CONFLICT OF LAWS—INTERNATIONAL LAW—REVENUE LAW RULE PREEMPTED BY POLICY OF INTERNATIONAL MONETARY FUND AGREEMENT WHERE PLAINTIFF IS A PRIVATE PARTY —*Banco Frances e Brasileiro S.A. v. Doe*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975).

During a period of about six weeks, twenty persons allegedly took part in falsifying currency exchange applications which were submitted to Banco Francês e Brasileiro S.A. in Brazil.[1] Banco Brasileiro acted upon these applications and exchanged Brazilian cruzeiros for United States travelers checks in the amount of $1,024,000.[2] Many of the travelers checks were soon deposited at Bankers Trust Company, New York, under the code name "Alberta," while others were deposited at Manfra, Tordella & Brookes, Inc., a New York foreign exchange broker,[3] under the code name "Samso."[4] Upon learning that it had been fraudulently induced to violate Brazilian currency regulations,[5] Banco Brasileiro brought an action in the New York

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[1] Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 595, 331 N.E.2d 502, 504, 370 N.Y.S.2d 534, 536, *cert. denied*, 423 U.S. 867 (1975). These are the facts as alleged in the plaintiff's complaint. Verified Complaint, Record on Appeal at 45–48, Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975) [hereinafter cited as Complaint in Record]. Since the case involved review of the dismissal of the complaint, 36 N.Y.2d at 596, 331 N.E.2d at 505, 370 N.Y.S.2d at 537, the court apparently accepted the truth of the facts stated therein for purposes of the appeal, *see id.* at 595–96, 331 N.E.2d at 504–05, 370 N.Y.S.2d at 537. *See generally*, *e.g.*, Schwartz v. Heffernan, 304 N.Y. 474, 478, 109 N.E.2d 68, 68 (1952) (facts accepted as true).

The transactions charged in the complaint were alleged to have occurred between May and June of 1973. Complaint in Record, *supra* at 46. During that time a man presenting himself as "Mr. Marcos" submitted to Banco Brasileiro applications from 1,024 Brazilian citizens. *Id.* at 46–47. An investigation conducted by Jean-Marie Monteil, managing director of the bank, revealed that each application contained false addresses or false passport or identity card numbers. Jean-Marie Monteil Affidavit, Record on Appeal at 55, 58, Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975).

[2] Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 595, 331 N.E.2d 502, 504, 370 N.Y.S.2d 534, 536, *cert. denied*, 423 U.S. 867 (1975). The exchange privilege applies to all Brazilian citizens planning a trip out of their country. Brazilian law limits the amount that each citizen may exchange to $1,000 in United States currency. Complaint in Record, *supra* note 1, at 46.

[3] *See* Affirmation of Ferdinand J. Wolf, Counsel for Manfra, Tordella & Brookes, Inc., Record on Appeal at 66, Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975).

[4] Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 595, 331 N.E.2d 502, 504, 370 N.Y.S.2d 534, 536, *cert. denied*, 423 U.S. 867 (1975).

[5] *See* Complaint in Record, *supra* note 1, at 46–48. The complaint explained:

Pursuant to laws and decrees of Brazil, the Central Bank of Brazil has promul-

county supreme court alleging fraud, deceit, and conspiracy, against twenty "John Doe" defendants, their true identities being unknown to the bank.[6]

The bank, having secured an order of attachment against the two accounts in question and having served the summons by publication, moved for disclosure from Bankers Trust, Manfra, and the attorney for John Doe No. 1 of the true identity of the defendant or defendants.[7] The court granted this motion, as well as the plaintiff's motion for further discovery.[8] Defendant John Doe No. 1's motions to vacate the order of attachment and to dismiss the complaint were denied except that the cause of action for damages was dismissed for failure to allege actual damages in the complaint.[9] On review, the appellate division dismissed all the plaintiff's claims for relief, relying upon precedents approving the conflict of laws rule that the courts of one jurisdiction will not enforce the revenue laws of another.[10]

> gated regulations relating to currency exchange control. Under such regulations a Brazilian citizen making a trip out of Brazil is strictly limited to exchange Brazilian cruzeiros for United States dollars . . . up to a maximum of U.S. $1,000.00 . . . for the trip. The exchange of Brazilian cruzeiros for more than U.S. $1,000.00 . . . for the trip constitutes a serious violation of the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil.

Id. at 46.

[6] Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 595, 331 N.E.2d 502, 504, 370 N.Y.S.2d 534, 536, *cert. denied*, 423 U.S. 867 (1975). The depositor of the account at Bankers Trust Company was designated "John Doe No. 1," and the depositor of the account at Manfra, Tordella & Brookes, Inc., was designated "John Doe No. 2." Other defendants were alleged coconspirators. *See id.*

The bank sought rescission of the executed exchange applications and monetary damages for injury to its business and reputation and for any fines levied by the Central Bank of Brazil for violation of its currency exchange regulations. *See* note 9 *infra*.

[7] Banco Frances e Brasileiro S.A. v. Doe, 36 N.Y.2d 592, 595, 331 N.E.2d 502, 504, 370 N.Y.S.2d 534, 537, *cert. denied*, 423 U.S. 867 (1975). Alternatively, the plaintiff moved to vacate the appearance of the attorney for John Doe No. 1. 36 N.Y.2d at 595, 331 N.E.2d at 504, 370 N.Y.S.2d at 537.

[8] Banco Frances e Brasileiro S.A. v. Doe, No. 12017/1973 (N.Y. Sup. Ct., Spec. T., N.Y. County, Dec. 31, 1973), *modified*, 44 App. Div. 2d 353, 355 N.Y.S.2d 145 (1st Dep't 1974), *modified*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534, *cert. denied*, 423 U.S. 867 (1975).

[9] *Id.* The bank's first cause of action was grounded on fraud and deceit and the alleged violation of Brazil's currency exchange regulations. The relief sought was a rescission of the currency exchanges. The second claim alleged an unlawful conspiracy to deceive and defraud the bank and also asked that the exchanges be rescinded. In each of these claims, it was asserted that no remedy at law would be adequate. The third cause of action claimed that because of the bank's reliance on the defendants' fraudulent acts and conspiracies, it would "be subject to sanctions and penalties imposed by the Central Bank of Brazil" and had suffered damage to its business and reputation. For this claim, damages were asked in the general sum of $100,000. Complaint in Record, *supra* note 1, at 45–49.

[10] Banco Frances e Brasileiro S.A. v. Doe, 44 App. Div. 2d 353, 354–55, 355

In *Banco Frances e Brasileiro S.A. v. Doe*,[11] the Court of Appeals of New York, modifying the decision of the appellate division, required that the order of attachment and the plaintiff's first two causes of action be reinstated,[12] granted the bank discovery and inspection of the two accounts,[13] and gave the bank leave on remand to plead as special damages the penalty assessed against it by the Central Bank of Brazil.[14] The court questioned the wisdom of the "revenue law rule" in present-day circumstances[15] but relied upon United States' membership in the International Monetary Fund as a ground for granting Banco Brasileiro a New York forum for its action.[16]

The rule precluding the enforcement in one jurisdiction of the revenue laws of another, examined by the court in *Banco Brasileiro*, has been utilized throughout more than two centuries of judicial decision.[17] Although the actual reasons for the institution of the rule are unclear,[18] revenue laws were apparently analogized to penal

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N.Y.S.2d 145, 146–47 (1st Dep't 1974), *modified*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534, *cert. denied*, 423 U.S. 867 (1975). Among the decisions relied upon by the appellate division were Banco do Brasil, S.A. v. A. C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964) (discussed at notes 73–98 *infra* and accompanying text), and Holman v. Johnson, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775) (*see* note 17 *infra*).

[11] 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534, *cert. denied*, 423 U.S. 867 (1975).

[12] 36 N.Y.2d at 596, 331 N.E.2d at 505, 370 N.Y.S.2d at 537. For a description of the bank's first two causes of action requesting rescission of the exchange contracts see note 9 *supra*.

[13] 36 N.Y.2d at 599, 331 N.E.2d at 507, 370 N.Y.S.2d at 540. The court found that on the record before it, the trial court did not abuse its discretion in ordering the attorney for John Doe No. 1 to disclose the identity of his client. It was added, however, that if disclosure were incompatible with the attorney's "trust and the duty assumed to his client, . . . his right . . . to withdraw from this case must be recognized." *Id.*

[14] *Id.* The penalty anticipated in the complaint was assessed against the bank after its action in the courts had been commenced. *Id.* The magnitude of the assessment was not specified in the court of appeals' opinion.

[15] *Id.* at 596–97, 331 N.E.2d at 505–06, 370 N.Y.S.2d at 537–38.

[16] *Id.* at 598–99, 331 N.E.2d at 506–07, 370 N.Y.S.2d at 539–40.

[17] *See* Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L.REV. 193, 215–16 & n.63 (1932). The *Banco Brasileiro* court traced the origin of the revenue law rule to Lord Mansfield's statement that " 'no country ever takes notice of the *revenue* laws of another.' " 36 N.Y.2d at 596, 331 N.E.2d at 505, 370 N.Y.S.2d at 538 (quoting from Holman v. Johnson, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (1775)) (emphasis in original). Although Boucher v. Lawson, Lee's Cas. t. Hardwicke 35, 95 Eng. Rep. 53 (1734), a pre-*Holman* case, did not state the doctrine in specific terms, it has nevertheless been cited as precedent for the revenue law rule. *See* Planché v. Fletcher, 1 Doug. 251, 253, 99 Eng. Rep. 164, 165 (1779).

[18] Note, 49 CORNELL L.Q. 660, 663 (1964). A frequently cited justification for the revenue law rule is the sovereign's interest in enhancing trade. *See, e.g.*, Emperor of Austria v. Day, 3 De G. F. & J. 217, 242, 45 Eng. Rep. 861, 871 (1861); Freeze, *Extraterritorial Enforcement of Revenue Laws*, 23 WASH. U.L.Q. 321, 338 (1938).

laws,[19] which have consistently been viewed as having no operation and effect outside the territory of the enacting government.[20] The penal law principle is seemingly rooted in classical notions of sovereignty,[21] and, by the same rationale, revenue laws came to be viewed as unenforceable extraterritorially.[22]

Whatever the justification, American courts by the early nineteenth century declined to entertain actions based on the law of another jurisdiction, where such law could obviously be characterized as a penal or revenue measure.[23] Certain laws were not so easily

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Nevertheless, a number of authorities have offered different grounds for the rule's origin. One such rationale was the reluctance by the courts to scrutinize a foreign revenue law because of the inherent infringement upon interstate relations involved in such a decision. *See* Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), *aff'd*, 281 U.S. 18 (1930).

Another view supporting the traditional revenue law rule was that the enforcement of a foreign revenue law effects an extension of that foreign state's sovereignty, thus violating the independent sovereignty of the forum state. *See, e.g.*, Government of India v. Taylor, [1955] A.C. 491, 511 (Lord Keith, concurring). Other reasons for the rule include the complexity involved in the court's investigation of a foreign revenue system, *see* H. READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 291 (1938); the belief that one sovereign should not further the interests of another government, *see* Mann, *Foreign Revenue Laws and the English Conflict of Laws*, 3 INT'L & COMP. L.Q. 465, 469 (1954); *cf.* Huntington v. Attrill, [1893] A.C. 150, 155–58 (P.C. 1892) (Ont.); and the possibility that the foreign law may have to be refused enforcement as contrary to the public policy of the forum, *see* Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1008 (1956). Still other bases proffered for the rule's beginning are the views that a policy of enforcing foreign revenue laws should come from the other coordinate branches of government, *see* Note, *Extraterritorial Enforcement of Tax Claims*, 12 WM. & MARY L. REV. 111, 115 (1970), and that there should be some guarantee of reciprocal treatment by the foreign state, *see* Note, 16 STAN. L. REV. 202, 209 (1963).

For further discussion of the many possible theoretical bases for the revenue law rule see Oklahoma *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 1126–28, 193 S.W.2d 919, 926–27 (1946); Robertson, *Extraterritorial Enforcement of Tax Obligations*, 7 ARIZ. L. REV. 219, 235–39 (1966).

[19] *See* Leflar, *supra* note 17, at 219.

[20] *See, e.g.*, Flash v. Conn, 109 U.S. 371, 376–77 (1883) (state penal laws "are strictly local and affect nothing more than they can reach"); The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) ("[t]he courts of no country execute the penal laws of another"). *See generally* Leflar, *supra* note 17, at 195–96.

[21] In The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825), Chief Justice Marshall, speaking for the Court, stated in support of the penal law rule:

> No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.

[22] *See* Leflar, *supra* note 17, at 215–16.

[23] Ludlow v. Van Rensselaer, 1 Johns. 94 (N.Y. 1806), has been said to be the earliest United States case enforcing the revenue law rule. *See, e.g.*, City of Detroit v. Proctor, 44 Del. 193, 197, 61 A.2d 412, 414 (Super. Ct. 1948). For an application of both the penal and revenue rules see Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888),

denominated penal or revenue measures, however, so that courts had to determine the issue on a case-by-case basis. Some guidance in making these decisions in interstate cases[24] was provided by the United States Supreme Court in *Huntington v. Attrill*,[25] in which Huntington, a creditor of a dissolved New York corporation, obtained a judgment in New York against Attrill, one of the corporate directors.[26] Attrill had become liable for the corporation's debts when he violated a New York law by falsely swearing to a certificate which "stat[ed] that the whole of the capital stock of the corporation had been paid in."[27] Huntington sought to enforce this judgment in Maryland, where Attrill owned stock in a Baltimore utility company.[28] Attrill had transferred this stock to his wife and daughters in trust, naming himself as trustee,[29] and Huntington sued to set aside the transfer as having been made "with the intent to delay, hinder and defraud [him] of his lawful suits."[30] In effect, Attrill's true interest in the stock was to be used in satisfaction of the New York judgment.[31] The trial court allowed the suit, but a Maryland appeals court dismissed the complaint.[32]

On review, the Supreme Court was called upon to decide whether the New York judgment was unconstitutionally denied full faith and credit.[33] To decide the issue, it was necessary for the court

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wherein the Supreme Court included a penalty for violation of a revenue measure within the ambit of the penal law rule. *Id.* at 290. The Court specifically found to be penal a Wisconsin law imposing a fine on an insurance company for failing to register a complete account of its business and property held within the state. *Id.* at 299. This being so, it was held that a Wisconsin judgment based on this law could not be enforced in an original proceeding in the Supreme Court of the United States. *Id.* at 299–300.

[24] *See* note 33 *infra*.

[25] 146 U.S. 657 (1892), *rev'g* 70 Md. 191, 16 A. 651 (1889).

[26] 146 U.S. at 660–61.

[27] *Id.* at 661. The law required that such a certificate be filed by corporate officers and provided that anyone making a material misrepresentation in such a certificate would be liable for any corporate debts incurred while he was an officer of the corporation. *Id.* at 660 n.1.

[28] *Id.* at 660.

[29] *Id.* at 662.

[30] *Id.* The transfer of stock was also alleged to have been made "without valuable consideration." *Id.*

[31] *See id.* at 663. The bill prayed that the court set aside the transfer and appoint a trustee to sell the stock, the proceeds of which would go to satisfy Huntington's New York judgment. *Id.* at 662–63.

[32] *Id.* at 663; *see* 70 Md. at 199, 16 A. at 654.

[33] 146 U.S. at 666. U.S. CONST. art. IV, § 1, provides in part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." This constitutional mandate applies on its face only to the acts and proceedings of other states, and thus can have no application where a state court is

to determine whether the New York statute imposed a penalty and was therefore unenforceable outside the state's boundaries.[34] The test set forth by the Court was whether the law upon which the action was brought was intended to punish a wrong done to the public or was merely designed to provide redress for a wrong done to a private individual.[35] The Court held that public wrongs could only be prosecuted in the courts of the interested state, whereas private wrongs were characterized as having " 'a transitory nature' " and thus were actionable in another state.[36] The New York law in question was adjudged not to be penal, and the New York judgment was therefore held entitled to full faith and credit in the Maryland courts.[37]

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called upon to enforce the laws or decisions of foreign countries. E. SCOLES & R. WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS 904 (2d ed. 1972).

Both interstate and international cases are discussed in this Note. The full faith and credit clause may control the ultimate decision in interstate cases. Nevertheless, principles and analyses are to be found in those cases which are applicable to international cases, since, in some respects, a state is as much an independent sovereign as a foreign country. As noted in City of Detroit v. Proctor, 44 Del. 193, 202, 61 A.2d 412, 416 (Super. Ct. 1948): "Michigan's sovereignity [*sic*] is as foreign to Delaware as Russia's."

For general discussions of full faith and credit see Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945) and Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957).

[34] 146 U.S. at 666–67, 676–77.

[35] *Id.* at 668. The Court adopted the classification set out by Blackstone:

> "Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries:* the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of *crimes* and *misdemeanors*."

Id. at 668–69 (quoting from 3 W. BLACKSTONE, COMMENTARIES *2) (emphasis in original).

[36] 146 U.S. at 669 (quoting from Rafael v. Verelst, 2 W. Bl. 1055, 1058, 96 Eng. Rep. 621, 623 (1776)).

[37] 146 U.S. at 686. The Court noted that when a judgment is recovered in one state and sought to be enforced in another, full faith and credit is to be given to that judgment. If a state enforces a law or judgment of another state, then the Supreme Court is without jurisdiction to review their decision. However, if enforcement is denied, the Court has jurisdiction, and it may independently review the character of the law sought to be enforced to see whether it is a proper subject for full faith and credit under the Constitution. *Id.* at 683.

In viewing the New York judgment in that light, the Court's reasoning centered on the nature of the relief given by the New York statute. The aim of the New York law was determined to be to recompense the individual creditor of the corporation for the corporate officer's wrongful action and, thus, the creditor's reliance on the corporation's solvency. *Id.* at 676. This right, it was added, was a private right to be enforced through civil suit by the injured creditor, rather than an action to punish a wrong against the state. *Id.* at 676–77.

Following the decision in *Huntington*, the above test was applied in various interstate contexts.[38] Whether a tax assessed in one state could be collected in another was for many years an area in which the applicability of the revenue law rule was uncertain. In *Colorado v. Harbeck*,[39] the court of appeals gave a definitive answer to that question for the state of New York. Harbeck, a resident of Colorado, had died in New York, where his will was admitted to probate, New York taxes were paid, and the estate distributed.[40] Colorado later assessed a transfer tax[41] on Harbeck's estate under a Colorado law which provided for a tax on any resident's estate.[42] Colorado officials came to New York to collect the assessed tax from the legatees, trustee, and trust beneficiary under Harbeck's will,[43] urging that under the relevant statute the state's attorney general was empowered to institute

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It is important to note that the *Huntington* test for determining whether a judgment is penal binds state courts only when it is the judgment of a sister state in issue. Where the action is based upon the law of a foreign country, the forum appears to have power to determine on any basis whether or not the law is penal in nature. *See* Note, 49 CORNELL L.Q. 660, 662 n.20 (1964).

[38] *See, e.g.*, Converse v. Hamilton, 224 U.S. 243, 260 (1912) (application of stockholders' liability statute held "contractual, not penal"); Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 268–70, 142 N.W. 305, 305–06 (1913) (Washington law imposing incapacity to maintain suit upon failure to pay annual corporate license fee held not to bar suit in another state); Loucks v. Standard Oil Co., 224 N.Y. 99, 102–04, 120 N.E. 198, 198–200 (1918) (enforcing Massachusetts wrongful death statute); Maryland v. Turner, 75 Misc. 9, 10–13, 132 N.Y.S. 173, 173–75 (Sup. Ct., N.Y. County, Spec. T. 1911) (refusing to enforce Maryland tax assessment); *cf.* Brady v. Daly, 175 U.S. 148, 154–58 (1899) (federal copyright infringement statute providing for set "minimum amount" of actual damages for each infringement held not "penal" so as to preclude suit in former federal circuit court); Fred S. James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 257, 146 N.E. 369, 371 (1925) (confiscation of insurance company by Russia held not to bar suit on insurance agreement where assets could be found in forum state).

[39] 232 N.Y. 71, 133 N.E. 357 (1921).

[40] *Id.* at 79, 133 N.E. at 358. Harbeck had traveled to New York to depart from there on a trip abroad. *Id.*

[41] The court defined "transfer tax" as

> a tax on the succession or the right to receive the bequest based on the value of the succession, but . . . assessed against and paid by persons and . . . not . . . collected from persons or out of property beyond the state's jurisdiction.

Id. at 82, 133 N.E. at 359.

[42] *Id.* at 79–80, 133 N.E. at 358. Although the state of Colorado had had no notice of the probate proceedings in New York, all defendants were given notice of the tax proceedings in Colorado. *Id.* at 79, 133 N.E. at 358. None of the defendants appeared in Colorado to contest the tax assessment, and none appealed the assessment made—nearly $55,000. *Id.* at 80, 133 N.E. at 358.

[43] *See id.* at 79–80, 133 N.E. at 358. The estate taxed was made up of stocks, bonds, and credits totaling nearly three million dollars. None of the taxed property was located in Colorado at the time of Harbeck's death or thereafter. *Id.* at 80, 133 N.E. at 358. The New York trial court dismissed the suit, but the appellate division reversed on the theory that since the beneficiaries inherited under a Colorado will, they assumed a "contractual obligation" to pay any Colorado taxes thereon. *Id.*

a common law action for recovery of the tax.[44] The argument was rejected, however, the court stating that to give effect to the statute outside the jurisdiction which enacted it would be inconsistent with the "well-settled" conflict of laws doctrine which prevents "one state from acting as a collector of taxes for a sister state and from enforcing its penal or revenue laws as such."[45] Since the court found it to be "universally recognized that the revenue laws of one state have no force in another," the action of Colorado was accordingly disallowed.[46]

Although the revenue law rule had become generally recognized in American law, the United States Supreme Court somewhat unsettled the security of the rule in *Milwaukee County v. M. E. White Co.*[47] Milwaukee County had sought to enforce in an Illinois federal court a Wisconsin tax judgment against an Illinois corporation.[48] The action was dismissed because, in the court's view, it called for the enforcement of Wisconsin's revenue laws and therefore could not be maintained in an Illinois federal court.[49] The correctness of the dismissal came before the Supreme Court on a certified question.[50]

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[44] *Id.* at 85, 133 N.E. at 360. The theory under which the attorney general proceeded was that since the decedent was a Colorado domiciliary, the "legal situs" of his personal property was in that state—the fact that all his assets were physically located in New York notwithstanding—and therefore that the Colorado tax assessment was a lien on the res which could be enforced extraterritorially. *Id.* at 83, 133 N.E. at 359.

The court of appeals dismissed this argument as dependent upon a mere legal fiction, pointing out that, under New York law, transfer taxes on nonresident decedents' personal property may only be levied "according to the actual situs of the thing." *Id.* at 83–84, 133 N.E. at 359–60. Applying this principle to the case at bar, Colorado could have no in rem jurisdiction over Harbeck's estate, and no lien could attach. *See id.* at 84, 133 N.E. at 360.

Alternatively, the court held, no in rem lien could attach to the assets of Harbeck's estate to satisfy the transfer tax assessment inasmuch as that liability was "a personal liability only," and Colorado had no in personam jurisdiction over any of the defendants. *Id.* at 83, 133 N.E. at 359.

For the court's final alternative holding which would dispose of the case should the first two "by any process of reasoning . . . be considered inapplicable," *id.* at 84, 133 N.E. at 360, see text accompanying notes 45–46 *infra*.

[45] 232 N.Y. at 85, 133 N.E. at 360.

[46] *Id.* (citing Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) (discussed at note 23 *supra*)).

[47] 296 U.S. 268 (1935).

[48] *Id.* at 269–70. The taxes had been assessed upon the income of the defendant corporation which was attributable to its business activities within Wisconsin. *Id.* at 270.

[49] *Id.* at 270. While jurisdiction in the district court had been grounded on diversity of citizenship, *see id.* at 270–71, it should be noted that *Milwaukee County* was decided some three years before Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and thus it would seem that the Court was applying general—not Illinois—law. *See id.* at 71.

[50] 296 U.S. at 269–70. The question certified by the Seventh Circuit court of appeals to the Supreme Court was:

> "Should a United States District Court in and for the State of Illinois, having jurisdiction of the parties, entertain jurisdiction of an action therein

The Court observed at the outset that, even if a state judgment found to be based upon a penal obligation could be denied enforcement outside that state,[51] "the obligation to pay taxes is not penal."[52] A distinction was then drawn between a cause of action and a cause of action on a judgment;[53] in particular, it was asserted that permitting an action on a tax judgment would not involve review of the revenue laws or policies of another state.[54] In holding that a judgment should be given effect extraterritorially even when it is for taxes, the Court based its decision on the full faith and credit requirement[55] and the lack of distinction between a tax judgment and any other judgment for money.[56] As to the revenue law rule itself, it was stated that the

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brought, based upon a valid judgment for over $3,000 rendered by a court of competent jurisdiction in the State of Wisconsin against the same defendant, which judgment was predicated upon an income tax due from the defendant to the State of Wisconsin?"

Id. at 270. The majority of the Court answered the question in the affirmative. *Id.* at 280.

[51] The Court ultimately left this question open, stating:

> We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense, . . . is within the jurisdiction of the federal district courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.

Id. at 279 (citation omitted).

[52] *Id.* at 271. The Court termed the tax liability "statutory" and "*quasi*-contractual in nature," to be enforced through civil suit. *Id.* (emphasis in original).

[53] *Id.* at 275. In a suit on any money judgment, the primary question reviewable is the jurisdiction of the court which had entered the judgment, not the grounds of its decision, unless the initial suit were fraudulent. *See id.* at 275–76.

[54] *Id.* at 276. This was apparently in answer to the appellee's argument, which maintained that taxing statutes, like penal laws, were not entitled to extraterritorial recognition,

> because the courts of one state should not be called upon to scrutinize the relations of a foreign state with its own citizens, such as are involved in its revenue laws, and thus commit the state of the forum to positions which might be seriously embarrassing to itself or its neighbors.

Id. at 274–75.

[55] *Id.* at 279. For a discussion of full faith and credit see note 33 *supra*.

[56] 296 U.S. at 276. The Court alluded to earlier cases which held that one state must enforce another state's judgment "although the forum would not be required to entertain the suit on which the judgment was founded." *Id.* at 277–78; *see, e.g.*, Roche v. McDonald, 275 U.S. 449, 454–55 (1928) (suit on judgment upheld where forum statute of limitations would have barred suit); Fauntleroy v. Lum, 210 U.S. 230, 237 (1908) (forum must execute judgment on sister state's arbitration award on gambling contract made in forum state in violation of forum's laws); New York v. Coe Mfg. Co., 112 N.J.L. 536, 538–40, 172 A. 198, 199–200 (Ct. Err. & App. 1934) (sister state's tax judgment enforced); *cf.* American Express Co. v. Mullins, 212 U.S. 311, 314 (1909) (in action by owner against carrier for lost goods, defense that goods were destroyed as contraband in sister state with notice to owner upheld even where such destruction contradicted earlier Supreme Court ruling).

question "[w]hether one state must enforce the revenue laws of another remains . . . open . . . in this Court."[57]

In *Perutz v. Bohemian Discount Bank in Liquidation*,[58] the Court of Appeals of New York was faced with a case involving the currency control laws of a foreign nation, where the constitutional requirement of full faith and credit did not enter into consideration.[59] Perutz, a naturalized American citizen, had sued the successor in interest of a Czech bank to recover pension money he had paid to the bank while he was its employee and a citizen of Czechoslovakia.[60] The law of that country prohibited a resident thereof from paying to a nonresident any currency, domestic or foreign, "unless such payment

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The Court further noted the seemingly contrary statement from an earlier Supreme Court case:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

296 U.S. at 278 (quoting from Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 292–93 (1888) (discussed at note 23 *supra*)). It was asserted, however, that to the extent that the *Pelican* case suggested that a judgment was not entitled to full faith and credit *unless* the underlying cause of action would have been so entitled, that case had been discredited by later cases. 296 U.S. at 278; *see, e.g.*, Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U.S. 411, 414 (1920); Fauntleroy v. Lum, *supra* at 236–37.

[57] 296 U.S. at 275. Even after the *Milwaukee County* case, courts continue to differ on whether tax assessments are collectible in a sister state in the absence of a prior judgment therefor. *Compare* City of New York v. Shapiro, 129 F. Supp. 149 (D. Mass. 1954) (tax assessment recoverable in sister state on basis of full faith and credit) *and* Oklahoma *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919 (1946) (tax assessment actionable in sister state) *with* City of Detroit v. Proctor, 44 Del. 193, 61 A.2d 412 (Super. Ct. 1948) (tax assessment not actionable in sister state on basis of either comity or full faith and credit) *and* City of Philadelphia v. Cohen, 11 N.Y. 2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188, *cert. denied*, 371 U.S. 934 (1962) (tax assessment not recoverable in sister state under full faith and credit, comity, or public policy).

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 89, comment *b* (1971), takes no position on enforcement of foreign tax claims. Many states have, however, enacted measures providing for reciprocal enforcement of tax claims. *See* Comment, *Extraterritorial Enforcement of State Tax Claims*, 16 HASTINGS L.J. 101, 109–10 & n.62 (1964), in which thirty-five such measures are cited.

[58] 304 N.Y. 533, 110 N.E.2d 6 (1953).

[59] *See* note 33 *supra*.

[60] 304 N.Y. at 535–36, 110 N.E.2d at 6–7. Jurisdiction over the defendant was apparently obtained by means of the attachment of certain assets which were present in New York. *See id.* at 537, 110 N.E.2d at 7.

Subsequent to institution of the action, Perutz died, whereupon his wife was appointed administratrix of his estate and substituted as plaintiff. *Id.* at 536, 110 N.E.2d at 7.

was licensed by the Czechoslovakian currency control authority."[61] The trial court dismissed the complaint, but the appellate division reversed, stating that "Czechoslovakia currency regulations can have no control over a levy on [defendant's] funds" found in New York.[62]

The court of appeals disagreed with the appellate division, holding that "[a] contract made in a foreign country . . . and intended . . . to be there performed is governed by the law of that country."[63] It was acknowledged that state tribunals may decline to effectuate foreign laws which are found to be inconsistent with its own public policy,[64] but the court took note of the International Monetary Fund,

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[61] *Id.* at 536, 110 N.E.2d at 7.

[62] Perutz v. Bohemian Discount Bank in Liquidation, 279 App. Div. 386, 392, 110 N.Y.S.2d 446, 452 (1952), *rev'd*, 304 N.Y. 533, 110 N.E.2d 6 (1953).

[63] 304 N.Y. at 537, 110 N.E.2d at 7. The conflict of laws principle that a contract action is automatically governed by the law of the place of making, the principle applied in *Perutz*, has since been abandoned by the New York courts. In its place, New York employs a "center of gravity" or "grouping of contacts" theory, under which

> the courts, instead of regarding as conclusive the parties' intention or the place of making or performance, lay emphasis rather upon the law of the place "which has the most significant contacts with the matter in dispute".

Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 101–02 (1954) (quoting from Rubin v. Irving Trust Co., 305 N.Y. 288, 305, 113 N.E.2d 424, 431 (1953)).

For a general discussion of the choice of law in contract cases see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 263–95 (1971) [hereinafter cited as WEINTRAUB].

[64] 304 N.Y. at 537, 110 N.E.2d at 7. Questions of "public policy" have been a recurring consideration in interstate conflict of laws cases. *See* Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956). Basically, applying the "public policy" doctrine,

> a court can refuse to enforce, as contrary to its own notions of justice and fairness, a rule found in the state designated by the forum's choice-of-law rule.

WEINTRAUB, *supra* note 65, at 58 (footnote omitted). A frequently quoted articulation of the doctrine is found in Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918), wherein Judge (later Justice) Cardozo stated that

> courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

Despite the purported objectivity of the test, however, courts have continued to differ on how public policy is to be determined. *Compare* Mertz v. Mertz, 271 N.Y. 466, 472, 3 N.E.2d 597, 599 (1936) ("a State can have no public policy except what is to be found in its constitution and laws") *with* Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 14, 203 N.E.2d 210, 212–13, 254 N.Y.S.2d 527, 530 (1964) ("[p]ublic policy is not determinable by mere reference to the laws [but may also be] found in prevailing social and moral attitudes of the community").

In cases involving international conflicts, other considerations become important. In particular, the Supreme Court has held that

> the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the

of which both Czechoslovakia and the United States were members.[65] The fact of IMF membership was held to preclude a determination that the Czechoslovakian laws in question were against the public policy of New York,[66] and, since those laws were deemed controlling

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superior Federal policy evidenced by a treaty or international compact or agreement.

United States v. Pink, 315 U.S. 203, 231 (1942) (citations omitted). *See* Santovincenzo v. Egan, 284 U.S. 30, 40 (1931) (American treaty preempts conflicting state law); *cf.* Hauenstein v. Lynham, 100 U.S. 483, 490 (1879) (federal treaty becomes part of state law). It was apparently for this reason that the *Perutz* court found that the Czechoslovakian laws in issue could not be found "offensive." *See* 304 N.Y. at 537, 110 N.E.2d at 7.

In another context, local conflict of laws principles may be displaced, even absent a treaty or agreement, by what is referred to as the act of state doctrine. A classic explanation of the doctrine is found in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), wherein the Court stated:

> Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This means, in effect, that where foreign law is found to govern a particular transaction involving a governmental act, that act must be recognized and given effect, even if the forum's public policy is to the contrary. *See* Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967).

It has been held that the act of state doctrine has a constitutional basis in the provisions concerning United States foreign relations, so that the scope of the principle is a matter of federal law, binding on the individual states. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423–27 (1964). It is clear that under *Sabbatino* a state court may not refuse on policy grounds to recognize a foreign act of state where the court otherwise takes jurisdiction of the proceeding. *See id.* at 425–27. However, the decision leaves open the question of whether a state court could in the first instance refuse to entertain a proceeding on the ground that local law prohibits a judgment for a party without consideration of the legality of the claim. *See* H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 809 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler 1973).

For general discussions of the act of state doctrine, the *Sabbatino* case, and its aftermath see *id.* at 806–09; Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805(1964); Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—Or Tragedy—of Errors*, 20 VAND. L. REV. 429 (1967). For a consideration of the relationship between the act of state doctrine and the International Monetary Fund see Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 387–94 (1975).

[65] 304 N.Y. at 537, 110 N.E.2d at 7. The enactment providing for United States membership in the International Monetary Fund is the Bretton Woods Agreements Act, 22 U.S.C. § 286 *et seq.* (1970). For a discussion of the IMF Agreement see notes 68–72 *infra* and accompanying text.

[66] *See* 304 N.Y. at 537, 110 N.E.2d at 7. The commentators appear to be in accord with this conclusion. *See, e.g.*, A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 899 (8th ed. 1967) [hereinafter cited as DICEY & MORRIS]; Williams, *supra* note 64, at 376.

and would prevent the plaintiff from recovering, the relief sought against the foreign bank had to be denied.[67]

The International Monetary Fund Agreement[68] is a multinational compact, formed for the purposes of "promot[ing] international monetary cooperation," "facilitat[ing] the expansion and balanced growth of international trade," and "promot[ing] exchange stability."[69] These objectives are met by the establishment of a Board of Governors, the central governing body of the Fund, consisting of representatives from each member nation,[70] and by the maintenance of a quota of each member's currency to be paid in by each member.[71] Simply stated, through the governing body and the monetary resources, the Fund can facilitate the resolution of international monetary problems, avoid exchange competition, promote the expansion of international commerce by removing foreign exchange restrictions, and provide members with an exchange medium through which they may deal in another member's currency.[72]

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[67] 304 N.Y. at 537–38, 110 N.E.2d at 7–8.

[68] Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39, *as amended*, 20 U.S.T. 2775, T.I.A.S. No. 6748 (entered into force July 28, 1969) [hereinafter cited as IMF Agreement].

[69] *Id.* art. I, 60 Stat. at 1401, 2 U.N.T.S. at 40. Additional purposes enumerated in Article I are "[t]o assist in the establishment of a multilateral system of payments" for "transactions between members," *id.*, and "[t]o give confidence to members by making the Fund's resources temporarily available to them," *id.*, 20 U.S.T. at 2775.

[70] *See id.* art. XII, § 2(a), 60 Stat. at 1415, 2 U.N.T.S. at 78, which provides that "[a]ll powers of the Fund shall be vested in the Board of Governors." The Board of Governors, in turn, is empowered to delegate to the Executive Directors of the Fund certain general operating duties. *Id.* art. XII, § 2(b), 60 Stat. at 1416, 2 U.N.T.S. at 80.

[71] *See id.* art. III, 60 Stat. at 1402–03, 2 U.N.T.S. at 42–44, *as amended*, 20 U.S.T. at 2776. Every member nation is given a quota which must be maintained with the Fund. The quota is paid to the designated depository per the following regulation:

> Each member shall pay in gold, as a minimum, the smaller of
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> (i) twenty-five percent of its quota; or
>
> (ii) ten percent of its net official holdings of gold and United States dollars
>
> . . . .

Id. § 3(b), 60 Stat. at 1402, 2 U.N.T.S. at 44.

[72] The Fund has access to relevant data concerning a member nation's economic activities, status, and regulations. *Id.* art. VIII, § 5, 60 Stat. at 1412–13, 2 U.N.T.S. at 70–72. If a question arises as to the obligations of members under the Agreement, the Executive Directors can thus issue an informed interpretation. *See id.* art. XVIII, para. (a), 60 Stat. at 1423, 2 U.N.T.S. at 100.

The Agreement empowers the Fund to set a par value for transactions in gold and to require member nations to adhere to the standard. *Id.* art. IV, §§ 1–2, 60 Stat. at 1403–04, 2 U.N.T.S. at 46. Additionally, the Agreement undertakes to limit exchange restrictions, *id.* § 4, 60 Stat. at 1404, 2 U.N.T.S. at 48, and to facilitate the growth of trade by offering the Fund's resources to members for capital transfers, *id.* art. VI, § 1, 60 Stat. at 1409, 2 U.N.T.S. at 60–62, *as amended*, 20 U.S.T. at 2779. These aims are advanced by the quota system, note 71 *supra*.

The Court of Appeals of New York again dealt with the IMF Agreement in deciding *Banco do Brasil, S.A. v. A. C. Israel Commodity Co.*[73] Plaintiff Banco do Brasil, an "instrumentality" of the Brazilian government, alleged that an American importer, together with a Brazilian exporter, had been involved in a conspiracy to defraud the government of Brazil.[74] The defendants' plan entailed the purchase of coffee from the exporter, for which payment was made in American dollars at less than the going price. The exporter then sold the American dollars in the open market, in contravention of Brazilian law which required a forced sale of the dollars to the government at less than one-half the open market rate.[75] The defendants' plan was accomplished by forging certain "documents evidencing receipt of the dollars by plaintiff."[76] Through the conspiracy, the exporter-seller gained the difference between the government's forced exchange rate and the price paid on the open market, and the importer-buyer gained by paying less for the coffee, because of the dollars' increased value to the exporter.[77] The loss to the Brazilian government was alleged to have totaled almost two million dollars.[78] The state supreme court vacated plaintiff's attachment of the defendant's property[79] and the appellate division affirmed.[80]

In deciding whether on the facts as alleged the plaintiff had stated a cause of action, the court of appeals dealt with article VIII, section 2(b) of the IMF Agreement.[81] That "general obligation" provision refers to "[e]xchange contracts which involve the currency of any

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[73] 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964), *noted in* 63 COLUM. L. REV. 1334 (1963).For general discussions of the case see Note, *International Monetary Fund—Scope of Article VIII. Sec. 2(b)—"Exchange Contracts" and Characterization of Them as "Foreign Revenue" Laws—Tort Remedies—Private as Opposed to Public International Law*, 7 HARV. INT'L L.J. 350 (1966); Note, *The Extraterritorial Effect of Foreign Exchange Control Laws*, 62 MICH. L. REV. 1232 (1964).

[74] 12 N.Y.2d at 374, 190 N.E.2d at 235, 239 N.Y.S.2d at 873.

[75] *Id.* The Brazilian foreign exchange regulations mandated a forced sale of American dollars to their government for 90 cruzeiros per dollar, while the available price on the open market at that time was claimed to be 220 cruzeiros per dollar. *Id.*

[76] *Id.* at 374, 190 N.E.2d at 236, 239 N.Y.S.2d at 873.

[77] *Id.* at 374, 190 N.E.2d at 235–36, 239 N.Y.S.2d at 873.

[78] *Id.* at 378, 190 N.E.2d at 238, 239 N.Y.S.2d at 876 (Desmond, C.J., dissenting).

[79] Banco do Brasil, S.A. v. A. C. Israel Commodity Co., 29 Misc. 2d 229, 231, 215 N.Y.S.2d 3, 6 (Sup. Ct.), *aff'd mem.*, 13 App. Div. 2d 652, 216 N.Y.S.2d 669 (1961), *aff'd*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964).

[80] Banco do Brasil, S.A. v. A. C. Israel Commodity Co., 13 App. Div. 2d 652, 216 N.Y.S.2d 669 (1961) (mem.), *aff'd*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964).

[81] 12 N.Y.2d at 375–77, 190 N.E.2d at 236–37, 239 N.Y.S.2d at 873–75.

member" and states that such contracts, if "contrary to the exchange control regulations of that member . . . shall be unenforceable in the territories of any member."[82] Interpretation of the specific language used in the provision and its overall import was central to the decision in *Banco do Brasil*.

The court first questioned whether the contract to export coffee in the instant case was an "exchange contract" within the meaning of the Agreement.[83] Looking to the specific wording of the provision, varying reasonable interpretations of the term "exchange contract" were found.[84] The court focused upon the language " 'involve the currency' " of the nation whose exchange control regulations were contravened[85]—in this case Brazil; it was asserted that to interpret the phrase as encompassing the "sale of coffee in New York for

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[82] IMF Agreement, *supra* note 68, art. VIII, § 2(b), 60 Stat. at 1411, 2 U.N.T.S. at 66–68, which provides in full:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

For an interpretation of this provision by the Board of Directors of the IMF see 14 Fed. Reg. 5208–09 (1949).

It has been noted that the "unenforceability of contracts" provision will operate despite the fact that the law of the nation whose regulations are violated is not the law which would govern the transaction under the forum's choice-of-law rule. *See* Gold, *The Interpretation by the International Monetary Fund of Its Articles of Agreement*, 3 INT'L & COMP. L.Q. 256, 262 (1954). To this extent, this section of the IMF "override[s] . . . general principles of the conflict of laws." DICEY & MORRIS, *supra* note 66, at 899.

[83] 12 N.Y.2d at 375, 190 N.E.2d at 236, 239 N.Y.S.2d at 873–74.

[84] *Id.* For a discussion of the subject see Mann, *The Private International Law of Exchange Control under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97, 100–05 (1953). The *Banco do Brasil* court noted the limiting interpretation of the term as applying only to " 'transactions which have as their immediate object "exchange," that is, international media of payment,' " 12 N.Y.2d at 375, 190 N.E.2d at 236, 239 N.Y.S.2d at 873 (quoting from Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L.J. 421, 426 (1950)), and the somewhat less limiting interpretation as applying the term to "contract[s] where the consideration is payable in the currency of the country whose exchange controls are violated," 12 N.Y.2d at 375, 190 N.E.2d at 236, 239 N.Y.S.2d at 874 (citing Mann, *The Exchange Control Act, 1947*, 10 MOD. L. REV. 411, 418 (1947)). The court also noted the more modern approach which is to apply the term "to 'contracts which in any way affect a country's exchange resources.' " 12 N.Y.2d at 375, 190 N.E.2d at 236, 239 N.Y.S.2d at 874 (quoting from Mann, *The Private International Law of Exchange Control Under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97, 102 (1953)). For an analysis of this last interpretation see Williams, *supra* note 64, at 337–44.

[85] 12 N.Y.2d at 375–76, 190 N.E.2d at 236, 239 N.Y.S.2d at 874 (quoting from IMF Agreement, *supra* note 68, art. VIII, § 2(b), 60 Stat. at 1411, 2 U.N.T.S. at 66).

American dollars" would in effect change the language in the provision to " 'involve the exchange resources' " of a member.[86] While the court suggested that such an expansive interpretation was unwarranted in view of the plain language of the provision,[87] it ultimately based its decision on a different ground.

Attention was turned to the overall import of section 2(b)'s requirement that proscribed contracts be " 'unenforceable' " in any IMF member's courts.[88] The "clear" purpose of the provision, noted the court, was to avoid any possible "affront" to a member nation which would be "inherent" in one member's judicial review of another member's currency regulation: Any denial of enforcement of a currency regulation would force the losing party into a confrontation between one nation's regulations and another nation's judicial power.[89] The court acknowledged that, by virtue of the IMF, the courts of a member nation were "obligat[ed]" to refrain from effectuating contracts contrary to the exchange controls of another member by compelling their performance or awarding damages for their breach.[90] However, such a duty did not, in the court's view,

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[86] 12 N.Y.2d at 375–76, 190 N.E.2d at 236, 239 N.Y.S.2d at 874.

[87] *Id.* at 376, 190 N.E.2d at 236, 239 N.Y.S.2d at 874.

[88] *Id.* (quoting from IMF Agreement, *supra* note 68, art. VIII, § 2(b), 60 Stat. at 1411, 2 U.N.T.S. at 66). For the text of section 2(b) see note 82 *supra*.

[89] 12 N.Y.2d at 376, 190 N.E.2d at 236, 239 N.Y.S.2d at 874. The court's apprehensions were apparently directed specifically to cases—like the one before it—where the IMF member itself was seeking enforcement. *See id.*

The considerations militating against such review were stated by Judge Learned Hand in his concurring opinion in Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930). In discussing the general rule precluding the extraterritorial enforcement of penal liabilities, Judge Hand asserted a frequently quoted justification:

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

30 F.2d at 604.

[90] 12 N.Y.2d at 376, 190 N.E.2d at 236–37, 239 N.Y.S.2d at 874.

"imply an obligation to impose tort penalties on those who have fully executed" such contracts.[91]

The *Banco do Brasil* court also discussed the applicability of the revenue law rule to the situation at hand, finding such discussion "inseparable from" its analysis of the IMF provision.[92] The action was perceived to be one by an "instrumentality" of the Brazilian government to give direct effect to a revenue measure, a situation clearly within the purview of the revenue law rule.[93] Additionally, the court determined that the IMF provision, in calling for "unenforceability" rather than some more positive sanction to accomplish its function, inherently admitted that suit by "the aggrieved government" was not made available.[94] This method for effectuating the Agreement, coupled with the revenue law rule, was held to preclude the court from hearing the action.[95]

Banco do Brasil was a four-to-three decision in which the dissent found the action to be one for redress of a tort, cognizable in the New York courts, rather than a proceeding to enforce a monetary regulation of Brazil.[96] *Perutz* was relied upon for the proposition that

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[91] *Id.* at 376, 190 N.E.2d at 237, 239 N.Y.S.2d at 874. The court noted that a proposal to accomplish this result was rejected when the IMF Agreement was being enacted. *Id.* at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875. For further discussion of this point see Note, *supra* note 73, 7 HARV. INT'L L.J. at 363.

[92] 12 N.Y.2d at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875.

[93] *Id.* The court cited no authority for its finding that the exchange control measure in issue was "clearly a revenue law." *Id.* This characterization, however, appears to be open to dispute. *See, e.g.*, Williams, *supra* note 64, at 373–74 & n.270; Note, *The Extraterritorial Effect of Foreign Exchange Control Laws*, 62 MICH. L. REV. 1232, 1238–39 (1964).

At least one commentator has stated that section 2(b) does not "abrogate the universally accepted principle of public international law that no country can enforce its . . . public laws within the territory of another country." Williams, *supra* at 372 (footnote omitted).

[94] 12 N.Y.2d at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875. The court, in making its decision, pointed out that section 2(b) expressly provides that member nations "may" enter into agreements to better effectuate each other's exchange control regulations. Any step in this direction would be "a matter for the Federal Government." Not only had the United States failed to enter into any such further agreements, but no enabling legislation as to this aspect of section 2(b) had yet been enacted. *Id.*; *see* 22 U.S.C. § 286h (1970).

[95] 12 N.Y.2d at 377, 190 N.E.2d at 237, 239 N.Y.S.2d at 875.

[96] *Id.* at 377–78, 190 N.E.2d at 237–38, 239 N.Y.S.2d at 876 (Desmond, C.J., dissenting). The majority had earlier observed that the IMF itself did not prohibit private parties from entering into contracts violative of a member's currency exchange measures. *Id.* at 376, 190 N.E.2d at 237, 239 N.Y.S.2d at 875. Because all conspiratorial acts were alleged to have been performed in New York, the majority assumed that New York law governed the transaction, yet found no justification for finding these acts to be tortious under the substantive law of that state. *Id.* at 376–77 & note, 190 N.E.2d at 237, 239

United States' membership in the IMF prevented a finding that the revenue law in question was inimical to the public policy of the state.[97] This being the case, the dissent concluded that the court's failure to permit the action contravened "our national policy of co-operation" with the other member nations of the IMF.[98]

The majority opinion in *Banco Brasileiro* thus appears more consonant with the dissent in *Banco do Brasil* than with the majority opinion in that case. In *Banco Brasileiro* the court decided to entertain the action based upon the United States' membership in the IMF.[99] In relating its discussion of the case to article VIII, section 2(b) of the IMF Agreement, the court took notice of the restrictive meaning placed upon that provision by the *Banco do Brasil* court[100] but offered its own broader interpretation of the provision.[101] It read the provision as not containing any language aimed at restraining the courts of one IMF member from acting to give effect to the exchange regulations of another IMF member.[102] Furthermore, the court acknowledged that aiding a co-member of the IMF in effectuating its currency regulations is consistent with the advancement of international cooperation.[103]

N.Y.S.2d at 875.

It is not clear from the opinion whether the dissenting judges meant that the defendant had committed a tort under New York law or whether they were intimating that the transaction should have been governed by the law of Brazil, under which the conspiracy would probably have been actionable. *See* Note, *The Extraterritorial Effect of Foreign Exchange Control Laws*, 62 MICH. L. REV. 1232, 1236 (1964).

For a more complete discussion of the vaguely treated choice-of-law question in the case see *id.* at 1235–37. *See also* Note, *supra* note 73, 7 HARV. INT'L L.J. at 359–63.

[97] 12 N.Y.2d at 378, 190 N.E.2d at 238, 239 N.Y.S.2d at 876 (Desmond, C.J., dissenting).

[98] *Id.* at 378–79, 190 N.E.2d at 238, 239 N.Y.S.2d at 876–77. Chief Judge Desmond would have held that the pleadings clearly alleged an unlawful tortious conspiracy which damaged the plaintiffs and benefited the defendants. Since *Perutz* precluded a public-policy bar, the suit should have been allowed. *Id.*

[99] 36 N.Y.2d at 599–600, 331 N.E.2d at 506–07, 370 N.Y.S.2d at 539–41.

[100] *Id.* at 598, 331 N.E.2d at 506, 370 N.Y.S.2d at 539. *See* notes 81–91 *supra* and accompanying text. *Banco do Brasil* has been noted by legal writers, as well, for its restrictive interpretation of the provision. *See, e.g.*, Williams, *supra* note 64, at 333, 336; Note, *supra* note 73, 7 HARV. INT'L L.J. at 366; Note, 59 NW. U.L. REV. 249, 253 (1964).

[101] 36 N.Y.2d at 598, 599, 331 N.E.2d at 506, 507, 370 N.Y.S.2d at 539, 540. Such a broad reading is consistent with the well-settled principle that treaty provisions "should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them," Jordan v. Tashiro, 278 U.S. 123, 127 (1928), so that where a treaty provision is susceptible to two interpretations, a court should adopt a construction which would expand rather than restrict rights which the provision may establish, *id. Accord*, Bacardi Corp. of America v. Domenech, 311 U.S. 150, 163 (1940); Nielsen v. Johnson, 279 U.S. 47, 51–52 (1929).

[102] 36 N.Y.2d at 598, 331 N.E.2d at 506, 370 N.Y.S.2d at 539.

[103] *Id.*

In order to apply this expansive interpretation of the IMF Agreement it was necessary to distinguish the *Banco do Brasil* case. The distinction centered on the character of the plaintiff in each case. The plaintiff in *Banco do Brasil* was seen to have been a Brazilian governmental agency seeking direct recompense for an infraction of a currency control law.[104] By contrast, the plaintiff in *Banco Brasileiro* was considered to be a private entity seeking contract and tort relief.[105] The court found the reasoning of *Banco do Brasil* inapplicable where the action was one between private parties for redress of a wrong.[106]

The lone dissenting judge in *Banco Brasileiro* referred to the standard laid down in *Huntington*, which distinguished between public offenses and private wrongs.[107] In scrutinizing the action brought by Banco Brasileiro in light of that standard, it was observed that the plaintiff was not alleging that the defendant had directly defrauded it of any funds. Rather, the plaintiff's damages were all found to be directly attributable to the sanctions imposed by the Brazilian government for violation of one of its monetary regulations.[108] Turning to the specific law in issue, the dissent assumed it to have been adopted by Brazil, in its capacity as a sovereign, for the purpose of controlling its economic affairs.[109] Under these circumstances, the dissent found that the aim and end result of permitting the plaintiff recovery would be the effectuation in New York of a foreign currency exchange regulation.[110] It was therefore asserted that the revenue law rule

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[104] *Id. See* text accompanying note 93 *supra*.

[105] 36 N.Y.2d at 598, 331 N.E.2d at 506, 370 N.Y.S.2d at 539.

[106] *See id.* at 598–99, 331 N.E.2d at 506–07, 370 N.Y.S.2d at 540.

[107] *Id.* at 600, 331 N.E.2d at 507, 370 N.Y.S.2d at 541 (Wachtler, J., dissenting). For a discussion of the *Huntington* standard see notes 34–37 *supra* and accompanying text.

[108] 36 N.Y.2d at 600, 603, 331 N.E.2d at 508, 509–10, 370 N.Y.S.2d at 541, 544 (Wachtler, J., dissenting). Judge Wachtler noted that the plaintiff sought recovery for "injury to its business and reputation," but claimed that such damages could not transform the action into one merely for private redress since such a claimed injury was still "wholly attributable" to the defendants' violation of Brazil's exchange regulation. *Id.* at 603, 331 N.E.2d at 509–10, 370 N.Y.S.2d at 544.

[109] *Id.* at 601, 331 N.E.2d at 508, 370 N.Y.S.2d at 542. Judge Wachtler argued that regardless of whether the specific regulations at issue were "revenue-producing," their

> ultimate economic objectives [were] significantly similar to, if not identical with, the objectives which underlie what would be characterized as revenue measures—namely, governmental management of its economy by a foreign country. Accordingly, the result is not determined by the threshold appearance of the particular law sought to be enforced or whether such law be denominated by the foreign government as a penal law or a revenue law or otherwise.

Id.

[110] *Id.* at 604, 331 N.E.2d at 510, 370 N.Y.S.2d at 544. Judge Wachtler was unconvinced by the public-private conclusions drawn by the majority and attacked what he

should have been sustained as a bar to the proceeding.[111]

The dissent also discussed the relationship between the IMF Agreement and the revenue law rule. Though recognizing that an American treaty obligation would supplant the rule, the dissent would have strictly interpreted the relevant provisions of the IMF Agreement in order to limit a foreign exchange regulation to use as a defense to an action.[112] The dissent acknowledged the arguments put forth by the majority in favor of abandoning or modifying the revenue law rule in light of the interdependent world trade market today but advanced the view that any change in policy should come from the federal government and not a state court.[113]

The majority and dissenting opinions clearly diverged as to the revenue law rule. While the dissent advocated its continued viability—at least pending legislative reevaluation—the majority, in dictum, went so far as to assert that the revenue law rule as applied today is not "justifiable" either "precedentially [or] analytically."[114] The precedents which led to the implementation of the revenue law rule in this country were claimed to have been misinterpreted or overextended.[115] The revenue law rule's carte blanche effect on laws in any way related to a country's revenue was criticized as anachronistic in view of the present-day "economic interdependence of all nations."[116] Notwithstanding this strong criticism of the revenue law rule, the court did not entirely foreclose every application of the rule. Rather, the court disposed of the case by presuming that the rule was still practicable and that a currency exchange regulation was a revenue law; but the overriding consideration of IMF co-membership and the status of the plaintiff led to its refusal to apply the rule in this case.[117]

In effect, the *Banco Brasileiro* court has only suggested that a closer inspection of our reasons for applying the revenue law rule is

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perceived to be the facade of private action in the case. *See id.* at 603, 331 N.E.2d at 509, 370 N.Y.S.2d at 543. It was acknowledged that a determination of whether or not the plaintiff bank was an "instrumentality" of the Brazilian government would be a difficult matter for a court. *Id.* at 604 note, 331 N.E.2d at 510, 370 N.Y.S.2d at 544. However, the dissent found such a determination to be unnecessary since, whether direct or indirect, the action was ultimately one to effectuate a foreign revenue law. *See id.* at 604, 331 N.E.2d at 510, 370 N.Y.S.2d at 544.

[111] *Id.* at 604, 331 N.E.2d at 510, 370 N.Y.S.2d at 544.

[112] *Id.* at 602, 331 N.E.2d at 509, 370 N.Y.S.2d at 543.

[113] *Id.* at 604, 331 N.E.2d at 510, 370 N.Y.S.2d at 545. This was the same view adopted by the *Banco do Brasil* majority. *See* note 94 *supra*.

[114] 36 N.Y.2d at 596, 331 N.E.2d at 505, 370 N.Y.S.2d at 538.

[115] *See id.* at 596–97, 331 N.E.2d at 505, 370 N.Y.S.2d at 538. *Cf.* Mann, *supra* note 18, at 469 (cases indicate that revenue law rule "rests largely on judicial tradition").

[116] 36 N.Y.2d at 597, 331 N.E.2d at 506, 370 N.Y.S.2d at 538.

[117] *See id.* at 597–98, 331 N.E.2d at 506, 370 N.Y.S.2d at 538–39.

now warranted. Under the *Banco Brasileiro* holding, where the litigation is between private parties, the situation will be beyond the reach of the rule even though a foreign revenue law may be involved in the decision.[118] Where the action is one brought directly by a foreign government instrumentality for enforcement of a currency control law, a more difficult question for the courts will be presented. It is apparently still the law that in this situation the courts of one jurisdiction may or may not enforce foreign laws as they see fit.[119] However, in light of today's interdependent world economy, stronger reasons may now exist for the courts of one nation, or the states of the United States, to voluntarily aid foreign nations in enforcing their economic regulations.[120]

On the other side, it may be argued that the simplest course is to maintain a blanket rule precluding enforcement, leaving any change or modification of the rule to international treaty or compact. Such a policy would ensure reciprocity between nations and specify precisely the rights and obligations of the nations involved.[121] Perhaps the ultimate solution is a middle ground whereby, with respect to the enforcement of foreign revenue measures, courts will draw distinctions between IMF member and nonmember nations, foreign revenue laws which are consistent with IMF policy and those which are not, or foreign enactments in general and those of sister states.[122] Whatever the solution to these difficult problems, it should only be reached after careful analysis of these considerations. Substantially more attention is needed than has heretofore been given to this conflict of laws principle which has been for too long extensively relied upon yet not closely examined.

Bruce J. Ackerman

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[118] *See* text accompanying notes 104–06 *supra*.

[119] Leflar, *supra* note 17, at 225.

[120] This is essentially what the *Banco Brasileiro* court suggested. *See* 36 N.Y.2d at 597, 331 N.E.2d at 505–06, 370 N.Y.S.2d at 538.

[121] *See id.* at 604, 331 N.E.2d at 510, 370 N.Y.S.2d at 545 (Wachtler, J., dissenting); Note, 49 CORNELL L.Q. 660, 664 (1964). It is important to note that the second sentence of article VIII, section 2(b) of the IMF Agreement, which provides for member nations entering into further agreements to cooperate in enforcing each other's currency regulations, was not enacted into law in the United States. *See* note 94 *supra*.

[122] *See* Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599 (1966), where the author urges that both courts and counsel should distinguish between international and interstate cases because of the prominent governmental interests and policies to be considered in many international disputes, inherently absent in interstate conflicts. *Id.* at 1622–23. Note also that numerous American states have dealt with the interstate problem by enacting statutes providing for reciprocal treatment at least in the area of tax claims. *See* note 57 *supra*.