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Racking Up the Money: A Solution to the Ongoing Battle Between RICO and the Revenue Rule

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**Racking Up the Money:
A Solution to the Ongoing Battle Between RICO and the
Revenue Rule**

Kye C. Handy*

INTRODUCTION.....	3
I. BACKGROUND.....	4
A. The Revenue Rule.....	4
B. RICO	6
C. A Tango Between Titians	8
i. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.	8
ii. Pasquantino v. United States	13
iii. European Community v. RJR Nabisco, Inc.	17
II. ARGUMENT	20
A. Limiting the Revenue Rule	20
i. Never Allowing the Revenue Rule to Ban RICO Claims	20
ii. Should the Revenue Be Abolished Completely?	26
B. Gaining Executive Consent	34
CONCLUSION	36

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Abstract

The Revenue Rule, a common law rule from British court systems, prevents foreign countries from bringing claims in the United States to enforce or adjudicate tax claims that did not happen in the United States. The United States Supreme Court in *Pasquantino v. United States* held that Canada's right to collect imported liquor taxes was not barred by the Revenue Rule. However, the Second Circuit in *European Community v. RJR Nabisco Inc.*, ruled the European Union and Colombia could not recover lost tax money or enforcement costs from cigarette smuggling under RICO because of the Revenue Rule. The European Community petitioned the Supreme Court. After accepting the Community's petition, the Supreme Court reversed and remanded the case back to the Second Circuit to be reheard in light of *Pasquantino*. The Second Circuit did not change its ruling citing *Pasquantino* as a criminal case brought by the U.S. government. With no distinction between criminal and civil RICO cases in current jurisdiction, this comment seeks to provide a solution to the split between the Second Circuit and the Supreme Court. This comment argues in favor of limitations being placed on the Revenue Rule so that it can never trump RICO claims in United States courts. In the alternative it argues if limitations cannot be placed upon the Revenue Rule then the only option is abolition. Lastly this comment provides that if limitations and abolition are not the answer, then foreign countries should appeal

to the United States government to bring the RICO claims on their behalf.

Introduction

“[W]ith liberty and justice for *all*.”¹ But does *all* just mean for Americans? What about other countries? Do they not have the right to seek justice within the borders of the United States? If a person smuggles tobacco, liquor, or drugs on American soil, they are punished through American court systems. What if an American citizen or company does the same in another country? The Racketeering Influence and Corrupt Organizations Act (RICO) allows foreign countries to bring suit in America for illegal acts committed by American citizens.² Unfortunately for these foreign countries, a common law rule³ denies them the remedies they seek.⁴ The Revenue Rule bars foreign RICO claims because of an almost 300 year old common law doctrine⁵ which states that “no country ever takes notice of the revenue laws of another.”⁶ This is an injustice on the part of American justice systems by denying the enforcement of a federally mandated statute to accommodate a common law ruling which has yet to be codified in any way.

¹ 4 U.S.C.A. § 4 (West 2002) (emphasis added).

² 18 U.S.C.A. § 1965 (West 1970).

³ Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. COMP. & INT’L L 79, (2006).

⁴ *Id.* at 83.

⁵ *Id.* at 79. First appearance of the rule is Att’y Gen. v. Lutwydge, 145 Eng. Rep. 674 (Ex. Div. 1729) *Id.* at 80.

⁶ *Id.* at 81 (citing *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775)).

This Comment will give a brief background on the Revenue Rule as well as the RICO act and how the two have interacted in the legal community. This Comment will then argue that the Revenue Rule should be limited in scope so that it no longer bars any RICO claims brought by foreign countries. This limitation can be accomplished in two ways: (1) Never allowing the Revenue Rule to trump RICO claims or (2) Completely abolishing the Revenue Rule and allowing America to interpret foreign countries' tax laws. In the alternative, this Comment argues that if the Revenue Rule cannot be restricted, (3) foreign countries should appeal to the United States government to bring these claims on their behalf.

I. Background

A. The Revenue Rule

The Revenue Rule was first adopted in eighteenth century British courts.⁷ Since then it has grown and developed into a method for “courts to decline to entertain[] suits or enforce[] foreign tax judgments or foreign revenue laws.”⁸ A 1729 case is the earliest sighting of the Revenue Rule.⁹ Following that case, *Holman v. Johnson*¹⁰ brought about Lord Mansfield’s famous statement, “[N]o country ever takes notice of the revenue laws of another.”¹¹ The series of early Revenue Rule cases all supported

⁷ *Id.* at 79.

⁸ *Id.*

⁹ *Id.* at 80 (citing *Att’y Gen. v. Lutwydge*, 145 Eng. Rep. 674 (Ex. Div. 1729)).

¹⁰ 98 Eng. Rep. 1120, 1121 (K.B 1775).

¹¹ Mallinak, *supra* note 3, at 81.

the premises that one nation does not take notice of the revenue laws of another¹², but these cases provided no rationale for the decisions of the court. These cases dealt with smuggled tea, illegally exported gold, and false shipping documents. With the recent rise of alcohol and cigarette smuggling, these cases are particularly interesting in United States courts when foreign countries bring criminal and civil actions only to have the Revenue Rule used as a defense.¹³

The United States first considered the Revenue Rule in 1806 with the *Ludlow v. Van Rensselaer*¹⁴ case.¹⁵ The Revenue Rule mostly appeared in disputes where “individual states sought enforcement of tax levies against sister states.”¹⁶ *Moore v.*

¹² See generally *Lutwydye*, 145 Eng. Rep. 674 (Ex. Div. 1729), *Bourcher v. Lawson*, 95 Eng. Rep. 55 (K.B. 1734), *Holman*, 98 Eng. Rep. 1120 (K.B. 1775), *Planche v. Fletcher*, 99 Eng. Rep. 164 (K.B. 1779).

¹³ *Mallinak*, *supra* note 3 at 83.

¹⁴ 1 Johns. 93 (N.Y. 1806). In this case, *Ludlow* sought enforcement of a promissory note issued by *Van Rensselaer*. *Mallinak*, *supra* note 3, at 83. Though the note was issued in Paris and did not bear the stamp required by French law, “*Van Rensselaer* resided in New York, and the note was to be paid in New York.” *Id.* The Court ruled in favor of *Ludlow*. *Ludlow*, 1 Johns. at 96.

¹⁵ *Mallinak*, *supra* note 3, at 83. The New York Supreme Court relied on *Holman v. Johnson* and held “we do not sit here to enforce the revenue laws of another country, it is perfectly immaterial, in a suit before us, whether or not the note was stamped according to the laws of France.” *Id.* at 83-84 (citing *Ludlow v. Van Rensselaer*, 1 Johns. 93, 95 (N.Y. 1806)). The New York court did not allow *Rensselaer* to default on the note “based on a defense that a foreign revenue provision was violated.” *Id.* at 84.

¹⁶ *Id.* States “generally were reluctant to involve themselves in the enforcement or evaluation of sister state tax laws.” *Id.* The New York court held “it is a principle universally recognized that the revenue laws of one country have no force in another” when “Maryland and the City of Baltimore sought enforcement of a judgment entered by the highest court in Maryland from a New York resident.” *Id.*

*Mitchell*¹⁷ involved Moore, a treasurer in Indiana, bringing a suit in New York “to recover taxes alleged to be due and unpaid . . .” against the “executors of the last will and testament of Richard Edwards Breed, who allegedly resided in [Indiana].”¹⁸ Judge Manton dismissed the action citing the Revenue Rule.¹⁹

By the beginning of the twenty-first century, courts today interpret and recognize the Revenue Rule as a means to decline jurisdiction over cases brought by foreign governments without an agreement between that country and the United States. This led to the Revenue Rule being recently used as a defense in foreign RICO cases.²⁰

B. RICO

The Racketeer Influenced and Corrupt Organizations Act was enacted in 1970.²¹ It outlaws a list of racketeering activities that includes: financial institution fraud, fraud in foreign labor contracting, interference with commerce, robbery, or extortion, and trafficking in contraband cigarettes.²² It originally limited civil

¹⁷ 30 F.2d 600 (2d Cir. 1929).

¹⁸ Mallinak, *supra* note 3, at 85 (citing *Moore*, 30 F.2d at 601 (2d Cir. 1929)).

¹⁹ *Id.* An “effort by Indiana to collect taxes in New York [is] ‘repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such. The revenue laws of one state have no force in another.’” *Id.* (citing *Moore*, 30 F.2d 600 (2d Cir. 1929)).

²⁰ *Pasquantino v. United States*, 544 U.S. 349 (2005); *Att’y Gen. of Canada v. R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001); *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004); *European Community v. RJR Nabisco*, 424 F.3d 175, 179 (2d Cir. 2005).

²¹ 18 U.S.C.A. § 1961 (2013) (Title IX of the Organized Crime Control Act of 1970).

²² 18 U.S.C.A. § 1961(1)(b) (2013).

remedies in the first proposed Senate bill,²³ “but the House added a treble-damages remedy modeled on section 4 of the Clayton Act.”²⁴ Since the 1970’s, the law has changed to the current law, updated as recently as March 2013.²⁵

RICO brings a criminal punishment of a fine and/or twenty years to life in prison depending on the severity of the crime.²⁶ Under civil remedies, a person convicted of RICO crimes can be divested of any interest in any enterprise and a restriction on any “future activities or investments of any person including . . . prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce”²⁷ A plaintiff must show he was injured by a criminal RICO violation. To show a violation occurred, the plaintiff must identify the previous commission of a crime specified in the RICO statute.²⁸ There are also certain defined terms that must exist to bring a civil RICO claim.²⁹ RICO claims must be brought before any district court in the United States “in

²³ GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 3 (3rd ed. 2010) (citing S. 30, 91st Cong., 2d Sess. (1970)).

²⁴ *Id.* (citing H.R. 1549, 91st Cong., 2d Sess., 116 Cong. Rec. 35, 363-64 (1970)).

²⁵ 18 U.S.C.A. § 1961 (2013).

²⁶ 18 U.S.C.A. § 1963 (2009).

²⁷ 18 U.S.C.A. § 1964(a) (1995).

²⁸ 18 U.S.C.A. § 1961(1) (2013) (defining racketeering activity).

²⁹ Randy D. Gordon, *Clarity and Confusion: RICO’s Recent Trips to the United States Supreme Court*, 85 TUL. L. REV. 677, 679 (2011). These terms are listed in § 1963 of the act and defined in § 1961.

which [the defendant] resides, is found, has an agent, or transacts his affairs.”³⁰

The implication of RICO cases brought by foreign countries has been a point of contention in United States courts recently.³¹ Cases have been brought before the Second Circuit Court of Appeals and the United States Supreme Court by foreign countries seeking remedies under RICO. Most of these cases deal with the smuggling of cigarettes or alcohol. Because these suits are being brought by foreign governments, the courts are being forced to consider RICO and how it interacts with the Revenue Rule.

C. A Tango Between Titans

1. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.

Filed by the Attorney General of Canada, this action sought damages under RICO “based on lost tax revenue and additional law enforcement costs.”³² In 1991, Canada doubled the taxes on cigarettes.³³ To circumvent the Canadian cigarette taxes, R.J. Reynolds smuggled cigarettes across the Canadian border.³⁴ To do

³⁰ 18 U.S.C.A. § 1965(a) (1970).

³¹ See *Attorney Gen. of Can. v. R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001); *Pasquantino v. United States*, 544 U.S. 349 (2005); *European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004); *European Cmty. v. RJR Nabisco*, 424 F.3d 175, 179 (2d Cir. 2005).

³² 268 F.3d at 105 (2d Cir. 2001). Defendants to the action included: RJR-MacDonald, R.J. Reynolds Tobacco Holdings Inc., R.J. Reynolds Tobacco Company, Northern Brands International, Inc., R.J. Reynolds Tobacco International, Inc., and R.J. Reynolds Tobacco Company PR. *Id.* at 106.

³³ *Id.* at 106.

³⁴ *Id.* at 105. These cigarettes were then sold on the black market. *Id.*

this, Reynolds “exported cigarettes from Canada to the United States,” falsely declaring to Canadian border patrol that the cigarettes were not for consumption in Canada.³⁵ Reynolds then sold the merchandise to known smugglers, who then sold the cigarettes to black market distributors and smuggled the cigarettes back into Canada.³⁶ In 1992, Canada imposed a second cigarette tax on exported cartons of cigarettes.³⁷ Defendants then began shipping “raw Canadian tobacco to Puerto Rico, where RJR PR manufactured Canadian-style cigarettes made to look as if they had been made by RJR-MacDonald in Canada.”³⁸ R.J. Reynolds utilized “United States mails and wires to make payments and to place and receive orders.”³⁹

Canada brought a civil RICO action as it “is a broadly worded statute that ‘has as its purpose the elimination of infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.’”⁴⁰ The New York Northern

³⁵ *Id.* at 106.

³⁶ *Id.* at 106-07. Some of the smugglers consisted of residents of the St. Regis/Akwesasne Indian Reservation. *Id.* R.J. Reynolds and the smugglers took advantage of the Foreign Trade Zones in upstate New York. *Id.* (Definition of Foreign Trade Zone found in the Foreign Trade Zone Act of 1996 19 U.S.C.A. § 81a).

³⁷ *Id.* at 107.

³⁸ *Id.* RJR PR made and shipped almost one billion Canadian style cigarettes from 1992 to 1993. *Id.* “To conceal their relationship with smugglers, defendants created NBI and directed their Canadian sales through it.” *Id.*

³⁹ *Id.* “In 1997 and 1998, the United States indicted NBI and 21 individuals in connection with these smuggling activities.” *Id.* “Several individuals involved in the scheme pled guilty to . . . wire fraud, aiding and abetting smuggling, conspiring to defraud the United States, currency violations, money laundering, and criminal RICO violations.” *Id.*

⁴⁰ *Id.* (citing Senate Report Number 91-617, at 76 (1969)).

District Court found that Canada fell into the category of a person entitled to bring a RICO claim, but granted R.J. Reynolds motion to dismiss the complaint stating the Revenue Rule barred the claim.⁴¹ To prove it suffered an injury, Canada would “have to prove, and the Court will have to pass on, the validity of Canadian revenue laws and their applicability hereto and the court would be, in essence, enforcing Canadian revenue laws. “Enforcing foreign revenue laws is precisely the type of meddling in foreign affairs the Revenue Rule forbids.”⁴² The court also noted the treaty between the United States and Canada “with respect to the recognition and enforcement of certain tax liabilities.”⁴³

Canada appealed this decision to the Second Circuit Court of Appeals arguing the inapplicability of the Revenue Rule. The Second Circuit affirmed the lower court’s decision that the Revenue Rule and the treaty with the United States barred Canada’s civil RICO claims.⁴⁴ Judge Katzmman, writing for the majority, listed the reasons for affirming the lower court’s

⁴¹ *Id.* at 108. The district court judge refused “to dismiss the action under the act-of-state and political-question doctrines. *Id.* The court also denied the claim because “a government’s claim for damages based on increased law enforcement and related costs does not satisfy civil RICO’s requirement that the plaintiff suffer an injury to its commercial interests; and that RICO does not provide for disgorgement and other equitable relief requested by Canada.” *Id.*

⁴² *Id.*

⁴³ *Id.* at 108. This treaty delineated “the extent to which one country’s revenue claims may be enforced in the other, and to limit such enforcement to ‘finally determined’ revenue claims.”

⁴⁴ *Id.* at 106.

decision: Respect for sovereignty⁴⁵ and judicial role and competence.⁴⁶ The decision also addresses criticism of the Revenue Rule⁴⁷ and the interaction of RICO and the Revenue Rule.⁴⁸ The majority asserts a difference between civil and criminal RICO claims.⁴⁹ Before concluding, the Court discussed the implications of Canada arguing for the direct or indirect

⁴⁵ *Id.* at 111. The Revenue Rule “prevents foreign sovereigns from asserting their sovereignty within the borders of other nations, thereby helping nations maintain their mutual respect and security.”

⁴⁶ The Court wrote, “The conduct of foreign relations is committed largely to the Executive Branch, with power in the Legislative Branch to, *inter alia*, ratify treaties with foreign sovereigns.” *Id.* at 114. “Extraterritorial tax enforcement directly implicates relations between our country and other sovereign nations. When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues . . . better handled—by the political branches of the government.” *Id.*

⁴⁷ *Id.* at 124-26. The rule is obsolete “in an age when . . . instantaneous transfer of assets can be easily arranged.” *Id.*, at 125 (citing RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS, § 483, Reporter’s Note 2 (1987)). “It is not clear why difficulties in proving or interpreting foreign law would be any greater [with revenue laws] than in other civil suits involving foreign laws.” *Id.* (citing Thomas B. Stoel, Jr., *The Enforcement of Foreign Non-criminal Penal & Revenue Judgments in England & the United States*, 16 INT’L & COMP. L.Q. 663, 668-69 (1967)). *Forum non conveniens* . . . remains applicable. *Id.* (citing Thomas B. Stoel, Jr., *The Enforcement of Foreign Non-criminal Penal & Revenue Judgments in England & the United States*, 16 INT’L & COMP. L.Q. 663, 668-69 (1967)). The act-of-state doctrine contradicts the Revenue Rule by stating “a court presumes the validity of a foreign state’s laws within that state’s territory.” *Id.* at 126.

⁴⁸ *Id.* at 126-30. Canada argued the lower court should not have dismissed the case without “carefully examining [RICO’s] structure, purpose, and policies before applying common law rules to restrict or modify . . .” *Id.* at 126. The Second Circuit found that “the Revenue Rule is a doctrine with continuing force” and that Canada could not “show that RICO bars the application of the Revenue Rule.” *Id.* RICO did not clearly abrogate the Revenue Rule and, therefore, it can be barred by the Revenue Rule. *Id.* at 127-28.

⁴⁹ *Id.* at 123. “[W]ith regard to the Revenue Rule, there is a critical difference between this civil suit brought by a foreign sovereign and the criminal actions previously considered by panel of this court.” *See* Attorney General of Canada v. R.J. Reynolds, 268 F.3d 103, 123-24 (2d Cir. 2001).

enforcement of its foreign tax laws under the Revenue Rule.⁵⁰ The Second Circuit concluded the Revenue Rule barred Canada's RICO claim and the lower court was correct in dismissing the action.⁵¹

Judge Calabresi wrote a dissenting opinion arguing the Revenue Rule did not bar Canada's claim.⁵² He stressed the Restatement⁵³ and argued that Canadian tax laws are only indirectly related to the action.⁵⁴ He rebutted the argument of sovereign interests, explaining that in order to further American sovereign interests "we are bound to entertain suits brought under federal statutes, and to award the damages that such statutes establish."⁵⁵ The arguments of separation of power and court

⁵⁰ *Id.* at 130-34. Canada brought a claim for the court "to assess and adjudicate the application of Canadian tax laws to wrongdoing alleged in its complaint," not "the enforcement of a final, fully adjudicated Canadian tax judgment." *Id.* at 130. To find if a claim is direct or indirect the court "must look to the 'object' of the claim." *Id.* at 131. "Indirect enforcement occurs where a foreign State (or its nominee) in form seeks a remedy, not based on the foreign rule in question, but which in substance is designed to give it extra-territorial effect." *Id.* (citing Albert Venn Dicey, J.H.C. Morris, & Lawrence Collins, DICEY AND MORRIS ON THE CONFLICT OF LAWS 91 (Sweet & Maxwell, 13th ed. 2000)). The "Revenue Rule 'relates only to *enforcement*, but it does not prevent *recognition* of a foreign [revenue] law.'" *Id.* at 133 (citing Albert Venn Dicey, J.H.C. Morris, & Lawrence Collins, DICEY AND MORRIS ON THE CONFLICT OF LAWS 90 (Sweet & Maxwell, 13th ed. 2000) (emphasis added)).

⁵¹ *Id.* at 134-35.

⁵² *Id.* at 135-141.

⁵³ *Id.* at 135. The Restatement states, "courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states." *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987)).

⁵⁴ *Id.* at 135. ("The Canadian tax laws come into play only indirectly, as a factor to be used in the calculation of damages, and do so entirely because the RICO statute itself makes the Canadian law relevant to that calculation.").

⁵⁵ *Id.* at 136. Congress created this action when they enacted RICO, which means "our government has determined that this suit advances *our own* interest,

competency,⁵⁶ and the difficulty in “figuring out the meaning and significance of some foreign laws—especially foreign tax laws”⁵⁷ are also rebutted. The dissent also insists the critical difference between civil and criminal RICO actions asserted by the majority opinion “founders in the face of the Supreme Court’s consistent refusal to treat criminal and civil RICO actions differently.”⁵⁸ *European Community I & II*, later Second Circuit cases, rely heavily on this case.

2. Pasquantino v. United States

*Pasquantino v. United States*⁵⁹ is a case brought by the United States government on behalf the Canadian government for a violation of the United States wire fraud statute.⁶⁰ The petitioners⁶¹ were indicted and convicted of federal wire fraud. The trio carried out a scheme to defraud the Canadian government of liquor taxes by smuggling liquor from the United States into

and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental. *Id.*

⁵⁶ *Id.* at 136-37. Separation of power is not a concern “whenever the legislative and executive branches have created the cause of action.” *Id.* at 137. The goal of RICO “is to divest the association of the fruits of its ill-gotten gains.” *Id.* “To reject the application of civil RICO to the case at hand is to hamper this congressional objective.” *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 585 (1981)).

⁵⁷ *Id.* Citing *United States v. Trapilo*, 130 F.3d 547 (Second Cir. 1997), and *United States v. Pierce*, 224 F.3d 158 (Second Cir. 2000), the dissent shows two instances in which the Second Circuit has rejected “the rationale for the revenue that is based on the desire to avoid analysis of foreign statutes.” *Id.* at 138.

⁵⁸ *Id.* at 139 (Second Cir. 2001); see *Attorney General of Canada v. R.J. Reynolds*, *supra* note 32, at 139.

⁵⁹ *Pasquinto*, *supra* note 20, at 349.

⁶⁰ 18 U.S.C. § 1343 (2000).

⁶¹ Carl J. Pasquantino, David b. Pasquantino, and Arthur Hilts.

Canada.⁶² Canada had almost doubled the liquor purchasing price at the time of the smuggling operation by taxing liquor imported from the United States to Canada.⁶³ Pasquantino moved to dismiss the wire fraud charge because the United States did not have a sufficient interest in enforcing Canada's revenue laws.⁶⁴ The District Court denied the motion and the jury convicted the Pasquantinos of wire fraud.⁶⁵ The Pasquantinos appealed to the Fourth Circuit Court of Appeals and the panel reversed the convictions.⁶⁶ The Fourth Circuit reheard the case *en banc* and vacated the panel's decision and affirmed the conviction.⁶⁷ The Court concluded "the common-law Revenue Rule, rather than barring any recognition of foreign revenue law, simply allowed courts to refuse to enforce the tax judgments . . . and therefore did not preclude the Government from prosecuting petitioners."⁶⁸ The Fourth Circuit also held Canada had a right to receive tax revenue as "'money or property' within the meaning of the wire fraud statute."⁶⁹ The Supreme Court of the United States granted certiorari "to resolve a conflict in the Court of Appeals over

⁶² Pasquantino, *supra* note 20, at 353. While in New York, the Pasquantinos ordered liquor from discount package stores in Maryland over the phone. *Id.* They hired Hilts to hid liquor in their cars and drive over the Canadian border without declaring the liquor or paying the required taxes. *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 353-54.

⁶⁵ *Id.* at 354.

⁶⁶ *Id.* Pasquantinos argued "their prosecution contravened the common-law revenue rule, because it required the court to take cognizance of the revenue laws of Canada." *Id.*

⁶⁷ *Id.* (citing Pasquantino v. U.S., 336 F.3d 321 (4th Cir. 2003)).

⁶⁸ *Id.* (citing Pasquantino v. U.S., 336 F.3d 321, 327-29 (4th Cir. 2003)).

⁶⁹ *Id.* (citing Pasquantino v. U.S., 336 F.3d 321, 331-32 (4th Cir. 2003)).

whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.”⁷⁰

The Court first considered if the conduct committed by the Pasquantinos fell within the literal terms of the wire fraud statute.⁷¹ Next, the Court contemplated the Revenue Rule argument.⁷² One of the biggest arguments against the Revenue Rule comes from the fact that “this is a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct” not a suit to recover foreign tax liability.⁷³ Like the Second Circuit, the Supreme Court addressed the issue of indirect versus direct enforcement of taxes. The Court stated, “The line the Revenue Rule draws between impermissible and permissible ‘enforcement’ of foreign revenue law has therefore always been unclear.”⁷⁴

⁷⁰ *Id.*

⁷¹ *Id.* at 355-59. The wire fraud statute “prohibits using interstate wires to effect ‘any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.’” *Id.* at 355 (citing 18 U.S.C. § 1343 (2000)). The Court found Canada had a property right to the uncollected taxes. *Id.* The Court also found the Pasquantinos committed a scheme to defraud Canada of its property and fell directly within the terms of the wire fraud statute. *Id.* at 357.

⁷² *Id.* at 359-70. “We are aware of no common-law revenue case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes.” *Id.* at 360.

⁷³ *Id.* at 362. This is an argument used later by the Second Circuit as to why they declined to follow *Pasquantino* for a civil RICO case brought by a foreign country. See *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005).

⁷⁴ *Id.* at 367. “This court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws.” *Id.* at 367-68 (citing *In re Hollins*, 139 N.Y.S. 713, 717 (Sur. Ct. 1913)). “It is sometimes difficult to draw

The Court convicted Pasquantino of wire fraud.⁷⁵ The majority found that the revenue rule was not a clear bar to the case.⁷⁶ The Court also noted Rule 26.1 of the Federal Rules of Criminal Procedure provided sufficient means for courts “to resolve the incidental foreign law issues they may encounter in wire fraud prosecutions.”⁷⁷ The Supreme Court also stated their interpretation did not give the wire fraud statute extraterritorial effect, disputing Justice Ginsburg’s assertion in his dissent that it did.⁷⁸

Justice Ginsburg wrote for the dissent asserting statutes should be domestic not extraterritorial.⁷⁹ Ginsburg only mentioned the RICO statute once at the end of the dissent.⁸⁰

the line between an issue involving merely recognition of a foreign law and indirect enforcement of it.” *Id.* at 368 (citing ALBERT VENN DICEY, J.H.C. MORRIS, & LAWRENCE COLLINS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 90 (13th ed. 2000)).

⁷⁵ *Id.* at 371.

⁷⁶ *Id.* at 368.

⁷⁷ *Id.* at 370.

⁷⁸ *Id.* at 371. The Court stated, “Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States This domestic element of petitioners’ conduct is what the Government is punishing . . . no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant.” *Id.*

⁷⁹ *Id.* at 373. “The Court has “adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application.”” *Id.* (citing *Small v. United States* 544 U.S. 385, at 388-89 n. 3 (2005)).

⁸⁰ *Id.* at 383. “A finding that particular conduct constitutes wire fraud therefore exposes certain defendants to the severe criminal penalties and forfeitures provide in both RICO, see § 1963 (2000 ed.), and the money laundering statute, § 1956(a), (b) (2000 ed. And Supp. II).” *Id.*

3. European Community v. RJR Nabisco, Inc. (EC I & II)

The European Community (EC)⁸¹ brought a claim in the United States District Court for the Eastern District of New York against RJR Nabisco, Inc. for lost tax revenue due to cigarette smuggling.⁸² After dismissal of their complaint from the district court due to the Revenue Rule, European Community sought an appeal from the Second Circuit Court of Appeals.⁸³

The Second Circuit relied heavily on their previous opinion in *Attorney General of Canada v. R.J. Reynolds* (Canada).⁸⁴ The EC tried to distinguish its suit from by using the USA PATRIOT Act of 2001.⁸⁵ The Second Circuit did not agree with this assertion and stated “the Patriot Act and its legislative history do not constitute the clear evidence of congressional intent necessary to find that Congress has abrogated the Revenue Rule.”⁸⁶ The EC, then, filed a petition for writ of certiorari with the Supreme

⁸¹ The European Community consisted of the Kingdom of Belgium, Republic of Finland, French Republic, Hellenic Republic, Federal Republic of Germany, Italian Republic, Grand Duchy of Luxembourg, Kingdom of the Netherlands, Portuguese Republic, and Kingdom of Spain.

⁸² *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, 127 (2d Cir.2004). The action was “three actions treated as related and decided together.” *Id.* at 128. The EC alleged the defendants “directed and facilitated contraband cigarette smuggling by studying smuggling routes, soliciting smugglers, and supplying them with cigarettes.” *Id.* Using forged shipping documents, the smugglers routed the cigarettes “so as to avoid paying the customs duties and excise taxes of the countries into which the cigarettes were smuggled.” *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 131-32.

⁸⁵ *Id.* at 127, 136-38 (2004). “Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, which amended RICO to . . . allow foreign sovereigns to use RICO to impose liability on domestic tobacco companies that attempt to evade their revenue laws.” *Id.* at 127.

⁸⁶ *Id.*

Court.⁸⁷ The Court granted the petition, vacated the Court of Appeals judgment, and remanded the case back to the Second Circuit “for further consideration in light of *Pasquantino v. United States*.”⁸⁸

Normally the Second Circuit is “bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court.”⁸⁹ An exception arises “where there has been an intervening Supreme Court decision that casts doubt on [the Second Circuit’s] controlling precedent.”⁹⁰ Using this exception rule, the Second Circuit reinstated its decision from EC II.

The Second Circuit considered *Pasquantino* and its impact on civil RICO cases.⁹¹ The Court pointed out the government’s decision to represent Canada in the case.⁹² The United States, by bringing the case on behalf of Canada greatly diminished the

⁸⁷ *European Community v. RJR Nabisco*, 544 U.S. 1012 (2005).

⁸⁸ *Id.*

⁸⁹ *European Cmty. v. RJR Nabisco*, 424 F.3d 175, 179 (2d Cir. 2005) (citing *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)).

⁹⁰ *Id.* (citing *Union of Needletrades, Indust. & Textile Empl. v. INS*, 336 F.3d 200, 210 (2d Cir. 2003)).

⁹¹ *Id.* at 180.

⁹² *Id.* By the government representing Canada, the Court “found ‘little risk of causing the principal evil against which the Revenue Rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns.’” *Id.* (citing *Pasquantino v. United States*, 544 U.S. 349, 368 (2005)). The action implies the Executive Branch has assessed the risk of pursuing a case in United States courts. *Id.* (“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.” *Id.* at 181 (citing *Pasquantino v. United States*, 544 U.S. 349, 368 (2005))).

concerns about separation of powers.⁹³ The United States involvement served as a key factor in *Pasquantino*.⁹⁴ The Second Circuit pointed out the United States lack of involvement as a crucial difference between the two cases.⁹⁵

The Court also asserted *Pasquantino* reaffirmed the Circuit's previous decisions "under which the Revenue Rule was held inapplicable to § 1343 smuggling prosecutions."⁹⁶ The Court asserted the Supreme Court decision implies a suit with a secondary objective "irrelevant to revenue collection might still be barred by the rule."⁹⁷ The substance of the claim had not changed and remained "that the defendants violated foreign tax laws."⁹⁸ The Second Circuit found no reason to deviate from its previous decision and reinstated the verdict from EC I.⁹⁹

Next, this Comment will argue that the Revenue Rule should be limited in scope so that it no longer bars any RICO claims brought by foreign countries in two ways: by (1) never allowing the Revenue Rule to trump RICO claims or (2) completely abolishing the Revenue Rule and allowing America to interpret foreign countries' tax laws. In the alternative, this

⁹³ *Id.* at 181.

⁹⁴ *Id.*

⁹⁵ *Id.* "The executive branch has given us no signal that it consents to this litigation." *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 182. The EC points out that the Supreme Court's decision adopts a narrow version of the Revenue Rule. *Id.* at 181. The narrow version of the rule bars only suits "whose 'whole object' is the collection of foreign tax revenue." *Id.* The Court rejected this argument.

⁹⁸ *Id.* at 182.

⁹⁹ *Id.* at 182-83.

comment contends that if the Revenue Rule cannot be restricted, (3) foreign countries should appeal to the United States government to bring these claims on their behalf.

II. Argument

A. Limiting the Revenue Rule

1. Never Allowing RICO Claims to Be Banned by the Revenue Rule

In RICO cases, the Revenue Rule should be restricted so that it does not bar RICO claims. Smuggling and other racketeering crimes occur not only in the United States but also in foreign countries.¹⁰⁰ There are laws in place in the United States to protect companies and persons from smuggling, counterfeiting, and fraud. We have implemented civil and criminal proceedings to handle these cases. This protection should extend to foreign countries with which we engage in treaties and contracts. We consider most of these countries allies and enter into trade agreements with them.¹⁰¹ This does not stop American citizens or corporations from engaging in the same smuggling, counterfeiting, and fraud we see in the United States in these foreign countries.¹⁰² Since these acts occur overseas, these countries need a way to procure remedies from the crimes committed against them.

¹⁰⁰ See Pasquantino, *supra* note 20; European Cmty v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004).

¹⁰¹ There are some arguments for dismissing the Revenue Rule only in those cases in which we have a treaty with the foreign country. Those arguments are outside the scope of this Comment.

¹⁰² See note 100.

RICO allows for foreign countries to bring claims against these wrong doers in the United States.¹⁰³ By allowing the Revenue Rule to bar these claims it effectively renders RICO useless in protecting these countries and deterring the very conduct it seeks to prohibit and outlaw. If the Revenue Rule is to continue to exist in common law tradition, it needs to be limited in scope so as not to interfere with RICO claims brought before United States District Courts. Statutory laws codified in the United States Code are not normally trumped by judicially made common law rules. One canon of statutory interpretation states, “statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”¹⁰⁴ RICO’s blatant wording allows foreign claims to be brought into the district courts of the United States in spite of the Revenue Rule’s long-established principles. RICO defines racketeering as “any act which is indictable under . . . [offenses] relating to trafficking in contraband cigarettes . . . any offense involving fraud . . . or . . . importation . . . buying, selling, or otherwise dealing in a controlled substance or listed chemical”¹⁰⁵ The Act goes on to state, “It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control

¹⁰³ 18 U.S.C.A. § 1964(a) (1995); 18 U.S.C.A. § 1965(a) (1970); 18 U.S.C.A. § 1961(1)(b) (2013).

¹⁰⁴ *Pasquantino*, *supra* note 20, at 359.

¹⁰⁵ 18 U.S.C.A. § 1961(1).

of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”¹⁰⁶ These cases interrupt foreign commerce. When cigarette and liquor smuggling rings commence, though most of the activities may be conducted in the United States, there is still wire and mail fraud transactions that not only cross interstate lines, but interrupt foreign commerce as well.

The statute “‘Speaks directly’ to the question addressed by the common law,” which is can the United States interpret the foreign laws of other states.¹⁰⁷ RICO explicitly gives the United States the jurisdiction unbarred by the Revenue Rule to hear these cases brought by other countries. In addition there is “no common-law Revenue Rule case decided as of 1952 [the year the wire fraud statute was created] that held or clearly implied that the Revenue Rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes.”¹⁰⁸ Not only does the RICO wording explicitly override the Revenue Rule’s intent, there is no case history to support the revenue barring such claims. Around the time of the creation of the Revenue Rule, courts “considered void foreign contracts that lacked tax stamps required under foreign revenue law.”¹⁰⁹ If it was not valid under the foreign court, it was not valid in the English courts. The line the Revenue Rule

¹⁰⁶ 18 U.S.C.A. § 1962(b).

¹⁰⁷ *Pasquantino*, *supra* note 20, at 359 (citing *United States v. Texas*, 507 U.D. 529, 534 (1993)).

¹⁰⁸ *Id.* at 360.

¹⁰⁹ *Id.* at 367 (citing *Alves v. Hodgson*, 101 Eng. Rep. 953, 955 (K.B. 1797); *Clegg v. Levy*, 170 Eng. Rep. 1343 (N.P. 1812)).

draws has been unclear and the clarity of the RICO Act clearly keeps the ambiguous rule from barring its suits.

The Restatement (Third) of Foreign Relations Law § 483 states, “Courts in the United States *are not required* to recognize or to enforce judgments for the collection of taxes . . .”¹¹⁰ This does not mean that they cannot. States are not required to deny enforcing foreign tax judgments. The Restatement gives the United States the option of whether or not to recognize or enforce the judgment.

The Court of Appeals for the Fourth Circuit and ultimately the Supreme Court agreed with this idea.¹¹¹ Quoting the Fourth Circuit, the Supreme Court agreed, “the common-law Revenue Rule, rather than barring any recognition of foreign revenue law, simply allowed courts to refuse to enforce the tax judgments of foreign nations”¹¹² The Revenue Rule should not become an easy way out for courts not to hear disputes when their citizens are committing crimes abroad.

In limiting the Revenue Rule in foreign RICO cases, it would be wise to look at direct versus indirect tax claims. Because the revenue gives the option of whether a United States Court will hear a case on foreign tax issues, if the tax law is only indirectly related to case “as a factor to be used in the calculation of

¹¹⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: RECOGNITION AND ENFORCEMENT OF TAX AND PENAL JUDGMENTS § 483 (1987) (emphasis added).

¹¹¹ Pasquantino, *supra* note 20, at 354-55 (citing U.S. v Pasquantino, 336 F.3d 321, 327-29 (4th Cir. 2003)).

¹¹² *Id.*

damages” it should not be barred.¹¹³ In this case, the court would not be interpreting foreign state’s tax laws because “the RICO statute itself makes [the laws] relevant to that calculation.”¹¹⁴ Here, foreign sovereignties would not be asking our courts to interpret and enforce foreign laws; they are asking the courts to grant a judgment “from the violation of a United States statute.”¹¹⁵

The Revenue Rule’s philosophy is embedded in refusing the “obligation to further the governmental interests of a foreign sovereign.”¹¹⁶ But by hearing cases that only indirectly relate to foreign taxes, we would not be furthering foreign sovereignties interests in their states, but “further[ing] American’s sovereign interests [by entertaining] suits brought under federal statutes, and to award the damages that such statutes establish.”¹¹⁷ Creating and following the RICO statutes advances American’s interests and it is only indirectly that foreign states may be aided. America cannot pick and choose to follow her laws when they are convenient or they do not like the plaintiff bringing suit, she must follow the rules her Congress has enacted and take the cases presented before her, even though these decisions may inadvertently aid a foreign country.¹¹⁸ RICO’s primary function “is ‘not merely to

¹¹³ See, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 135 (Second Cir. 2001) (Circuit Judge Calabresi dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 136 (Circuit Judge Calabresi dissenting) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964)).

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“Whether our decision today indirectly assists [foreign states] in keeping smugglers at bay or assists them in the collection of taxes, is not our Court’s

compensate victims but . . . to [eliminate] racketeering activity.”¹¹⁹ It may be “true that [United States courts] will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the enforcement of such revenue laws.”¹²⁰ Indirectly using overseas tax laws to accomplish this goal does not diminish the Revenue Rule at all, but furthers the legitimacy of the American court systems. If the Revenue Rule cannot be restricted to allow all foreign RICO claims to be heard, then it should be limited to allowing claims that only need the indirect involvement of foreign laws.

The Second Circuit in *European Community v. RJR Nabisco, Inc.*, stated “A claim that triggers the Revenue Rule is barred unless the plaintiffs establish that superior law, *such as a federal statute* that provides the applicable right of action, abrogates the rule in the context in which the plaintiffs seek to enforce their tax laws.”¹²¹ When dealing with issues that would impact foreign relations, the statute seeking to abrogate the common law “must speak directly to the matter in order to

Concern.” (quoting *United States v. Trapilo*, 130 F.3d 547, 553 (Second Cir. 1997)))

¹¹⁹ *Id.* at 137 (citing *Rotello v. Wood*, 528 U.S. 549, 557 (2000)).

¹²⁰ Pasquantino, *supra* note 20, at 367-68 (citing *In re Hollins*, 79 Misc. 200, 208 (Sur. Ct. 1913)).

¹²¹ *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, 132 (emphasis added) (citing *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 at 113, 119, 126.).

abrogate it.”¹²² Though the Second Circuit led by Judge Sotomayor did not agree, RICO is a statute that explicitly abrogates the Revenue Rule.

2. Should the Revenue Rule Be Abolished Completely?

If the Revenue Rule cannot be limited in scope it should be abolished in its entirety. Though the rule is almost three hundred years old,¹²³ it does not specifically deny courts the right to hear foreign tax issues.¹²⁴ Though there is an argument that the United States is unable to interpret the laws of foreign states. There is no evidence as to why “proving or interpreting foreign law would be any greater than in other civil suits involving foreign law.”¹²⁵ Implementing certain court processes easily overcomes this argument. Foreign countries must provide experts as well as translated versions of the appropriate laws to be interpreted. Also they should provide experts to testify on the legitimacy of the law. This poses an expensive burden on the foreign company, but if they are adamant in bringing claims for taxes, then this is not an impossible task. The foreign country’s laws then become an issue of fact that must be proven before the case can proceed. Once proven, the United States courts are now qualified to interpret the

¹²² *Id.* (internal quotation marks omitted) (citing Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 at 129).

¹²³ Mallinak, *supra* note 3, 79.

¹²⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *Supra* note 110 (“Courts in the United States are not required to recognize or enforce . . . other states.”).

¹²⁵ Thomas B. Stoel, *The Enforcement of Foreign Non-criminal Penal & Revenue Judgments in England & the United States*, 16 INT’L & COMP. L.Q. 663, 668 (1967).

laws and will proceed in the cases with adequate understanding of those foreign laws. This would not be too complicated to enforce in courts because “Federal Rule of Criminal Procedure 26.1 . . . [sets] forth a procedure for interpreting foreign law that improves on those available at common law. [I]t permits a court . . . to consider ‘any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.’”¹²⁶ There is also a similar rule in the Federal Rules of Civil Procedure. Rule 44.1 states, “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. The court’s determination must be treated as a ruling on a question of law.”¹²⁷ This would prevent one of the two concerns the Revenue Rule seeks to address: “policy complications and embarrassment [that] may follow when one nation’s courts analyze the validity of another nation’s tax laws.”¹²⁸ The second concern is addressed later in this Comment.

The Second Circuit in *Attorney General of Canada v. R.J. Reynolds*, lays out a set of criticisms for the Revenue Rule. These criticisms show why the rule should no longer be used and in modern times have become obsolete. Advances in laws and technology make it possible to arrange for easy “instantaneous

¹²⁶ Pasquantino, *supra* note 20, at 370.

¹²⁷ Fed. R. Civ. Pro. 44.1.

¹²⁸ *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175, 180 (2d Cir. 2005).

transfer of assets.”¹²⁹ In the twenty-first century, “virtually all states impose and collect taxes.”¹³⁰ The fact that all states impose taxes and the ability to instantaneously transfer funds and assets makes enforcing judgments for foreign states much easier. There is no long complicated process to transfer one parties funds in America to pay off the debt they owe Canada. The rule has little basis and simply survives because “it [has] been in effect for [over] two centuries.”¹³¹ Since its appearance in 1729,¹³² there has been “scanty reasoning justifying the rule’s emergence.”¹³³ The rule simply appeared with no justification and in its beginnings did not “provide the basis of decision.”¹³⁴ If courts follow the rule as it was created, it should not provide the basis for decisions in these RICO cases when it was not originally used to do so, even if it has been used for hundreds of years. Though *stare decisis* is typically the method followed by courts, centuries old traditions should be broken when they become no longer necessary.

In addition to being technologically obsolete, the Revenue Rule is not needed because there are “other doctrines now used to bar enforcement of foreign claims [that] would remain in

¹²⁹ Attorney General of Canada v. R.J. Reynolds, 268 F.3d 103, 125 (Second Cir. 2001) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Reporter’s Note 2 (1987)).

¹³⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 110 (Reporter’s Note 2).

¹³¹ *Id.*

¹³² The Attorney General v. Lutwydige & Al’, 145 Eng. Rep. 674 (Ex. Div. 1729).

¹³³ Canada, 268 F.3d at 125.

¹³⁴ *Id.*

effect.”¹³⁵ The United States could use the principle of *forum non conveniens* to take care of certain civil cases in the absence of the Revenue Rule. The Restatement (Third) of Foreign Law Relations § 421 outlines when a state has jurisdiction to adjudicate.¹³⁶ If these criteria are not met then the state cannot hear the case. This is a more concrete and effective rule than the Revenue Rule. Section 421(1) states, “A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the *relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.*”¹³⁷ Section 421(2) details the qualification for a person to be tried in a state.¹³⁸ In these RICO cases, if the company defendants are not United States citizens as classified by § 421(2)(e) then they would be barred from bringing the claim in the United States.¹³⁹ There is no longer a need for the Revenue Rule to bar these claims. In addition to *forum non conveniens*, “local public policy could still be invoked.”¹⁴⁰ If adjudicating and enforcing a foreign judgment offended public policy then that justification could bar the claim. Changing times are forcing the Revenue Rule to retire making way for other measures to bar these civil RICO claims in its place.

¹³⁵ Stoel, *supra* note 125, at 668.

¹³⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987).

¹³⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(1) (1987).

¹³⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2) (1987).

¹³⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421(2)(e) (1987). (“[T]he person, if a corporation or comparable juridical person, is organized pursuant to the law of the state”) *Id.*

¹⁴⁰ Stoel, *supra* note 125, at 669.

The Second Circuit argues that “the foreign affairs and separation of powers rationales for the Revenue Rule” overrides the many points against it.¹⁴¹ The Court specifically focuses on the fact that the United States and Canada have “recognized the vitality of the Revenue Rule and have a well-established treaty process that has strictly limited the extent to which each government can pursue its tax claims.”¹⁴² The Court does not address the issue of if the country bringing the claim does not have a treaty process established with the United States. Treaties, as discussed later in this comment, are not always the best way to overcome the Revenue Rule. Even if the two countries do have a treaty, then they would not be barred by the Revenue Rule, but by the four corners of the signed treaty.

The Revenue Rule also seems to contradict the act of state doctrine. The act of state doctrine states “a court presumes the validity of a foreign state’s laws within that state’s territory.”¹⁴³ This in essence precludes courts in the United States from inquiring about the validity of a foreign state’s domestic law.¹⁴⁴ This law is assumed to be valid in the foreign country and it is not up to American courts to try and prove the law’s invalidity. In opposition, “the revenue presumes the extraterritorial unenforceability of a foreign sovereign’s tax laws.”¹⁴⁵ The Second

¹⁴¹ Attorney General of Canada v. R.J. Reynolds, 268 F.3d 103, 125 (2d Cir. 2001).

¹⁴² *Id.*

¹⁴³ *Id.* (citing *Galu v. Swissair*, 873 F.2d 650, 653 (2d Cir. 1989)).

¹⁴⁴ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

¹⁴⁵ *Canada*, 268 F.3d at 125.

Circuit disagreed that the two were completely inconsistent and instead sided with the idea that “the rules are consistent and ‘represent two different ways in which courts steer clear of foreign affairs in different contexts.’”¹⁴⁶ This argument when combined with the Supreme Court’s statements in *Sabbatino*, seem to provide the only argument in favor of the revenue not easily disputed.¹⁴⁷ The act of state doctrine arguably enables “courts to avoid entanglement with questions about the underlying validity of a foreign sovereign’s laws.”¹⁴⁸

After the ruling in *Sabbatino*, the legislature enacted 22 U.S.C.A. § 2370 limiting the act of state doctrine. It disallows any court to “decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state”¹⁴⁹ This included “the principles of compensation”¹⁵⁰ If the President determines in any case an “application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 125-26 (citing *Banco Nacional de Cuba v. Peter L. F. Sabbatino*, 376 U.S. 398, 423 (1964)). (The act of state doctrine “arises out of the basic relationships between branches of government in a system of separation of powers The Judicial Branch[’s] engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere”).

¹⁴⁸ *Id.* at 126.

¹⁴⁹ 22 U.S.C.A. §2370 (2).

¹⁵⁰ *Id.*

this effect is filed on his behalf in that case with the court,” the act of state doctrine will be applied.¹⁵¹ This limitation helps the Revenue Rule trump the act of state doctrine.

The majority in *Attorney General of Canada v. R.J. Reynolds*¹⁵² argues that the concern interpreting other countries’ statutory law is “beyond the purview of the courts of this country . . . [and] the pragmatic reason that it is very complicated.”¹⁵³ This argument has been tackled and rejected by the very court which brought it. In *United States v. Trapilo*,¹⁵⁴ the Second Circuit undertook “the question whether a scheme . . . to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute.”¹⁵⁵ In that case the Revenue Rule provided no reason to bar the claim.¹⁵⁶ “Because the statute prohibited schemes to defraud regardless of their success [like RICO], we assumed that we could find a violation without delving into the intricacies of Canadian law.”¹⁵⁷ Addressing the same question in *United States v. Pierce*,¹⁵⁸ the Court first established a property right and then, if there is a conviction, “the sentencing guidelines require that the sentence be imposed based on the

¹⁵¹ *Id.*

¹⁵² *Canada*, 268 F.3d at 135.

¹⁵³ *Id.* at 137 (Circuit Judge Calabresi dissenting).

¹⁵⁴ 130 F.3d 547 (2d Cir. 1997).

¹⁵⁵ *Canada*, 268 F.3d at 138 (Circuit Judge Calabresi dissenting) (citing *United States v. Trapilo*, 130 F.3d 547, 548 (2d Cir. 1997)).

¹⁵⁶ *Id.* (Circuit Judge Calabresi dissent) (citing *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997)).

¹⁵⁷ *Id.* (Calabresi, J., dissenting) (citing *United States v. Trapilo*, 130 F.3d 547, 552-53 (2d Cir. 1997)).

¹⁵⁸ *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000).

amount of tax revenue lost.”¹⁵⁹ These guidelines make it necessary to consider foreign tax laws making the Revenue Rule claims unneeded. “The [sentencing] guidelines mandate this degree of involvement to determine . . . the existence of a RICO civil action and to calculate the proper damages under that action.”¹⁶⁰ The Revenue Rule is no longer needed as RICO transcends the Revenue Rule’s boundaries and “has been effectively rejected by [the Second Circuit].”¹⁶¹ Though *Trapilo* and *Pierce* were both criminal cases, “there is no reason why the same courts must be deemed incompetent to undertake an identical analysis in civil RICO cases.”¹⁶² This fact is in the light “of the Supreme Court’s consistent refusal to treat criminal and civil RICO actions differently.”¹⁶³ Also there has been no stated reason for the Revenue Rule to treat civil and criminal cases differently.¹⁶⁴

¹⁵⁹ 268 F.3d at 138 (Calabresi, J., dissenting) (citing *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 139.

¹⁶³ *Id.* (Calabresi, J., dissenting). (“The Court made clear that it would not interpret civil RICO narrowly in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985). The Court noted that its broad interpretation of civil RICO ‘is amply supported by our prior cases and the general principles surrounding the statute.... This is the lesson not only of Congress’s self-consciously expansive language and overall approach, ... but also of its express admonition that RICO is to “be literally construed to effectuate its remedial purposes.”’ *Id.* at 497–98 (citation omitted) (quoting Pub.L. 91–452 § 904(a), 84 Stat. 947)).

¹⁶⁴ *Id.* at 139.

*B. Gaining Executive Consent, Allowing the U.S. to Try
Foreign RICO Cases*

The Second Circuit argues vigorously that one of the main differences between *Pasquantino* and *European Community* is that the United States was the party bringing the claim in *Pasquantino*.¹⁶⁵ The Court established “the fact of the prosecution [in *Pasquantino*] implies an assessment of risk by the executive branch on which the courts may rely” and by bringing the 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.”¹⁶⁶ Executive consent, therefore, is another way to circumvent the Revenue Rule and try foreign RICO claims.

Gaining executive consent in these foreign RICO cases, tackles the second problem the Revenue Rule seeks to address: “that the executive branch, not the judicial branch, should decide when our nation will aid others in enforcing their tax laws.”¹⁶⁷ By the executive branch bringing these cases it implies “there is little reason to worry about infringing on the executive’s sphere of decision-making, and the rule will not be applied.”¹⁶⁸ Once executive consent is given and the United States brings the claim,

¹⁶⁵ *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175, 181 (2d Cir. 2005).

¹⁶⁶ *Id.* at 180-81.

¹⁶⁷ *Id.* at 180 (citing *Attorney General of Canada v. R.J. Reynolds*, 268 F.3d 103, 131 (2d Cir. 2001)).

¹⁶⁸ *Id.* (citing *Attorney General of Canada v. R.J. Reynolds*, 268 F.3d 103, 132 (2d Cir. 2001)).

there is “little risk of causing the principal evil against which the Revenue Rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns.”¹⁶⁹ The United States has assessed the risk and the impact bringing a case of this nature may have on foreign relations.¹⁷⁰ It also means there is “little danger of causing international friction.”¹⁷¹ This allows the suit to bypass the Revenue Rule as it will not be triggered in a case brought by the United States in the United States.

When the United States brings these foreign RICO cases on behalf of other countries it also eliminates the concern of separation of powers issues.¹⁷² The Second Circuit found that “where the two political branches have approved a legal action that may advance the policies of a foreign government, the courts do not overstep their authority by allowing the action to go forward.”¹⁷³ This eliminates almost all concerns courts have had when considering these foreign RICO cases and it allows the Revenue Rule to remain intact as it has for over three centuries.¹⁷⁴ It also keeps the courts from going beyond their powers and dealing with “the relations between the states themselves, with

¹⁶⁹ *Id.* (citing Pasquantino, *supra* note 20, at 369.

¹⁷⁰ *Id.* at 180-81.

¹⁷¹ *Id.* at 180 (citing Pasquantino v. United States, 544 U.S. 349, 369 (2005)).

¹⁷² *Id.* at 181.

¹⁷³ *Id.*

¹⁷⁴ An issue may arise as to how a country may properly secure Executive permission to bring a foreign RICO case but that is not covered within the scope of this Comment.

which the courts are incompetent to deal.”¹⁷⁵ The Executive is more in tune to the relationships between the United States and other countries. By requiring foreign states to obtain Executive permission and allowing them to be represented by the state, we bypass the problem of possibly creating international tension between allies. An assumption can be made that the Executive, in bringing these types of prosecutions, has assessed any impact this type of case could have on foreign relationships “and concluded that it poses little danger of causing international friction.”¹⁷⁶ There are no common-law courts that have used the Revenue Rule to bar a case brought by the United States government on behalf of a foreign state.¹⁷⁷

For these reasons, an alternative to the revenue barring foreign RICO claims, these countries should seek the aid of the United States government to bring their cases.

III. Conclusion

With roots reaching back to the eighteenth century, the Revenue Rule has firmly situated itself in American jurisprudence. Now over three centuries later, it has become entangled in a legal battle with the Racketeering Influence and Corrupt Organizations Act of 1970 (RICO). These two legal titans have battled in the United States District Courts, United States Courts of Appeals, and the Supreme Court. In theory, the Revenue Rule bars civil RICO

¹⁷⁵ *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (citing *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929)).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

claims by foreign countries denying them the remedies they seek after falling victim to the wrongdoings of Americans.

Three hundred years after its development the Revenue Rule has become obsolete. This common law rule no longer has a place within American jurisprudence and should be released from legal use. With changing technology and the evolution of instantaneous currency exchange, the Revenue Rule has lost its standing in the legal world. Unfortunately, because of its survival through centuries of legal history, some feel the Revenue Rule still has a place in the court room. In this case, the Revenue Rule should be restricted so as to never bar civil RICO claims brought by foreign countries seeking justice in America. When American citizens or companies commit crimes abroad, the ones offended should be able to seek a remedy. By allowing RICO claims to supersede the Revenue Rule, we allow justice to be served on the very people RICO seeks to punish. As a last effort, if the Revenue Rule cannot be abolished or restricted, foreign countries should seek the assistance of the American government in bringing a case in the United States against their aggressors. By bringing these suits, the government can assure courts that any international problems will be circumvented. This also keeps courts from invoking the Revenue Rule. With the United States bringing the claim, there is no longer the issue of interpreting foreign revenue laws. This solves any doubts courts may have in adjudicating these types of cases. These options provide an ending to the ongoing battle between the Revenue Rule and civil RICO.