source country from taxing certain forms of income even though the income arose in the source country. For example, the treaty included a provision (now common in almost all bilateral income tax treaties) limiting the authority of a country to tax the business income of residents of the other treaty countries unless the business activities were undertaken in a "permanent establishment." If the foreign taxpayer operated the business without having such a permanent establishment, income therefrom could not be taxed. The treaty also exempted from tax the following items:

- Compensation paid by one of the contracting states to its citizens for labor or personal services performed in the other state.

- War pensions paid by one of the contracting states to persons residing in the territory of the other.

- Amounts paid as consideration for the right to use patents, secret processes and formulas, trademarks, and other analogous rights.

- Income received as copyright royalties.

- Private pensions and life annuities.

The treaty did not deal with the taxation of dividends and interest. Further, the treaty did not require the treaty partners to take steps to mitigate double taxation.

A few other treaties were concluded in the years after the initial treaty with France came into force. Tax treaties with Sweden and Canada were signed in 1939 and 1942, respectively. By the late 1940s, the United States sought to expand its network of tax treaties. The initiative was attributed

18. Convention Concerning Double Taxation, U.S.- Fr., Apr. 27, 1932, 49 Stat. 3145.

19. The original treaty with France was superseded by another signed in 1939 that did not come into force until after the end of World War II in 1945. The current treaty between the United States and France came into force in 1995.

at least in part to the substantial increase in U.S. investments around the world.[20] During the decade following the end of World War II, the United States concluded many new tax treaties. Twelve of those treaties were concluded with European countries: Austria, Belgium, Denmark, Germany, Finland, Greece, Ireland, Italy, the Netherlands, Norway, Switzerland, and the United Kingdom. Treaties were also concluded with Australia, Japan, New Zealand, and South Africa. Most of these treaties were justified as part of widespread efforts to stimulate economic activity to aid in the recovery from the deprivations wrought by World War II.[21] The process of establishing new treaty relations and modifying those in existence has continued regularly since that time.

In some instances, tax treaties concluded with colonial governments had been made applicable to their colonies. However, with the arguable exception of South Africa, no tax treaties were concluded in the 1950s with what came to be known as developing countries, even though the wave of independence had begun with India and Pakistan in 1947. Of course, the massive independence movement in Africa did not begin until 1957 with the creation of Ghana. Since then, many treaties have been concluded between the United States and developing countries.

It should be noted that tax treaties are renegotiated periodically, but only a few have been terminated and not replaced. These include particularly a treaty with Honduras and an old treaty with the Netherlands that had been made applicable to the Netherlands Antilles after that country's independence. In both instances the action of the United States reflected concerns with an unacceptable degree of treaty shopping.[22] Further, Honduras was insisting upon the addition of a provision for "tax sparing," an arrangement in which the country of citizenship grants a foreign tax credit even though the host country has granted a tax holiday.[23]

20. Max J. Wasserman & James F. Tucker, *The U.S. Tax Treaty Program*, 2 NAT'L TAX J. 33, 36 (1949) (citing NAT'L ADVISORY COUNCIL ON INT'L MONETARY AND FIN. PROBLEMS, 80TH CONG., FOREIGN ASSETS AND LIABILITIES OF THE UNITED STATES AND ITS BALANCE OF INTERNATIONAL TRANSACTIONS 51 (Comm. Print 1948)).

21. RICHARD ANDERSEN, ANALYSIS OF UNITED STATES INCOME TAX TREATIES ¶¶ 1.02[a],[b] & n.37 (2009 ed.); Mitchell B. Carroll, *The Historical Development of Income Tax Treaties*, *in* INCOME TAX TREATIES 57 (Jon E. Bishel ed. 1978).

22. "Treaty shopping" is a term used to describe efforts by residents of non-treaty countries to exploit tax treaty benefits, usually by organizing corporations or other entities in a treaty country. *See* CHARLES H. GUSTAFSON, ROBERT J. PERONI & RICHARD C. PUGH, TAXATION OF INTERNATIONAL TRANSACTIONS 243 (4th ed. 2011).

23. Tax sparing has been advocated vigorously by leaders of many developing countries who use tax holidays to attract foreign investment. They argue that the operation of the foreign tax credit mechanism in countries like the United States effectively interferes with the implementation of the economic policies adopted by the developing country by mitigating the effect of the incentives created by the tax holidays.

2. *Current Treaty Relationships*

At the present time, the United States is a party to tax treaties with the following countries:

Australia	Austria	Barbados
Bangladesh	Belgium	Bermuda
Bulgaria	Canada	China
Cyprus	Czech Republic	Denmark
Egypt	Estonia	Finland
France	Germany	Greece
Hungary	Iceland	India
Indonesia	Ireland	Israel
Italy	Jamaica	Japan
Kazakhstan	Latvia	Lithuania
Luxembourg	Malta	Mexico
Morocco	Netherlands	New Zealand
Norway	Pakistan	Philippines
Poland	Portugal	Romania
Russia	Slovakia	Slovenia
South Africa	South Korea	Spain
Sri Lanka	Sweden	Switzerland
Thailand	Trinidad & Tobago	Tunisia
Turkey	Ukraine	United Kingdom
Venezuela		

Further, the tax treaty with the former U.S.S.R. remains in effect with certain members of the Commonwealth of Independent States. As a result, there are currently treaties in force with well over sixty countries.[24]

3. *Modern Bilateral Income Tax Treaties: Allocating Jurisdictional Priority*

The bilateral income tax treaties currently in force are far more complex than the first such treaty with France. As indicated previously, the allocation of primary taxing jurisdiction is an important function of the treaties. Thus, virtually all of the income tax treaties prescribe circumstances in which primary jurisdiction is ceded either to the country of source (again, the country that is exercising jurisdiction on the basis of territoriality) or to the country of citizenship or residence. Moreover, where primary jurisdiction is ceded to the source country, the treaty partner is obligated to take steps to mitigate double taxation.

The impact of such provisions is often dramatic. In the absence of a treaty, the United States imposes a gross income tax of thirty percent on

24. *See generally* 1 Tax Treaties (CCH) ¶ 11B, at 513-16 (2004).

certain forms of passive investment income, such as interest, royalties, and dividends, when they derive from U.S. sources and are not effectively connected with a U.S. trade or business.[25] Such taxes are generally collected through the imposition of a withholding requirement on the person or entity in the United States making the payment.[26] The withholding mechanism, which is used by many countries around the world, is a device intended to deal with the problem of tax collection when the taxpayer is a foreign person or entity without readily identifiable assets in the country. The absence of comity in tax collections would make it almost impossible in many situations to collect the tax. The imposition of a withholding obligation on the domestic person or entity making the payment means that the substantial collection authority established for the IRS can be used.

The treaties generally provide for the reduction or elimination of withholding taxes on a reciprocal basis. For example, the 2006 U.S. Model Treaty,[27] which was published by the U.S. Treasury Department and is used in the negotiation of treaties with other countries, provides in most instances for an exemption from the thirty percent withholding tax for interest and royalties from U.S. sources and for a substantial reduction in the rate of the withholding tax on dividends paid by U.S. corporations to foreign shareholders.[28] This represents a clear tilt in favor of the country of citizenship or residence and against the country of territoriality or source.

A similar tilt, first observed in the original treaty with France, is found in most income tax treaties with respect to trade or business income. If the foreign taxpayer (usually a foreign corporation or nonresident alien) operates a U.S. trade or business, the net income is subject to U.S. tax at the usual rates applied for corporations or individuals, as the case may be.[29] Under U.S. law, such a foreign taxpayer can be found to be conducting a U.S. trade or business even though the activity is not focused on a particular office or other business site. However, all bilateral income tax treaties provide that business profits will only be taxed if the business is conducted through a "permanent establishment."[30] The 2006 U.S. Model Treaty, like almost all treaties in force, sets out a list of situations that will

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25. I.R.C. §§ 871, 881 (2006). *See generally* GUSTAFSON ET AL., *supra* note 22, at 228-301.

26. I.R.C. § 1441.

27. United States Model Income Tax Convention, Nov. 15, 2006, 1 Tax Treaties (CCH) ¶ 209.22 [hereinafter 2006 U.S. Model Treaty]. The U.S. Treasury Department has published a series of model treaties since the 1970s. Model treaties have been developed by other governments and by international organizations. The OECD published its first model treaty in the 1960s. A model treaty designed for use in negotiations between developed and developing countries was issued by the United Nations in 1980. Both models have been revised from time to time.

28. *Id.* arts. 10-12.

29. *See* GUSTAFSON ET AL., supra note 22, at 141-227.

30. *See, e.g.*, 2006 U.S. Model Treaty, *supra* note 27, art. 7.

be regarded as a permanent establishment and a list of relatively permanent arrangements that will not be deemed a permanent establishment.[31] The effect of these provisions is to allow a foreign taxpayer to operate a trade or business within the country while being effectively exempted from the taxing regime that would normally apply to such income.

Unless the treaty prescribes a preference for the country of citizenship or residence, priority is generally ceded to the country of territoriality or source. In such a case, the treaty partner is required to take steps to mitigate double taxation.[32] There are two principal forms of mitigation that satisfy the treaty obligation. In some instances the country of citizenship or residence will exempt the income realized in the treaty partner from tax, thereby eliminating the risk of double taxation. In other instances, the country of citizenship or residence will provide a tax credit for taxes that have been imposed, as authorized by the treaty, by the other country.

United States negotiators will readily agree to provide a foreign tax credit. Such readiness arises from the fact that the Internal Revenue Code (IRC) generally authorizes such credits whether or not a treaty applies to the income in question.[33] In fact, the statutory entitlement to foreign tax credits, coupled with the usual demand that taxes on passive investment income be reduced or eliminated, have caused most of the major trading partners of the United States in South America to reject attempts to establish income tax treaties. Somewhat ironically, at this time Venezuela is the only country in South America with which there is in force an income tax treaty with the United States.[34] A treaty between the United States and Chile, signed in early 2010, awaits Senate approval.[35]

4. *Tax Enforcement in the International Context: Generally Available Tools*

As indicated previously, comity has not generally been extended to actions in the courts of a foreign country to collect taxes. Increasingly, however, actions in U.S. courts to enforce U.S. tax laws involve individuals and entities in other countries. The UBS episode is just one example. When seeking to enforce U.S. tax laws in an international context, the IRS confronts the kind of challenges presented for all litigants engaged in international litigation. Service of process abroad and elicitation of evidence from witnesses in other countries is a common problem. Unsurprisingly, tools of general applicability for judicial cooperation de-

31. *Id.* art. 5.

32. *Id.* art. 23.

33. I.R.C. § 901 (2006). *See generally* GUSTAFSON ET AL., *supra* note 22, at 302-484.

34. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Venez., Jan. 25, 1999, S. TREATY DOC. No. 106-3 (1999).

35. An income tax treaty between the United States and Chile was signed on February 4, 2010, but is not yet in force.

veloped by international practice and treaties are often used to enhance the effectiveness of tax collection efforts. There are, however, limitations on the availability of such techniques in many instances. As a result, these traditional tools have been importantly supplemented by provisions of bilateral income tax treaties and by treaties providing for the sharing of information between taxing authorities.

A basic proposition of customary international law is that a nation-state may not conduct official activities in the territory of another nation-state without that state's consent. Accordingly, every state is entitled to determine the conditions for service of process in its territory in aid of litigation in another state. This approach is applied to the service of judicial documents and to the taking of evidence in connection with litigation. The manner of service of a summons, complaint, or comparable document must comply with the law of the state where service is made.[36]

The practices of different countries vary materially. The Restatement reflects some of the dramatic difference:

> Civil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own law. In such states, absent a treaty, service must ordinarily be made pursuant to a letter rogatory, addressed by the court from which the process issues to the authorities in the state where service is to be made. Attempted service in such states—including service by mail or by personal delivery—if not in compliance with local law, will generally not be accepted in [U.S. courts].[37]

A few aspects of the use of letters rogatory are worth noting. A letter rogatory is generally a formal request from a court in one country to the appropriate judicial authorities in another country requesting compulsion of testimony or documentary or other evidence or to effect a service of process. Compliance is not required by customary international law. As such, the response is based upon comity unless a treaty obligates the requesting state to cooperate. Practice among states differs markedly. Some states will not object to service of process by mail, personal delivery, or by a consul of the state where the litigation is occurring. But, as suggested earlier, other countries consider the act of serving process essentially to be a sovereign act that can only be effected under government aegis.

International cooperation to effect service in and obtain evidence from another country has taken a number of forms. As a result, the degree of cooperation and success of the efforts differs markedly from country to country. In recognition of the demands of litigation in the modern

36. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 (1987). *See generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 815-905 (4th ed. 2007).

37. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. b.

international contexts, these practices, originally deriving from comity, have been supplemented in recent decades by a number of multilateral treaties developed to provide expanded opportunities for judicial assistance.

The work of the Hague Conference on Private International Law has produced several well-known multilateral conventions that have become increasingly used to facilitate international litigation, including particularly the Hague Service Convention[38] and the Hague Evidence Convention[39] (together, the Hague Conventions). These treaties are sometimes, but not always, available in respect of tax litigation.

The Hague Conventions are limited to civil and commercial matters. They are not available for use in connection with criminal proceedings. Moreover, the Hague Conventions are not always available in respect of tax litigation. The terms "civil" and "commercial" are not defined in the Conventions. Different countries have applied different interpretations to these terms. For example, in the United States and United Kingdom any proceeding that is not criminal is generally considered to be "civil or commercial." However, the interpretation of those terms in France excludes fiscal as well as criminal proceedings. German practice is reportedly to exclude any matters involving enforcement of "public law." As a result, French and German central authorities have declined to serve legal documents issued, for example, by several U.S. federal agencies.[40]

Tax litigation would generally not be considered to be covered by the Hague Conventions under the French or German interpretations. In fact, a similar interpretation was urged in a British case some years ago.[41] A Norwegian court had issued letters of request to the United Kingdom under the Hague Evidence Convention. A lower British court had held that there was no jurisdiction because the case was a tax collection or fiscal matter that was not properly considered to be civil or commercial. The case was eventually appealed to the House of Lords. The lower court decision rejecting the request for judicial assistance was defended on the ground that the terms of the convention, *matiere civile ou commerciale* in the French text, are limited in application in France and other civil law countries to private law matters. Thus, it was argued, the adoption of a similar

38. Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969).

39. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 (entered into force Oct. 7, 1972).

40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471, cmt. f.

41. In re State of Norway, [1990] 1 A.C. 723 (H.L.) (appeal taken from Eng.) (U.K.), *reprinted in* 28 I.L.M. 693 (1989); *see* Peter D. Trooboff, Note, *Judicial Assistance—Jurisdiction—1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—Meaning of "Civil or Commercial Matters" as Used in the Implementing Statute and the Convention*, 83 AM. J. INT'L. L. 933 (1989).

approach was in the interest of uniformity in the construction of provisions of the convention.

The argument did not prevail. The House of Lords applied the traditional British view that civil matters include all matters not criminal. Thus, as the fiscal proceedings giving rise to the letters of request did not involve a criminal prosecution, the request could be granted. The decision also noted the apparent absence of an absolutely uniform interpretation of *matiere civil ou commerciale* among civil law countries. Although there appeared to be a general consensus that the phrase covered private, rather than public, law matters, the specific application of the principle was not wholly consistent in each civil law jurisdiction.

The opinion then considered the possible application of the British version of the revenue rule: whether the court should refrain from exercising jurisdiction because the letters of request related to civil proceedings concerning the enforcement of the tax laws of the requesting state. The opinion acknowledged that British courts should decline to execute such letters of request, as a matter of judicial discretion, if they involved the direct or indirect enforcement of foreign revenue laws in Great Britain. It concluded, however, that such a result was not obtained in the case because Norway's request involved only assistance in obtaining evidence so as to enforce Norwegian tax laws in Norway. Norway was not attempting in these proceedings to enforce its tax laws in British courts. Further, the letters of request were issued in part upon the application by a taxpayer seeking assistance in opposing a tax claim by Norway.

The net result is that comity, reflected in the use of letters rogatory for service of process and evidence accumulation, and the Hague Conventions on Service of Process and Evidence have often been useful, but the efficacy of these tools is quite inconsistent from country to country. This situation has led tax administrators to seek ways to expand areas of cooperation specifically to enhance the effectiveness of tax administration. As a consequence, commitments for mutual cooperation in tax administration have been included in bilateral tax treaties. A further consequence is the development of tax information exchange agreements.

5. *Bilateral Tax Treaties: Mutual Cooperation*

As indicated previously, a primary objective of bilateral tax treaties is to mitigate double taxation by prescribing jurisdictional preference for either the country of source or the country of citizenship or residence. However, these treaties also provide important additional means of enhancing international tax administration that go beyond the avenues provided by comity or the Hague Conventions.

The specific provisions of any treaty in force will, of course, depend upon the results of the negotiation process. Thus, while there are many similarities among the scores of U.S. tax treaties currently in force, they are not congruent. It is well beyond the scope of this paper (and the endurance of the reader) to analyze all of these treaties. Although not in force with any other country, however, the 2006 U.S. Model Treaty provides a useful example of the areas of cooperation to which tax treaty partners often commit themselves. It will be used here to demonstrate examples of the way in which the bilateral income tax treaties foster administrative cooperation between the treaty partners.

Article 26 of the 2006 U.S. Model Treaty deals with the exchange of information with and provision of administrative assistance to the treaty partner. A brief summary of the provision reflects the extent to which the taxing authorities of the treaty partners would be committed to cooperate.

Article 26(1) provides that the taxing authorities of the two countries

> shall exchange such information as may be relevant for carrying out the provisions of [the treaty] or of the domestic laws of the [treaty partners] concerning taxes of every kind imposed by the [treaty partner] . . . , including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, such taxes.

Information provided under this provision can only be used for purposes of administering or enforcing taxes. The information must be kept confidential, but can be disclosed "in public court proceedings or in judicial decisions."[42]

The commitment is, however, not unlimited. Article 26(3) of the 2006 U.S. Model Treaty provides that there is no obligation:

> a) to carry out administrative measures at variance with the laws and administrative practice of the [requested state];
>
> b) to supply information that is not obtainable under the laws or in the normal course of the administration of [either state];
>
> c) to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy.

In some treaties, the requested state must have a "tax interest" in the matter, meaning that it is also concerned to enforce its tax laws against the same taxpayer(s) or transaction(s). There is no such requirement in the 2006 U.S. Model Treaty. The requested state is obligated to "use its information gathering measures to obtain the requested information, even though that other state may not need such information for its own purposes. . . . [I]n no case shall . . . a Contracting State . . . decline to supply information because it has no domestic interest in such information."

42. 2006 U.S. Model Treaty, *supra* note 27, art. 26(2).

Issues of bank secrecy laws (an important part of the UBS matter) are also addressed in the model treaty. Article 26(5) of the 2006 U.S. Model Treaty provides:

> In no case shall the provisions of paragraph 3 [set forth above] be construed to permit a Contracting State to decline to supply information requested by the other contracting state because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

The 2006 U.S. Model Treaty specifically requires the requested state to take initiative in certain situations:

> If specifically requested by the competent authority of a Contracting State, . . . the other Contracting State shall provide information under this article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).[43]

The model treaty also includes a substantial commitment to allow agents from the other country "to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination."[44]

6. *Bilateral Tax Treaties—Resolving Interpretive Differences*

The bilateral tax treaties also provide a mechanism for resolving interpretive differences between the taxing authorities of the treaty partners. Again, because the specific terms of the many tax treaties in force are not congruent, it is useful to examine the model treaty as an example of the approaches taken. Article 25 of the 2006 U.S. Model Treaty reflects the nature of the commitments by setting forth a "mutual agreement procedure":

> 1. Where a person considers that the actions of one or both of the Contracting States result or will result for such person in taxation not in accordance with the provisions of this Convention, it may, irrespective of the remedies provided by the domestic law of those States, and the time limits prescribed in such laws for presenting claims for refund, present its case to the competent authority of either Contracting State.
>
> 2. The competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement

43. *Id.* art. 26(6).
44. *Id.* art. 26(8).

with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States. Assessment and collection procedures shall be suspended during the period that any mutual agreement proceeding is pending.

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They also may consult together for the elimination of double taxation in cases not provided for in the Convention. In particular the competent authorities of the Contracting States may agree:

a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

b) to the same allocation of income, deductions, credits, or allowances between persons;

c) to the settlement of conflicting application of the Convention, including conflicts regarding:

i) the characterization of particular items of income;

ii) the characterization of persons;

iii) the application of source rules with respect to particular items of income;

iv) the meaning of any term used in the Convention;

v) the timing of particular items of income;

d) to advance pricing arrangements; and

e) to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of the Convention.

One of the principal areas in which the mutual agreement procedures are often invoked involves transfer pricing issues. Section 482 of the IRC famously authorizes the IRS to recalculate the pricing of all transactions between and among related entities if necessary "to clearly reflect income."[45] The taxing authorities of other countries are frequently

45. The authority to challenge transfer prices is not limited to situations of intentional tax evasion. Section 482 provides:

> In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by

armed with similar authority. The result can be that the taxing authorities of two countries are examining the same transaction from materially different perspectives.

For example, suppose that a U.S. corporation and a corporation organized in Country X are owned by a common shareholder. The U.S. corporation sold products to the sibling corporation. The U.S. corporation charged $100/unit for the product. The IRS believes that the correct price should have been $110/unit and is proposing an adjustment under Section 482 and proposes to increase the taxable income of the U.S. corporation accordingly. The taxing authorities in Country X are examining the same transaction with a focus on the income of the corporation organized under the laws of that country. They believe that the correct price should have been only $90/unit, and are proposing an adjustment under the tax laws of that country that would reduce the cost of the goods to the foreign corporation and increase its taxable income accordingly.

If there is no treaty, the matter may be contested in both countries with quite inconsistent results. If the taxpayers are particularly unlucky, it is possible that income of $20/unit would be taxed in both countries in a way that can result in double taxation. If, however, there is a bilateral tax treaty, the matter may be referred to the taxing authorities of the two countries who will then endeavor to negotiate a price that is used both as the income to the U.S. corporation and as the cost to the foreign corporation. The treaty does not guarantee a successful result. Rather, it obligates the treaty partners to use their best efforts to achieve a consistent price determination.

IV. ARBITRATION OF INTERNATIONAL TAX DIFFERENCES

The United States historically has been uneasy about the submission of international disputes to litigation or arbitration. In the area of international taxation, the desirability of submitting unresolved differences with respect to treaty interpretation to binding arbitration has been discussed for several decades. It has been widely recognized that certain disputes, such as disagreements about transfer pricing analyses of the type described in the preceding section of this paper, were peculiarly appropriate for such a process. Both countries generally have an interest in resolving the issue in a way that avoids double taxation. There is no reason to believe that one of the treaty partners would be favored or disfavored in the long run. Finally, it is recognized that the possibility of a resort to binding arbitration is likely to facilitate the conclusion of negotiated agreements in many instances.

the same interests, the [IRS] may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses.

During the 1990s, a number of treaties concluded by the United States contemplated the possibility of arbitration. These treaties, however, reflected only the commitment of treaty partners to consider the possibility of arbitration, and did not obligate the parties actually to submit to such a process. For example, the 1991 treaty with Germany (Article 25), the 1993 treaty with the Netherlands (Article 29), and the 1993 treaty with Mexico (Article 26) all contained provisions authorizing the use of binding arbitration. However, none obligated the treaty partners to submit thereto, and no arbitration proceedings involving the United States have been reported.

The 2006 U.S. Model Treaty makes no reference to the possibility of arbitration. In that year, however, a dramatic new step was taken in U.S. tax treaty practice. The United States and Germany signed a protocol to their income tax treaty providing for binding arbitration of unresolved disputes in certain situations.[46] The protocol provides:

> In respect of any case where the competent authorities have endeavored but are unable to reach an agreement under Article 25 regarding the application of one or more of the following Articles of the Convention: 4 (Residence) (but only insofar as it related to the residence of a natural person), 5 (Permanent Establishment), 7 (Business Profits), 9 (Associated Enterprises), 12 (Royalties), binding arbitration shall be used to determine such application . . . .

Article 22 of the revised treaty also provides that the parties may "agree that binding arbitration shall be used in respect of any other matter to which Article 25 applies." The commitment to arbitrate issues is not necessarily absolute. The "competent authorities [may] agree that the particular case is not suitable for determination by arbitration."

As suggested earlier, the original text of the treaty contemplated the possibility of arbitration to settle disputes that were not resolved by negotiation. Article 25(5) provides:

> Disagreements between the Contracting States regarding the interpretation or application of this Convention shall, as far as possible, be settled by the competent authorities. If a disagreement cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration. The procedures shall be agreed upon and shall be established between the Contracting States by notes to be exchanged through diplomatic channels.

The 2006 Protocol prescribes a number of detailed procedures for conducting the arbitration. These include the process of initiating a pro-

46. Protocol Amending Tax Convention with Germany, U.S.-Ger., June 6, 2006, S. TREATY DOC. No. 109-20 (2006).

ceeding, appointing arbitrators, and the timing of the process. Substantial authority is according to the arbitrators to "adopt any procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 or the Protocol to the Convention." The decision of the arbitrators is binding on the parties. But no rationale will be stated and the decision will have no precedential value.

The evidentiary standards and substantive approach to be used by the arbitrators is consistent with a form of dispute settlement called in the United States "baseball arbitration," which many have advocated as peculiarly appropriate for transfer pricing issues.[47] The term "baseball arbitration" (happily) does not refer to the weaponry used to settle the dispute. Rather, it is a method established by the principal professional baseball organization in the United States to deal with salary disputes between team owners and players.

As is well known (at least by sports fans), the usual procedure used in commercial arbitration is one in which arbitrators hear evidence and reach a decision based upon their analysis of law and facts in which the damage award, if any, might be any amount and is often somewhere between the demands of the claimant and the position of the defendant. In "baseball arbitration," however, a dramatically different approach governs. Each side (the team and the player) finally submits a number which it believes to be the appropriate salary figure. The arbitrators then have two choices: the team's submission or the player's submission. No compromise award is permitted.

There are several rather obvious advantages to this approach. First, it automatically mitigates against extreme positions. The more extreme the submission by either side, the less likely the submission will be accepted by the arbitrators. Thus, the tendency is to encourage both sides to reasonableness. As they respond to this encouragement, the gap between the two sides narrows so that the probability of settlement is increased. The result is that a commitment to submit to an outside determination reduces the frequency with respect to which the submission actually occurs.[48]

The 2006 protocol to the U.S.-Germany Treaty in effect prescribes this procedure. Both sides are provided with the opportunity to submit "a Proposed Resolution describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case." The arbitration board "will adopt as its determination one of the Proposed Resolutions submitted" by the parties.

It appears that the 2006 protocol to the U.S.-German Treaty is part of at least a modest trend. A new treaty between the United States and

47. *See* Brien M. Wassner, *Major League Baseball's Answer to Salary Disputes and the Strike—Final Offer Arbitration: A Negotiation Tool Facilitating Adversary Agreement*, 6 VAND. J. ENT. L. & PRAC. 5 (2003).

48. *See* James Morgan, *New Developments in the Resolution of International Tax Disputes*, 43 TAX NOTES INT'L 77 (2006).

Belgium, concluded at the end of 2006, included a provision for mandatory arbitration.[49] Since then, mandatory arbitration provisions have been added to United States tax treaties in force with Canada[50] and France.[51] In each case, it is contemplated that a form of baseball arbitration be used.

V. MORE COOPERATION: TAX INFORMATION EXCHANGE AGREEMENTS

As indicated previously, bilateral income tax treaties negotiations undertaken by the United States have not always been successful. In a number of instances, however, governments have been willing to enter into a form of treaty called a Tax Information Exchange Agreement (TIEA).[52] A part of the motivation to conclude such agreements developed from the publication by the OECD of a "black list" of countries that encouraged tax evasion.

TIEAs, as their title suggests, reflect commitments between the treaty partners to cooperate in tax administration through information exchanges. In contrast to bilateral tax treaties, however, TIEAs do not include provisions dealing with the substance of the tax laws of the two countries, including the allocation of primary jurisdiction between them.

The TIEA concluded with Antigua and Barbuda in 2001 provides a good example of the operation of such agreements.[53] The essence of the agreement is found in articles 4 and 5. Article 4 deals with exchange of information. The parties are committed to exchange information to administer and enforce the domestic laws of the two countries "concerning taxes [specified in the agreement], including information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or

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49. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Belg., art. 24, Nov. 27, 2006, S. TREATY DOC. No. 110-3 (2006).

50. Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Sept. 21, 2007, S. TREATY DOC. No. 110-15 (2008).

51. Protocol Amending Tax Convention with France, U.S.-Fr., Jan. 13, 2009, S. TREATY DOC. No. 111-4 (2009).

52. Tax Information Exchange Agreements (TIEAs) are commonly concluded as Executive Agreements not requiring the vote of two-thirds of the Senate. Such agreements are often authorized by legislation. For example, I.R.C. § 274(h)(6)(C) authorizes the conclusion of TIEAs with Caribbean Basin Initiative countries. Currently, the United States has TIEAs in force with the following countries and territories: American Samoa, Antigua and Barbuda, Aruba, Bahamas, Barbados, Bermuda, Cayman Islands, Colombia, Costa Rica, Dominica, Dominican Republic, Gibraltar, Grenada, Guam, Guernsey, Guyana, Honduras, Isle of Man, Jamaica, Jersey, Marshall Islands, Mexico, Monaco, Netherlands Antilles, Peru, Puerto Rico, Saint Lucia, Trinidad and Tobago, Virgin Islands (British), and Virgin Islands (U.S.).

53. Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda For the Exchange of Information with Respect to Taxes, U.S.-Ant. & Barb., Dec. 6, 2001, T.I.A.S. No. 13,178.

crimes involving the contravention of tax administration." All federal taxes are covered in the agreement. The exchange commitment is made "without regard to whether the person to whom the information relates is, or whether the information is held by, a resident or national of a Contracting State." If information is not available in the tax files of the requested party, that party shall "take all relevant measures to provide . . . the information requested." No tax interest is required on the part of the requested party. The agreement specifically provides that the requested state must endeavor in good faith to provide information "in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts and writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of the requested state with respect to its own taxes."

The agreement includes some customary limitations. There is no obligation to carry out administrative measures at variance with the laws and administrative practice of either state or to supply items of information not obtainable under the laws or in the normal course of the administration of either country. There is no obligation to supply information that would disclose any secrets or trade processes. There is no obligation to supply information whose disclosure would be contrary to public policy or to supply information that discriminates against a national of the requested state.

The agreement also provides that the requested state shall allow representatives of the applicant state to enter the requested state to interview individuals and examine books and records with the consent of the individuals contacted. Information provided under the agreement will be considered to be confidential and protected as such.

VI. THE REVENUE RULE REVISITED: TREATY EXCEPTIONS

Some early treaties included language that commits the treaty partners to assist in the collection of taxes owed to the other country. However, earlier efforts to increase cooperation in the collection of foreign taxes through such treaty commitments evoked a negative response on the part of a skeptical Senate. Four early bilateral treaties (Denmark, France, Sweden, and the Netherlands), concluded in the 1930s and 1940s, included provisions for tax collection assistance. After the treaties came into force, however, concerns were expressed in the Congress about the effect of such provisions. One result was the adoption of a protocol in the treaty with France narrowing the obligation of each country so that collection assistance would not be required if the target was a taxpayer of the requested state.[54] Treaties negotiated with Greece, Norway, and South Africa at about the same time also included provisions for collection

54. Supplementary Protocol to the Convention About Double Taxation and Fiscal Assistance, U.S.-Fr., May 17, 1948, T.I.A.S. No. 1,982.

assistance. Such provisions, however, were not applicable in the case of citizens and corporations of the requested state. The view of the Senate, echoing the rationale for the revenue rule, was clearly stated in a report of the Foreign Relations Committee:

> The committee believes that the collection provisions . . . [of the three treaties] are too broad, and it repeats that, as a general rule, it is not believed wise to have one government collect the taxes which are due to another government. . . . Thus, the committee recommends the acceptance of the collection provisions . . . subject to the understanding that each of the governments may collect the other's tax solely in order to insure that the exemptions or reduced rates of tax provided under the respective conventions will not be enjoyed by persons not entitled to such benefits.[55]

The continued reluctance of the United States Government to support tax collection efforts on behalf of other countries was manifest when it adopted a reservation to the reciprocal collection assistance provisions of the OECD Convention on Mutual Administrative Assistance in Tax Matters.[56]

The 2006 U.S. Model Treaty provides for such mutual assistance in tax collection, but only to assure that treaty benefits have not been exploited by taxpayers not entitled to them:

> Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto.

This provision might be invoked, for example, if a taxpayer in another country claimed treaty benefits, such as the elimination of withholding taxes, to which it was not entitled. The other government would be obligated to collect the taxes that should have been paid. The treaty makes it clear, however, that it does not impose upon either of the contracting states an obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.[57]

In a few instances, a treaty will provide that a treaty partner may request assistance in the collection of taxes owed to it, but does not obligate the requested state to render an affirmative response. Such a provision was added to the U.S.-Canada Income Tax Treaty by a protocol that be-

55. S. REP. No. 82-1, at 21 (1951).

56. 136 CONG. REC. S13,293 (1990).

57. 2006 U.S. Model Treaty, *supra* note 27, art. 26(7).

came effective in 1995.[58] Under this provision, for example, Canada might request the United States to endeavor to collect income taxes owed to Canada where a "final determination" of the tax liability has been rendered in Canada. The United States may then choose whether to initiate collection action. The provision, however, would not authorize the initiation of a collection action in the United States against a U.S. citizen or an entity, such as a corporation, organized in the United States.

VII. THE REVENUE RULE REVISED: A JUDICIAL EXCEPTION?

As indicated previously, the revenue rule was not founded on either constitutional or statutory requirements. It has, however, been consistently respected by U.S. courts. In 2003, the European Community, a number of European countries, and the government of Colombia sued in U.S. courts to recover certain excise taxes owed in their respective countries under a somewhat different theory. The lawsuits (consolidated for purposes of the appeal because they involved the same issue) were based upon alleged violations of U.S. law in the United States.[59]

The taxing authorities in Europe and Columbia had initiated action in U.S. courts to collect tobacco taxes allegedly owed by U.S. companies that had not been paid because of fraudulent activity by those companies specifically designed to evade their excise tax obligations. In particular, the plaintiff governments alleged that the tobacco companies "directed and facilitated the smuggling of contraband cigarettes" into their respective countries. The claims were based upon U.S. legislation, including the RICO statute.[60] The foreign countries sought to obtain a judgment for an amount equal to three times the duties and taxes not paid on the cigarettes (RICO authorizes treble damages for successful plaintiffs). The governments also sought to recover funds which "they had been required to expend . . . to fight against cigarette smuggling."

The defendant companies moved to dismiss the civil actions on the grounds of the revenue rule, and the trial court agreed. The court of appeals affirmed the dismissals on the ground that the revenue rule had been well established in United States jurisprudence and that the RICO legislation had not been adopted as an explicit exception to the well-established principle. Other federal courts of appeals had rendered similar de-

58. Protocol Amending the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Apr. 24, 1995, S. TREATY DOC. No. 104-4 (1995).

59. Eur. Cmty. v. RJR Nabisco, Inc., 355 F.3d 123, 128 (2d Cir. 2004), *vacated*, 544 U.S. 1012 (2005).

60. Although RICO had been designed originally to deal with organized crime situations, its provisions have been used in many instances to collect damages for fraud even though organized crime (as historically perceived) was not involved in the case.

cisions rejecting efforts by foreign governments effectively to collect taxes and other damages associated with tax collection.[61]

Two years later, in 2005, the Supreme Court was asked to consider the viability of the revenue rule in a similar, but somewhat different, context. The widely discussed decision of the Court raises interesting questions about the current posture and future development of the revenue rule and, therefore, the possibility of enforcing foreign tax laws in United States courts. The effect of the Supreme Court opinion in *Pasquantino v. United States*[62] was to affirm a criminal conviction by a U.S. court of U.S. citizens for conspiring and undertaking actions within the United States to evade Canadian taxes on the importation of alcoholic beverages.

The facts of the *Pasquantino* case are not complicated. Three U.S. citizens and residents were charged with implementing a scheme to smuggle large quantities of liquor into Canada from the United States to evade the substantial alcohol taxes imposed by Canada. The men were charged and convicted in a U.S. district court of violating the U.S. wire fraud statute.[63]

The evidence adduced at trial showed that the three petitioners, while in New York State, had ordered liquor by telephone from stores in the state of Maryland. The liquor was then smuggled across the border into Canada. No Canadian excise taxes were paid. The trial court concluded, primarily on the basis of expert evidence presented by the prosecution at trial, that Canadian taxes about twice the purchase price of the liquor in Maryland should have been paid. The result was a substantial sum that lead to a very stiff prison sentence under applicable judicial guidelines.

The petitioners challenged the prosecution and conviction as violations of the revenue rule because the purpose was to assist in the administration and application of Canadian tax laws. Even though the matter arose from the violation of foreign tax laws, the *Pasquantino* case differed from the litigation initiated by European countries and Colombia because it was a criminal prosecution initiated, of course, by U.S. authorities. The convictions were initially overturned by the court of appeals on the ground that they contravened the revenue rule.[64] However, that court of appeals decided to rehear the case en banc. The result of the en banc hearing was to vacate the initial decision of the three-judge panel and reinstate the convictions.[65]

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61. *See, e.g.*, Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003).

62. 544 U.S. 349 (2005).

63. 18 U.S.C. § 1343 (2006).

64. United States v. Pasquantino, 305 F.3d 291 (4th Cir. 2002), *aff'd on reh'g*, 336 F.3d 321 (4th Cir. 2003) (en banc), *aff'd*, 544 U.S. 349 (2005).

65. *Pasquantino*, 336 F.3d 321.

The Supreme Court was also sharply divided. The en banc decision of the court of appeals was affirmed by a vote of five to four.[66] The majority held that the convictions were not prohibited by the common law revenue rule and rejected several alternative challenges to them.

The Supreme Court was presented with a series of issues. Most importantly, was the wire fraud statute intended to apply to this kind of situation? If so, was the application of the statute a violation of the revenue rule? Finally, were there alternative sources of law or general policy considerations that would help to answer these questions?

The first question involved the application of the terms of the wire fraud statute to this situation. The 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."[67] The petitioners argued that, even if there was a fraudulent scheme, they had not "obtained money or property" from the government of Canada. They simply had failed to pay taxes that they might be owing. A majority of the Supreme Court rejected this argument and explained:

> Canada's right to uncollected excise taxes on the liquor . . . is "property" in its hands. This right is an entitlement to collect money from petitioners, the possession of which is "something of value" to the Government of Canada. Valuable entitlements like these are "property" as that term ordinarily is employed. Had petitioners complied with this legal obligation, they would have paid money to Canada. Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. The object of petitioners' scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the deprivation of Canada's "property."[68]

The Court rejected several other arguments about the application of the wire fraud statue as well. Federal law includes a specific "antismuggling statute," which applies to persons owning vessels engaging in smuggling into other countries.[69] This provision specifically addresses issues involving smuggling into other countries. It authorizes a fine and imprisonment of up to two years for violators. However, the anti-smuggling statute includes a reciprocity requirement; the provision only applies "if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United Sates respecting the cus-

66. Justice Thomas wrote the opinion of the Court. It was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justice Ginsburg wrote the dissenting opinion, which was joined in whole or part by Justices Breyer, Scalia, and Souter.

67. 18 U.S.C. § 1343.

68. *Pasquantino*, 544 U.S. at 355-56 (citations omitted).

69. 18 U.S.C. § 546.

toms revenue." In other words, the statute specifically designed to deal with situations of the kind raised in *Pasquantino* (albeit involving the use of vessels) depends for its application upon a reciprocal arrangement with the other government. Interestingly, the Court's opinion observed that the anti-smuggling statute would not apply in this case. Moreover, Canadian law does not have provisions that would invoke the anti-smuggling statute.

As discussed previously, some tax treaties have provided for collection action by a treaty partner in respect of taxes owed in the other country. The petitioners argued that the existence of such treaties demonstrated that the more general wire fraud statute was not intended to apply to foreign tax controversies. The Court rejected this inference, observing that such treaty arrangements do not "convince us that [this] scheme falls outside the terms of the wire fraud statute."[70]

The Court then considered whether the wire fraud statute had been intended to be an exception to the revenue rule.[71] The jurisprudential status of the revenue rule as it obtained in 1952, the year in which the wire fraud statute was adopted, was analyzed to determine whether Congress intended to negate the rule by adopting the then new legislation. The Court cited Chief Justice Marshall for the clearly established principle that "the courts of no country execute the penal laws of another."[72] In both instances (criminal law and tax law), there is concern about the interpretation and enforcement of the laws of other countries. The Court concluded that Congress intended to authorize prosecutions in cases such as *Pasquantino.* Interestingly, the Court also observed that the revenue rule did not even apply to a prosecution by U.S. authorities for violations of U.S. laws. Under this view, it would not seem to be necessary to question whether the revenue rule was preempted by the 1952 legislation.

The primary example of the appropriate invocation of the revenue rule arises when there is an attempt by a foreign government to collect taxes by initiating an action in a U.S. court. Such actions were, as indicated previously, exactly the kind of litigation initiated by European countries and Colombia. The Court explained the difference this way:

> An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension, to our knowledge is unprecedented in the long history of either the revenue rule or the rule against enforcement of penal laws.[73]

70. *Pasquantino,* 544 U.S. at 358.

71. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 221-23 (1987).

72. The Antelope, 23 U.S. (10 Wheat.) 66 (1825).

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

The Court distinguished its analysis from cases in which actions were undertaken actually to collect taxes:

> The main object of the action in each of those cases was the collection of money that would pay foreign tax claims. The absence of such an object in this action means that the link between this prosecution and foreign tax collection is incidental and attenuated at best, making it not plainly one in which "the whole object of the suit is to collect tax for a foreign revenue."[74]

With respect to congressional intent, the Court concluded: "Even those courts that as of 1952 had extended the revenue rule beyond its core prohibition had not faced a case closely analogous to this one—and thus we cannot say with any reasonable certainty whether Congress in 1952 would have considered this prosecution within the revenue rule."

The Court was then left with a rather tricky question that seemed to contravene the general analysis of the opinion. Victims of wire fraud are entitled to restitution under another federal law, the Mandatory Victims Restitution Act of 1996.[75] The petitioners argued that the provisions of this act effectively made the *Pasquantino* case into one in which Canada would inevitably be entitled to collect taxes. The Court rejected this argument as well:

> 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.
>
> In any event, any conflict between mandatory restitution and the revenue rule would not change our holding today. If awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later enacted restitution statute impliedly repealed § 1343 as applied to frauds against foreign sovereigns.[76]

There were a number of policy concerns raised by the petitioners in support of the revenue rule. In particular, they urged that it is inappropriate for U.S. courts to interpret complex foreign laws, that U.S. courts in other contexts have refrained from passing judgment on foreign laws, that general rules of statutory construction require that U.S. legislation not be given extraterritorial effect unless Congress clearly intends to do so, and that criminal laws, where ambiguous, should be interpreted in the less harsh way to avoid unfair results.

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74. *Id.* (citing Peter Buchanan Ltd. v. McVey, [1950] I.R. 89 (H.Ct.) (Ir.)).

75. 18 U.S.C. §§ 3663A-64 (2006).

76. *Pasquantino*, 544 U.S. at 365.

The Court dealt with these policy concerns in a rather summary fashion. Responding to concerns deriving in particular from the problem of interpreting and applying the revenue laws of another country, the Court concluded:

> True, a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U.S. law. 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. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any. The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have "neither aptitude, facilities nor responsibility" to evaluate.[77]

The Court also rejected concerns about the interpretation of "unfamiliar foreign tax schemes." It concluded that, at least in this case, foreign law "posed no unmanageable complexity" and noted that there was uncontroverted testimony of a prosecution witness that the petitioners' scheme had been "aimed at violating Canadian tax law."

The Court was not concerned about the possible need to pass judgment on the validity of foreign laws, which was one of the principal concerns leading to the judicial recognition of the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*[78]:

> The present prosecution, if authorized by the wire fraud statute, 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. Such a reading of the wire fraud statute gives effect to that considered policy choice. It therefore poses no risk of advancing the policies of Canada illegitimately.

The Court finally concluded that its interpretation did not give "extraterritorial effect" to the wire fraud statute because all of the actions upon

77. *Id.* at 369.

78. 376 U.S. 398 (1964). In fact, the act of state doctrine recognized by the Supreme Court in *Sabbatino* has been invoked primarily in cases involving the expropriation by foreign governments of properties owned by U.S. persons and entities. When the doctrine is applied, U.S. courts will accept and apply the foreign expropriation law even though it might violate customary international law norms. A number of statutory exceptions to the act of state doctrine have been adopted. Because the Supreme Court had held that the act of state doctrine was not required by the U.S. Constitution, the doctrine will not be applied in those cases in which a statutory exception applies.

which the prosecution was based occurred in the United States, even though the purpose of the action was to deliver liquor into Canada. As a result, it was not necessary to consider whether Congress intended the wire fraud statute to have extraterritorial effect.

Four Justices disagreed with several elements of the Court's opinion. The dissenting opinion emphasized the role of "overriding importance" of bilateral tax treaties in fostering tax cooperation. It noted that the treaty between the United States and Canada did not authorize collection action in the United States in this situation.[79]

The dissenting opinion strongly criticized the Court's view for its "failure to take account of Canada's primary interest in the matter." It pointed out that the petitioners could have been extradited to Canada to face the consequences of violating Canadian law. The U.S.-Canada Extradition Treaty of 1971 includes in the list of extraditable offenses "[o]btaining property, money or valuable securities by false pretenses or by threat of force of by defrauding the public or any person by deceit or falsehood" and "[u]se of mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public."[80] The interpretation of the majority opinion with respect to the "property" aspect of the wire fraud statute would thus seem to support the conclusion that the petitioners' actions, if constituting a crime in Canada, would be a basis for seeking extradition. Somewhat ironically, however, Article 4(1) of the extradition treaty provides that extradition shall not be granted when the target "is being proceeded against . . . in the territory of the requested State for the offense for which his extradition is requested." This language implies that the prosecution initiated by U.S. authorities would eliminate a possible extradition.

The dissent further argued that "the Court has ascribed an exorbitant scope to the wire fraud statute." The dissent noted the heavy reliance on Canadian law, both as to liability and as to sentencing. It observed that the trial court determined the magnitude of the fraud by estimating the number of cases of liquor smuggled in Canada and the aggregate amount of import duties owed thereon. The resulting calculation of $2.5 million "yielded significantly longer sentences for the defendants."

The dissenting opinion also charged that "the Court ignores the absence of anything signaling Congress' intent to give the statute such an extraordinary extraterritorial effect." It observed further that:

> Congress, which has the sole authority to determine the extraterritorial reach of domestic laws, is fully capable of conveying its policy choice to the Executive and the courts. I would not assume from legislative silence that Congress left the matter to Executive discretion.

79. *Pasquantino*, 544 U.S. at 374 (Ginsburg, J., dissenting).

80. Treaty on Extradition, U.S.-Can., Dec. 3, 1971, art. 2, 27 U.S.T. 983 (entered into force Mar. 22, 1976).

> The presumption against extraterritoriality, which guides courts in the absence of congressional direction, provides ample cause to conclude that § 1343 does not extend to the instant scheme. Moreover, as to foreign customs and tax laws, there is scant room for doubt about Congress' general perspective: Congress has actively indicated, through both domestic legislation and treaties, that it intends "strictly [to] limit the parameters of any assistance given" to foreign nations.[81]

The fact that Congress had enacted specific legislation criminalizing offenses of the kind committed by the petitioners here was seen as another reason to reject the application of the wire fraud statute for smuggling offenses. Moreover, the reciprocity element of the anti-smuggling statute was cited as a reason for concluding that such legislation was intended to deal with these circumstances. The dissent further observed: "The limitation also cabins the Government's discretion as to which nation's customs laws to enforce, thereby avoiding the appearance of prosecutorial overreaching."

The dissent noted further that the bilateral tax treaty then in force between the United States and Canada for seeking assistance in tax collection, discussed in a prior section of this paper,

> does not call upon either nation to interpret or calculate liability under the other's tax statutes; 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 claim against a citizen or corporation of "the requested State."

The dissent also emphasized the impact of the Mandatory Victims Restitution Act of 1996, which provides an avenue by which Canada could in effect collect taxes. That result, according to the dissent, is precisely and clearly inconsistent with the revenue rule. The failure to fully take into account this consequence of the interpretation of the wire fraud statute, in the view of the dissent, was a major shortcoming in the Court's analysis.

Finally, the dissent would adopt "the rule of lenity," which holds that a court should adopt a less harsh interpretation when Congress has not "spoken in clear and definite language."

VIII. IMPACT OF *PASQUANTINO* AND THE FUTURE OF THE REVENUE RULE

The response to the *Pasquantino* decision has been somewhat mixed.[82] Many might concede that the Court's analysis, depending as it

81. *Id.* at 379-80 (alteration in original) (citation omitted).

82. *See, e.g.*, Kate Kraus, Pasquantino*: Foreign Tax Evasion as a Domestic Crime*, 32 CORP. TAX 3 (2005); Joshua Shore, Note, *The* Pasquantino *Plea: The Unfortunate Decline of the Revenue Rule and the Imprudent Extraterritorial Expansion of the American*

does on the application of U.S. law to U.S. individuals for actions undertaken in the United States, can be supported. However, there are obvious questions about the exercise of prosecutorial discretion and the allocation of limited resources to the prosecution for the failure to comply with foreign tax laws, particularly in cases when there is no reciprocal obligation of the other country to enforce U.S. tax laws.

The decision does seem to lay a basis for extensive prosecutions in the United States for intentional failure to comply with foreign tax laws. If using a telephone in the United States to organize smuggling to avoid paying excise taxes in Canada is a violation of U.S. criminal law, would the use of a telephone or other electronic device in the United States to remove financial assets from Canada to avoid paying Canadian income taxes also constitute a violation of U.S. criminal law? Would the participation by a person or corporation operating in the United States in a scheme to shelter Canadian income from Canadian tax in a way that is found to constitute tax fraud in Canada constitute a violation of U.S. criminal law? Such questions cannot, of course, be answered on the basis of the Court's decision in *Pasquantino.* But there is no language in the Court's opinion in *Pasquantino* that would provide protection against such prosecutions.

In practical terms, the long-term impact of *Pasquantino* on the revenue rule is not altogether clear. After rendering its decision in *Pasquantino,* the Supreme Court directed the Court of Appeals for the Second Circuit to reconsider its decision in the civil actions by European countries and Colombia to collect taxes from U.S. cigarette companies. After reconsidering the matter, the court of appeals affirmed its early decision to dismiss those cases on the ground of the revenue rule.[83] The Supreme Court declined to hear an appeal of the decision.[84]

Another relatively recent case involved the administration of foreign tax laws in a somewhat different context. The Fifth Circuit affirmed a decision declining to dismiss an action under the Foreign Corrupt Practices Act arising from the alleged bribery of Haitian tax officials.[85] There was, however, no mention of the revenue rule in the decision. It is possible that the issue was never raised.

There remains the question of whether the revenue rule is good tax policy. Differences in substantive tax law and procedure in different countries of the world suggest that the enforcement of foreign taxes, at least where a final determination has not been made by the courts or administrators of the foreign country, is a dangerous practice. One possible response is suggested by the anti-smuggling statute discussed in the

Wire Fraud Statute to Enforce Foreign Tax Law, 37 U. MIAMI INTER-AM. L. REV. 197 (2005).

83. Eur. Cmty. v. RJR Nabisco, Inc., 424 F.3d 175 (2d Cir. 2005).

84. For a discussion of the decision of the court of appeals, see Abraham Leitner, *CA-2's Narrow View of* Pasquantino *Does Not Affect Enlarged Scope of Federal Fraud and Money Laundering,* 104 J. TAX. 35 (2006).

85. United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

Pasquantino opinions. Rather than leave the question open to the rather imprecise language of statutes such as the wire fraud law, the development of treaty provisions that might provide reciprocal rights and obligations to enforce or seek the enforcement of foreign tax obligations would seem to be the more sensible course. Of course, there was such a treaty in place between the United States and Canada, but it did not authorize the enforcement of Canadian taxes in the *Pasquantino* situation.

It is possible that the Supreme Court decision in *Pasquantino*, while not interpreted to allow the initiation of litigation in U.S. courts by a foreign government to collect foreign taxes, might well lead over time to a reconsideration of the fundamental premise of the revenue rule. Increasingly, courts in one country are available to enforce foreign judgments in civil actions. The evolution of electronic research tools has already brought about a fundamental change in the way that foreign law is determined in U.S. courts. At an earlier time, foreign law was generally treated as a question of fact. As such, it would often be proved by expert witness testimony and/or affidavits. As a question of fact, foreign law would be determined by juries rather than judges. Rule 44.1 of the Federal Rules of Civil Procedure currently provides: "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Moreover, determinations of foreign law by a U.S. court will be regarded as a question of law rather than a question of fact.

It may be time to reconsider the purported uniqueness of tax law and administration. At least in circumstances where a tax controversy has been litigated in the courts of a country whose legal system is respected, it would not seem to be self-evident that such civil judgments should not be the basis for enforcement action in other countries.

IX. CONCLUSION

In his extensive and extraordinary scholarship, Professor John F. Murphy has analyzed many different ways in which international law and practice have, and sometimes have not, been reflected in the policies of and relations among nation-states. In many instances, issues of overlapping national jurisdictional authority have given rise to substantial conflict. Differences between the laws of countries involving the application of antitrust laws and discovery procedures have often proven difficult to resolve. By contrast, as suggested by the practices described in this paper, tax administration has been marked by a considerable degree of international cooperation even though the tax laws and policies of different countries are far from congruent. As governments have a common interest in effective tax administration as an essential ingredient in public finance, perhaps it is not surprising to discover the considerable evidence of the use of the tools of international law to advance their common objectives. The evolution of the broad web of bilateral income tax treaties, the development of a widespread series of tax information agreements, the willingness of the United States to commit to international arbitration to resolve interpretive disputes, and the possible erosion of the revenue rule all suggest that such cooperation will continue with enlarged vigor.