

December 20, 2007

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Introduction

Some academic studies of recent years have argued with few provisos for abandonment of the rule traditional in both common- and civil-law jurisdictions barring (in the absence of a specific treaty engagement to the contrary) the enforcement of foreign tax claims and judgments.¹ There has been discussion also of measures introduced by certain governments to counter the tax advantage of emigration for owners of appreciated assets. These have included "exit taxation", or the deemed sale for capital gains tax purposes of certain assets upon emigration.² The United States has extended liability to tax to some classes of income and gains in cases of "expatriation to avoid tax".³ It has imposed capital gains tax on certain transfers of appreciated property to foreign entities.⁴ The United Kingdom has imposed a migration charge on trusts.⁵ The debate on such expansion of the

¹ William J. Kovach, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUSTON J. INT'L L. 265 (2000); Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, 22 GA. J. INT'L & COMP. L. 609 (1992); Richard E. Smith, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, 1981 U. ILL. L. REV. 241 (1981); Vitaly S. Timokhov, *Enforcing Tax Judgements Across Borders: How Collection Assistance Can Overcome Limitations of the "Revenue Rule"*, Part 1, 14 J. INT'L TAX'N 34 (June 2003), Part 2, 14 J. INT'L TAX'N 20 (Sept. 2003).. Cf. Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J., OF COMP. & INT'L L. 79 (2006); Note, *International Enforcement of Tax Claims*, 50 COLUM. L. REV. 490 (1950). See more generally Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1967) and Thomas B. Stoel, Jr., *The Enforcement of Foreign Non-criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L & COMP. L.Q. 663 (1967); and see text at n. 138, *infra*. The evolving nature of "mutual assistance" in tax matters is reviewed in UNITED NATIONS, AD HOC GROUP OF EXPERTS ON INTERNATIONAL COOPERATION IN TAX MATTERS, TENTH MEETING, GENEVA, 10-14 Sept. 2001, *Mutual Assistance in Collection of Tax Debts*, ST/SG/AC.8/2001/L.2.

² *Infra*, nn. 286-289; compare 108th Cong., 1st Sess., S. 260, "To amend the Internal Revenue Code of 1986 to prevent the continued use of renouncing United States citizenship as a device for avoiding United States taxes" (incorporating in the IRC mark-to-market provisions and deemed sale for capital gains tax purposes). Transfer of assets abroad may also invoke assignment of income issues: *Inland Revenue Commissioners v. John Lewis Properties, Plc.*, [2003] Ch. 523 (also addressing the characterization of payment as income or capital). And see Andrew Walker, *The Tax Regime for Individual Expatriates: Whom to Impress?*, 58 TAX LAW. 555 (2005).

³ Health Insurance Portability and Accountability Act of 1996 (H.R. 3103), Pub. L. 104-191, 110 Stat. 2093, § 511, 26 U.S.C. § 877 (2005); see JOINT COMMITTEE ON TAXATION, REVIEW OF THE PRESENT-LAW OF TAX AND IMMIGRATION TREATMENT OF RELINQUISHMENT OF CITIZENSHIP AND TERMINATION OF LONG-TERM RESIDENCY (JCS-2-03), Feb. 2003; Richard A. Westin, *Expatriation and Return: An Examination of Taxdriven Expatriation by United States Citizens, and Reform Proposals*, 20 VA. TAX REV. 75 (2000).

⁴ 26 U.S.C. § 1491 (2005); *Syufy v. United States*, 818 F.2d 1457 (9th Cir. 1987), *aff'g* 651 F. Supp. 1282 (N.D.Cal. 1972).

⁵ Section 80 T.C.G.A. 1992. See also ss. 739 to 746 I.C.T.A. 1988 taxation of income from assets transferred abroad. See draft clauses and HMRC Technical Notes published Dec. 5, 2005,

extraterritorial reach of taxation has scarcely taken into consideration important conflicts in nationality law, private international law, bankruptcy law, national tax-deferral and -sparing concessions, characterization⁶, tax years⁷, concepts of status, entity⁸ and title.⁹ Nor has it addressed the constitutional¹⁰ and public policy aspects generally, including what may prove to be true conflicts of governmental interests. Indeed, to the degree that taxpayer intent bears upon taxability, cross-border consistency may be particularly difficult to achieve.¹¹ As will be shown, both rejection of the so-called "Revenue Rule" and its application can give rise to situations of undue hardship.

Certain provisions of tax law may owe their enactment to political convenience in response to a very few notorious incidents of perceived abuse.¹² Individuals who are not the intended targets of these laws may fall accidentally into a tax trap, and obligations imposed upon them may conflict with the important national interests of other states and yet fall outside the protection of existing tax treaties. Uncritical recognition of foreign states' tax claims may conflict with the interest of the forum state in compensation or restitution to its own nationals.¹³ The issue has arisen, too, in deciding what credit or deference shall be given to foreign liquidation proceedings, especially in relation to financial institutions.¹⁴ Conflict between victims' rights to restitution and tax authorities' claims is common enough even at

<<http://www.hmrc.gov.uk/pbr2005/assets-abroad.pdf>> (visited Nov. 4, 2007). Taxation of most trusts where the settlor or his estate would be subject to inheritance tax was further tightened by the 2006 Finance Act (a 20% tax upon transfer, a periodic 10-yearly charge, and a further charge upon exit).

⁶ Thus: what constitutes realty and personalty, *Fair v. Commissioner*, 91 F.2d 218 (3rd Cir. 1937) (Cuban *hypotecas* as immovables); trusts and estates as separate tax entities: PLR 9413005 (Germany-U.S.; trust determined to constitute US domestic estate with no treaty exemption notwithstanding that assets not actually distributed to beneficiaries were taxable to them in Germany). A foreign tax may be characterized as other than an income tax, and credit denied: Rev. Rul. 76-536 (Irish wealth tax) citing *Biddle v. Commissioner*, 302 U.S. 573 (1938), Rev. Rul. 70-464 (Swiss wealth tax) citing *Lynch v. Turrish*, 247 U.S. 221 (1918); see RIA ¶ O-4233 for rulings and decisions on specific foreign taxes. For an argument as between characterization and timing in relation to a Canadian statute of limitations and method of accounting, see *Coulter Electronics, Inc. v. C.I.R.*, T.C. Memo 1990-186, *aff'd* 943 F.2d 1218 (11th Cir.).

⁷ Notoriously among them the conflict of tax years for cross-border cash-basis taxpayers resulting from the UK tax year, April 6 of one year to April 5 of the next (reflecting its origins in the ecclesiastical calendar). The INLAND REVENUE DOUBLE TAXATION MANUAL, DT1921, discusses the impact of varying tax treaty definitions of "tax year" on the taxation of employment.

⁸ *Liechtenstein Stiftung as trust: Estate of Swan v. Commissioner*, 24 T.C. 829 (1955), *acq.*, 1956-2 C.B. 8, *aff'd* in part and *rev'd* in part on other grounds, 247 F.2d 144 (2d Cir. 1957); PLR 200302005, PLR 200226012.

⁹ *Infra*, n. 367.

¹⁰ David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 DET. C.L. REV. 95.

¹¹ As in the use of domicile as criterion for taxation, "Intent" was rejected as constitutive of the offence of tax evasion in the absence of taxable profits, *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998), rejecting the rule applied in *United States v. Williams*, 875 F.2d 846 (11th Cir. 1989). Conflict in determination of domicile may be resolved by objective treaty tie-breaker criteria or through competent authority consultation.

¹² See n. 259 *infra*.

¹³ On the other hand, a court may find no difficulty in enforcing a foreign judgment by way of restitution, *United States v. Levy*, [2002] O.J. No. 2298 (Ont. Super. Ct.).

¹⁴ *In re Hourani*, 180 B.R. 58 (S.D.N.Y. 1995) (Jordanian bank liquidation). Liquidation of the BCCI group (*infra*, n. 156) led to numerous irreconcilable conflicts.

the domestic level.¹⁵ In cross-border situations of dual tax liability through facts of residence, domicile or citizenship and ambiguity as to existence of permanent establishment¹⁶ and to source of income, yet more tax anomalies can be expected. Imposition of tax at progressive rates on expatriates' income can, under certain conditions, fail a "reasonableness of burden" test, perhaps because of accident of overvalued ("confiscatory") official exchange rate¹⁷ or (for certain U.S. taxpayers) because of the pariah status of the place where they happen to live.¹⁸

It may well be that what is now in fact developing is a two-tier system, with expanded enforcement and new or extended tax liability directed chiefly at earnings and accumulations in tax havens and a pragmatic, benign neglect (in the sense of an absence of any active search for enforcement opportunities) of some classes of accidental hardship for the low-paid, especially abroad.¹⁹ The aim may be to see that all income is taxed *somewhere*, that tax competition and invitation to evasion are discouraged: a harmonization of tax laws at least in result, as well as increased transparency of the ownership of assets.²⁰ Even so, persistent conflict in state interests insures that no seamlessness in liability to tax is possible even among like-minded, developed countries. Furthermore, relying on forbearance or benign

¹⁵ *James v. United States*, 366 U.S. 213 (1961) (embezzled funds as taxable income, irrespective of "the manifest injury that its holding will inflict on those honest taxpayers, victimized by embezzlers, who will find their claims for recovery subordinated to federal tax liens" (dissent, 366 U.S. at 252)); *Bailey v. United States*, 415 F. Supp. 1305 (D.N.J. 1976) (fraudulent conveyance claims related to Robert Vesco affair).

¹⁶ Luc Hinnekens, *The Uneasy Application of the Current Concepts of Permanent Establishment and Corporate Residence to Cross-Border Electronic Commerce*, 1 TAX PLANNING INT'L E-COMMERCE, June, 1999, at 3.

¹⁷ *AMP Corp. v. United States*, 185 F.3d 1333 (Fed. Cir. 1999) (depreciating Brazilian currency); *Ujvari v. United States*, 212 F. Supp. 223 (S.D.N.Y. 1963) (wartime exchange rate for Hungarian currency). The issue has not often reached the courts in tax cases; however, a confiscatory exchange rate has been used to justify blocking transmission abroad of a legacy: *In re Bold's Estate*, 173 Misc. 545, 18 N.Y.S.2d 291 (Sur. N.Y. Co. 1940) (applying Surrogate's Court Act, § 269 (1940)).

¹⁸ "Restricted country" earnings, I.R.C. sec. 911(d)(8) (2006). However, income from such countries may fall under the dispositions regarding blocked foreign income, I.R.C. § 446, Rev. Rul. 74-351 as modified by Rev. Rul. 81-290. For the reciprocal problem in relation to the 1997 Philippines currency depreciation, see text at n. 329, *infra*.

¹⁹ It is not difficult to envisage circumstances under which tax approaches or exceed income and assets, *Texas v. Florida*, 306 U.S. 398 (1939) (multiple states assessing estate tax), or income, *Hubbard v. United States*, 2005 WL 567296, 95 A.F.T.R.2d 2005-1049 (W.D. Wash.) (incentive stock options and AMT). Similarly, *Tanner v. Commissioner*, 117 T.C. 237 (2001), *aff'd* 65 Fed. Appx. 508 (5th Cir. 2003); certain cases following *Commissioner v. Banks*, 543 U.S. 426 (2005) and *Schleier*, 515 U.S. 323 (1995) (contingent fees not deductible from certain taxable damage awards); and discussion and references on policy and prior law in *Porter v. U.S. Agency for Int'l Dev.*, 293 F.Supp.2d 152 (D.C. D.C. 2003). After the enactment of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976), certain U.S. citizen employees of foreign employers in high-cost of living countries (including such low-paid staff as teachers) found that their US tax exceeded cash income. *Cf. McDonald v. Commissioner*, 66 T.C. 223 (1976); *Stephens v. Commissioner*, 66 T.C. 226 (1976) (housing allowance in Japan); and *see infra*, n. 388 (exchange rates applicable upon sale of foreign assets). As for duplicative state taxation, *see CNA Holdings, Inc. v. Director of Revenue*, 818 A.2d 953 (Del. 2002) (gain taxed by multiple states to the extent of 187%, yielding 13% total state tax on the gain). The same result is possible, although perhaps less likely, following revisions to I.R.C. § 911 by the Tax Increase Prevention and Reconciliation Act of 2005 (H.R. 4297) ("TIPRA") signed into law May 17, 2006. Estate tax may exceed the net value of encumbered assets where secured loans are on a recourse basis: I.R.C. § 2106(b); *Estate of Fung*, 117 T.C. 247 (2001). Capital gains tax can exceed the yield on sale of heavily leveraged foreign assets (*infra*, n. 388).

²⁰ See text at n. 411, *infra*.

neglect by the fiscal authorities to deal with cases of extraterritorial imposition of tax liability in situations where enforcement is either impossible or inequitable risks damaging respect for tax laws generally.

Cross-border enforcement of judgments and claims

Whether by reason of comity²¹, reciprocity²², statute²³ or treaty²⁴, foreign civil judgments are commonly eligible for recognition and enforcement, subject only to jurisdictional²⁵ and public-policy²⁶ considerations, or to conflict with another final and conclusive judgment.²⁷ Public policy objections may refer to foreign procedural matters²⁸, to

²¹ *Hilton v. Guyot*, 159 U.S. 113 (1895); *Dart v. Dart*, 460 Mich. 573, 597 N.W.2d 82 (1999), *aff'g* 224 Mich. App. 146, 568 N.W.2d 353 (1997) (English divorce; renunciation of US citizenship); *Mori v. Mori*, 931 P.2d 854, 856 (Utah 1997), *discussed in* *Smith v. Toronto-Dominion Bank*, 1999 Colo. J. C.A.R. 667, 1999 U.S. App. LEXIS 1184 (unpub., 10th Cir. 1999); *Messina v. Petrocchino*, (1872) L.R. 4 P.C. 144; LAWRENCE COLLINS, ED., 1 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS [Dicey, Morris & Collins] 5-9 (14th ed., 2006) and Collins, *Comity in Modern Private International Law*, in James Fawcett, ed., REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW 89-110 (2002); *Workers' Compensation Board v. Amchem Products Inc.*, [1993] 1 S.C.R. 897 (Can.); *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72 (Can.: Florida default judgment). On comity as a defense, *see* *Bibio v. Coca Cola Company*, 239 F.3d 440 (2d Cir. 2000).

²² *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436 (D. Mass. 1994); Mass. Gen. L., ch. 235, § 23A; *but see* *Hilton v. Guyot*, 159 U.S. at 210 (1895). England: Foreign Judgments (Reciprocal Enforcement) Act 1933. Victoria, Australia: Judgments (Reciprocity) Acts, 1925, (Act No. 3395).

²³ Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261.

²⁴ European Union Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Brussels, Sept. 27, 1968, as amended by the Accession Convention of Oct. 9, 1978, consolidated version, 1990 O.J. (C 189) 1, superseded Mar. 1, 2002 by Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1; EEC-EFTA Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano, 1988 O.J. (L 319) 19; Canada-United Kingdom Civil and Commercial Judgments Convention Act, Ch. C-30, 1984, c. 32 (and underlying treaty dated Sept. 27, 1968). A U.S.-U.K. treaty was negotiated in the mid-1970s but never ratified by the United Kingdom, reportedly due to opposition by the Society of Lloyd's.

²⁵ *Hilton v. Guyot*, 159 U.S. at 202-03 (1895); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354 (10th Cir. 1996); *Kam-Tech Systems Ltd. v. Yardeni* 774 A.2d 644 (N.J. Super. 2001); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981) (Netherlands judgment; absence of due process); Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261, § 4(a)(2), (3). In *Attorney General of Canada v. Gorman*, 2 Misc.3d 693, 769 N.Y.S.2d 369 (Civil Ct., Queens Co. 2003), enforcement was refused because the motion for summary judgment contained no declaration of personal jurisdiction over the defendant. Examination of the court file by this writer showed that there was also ambiguity in the nature of the claim. The claim was apparently made on behalf of Human Resources Development Canada, although this appears only in a typewritten notation to a computer printout purporting to calculate accrued interest. That agency (since reorganized into two separate entities) had responsibility for social benefits and for educational loans. The court did not address, and perhaps did not notice, the possibility however remote that the claim might have been tax-connected.

²⁶ YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ, §§ 498-509, esp. § 501 (6th ed. 1999); ALBERT A. EHRENZWEIG, CONFLICT OF LAWS 160-215 (1962).

²⁷ *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App. 9th Dist. 2002). Likewise, a U.S. bankruptcy discharge of a foreign debt, *Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991 (9th Cir. 1998).

²⁸ *Le Credit Lyonnais, S.A. v. Nadd*, 741 So.2d 1165 (Fla. C.A. 5th Dist. 1999) (discussing limitations issues in registration in Florida of a foreign judgment); *In re: Letter Rogatory Issued by the Second Part of the III Civil Regional Court of Jabaquara/Saude, Sao Paulo, Brazil*, E.D.N.Y., 01-MC-212 (JG), Feb. 6, 2002 (unpub.), 2002 WL 257822, 2002 U.S. Dist. LEXIS 2702 (E.D. N.Y.) (letter rogatory held an impermissible

denial of due process²⁹ or fraud³⁰, or to other substantive constitutional or human rights law.³¹ The public policy debate is especially familiar to those in civil law jurisdictions.³² Its impact upon the enforcement decision may be attenuated as compared with situations where it would have blocked application of the same foreign law in litigation on the merits.³³ The enforcing court is not in such cases being asked to interpret a foreign law, and the judgment debtor is presumed in law to have had the opportunity to defend upon the merits, this irrespective of whether statutory, procedural or certain public-policy protections in the two jurisdictions are equivalent. Indeed, the existence of remedy and comparability of procedure may be something of a fiction.³⁴ Increasingly, especially in the United States, neither argument of

method of enforcing foreign judgment against Northrup Grumman Corp. and others). Numerous cases have held that imposition against the loser of the litigation costs of the winner does not violate public policy: *Arab Monetary Fund v. Hashim (In re Hashim)*, 213 F.3d 1169 (9th Cir. 2000); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986); *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981).

²⁹ *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (Iran); *Roxas v. Marcos*, 89 Haw. 91, 969 P.2d 1209 (1998) (Philippines); *cf. Muduroglu Ltd. v. T.C Ziraat Bankasi*, [1986] Q.B. 1226 (Ct. App.) (Libya; forum non conveniens); *In re Castioni*, [1891] 1 Q.B. 149 (extradition declined for offense of political character); *Bridgeway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000) (Liberia; civil war, corruption); *de la Mata v. American Life Ins. Co.*, 771 F.Supp. 1375 (D. Del. 1991) (fraud; due process), *Rockwell Int'l Systems, Inc. v. Citibank, N.A.*, 719 F.2d 583 (2d Cir. 1983) (letter of credit case; post-revolutionary Iranian judicial system incapable of affording an adequate remedy); *Corporacion Salvadorena de Calzado, S.A. v. Injection Corp.*, 533 F.Supp. 290 (S.D.Fla. 1982) (due process; failure to abide by procedural rules of Salvadoran law). Compare *In re Transamerica Airlines, Inc.*, 2007 Del. Ch. LEXIS 68 (discussing UFMJRA criteria and enforcing Nigerian judgment in a case dating from 1976).

³⁰ *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443; *Edward Owen Engineering Ltd v. Barclay's Bank Int'l Ltd*, [1978] Q.B. 159 (Ct. App.); *Itek Corp. v. First Nat'l Bank of Boston*, 730 F.2d 19 (1st Cir. 1984); 1 DICEY, MORRIS & COLLINS, Rule 43, at 622-28 (14th ed. 2006).

³¹ *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Co. 1992) and *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997) (First Amendment issue; denying enforcement of English libel judgments); *cf. Berezovsky v. Michaels*, [2000] 1 W.L.R. 1004 (H.L.); *Ehrenfeld v. Bin Mahfouz*, 2005 WL 696769, 2006 WL 1096816 (S.D. N.Y.) (declaratory judgment sought; jurisdiction lacking), subsequent ruling at 489 F.3d 542 (2d Cir. 2007), question certified by *Ehrenfeld v. Mahfouz*, 9 N.Y.3d 838, 872 N.E.2d 866, 840 N.Y.S.2d 754 (2007); Jeremy Maltby, *Note: Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978 (1994). Generic public policy grounds for non-enforcement used to be more common: *Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956) and *Bank of China, Japan & The Straits v. Morse*, 168 N.Y. 458, 61 N.E. 774 (1901) (denying enforcement of English judgment for shareholder cash call).

³² Etienne Bartin, *Les dispositions de l'ordre public*, 1897 REV. DE DROIT INT. ET DE LÉG. COMP. 385 & 613; BATIFFOL & LAGARDE, § 361-362 at 580-84 (8th ed. 1993); civil law systems have a wider definition of *ordre public* than common-law systems. Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, *supra* n. 31; Nicholas de B. Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 (1956); John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985); P.B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 INT'L & COMP. L.Q. 1 (1993).

³³ *Southwest Livestock and Trucking Co. Inc. v. Ramon*, 169 F.3d 317 (5th Cir. 1999), *reh'g denied* 1999 U.S. App. LEXIS 11837 (usury); *Neporany v. Kir* (173 N.Y.S.2d 146 (1958) (seduction and criminal conversation); and *see Nedcor Bank Ltd. v. Bessinger*, QBD, Nov. 6, 1998, LAWTEL No. C7600086 (judgment enforceable notwithstanding that it followed imprisonment for debt in South Africa); RESTATEMENT (THIRD) OF JUDGMENTS §§17, 18 (1982) (merger of cause of action into money judgment); YVON LOUSSOUARN & PIERRE BOUREL, *DROIT INTERNATIONAL PRIVÉ*, §§ 259-261 (6th ed. 1999).

³⁴ David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction"*, 103 L.Q. REV. 398 (1987). *But see Owusu v. Jackson*, [2002] EWCA Civ. 877. [2003] P.I.Q.R.186 (reference to ECJ), ECJ Case C-281/02, decision of Mar. 1, 2005, [2005] E.C.R. I-1383 (denying trial judge's ability to apply

substantively "better law"³⁵ in the forum jurisdiction nor the absence of any genuine possibility of litigation or arbitration of asserted defenses³⁶ in the foreign one is a barrier to enforcement.

Within the public policy exception to the general rule is a provision for judicial scrutiny prior to the cross-border enforcement, direct or indirect, of foreign public-law judgments and orders. Particular exception is taken to the enforcement of foreign penal³⁷ and revenue³⁸ claims. There is far less resistance to cooperation in the enforcement of non-tax foreign public law, notably in respect of securities regulation and antitrust law³⁹, although here the same act may be an offense, and have effects, in more than one jurisdiction. Within the European Union, there are initiatives for the mutual recognition of financial penalties⁴⁰,

forum conveniens test when Brussels Convention applies).

³⁵ R. LEFLAR, *AMERICAN CONFLICTS LAW*, § 107 (3d ed. 1977), RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS*, §6.29 at 416-20 (4th ed. 2001).

³⁶ Viz.: the Lloyd's of London cases, including *Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (enforcement of judgment) and *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992) (securities law claims), decided in part on the basis of the Arbitration Act, 9 U.S.C. §§ 1-306 (2005). As far as this writer could determine, the only arbitration that actually took place following the dismissal of those cases was that of Lloyd's investor Jeremy N.M. Lyons against his members agent, and it was undertaken in accordance with Lyons' settlement with Lloyd's and the dismissal of Lyons' bankruptcy proceeding, S.D. Fla. 95-22606 and his Chapter 7 trustee's adversary proceeding seeking unscheduled offshore assets, *Tolz v. Lyons (In re Lyons)*, S.D. Fla. 95-01343 (both unreported). Several law review articles have criticized the decisions in the Lloyd's cases, e.g., Darrell Hall, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57 (1997). U.S. investors in Lloyd's whose assets were involuntarily liquidated to pay Lloyd's cash calls (either because they were held by Lloyd's or supported letters of credit or bank guarantees) needed to find other means to meet any resulting U.S. tax claims. The estate of A. Carey Harrison III, deceased in 2003, encountered a five-way conflict among the tax authorities of two countries, his mortgagee bank, Lloyd's, and his heir. Harrison, litigant in person in *State Bank of New South Wales v. Harrison*, [2002] E.W.C.A. Civ. 363 (Ct. App.), had property in England and in Florida.

³⁷ *Banco de Vizcaya v. Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140; *Lynch v. Provisional Government of Paraguay*, (1871) L.R. 2 P.&D. 268 (confiscation decrees); *Huntington v. Attrill*, [1893] A.C. 151 (Ontario court not bound to enforce New York judgment of penal character). The argument here relates to enforcement of fines and forfeitures; in matters of extradition and handover to military authorities different issues arise and the cases involve close reading of treaties, application of domestic statutes and consideration of public policy and human rights claims: *In re Amand*, [1941] 2 K.B. 239 (desertion, forces under control of Netherlands government in exile); *United States v. Cullinane*, [2003] 2 N.Z.L.R. 1, [2002] N.Z.C.A. 330, *aff'g* [2001] B.C.L. 962 (denial of extradition in visa fraud case). As to a judgment for a civil claim attached to a judgment *in absentia* by a French court in a prosecution for fraud and breach of trust, see *Gondre v. Silberstein*, 744 F. Supp. 429 (E.D. N.Y. 1990) (denying summary judgment pending discovery on issue of adequacy of notice). The quality of a statute as penal may be broadly interpreted and may merge with public policy: *Frankfurter v. W. L. Exner, Ltd.*, [1947] Ch. 629 (Austrian decree of 1938 giving control of Jewish businesses to commissars).

³⁸ *Queen of Holland v. Drukker (In re Visser)*, [1928] Ch. 877; *Sydney Municipal Council v. Bull*, [1909] 1 K.B. 7; PIERRE MAYER, *DROIT INTERNATIONAL PRIVÉ* (4th ed. 1991) §§ 353-354.

³⁹ Philip J. McConaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255 (1999) ("The task of identifying, explaining, and weighing the comparative regulatory interests of different nations in any given international transaction is virtually impossible for courts and private litigants.") *But see* *United States v. A Limited*, High Ct. Cook Isl., No. 57/1999 (2001). On the internationalization of securities regulation, see Lawrence Collins, *Choice of Law and Choice of Jurisdiction in International Securities Transactions*, 5 SING. J. INT'L & COMP. L. 618 (2001).

⁴⁰ Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, Council doc. 11178/01. See also European Convention on the Punishment of Road Traffic Offences,

and the European Convention on the Punishment of Road Traffic Offences provides for cross-border collection of fines.⁴¹ European arrest warrants are available for "serious" (i.e., punishable by imprisonment for twelve months or more) fiscal offenses.⁴² The enforcement exception for money claims of a penal nature relates to fines and not to orders of restitution⁴³ or to fulfillment of information requests⁴⁴ even where the act alleged is not an offense in both countries (or an offense scheduled in the relevant treaty), the common test for extradition.⁴⁵ Recent cases implicating the new U.S.-U.K. extradition agreement⁴⁶ suggest a relaxation in the name of fighting terror of criteria for extradition.⁴⁷ The Convention relating to extradition between the member states of the European Union⁴⁸, article 6, allowed for a reservation:

Fiscal Offenses

1. With regard to taxes, duties, customs and exchange, extradition shall also be granted under the terms of this Convention, the European Convention on Extradition and the Benelux Treaty in respect of offenses which correspond under the law of the requested Member State to a similar offence.

ETS 052, Nov. 30, 1964, in force in Cyprus, Denmark, France, Romania and Sweden; European Council Act of 17 June 1998 drawing up the Convention on Driving Disqualifications, *O.J.E.C.*, 1998, C 216/1 (not yet in force) and explanatory report, *O.J.E.C.*, 1999, C 211/1. The draft treaty establishing a European Constitution contains a number of general principles relating to criminal proceedings, cooperation, coordination and approximation of relevant laws.

⁴¹ Strasbourg, Nov. 30, 1964, E.T.S. 52, in force as among the Czech Republic, Denmark, France, Romania and Sweden only.

⁴² Council Framework Decision of June 13, 2002, 2002/584/JHA, OJEC L190, July 18, 2002, at 1; (UK) Extradition Act 2003, ss. 63(8), 64(8). Article 2 of the framework decision abolishes the requirement for "dual criminality" in numerous cases, including those of "laundering of the proceeds of crime" and of "fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests". Note also Article III-174 of the draft treaty establishing a Constitution for Europe, relating to Eurojust and the protection of the European Union's financial interests.

⁴³ *Raulin v. Fischer*, [1911] 2 K.B. 93 (French criminal prosecution with civil award for damages); Council Regulation (EC) No. 44/2001 of Dec. 22, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(4); *Krombach v. Bamberski*, [2000] E.C.R. I-1935 (basis for decision was denial of right to defend). Compare *Alberta Securities Comm'n v. Ryckman*, 200 Ariz. 540, 30 P.3d 121 (foreign judgment for investigation expenses in a securities fraud matter).

⁴⁴ *Young v. United States Dep't of Justice*, 882 F.2d 633 (S.D.N.Y. 1989).

⁴⁵ *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *United States v. Anderson*, 472 F.3d 662 (9th Cir. 2006) (dual criminality and specialty); cf. *McVey v. United States*, [1992] 3 S.C.R. 475; and see PROPOSAL FOR A COUNCIL FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT AND THE SURRENDER PROCEDURES BETWEEN THE MEMBER STATES, COM (2001) 522/final2, at 7 ("the principle of double criminal liability is abolished").

⁴⁶ Washington, Mar. 31, 2003, United States No. 1 (2003), Cm. 5821, Extradition Act 2003, chapt. 41.

⁴⁷ *R. (Norris) v. Home Secretary*, [2006] EWCA Crim. 280, [2006] 3 All E.R. 1011; *Norris v. Government of the United States of America*, [2007] EWHC 71 (Admin.), [2007] 2 All E.R. 29; Zoe Brennen, *Snatched by the American Courts*, SUNDAY TIMES (London), Mar. 19, 2006, p. 5-2.; cf. *United States v. Tollman*, Westminster Magistrates' Court, June 28, 2007 (unreported) (extradition refused as oppressive).

⁴⁸ 1996 O.J. (C 313) 12, replaced since January 1, 2004 by the Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 19. See the discussion in THE EXTRADITION BILL, HOUSE OF COMMONS RESEARCH PAPER 02/79, Dec. 6, 2002.

2. Extradition may not be refused on the ground that the law of the requested Member State does not impose the same type of taxes or duties or does not have the same type of provisions in connection with taxes, duties, customs and exchange as the law of the requesting Member State.

3. When giving the notification referred to in Article 18(2), any Member State may declare that it will grant extradition in connection with a fiscal offence only for acts or omissions which may constitute an offence in connection with excise, value-added tax or customs.

The legislation underlying the European Arrest Warrant has no such provision for exception.⁴⁹ Some modern bilateral extradition treaties include tax evasion as an extraditable offense.⁵⁰

Recognition and indirect enforcement of foreign laws concerned with economic offenses may depend upon the proximity of the claimant to the violation.⁵¹ Typically, a contract will have been repudiated on the basis that to honor it would entail violation of foreign exchange controls⁵² or customs laws.⁵³ Some of the cases relate to buyers' nonpayment after loss of the goods in transit and, given the buyer's knowledge of the illegality in question, can invoke a doctrine of unclean hands.⁵⁴ The connection of the offense to the debt may be trivial or without relevance to the forum state. Thus, the absence of documentary revenue stamps that would render a contract unenforceable at home may not do

⁴⁹ See Art. 8, and discussion in Damian Chalmers, *Constitutional Reason in an Age of Terror*, Global Law Working Paper 06/04, Hauser Global Law School Program (2004) at 51-52.

⁵⁰ E.g., U.S.-Sweden: Supplementary Convention on Extradition, Mar. 14, 1983, T.I.A.S. 10812, S&OUMI; 1984:34; U.S.-Canada: Treaty on extradition, as amended by exchange of notes of June 28 and July 9, 1974, Washington Dec. 3, 1971, art. 2, 27 UST 983, TIAS 8237; U.S.-Australia: United States v. Larry Richard Williams (unreported), High Court of Australia, Aug. 3, 2007; Hermanowski v. United States of America, 191 F.L.R. 83 (2005); same, 149 F.C.R. 93 (2006); Onapolis (Shong) v. Wisconsin, 2006 WI App 84; 292 Wis. 2d 819; 716 N.W.2d 169 (2006) (issue conceded). See Matter of Extradition of Nacif-Borge, 829 F.Supp. 1210 (D.Nev. 1993) (extradition to Mexico for tax evasion); United States v. Axelrod, D.N.J., Crim No. 3:04-cr-0.0241-GEB (fugitive extradited from Germany; indictment, plea agreement and judgment on PACER; arrest reported DIE WELT, June 18, 2004 at 33, extradition N.Y. TIMES, Nov. 13, 2004 at B4, conviction N.Y. TIMES, Mar. 22, 2005 at B3). See Bruce Zagaris, *U.S. Efforts to Extradite Persons for Tax Offenses*, 25 LOY. L.A. INT'L & COMP. L. REV. 653 (2003).

⁵¹ *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222 (enforcement of Swiss arbitral award on contract notwithstanding allegation it was contrary to public policy in place of performance, Algeria).

⁵² 1 DICEY, MORRIS & COLLINS at 2005-15 (14th ed. 2006); Bills of Exchange Act 1882, s. 72(1)(a); EHRENZWEIG, CONFLICT OF LAWS at 489-90 (1962); Wallenstein v. Deak & Co., 26 Misc.2d 28, 207 N.Y.S.2d 169 (1960); Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft, [1939] 2 K.B. 678; Garratt v. Waters (*In re* Lord Cable), [1977] 1 W.L.R. 7; Ispahani v. Bank Melli Iran, (1998) Lloyd's Rep. Bank. 133 (Ct. App.); Scales Trading v. Far Eastern Shipping Co. Public Ltd., [2001] 1 N.Z.L.R. 513; also cases *infra*, n. 158.

⁵³ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS at 212 (1834). But see *Foster v. Driscoll*, [1929] 1 K.B. 470 ("the Court ought not to assist these parties to settle disputes arising out of their abortive attempts to import whisky into the United States of America").

⁵⁴ *Adler v. Nigeria*, 219 F.3d 869 (9th Cir. 2000) (Nigerian "419" advance-fee fraud; unclean hands), *vacating* 1998 U.S. Dist. LEXIS 23419 (unreported, S.D. Cal. 1998)); *similarly*, *Southway v. Central Bank of Nigeria*, 328 F.3d 1267 (10th Cir. 2003), *aff'g* 149 F.Supp.2d 1268 (D. Colo. 2001).

so abroad⁵⁵ and a contract incidentally in violation of foreign customs regulations⁵⁶, statutory monopoly⁵⁷ or price controls⁵⁸ may nonetheless be enforceable. The contrary may be true with respect to contracts made with the specific object of breaking such laws.⁵⁹ Courts have found justification in international agreements for the enforcement of foreign public-law economic restraints.⁶⁰ Judgments and orders, even if unenforceable in a particular situation as money judgments, may give rise to a status (insolvency, a lien) that will itself be recognized.⁶¹ Yet the Revenue Rule, Lord Mansfield's 1775 dictum⁶², retains vitality even if over-broad in its expression. Courts may look behind the pleadings to ascertain whether, in

⁵⁵ *Ludlow v. Van Rensselaer*, 1 Johns. 94 (N.Y.Sup. 1806); *but see* *Guatemala v. Nunez*, [1927] 1 K.B. 669 (formal invalidity of gift under law of common domicile requiring stamped paper). *Compare* cases like *In re Melbourn*, (1870) L.R. 6 Ch. App. 64 (pre-marital contract providing for separate property honored, although not registered with the court as required under the law of domicile, Batavia).

⁵⁶ *Pellecatt v. Angell*, (1835) 2 C. M. & R. 311, 5 Tyr. 945, 150 Eng. Rep. 135; *Holman v. Johnson*, (1775) 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121; *but see* *Foster v. Driscoll*, [1929] 1 K.B. 470 (Ct. App.) and *Regazzoni v. K.C. Sethia* (1944) Ltd., [1958] A.C. 301, *aff'g* [1956] 2 Q.B. 490 (Ct. App.) (while the English courts will not enforce foreign revenue or penal laws, they will not entertain an action based on a transaction which is knowingly intended to involve a breach of such laws).

⁵⁷ *Gross v. La Page*, (1815) Holt 105, 171 Eng. Rep. 179 (trader not a member of Russian Company, London); *Hodgson v. Temple*, (1813) 5 Taunton 181, 128 Eng. Rep. 656 (Mansfield, C.J.: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction.")

⁵⁸ *Trinidad Shipping and Trading Co., Ltd. v. G.R. Alston & Co.*, [1920] A.C. 888 (P.C. Trinidad & Tobago).

⁵⁹ 2 DICEY, MORRIS & COLLINS at 1594-98 (14th ed. 2006); *Ralli Bros v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287 (holding uncollectible that portion of unpaid freight charges in excess of legal maximum in destination country); *Foster v. Driscoll*, [1929] 1 K.B. 470 (shipment of whiskey in violation of U.S. Volstead Act); *Regazzoni v. K.C. Sethia* (1944) Ltd., [1958] A.C. 301 (contract for sale of jute of which the export from India was prohibited); *Tinsley v. Milligan*, [1994] 1 A.C. 340 (modern restatement of the rule); *Soleimany v. Soleimany*, [1999] Q.B. 785 (Ct. App.) (overturning a decision of a Beth Din religious court which had held that a contract otherwise unenforceable for illegality became enforceable if the procedural law of the arbitration attached no significance to the illegality). *But see* *Beximco Pharmaceuticals Ltd v. Shamil Bank of Bahrain EC*, [2004] EWCA Civ 19 (Ct. App.) (dismissing argument that reference to Sharia alongside English law in contract renders unenforceable a contract providing for payment of interest). See also the discussion of public policy *supra*, n. 31.

⁶⁰ *Banco Frances e Brasileiro S. A. v. Doe*, 36 N.Y.2d 592, 370 N.Y.S.2d 534 (Ct. App. 1975) (International Monetary Fund); *United City Merchants (Investments) Ltd v. Royal Bank of Canada*, [1982] Q.B. 208 and *Frankman v. Prague Credit Bank*, [1948] 1 K.B. 730 (Bretton Woods Agreement). *Compare* *Sharif v. Azad*, [1967] 1 Q.B. 605 (transaction in rupees enforceable as between English residents although unlawful under the law of Pakistan) and *Emery v. Emery* (*In re Emery's Investment Trusts*), [1959] Ch. 410 ("unclean hands").

⁶¹ Bernard Audit remarks, "Even with respect to laws most directly concerned with state interests such as tax and customs laws, it is an overstatement to suggest a principle that the character of these laws prevents them from being recognized outside the state that enacted them." [Informal translation] *DROIT INTERNATIONAL PRIVÉ*, § 281 (3d ed. 2000). Also, EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* at 978-79, 984-86 (2d ed. 1992), distinguishing sister-state claims and citing (at 979, n. 3); STORY, *COMMENTARIES* (*supra*, n. 53) at 815 (6th ed. by Redfield 1865): "the doctrine ... is however, to be understood with some limitation".

⁶² *Holman v. Johnson*, (1775) 1 Cowp. 341, 98 Eng. Rep. 1120; also *Planché v. Fletcher*, (1779) 1 Dougl. 251, 99 Eng. Rep. 164 (1779). "It is now recognized that the often quoted citation of Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341: 'No country ever takes notice of the revenue laws of another' does not represent the law". 2 DICEY, MORRIS & COLLINS, 11th ed. (1987) at 1230, n. 22; *cf.* 14th ed. (2006) at 105-07.

substance, a facially private demand constitutes in fact a foreign public-law revenue claim.⁶³ Erosion of the Rule is most marked in respect of relations between sub-national quasi-sovereign entities and within supra-national entities.⁶⁴ Within the European Union there is provision for the exchange of information in matters of direct taxation⁶⁵ and concern over evasion of VAT.⁶⁶ Increased cooperation in enforcement among member states seems inevitable.

Administrative assistance to foreign revenue authorities by way of supply of data relevant to a specific taxpayer has existed as long as there have been tax treaties, but aside from routine exchange of mass data⁶⁷ approaches have been selective in cases justifying the expenditure of diplomatic capital. More novel has been agreement for the mutual collection of tax debts, however limited by conditions and in scope.⁶⁸ Notwithstanding academic objection to continued application of the Revenue Rule, that rule continues to bedevil courts, reflecting the tension between statutes and the common law that they displace. Other limits to cooperation are set by terms of the treaty arrangements themselves⁶⁹, protection of innocent

⁶³ *Connor v. Connor*, [1974] N.Z.L.R. 632 (Sup. Ct. Christchurch 1973) (holding, however, enforceable a judgment for costs that would constitute reimbursement to a foreign legal aid scheme); *Metal Industries (Salvage) Ltd. v. Owners of S.T. "Harle"*, [1962] S.L.T. 114 (Court of Session, Outer House) (denying enforcement in Scotland of a French claim for employers' social insurance contributions).

⁶⁴ *Weir v. Lohr*, (1967) 65 D.L.R.(2d) 717; *State ex rel. Oklahoma Tax Commission v. Rodgers*, 193 S.W. 2d 919 (1946); cf. *Colorado v. Harbeck*, 232 N.Y. 71, 133 N.E. 357 (Ct. App. 1921), holding abrogated by legislation, N.Y. L. 1932, c. 333, Tax L. § 249-t (repealed, L. 1990, c. 190, § 108); and see *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, at 279 (1935) ("We conclude that a judgment is not to be denied full faith and credit in state and federal courts merely because it is for taxes."). As an example of contemporary laws, see 35 ILL. COMP. STAT. 705 (West 2005) (Illinois Tax Collection Suit Act); FLA. STAT. 72.041 (West 2005), "Tax liabilities arising under the laws of other states". In Canada: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (discussing grant of full faith and credit to judgments of courts in other provinces). The Uniform Enforcement of Canadian Judgments Act (1992) excludes from its scope judgments "for the payment of money as a penalty of fine for committing an offence" but implicit in its inclusion of "a final order that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada" is a claim for taxes enforceable as a "judgment of the superior court of unlimited trial jurisdiction".

⁶⁵ Council Directive concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation, Council Directive 77/799/EEC, 1977 O.J. (L 336) 15; *W.N. v. Staatssecretaris van Financiën*, [2000] E.C.R. I-2847 ("the obligation to forward information is not connected with the magnitude of the tax evasion and avoidance which might arise if such information were not forwarded").

⁶⁶ Special Report No 9/98 concerning the protection of the financial interests of the European Union in the field of VAT on intra-Community trade together with the Commission's replies, 1998 O.J. (C 356) 1. *But see* *Governor & Co. of the Bank of Ireland v. Meenaghan*, [1994] 3 I.R. 111 (evasion of United Kingdom value added tax).

⁶⁷ I.R. Reg. 1-6049-8 requirements for interest paid to certain nonresident aliens and proposal for its geographic extension, 67 FR 50386, REG-133254-00, currently blocked due to Congressional opposition; Marshall J. Langer, *Proposed Interest Reporting Regulations Could Cause Massive Outflow of Funds*, 22 TAX NOTES INT'L 1432 (2001). EU documents: Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, Council Decision 2004/587/EC of 19 July 2004 on the date of application of Council Directive 2003/48/EC; related agreements with Switzerland, Andorra, Liechtenstein, Monaco and San Marino. As for Switzerland, see R.S. 642.41, F.F. 6151, Nov. 9, 2004. See also *W N v. Staatssecretaris van Financiën*, Case C-420/98, [2000] E.C.R. I-2847.

⁶⁸ The various U.S. treaty collection provisions are discussed in IRS Chief Counsel Advisory 199919034 dated Aug. 6, 1999, discussing the application of IRC § 6330 to levies made for treaty partners.

⁶⁹ Bruce Zagaris, *Developments in Mutual Cooperation, Coordination and Assistance Between the U.S. and Other Countries in International Tax Enforcement*, 27 TAX MGMT. INT'L J. 506 (1998); Report of the ABA Committee on International Property, Estate and Trust Law & Probate and Trust Division, *Local Enforcement of*

third parties including heirs, trustees and stakeholders, the intervention of proceedings in bankruptcy and succession⁷⁰, and actions incident to prosecution for extraditable offenses.⁷¹ In its essence this means that at least in principle a tax, fine, penalty or confiscation, absent treaty⁷² or statute⁷³ to the contrary, will not be given direct effect. That practice is echoed in the jurisprudence of civil-law countries.⁷⁴ The 1962 Uniform Foreign Money-Judgments Recognition Act⁷⁵ and its 2005 successor the Uniform Foreign-Country Money-Judgments Recognition Act, the (English) Foreign Judgments (Reciprocal Enforcement) Act 1933⁷⁶ and the Lugano Convention⁷⁷ and protocols and the (EU) Council regulation on jurisdiction and the recognition of judgments in civil and commercial matters⁷⁸ among other statutes and

Foreign Tax Laws, 36 REAL PROPERTY, PROBATE & TRUST J. 73 (2001). In fact, the main focus of treaties is necessarily, by the fact of volume of covered transactions, cooperation in taxation of international business; this has led to proposals for a multinational treaty: Victor Thuronyi, *Principal Paper: International Tax Cooperation and a Multinational Treaty*, 26 BROOKLYN J. INT'L L. 1641 (2001). Given the problems noted in this paper deriving from issues unique to individual legal systems it is not obvious that enforcement and collection issues are susceptible to multinational resolution.

⁷⁰ *In re McClean* (1997) 1 O.F.L.R. 818; *In re Tucker* (A Bankrupt), Lawtel, July 11, 1988 (Isle of Man, May 16, 1987); Philip Baker, *The Transnational Enforcement of Tax Liabilities*, 1993 BRITISH TAX REV. 313 (1993); David Graham, *Tucker and the Taxman*, IAN FLETCHER, ED., CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 205 (1990); P. St.J. Smart, *International Insolvency and the Enforcement of Foreign Revenue Laws*, 35 INT'L & COMP. L.Q. 705 (1986). A relatively recent case is that of an Irish registered company, Cedarlease Ltd., [2005] IEHC 67, where the Irish High Court, applying European Council Regulation (EC) No. 1346/2000 on insolvency proceedings ordered the winding up of the firm on the petition of the UK Customs and Excise on a claim for unpaid VAT. Compare the older case of *Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89, [1955] A.C. 516, *infra* n. 209.

⁷¹ *Thus*, *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Home Secretary*, [1988] 1 W.L.R. 1204 (extradition to Norway in respect of false accounting, forgery and theft notwithstanding that the offences were all in a revenue context and might involve enforcement of foreign revenue laws).

⁷² Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, Nov. 8, 1990, E.T.S. 141.

⁷³ Proceeds of Crime Act 1997 & Proceeds of Crime (Anti-Money Laundering) Regulations 1998 (Bermuda); International Co-operation in Criminal Matters Act, 1996 (No. 75 of 1996) (South Africa); Confiscation Act 1997 (No. 108/1997) (Victoria, Australia); Criminal Justice Act 1988, Proceeds of Crime Acts 1995, 2002 (United Kingdom); *In re S-L* (Restraint Order: External Confiscation Order), [1996] Q.B. 272 (Ct. App.), *appeal dismissed* [1996] 1 W.L.R. 66 (drugs trafficking proceeds); *R. v. Foggon*, [2003] E.W.C.A. Crim. 270 (tax evasion).

⁷⁴ Cases cited *infra*, n.219. The issue has recently arisen with respect to the inner London congestion charge for automobile usage: Andrew Clark, *Tourists can evade congestion charge, debt collectors admit*, GUARDIAN (London), Jan. 27, 2002, at 6; *but see* European Convention on the Punishment of Road Traffic Offences, E.T.S. 52, *supra*, n. 41 (the UK is not a signatory but has not excluded future adherence, HANSARD (Lords), June 13, 1996, Col. WA175).

⁷⁵ 13 U.L.A. 261, § 1(2): "other than a judgment for taxes, a fine or other penalty...". Diversity in practice among U.S. jurisdictions is discussed in Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 Notre Dame L. Rev. 253 (1991).

⁷⁶ 1933 c. 14. S. 2(b) as amended by the Civil Jurisdiction and Judgments Act 1982, c. 27, s 35(1), Sch 10, para 1(2): "not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty".

⁷⁷ *Supra*, n. 24.

⁷⁸ Regulation (EC) No. 44/2001, 2001 O.J. (L 12) 1, art 1(1) states: "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters." This wording is essentially the same as that of the Brussels Convention, tit. I, art. 1, and is identical to art. 2(1) of the proposed Council Regulation creating a European enforcement order

instruments specifically exclude revenue measures from their scope. This is reflected also in the Restatement Third of the Foreign Relations Law of the United States, § 483.

Cross-border activities of tax administrations

Cross-border enforcement of tax claims encounters particular frustration in relation to absconders, nonresidents with no assets in the forum, entities with taxable revenue attributable to the forum but no reachable assets there and, perhaps, cases of transferee liability.⁷⁹ Information sharing, of mass data and in relation to specific civil and criminal investigations, is routine between certain country-pairs. Yet tax authorities complain that some requests for assistance go unanswered, that letters rogatory imply cumbersome legal process and that a domestic summons for information located abroad must meet onerous tests of relevance, necessity and materiality.⁸⁰ Assuming access to information, transferee liability principles may, in the absence of any time bar, make assets subject to seizure once introduced, by inheritance or otherwise, into the jurisdiction.⁸¹ Vicarious liability of a transferee for penalties and fines raises additional issues, including, in the United States, the dual nature of certain tax penalties (notably the trust fund recovery penalty) both as tax and as true penalty.⁸² The European Court of Human Rights has denied the legitimacy of imposing penalties (in addition to unpaid tax and interest) upon the heirs of a tax-evading decedent.⁸³ Even where enforcement of civil tax debts might be allowed, it could be otherwise for penalties, if not interest.⁸⁴

The pattern and patchwork of cross-border activities of tax administrators reflects longstanding formal and informal contacts; in the case of the United States not least between Internal Revenue attachés abroad and local tax administrators. Although somewhat dated, the Internal Revenue Manual reveals something of the Service's institutional practice and of its frustration with juridical and diplomatic limitations over its inquiries.⁸⁵ In recent years there has been activity aimed at isolating and neutralizing tax havens and jurisdictions with lax financial controls that facilitate money laundering and tax evasion.⁸⁶ Informal demarches and unilateral practices aside, the parameters of existing official cross-border action have been formed by tax treaties, multilateral conventions and out of case law where tax administrations

for uncontested claims, COM(2002) 159 final.

⁷⁹ See Robert Whitman, *Tax Collection from Estates of Nonresidents*, 68 COLUM. L. REV. 1049 (1968) and *Note, Transnational. Tax Evasion of United States Taxation*, 81 HARV. L. REV. 876 (1968).

⁸⁰ *United States v. Toyota Motor Corp.*, 569 F. Supp. 1158 (C.D. Cal. 1983).

⁸¹ *United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002) (gift taxes collected from donee); *Healy v. Commissioner of Internal Revenue*, 345 U.S. 278 (1953) (transferee of corporate assets).

⁸² I.R.C. § 6672.

⁸³ *E.L. v. Switzerland*, Eur. Ct. H.R. 1997-V at 1509; *A.P. v. Switzerland*, Eur. Ct. H.R. 1997-V at 1477.

⁸⁴ *United States Government v. Montgomery*, [1999] All E.R. 84 (Ct. App.).

⁸⁵ INTERNAL REVENUE MANUAL, 43.3.2.1.

⁸⁶ Jacqueline B. Manasterli, *Offshore Financial Centers and Harmful Tax Regimes Trigger Flurry of International Developments*, 21 TAX NOTES INT'L 2541 (2000). These initiatives have been largely driven by the European Union, and the U.S. Treasury has re-evaluated its support for a joint effort: Statement of Secretary Paul O'Neill, U.S. Treasury Press Release PO-366, May 10, 2001; Paul O'Neill, *Confronting OECD's "Harmful Tax" Approach*, WASHINGTON TIMES, May 11, 2001, at A17; and see Robert Goulder, *Trio of Legislators Question OECD Tax Haven Initiative*, 22 TAX NOTES INT'L 1339 (2001).

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have tested the limits of their rights in foreign courts. Cross-border collection and enforcement activities take several forms:

- exchange of information, under treaty or otherwise, at the instance of foreign or domestic parties in interest or by letters rogatory or similar request;
- enforcement of foreign money-judgment for a tax debt under treaty provisions providing for reciprocal collection or as an ordinary foreign money judgment;
- prosecution or extradition for criminal conduct involving fraudulent evasion of foreign tax or for crimes collateral to tax evasion including mail and wire fraud and money laundering;
- indirect enforcement of a foreign government claim of tax by way of insolvency proceedings or recognition of foreign liens, asset seizures and vesting orders;
- status under bankruptcy law: foreign taxes as provable debts and as administrative expenses of the estate.

These are addressed in turn.

1. Generalized cross-border assistance and exchange of information

Exchange of information leading to foreign criminal prosecution for fiscal evasion is not new.⁸⁷ There exist institutional arrangements for joint criminal investigatory action by specific fiscal authorities.⁸⁸ Within the European Union, the Council Directive concerning mutual assistance by the competent authorities of the member states in the field of direct taxation⁸⁹ as amended to include value added tax⁹⁰ and excise duties⁹¹ provides for the

⁸⁷ United States v. Stuart, 489 U.S. 353 (1989) (Canada); United States v. A.L. Burbank & Co., Ltd., 525 F.2d 9 (2d Cir. 1975) (Canada); Estate of Myers, Azouz v. United States, 85 A.F.T.R.2d 2000-1217 (S.D.N.Y. 1999) (Canada); Estate of Myers, 842 F.Supp. 1297 (E.D. Wash. 1993) (Canada, discovery in aid of potential criminal prosecution); Mazurek v. United States, 86 A.F.T.R.2d 2000-6293 (E.D. La. 2000), *aff'd* 271 F.3d 226 (5th Cir. 2001) (France); United States v. Barquero, 18 F.3d 1311 (5th Cir. 1994) (Mexico); Fernandez-Marinelli v. United States, 76 A.F.T.R.2d 95-8102 (S.D.N.Y. 1995) (Mexico); Urtuzuastegui v. United States, 86 A.F.T.R.2d 2000-7356 (D.C. Ariz. 2000), *reconsid. denied* 87 A.F.T.R. 2d 2001-821 (Mexico); Chris-Marine USA, Inc. v. United States, 892 F.Supp. 1437 (M.D. Fla. 1995) (joint investigation with Sweden); Yun v. United States, 87 A.F.T.R.2d 2001-1408 (C.D. Cal. 2000) (Korea); Nuechter v. United States, 88 A.F.T.R.2d 2001-6151 (C.D. Cal. 2001) (Germany); Caesar Electronics Inc. v. U.S., 86-1 T.C. (CCH) ¶ 9693 (E.D.N.Y. 1986) (Germany; District Court lacks jurisdiction until IRS has sought to compel compliance with summons); Ryan v. Commissioner, 58 T.C. 107 (1974) (Switzerland). *Similarly*: Griffiths v. Catforth (*In re Lorillard*), [1922] 2. Ch. 638 (English court not bound to remit surplus of decedent's estate to New York to pay debts there). James P. Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 GEO. WASH. J. INT'L L. & ECON. 277 (1988); U.S. DEP'T OF JUSTICE, TAX RESOURCE MANUAL, Title 6; INTERNAL REV. MANUAL, pt. 42 ch. 2. *See also* cases cited *infra*, n. 93. On increasingly expansive judicial cooperation in connection with foreign proceedings of a penal nature, *see*, e.g., McKevitt v. Pallaasch, 339 F.3d 530 (7th Cir. 2003); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), *affirming* 292 F.3d 664 (9th Cir. 2003); United States v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation, 235 F.3d 1200 (9th Cir. 2000).

⁸⁸ INTERNAL REVENUE MANUAL 9.13.2.4 (2002), Simultaneous criminal investigation program with Canada, Italy, France and Mexico.

⁸⁹ Council Directive 77/799/EEC, 1977 O.J. (L 336) 15; W.N. v. Staatssecretaris van Financiën, [2000] E.C.R. I-2847 ("the obligation to forward information is not connected with the magnitude of the tax evasion and avoidance which might arise if such information were not forwarded").

provision of information to assist in the assessment of taxes. It does so without respect to nationality or residence of the taxpayer, but subject to domestic laws and administrative practices in the requested state regarding the making of such inquiries and collection of such information. The OECD Model Convention's article 26 provides for the exchange of "such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention."⁹² These exchanges encompass matters of practice and policy, mass transmission of payments data and *ad hoc* provision of accounting, earnings, banking, investment and other fiscally-relevant data concerning specific taxpayers. The exchanges are intended both to assure that the benefits of double taxation agreements are limited to their intended recipients and to protect the integrity of the requesting country's tax collecting regime. Aside from a promise of secrecy, the use to which taxpayer data may be put and the circumstances under which it may be obtained and transmitted are not necessarily limited by the data sending country's laws regarding domestic tax investigations⁹³ nor in general by the personal scope provisions.⁹⁴

International exchanges of data have lately seen particular emphasis because of the association of fiscal crimes in domestic law and in international fora with money-laundering⁹⁵, political corruption⁹⁶, organized crime⁹⁷ narcotics trafficking⁹⁸ and terrorism⁹⁹.

⁹⁰ Council Directive 79/1070/EEC, 1979 O.J. (L 331) 8.

⁹¹ Council Directive 92/12/EEC, 1992 O.J. (L 76) 1 (further amended by Directive 92/108/EEC, 1992 O.J. (L 390) 124.

⁹² Module on General and Legal Aspects of Exchange of Information, OECD MANUAL ON THE IMPLEMENTATION OF EXCHANGE OF INFORMATION PROVISIONS FOR TAX PURPOSES (2006).

⁹³ *Lidas, Inc. v. United States*, 238 F.3d 1076 (9th Cir. 2001), *aff'd* 83 A.F.T.R.2d 99-1112 (C.D. Cal. 1999), *cert. denied*, 533 U.S. 903 (2001) (France); *United States v. Stuart*, 489 U.S. 353 (1989) (Canada); *United States v. First Federal Savings and Loan Assn. of Broward*, 81-1 T.C. 9400 (Canada); *United States v. Lincoln First Bank, N.A.*, 80-1 T.C. 9231 (Norway). *Cf. Anderson v. Minister of National Revenue*, 95 D.T.C. 8085 (1995) (procedural requirements and statutory limits to Canadian tax authorities' actions in response to IRS requests); *United States of America v. Schneider*, 2002 B.C.J. 1561 (search warrant served under Mutual Legal Assistance in Criminal Matters Act against alleged promoter of scheme sold to US citizens "for the purpose of evading the payment of United States' income taxes and/or defrauding clients of the respondent").

⁹⁴ Art. 16, Canada-U.S. Third Protocol signed Mar. 17, 1995, Amending the Convention Between the United States and Canada with Respect to Taxes on Income and on Capital signed Sept. 26, 1980 [Third Protocol], Can. T.S. 1995 No. 17.

⁹⁵ On multilateral action, *see* Proposal for a European Parliament and Council Directive amending Council Directive 91/308/EEC of June 10, 1991 on prevention of the use of the financial system for the purpose of money laundering and for an overview, UN Economic and Social Council Committee of Experts on International Cooperation in Tax Matters, *Tax cooperation and cross-border tax crime: Roles of international organization and potential roles for the United Nations*, Doc. E/C.18/2005/10/Add.3, Nov. 22, 2005; *The Role of International Organizations in Fighting Cross-Border Tax Crimes*, 41 TAX NOTES INT'L 1073 (2006); Bruce Zagaris, *The Increasing Interaction Between International Tax Enforcement and Anti-Money Laundering Enforcement Cooperation*, ITPA YEARBOOK, Jan. 28, 2004.

⁹⁶ *See, e.g., Sagaydak v. Gonzales*, 405 F.3d 1035 (9th Cir. 2005) (asylum case; persecution by Ukrainian officials of tax auditor).

⁹⁷ Council of Europe, Multidisciplinary Group on Corruption.

⁹⁸ *Miller v. United States*, 838 F. Supp. 338 (N.D. Ohio 1993), *Miller v. United States*, 921 F. Supp. 494 (N.D. Ohio 1996), *Miller v. United States*, 955 F.Supp. 795 (N.D. Ohio 1996).

⁹⁹ *United States v. Mubayyid*, 476 F.Supp.2d 46 (D. Mass. 2007).

Where civil forfeiture and charges of tax evasion are used as alternatives to direct criminal prosecution, issues of due process and proportionality are bound to arise.¹⁰⁰ Defining fiscal fraud in such manner as to preempt bank secrecy legislation remains problematic in some countries.¹⁰¹ In one series of cases a sovereign government was found to have participated in tax fraud via the provision of fraudulent tax receipts.¹⁰²

2. Specific assistance in collection of foreign tax debts, and cross-border levies and seizures

Among the States of the former French Community¹⁰³ there exists a series of treaties premised on comparability of tax systems and providing for mutual tax collection assistance. However, the French Cour de Cassation ruled in 1972 that for want of legal publication conventions with Mali and Senegal were without legal force, and it blocked such assistance on the part of the French fiscal authorities.¹⁰⁴ Provision for assistance in the collection of tax debts is more commonly found in bilateral agreements between industrialized countries.¹⁰⁵ It may be supposed that such agreements work best among systems that are administered in similar fashion, and especially where administrative integrity and transparency are unquestioned. The United States has entered into a limited number of tax treaties containing collection agreements with general enforcement provisions¹⁰⁶, provisions for collection assistance to assure that exemption from tax and reduced rates of tax granted under the treaty are not enjoyed by persons not entitled to them are more widespread. General enforcement clauses appear in its income tax treaties with Canada¹⁰⁷, Denmark¹⁰⁸, France¹⁰⁹, the Netherlands¹¹⁰ and Sweden¹¹¹ and in estate tax treaties with France¹¹² and South Africa.¹¹³

¹⁰⁰ Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture). On the limits to forfeiture of unreported, but innocent, cash see United States v. Bajakajian, 524 U.S. 321 (1997); on its civil nature see also Goldsmith v. Commissioner of Customs and Excise, [2001] 1 W.L.R. 1673 (Q.B.D.). A recent case is United States v. Jose, -- F.3d --, 2007 U.S. App. LEXIS 19735, 2007 WL 2349359 (1st Cir.)

¹⁰¹ John J. Tigue, Jr., *New Treaties Making Inroads into Foreign Bank Secrecy*, N.Y.L.J., Jan. 15, 1998, at 3.

¹⁰² The "Winebox Case" (Cook Islands): Controller and Auditor-General v. Davison, [1996] 2 N.Z.L.R. 278; Controller and Auditor-General v. Davison, [1996] N.Z.A.R. 145; Brannigan v. Davison, [1997] A.C. 238 (P.C.); Peters v. Davison, [1998] N.Z.A.R. 309; Peters v. Davison, [1999] 2 N.Z.L.R. 164; Peters v. Davison, [1999] 3 N.Z.L.R. 744.

¹⁰³ Previously "French Union"; constituted by French Constitution of Oct. 4, 1958, title XII (section abrogated Aug. 4, 1995).

¹⁰⁴ Cass. Comm., May 2, 1972, Bull. Civ. IV, No. 124; 2 JURIS-CLASSEUR DROIT FISCAL INTERNATIONAL, Fasc. 358 III A.

¹⁰⁵ See e.g., Protocol to the income tax treaty between Japan and Sweden of 1983, signed Feb. 19, 1999.

¹⁰⁶ Robert T. Cole & Richard A. Gordon, *Exchange of Information and Assistance in Tax Collection*, 23 TAX MGMT. INT'L J. 600 (1994), 24 TAX MGMT. INT'L J. 25 at 33-35 (1995) (describing Senate reluctance to ratify such provisions in some cases); Bruce Zagaris, *U.S. Policy Regarding Assistance in Tax Collection*, 10 TAX PLANNING INT'L REV. 7 (July 1983).

¹⁰⁷ Article 15, third protocol, signed at Washington, Mar. 17 1995. The provision does not apply where "the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested State".

¹⁰⁸ Article 27, treaty signed at Washington, Aug. 19, 1999.

¹⁰⁹ Article 28, treaty signed at Paris, Aug. 31, 1994.

¹¹⁰ Article 31, treaty signed at Washington, Dec. 18, 1992 as amended by Article XXX, protocol signed

Other treaties provide for more limited collection assistance for the purpose of countering abuse of specific treaty benefits.¹¹⁴ In 2005 Australia and New Zealand entered into a protocol amending their existing tax treaty, adding an Article 27 that provides "[t]he Contracting States shall lend assistance to each other in the collection of revenue claims. ..."¹¹⁵

General enforcement provisions have been addressed in few reported cases. At the District Court level, *Tesher v. United States*¹¹⁶ dismissed the attempt of the taxpayer, a Canadian physician resident in New York, to restrain IRS collection of a Canadian tax claim. In *In re Morgan*¹¹⁷ an undischarged bankrupt, likewise a doctor who had moved from Canada to the United States, was pursued in 1997 by the Internal Revenue Service for Canadian tax debts that Revenue Canada (now Canada Customs and Revenue Agency) had claimed in the 1994 Canadian bankruptcy. The reciprocal collection arrangement operated as it was intended to, forcing the debtor to return to the Canadian court which, taking account of his increased earnings capacity, fixed Can.\$100,000 (approximately half the tax debt exclusive of interest and penalties) as the amount to be paid over 60 months as condition to the grant of a discharge. *Chua v. Minister of National Revenue*¹¹⁸ dealt more specifically with the working of the treaty provision in relation to Canadian collection of tax claimed by the Internal Revenue Service. The judgment in that case held inconsistent with Subsection 15(1) of the Canadian Charter of Rights and Freedoms retroactive aspects of the Protocol's mutual collection provisions, finding that the applicant, not a Canadian citizen when her U.S. tax liability arose, "is now vulnerable to breaches of procedural and substantive justice in respect of this escalating IRS claim". Oblique reference to the bar on enforcement of foreign claims against a local national was made in a United States case, *United States v. Van der Horst*¹¹⁹ which, however, concerned the enforcement of federal tax liens in the context of an alleged fraudulent conveyance.

In a 1989 case, *Van deMark v. Toronto-Dominion Bank*¹²⁰, the Internal Revenue Service had levied upon the U.S. branch of a Canadian bank in which a Canadian citizen-resident held accounts, asserting that the Canadian held certain funds fraudulently transferred to him by his father, a U.S. resident and tax debtor. A Canadian court held the bank liable to

at Washington, Oct. 13, 1993. For an example of implementation of this provision, see *Miller v. United States*, 838 F. Supp. 338 (N.D. Ohio, 1993), 921 F. Supp. 494 (N.D. Ohio, 1996), 955 F. Supp. 795 (N.D. Ohio, 1996).

¹¹¹ Article 27, treaty signed at Stockholm, Sept. 1, 1994.

¹¹² Article 16, treaty signed at Washington, Nov. 24, 1978.

¹¹³ Article III, treaty signed at Cape Town, Apr. 10, 1947, as amended by supplemental protocol, Pretoria, July 14, 1950.

¹¹⁴ E.g., Article 26(2), U.S.-Switzerland income tax treaty and protocol signed at Washington, Oct. 2, 1996; Article 26(4), U.S.-South Africa income tax treaty, signed at Cape Town, Feb. 17, 1997.

¹¹⁵ Protocol signed at Melbourne, Nov. 15, 2005. See Angus Martyn, *International Tax Agreements Amendment Bill (No.1) 2006*, BILLS DIGEST, 27 July 2006, no. 5, 2006-07, International Tax Agreements Amendment Act (No. 1) 2006, No. 100, 2006 (Aus.), Double Taxation Relief (Australia) Amendment Order 2006 (N.Z.). The 1995 treaty is to be redrafted in its entirety in the future.

¹¹⁶ 246 F.Supp. 2d 297 (S.D.N.Y. 2003).

¹¹⁷ 1999 Man. D. J. 185, (1999) 88 A.C.W.S. (3d) 964.

¹¹⁸ Federal Court of Canada, Docket T-1216-99, Sept. 12, 2000.

¹¹⁹ 270 F. Supp 365 (D. Del. 1967).

¹²⁰ 68 O.R.(2d) 379 (Ont. H.C.J.)

its Canadian depositor for the funds, irrespective of its own susceptibility to the jurisdiction of the United States courts, stating that "the effect of permitting the Ontario branches to defend the applicants' claim on the basis of the bank's liability in New York [] State would be to enforce indirectly a claim for taxes by a foreign state".¹²¹ In this regard, the USA PATRIOT Act, in providing for seizure of funds in the U.S. correspondent bank of a foreign financial institution¹²², invites policy conflict of the sort seen in prior assertions of extraterritorial jurisdiction. Extraterritorial assertion of jurisdiction in the face of policy objections is susceptible to blocking action on the part of the other state, claiming paramountcy in matters of vital national interest over the operation: the United Kingdom's Protection of Trading Interests Act, 1980¹²³, French law No. 80-538 of July 6, 1980¹²⁴, art. 273 of the Swiss Penal Code¹²⁵, the Mexican law "to protect trade and investment from foreign norms that contravene international law"¹²⁶, the Canadian Foreign Extraterritorial Measures Act.¹²⁷

3. Penal-law aspects of cross border tax enforcement

The OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters¹²⁸ explicitly provides for the exchange of information foreseeably relevant to the undertaking of administrative proceedings or criminal prosecution for fiscal offenses.¹²⁹ The United States authorities have pursued cases of evasion of foreign taxes under existing fraud and money laundering statutes.¹³⁰ The U.S. has also included evasion of taxes due to one of its own sub-sovereign governmental entities as a crime of moral turpitude supporting deportation under the Immigration Reform and Immigrant Responsibility Act of 1996.¹³¹ Information may be passed to a foreign fiscal authority irrespective of the potential

¹²¹ *Id.* at 384.

¹²² Pub. L. 107-56, § 319, 18 U.S.C. § 981(k) (2005); 31 C.F.R. Part 103, 67 Fed. Reg. 60562 (2002).

¹²³ 1980, c. 11; *British Airways Bd. v. Laker Airways Ltd.*, [1985] A.C. 58 (1984), overruling [1984] Q.B. 142 (Ct. App. 1983); *Midland Bank PLC v. Laker Airways Ltd.*, [1986] Q.B. 689 (Ct. App. 1985); 1 DICEY MORRIS & COLLINS 682-84 (14th ed. 2006), 11th ed. at 397 (1987), 12th ed. at 411 (1993), 13th ed. at 420-21 (2000).

¹²⁴ *Partenreederei M/S "Heidberg" v. Grosvenor Grain and Feed Co.*, [1993] 2 Lloyd's Rep. 324.

¹²⁵ *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980), 72 Rev. crit. 242 (1983); see A.R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069 at 1075 (1965).

¹²⁶ 36 I.L.M. 145 (1997).

¹²⁷ 36 I.L.M. 111 (1997).

¹²⁸ E.T.S. No. 127; A.H.M. Daniels, *Council of Europe/OECD Convention on Mutual International Cooperation between Tax Authorities-The Multilateral Convention on Mutual Administrative Assistance in Tax Matters of the Council of Europe/OECD*, LEGAL ISSUES OF EUROPEAN INTEGRATION, 1988/1 at 35.

¹²⁹ Art. 4(1)(b), 130 F.3d at 550, n. 4.

¹³⁰ *United States v. \$15,270,885.69, N.Y.L.J.*, Sept. 12, 2000 (S.D.N.Y. 2000) (*Sobinbank-Bank of New York case*); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (civil forfeiture based on deprivation of information, not revenue, to U.S. Government in connection with currency and tax fraud in Pakistan).

¹³¹ Pub. L. No. 104-208, 110 Stat. 3009, 8 U.S.C. § 1252 (2005); *Wittgenstein v. Immigration & Naturalization Service*, 124 F.3d 1244 (10th Cir. 1997); but see *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), especially footnote 3.

use of the data for criminal prosecution.¹³² Legality under the laws of the reporting country of the seizure or collection of information may not control its use by the taxing country.¹³³ In principle, confidentiality of such data is to be maintained; the U.S.-Finland treaty, copying model-treaty wording, provides for confidentiality of information received. Yet, in Finland basic personal income tax information is widely available for general law enforcement and administrative purposes.¹³⁴

Beyond specific provisions for assistance upon the request of foreign authorities are the possibilities of civil action by the defrauded tax authorities of a foreign country, or criminal prosecution by one country for actions in that country in fraud of another's fiscal interests.¹³⁵ Several recent United States cases¹³⁶ have addressed customs and excise fraud on the part of Native Americans in abuse of their free transit privileges and customs exemption under the Jay Treaty.¹³⁷ When the Revenue Rule was raised as a defense in *Trapilo*, the Circuit Court of Appeals rejected it, quoting approvingly the *Restatement (Third) of the Foreign Relations Law of the United States*¹³⁸: "In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete." The District Court similarly regretted the precedent in a civil RICO case brought by the Canadian authorities in the United States, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*¹³⁹:

¹³² *United States v. Stuart*, 489 U.S. 353 (1989).

¹³³ *United States v. Stonehill*, 420 F.Supp. 46 (C.D. Cal. 1976) (evidence secured in raid by Philippine authorities).

¹³⁴ Steve Stecklow, *Helsinki on Wheels: Fast Finns Find Fines Fit Their Finances--Traffic Penalties Are Assessed According to Driver Income; The \$71,400 Speeding Ticket*, WALL ST. J., Jan. 2, 2001, at 1; Ian Evans, *Flying Finn hit by £116,000 speeding ticket*, TIMES (London), Feb. 11, 2004, at 1. The statutory references and methodology appear in COMPARATIVE STUDY OF ROAD TRAFFIC RULES AND CORRESPONDING ENFORCEMENT ACTIONS IN THE MEMBER STATES OF THE EUROPEAN UNION, COUNTRY REPORT - FINLAND, TREN/E3/47-2003.

¹³⁵ Such potential for prosecution in the United States goes beyond fiscal offenses and includes money laundering, RICO and Lacey Act violations. Prosecution may succeed even in the face of opposition by the foreign government and even where the foreign government itself denies the validity of the law attributed to it: *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), cert. denied 540 U.S. 1177 (2004).

¹³⁶ *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997) ("We therefore hold that a scheme to defraud the Canadian government of tax revenue is cognizable under the federal wire fraud statute, 18 U.S.C. §§ 1343, and reverse the order of the district court that dismissed the indictment alleging a money-laundering conspiracy in violation of 18 U.S.C. §§ 1956"); *similarly*, *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003), *aff'd* 544 U.S. 349 (2005); *cf.* *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), cert. denied 519 U.S. 905 (1996). Other tobacco excise tax cases implicated domestic law: *United States v. Miller*, 26 F. Supp. 2d 415 (N.D.N.Y. 1998) (outbound smuggling and money laundering; *Trapilo* applied); *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995) (Contraband Cigarette Trafficking Act, 18 U.S.C. § 2341 (2005)), *United States v. Gord*, 77 F.3d 1192 (9th Cir. 1996) (evasion of state excise tax and money laundering; indictment reinstated); *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000) (money laundering; acquittal because no proof of scheme to defraud Canadian Government adduced). *See also* the cases brought by foreign governments against U.S. tobacco exporters: *Attorney General of Canada v. RJ Reynolds Tobacco Holdings*, 103 F. Supp. 2d 134 (N.D. N.Y. 2000); *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D. N.Y. 2001); *European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D. N.Y. 2002), *aff'd sub nom.* *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005); *Republic of Ecuador v. Philip Morris Cos.*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002).

¹³⁷ *United States and Great Britain*, 19 Nov. 1794, T.S. 105, 8 Stat. 116; *Akins v. Saxbe*, 380 F.Supp. 1210 (D.Me. 1974); *compare Francis v. R.*, [1956] S.C.R. 618 (Can.).

¹³⁸ § 483 (1987).

¹³⁹ 103 F. Supp. 2d 134, n. 3 (N.D.N.Y. 2000).

Were the Court writing on a clean slate (which, as will be discussed, it is not), it would be inclined to find the Revenue Rule to be outdated (to the extent it was ever properly recognized by courts in the United States in the first instance) and the rationales for the rule to be largely unpersuasive, at least with respect to the recognition of foreign tax judgments.

The issues are different where a foreign government seeks extradition for tax evasion¹⁴⁰, for bankruptcy fraud¹⁴¹, for conspiracy in assisting in concealment of assets¹⁴² or other crimes which may include charges of tax evasion. Some country pairs recognize tax evasion as grounds for extradition.¹⁴³ Or, given the right facts, more generalized fraud may be charged: thus Ian Leaf was extradited from Switzerland, and in due course convicted in the UK, for "fraudulent trading" although the fraud was fiscal in nature.¹⁴⁴ Similarly, Tore Kjell Nuland was extradited from Britain to Norway on the basis that although the courts would not enforce a claim by a foreign state to recover a tax, that did not prevent the courts from extraditing a person for an ordinary offence arising out of tax evasion if that offence was an extradition crime under treaty and statute.¹⁴⁵ Beyond the Revenue Rule, the requirement that the offense stated constitute conduct susceptible to prosecution in both states may be an obstacle to extradition.¹⁴⁶ Since the 1993 revision of the United States Sentencing

¹⁴⁰ Marc Rich extradition request (unreported, Switzerland/United States). Switzerland refused his extradition on the basis that tax evasion is not an extraditable treaty offense; Rich was pardoned as to charges under federal law on Jan. 20, 2001 by President Clinton. *See also* Marc Rich & Co. A.G. v. United States (*In re* Marc Rich & Co. A.G.), 739 F.2d 834 (2d Cir. 1984) (subpoena); N.Y.S. Dep't of Taxation and Finance Press Release, Mar. 1, 2001 ("State: Fugitive financier Rich owes \$137 million in back taxes"). *Other cases*: Attorney-General v. Schreiber, [1998] 1 S.C.R. 841 (Karlheinz Schreiber, Canada/Germany); Secretary of Justice v. Lantion, Philippine Sup. Ct., G.R. No. 139465, Jan. 18, 2000, *rev'd on reconsideration*, Oct. 17, 2000 (Mark Jimenez, Philippines/United States). *See also* n. 50 *supra*.

¹⁴¹ United States v. Davis, 132 C.C.C.3d 442 (B.C.S.C. 1999), declining to free U.S. fugitives from extradition arrest on U.S. bankruptcy fraud charges in context of delay in issuance of surrender order.

¹⁴² *Infra*, nn. 243-245.

¹⁴³ *Supra*, n. 50.

¹⁴⁴ Ian Leaf: Adam Fresco, "Swindler took £55m off taxman", *TIMES* (London), Dec. 2, 2005, p. 41; Stephen Fidler, "Switzerland to return Briton facing tax evasion charges extradition", *FINANCIAL TIMES*, Sept. 25, 2004, p. 2 ("the Inland Revenue had made two previous unsuccessful efforts to extradite the businessman from Switzerland. It had since recharacterised the alleged offences as fraud--for which he can be extradited from Switzerland--instead of tax evasion, which is not an extraditable offence ..."); *R. v. Leaf*, [2007] EWCA Crim 802 (sentencing issues); *The Queen on the Application of the Commissioners of Inland Revenue v. The Crown Court at Kingston, Robin Wayne John*, [2001] EWHC Admin 581, 2001 WL 825037 (discussion of Leaf's tax evasion scheme). *Compare* David Bogatin: *Ewe Distributors, Inc. v. Chu*, 629 F.Supp. 1527 (E.D. N.Y. 1986), extradited from Poland in 1992, *N.Y. TIMES*, Feb. 9, Apr. 20, Apr. 30, 1992 (tax evasion); William C. Cooper: *Cooper v. Attorney General of Antigua and Barbuda*, Civ. suit, V2002/0228, High Court of Justice of Antigua and Barbuda, Jan. 13, 2003; *Todhunter v. United States of America*, 129 A.L.R. 331, 57 F.C.R. 70 (Australia 1995) (tax evasion among offenses charged); *Reg. v. Chief Magistrate, Ex p. Home Secretary*, [1988] 1 W.L.R. 1204 (extradition to Norway; tax evasion among offenses charged); Senate, Minority Staff of the Permanent Subcommittee on Investigations, *REPORT ON CORRESPONDENT BANKING: A GATEWAY FOR MONEY LAUNDERING*, at 59-116 (Feb. 5, 2001) (extradition refused for money laundering offense prior to ratification of treaty).

¹⁴⁵ *R v Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department*, [1988] 1 W.L.R. 1204 (QBD) (escaped convict).

¹⁴⁶ *Matter of Extradition of Matus*, 784 F. Supp. 1052 (S.D. Fla. 1993) (Chile); *but see* *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996) ("a cursory search has failed to make

Commission Guidelines Manual, responding to a refusal of the 9th Circuit to consider violation of Canadian tax laws in enhancement of a sentence for evasion of U.S. taxes for sentencing purposes¹⁴⁷, "[c]riminal activity' means any conduct constituting a criminal offense under federal, state, local, or foreign law". Conviction under U.S. law may be predicated on violation of a foreign law as interpreted by a U.S. court without reference to the foreign government's view as to the validity of its law or whether it was infringed.¹⁴⁸ Absconding may itself be an offense¹⁴⁹; or a court may acknowledge the act of flight as putting a party beyond its reach while nevertheless asserting powers with respect to assets within or without its jurisdiction. Although certain details pertaining to applicants for United States passports are made available to the tax authorities¹⁵⁰, the fundamental right of egress and ingress of the citizen from his or her country¹⁵¹ implies that passport facilities may not be withheld except for reasons of national security¹⁵² including, seemingly, an outstanding arrest warrant.¹⁵³ Issuance of U.S. passports may also be refused and existing passports canceled on grounds of outstanding child support obligations.¹⁵⁴

Neither the tax authorities nor the courts have been successful in addressing certain forms of intra-family, cross-border tax avoidance and evasion schemes of the type revealed in hearings into the BCCI affair¹⁵⁵ and in some of the BCCI court cases involving claims of set-

it clear whether a violation of Canadian revenue or tax laws would be grounds for extradition of the violator to Canadian authorities").

¹⁴⁷ United States v. Ford, 989 F.2d 347, 350-51 (9th Cir. 1993).

¹⁴⁸ United States v. McNab, 331 F.3d 1228 (11th Cir. 2003).

¹⁴⁹ Writs *ne exeat republica*: 26 U.S.C. § 7402(a) (2005); Department of Justice U.S. Attorneys' Manual, § 6-5.112; Illinois Code of Civil Procedure, § 16-101; United States v. Mathewson, 839 F. Supp. 857 (S.D. Fla. 1993), also 1993 U.S. Dist. LEXIS 3931 (S.D. Fla. 1993); United States v. Maryans, 803 F. Supp. 1378 (N.D. Ind. 1992) (guardianship issue); United States v. Lipper, 47 A.F.T.R.2d 81-1289 (N.D. Cal.); United States v. Shaheen, 445 F.2d 6 (7th Cir. 1971) (related case denying enforcement of U.S. Government levy against taxpayer's household goods on the high seas: *Brokaw v. Seatrain U.K. Ltd.*, [1971] 2 Q.B. 476 (Ct. App.)); United States v. Robbins, 235 F. Supp. 353 (D. Ark. 1964); *Aetna Casualty & Surety Co. v. Markarian*, 114 F.3d 346 (1st Cir. 1997); *Lewis v. Shainwald*, 48 Fed. 492 (D. Calif. 1881). Writs *ne exeat regno*: *Boyle v. Scarborough* (1665) Sty. 440, 82 Eng. Rep. 845; *Naylor's Case*, (1701) Holt K.B. 494, 90 Eng. Rep. 1172; *Al Nahkel For Contracting and Trading Ltd. v. Lowe*, [1986] Q.B. 235; writ refused in *Felton v. Callis*, [1969] 1 Q.B. 200 Australia: *Edelstein v. Deputy Comm'r of Taxation*, (1992) 108 A.L.R. 195; *Skase v. Commissioner of Taxation*, (1991) 105 A.L.R. 506; *Clyne v. Deputy Comm'r of Taxation*, (1984) 154 C.L.R. 589; *Oates v. Attorney-General*, [2001] F.C.A. 84 (tax authorities could secure departure prohibition order following defendant's extradition from Poland over securities-law offenses); *Taxation Administration Act*, s. 14S (departure prohibition order); *Bankruptcy Act*, 1966, s. 178 (undischarged bankrupt requires trustee consent for overseas travel); England: *Insolvency Act* 1986, s. 360; IAN FLETCHER, *THE LAW OF INSOLVENCY* at 340-41 (2d ed. 1996).

¹⁵⁰ 26 U.S.C. § 6039E (2005), Pub. L. 99-514, tit. XII, sec. 1234(a)(1), Oct. 22, 1986, 100 Stat. 2565, amended Pub. L. 100-647, tit. I, sec. 1012(o), Nov. 10, 1988, 102 Stat. 3515.

¹⁵¹ *Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964) (Journalist refused passport for travel to Cuba; fundamental right of ingress held infringed).

¹⁵² *Haig v. Agee*, 453 U.S. 280 (1981) (renegade former CIA officer).

¹⁵³ *Cf. R. v. Foreign & Commonwealth Secretary, ex parte Everett*, [1989] Q.B. 811 (Ct. App.) (British fugitive in Spain).

¹⁵⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, Sec. 370(a)(1), 42 U.S.C. §§ 652(k), 654(31) (2005) (child support arrears exceeding \$5,000).

¹⁵⁵ Report of Lord Justice Bingham, *Inquiry Into the Supervision of the Bank of Credit and Commerce International*, 22 Oct. 1992; 102th Cong., 2d Sess., U.S. Senate Committee on Foreign Relations, *The BCCI*

off where credit and debit balances had been recorded with the bank in different names.¹⁵⁶ The enforcement problem is similar to that in respect of money-laundering allegations against *hawalas*, the informal network of money transfer agents relying entirely on trust and leaving no paper trail.¹⁵⁷ Regarding BCCI, the accusation was made that funds deposited with the bank to the credit of nonresidents, earning untaxed interest, were used to guarantee loans made to resident businesses as to which the interest paid was a tax-deductible business expense. Implicit in the facts presented is that the funds were either maintained abroad in violation of foreign exchange control laws¹⁵⁸ or were property of the taxpayers held by nominees as to which earnings were undeclared for tax purposes.¹⁵⁹

No general rules can be drawn from the few cases reported involving criminal bankruptcy and civil confiscation orders. The freezing order (formerly *Mareva* injunction)¹⁶⁰, developed by the English courts and later enacted into statute law there, is unavailable as such in the U.S. federal courts¹⁶¹ but tax authorities have jeopardy assessment and levy provisions available to them.¹⁶² Although courts will hesitate to issue orders dependent for their enforcement on foreign jurisdictions without some indication that the foreign authorities will be receptive¹⁶³ there is no such hesitation with respect to declarations as to the rights of

Affair, 30 Sept. 1992.

¹⁵⁶ BCCI cases included: *Bank of Credit and Commerce Int'l SA (in Liquidation) v. Al-Saud*, T.L.R., Aug. 12, 1996 (Ct. App.) (counterclaims and set-offs); *In re BCCI SA (in Liquidation)* (No. 9), T.L.R., Oct. 8, 1996 (Chancery) (application of English procedural rules in matters of set-off); *Bank of Credit and Commerce Int'l S.A. (No. 8)*, [1995] Ch. 46, *aff'd* [1996] Ch. 245 (Ct. App.) (set-off denied in the case of guarantees); *M.S. Fashions Ltd. v. Bank of Credit and Commerce Int'l S.A.*, [1993] Ch. 425 (set-off granted); *Bank of Credit and Commerce Int'l v. Forde*, C.A. Paris, Apr. 29, 1994, D.S. 1995 Somm. 385. *Cf. Aston v. Commissioner*, 109 T.C. 400 (1997) (deductibility of lost deposits); *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000) (civil forfeiture; financial and customs fraud).

¹⁵⁷ *United States v. Ismael*, 97 F.3d 50 (4th Cir. 1996) (prosecution for structuring financial transactions to evade currency reporting requirements); *United States v. Talebnejad*, 342 F.Supp.2d 346 (D. Md. 2004) (hawala); *United States v. Uddin*, 365 F.Supp.2d 825 (E.D. Mich. 2005) (hawala).

¹⁵⁸ *Ispahani v. Bank Melli Iran*, (1998) Lloyd's Rep. Bank 133; T.L.R. 29 Dec. 1997; *Sharif v. Azad*, [1967] 1 Q.B. 605; *Banco Frances e Brasileiro v. Doe*, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 538, 331 N.E.2d 502 (Ct. App. 1975), *cert. denied*, 423 U.S. 867 (1975); *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 239 N.Y.S.2d 872 (Ct. App. 1963); *Francis A. Mann, The Private International Law of Exchange Control Under the International Monetary Fund Agreement*, 2 INT'L & COMP. L.Q. 97 (1953).

¹⁵⁹ *Emery v. Emery (In re Emery's Investment Trusts)*, [1959] Ch. 410 (Ch. Div.) (registration of foreign securities in wife's name to avoid tax in fraud of foreign fiscal authorities). "Nominee" can suggest shadow ownership and control, fraudulent transfer or transferee liability: *Libutti v. United States*, 107 F.3d 110 (2d Cir. 1997), *cert. denied*, 510 U.S. 904 (1996), 178 F.3d 114 (2d Cir. 1999). For Canada see *Kirkwood v. R.*, 2003 TCC 76, 2003 D.T.C. 277, appeal dismissed, cross-appeal allowed, 2003 FCA 481, 2004 D.T.C. 6035.

¹⁶⁰ *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (Ct. App.); *Derby & Co. Ltd. v. Weldon*, [1990] Ch. 48; *Derby & Co. Ltd. v. Weldon* (Nos. 3 & 4), [1990] Ch. 65 (Ct. App.). Practice Direction, High Court of Justice, [1994] 1 W.L.R. 1233 set out guidelines for the issuance of *Mareva* injunctions and of Anton Piller orders for the production of documents; Civil Procedure Rules, Ch. 13; William Tetley, *Arrest, Attachment and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895 (1990).

¹⁶¹ *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

¹⁶² I.R.C. § 6331-6344 (2002) and comparable state laws, e.g., Cal. REV. & TAX CODE §§ 19081-19093 (West 2002). Similarly, (Australia) Income Tax Assessment Act 1936 (Cth), ss 204, 205; *Thai v. Commissioner of Taxation*, 53 F.C.R. 252, 28 A.T.R. 475 (N.S.W. Dist. Reg. 1994).

¹⁶³ Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 REC. DES COURS 9, 115-120 (1992-III) (worldwide *Mareva*); *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093 (Ct. App.). On international aspects, see Paul D. Friedman, *Worldwide Mareva Injunctions—Assumption of*

domestic tax authorities in foreign assets of taxpayers.¹⁶⁴ If courts have *in personam* jurisdiction over taxpayers they may hold them in contempt for willful, recent transfers in fraud of creditors or where assets, nominally held in discretionary trust by others, appear to be under their actual control.¹⁶⁵ "Constructive control" over foreign property may suffice to give the court a basis for *in rem* jurisdiction.¹⁶⁶ If a court has jurisdiction over a trustee of a discretionary trust wherever formed it may require that trust to give notice prior to making any disbursement to a beneficiary who is a judgment debtor.¹⁶⁷ It is obvious that the power to adjudicate a tax demand does not depend on the existence of any effective power to seize, or to compel production of, assets for the satisfaction of a tax debt.¹⁶⁸

International joint action has been undertaken in the past where tax evasion represents only one aspect of a broader criminal enterprise¹⁶⁹ or has defrauded the revenue authorities of two or more countries simultaneously.¹⁷⁰ The assertion of similar powers, including criminal prosecution for fraud solely affecting a foreign fiscal authority based upon such crimes as money laundering and RICO is new. Thus it may be possible to undertake prosecution in one country for activity that has had the effect of defrauding the revenue authorities of another country. In the United States success in such cases¹⁷¹ or in civil RICO actions such as *Attorney-General of Canada v. R.J. Reynolds Tobacco*¹⁷² has been predicated upon violation of mail and wire fraud statutes in the course of an activity specified in 18 U.S.C. §1961(a).¹⁷³

Jurisdiction, 144 NEW L.J. 932 (1994). Cf. the U.S. rule enunciated in *Visual Sciences, Inc. v. Integrated Communications, Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) ("A court must have in personam jurisdiction over a party before it can validly enter even an interlocutory injunction against him."), although this does not necessarily apply to the party's assets, *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971), *supra*, n. 149. As to the adoption by several U.S. Circuit Courts of Appeal of a comparable remedy, see *Alliance Bond Fund Inc. v. Grupo Mexicano de Desarrollo S.A.*, 143 F.3d 688 (2d Cir. 1998). Ireland: *Balkanbank v. Taher, T.L.R.*, Dec. 1, 1994, *The Independent*, Dec. 9, 1994, 139 S.J.L.B. 16 (Ct. App. 1994) (Irish worldwide Mareva injunction issued following allegations of fraudulent obtaining of American bank loan. This was an English action for damages following discharge of injunction.)

¹⁶⁴ *In re Guyana Development Corp.*, 168 B.R. 892 (Bankr. S.D. Tex. 1994), 189 B.R. 393 (Bankr. S.D. Tex.; U.S. v. Barnette, 129 F.3d 1179 (11th Cir. 1997). Cf. *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968 (N.D. Tex. 1988) (nonrecognition of foreign discharge of tax debt); *In re International Administrative Services, Inc.*, 211 B.R. 88 (Bankr. M.D. Fla. 1997) (U.S. Chapter 11 proceeding; avoidance action and Guernsey asset freeze).

¹⁶⁵ Cases cited *infra*, n. 243.

¹⁶⁶ *U.S. v. All Funds on Deposit in any Accounts Maintained in Names of Meza or De Castro*, 63 F.3d 148 (2d Cir. 1995), *aff'g* 856 F. Supp. 759 (E.D.N.Y. 1994).

¹⁶⁷ *Bass v. Denney*, 12 Tex. Bankr. Ct. Rep. 92 (N.D. Tex. 1998).

¹⁶⁸ *Lord Advocate v. Tursi*, 1998 S.L.T. 1035 (Outer House 1997).

¹⁶⁹ Use of mutual legal assistance convention with respect to a cross-border illicit sports betting enterprise, resulting in civil forfeiture: *United States v. \$734,578.82*, 286 F.3d 641 (3d Cir. 2002).

¹⁷⁰ *Boggs v. Commissioner*, T.C. Memo. 1985-429.

¹⁷¹ Cases cited *supra*, n. 130; *In re Impounded*, 178 F.3d 150 (3d Cir. 1999) (cross-border antitrust investigation; issue was 5th Amendment rights, demonstrating the limits to constitutional protection in international investigation and prosecution).

¹⁷² 103 F. Supp.2d 134 (N.D.N.Y. 2000) (applying, however, the Revenue Rule to deny Canada recovery).

¹⁷³ *United States v. Miller*, 26 F. Supp.2d 415 (N.D.N.Y. 1998) (tobacco and liquor smuggling); *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965) (jeopardy assessment and asset freeze); Robert B. Chapman, *Tax Compliance and the Revenue Rule in Prosecutions for Wire and Mail Fraud*, 48 Int'l & Comp. L.Q. 437

It is increasingly the case that charges of tax evasion, money laundering and conspiracy in the context of organized crime are used, or sought to be used, to combat excise and customs fraud¹⁷⁴, financial fraud¹⁷⁵, narcotics trafficking¹⁷⁶ and cross-border offenses generally.¹⁷⁷

4. Dealing with foreign tax obligations in the course of bankruptcy and insolvency proceedings and other indirect enforcement

The status of domestic and foreign tax liabilities as an administrative expense¹⁷⁸ when incurred by the estate following liquidation of foreign property, and their status with respect to eligibility for dividend, priority and dischargeability as prepetition claims, depends upon (1) statutory and treaty provision in derogation of the common law (and civil law) prejudice against foreign revenue claims, (2) pragmatic cooperation with foreign authorities whose assistance is needed to collect and liquidate assets, (3) judicial protection against personal liability of the trustees and practitioners involved in cross-border insolvency proceedings. Similar tax issues would arise in the cases of confiscation and liquidation of appreciated assets by a foreign government. The U.S. Bankruptcy Code provides that capital gains taxes accruing as a result of liquidation of estate property are administrative expenses of the proceeding.¹⁷⁹ Still, unsettled practice with respect to proof of claim by foreign tax authorities and denial or limitation of double taxation relief due to inconsistent characterization¹⁸⁰, uncertain incidence¹⁸¹, unilateral limitation or restriction¹⁸² or inconsistent attribution of tax

(1999).

¹⁷⁴ United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997); Fountain v. United States, 357 F.3d 250 (2d Cir. 2004).

¹⁷⁵ United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998).

¹⁷⁶ Two unreported cases: United States v. McCoy, 1999 U.S. App. LEXIS 19242 (4th Cir. 1999); United States v. Smith, 2000 U.S. App. LEXIS 6814 (9th Cir. 2000).

¹⁷⁷ International Narcotics Control Strategy Report, 1999, Bureau for International Narcotics and Law Enforcement Affairs, U.S. Department of State, March 2000. The Anderson's Ark & Associates prosecution involved charges of tax return fraud, mail fraud, wire fraud, money laundering and conspiracy; see United States v. Anderson, 472 F.3d 662 (9th Cir. 2006)..

¹⁷⁸ The priority status of UK corporation tax on post-liquidation interest deemed payable by statute (although not in fact received) was at issue in Kahn v. Commissioners of Inland Revenue (*In re Toshoku Finance UK*), [2002] 1 W.L.R. 671, [2002] U.K.H.L. 6, *aff'd* [2000] 1 W.L.R. 2478.

¹⁷⁹ 11 U.S.C. §§ 503(b)(1)(B), 507(a)(1) (2006); Waldschmidt v. C.I.R. (*In re Lambdin*), 33 B.R. 11 (Bankr. M.D. Tenn. 1983); *In re Duby*, 98 B.R. 126 (Bankr. D.R.I. 1989); *In re Roosevelt*, 176 B.R. 200 (B.A.P. 9th Cir. 1994); Dunham & Shimkus, *Tax Claims in Bankruptcy*, 67 AM. BANKR. L.J. 343 (1993).

¹⁸⁴ State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Curry v. McCanless, 307 U.S. 357 (1939); *In re Dorrance*, 115 N. J. Eq. 268, 170 A. 601 (Prerog. 1934), *aff'd*, 116 N.J.L. 362 (E.&A. 1936), *cert. denied*, 298 U.S. 678 (1936); *In re Dorrance*, 309 Pa. 151, 163 A. 303 (1932); R. v. Dimsey, [2001] U.K.H.L. 46 (anti-avoidance provisions); *In re Orville*, N.Y.S. Tax Appeal Tribunal No. 62942 (1987) (Trust Fund recovery (100%) penalty for failure to remit withholding). However, "under long-standing administrative practice, the IRS 'collects the amount of unpaid trust fund taxes only once'", Bradley v. United States, 936 F.2d 707, 711 (2d Cir. 1991). See also Canadian cases *infra*, n. 263.

Deleted: ¹⁸⁰ E.g., different "baskets" of income, as in the calculation of passive activity losses on IRS Form 8582 (26 U.S.C. § 469 (2005)) or foreign tax credit on form 1116 (26 U.S.C. §§ 27, 901, 904 (2005), especially § 904(d)). Such problems are not limited to cross-border transactions: see United States v. Dalm, 494 U.S. 596 (1990) (recoupment of gift tax previously paid on same transaction denied after payment to administratrix of estate was recharacterized as income). See also Boulez v. Commissioner, 83 T.C. 584, 596 (1984), *aff'd*, 810 F.2d 209 (D.C. Cir. 1987), (orchestral conductor who recorded music in return for a percentage of the record sales; although the contract termed his payment a royalty he held no property rights in the recordings and his payments were therefore held to be compensation for personal services). The treatment abroad of a particular levy or tax may be unpredictable: Kempe v. The Queen, 2000 Can. Tax Ct. LEXIS 2479, Docket No. 98-3864-IT-1, 1999-2782-IT-1 (Swedish church tax deemed deductible foreign tax; same tax discussed in Darby v. Sweden, ECHR, Case No. 17/1989/177233, Oct. 25, 1990); Estate of Ballard v. Commissioner, 85 T.C. 300 (1985), n. 269 *infra* (capital gains tax and estate tax). ¶

¹⁸¹ Bankers Trust New York Corp. v. United States, 225 F.3d 1368 (Fed. Cir. 2000). ¶

¹⁸² AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT, INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION II, PROPOSALS ON THE UNITED STATES INCOME TAX TREATIES 101-02 (1992). ¶

¹⁸³ Michael Prior has commented on national preferential claims with respect to taxes and other obligations to governments as a barrier to effective multilateral administration of insolvent estates: *Bankruptcy Treaties Past, Present and Future: Their Failures and Successes*, HARRY RAJAK, ED., INSOLVENCY LAW: THEORY & PRACTICE (1993). ¶

years represent traps for the unwary.¹⁸³ Indeed, taxpayers have no inherent constitutional or human rights protection from multiple taxation of the same income or transfer.¹⁸⁴ The susceptibility to double taxation is especially great in respect of trusts, where there is little consistency or coordination in the criteria for taxation.¹⁸⁵ In fraudulent transfer cases, especially those involving transfers to a spouse (with or without consideration), the nonrecognition of a taxable event or the facts of payment, postponement or exoneration¹⁸⁶ of any tax in some jurisdictions and not in others complicates the calculation and makes analysis speculative.¹⁸⁷ Tax liability arising upon cancellation of debt is another; its exclusion in the United States from income for tax purposes in the cases of insolvency or bankruptcy is statutory.¹⁸⁸ A complication may arise under certain circumstances: there is lack of consensus on the existence of a post-confirmation "estate" in Chapter 13 cases¹⁸⁹, and in Chapter 7 cases

¹⁸⁵ *Aloysius B. Carmichael Trust v. Illinois*, Dep't of Revenue Office of Administrative Hearings, IT-00-7 (2000) (decendent domiciled in Illinois; trustee and beneficiaries non-resident); Idaho Income Tax Administrative Rule 035 (3-out-of-5 test for trust residency); Cal. Revenue and Taxation Code, sec. 17742 ("The tax applies to the entire taxable income of an estate, if the decedent was a resident, regardless of the residence of the fiduciary or beneficiary, and to the entire taxable income of a trust, if the fiduciary or beneficiary (other than a beneficiary whose interest in such trust is contingent) is a resident, regardless of the residence of the settlor."); *In re Mallinckrodt*, N.Y.S. Tax Appeal Tribunal No. 807533 (1992) (beneficiary of nonresident trust taxed without credit for tax paid to state of trust residence, Minnesota); Idaho Tax Commission Docket No. 2001-14876 (discussing nexus and imposing tax on certain trust income as "Idaho source income"; *District of Columbia v. Chase Manhattan Bank*, 689 A.2d 539 (D.C. Ct. App. 1997); *Chase Manhattan Bank v. Gavin*, 733 A.2d 782 (Conn. 1999). Cf. *Blue v. Dep't of Treasury*, 185 Mich. App. 406, 462 N.W.2d 762 (1990) (taxation of Michigan decedent's trust having solely out-of-state trustee and beneficiaries held unconstitutional). Conflict of partnership taxation rules may likewise lead to double taxation: *In re Estate of Havemayer*, 17 N.Y.2d 216, 217 N.E.2d 26, 270 N.Y.S.2d 197 (1966) (estate taxation of Connecticut land owned by New York partnership). Compare 61 Pa. Code § 101.1: "The single controlling factor in determining if a trust is a resident trust for purposes of this article shall be whether the decedent, the person creating the trust or the person transferring the property was a resident individual or person at the time of death, creation of the trust or the transfer of the property. The residence of the fiduciary and the beneficiaries of the trust shall be immaterial...." UK taxation of trusts differs in each case, for income, capital gains and inheritance tax purposes; the residence, domicile and status of settlor, trustee and beneficiary may be relevant. See, e.g., *Green v. Cobham*, [2002] S.T.C. 820 (retirement of UK-based trustee from active practice of law rendered nonresident trust subject to capital gains taxation).

¹⁸⁶ E.g., potentially exempt transfers, (U.K.) Inheritance Tax Act 1980, c. 51, s. 86(2), 86(5); Simon's Taxes ¶ 14.213; limitation to £55,000 of UK marital exemption where donor spouse is UK-domiciled and donee spouse is foreign-domiciled (Budget Act 2002); US: tax-exempt gifts between spouses, 26 U.S.C. § 1041 (2005).

¹⁸⁷ *Re Nurkowski (A Bankrupt)*; *Hill v Spread Trustee Co. Ltd.* [2005] B.P.I.R. 842 (Ch.D.) involved the settlement on trust of certain appreciated land, the trust being exported to Guernsey, the land sold and the settlor, charged with capital gains tax, unable to pay it and made bankrupt by the Inland Revenue.

¹⁸⁸ Bankruptcy Tax Act of 1980, Pub. L. 96-589, 26 U.S.C. § 108(a)(1) (2005); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931); *Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409 (9th Cir. 1986); F.T. Witt & W.H. Lyons, *An Examination of the Tax Consequences of the Discharge of Indebtedness*, 10 VA. TAX. REV. 1, 37 (1990). Cross-border (Canada-U.S.) bankruptcies arising from Lloyd's of London cash calls against its investors yielded anomalies relevant here: Canadian investors who, under Canadian law could deduct unpaid losses in Lloyd's syndicates and who by reason of a U.S. connection were able to file bankruptcy in the U.S. were not taxed in the U.S. for the relief from debt; neither were they taxed in Canada because Canadian law did not recognize a bankruptcy discharge where the law of the bankruptcy proceeding was not the proper law of the debt. For Canadian law see S.C. 1995, c. 21 (Bill C-70) (Part 1, "Amendments relating to debt forgiveness and foreclosure").

¹⁸⁹ *Security Bank of Marshalltown, Iowa v. Neiman (In re Brown)*, 1 F.3d 687 (8th Cir. 1993) (citing cases to show divergence among the circuits).

a trustee may abandon onerous property back to the debtor. Thus even in purely domestic cases the incidence of capital gains tax may not always be susceptible to pre-bankruptcy planning.

In England, the House of Lords decision in *Government of India v. Taylor*¹⁹⁰ established that a foreign government may not prove a debt for taxes under section 302 of the Companies Act 1948 in the liquidation of a firm. The Insolvency Act 1986 s. 115 and Rule 4.218 provide (in the case of voluntary winding up) and s. 324(1) and Rule 6.224 (in the case of personal bankruptcy) for the payment out of the estate of the expenses of the bankruptcy in a specified order of priority. While this will primarily relate to operating expenses including wages and employment taxes¹⁹¹ and is partly in fulfillment of European Union law¹⁹², the statutory terms are broad enough to encompass all necessary debts, including capital gains¹⁹³ and other taxes, incurred in the course of administration without geographic limit. The statute must be read in the light of European Union law on the protection of wages in the transfer and insolvency of undertakings.¹⁹⁴ Specifically with respect to capital gains tax, United Kingdom tax law provides for assessment of tax upon the trustee or assignee in bankruptcy or under a deed of arrangement.¹⁹⁵ The leading case is *Re Mesco Properties Ltd.*¹⁹⁶, which affirmed a Chancery Division decision that the capital gains tax on the liquidation of assets in a winding-up proceeding constituted a charge which the liquidator is bound to discharge to the extent that assets are available.¹⁹⁷ These rules relate to United Kingdom taxes only; the answer may well be different with respect to claims of foreign tax authorities¹⁹⁸, and tax

¹⁹⁰ [1955] A.C. 491, affirming the decision of the Court of Appeal in *In re Delhi Electric Supply and Traction Co. Ltd.*, [1954] Ch. 131, in which Jenkins, L.J. said: "I have come to the conclusion that if the claim of the applicant were allowed, subject to ascertainment of quantum, the substance and reality of the matter would be that the English court would be collecting tax for the benefit of another State. That would involve an invasion of the principle which, as I think, must be definitely recognized."

¹⁹¹ *In re FJL Realisations Ltd.*, T.L.R., Aug. 2, 2000 (Ct. App.).

¹⁹² *Everson & Barrass v. Secretary of State for Trade & Industry and Bell Lines Ltd (in liquidation)*, E.C.J. Case C-234/98, Dec. 16, 1999.

¹⁹³ *Kahn v. Inland Revenue Comm'rs (In re Toshoku Finance UK plc)*, [2000] 3 All E.R. 938 (Ct. App.); INLAND REVENUE MANUAL, INS7105.

¹⁹⁴ Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, 1980 O.J. (L 283) 23 and Council Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, 1977 O.J. (L 061) 26.

¹⁹⁵ Taxation of Chargeable Gains Act 1992, c. 12 (U.K.), s. 66(1).

¹⁹⁶ [1980] 1 W.L.R. 96 (Ct. App. 1979) ("The tax is a consequence of the realisation of the assets in the course of the winding-up of the company. That realisation was a necessary step in the liquidation; that is to say, in the administration of the insolvent estate. The fact that in the event there may be nothing available for the unsecured creditors does not, in my view, mean that the realisation was not a step taken in the interests of all who have claims against the company. Those claims must necessarily be met out of the available assets in due order of priority.")

¹⁹⁷ *Re Mesco Properties Ltd.*, [1979] 1 W.L.R. 558; accord, *In re McMeekin, A Bankrupt*, 48 T.C. 725 (H.C.N.I. 1973). See also *Commissioners of Inland Revenue v. Fleming*, 1928 S.C. 759, 14 T.C. 78 (Sess. 1928) (during sequestration income from the estate is attributable to the trustee, not the bankrupt).

¹⁹⁸ See Francis A. Mann, *Foreign Revenue Laws and the English Conflict of Laws*, 3 INT'L & COMP. L.Q. 465 (1954), regretting a Scottish decision, *Att.-Gen. for Canada v. William Schulze & Co.*, (1901) S.L.T. 4; W.C. Caccamise, Jr., *Note: U.S. Countermeasures Against Tax Haven Countries*, 26 COLUM. J. TRANSNAT'L L. 553 (1988) (discussing blocking statutes designed to counter U.S. discovery efforts in tax enforcement cases).

treaties provide little guidance.¹⁹⁹ Foreign tax paid by the liquidator, receiver or trustee on transactions undertaken abroad could reasonably fall under 4.218(1)(a), "expenses properly chargeable or incurred by the official receiver or the liquidator in preserving, realising or getting in any of the assets of the company" insofar as the tax is withheld at source or paid by the professionals engaged abroad to realize foreign assets. In default of payment of the tax those professionals abroad might be held personally liable. In fact, some glimmer of hope was offered by Lord Goff in *In re State of Norway's Application (No 2)*:

It has been suggested that the question can be avoided in the present case because the letters of request have been issued in response to an application by a taxpayer, seeking assistance for the purpose of opposing a claim by a foreign state for tax. ... It is true that in the present case the request was made by both the state and the estate. But in such a case the English court could (if necessary) accede to the application of the estate, while rejecting that of the state.²⁰⁰

Provisions of the Canadian Bankruptcy and Insolvency Act are similar in effect to the foregoing statutes.²⁰¹ However, quite apart from the issue of whether one jurisdiction will honor the tax claims of another arising within an insolvency or bankruptcy proceeding is the cross-border reconciliation of certain definitions. "Taxable income", like bankruptcy, is purely a statutory creation. It was at issue before the Federal Court of Australia in the *Alan Bond* case²⁰² where the trustee contended that gifts to the bankrupt for his living expenses and legal costs above a statutory threshold from members of his family and associated entities would be taxable to him; the court (in a 2 to 1 decision) reversed the judgment of the Administrative Appeals Tribunal and held the gifts to be non-taxable.²⁰³

5. Status in bankruptcy of prepetition foreign revenue claims generally

The Bankruptcy Abuse Prevention and Consumer Protection Act, in its new Chapter 15 provisions, specifically declines to "change or codify present law as to the allowability of

¹⁹⁹ The 1975 United Kingdom-United States treaty provides, in Art. 13: "Except as provided in Article 8 (Shipping and Air Transport) of this Convention, each Contracting State, may tax capital gains in accordance with the provisions of its domestic law." T.I.A.S. 9682, 1980-1 C.B. 394; United States of America Order 1980, S.I. 1980 No. 568. The article was not repeated in the 2001 treaty.

²⁰⁰ [1990] A.C. 723, 808.

²⁰¹ R.S., 1985, c. B-3, s. 136; 1992, c. 1, s. 143(E), c. 27, s. 54; 1997, c. 12, s. 90, art. 136, Priority of claims

(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows: ...

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee ...

²⁰² *Bond v. Trustee of the Property of Alan Bond, A Bankrupt*, (1994) 125 A.L.R. 399 (the trustee and Administrative Appeals Tribunal had argued for including gifts within the definition of "fringe benefit" for income tax purposes, citing the 1988 report of the Australian Law Commission to the effect that "as a matter of policy income from personal exertion was all that should be reserved to the bankrupt while income from other sources ought to be available for distribution among creditors").

²⁰³ Cf. Indian taxation of certain gifts as income, n. 282 *infra*.

foreign revenue claims or other foreign public law" in proceedings brought under it.²⁰⁴ Still, unsettled practice with respect to proof of claim by foreign tax authorities and denial or limitation of double taxation relief due to inconsistent characterization²⁰⁵, uncertain incidence²⁰⁶, unilateral limitation or restriction²⁰⁷ or inconsistent attribution of tax years represent traps for the unwary.²⁰⁸

The Revenue Rule was strictly applied by the Irish Supreme Court in *Peter Buchanan Ltd. v. McVey*²⁰⁹, an action on a claim by the Scottish liquidator of the plaintiff company, wound up at the instance of the Scottish Revenue to which taxes of £155,000 were due, against the absconding defendant owner of 99 percent of its shares. The English Court of Appeal ruled similarly in *QRS 1 Aps v. Frandsen*²¹⁰, an action brought by the liquidator of certain Danish companies against their former owner, a United Kingdom resident, under circumstances where the firm's sole creditor was the Danish revenue authorities. The result might be otherwise where claimants in a bankruptcy or insolvency proceeding include private creditors as well as a foreign revenue authority.²¹¹

In a landmark relaxation of the rule against admitting foreign revenue claims that went further in this respect than the House of Lords in Norway, the Alberta Court of Queen's Bench, in *Re Sefel Geophysical Ltd.*²¹², under the special circumstances of a stay of litigation

²⁰⁴ Pub.L. 109-8, Title VIII, § 801(a), Apr. 20, 2005, 119 Stat. 138, 15 U.S.C. § 1513(b)(2)(A) (2006); cf. Art. 13, UNCITRAL Model Law on Cross-Border Insolvency. And see *In re Lernout & Hauspie Speech Products, N.V.*, 301 B.R. 651 (Bankr. D. Del. 2003), aff'd, 308 B.R. 672 (D. Del. 2004) (confirming a plan that proposed to pay to the Belgian curators additional funds for payment of claims having priority under Belgian law, including tax and employee claims); *Yukos Oil Co. v. Russian Federation (In re Yukos)*, 320 B.R. 130 (Bankr. S.D. Tex. 2004) (injunctive relief to prevent sale of assets in satisfaction of Russian tax obligation).

²⁰⁵ E.g., different "baskets" of income, as in the calculation of passive activity losses on IRS Form 8582 (26 U.S.C. § 469 (2005)) or foreign tax credit on form 1116 (26 U.S.C. §§ 27, 901, 904 (2005), especially § 904(d)). Such problems are not limited to cross-border transactions: see *United States v. Dalm*, 494 U.S. 596 (1990) (recoupment of gift tax previously paid on same transaction denied after payment to administratrix of estate was recharacterized as income). See also *Boulez v. Commissioner*, 83 T.C. 584, 596 (1984), aff'd, 810 F.2d 209 (D.C. Cir. 1987), (orchestral conductor who recorded music in return for a percentage of the record sales; although the contract termed his payment a royalty he held no property rights in the recordings and his payments were therefore held to be compensation for personal services). The treatment abroad of a particular levy or tax may be unpredictable: *Kempe v. The Queen*, 2000 Can. Tax Ct. LEXIS 2479, Docket No. 98-3864-IT-I, 1999-2782-IT-I (Swedish church tax deemed deductible foreign tax; same tax discussed in *Darby v. Sweden*, ECHR, Case No. 17/1989/177/233, Oct. 25, 1990); *Estate of Ballard v. Commissioner*, 85 T.C. 300 (1985), n. 280 *infra* (capital gains tax and estate tax).

²⁰⁶ *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed. Cir. 2000).

²⁰⁷ AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT, INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION II, PROPOSALS ON THE UNITED STATES INCOME TAX TREATIES 101-02 (1992).

²⁰⁸ Michael Prior has commented on national preferential claims with respect to taxes and other obligations to governments as a barrier to effective multilateral administration of insolvent estates: *Bankruptcy Treaties Past, Present and Future: Their Failures and Successes*, HARRY RAJAK, ED., INSOLVENCY LAW: THEORY & PRACTICE (1993).

²⁰⁹ [1954] I.R. 89, [1955] A.C. 516; but see *supra* n. 70 and cf. *Oliver v. Byrne*, [1998] 2 I.L.R.M. 113; [1999] 2 C.M.L.R. 617 (Irl. Sup. Ct.) (agricultural subsidy fraud: applying European Union law in extradition of alleged offender to Northern Ireland).

²¹⁰ [1999] 3 All E.R. 289 (Ct. App.).

²¹¹ P. St. J. Smart, *International Insolvency and the Enforcement of Foreign Revenue Laws*, 35 INT'L & COMP. L.Q. 704 (1986); David Graham, *Tucker and the Taxman*, in IAN F. FLETCHER, ED., CROSS-BORDER INSOLVENCY: COMPARATIVE DIMENSIONS 205 (1990).

²¹² 54 D.L.R. (4th) 117 (Alta. Q.B. 1988).

granted in an ancillary proceeding by the U.S. Bankruptcy Court in Colorado and having considered the judgments in *Government of India v. Taylor* and *United States of America v. Harden*²¹³, admitted as claims against the estate, tax, unemployment insurance and workers' compensation debts from the United States. Forsyth, J., having opined that he was "not certain that the Government of India case is compatible with the current judicial climate", held that

current comity principles suggest that some foreign tax claims should be recognized in a Canadian liquidation setting. Comity is about respecting foreign judgments, proceedings and acts of state. If our bankruptcy proceedings are respected and deferred to, as they were in the case at bar, I am of the opinion that the claims of foreign states should be respected in our proceedings as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens. ...

The judgment took account of the fact that 90 percent of the assets in the proceeding came from United States sources; and it provided that where relevant United States creditors were to be accorded a preference on distribution similar to that attributable to a Canadian creditor of the same type. Tax anomalies of many kinds can arise in cross-border insolvencies and the experience of the receivers in *In re Petition of Ernst & Young, Inc.*²¹⁴ suggests that, in general, there are limits to the present scope for cooperation by the tax authorities of one nation with the courts directing an insolvency proceeding in another. Ernst and Young had been appointed receivers of Soundair, a Canadian airline serving the United States. The receivers had instituted ancillary proceedings in the United States and sought an injunction to enjoin the Internal Revenue Service from levying upon, placing a lien upon or seizing assets located in the United States, or commencing an action for those purposes. A preliminary injunction was first granted and then vacated, based on a finding of the District Court "that the IRS has not waived its sovereign immunity under 11 U.S.C. §§ 106(a) or (c) and that the Anti-Injunction Act, I.R.C. § 7421 bars appellee's suit for injunctive relief. The bankruptcy court was, thus, without jurisdiction to grant the May 6, 1991 preliminary injunction."²¹⁵

*Matol Botanical International Ltd. v. State Board of Equalization (In re Matol Botanical International Ltd.)*²¹⁶, a decision of the Cour Supérieure du Québec, was another case that recognized foreign claims for tax, but on grounds of comity and in the context of parallel proceedings in both countries²¹⁷:

13 ... [I]t seems probable that Richter & Associés Inc. in its capacity as Coordinator under the Plan of Arrangement could have refused to recognize the claim of the Respondent for taxes, interest and penalties due as of March 28, 1995. However, in the interest of settling the claims of all categories of creditors including those of U.S. governments and government agencies, it included Class II-A creditors in the Plan of Arrangement, which received the approval not only of this Court but of the Courts in the United States. No objection to such inclusion was registered by Respondent. In

²¹³ [1963] S.C.R. 366.

²¹⁴ Internal Revenue Service v. Ernst & Young, Inc. (*In re Soundair Corp.*), 135 B.R. 521 (S.D. Ohio 1991).

²¹⁵ *Id.* at 526. The facts of the case are stated at 129 B.R. 147 (Bankr. S.D. Ohio 1991).

²¹⁶ [2001] R.J.Q. 2333.

²¹⁷ *In re Matol Biological International Ltd.*, D. Nev. (Las Vegas), 95-22519 (Ch. 304).

such circumstances, can it now be permitted to contest the competence of the Court to interpret the terms of the Plan of Arrangement, even when the interpretation will have the effect of determining, at least in this jurisdiction, the Respondent's rights under a taxing statute?

14 The Court is of the opinion that an exception to the rule enunciated by the Privy Council in *Government of India v. Taylor* should be made in the case of an international insolvency where the courts of the countries concerned have already made an effort to coordinate their decisions so as to permit the settlement of claims in both jurisdictions, with a view to the continuation of the insolvent corporation's business. ...

Beyond such cases, the status of cross-border tax claims in bankruptcy is largely untested in practice if only because tax authorities often do not themselves file claims. Article 40 of the French Law of January 25, 1985 provides that debts incurred in the ordinary course of business after the commencement of a bankruptcy are paid when due; in case of liquidation they are given priority (with specified exceptions) over other debts.²¹⁸ The issue of foreign administrative expenses is not addressed. The general French rule of *ordre public* is that the French courts will not assist in the collection of foreign taxes.²¹⁹ The House of Lords Select Committee on the European Communities envisaged some problem with respect to "the potential loss of jurisdiction which is currently exercisable where the debtor has assets in the United Kingdom" under the proposed (but now abandoned) draft European Union Convention on Insolvency Proceedings.²²⁰ The replacement instrument, Council Regulation (EC) No. 1346/2000²²¹ provides in article 39: "Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing." The regulation is principally relevant to debtor undertakings having their center of main interests within the European Union, and to creditors having habitual residence, domicile or registered office in a member state. It entered into force May 31, 2002. The European Convention on Certain Aspects of Bankruptcy (Istanbul Convention)²²² refers to public-law claims in the context of secondary bankruptcies and liquidation of assets in secondary countries of operation and does not, by itself, grant additional rights to fiscal authorities. The UNCITRAL Model Law on Cross-Border Insolvency²²³ provides alternative wording in its footnote 2 for signatory states that refuse to recognize foreign tax and social security claims so that they may continue to

²¹⁸ Reprinted in DALLOZ, CODE DE COMMERCE; for annotation and discussion see 2 GEORGES RIPERT & RENÉ ROBLOT, TRAITÉ DE DROIT COMMERCIAL [Ripert & Roblot] §§ 3062-3067 (14th ed. 1994) particularly at § 3064: "Obligations incurred in the ordinary course of business in foreign operations must remain, in our opinion, outside the insolvency proceeding." [Informal translation] In a cross-border insolvency involving U.S. assets and a U.S. ancillary proceeding, no conflict need arise as claims for U.S. taxes would be addressed by the U.S. bankruptcy court.

²¹⁹ *Héritiers Vogt v. Felten*, Cass. civ., July 3, 1928, 56 *Clunet* 385 (1929); *Bemberg v. Fisc de la province de Buenos Ayres*, Seine, Feb. 24, 1949, 1949 J.C.P. II No. 4816, 1949 *Sirey* II 101.

²²⁰ House of Lords, Sess. 1995-96, 7th Report, H.L. Paper 59, Convention on Insolvency Proceedings.

²²¹ 2000 O.J. (L 160) 1.

²²² Istanbul, June 5, 1990, E.T.S. No. 136; see Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485 (1996) for discussion.

²²³ 72nd Plenary Meeting, Dec. 15, 1997, adopted at 30th session.

resist their enforcement.

Beyond the limited receptivity of courts to tax claims by foreign governments is the reluctance of those foreign governments to submit themselves to the jurisdiction of an alien court and the competence of a debtor or representative to submit proof of claim on his or her own initiative. Indeed, the bankruptcy laws of other countries may lack provisions comparable or equivalent to § 501 of the U.S. Bankruptcy Code, entitling a co-debtor or, in the alternative, the debtor or trustee, to file a proof of claim.²²⁴ Submission by a government to the jurisdiction of a foreign tribunal may work a waiver of sovereign immunity with unpredictable results. The United States Government failed before the Supreme Court of Canada in *United States of America v. Harden*²²⁵ in its effort to enforce a tax debt in Canada and thereafter Internal Revenue Service administrative policy was to decline participation in foreign court proceedings.²²⁶ The U.S. Government had mixed results before provincial courts in "friend of the court" (non-)appearances in personal bankruptcy proceedings where it sought to block discharge of educational loans of a sort not normally dischargeable under the municipal law of either Canada or the United States.²²⁷ In *United States of America v. Inkley*²²⁸ the U.S. Government was rebuffed in an attempt to collect a U.S. civil judgment on a bail bond against a British subject and resident; however, in *United States Government v. Montgomery*²²⁹ a U.S. forfeiture order was held not to be "an external and penal confiscation order" but merely an award of interest. The IRS failed in an effort to enforce a levy in an English court²³⁰, but has been more successful where it has been able to pursue in the U.S. courts a tax debtor with foreign assets. Recent cases have concerned tax debtors in civil and criminal proceedings who have absconded with their assets or sought to hide assets in foreign trusts, legal entities and bank and securities accounts and to use foreign credit and debit cards.²³¹

²²⁴ Canada Bankruptcy and Insolvency Act 1985, Art. 124(3): "Who may make proof of claims. (3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge." The British Insolvency Rules (S.I. 1986/1925), Rule 4.73 provides that "a person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must ... submit his claim in writing to the liquidator". The provision with respect to bankruptcies of individuals (Rule 6.96) is similar.

²²⁵ [1963] S.C.R. 366. *Similarly*, Her Majesty Queen in Right of Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979).

²²⁶ Communication of May 30, 1995, U.S. Internal Revenue Service attaché, U.S. Embassy, London. Determination in individual cases is the responsibility of Special Procedures Division, Office of International Operations. The reciprocal collection provision of the Third Protocol, *supra*, n. 107, would change the result with respect to Canada.

²²⁷ *In re Taylor*, (1988) 68 C.B.R.(N.S.) 93 (P.E.I.S.C.); *In re Bialek*, (1994) 25 C.B.R.(3d) 271 (S.C. Ont.) (holding the proper law of the loan contract to be that of the United States, and conditioning a discharge on payment of \$2,000 monthly for 45 months. "The position of the United States' government before me is thus not a refusal to accept the jurisdiction of the court, but merely a statement of the limits of that jurisdiction according to our own law.").

²²⁸ [1989] Q.B. 255 (Ct. App.).

²²⁹ [1999] All E.R. 84, [1998] 2 F.L.R. 1035 (C.A.).

²³⁰ *Brokaw v. Seatrain U.K. Ltd.*, [1971] 2 Q.B. 476.

²³¹ Ronald Smothers, *Banker Outlines Money Laundering in Caymans*, N.Y. TIMES Aug. 3, 1999, at 1, B6; *Miler v. Commissioner*, T.C. Memo. 1994-249 (Turks and Caicos sham trust company); *United States v. Abboud*, 273 F.3d 763 (8th Cir. 2001) (dismissed on jurisdictional ground: Abboud had patronized Mathewson's Cayman Islands bank (*supra*, n. 149); *United Imports Corp.*, Case No. 8:99CR80 (D. Neb. 2000) (unreported) <<http://www.nebar.com/pdfs/DCOpinPDFs/8-99cr80.pdf>> (visited Nov. 4, 2007); *R. v. Allen*, [2001] U.K.H.L.

Some major industrial countries have sought to undertake coordinated attack against casual and small-scale tax evasion, notably at the OECD.²³² The United States has been particularly aggressive in seeking disclosure of foreign transactions and accounts.²³³ It has signed a number of tax information agreements with jurisdictions it had formerly targeted as tax havens.²³⁴ Cross-border cooperation in money-laundering and narcotics matters may facilitate future seizures of the proceeds of particular sorts of criminal activity, if not of tax claims for unreported criminal profits. Involuntary bankruptcy (and, formerly, English criminal bankruptcy²³⁵) has been a means of confiscating proceeds of crime including, particularly, income tax and value added tax evasion.²³⁶ It has also been, under particular circumstances, a means of sequestering foreign-held assets: success has depended upon statutory recognition of and cooperation with the foreign proceeding, municipal-law recognition of foreign vesting of title in the trustee or receiver, or inclusion of tax debts as one among several. The latter circumstance has given rise to discussion in the legal literature over a possible threshold level of ordinary commercial debts compared with revenue debts required to justify the legitimacy of the foreign insolvency proceeding as non-revenue in nature.²³⁷

In addressing the treatment of tax claims in bankruptcy, the prepetition/postpetition distinction has particular relevance. With respect to prepetition obligations for payment of foreign taxes, the effect of the proceeding will depend on:

- the applicable (in English-law terms, "proper") law of the debt, normally the law

45 (conviction for tax evasion and confiscation order against shadow director of offshore firm); *United States v. Mann*, 829 F.2d 849 (9th Cir. 1987) (disclosure of Cayman bank records).

²³² Notably: OECD Model Convention; OECD COMMITTEE ON FISCAL AFFAIRS, IMPROVING ACCESS TO BANK INFORMATION FOR TAX PURPOSES (2000). *See* (Switzerland) CODE PÉNAL F.S. 311.0, art. 305-305-ter.

²³³ The U.S. District Court for the Southern District of Florida granted the IRS an order October 30, 2000 requiring the turnover of data on usage in the United States during 1998 and 1999 of certain debit and credit cards issued by financial institutions in Antigua and Barbuda, the Bahamas and the Cayman Islands. U.S.D.C., S.D. Fla., Case No. 00-CV-3919. The IRS demand was withdrawn on Nov. 22, 2002, following settlement with the credit card issuers: IRS Chronology On Credit Cards and John Doe Summons, <<http://www.irs.gov/newsroom/article/0,,id=105698,00.html>> (visited Nov. 4, 2007). The Department of Justice memorandum in support of its *ex parte* petition for leave to issue John Doe summonses on VISA International was archived by Cryptome at <<http://cryptome.org/usa-visa-does.htm>> (visited Nov. 4, 2007). *Cf.* Re an Application by Revenue and Customs Commissioners to Serve section 20 Notice, [2006] S.T.C. (SCD) 71 (Information sought about credit card customers with United Kingdom addresses holding cards associated with offshore bank accounts).

²³⁴ U.S.-Cayman Islands agreement, Washington, Nov. 27, 2001, and other similar agreements.

²³⁵ Criminal Justice Act 1972, c. 71; Powers of Criminal Courts Act 1973, c. 62, ss. 39-40; abolished by Criminal Justice Act 1988, c. 33, s. 39, and replaced by confiscation orders by ss. 71-103; *see also* Terrorism Act 2000, c. 11.

²³⁶ *In re Tucker* (A Bankrupt), LAWTEL, July 11, 1988 (Isle of Man, May 16, 1987) (applying Bankruptcy Act 1914; taking evidence in support of English proceeding); *Bullen v. Her Majesty's Government of the United Kingdom*, 553 So.2d 1344 (Fla. App. 4th Dist. 1989) petition for review denied, 567 So.2d 434 (Sup. Ct. Fla. 1990), enforcing vesting of Florida property in English receiver in *Regina v. Garner*, [1986] 1 W.L.R. 73. *Cf. Ex parte Bettel* (*In re "The Land Transfer Act, 1885"*), (1895) 14 N.Z.L.R. 129. *And see* *Ashurst v. Pollard*, [2000] 2 All E.R. 772 (Ch.D.) (Portuguese real property; court's power to compel English debtor and spouse to execute transfer documents in favor of debtor's bankruptcy trustee); *In re International Administrative Services, Inc.*, 211 B.R. 88 (Bankr. M.D. Fla. 1997).

²³⁷ *Supra*, n. 70.

imposing the tax but conceptually the law of the underlying transaction

- the susceptibility of property of the assessed party to *in rem* proceedings in a third-country jurisdiction
- dischargeability of taxes under the law of a bankruptcy forum
- willingness of the tax-assessing authority to intervene directly or at least declare its position from the margins in the foreign bankruptcy proceeding
- treaty arrangements which may give domestic status to tax claims by treaty partner countries
- depending on the law of the forum, voluntary filing of proof of claim (debt) by the debtor to induce a partial liquidation of nondischargeable foreign tax debts at the expense of holders of other (dischargeable) claims
- personal jurisdiction in the forum over parties with an interest in or control over assets which a taxing authority might seek to levy upon to satisfy its claim.

Much of the legislative debate over cross-border bankruptcy has concerned the assurance for creditors, including governmental creditors, of fair or proportionate access to assets located within their jurisdiction. Other issues concern the priority to be given particular claims, including taxes, wages, child support, educational loans. Where the controlling persons of an entity would have personal liability for certain classes of debt in a particular jurisdiction, they may have incentive to contrive to position assets during the pre-bankruptcy ("suspect", in civil-law terms²³⁸) period in such manner as to make them available for payment of those debts, including tax debts. It will be difficult to apply fraudulent conveyance (Paulian or revocatory action in civil-law systems) or preference provisions to such situations.²³⁹ Another such conflict concerns the attribution of trust-fund status to certain taxes, such as those withheld from wages²⁴⁰ and those collected at point of sale, and the Article 11 sovereign immunity of U.S. states.²⁴¹ Inasmuch as U.S. states may not deem themselves as bound by tax treaties negotiated and ratified by the federal government insofar as they define taxable income independently of federal adjusted gross income, use by them of treaty rights to collect taxes is doubtful. Only some U.S. states allow for cross-border credit of income tax assessed

²³⁸ RIPERT & ROBLOT §§ 3108 (14th ed. 1994).

²³⁹ *Wittman v. United States (In re Weir)*, 90-1 U.S.T.C. ¶ 50229, 1990 Bankr. LEXIS 778 (Bankr. D. Kan. 1990); *Begier v. United States IRS (In re American International Airways, Inc.)*, 878 F.2d 762 (3d Cir. 1989); *Barry v. Arkansas (In re Wieser)*, 86 B.R. 157 (Bankr. W.D. Ark. 1988); cf. *United States v. Daniel (In re R & T Roofing Structures & Commer. Framing, Inc.)*, 887 F.2d 981 (9th Cir. 1989) (commingled funds held not traceable to unpaid taxes). The (French) Civil Code provides no remedy for pre-bankruptcy preferential payments to creditors: art. 1167; Claude Colombet, *De la règle que l'action paulienne n'est pas reçue contre les paiements*, 1965 REVUE TRIMESTRIELLE DE DROIT CIVIL 5.

²⁴⁰ 26 U.S.C. 7501(a) (2005).

²⁴¹ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Edelman v. Jordan*, 415 U.S. 651, 667 (1974); Henry Paul Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996); *Schlossberg v. Maryland (In re Creative Goldsmiths of Wash. D.C., Inc.)*, 119 F.3d 1140 (4th Cir. 1997); such claims are in most instances effectively relegated to state courts.

by sub-sovereign entities.²⁴² The recognition of tax levies and liens across sovereign boundaries is likewise open to doubt. While an IRS tax lien attaches worldwide to all assets of the debtor, in the absence of *in rem* jurisdiction its enforceability depends upon coercive power over the person having effective control.²⁴³ A bank or banker within the jurisdiction may be subpoenaed.²⁴⁴ Professional advisors of persons who abscond or who undertake fraudulent conveyances may be sanctioned.²⁴⁵

In the United States limitations periods for tax-related offenses will be tolled while the taxpayer has absconded or is outside the United States; and on civil liability also where a fraudulent return or no return has been filed.²⁴⁶ The limitations period on collection of assessed tax will likewise be tolled.²⁴⁷ In at least two U.S. jurisdictions, the limitations period under the Uniform Fraudulent Transfer Act may not begin to run until a judgment for debt has been obtained.²⁴⁸ An appeal may be dismissed on the basis that the appellant is a fugitive

²⁴² E.g., MASS. GEN. LAWS ch. 62, § 6 (2005); ME. REV. STAT. ANN. tit. xxxvi § 5217-A (2005); MINN. STAT. § 290.01, subd. 19a(2) (2005); MICH. COMP. LAWS § 206.255 (2005); MINN. STAT. § 290.06 Subd. 22 (2005); N.Y. TAX L., § 620 (McKinney 2005); VT. STAT. ANN. tit. xxxii § 5825 (2005); cf. Quebec: R.S.Q. §§ 772.2-772.12 (2005).

²⁴³ *In re Lawrence*, 238 B.R. 498 & 251 B.R. 630 (Bankr. S.D. Fla. 1999); *Lawrence v. Goldberg (In re Lawrence)* 279 F.3d 1294 (11th Cir. 2002); *FTC v. Affordable Media*, 179 F.3d 1228 (9th Cir. 1999); *In re Portnoy*, 201 B.R. 685 (Bankr. S.D.N.Y. 1996); *Brown v. Higashi (In re Brown)*, 4 Ak. Br. Rpt. 279 (Bkrt. D. Alaska 1995); *Riechers v. Riechers*, 679 N.Y.S.2d 233 (Sup. Ct., West. Co. 1998); but see *Securities and Exchange Comm'n v. Brennan*, 2000 U.S. App. LEXIS 26890 (2d Cir. 2000) (scope of automatic stay in bankruptcy, the issue also in *Nakash v. Zur (In re Nakash)*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996)). Order to repatriate assets: *United States v. Pozgay*, 1997 U.S. Dist. LEXIS 21545 (E.D. Mo. 1997); *United States v. McNulty*, 446 F. Supp. 90 (N.D. Calif. 1978).

²⁴⁴ *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied 462 U.S. 1119 (1983); *United States v. Field (In re Grand Jury Proceedings)*, 532 F.2d 404 (5th Cir. 1976), cert. denied 429 U.S. 940 (1976). Compare the issue of self-incrimination risk in the context of the "same-sovereign" rule: *United States v. Balsys*, 524 U.S. 666 (1998); *King of the Two Sicilies*, (1851) 1 Sim. (N.S.) 301, 61 E.R. 116; *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547. And see *R. v. Spencer*, 31 C.P.C. 162, 145 D.L.R. (3d) 344 (Ont. S. Ct., 1983) (Crown witness subpoenaed to give evidence as to customers and transactions of foreign bank), *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964) (effect of immunity granted by a different sovereign).

²⁴⁵ *Riggs Nat'l Bank v. Andrews (In re Andrews)*, 186 B.R. 219 (Bankr. E.D. Va. 1995) (pre-bankruptcy planning deemed to be counsel in support of subsequent fraudulent transfer, vitiating lawyer-client privilege); *United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991) (use of law firm and accounting firm trust accounts in bankruptcy fraud); *Handeen v. Lemaire*, 112 F.3d 1339 (8th Cir. 1997) (law firm subject to suit under RICO for assisting client to manipulate his bankruptcy to defeat creditor's claims); but compare *Freeman v. First Union Nat'l Bank*, 865 So.2d 1272 (Fla. 2004) (no cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee). Cf. (Engl.) Insolvency Act 1986, s. 358(b) (an offence to abscond with property valued over £500 in the six months prior to the filing of a petition in bankruptcy); s. 357(1) (an offence to make any gift or transfer or charge on property within five years of bankruptcy); see *Re Attorney General's Reference (No. 1 of 2004)*, [2004] 1 W.L.R. 2111, [2004] E.W.C.A. Crim. 1025, leave to appeal to the House of Lords refused, [2004] 1 W.L.R. 2856. An assisting practitioner is potentially subject to professional discipline or to prosecution. See also: Margaret Robertson, *The International enforcement of judgments against trusts*, 8 TRUSTS & TRUSTEES 7 (2002) (discussing enforcement of divorce, tax and other obligations in the context of offshore trusts).

²⁴⁶ 18 U.S.C. § 3290, 26 U.S.C. § 6531 (2005); *United States v. Hoffman*, 80 A.F.T.R.2d (RIA) 6062 (6th Cir. 1997) (conviction for tax offenses; statute of limitations tolled during flight from prosecution on unrelated state charge); *United States v. Marchant*, 774 F.2d 888, 892 (8th Cir. 1985), cert. denied 475 U.S. 1012 (1986) (absence from United States); 26 U.S.C. § 6501(c)(1), (3) (2005).

²⁴⁷ 26 U.S.C. § 6503(c) (2005).

²⁴⁸ *Cortez v. Vogt*, 52 Cal.App.4th 917 (4th App. Dist. 1997), but see Cal. Civ. Code § 3439.09(c)

or has absconded.²⁴⁹ The United States also claims the right to require its citizens to return and give evidence when summoned.²⁵⁰ In the United Kingdom trading is not considered to have ceased for the purposes of the insolvency laws "until the sums due are collected and all debts paid" inclusive of taxes.²⁵¹ Courts have infrequently considered the relevance of foreign limitations periods in such cross-border issues, although the underlying problem for the taxpayer may be evident where inconsistent declarations have been made to the tax authorities of two different jurisdictions and the time has expired for filing a claim for tax credit with one on an assessment made by the other.²⁵² Although the respective circuit courts of appeal holdings are not consistent, the majority view is that there is an autonomous statute of limitations for fraudulent transfers in the tax context, and this irrespective of the UFTA's purporting to extinguish the right rather than the remedy.²⁵³ The problem of resolving

(extinction of cause of action "if no action is brought or levy made within seven years"), *Macedo v. Bosio*, 86 Cal. App. 4th 1044 (1st App. Dist. 2001), *Forum Insurance Co. v. Comparet*, 62 Fed. Appx. 151 (Cal. 9th Cir. 2003) and *Morganroth & Morganroth v. Norris, McLaughlin & Marcus P.C.*, 331 F.3d 406 (N.J., 3d Cir. 2003); cf. *Levy v. Markal Sales Corp.*, 724 N.E.2d 1008 (2000).

²⁴⁹ Fugitive disentitlement doctrine: *Molinaro v. New Jersey*, 396 U.S. 365 (1970), subsequently restrained by *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993); *State v. Bell*, 2000 ND 58, 608 N.W.2d 232 (2000) (discussion of states' practices); *Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir. 1997) (deportation case; further background at 163 F.3d 1164 (10th Cir. 1998)); *Pecoraro v. Commissioner*, T.C. Memo. 1995-220 and *Daccarett-Ghia v. Comm'r*, 70 F.3d 621 (D.C. Cir. 1995) (declining to dismiss tax appeals). See also *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000) (child custody); *In re Henson*, 289 B.R. 730 (Bankr. N.D. Calif. 2002) (bankruptcy) (all discussing prior cases). The doctrine may not bar the defense of unrelated civil claims, *Federal Deposit Ins. Corp. v. Pharaon*, 178 F.3d 1159 (11th Cir. 1999); it cannot be used to deny a hearing in civil forfeiture cases, *Degen v. United States*, 517 U.S. 820 (1996), but may bar a child custody action, *Prevot v. Prevot (In re Prevot)*, 59 F.3d 556 (6th Cir. 1999), 244 F.3d 1250 and *Mishkin Pesin v. Osorio Rodriguez*, 244 F.3d 1250 (11th Cir. 2001). The doctrine is stronger in the USA than England: compare *Parretti v. United States*, 143 F.3d 508 (9th Cir. 1998) and *Polanski v. Condé Nast Publications Ltd.*, [2005] UKHL 10, [2005] 1 W.L.R. 637; one explanation, mentioned in *Polanski*, may be the interpretation given to Art. 6(1) of the European Convention on Human Rights (right to a "fair and public hearing within a reasonable time" in determination of civil rights and obligations. In Canada the issue has been addressed in relation to the right of appeal while a fugitive: *R. v. Piché (C.A., Quebec 1994*, reported only as 1994 CarswellQue 1047 (Westlaw), citing *R. v. Dzambas*, (1974) 14 C.C.C. (2d) 364 (Ont.C.A.); and see *Jaffe v. Miller*, reported only as 1994 CarswellOnt 2871 (Ont. C.J.), discussing *Jaffe v. Snow*, 610 So.2d 482 (C.A. Fla. 5th Dist. 1993), applying fugitive disentitlement doctrine to bar wife from enforcing a Canadian judgment on claims derivative from fugitive husband.

²⁵⁰ *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (writ of certiorari; fines imposed on a U.S. citizen resident in France for disobeying a subpoena to testify in a criminal case); *ALBERT GOUFFRE DE LAPRADELLE, AFFAIRE HENRY M. BLACKMER EXTRADITION* (1929); *United States v. Lansky*, 496 F.2d 1063 (5th Cir. 1974). Similarly for nonresident alien fleetingly present in the United States, *United States v. Field (In re Grand Jury Proceedings)*, 532 F.2d 404 (5th Cir. 1976) (Cayman Islands banker). See also IRS National Officer Chief Counsel Advice Memorandum No. 200143032, Sept. 21, 2001 (discussing the enforcement of an administrative summons against taxpayers resident overseas).

²⁵¹ *Theophile v. Solicitor-General*, [1950] A.C. 186, 201. The Canadian rule on time-bar is set by Income Tax Act, art. 222 (S.C. 2004, c. 22, sect. 50), abrogating the holding in *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9.

²⁵² *Gupta v. The Queen*, Tax Court of Canada, Docket No. A-4697, 1998 Can. Tax Ct. LEXIS 2794.

²⁵³ *Bresson v. Commissioner*, 213 F.3d 1173 (9th Cir. 2000), citing prior and divergent cases; there is a similarly autonomous rule in matters of disclaimer: *Drye v. United States*, 528 U.S. 49 (1999), although presumably ineffective as to foreign estates and inheritance. In civil law systems it may be necessary to disclaim inherited assets to avoid inheriting debts of the decedent; the heirs have the right to a prior accounting (*inventaire*), (French) Civ. Code art. 774. IRS priority claims and liens can scarcely have extraterritorial effect to compromise the right to disclaim, Civ. Code Art. 784-810, especially Art. 802 (effect of "without prejudice")

conflicts will be particularly where tax is claimed under a theory of derivative liability, or as a penalty²⁵⁴, or where the claim is arguably time-barred.²⁵⁵ The taxing entity and a foreign forum before which enforcement is sought may have conflicting views as to the adequacy of contacts to support jurisdiction to tax.

Cross-border cooperation in tax matters is most developed in the exchange of information to aid in assessment and collection and to hinder inconsistent declarations. Acquisition and transmittal of such information may be free of constitutional and statutory protections applicable in the domestic context.²⁵⁶ Withholding arrangements, with full or partial refund subject to declaration to the fiscal authorities of the country of residence, may negate any incentive to non-declaration on the part of a taxpayer.²⁵⁷ This has been taken further by the imposition by the United States on foreign financial institutions of "qualified intermediary" enforcement regimes with respect to their clients who are U.S. persons. A major incentive to full declaration and payment of tax to the fiscal authority entitled by treaty or by facts of residence to primary jurisdiction is that the non-declaring taxpayer risks forfeiture of any protection from double taxation once a claim for refund abroad is time-barred. This was, in fact, formerly the case also with respect to the U.S. earned income exclusion.²⁵⁸ Many of the more expansive tax- and immigration-law provisions have been born of frustration over publicity given to particular cases that generated legislative outrage.²⁵⁹ Without more detailed information on the scale of tax avoidance by persons with a continuing relationship with the United States and with U.S.-resident family members, it is

declaration) (2006); compare Req. Dec. 28, 1938, Rec. crit. de juris. et de lég. Dalloz, 1941, J. 132 (disclaimer invalid where the heir is insolvent; Cass. civ. Dec. 13, 1989, No. 88-13393 (addressing tax debt, disclaimer, gift and Paulian issues) and see. Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORN. L. REV. 587 (1989)).

²⁵⁴ For status of "penalty" as tax, see *United States v. Sotelo*, 436 U.S. 268 (1978) (nondischargeable in bankruptcy).

²⁵⁵ *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995) (liability of partners); *New York State Department of Taxation v. Patafio*, 829 So.2d 314 (Ct. App. 2002) (interstate claim, time-barred).

²⁵⁶ *United States v. Powell*, 379 U.S. 48 (1964); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

²⁵⁷ EU: Proposal for a Council Directive to ensure a minimum of effective taxation of savings income in the form of interest payments within the Community (98/C 212/09) COM(1998) 295 final - 98/0193(CNS); UK comment: Inland Revenue, Exchange of Information and the Draft Directive on Taxation of Savings (Feb. 2000), and see European Parliament, Directorate General for Research, Working Paper, Tax Competition in the European Union, ECON-105, Dec. 1998; Switzerland: Loi fédérale sur l'impôt anticipé, Oct. 13, 1965, R.S. 642.21, R.O. 1966, 385; U.S.: I.R. Reg. 1.1441 (withholding on payments to foreign persons and qualified intermediary rules); Rev. Proc. 2000-12, 2000-4 I.R.B. 387; IRS Announcement 2000-48; *Overview of the QI Regime, the Final QI Agreement and the May Amendments*, 29 TAX MGMT. INT'L 404 (2000) (qualified intermediaries).

²⁵⁸ Current law: Pub. L. 97-34, 26 U.S.C. § 911 (2005); I.R. Reg. 1.911-7(a), T.D. 8006, 50 F.R. 2976, Jan. 23, 1985, as amended by T.D. 8480, 58 F.R. 34885, June 30, 1993 (to allow claims for the exclusion in cases where tax is owed provided they are made "before the Internal Revenue Service discovers that the taxpayer failed to elect the exclusion"); Sheldon J. Fleming, *Go Abroad, Young Man, Go Abroad: The Economic Recovery Tax Act of 1981's Changes in the Treatment of Foreign Earned Income*, 10 PEPPERDINE L. REV. 55 (1982).

²⁵⁹ Brigid McMenamin, *Home Free*, FORBES 110 (July 26, 1999) at 110 (tax benefits of expatriation); Robert Lenzer, *And Don't Come Back*, FORBES, Nov. 18, 1996, at 44. Brigid McMenamin, *Flight Capital: Avoiding U.S. Taxes by Renouncing Citizenship*, FORBES, Feb. 28, 1994, at 55; Christine L. Agnew, *Expatriation, Double Taxation, and Treaty Override: Who is Eating Crow Now?*, 28 U. MIAMI INTER-AM. L. REV. 69 (1996).

not possible to judge the scale of evasion or the proportionality of the response.²⁶⁰

Acquiescence by a taxpayer in the position of the revenue authority of one country under circumstances implying determination of legal or factual issues adverse to that of a treaty partner may exclude subsequent access to competent authority resolution.²⁶¹ It is easy to envisage an enforcement request that conflicts with a policy position of the treaty partner from which collection aid is requested. More generally, taxpayers with dual-residence status (and, in the case of the United States, foreign residence coupled with U.S. nationality) may, for reasons of time-barred appeal, intransigent foreign tax authority or inflexible domestic tax law²⁶², find mutual agreement procedure unavailable.²⁶³ Similarly, provisions that attribute domestic source status to deemed income on outbound transfers from the United States of intangible property²⁶⁴ and deny foreign tax credit²⁶⁵, create an atmosphere of conflict unlikely to encourage foreign provision of enforcement assistance. In the United States the non-applicability of tax treaty commitments to the states means that foreign income taxed abroad may be taxed by a state notwithstanding exemption from federal taxation.²⁶⁶ The *Huckaby* decision²⁶⁷ of the New York Court of Appeals suggests that there could be no geographic limit to state taxation of wage income, interstate or international, where the location of the work is for the convenience of the taxpayer other than the dependence of some state tax laws on the federal definition of taxable income. In practice, it may be that such telecommuting cases will be decided on their facts and that the physical presence of *Huckaby* in New York for 25% of his working time was crucial to the outcomes. Other states have, however, imposed tax with even less nexus: an Indiana Letter of Findings²⁶⁸ assessed Indiana income tax on fees for consulting services performed by telephone from North Carolina for an equipment company located in Indiana. As the statute of limitations had run for the taxpayer to claim tax credit from North Carolina (if, indeed, North Carolina would have entertained the claim), the result was double taxation. A protective claim, if indeed it will be entertained, is only likely to be lodged if the risk of later assessment is known.

²⁶⁰ U.S. General Accounting Office, Tax Administration: Nonfiling Among U.S. Citizens Abroad, GAO/GGD-98-106, May 1998.

²⁶¹ INTERNAL REVENUE MANUAL 4.3.1.1, *International Procedures Handbook* 8.1.10 (2001); Rev. Proc. 96-13, 1996-1 C.B. 616.

²⁶² Limitations period for refund: *Baral v. United States*, 528 U.S. 431 (2000); *Commissioner v. Lundy*, 516 U.S. 235 (1996).

²⁶³ *Caron v. The Queen*, Docket No. 95-4210-IT-I (Tax. Ct. of Can. 1998) (French and Canadian residence; taxpayer employed in France, family resident in Quebec. "The only decision this Court can render under the rules of law in Canada is to confirm the assessment as the appellant is a resident of Canada and to dismiss the appeal."); *McFayden v. The Queen*, Docket No. 97-2037-IT-G (Tax Ct. Can. 2000) (unavailability of competent authority procedure).

²⁶⁴ 26 U.S.C. § 367(a) (2005).

²⁶⁵ 26 U.S.C. § 367(d) (2005). Foreign tax credit is anyway denied for taxes imposed by unrecognized states: 26 U.S.C. § 901(j).

²⁶⁶ Thus California may tax a foreign pension exempt from federal taxation: *In re de Mey van Streefkerk*, Calif. State Board of Equalization opinion 84R-1137, 85-SBE-135, Nov. 6, 1985 (Netherlands military pension). California's power also to tax pensions paid to non-domiciled nonresidents accrued during prior California-based employment was curtailed by H.R. 394, Pub. L. 104-95, 109 Stat. 979, 4 U.S.C. § 1145.

²⁶⁷ *Huckaby v. New York State Div. of Tax Appeals*, 4 N.Y. 3d 427, 829 N.E.2d 276, 796 N.Y.S.2d 312, *aff'd* 6 A.D.3d 988, 776 N.Y.S.2d 125 (3d Dept. 2004).

²⁶⁸ 97-0512 AGI.

Characterization disputes, time bars and absence of any remedy by way of recoupment occasionally lead to such outcome.²⁶⁹ So also, inconsistent standards of proof of extinguishing domicile, particularly upon departure abroad.²⁷⁰ Income may be attributed as a matter of law in one jurisdiction to a party other than the one to whom it was paid.²⁷¹

The securing on behalf of and provision of assistance to, a foreign revenue authority is likely to be without regard to the domestic status (in the assisting country) of the potential foreign claim for tax, just as it can be without regard to taxpayers' domestic procedural rights (*i.e.*, of confidentiality). Assistance in collection of tax and in prosecution and extradition is more problematic. The state from which assistance is requested may have interests adverse to those of the requesting state. This may result from tax credits, inconsistent characterization and jurisdictional conflicts that could necessitate competent authority resolution. Yet competent authority, or treaty rights generally, may have been waived or refused.²⁷² A claim underlying a request for collection assistance might be discharged in bankruptcy or statute-barred in one country but not another.²⁷³ A U.S. bankruptcy discharge, and even more so the automatic stay, claims worldwide effect.²⁷⁴ That aid in collection need not be provided as against nationals of the requested state²⁷⁵ provides some protection, as does allowance for administrative discretion. Direct access to foreign courts for enforcement of a revenue judgment is likely to leave little room for the assertion of the domestic policy of the forum state, although presumptively a discharge in bankruptcy in that state will preclude suit there even though the debt may not have been discharged under the laws of the taxing

²⁶⁹ *United States v. Dalm*, 494 U.S. 596 (1990).

²⁷⁰ *In re Malinasky*, TSB-H-86(124)I; 41544, N.Y.S. Tax Comm'n (1986) (Philippines); *In re Katz*, TSB-H-83(253)I; 26720, N.Y.S. Tax Comm'n (1983) (Canada). Purchase of a house abroad may not affect the result, *In re McVeigh*, TSB-H-82(198)I; 23479, N.Y.S. Tax Comm'n (1982) (United Kingdom). It may be difficult to prove acquisition of a foreign domicile in the absence of permanent residence (immigrant) status or naturalization in the foreign country, *Bodfish v. Gallman*, (*In re Bodfish*), 50 A.D.2d 457, 378 N.Y.S.2d 138 (3d Dep't, 1976); but *cf.* *Klein v. State Tax Comm'n*, 55 A.D.2d 982, 390 N.Y.S.2d 686 (3d Dep't 1977) (finding acquisition, on the facts, of Swiss domicile). *See* 20 N.Y.C.R.R. 105.20(d)(3) ("a United States citizen will not ordinarily be deemed to have changed such citizen's domicile by going to a foreign country unless it is clearly shown that such citizen intends to remain there permanently.") *Compare In re Tootal's Trust*, (1883) 23 Ch.D. 532, 534 (presumption against establishment of domicile in a different, non-Christian, culture). Not every jurisdiction applies such rules: *Said v. Department of Treasury*, 245 Mich. App. 489, 628 N.W.2d 100 (2001) ("Contrary to the Tax Tribunal's presumption, it does not necessarily follow that petitioner abandoned his domicile in Yemen when he came to the United States.").

²⁷¹ Thus: *Jones v. Garnett, Inspector of Taxes*, [2005] EWCA Civ 1553 (C.A.) (barring the Inland Revenue's practice of attributing for tax purposes dividends of a closely-held firm that provides personal services exclusively to the professionally-qualified spouse; the House of Lords heard HMRC's appeal of the decision on June 5, 2007).

²⁷² As in *Caron v. The Queen*, Docket No. 95-4210-IT-I (Tax. Ct. of Can. 1998) *supra*, n. 263.

²⁷³ *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968 (N.D. Tex. 1988) (Luxembourg court order compromising firm's debts could not bind IRS in the U.S.A.); *Bank of Buffalo v. Vesterfelt*, 136 Misc.2d 381; 232 N.Y.S.2d 783 (County Ct. Erie Co. 1962) addressed the distinction between the extinction of the debt and that of the remedy where a discharge is granted in a jurisdiction (Canada) other than that of the law of the contract or claim (New York). *See also* Jay Lawrence Westbrook, *Beneath the Surface of BAPCPA*, 13 Am. Bankr. Inst. L. Rev. 503 (2005).

²⁷⁴ *Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991 (9th Cir. 1998); *United States Lines, Inc. v. GAC Marine Fuels, Ltd. (In re McLean Industries, Inc.)*, 68 B.R. 690 (Bankr. S.D. N.Y. 1986); *cf.* *Felixstowe Dock and Railway Co. v. US Lines Inc.* [1989] 1 QB 360.

²⁷⁵ U.S.-Canada Third Protocol art. 15, adding new Treaty art. XXVI A.

jurisdiction.²⁷⁶ There are also issues of priority and sovereignty: domestic tax claims may trump private claims for restitution²⁷⁷, but will a State want to give similar priority to a foreign government's tax claims?

Tax effects of immigration, emigration, expatriation and change of domicile

One is recognized as having a right to emigrate and to renounce one's nationality.²⁷⁸ This does not, however, imply a right to emigrate with assets bearing untaxed gains, even if those gains occurred before the taxpayer came into the scope of taxation by that jurisdiction, and irrespective of issues of retroactivity²⁷⁹ and possible double taxation. Legislators in a number of countries have sought to claim for their fiscal authorities capital gains tax applicable to gains on sales of real and personal property and to economic undertakings located in or having a relevant connection to their country. They have claimed authority to impose tax when a beneficial or indirect owner is otherwise subject to tax upon worldwide income. A jurisdiction may impose capital gains tax in lieu of estate duty²⁸⁰ or on accrued but unrealized gains at the time that a gift of property is made²⁸¹, or impose income tax upon the recipient based on the value of gifts received.²⁸² Numerous jurisdictions impose withholding tax upon earnings of foreign entities from portfolio investments²⁸³ and several impose capital gains tax upon any sale of real property or of shares in a business holding title to real property or having a permanent establishment in the jurisdiction²⁸⁴ whatever the domestic tax

²⁷⁶ *Hong Kong and Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991 (9th Cir. 1998).

²⁷⁷ *James v. United States*, 366 U.S. 213 (1961) (embezzlement), overruling *Commissioner v. Wilcox*, 327 U.S. 404 (1946); *Becton-Dickinson & Co. v. Wolckenhauer*, 24 F.Supp.2d 375 (D. N.J. 1998), remanded 215 F.3d 340 (3d Cir. 2000), cert. denied, 531 U.S. 731 (2001) (tax levy on pension of embezzler).

²⁷⁸ Expatriation Act of 1868, 15 Stat 223; Expatriation Act of 1954, 68 Stat. 1146; *Vance v. Terrazas*, 444 U.S. 252 (1980); Elwin Griffith, *Expatriation and the American Citizen*, 31 HOW. L.J. 453 (1988); Siegfried Wiessner, *Blessed Be the Ties That Bind: The Nexus Between Nationality and Territory*, 56 MISS. L.J. 447 (1986); as to right of return, see *Worthy v. United States*, 328 F.2d 386 (5th Cir. 1964) (journalist refused passport facilities for travel to Cuba and China).

²⁷⁹ *United States v. Carlton*, 512 U.S. 26 (1994); *Quarty v. United States*, 170 F.3d 961 (9th Cir. 1999); *Appendrodt v. United States*, 490 F.Supp. 490 (W.D. Pa. 1976) (AMT).

²⁸⁰ This conflict derives from inconsistent characterization: (Canada) Income Tax Act, Ch. I-3.3, R.S.C. 1985, s. 70 (5th Supp.), *Estate of Ballard v. Commissioner*, 85 T.C. 300 (1985); relieved as to estate duty by Third Protocol, Art. 19 (Treaty, art. XXIX-B) (1994). Cf. *Wilson v. Commissioner*, 7 T.C. 1469 (1946) (testamentary trust). Compare HMRC Extra-statutory concession F18 (IHT charged on the net value, after payment of Canadian capital gains tax, on estate assets).

²⁸¹ (Canada) Income Tax Act, Ch. I-3.3, R.S.C. 1985, s. 69 (5th Supp.).

²⁸² India, Finance (No. 2) Act; see (1998) 231 I.T.R. 56, 65, eff. Oct. 1, 1998. Exceptions are: gifts from nonresident Indian nationals, gifts by will, gifts from a former employer, gifts for educational and medical expenses of dependents, gifts of immovable property. Cf., Germany, Erbschaft- und Schenkungsteuer (ErbStG), §§ 2, 7.

²⁸³ *Stichting Pensioenfonds voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States*, 129 F.3d 195 (D.C. Cir. 1997) *aff'g* 950 F. Supp. 373 (D.D.C. 1996); issue discussed further in *Tupper v. United States*, 134 F.3d 444 (1st Cir. 1998) (domestic plan that failed to meet ERISA norms). Cf. *MNOPF Trustees Limited v. United States*, 123 F.3d 1460 (foreign labor union statutorily exempt).

²⁸⁴ Thus Pub. L. 96-499, title XI, Sec. 1122(a), Dec. 5, 1980, 94 Stat. 2682 as amended, 26 U.S.C. § 897 (2005); (French) Code général des impôts, art. 150A; (Canadian) Income Tax Act, Ch. I-3.3, R.S.C. 1985, Chapter 1 (5th Supp.), as amended, s. 39.

status of the seller, a practice that, in the absence of bilateral agreement²⁸⁵, inevitably will cause conflict where foreign charitable or pension entities have invested there. Australia²⁸⁶, Canada²⁸⁷, Denmark²⁸⁸, France²⁸⁹, Germany²⁹⁰ and the Netherlands²⁹¹ impose capital gains tax upon emigration by marking to market value, with an option of deferral of tax under certain circumstances, although such regimes have now been held incompatible with European Union freedom of movement at least for migration within the EU, EEA and Switzerland.²⁹² The 1996 U.S. Tax Code amendments provided for similar taxation under certain circumstances upon removal of appreciated tangible personal property from the United States.²⁹³ In the absence of deferral a taxpayer could be subjected to double taxation without relief; on the other hand deferral could deprive a taxpayer of an allowance or exemption otherwise applicable in one jurisdiction, for example on gain upon sale of a principal residence. In addition, the United States has asserted effective tax jurisdiction over assets transferred to a foreign trust within five years of immigration²⁹⁴ and impressed beneficiaries and constructive beneficiaries with onerous tax and interest obligations on certain distributions of accumulated earnings of foreign trusts.²⁹⁵ In either case, the tax claim could approach or exceed the amount received and the ability of the assessed taxpayer to pay. Taxation is on a remittance basis, with accurate calculation of the interest component on the accumulations dependant upon the beneficiary being able to require from the trustee the furnishing of the requisite accounting data.

The 1996 amendments concerning expatriated nationals and long-term residents²⁹⁶

²⁸⁵ Thus: Article 18, Convention Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains signed at London, July 24, 2001, modified by protocol July 19, 2002 and entered into force March 31, 2003.

²⁸⁶ Income Tax (Transitional Provisions) Act 1997, s. 104-160(1) (cessation of residence in Australia effects a deemed disposal of all the taxpayer's post Sept. 20, 1985 assets at market value).

²⁸⁷ S. 128.1(4), Income Tax Act, Ch. I-3.3, R.S.C. 1985, Chapter 1 (5th Supp.), as amended.

²⁸⁸ Law No. 829 of Dec. 29, 1987, Lovtidende A, Hæfte 109, 1987. Where a person has had unlimited tax liability for five or more of the past ten years before leaving Denmark, the unrealized capital gains are taxed when the person's full tax liability ceases.

²⁸⁹ Law 98-1266 of Dec. 30, 1998 (Loi de finances 1999), CODE GÉNÉRAL DES IMPÔTS, art. 167. *But see*: Case C-9/02, de Lasteyrie du Saillant, [2004] E.C.R. I-2409 (imposition of tax on intra-EU displacement held contrary to Article 43 EC).

²⁹⁰ § 6, deutschen Außensteuergesetzes (AStG).

²⁹¹ § 3, Wet op de inkomstenbelasting, 1964. *But see*: Case C-470/04, N v. Inspecteur van de Belastingdienst Oost/kantoor Almelo, decided Sept. 7, 2006, [2006] C.M.L.R. 49.

²⁹² PASQUALE PISTONE, THE IMPACT OF COMMUNITY LAW ON TAX TREATIES 187-96 (2002); and cases cited in the immediately preceding notes.

²⁹³ 26 U.S.C. § 877(d)(2), in particular § 877(d)(2)(E) (2006); Pub. L. No. 104-91. The provision overrides existing treaties.

²⁹⁴ Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1903(c), 110 Stat. 1910, 26 U.S.C. § 679(a)(4) (2005) *Cf.* New Zealand Income Tax Amendment Act (No.5) 1988, s. 9, §§ 226A, 228.

²⁹⁵ Small Business Job Protection Act of 1996, § 1906, 26 U.S.C. §§ 668, 679 (2005); Rev. Reg. §§ 301.7701. *Cf.* Vestey v. Inland Revenue Comm'rs, [1980] A.C. 1148 ("Nothing in [Income Tax Act 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 10] section 412 (2) gives it retroactive effect: it does not provide that the income of the non-resident in any year before a person receives or is entitled to receive is to be deemed that person's income.")

²⁹⁶ Health Insurance Portability and Accountability Act of 1996 (H.R. 3103), Pub. L. 104-191, 110 Stat. 2093, § 511, 26 U.S.C. § 877 (2005).

seem to have been more symbolic than practical since cases of renunciation of U.S. nationality are few in number²⁹⁷ and while some are founded on income- or estate-tax considerations²⁹⁸ it is at least arguable that more are connected with foreign political aspirations²⁹⁹ or with foreign restrictions on employment, the professions, real estate ownership and on dual nationality generally.³⁰⁰ In fact, the statute applies fixed criteria to attribute presumptive intent. Harking back to the era of perpetual allegiance³⁰¹, the law would restrict one's ability to divest oneself of obligations associated with nationality, specifically those relating to taxation. At the same time, accumulations of wealth outside the United States by persons with a present, past or future connection with the country have been subjected to controls and, directly or indirectly, to tax. The latter has been made enforceable by new reporting requirements³⁰² and tax provision³⁰³ for inbound gifts and legacies. Insofar as the reach of U.S. taxation is sought to be extended to such assets and transferee liability enforced, fiscal authorities might encounter insuperable problems of attribution of status and tracing of income to foreign-born individuals who may have little contact with the United States. The denial of the marital deduction to property, including foreign property, passing upon death from a U.S. citizen to an alien spouse in instances where both are resident abroad and a qualified domestic trust (QDOT) is impossible or unfeasible due to nonrecognition of trusts or otherwise³⁰⁴, forced heirship laws, marital regime or the form of title to property³⁰⁵,

²⁹⁷ As reported in the Federal Register pursuant to 26 U.S.C. §§ 877(a), 6039G (2005) ("Quarterly Publication of Individuals, Who Have Chosen to Expatriate") and (through 1999) reproduced in U.S. GENERAL ACCOUNTING OFFICE, TAX-MOTIVATED EXPATRIATION: ENFORCEMENT OF IRS AND IMMIGRATION ACT PROVISIONS, GAO/GGD-00-110R (May 2000): 2004: 631; 2003: 571; 2002: 504; 2001: 493; 2000: 430; 1999: 433; 1998: 398; 1995-97: 1,903. Links to data are at <<http://www.frissell.com/taxpat/taxpats.html>> (visited Oct. 31, 2006). Data for the years 1980-1994 (showing an average of 781 instances of expatriation per year) were published in Staff of Joint Comm. on Taxation, 104th Cong., Report on Issues Presented by Proposals to Modify the Tax Treatment of Expatriation 7 (Comm. Print 1995) and reprinted in Emmanuel Lee, *Will the Renunciation of U.S. Citizenship Still Be Worth Some Tax Savings? An Analysis of the Recent Reform on the Taxation of Expatriates*, 37 SANTA CLARA L. REV. 1063, 1065, n. 10 (1997).

²⁹⁸ *Dacey v. Commissioner*, T.C. Memo. 1992-187; *Kronenberg v. Commissioner*, 64 T.C. 428 (1975); cf. *Furstenberg v. Commissioner*, 83 T.C. 755 (1984); *Crow v. Commissioner*, 85 T.C. 376 (1985) (all under prior law) and cases cited *infra*, n. 336. Expatriations under current law, where tax is an issue, are commonly addressed by requests for private letter rulings, of which 355 were published between June 13, 1997 and July 9, 2004. See I.R.S. Notice 97-19 (1997-1 C.B. 394) and Notice 98-34 (1998-2 C.B. 29).

²⁹⁹ *Kahane v. Shultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987), *Kahane v. Secretary of State*, 700 F. Supp. 1162 (D.D.C. 1988); *United States v. Kahane*, 396 F. Supp. 687 (E.D.N.Y. 1975), *modified* 527 F.2d 492 (2d Cir. 1975).

³⁰⁰ E.g., German Reichs- und Staatsangehörigkeitsgesetz, Jul. 22, 1913, RGBI. I S. 583, modified June 30, 1993, BGBl. I S. 1062, July 15, 1999, BGBl. I S. 1618; Ausländergesetz, July 9, 1990, BGBl. I S. 1354, modified June 30, 1993, BGBl. I S. 1062 EUROSTAT, STATISTICS IN FOCUS, POPULATION AND SOCIAL CONDITIONS, 95-11, *Acquisition of Citizenship by Naturalization in the European Union, 1993* (showing numbers of U.S. nationals naturalized in European Union countries and Switzerland in that year).

³⁰¹ *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 245 (1830); *Afroyim v. Rusk*, 387 U.S. 253, 258 (1967); JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* (1978); CLIVE PARRY, *BRITISH NATIONALITY LAW AND THE HISTORY OF NATURALISATION, passim* (1954).

³⁰² Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1905, 26 U.S.C. § 6039F (2005).

³⁰³ IRS Field Service Advisory 199952014.

³⁰⁴ See PLR 199918039 for the possible use of corporate entity to avoid the problem of trust nonrecognition for commercial rental real estate. Placing title of residential property would not be feasible for residential property left to a spouse resident in the UK and subject to UK income tax because of the tax on deemed income based on rental value under ICTA 1988, s. 740. I.R. Reg..20.2056A-2 addresses some of the

is yet another source of conflict that may be incapable of resolution.³⁰⁶

To the extent that taxing jurisdictions, including the United Kingdom, the United States and the latter's political subdivisions, make domicile a criterion for taxation either of income or decedents' estates, difficult problems of definition and proof of facts arise. These are complicated to the extent that those political subdivisions are not bound by tax treaty provisions nor the conflicts necessarily susceptible to resolution by competent authority consultation.³⁰⁷ The rules of common law which determine domicile differ substantially in U.S. jurisdictions from those which follow English or Scots law.³⁰⁸ Repeated efforts at modifying the English law of domicile have been frustrated³⁰⁹, beyond superseding rules contained in some tax treaties and deeming provisions applied to certain long-term residents. Discharge by a fiduciary of tax liability owed to a particular jurisdiction may depend upon situs within that jurisdiction of sufficient assets susceptible to seizure in satisfaction of any tax demand.³¹⁰ Where liability to tax is a personal obligation of the trustee or executor³¹¹ or

problems relating to foreign real property.

³⁰⁵ Titling in a company or in certain kinds of trust UK residential property occupied by a UK resident would create a liability to income tax on rental value as "benefit in kind" under ICTA 1988, s. 740. A transfer of property into trust or an entity with continued occupancy by the transferor creates a liability under the previously-owned asset rules, Schedule 15, Finance Act 2004. See Inland Revenue Explanatory Memorandum 2005 No. 724; and criticism in FURTHER CONSULTATION ON TAXATION OF PRE-OWNED ASSETS, JOINT SUBMISSION BY THE CHARTERED INSTITUTE OF TAXATION AND THE ICAEW TAX FACULTY, Oct. 26, 2004..

³⁰⁶ 26 U.S.C. § 2056(d) (2005), disallowance of marital deduction where surviving spouse is not a United States citizen; but see US-Germany Tax Protocol (Washington, Dec. 14, 1998), para. 6, providing for limited marital deduction for estates of limited value. Note I.R. Reg. 20.2056A-2, Requirements for qualified domestic trust, particularly relating to foreign real estate, para (d)(1)(ii). There is no case law on point; one reported case illustrates the valuation problem for nonresident aliens: *Fung v. Commissioner*, 117 T.C. 247 (2001). Note the anomaly that, exceptionally, the estates of persons, U.S. citizens, born or naturalized in Puerto Rico and domiciled and resident there at the time of death, are not subject to U.S. estate tax on Puerto Rican assets: 26 U.S.C. §§ 2208, 2209; Rev. Rul. 74-25; TAM 7612220070A; General Counsel Memorandum 36944, Dec. 10, 1976.

³⁰⁷ *Arrowsmith v. Register of Wills for Baltimore County*, Docket No. 99-EI-OO-0054 (Md. Tax Ct. 1999) (Germany-Maryland, statute of limitations problem), *aff'd* 365 Md. App. 237, 778 A.2d 364 (2001); *cf.* *United States v. Brockamp*, 519 U.S. 347 (1996).

³⁰⁸ *Adams v. Smith (In re Estate of Jones)*, 192 Iowa 78, 182 N.W. 227 (1921), (Iowa and English/Welsh domicile); *cf.* *Lane-Burslem v. Commissioner of Internal Revenue*, 70 T.C. 613 (1978) (community property issue; domicile of nonresident alien husband).

³⁰⁹ Letter of Prof. G.C. Cheshire, *Times* (London), Mar. 2, 1959, at 9; letter of Lord Meston and of Hugh Lucas-Tooth, *TIMES* (London), Apr. 16, 1959, at. 13. Working Paper No. 88, *The Law of Domicile* (1985); Working Paper No. 89, *Choice of Law Rules in Marriage* (1985); LAW COMMISSION (NO. 168) AND SCOTTISH LAW COMMISSION (NO. 107), *PRIVATE INTERNATIONAL LAW: THE LAW OF DOMICILE* (1987); on the abandonment by the government of the project: HANSARD, Commons, Written Questions, May 26, 1993, at 597. The current situation is discussed in Peter North, *Private International Law: Change or Decay*, 50 INT'L & COMP. L.Q. 477 (2001). In its mini-budget of Oct. 9, 2007 the Government announced a plan to tax unearned foreign income of long-term non-domiciled residents or, in lieu of that, exact a £30,000 annual charge: Vanessa Houlder, "Rich 'non-doms' face £30,000 fee", *FINANCIAL TIMES*, Oct. 10, 2007, p. 6 (compare the Swiss *impôt à forfait des étrangers/Aufwandsteuer der Ausländer*, art. 14, R.S. 642.11, taxation based on expenditure in lieu of income).

³¹⁰ *Jones v. Borland*, 1969 (4) S.A. 29 (W) (Witwatersrand, R.S.A.) ("the applicants are entitled and obliged to administer and distribute the South African estate of the late Helen Jameson Hardie without taking into account any amounts due or chargeable to estate duty in the United Kingdom against the deceased estate of the said Helen Jameson Hardie"). Similarly, *Bath v. British & Malayan Trustees Ltd.*, (1969) 90 W.N. 44 (N.S.W.) (question of liability for Singapore death duties of assets located in New South Wales).

local assets may need to be applied to satisfy the tax on that part of the estate located abroad³¹² there may be unintended consequences for the estate.³¹³ This is not dissimilar to the purely domestic issue of apportionment of tax as between probate and non-probate assets.³¹⁴ Some disputes over foreign death duties result from ambiguity of drafting and are resolved by judicial interpretation of terms of the will.³¹⁵

Whether foreign assets are available to pay local tax may be similarly resolved³¹⁶ and on timely intervention by the heirs. The English Chancery Court decided in the *Grimthorpe* case³¹⁷ that the costs and expenses incurred and paid by trustees in good faith (in that case, barristers' fees) must be allowed. This would suggest that in English practice at least, if the beneficiary or legatee raises no advance objection and the will or trust deed contains an instruction to pay legacies net of tax³¹⁸ or at least includes no provision to the contrary, the trustee or executor might be indemnified for foreign taxes actually paid. The Supreme Court of New South Wales (Court of Appeal) addressed a related issue in *Balkin v. Peck*³¹⁹ and held that English trustees had a right of indemnification from Australian beneficiaries where the trustees had been assessed capital gains tax in the UK following their remittance to Australia of gross proceeds from the sale of trust assets. In other cases, a variation of the trust and payment out of trust principal of an unexpected assessment of tax due to a changed tax situation or an amendment of law may be possible upon resort to the courts.³²⁰ Such an outcome would, however, depend not only upon the relationship between settlor, trustee and beneficiary but the relationship between the respective judicial systems as well. A satisfactory outcome may not be possible if the settlor is no longer alive and able to consent and especially if a beneficiary is under a disability.

The common circumstance of emigration or long-term residence abroad without change of nationality may implicate an interesting issue of double taxation agreements: their

³¹¹ *In re Clore* (dec'd), [1982] Fam. 113; *Inland Revenue Comm'rs v. Stype Investments (Jersey) Ltd.*, [1981] Ch. 367 (Ch. D.), allowing appeal of the Commissioners [1982] Ch. 456 (Ct. App.); *Inland Revenue Comm'rs v. Stannard*, [1984] 1 W.L.R. 1039 (Ch.D.) (following *IRC v. Stype*, holding testator's personal representative liable for tax, although resident in Jersey).

³¹² See also *Estate of Michael*, 173 F.3d 503 (addressing IRS error); *Taylor v. Commissioner*, T.C. Memo. 1989-112.

³¹³ *Abdel Rahman v. Chase Bank (C.I.) Trust Co. Ltd.*, 1984 J.J. 127 (Jersey Ct. App.) (Jersey trust; potential liability, including transferee liability, for U.S. estate duty).

³¹⁴ *In re Ruperti's Estate*, 86 N.Y.S.2d 887 (Sur. N.Y. Co. 1949).

³¹⁵ *Winter v. American Parkinsons Disease Ass'n (In re Estate of Herz)*, 85 N.Y.2d 715, 651 N.E.2d 1251, 628 N.Y.S. 232 (1995) (German *Erbschaftsteuer*).

³¹⁶ *In re Hollins*, 139 N.Y.S. 713 (Sur. Ct. 1913); *In re Gyfteas*, 36 A.D.2d 380, 320 N.Y.S.2d 540 (1st Dept. 1971); *Stringham v. Dubois*, [1992] A.C.W.S.J. 78344 (Can.); *Permanent Trustee Co. (Canberra) Ltd. v. Finlayson*, 122 C.L.R. 338 (High Ct. Australia 1968) (death duties not recoverable from out-of-state executor); *Moore v. Mitchell*, 30 F.2d 600 (2d Cir.1929), aff'd 281 U.S. 18 (1930) (interstate claim). More recent New York cases: *Matter of Herz*, N.Y.L.J. Dec. 23, 1992, 26:5 (Sur. Ct. Bronx, County), aff'd 206 A.D.2d 283, 614 N.Y.S.2d 51 (1st Dept 1994), rev'd 85 N.Y.2d 715, 628 N.Y.S.2d 232 (1995) ("all' inheritance taxes includes the foreign inheritance tax"); *Matter of Leigh*, NYLJ Mar. 31, 1980, 14:1 (Sur. Ct. N.Y. Co.)

³¹⁷ *In re Grimthorpe* (Dec'd), [1958] Ch. 615, decision based on Practice Direction (Trustees' Costs), dated Oct. 27, 1953, [1953] 1 W.L.R. 1365; similarly, *Garratt v Waters (In re Lord Cable)*, [1977] 1 W.L.R. 7.

³¹⁸ *Scottish National Orchestra Society Limited v. Thomson's Executor*, [1969] S.L.T. 325.

³¹⁹ [1998] N.S.W.C. 337.

³²⁰ Cf. *In re T Settlement*, [2002] J.L.R. 204 (Jersey trust: settlor UK-resident and change in UK tax law made her liable to tax on trust gains; trust variation approved).

concern with fiscal evasion and the concern of those applying them that they not be used as a basis for tax avoidance. A Canadian case, *In re Estate of Haussmann*³²¹, illustrates the point, one that caused the court to compare the equally-authoritative French- and English-language versions of the Canada-Belgium tax treaty in seeking guidance: "pensions ... may be taxed in the Contracting State in which they arise" and "*les pensions ... sont imposables* [are taxable] *dans l'Etat contractant d'où elles proviennent.*" (It was not discussed, and perhaps not relevant, that the language of negotiation for the treaty was likely to have been French and any linguistic lacunae attributable to Canada.) The state pension actually received by Mr. Haussmann fell below the tax threshold in Belgium, and so while it was subject to tax³²² there it was not, in fact, taxed.³²³ Notwithstanding the claim of the Canadian authorities to have the right, based on the English-language version, to tax the Belgian pension insofar as it was not actually taxed in Belgium, the court concluded "that the pension payments received by the late Mr. Hausmann from l'Office National des Pensions are social security pensions and similar allowances and are taxable only by Belgium. The fact that Belgium chose not to tax them in this case is irrelevant."³²⁴ The issue is the use of treaty rules to divide taxable income between or among jurisdictions so as to benefit from tax-free allowances, exemptions and low- or zero-rate bands of progressive tax schedules. The reciprocal of this, increasing total social security (national insurance or state pension) benefit through participation in multiple (and not totalized) governmental pension schemes with disproportionately large benefits for those with lower average wages, was addressed by the Windfall Elimination Provision of the U.S. Social Security Act³²⁵ and, in Canada, by a separate noncontributory, means-tested old-age benefit for which substantial present or former residence is a criterion for eligibility.³²⁶

Nationality issues

Nationality (and legal permanent resident status, irrespective of actual or habitual residence) is most directly applicable to income and estate tax claims upon nonresidents by the United States, although it may be relevant to certain taxes of other countries as well and it may have bearing on determination of domicile.³²⁷ While the extent of nonfiling among

³²¹ *Estate of Haussmann v. The Queen*, Docket No. 97-1767-IT- I (Tax Ct. Can. 1998).

³²² Compare SIMON'S TAXES F1.231, F1.221 ("subject to tax" criterion satisfied even if relevant income is below the tax threshold).

³²³ The abhorrence of a vacuum may extend to some treaty-based exclusions from taxation: see U.S.-U.K. Tax Treaty (2002), art. 17(2) denying residence-only taxation to lump sum pension distributions, which are generally free of tax in the U.K. and heretofore could escape taxation in the U.S. as well: PLR 8934025, May 25, 1989.

³²⁴ Compare U.S.-U.K. Tax Treaty (2002), art. 19(2)(a) (pensions for government service taxable only in paying state).

³²⁵ 42 U.S.C. 415(a)(7) (2005); see *Rudykopf v. Apfel*, 193 F.3d 579 (2d Cir. 1999).

³²⁶ Old Age Security Act, R.S. 1985, c. O-9, art. 3. Application of the means test in the context of a non-taxable German pension was at issue in *Swantje v. The Queen*, [1996] 1 S.C.R. 73.

³²⁷ Furthermore, the court adjudicating liability to tax may first have to address arcane points of nationality law: *Buhre*, Oct. 6, 1959, Rt. 1959 at 928, 90 Clunet 794 (1963). (*Buhre* was born in Norway of Norwegian parents but lived in the Far East from 1904 until his death in 1952. Until 1924, Norwegian nationality law contained a provision for loss of nationality in the event of permanent departure without intent to return. Basing its decision on his lack of any other nationality and of his maintenance of Norwegian travel documents throughout his life, the Court unanimously found Mr. Buhre to have been a Norwegian national at the time of his death and his estate subject to tax in Norway).

nonresident U.S. nationals has been the subject of study, it was not possible to estimate the amount of revenue lost.³²⁸ The Philippines also taxed the worldwide income of its nationals between 1913 and 1999³²⁹ but steeply progressive tax rates caused serious hardship to expatriates following the devaluation of the peso in July 1997. Philippine income taxation of expatriate nationals was thereafter modified, and in 1999 it was abandoned.³³⁰ Specific taxation of expatriates has been suggested, but never implemented, as a policy instrument for managing the migration of technical, professional and managerial "human capital flows".³³¹

Dual residence is a more common cause of unrelieved double taxation,³³² as is disagreement between taxing jurisdictions regarding the geographic source of income.³³³ Elsewhere, nationality may be relevant to residence (or ordinary or habitual residence) or to deemed residence; and it may be one element in the determination of domicile. Because the rules of domicile in U.S. jurisdictions differ from those in England and other common-law countries, one may be domiciled in different places for the same purpose under the laws of two jurisdictions.³³⁴ Indeed, and notwithstanding frequent judicial supposition to the contrary, one may conceptually be domiciled in different places for different purposes under the laws of the same jurisdiction.³³⁵ Because the United States imposes income tax based on the sole fact of nationality as well as upon residence and source, and because it imposes tax under certain conditions even following expatriation or abandonment of residence³³⁶, international conflicts are easy to envisage.³³⁷ This is especially so because under Supreme Court

³²⁸ U.S. General Accounting Office, Tax Administration: Nonfiling Among U.S. Citizens Abroad, GAO/GGD-98-106, May 1998. According to the report, in 1995 the State Department estimated that there were three million U.S. nationals residing abroad; 380,577 tax returns were filed by U.S. nationals and permanent residents from addresses abroad in that year.

³²⁹ Richard D. Pomp, *The Experience of the Philippines in Taxing Its Nonresident Citizens*, 17 N.Y.U. J. INT'L L. & POL. 245 (1985).

³³⁰ Tax Reform Act of 1997, Republic Act 8424, Sec. 23(B).

³³¹ MIHIR DESAI, DEVESH KAPUR & JOHN MCHALE, SHARING THE SPOILS: TAXING INTERNATIONAL HUMAN CAPITAL FLOWS, Weatherhead Center for International Affairs Working Paper 02-06 (2001).

³³² *Caron v. The Queen*, Docket No. 95-4210-IT-I (Tax. Ct. of Can. 1998), *supra*, n. 263 (refusal of reference to competent authority). A state may afford credit for resident income tax imposed by another state on earned, but not unearned, income: *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 695 N.E.2d 1125, 673 N.Y.S.2d 44 (1998), citing 20 N.Y.C.R.R. 132.5(a).

³³³ Indiana Dep't of State Revenue, Letter of Findings 97-0512 AGI (telephonic consultation from North Carolina to Indiana firm); *and see* n. 267 *supra*.

³³⁴ *Adams v. Smith (In re Estate of Jones)*, 192 Iowa 78, 182 N.W. 227 (1921), *supra*, n. 308.

³³⁵ Willis L.M. Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955).

³³⁶ Health Insurance Portability and Accountability Act of 1996 (H.R. 3103), Pub. L. 104-191, 110 Stat. 2093, § 511, 26 U.S.C. § 877 (2005). For the application of prior law see *Di Portanova v. United States*, 690 F.2d 169 (Ct. Cl. 1982) and *Dillin v. Commissioner*, 56 T.C. 228 (1972); for practical effect of new law, *see* Barry Newman, *Renouncing U.S. Citizenship Becomes Harder Than Ever*, WALL ST. J., Dec. 28, 1998, at 1. Professor Jeffrey M. Colón argues rather for an exit tax by way of marking to market (following the Canadian model) in *Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and the Need for a Coherent Tax Policy*, 34 SAN DIEGO L. REV. 1 (1997).

³³⁷ Domicile is a criterion for liability to income tax and estate and gift tax in numerous U.S. states (*see, e.g.,* *Comptroller of the Treasury v. Haskin*, 298 Md. 681, 472 A.2d 70 (Ct. App. 1984)), and to income tax on unremitted investment income and to inheritance tax in the United Kingdom. Furthermore, U.S. states are not bound by tax treaty commitments and may (absent concession, *e.g.* N.Y.S. Tax L. § 620 (McKinney 2002)) tax income previously taxed abroad at a national and provincial level. *Tetreault v. Franchise Tax Board*, 255 Cal. App. 2d 277 (Cal. App. 1st 1967); *Burnham v. Franchise Tax Board*, 341 P.2d 833 (Cal. App. 2d 1959).

jurisprudence nationality has been effectively restored to many naturalized persons who earlier lost it due to residence abroad, and to U.S. nationals who lost that status due to naturalization abroad.

There is a significant number of instances of doubtful nationality where, because the requisite physical presence of a U.S. national parent has not been documented nor a foreign-born infant's nationality claimed, an individual has not been regarded as a U.S. national for any purpose, including taxes.³³⁸ Its existence once established, the Internal Revenue Service demands specific proof of actual relinquishment of U.S. nationality for removal from the tax rolls.³³⁹ Several cases have addressed the issue of incomplete or doubtful expatriation.³⁴⁰ It appears, however, that despite the retroactive abrogation of U.S. law regarding expatriating acts, the IRS will not assert a claim to tax (at least for periods prior to January 1, 1976) in the particular situation of a former national of the United States whose loss of nationality was documented under prior law if that person did not subsequently avail him- or herself of attributes or rights of U.S. nationality.³⁴¹ The effectiveness of renunciation (and thus the national status of after-born children) may depend on the circumstances of the renunciation and upon the party's subsequent conduct³⁴², including use of a United States passport.³⁴³ Where U.S. nationality has been renounced and subsequently reclaimed, the filing of amended (or late) tax returns may be necessary.³⁴⁴

It is within the sovereign power of each state or other relevant political entity to determine who are its nationals. A state is not bound to acknowledge the claim of allegiance asserted against one of its nationals by another country (1) while that individual is in the first state or (2) when the second nationality is not an "effective" nationality in the *Nottebohm*³⁴⁵ sense. Tax treaties may contain rules for establishing the dominant taxing authority with respect to a particular individual or situation³⁴⁶; the U.S. exception for its own nationals³⁴⁷ invites conflict of the sort just discussed. Nationality is also a factor in the application of reciprocal collection provisions, as a signatory state may not be obliged to assist in collection action against its own nationals.³⁴⁸ However, with few exceptions mostly related to

³³⁸ See, in particular, 25 U.S.C. § 1300b-11-16 (2005), Pub. L. 97-429, 96 Stat. 2269-70 (Texas Band of Kickapoo Indians).

³³⁹ *United States v. Matheson*, 532 F.2d 809 (1976).

³⁴⁰ *Estate of Lyons v. Commissioner*, 4 T.C. 1202 (1945); *Dacey v. Commissioner*, T.C. Memo. 1992-187. See also *Marc Rich case*, *supra*, n. 140.

³⁴¹ Rev. Rul. 75-357, PLR 8138071; compare Rev. Rul. 92-109, 1992-2 C.B. 3.

³⁴² *Kahane v. Secretary of State*, 700 F. Supp. 1162 (D.D.C. 1988).

³⁴³ *Action S.A. v. Rich*, 951 F.2d 504 (2d Cir. 1991), *cert. denied* 503 U.S. 1006 (1992).

³⁴⁴ *United States v. Benitez Rexach*, 482 F.2d 10 (1st Cir. 1973).

³⁴⁵ *Liechtenstein v. Guatemala* (2d phase), I.C.J., 1955 I.C.J. Rep. 4. The scope of this rule has diminished significantly as access to a nationality has come increasingly to be seen as a universal right and transmissible equally by both parents, increasing the incidence of multiple nationality. Within the EU, EEA and Switzerland no state may question the effectiveness of a grant of nationality: *Micheletti v. Delegación del Gobierno en Catabria*, [1992] E.C.R. I-4239.

³⁴⁶ Art. 4(2), Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, Sept. 26, 1980, T.I.A.S. 11087.

³⁴⁷ As in article XIII(2), Protocol signed June 14, 1983, Amending the Convention Between the United States and Canada with Respect to Taxes on Income and on Capital, Sept. 26, 1980 (First Protocol).

³⁴⁸ Thus, Article 15(8)(a) (Art. XXVI-A of the Convention) of the Third Protocol. See Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Canada, Committee on Foreign

succession of states there appears to be a developing consensus that an individual (as contrasted with all the inhabitants of a territory³⁴⁹) may not any longer be attributed involuntarily³⁵⁰ a nationality at a time other than birth or adoption. Where nationality has nonetheless been so attributed, as to an alien woman upon her marriage to a national, it may be disregarded elsewhere.³⁵¹ As far as can be determined and notwithstanding the text of the Revenue Rulings cited above³⁵², the United States seems not, after the Supreme Court decisions in *Afroyim v. Rusk*³⁵³ and *Vance v. Terrazas*³⁵⁴, to have asserted with any force a claim to the allegiance of persons earlier divested of nationality under laws later abrogated with retroactive effect. Much less has it sought to claim as citizens their otherwise qualifying offspring born abroad or taken affirmative steps to subject either category of persons to tax on their worldwide income if they remained abroad.³⁵⁵ A related category of persons is comprised of persons born abroad, otherwise U.S. citizens, whose births were never registered with U.S. consular authorities and who are therefore subject to a (rebuttable) presumption of alienage.³⁵⁶ While it is beyond the scope of this article to develop further the argument against involuntary attribution of nationality, several postwar cases involving expatriated Germans and citizens of unrecognized territories discuss the point.³⁵⁷

Tax treaties tend to leave to subsequent mutual agreement and competent authority procedure conflicts arising from dual nationality and dual residence.³⁵⁸ Where possession of the nationality of a taxing jurisdiction is admitted, tax treaty benefit of a second, foreign,

Relations, United States Senate, May 23, 1995, at 41-43.

³⁴⁹ Restoration of South African Citizenship Act, No. 73 of 1986.

³⁵⁰ Consent may be implied, as in the case of acquisition of nationality through naturalization of a parent.

³⁵¹ *Airola v. Commission*, [1975] E.C.R. 221 (former Italian law).

³⁵² n. 341.

³⁵³ 387 U.S. 253, 268 (1967).

³⁵⁴ 444 U.S. 252, 260 (1980).

³⁵⁵ *Cf. Rocha v. Immigration and Naturalization Service*, 450 F.2d 946 (1st Cir. 1971) (U.S. nationality of mother deemed never to have been lost). It would seem a heroic undertaking for a tax agency to inquire *sua sponte* into matters relating to derivative acquisition of status, whether nationality or domicile. The task is rendered all the more difficult in the wake of *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407 (9th Cir. 1993) and *Benner v. Canada* (Secretary of State), [1997] 1 S.C.R. 358.

³⁵⁶ *Rios v. Civiletti*, 571 F. Supp. 218 (D.P.R. 1983) (father, U.S. Army deserter, recorded birth in Mexico using fictitious name); *Corona-Palomera v. INS*, 661 F.2d 814, 818 (9th Cir. 1981); *Matter of Leyva*, 16 I. & N. Dec. 118, 119 (BIA 1977).

³⁵⁷ *Terhoch v. Daudin*, C.A. Paris, Feb. 8, 1947, 1947 II Dalloz 240, 14 Ann. Dig. 121 (former German national who served in French army allowed to recover former residence); *cf. C.A. Berlin*, Dec. 21, 1965, 18 W 1516/61, 43 I.L.R. 191 (Romanian native granted Hungarian nationality by *Wiener Schiedsspruch*, later rendered stateless; imposition of unwanted Romanian nationality declared contrary to international law). The *Reich* nationality law was abolished by Allied Control Council (*Kommandatura*), Law No. 1 of 20 Sept. 1945, *Official Gazette of the Control Council for Germany*, 1945, No. 1, p. 3, but this did not restore German nationality involuntarily to expatriated nationals: *Oppenheimer v. Cattermole*, [1976] A.C. 249 (tax case, interpreting German Basic Law provisions on nationality of expatriated German Jews). *Avery Jones v. Internal Revenue Comm'rs*, [1976] 2 All E.R. 898, denied a treaty advantage to a U.S. citizen to whom British nationality was involuntarily attributed upon her marriage; such cases are improbable today (*compare Airola v. Commission*, [1975] ECR 221 (Italian nationality acquired upon marriage; foreign posting allowance eligibility restored by the court)).

³⁵⁸ U.S.-Canada Treaty, art. IV(2)(d); U.S.-France Treaty, art. 3(d).

nationality may be limited.³⁵⁹ Cases of doubtful nationality with respect to offspring of United States citizens born abroad are not infrequent, especially where transmission of nationality depends upon proof of facts regarding prior residence³⁶⁰ or paternity.³⁶¹ Unlike the nationality laws of some other countries, the existence of U.S. nationality does not usually depend upon the making of an administrative demarche³⁶² although there may be exceptions.³⁶³ The expatriation-tax law distinguishes, within the limits of statutory drafting, between a second or replacement nationality of convenience and an "effective"³⁶⁴ nationality with which the taxpayer has had a genuine past connection. Its imposition of income and estate taxation on certain expatriates must be viewed in connection with a more generalized attempt to neutralize foreign accumulation trusts and entities.³⁶⁵ Such principles are hardest to enforce as against intra-family cross-border business arrangements where the asset-holders have no taxable-justifying connection to the taxing country: the clientele said to have been particularly solicited by the BCCI group.³⁶⁶ It is clearly impossible to impose tax on profit-making opportunities foregone and transferred within a transnational family or group, as against transfer of capital and actual profits. That is the limit of the state's ability to protect its fiscal interests. Furthermore, cross-border conflicts in relation to status inevitably will yield anomalies of attribution of income and thus of taxability and rates of tax.³⁶⁷

³⁵⁹ *Oppenheimer v. Cattermole*, [1976] A.C. 249, *supra*, n. 357; *Caglar v. Billingham* (Inspector of Taxes), [1996] S.T.C. 150, [1996] 1 L.R.C. 526 (London representative of Turkish Republic of Northern Cyprus, held to be a Commonwealth citizen). But see text accompanying n. 341, *supra*; and Rev. Rul. 75-82, 1975-1 C.B. 5; also cases at n. 392 (unrecognized states treated as subsovereign entities).

³⁶⁰ *In re S.F.*, 2 I. & N. Dec. 182 (1944), *accord* *Ruiz v. INS*, 410 F.2d 382 (6th Cir. 1969) (impossibility for a parent under 21 years of age at the time of the child's birth to qualify to transmit her nationality); *Weedin v. Chin Bow*, 274 U.S. 657 (1927); 8 U.S.C. § 1401(g) (2005) (modified by Pub. L. 99-653 (1986)).

³⁶¹ *Fiallo v. Bell*, 1430 U.S. 787 (1987); *Miller v. Albright*, 523 U.S. 420 (1998); *Nguyen v. INS*, 533 U.S. 53.

³⁶² *Gowa v. Attorney-General*, [1985] 1 W.L.R. 1003 (registration application pending at time of revision of nationality law); *Cuenco v. Secretary of Justice*, 5 Sup. Ct. Rep. Ann. 108 (Phil. 1962) (election at majority of Philippine nationality); *Frühau, Cour supérieure de justice, Luxembourg*, Apr. 23, 1975, 1975-77 Pas. lux. 142 (former law); but see *Département fédéral de justice et police v. Vilchez*, Trib. féd., Cour de droit public, 29 June 1979, 105 A.T.F. Ib, 63 (1979), 114 Clunet 674 (1987) (failure to register birth with Peruvian authorities did not lead to acquisition by child of Swiss nationality).

³⁶³ *In re Forrest's Will*, 2 Lobinger Extraterr. Cas. 544 (U.S. Ct. for China 1923) (after termination of marriage the American wife of a foreigner could have her American nationality restored). Automatic loss of U.S. nationality by women upon their marriage was abolished by Act of Sept. 22, 1922 (Cable Act, 42 Stat. 1021). U.S. consular procedures are at 7 F.A.M. 1130. For some years after the transfer of sovereignty there were some few residents of Puerto Rico, Guam and the Virgin Islands able to have retained Spanish or Danish nationality, respectively by right of option: 8 U.S.C. § 1406 (2005), 8 U.S.C. § 1407 (2005), 66 Stat. 237; 66 Stat. 237; 8 U.S.C. § 1402 (2005), 66 Stat. 236.

³⁶⁴ *Liechtenstein v. Guatemala* (2d phase) (Nottebohm case), I.C.J., at 4. (1955); see also *Flegenheimer, Italian-U.S. Conciliation Comm'n*, 20 Sept. 1958, A.S.D.I., vol. XVIII, p. 155, 25 I.L.R. 91.

³⁶⁵ *Supra*, nn. 293-294.

³⁶⁶ *Supra*, n. 155. See also *Davis v. Commissioner*, 40 T.C. 525 (1963) for a more innocent example of the problem, involving a gift of U.S. real property, and *Wada v. Commissioner*, T.C. Memo. 1995-241, relating to intra-family loans.

³⁶⁷ E.g., issues of status, notably Hindu undivided families (Karta and co-parceners): T.N. Pandey, *Constituting Hindu Undivided Family Property Nucleus Through Gifts*, (1998) 234 I.T.R. 9; (India) Income Tax Act, No. 43 of 1961, ss. 2(31), 171; also marital regime conflicts: (India) Income Tax Act, No. 43 of 1961, s 5A, *Commissioner of Income Tax v. Gaitonde*, (2000) 241 I.T.R. 241 (Bom.) (Portuguese Civil Code of 1860); U.S.: *Lane-Burslem v. Commissioner*, 70 T.C. 613 (1978).

Conflicts in nongovernmental pensions and other tax-sparing and -deferral arrangements

Within the realm of direct taxation of individuals and of decedents' estates³⁶⁸, private and industrial pensions and statutory reduced- or deferred-tax savings arrangements (including investment intermediaries such as mutual funds) constitute an important source of cross-border conflict, arguably less susceptible to strategic planning than in the case of transfers by way of donation and succession.³⁶⁹ Tax treatment of pension contributions, retained capital gains and disbursed benefits is entirely dependent upon statutory and treaty criteria³⁷⁰, and classification and temporal conflicts can lead to loss of tax privilege.³⁷¹ Article 18 of the OECD Model Treaty would have the state of residence tax recipients of pensions except for those pensions based upon government service, which would be taxed by the paying government.³⁷² Absent specific treaty provision, earnings on investments by pension funds abroad will be taxable in the source country.³⁷³ Indeed, to a lesser degree, even public

³⁶⁸ See, generally, Morris A. Baldinger, *Income Taxation of Foreign Estates*, 39 TAX LAW. 601 (1986); Thomas St. G. Bissell and Alfred Giardina, *International aspects of U.S. retirement plans, deferred compensation and equity-based compensation plans: An overview*, 25 TAX MANAGEMENT INTERNATIONAL JOURNAL 275 (May 10, 1996).

³⁶⁹ See Cynthia Blum, *U.S. Income Taxation of Cross-Border Pensions*, 3 FLA. TAX REV. 259 (1996); Jim Klein & Kathleen Clancy, *Keeping Expatriates in U.S.-Qualified Plans*, 16 J. COMPENSATION & BENEFITS, Jan.-Feb. 2000 at 24, Mar.-Apr. 2000 at 30; COMMISSION OF THE EUROPEAN COMMUNITIES, THE ELIMINATION OF TAX OBSTACLES TO THE CROSS-BORDER PROVISION OF OCCUPATIONAL PENSIONS, COM(2001) 214 final (2001); *Taxation of Cross-Border Pensions*, 41 EUR. TAX. (supplement), Dec. 2001

³⁷⁰ *Hudson v. Gribble*, [1903] 1 K.B. 517 (Ct. App.) (employees' contributions to municipal pension fund were taxable); *Parella v. Retirement Board*, 173 F.3d 46 (1st Cir. 1999) (investment profits of fund potentially taxable).

³⁷¹ *Avon Products, Inc. v. United States*, 97 F.3d 1435 (Fed. Cir. 1996) (foreign tax credit; Mexican employee profit sharing); *In re Druyf*, Calif. tax Appeal No. 64-SBE-033 (1964) (formerly blocked funds); *Brilla v. The Queen*, 98 DTC 1502 (Tax Ct. Can. 1998) (U.S. 401(k) contributions assessed for tax by Canada); *Abrahamson v. Minister of National Revenue*, 91 D.T.C. 213 (Tax Ct. Can. 1990) (IRA contributions). Under the model treaty, pension benefits that were previously taxed by the source country where earned cannot again be taxed by the residence country when such benefits are paid. RIA ¶ 21.04[2][c]. *But see* 1996 U.S. Model Tax Treaty, Art. 18(1) (pensions beneficially owned by a resident of a foreign country taxable only in country of residence, subject however to savings clause regarding taxation of nonresident U.S. citizens).

³⁷² This is consistent with UK tax treaty practice, viz. the U.S.-U.K treaty (1975 and 2001/2002 texts), art. 19(2)(a), *supra*, n. 324. *Cf.* U.S.-Canada treaty, art. xviii, as amended; *and see* *Chong v. Commissioner of Taxation* [2000] F.C.A. 635 (omission of word "only"; government service pension paid to migrant retiree held taxable both by Malaysia and by Australia); *but cf.* *Estate of Haussmann v. The Queen*, Docket No. 97-1767-IT-I (Tax Ct. Can. 1998), *supra*, n. 321.

³⁷³ See Rev. Rul. 83-144, 1983-2 C.B. 295 (Philippine pension trust taxable in the U.S.); LTR 8030005 (foreign pension trusts taxable notwithstanding treaty nondiscrimination clause). T

reaty provisions include: U.S.-Canada treaty, art. 21; U.S.-Netherlands treaty, art. 35; *see also* 26 U.S.C. § 514 (2005) ("unrelated debt-financed income", interest and dividend income from leveraged investments subject to tax). As to real estate investment trusts, see *e.g.*, Protocol Amending the U.S.-Netherlands Income Tax Treaty, art. 6; Foreign Investment in Real Property Tax Act of 1980, Pub. L. No. 96-499, section 1125(c), reprinted in 1980-2 C.B. at 528 (section 897 FIRPTA gain tax generally supersedes treaty obligations); U.S. Treasury Explanation of Proposed U.S.-Switzerland Income Tax Treaty and Protocol, Doc. 97-28090 (1997), para., 46; Ameek Ashok Ponda, *Foreign Pension Plans Investing In Shares Of a U.S. REIT*, 74 TAX NOTES 1593 (1997).

service pensions³⁷⁴ and state-funded old-age pensions³⁷⁵ may engender conflict. Country pairs with significant cross-border employment cannot reasonably avoid addressing pension anomalies by treaty, regulatory provisions or extra-statutory concession.³⁷⁶ Where such provision does not exist, genuine hardship and double taxation can occur for individuals; and funds (and charitable organizations) that are tax exempt in their country of origin may be subjected to withholding and capital gains taxes abroad. Double taxation may also occur with respect to state pensions contributions absent a totalization agreement between the countries in question.³⁷⁷ In any of these circumstances an individual with multiple residences for tax purposes may be without remedy.³⁷⁸ The Internal Revenue Service had considered applying grantor trust norms to surplus assets of foreign pension funds of U.S. multinational enterprises.³⁷⁹ This would have represented a praetorian assertion of control over funds over which social and labor policy of other sovereigns can claim predominant interest. Already taxpayers with dual or multiple tax residences may be liable for income tax in one or more jurisdictions both on their contributions to a pension plan and its accruals, and on benefits received. Exceptionally, deferral is granted on a reciprocal basis under the current U.S.-Canada³⁸⁰ and U.S.-United Kingdom³⁸¹ treaties.

Income taxation by subordinate levels of government creates a further opportunity for conflict and for double taxation. H.R. 394 (104th Congress)³⁸², limiting the taxation of pension income by the states, resolved the problem to some extent. Conflicting claims to

³⁷⁴ *Apgar v. Minister of National Revenue*, 56 D.T.C. 132, 14 Tax A.B.C. 389 (1956) (U.S. civil service retirement pension taxable in Canada even though under U.S. law then in force it was non-taxable in U.S. until retiree recovered own contributions). Similarly, *Laird v. Commissioners of Inland Revenue*, 14 Tax Cas. 395 (1929) (American war pension exempt in U.S. but taxable in England), *Oppenheimer v. Cattermole*, [1976] A.C. 249 (nationality issue). Foreign government service pensions may be taxable by U.S. states regardless of tax treaty exemption from federal taxation.

³⁷⁵ *Aspin v. Estill*, 60 T.C. 549, [1987] S.T.C. 723 (Ct. App. 1987) (U.S. social security pension taxable by the United Kingdom).

³⁷⁶ United States: Rev. Rul. 89-95, 1989-2 C.B. 131; Rev. Proc. 89-45, 1989-2 C.B. 596; Notice 96-31, 1996-1 C.B. 378; *but see* Private Letter Ruling 9833020 (RRSP may not be rolled over into IRA); *see also* Canada Customs and Revenue Agency, Interpretation Bulletin IT499R, Superannuation or Pension Benefits, Jan. 19, 1992. *See also* (UK) Inland Revenue Practitioners Series, Pub. IR1 and IR1 Supp., "Extra-Statutory Concessions".

³⁷⁷ *Priebe v. Commissioner*, T.C. Memo. 1986-162; *Duncan v. Commissioner*, 86 T.C. 971 (1986). Double taxation leading to qualification for benefits under two more state pension systems (rather than totalization) may or may not be cost-effective to the worker. Qualification for Medicare benefits in the U.S. is a common objective.

³⁷⁸ *Caron v. The Queen*, Canada Tax Court, 2 Feb. 1998, Docket No. 95-4210-IT-I, *supra*, n. 263. Similar problems of double taxation affect cross-border commuters, see cases cited, nn. 374, 396, 397, 408. Within the United States double taxation of income without relief is inherent in conflicting criteria: *Murphy v. Taxation and Revenue Dept.*, 94 N.M. 54, 607 P.2d 592 (1980) (wage income, D.C. residence and domicile, N.M. source); *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530, 695 N.E.2d 1125, 673 N.Y.S.2d 44 (1998) (tax on income from intangible personal property); Tennessee Hall income tax on dividends and bond interest, imposed on "actual residents": Tenn. Code 67-1-101, -102; Tenn. Letter Ruling 94-06.

³⁷⁹ Proposed Regulation of Sept. 27, 1996, REG 209826-96, 61 F.R. 50778, INT. REV. BULL. 1996-42 at 10; C. Frederick Oliphant III, *IRS Proposes Attack on Overfunded Foreign Pension Plans*, 4 J. TAX. EMPLOYEE BENEFITS 205 (1997).

³⁸⁰ Text of Aug. 16, 1984, article XVIII, *Pensions and Annuities*.

³⁸¹ Text of July 24, 2001, article 17, *Pensions, Social Security, Annuities, Alimony, and Child Support*.

³⁸² 4 U.S.C. § 114 (2006).

primary taxation of deferred income persist, however, as in Virginia State Tax Commissioner Ruling 05-32 of March 15, 2005 relating to pro-rated withholding of Virginia income tax for compensation generated through stock options granted in connection with Virginia employment to a (currently) nonresident taxpayer. Foreign pensions may be taxed at the U.S. state level even though exempt from federal taxation by provisions of a tax treaty.³⁸³

Certain areas of cross-border taxation are particularly susceptible to sovereign conflict. There is optimism among some tax policymakers that broad international agreement might be reached to reserve to countries of residence at the time capital gains are accrued (but not realized) the primary power to tax them.³⁸⁴ Its financial pre-eminence has enabled the United States to impose current taxation on U.S.-citizen or -resident beneficial owners or controlling persons of various kinds of foreign investment intermediaries, notably passive foreign investment companies³⁸⁵ and trusts. Curtailment (or conditioning upon adequate security) of concessions normally available in the case of inheritance from spouses where the legatee or heir at law is an alien can conflict with the presumption on the part of a foreign country of situs, residence or nationality that it should have priority in tax claims. Forced heirship and rates of inheritance tax that vary with degrees of kinship, and rules as to incidence, can exacerbate the conflict. In the absence of power on the part of competent authorities of contracting states to resolve such disputes, hardship can result. Cumulative marginal tax rates in excess of 100 percent could be envisaged as a result of classification and temporal conflicts, especially where these problems are not addressed by treaty.³⁸⁶ Anomalies due to market declines are not unknown domestically³⁸⁷; taxation is a trap for the unwary upon the sale of leveraged foreign assets after an exchange rate change.³⁸⁸ This is apart from

³⁸³ *In re de Mey van Streefkerk*, Calif. State Board of Equalization opinion 84R-1137, 85-SBE-135, Nov. 6, 1985 (Netherlands military pension).

³⁸⁴ Taxpayer Migration and Trusts: Detailed Proposals December 23, 1998, Canada, Department of Finance News Release 98-124.

³⁸⁵ 26 U.S.C. § 1298 (2006).

³⁸⁶ *E.g.*, Third Protocol, *supra*, n. 94, granting a foreign tax credit as between federal and provincial income taxes payable in Canada on deemed capital gains on property held at death and U.S. estate tax due with respect to the same property, Art. 19 (new Art. XXIX-B). The problem remains, for migrants from Canada to the United States, with respect to accrued but unrealized capital gains in the absence of an election to postpone the Canadian tax on deemed disposal pursuant to Canada Income Tax Act s. 128.1(4)(b)(iv). *Compare* U.K. extra-statutory concession, Revenue CTO Advanced Instruction Manual AIM S.60 (Canadian capital gains tax deducted from value of Canadian assets subject to inheritance tax), SIMON'S TAXES, ¶ 19.123; *and see* *Lloyds Bank Ltd. v. Hutson (In re Sebba, deceased)*, [1959] Ch. 166 (Canadian, Ontario, South African and U.S. succession duties). U.S. states are free to impose estate duty on foreign property without deduction or credit for foreign taxes paid: *In re Estate of Ward*, 168 Mont. 396, 543 P.2d 382 (1975) (power of appointment over English trust assets); *Maryland Nat'l Bank v. Register of Wills*, 1970 WL 22438 (Md. Tax Ct.) (UK domiciliary; construction of Maryland reciprocity statute).

³⁸⁷ *See* HR 2794 (107th Cong.) ("To provide relief from the alternative minimum tax with respect to incentive stock options exercised during 2000").

³⁸⁸ Rev. Rul. 90-79; *Quijano v. United States*, 93 F.3d 26 (1st Cir. 1996); *cf.* Rev. Rul. 90-76 (foreign owner of U.S. real estate); *National-Standard Co. v. United States*, 749 F.2d 369 (6th Cir. 1984) (foreign exchange transaction yields ordinary, not capital, gain or loss). *Compare* *Capcount Trading v. Evans (Inspector of Taxes)*, [1993] 1 All E.R. 125 (Sterling values on transaction dates used to calculate taxable gain) and *Rezvankhah v. The Queen*, Docket No. 2002-2104-IT-I (Tax. Ct. Can. 2002) (Canadian dollars). A further anomaly for U.S. residents is the withholding tax requirement, in the absence of a treaty exception (such as art. 11, U.S.-Switzerland 1998 tax treaty and art. 6, Fifth Protocol (signed Sept. 11, 2007), amending art. 11, U.S.-Canada Tax Treaty), on mortgage interest paid to a foreign mortgagee on loans secured by foreign property: *Housden v. Commissioner*, T.C. Memo. 1992-91; I.R.C. §§ 871; 1441-42.

conflicting claims to the right to tax the same income, as in "unitary tax" schemes.³⁸⁹

Sovereign and diplomatic immunities, international organizations, charitable exemptions and unconventional legal entities

Foreign sovereign entities, if recognized as such at the diplomatic level³⁹⁰, and their subordinate levels of government are exempt from direct taxation on their noncommercial activities, including most governmental pension funds.³⁹¹ Under some circumstances an unrecognized foreign government deemed controlled by a recognized state may be regarded as a subordinate level of that state.³⁹² Nationals of such a jurisdiction may not enjoy treaty benefits³⁹³, and as to the United States, foreign tax credit may be denied.³⁹⁴ Tax treaties invariably apply without prejudice to diplomatic and consular privileges³⁹⁵, and indeed may go further than they do in exempting all remuneration paid by way of governmental salary and benefits to persons in the employment of the treaty partner of which that person is a national³⁹⁶, thus including border commuters³⁹⁷ but not necessarily recipients of civil service

³⁸⁹ *Barclays Bank Plc v Franchise Tax Board of California*, 512 4.S. 298 (1994).

³⁹⁰ JOE VERHOEVEN, *LA RECONNAISSANCE INTERNATIONALE DANS LA PRATIQUE CONTEMPORAINE* (1975); L. THOMAS GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES* (1978); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979); JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* (1987); M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995* (1997).

³⁹¹ *E.g.*, 26 U.S.C. § 892 (2005).

³⁹² *Gur Corporation v. Trust Bank of Africa Ltd.*, [1987] Q.B. 599 (Ct. App.) (Ciskei); *Achievers Investments, Inc. v. Karalekas*, 675 A.2d 946 (D.C. Ct. App. 1996) (Bophuthatswana); *but compare* *Caglar v. Billingham (Inspector of Taxes)*, [1996] S.T.C. 150, [1996] 1 L.R.C. 526 (national of Turkish Republic of Northern Cyprus treated as national of Republic of Cyprus, and hence Commonwealth citizen, for purposes of UK income taxation). *Cf.* *Bophuthatswana National Commercial Corp. Ltd. v. Customs and Excise Comm'rs*, [1992] S.T.C. 741 (value added tax).

³⁹³ As between the United States and Taiwan, *see* Rev. Rul. 80-208, 1980-2 C.B. 212, 1980-31 I.R.B. 12: "Section 4(c) of the [Taiwan Relations] Act provides that for all purposes the Congress approves the continuation in force of all treaties and all other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan, which were in force between them on December 31, 1978, unless and until terminated in accordance with law."

³⁹⁴ 26 U.S.C. § 901(j) (2005). "This subsection shall apply to any foreign country— (i) the government of which the United States does not recognize, unless such government is otherwise eligible to purchase defense articles or services under the Arms Export Control Act, (ii) with respect to which the United States has severed diplomatic relations, (iii) with respect to which the United States has not severed diplomatic relations but does not conduct such relations, or (iv) which the Secretary of State has, pursuant to section 6(j) of the Export Administration Act of 1979, as amended, designated as a foreign country which repeatedly provides support for acts of international terrorism." Taxes paid to Cuba, Iran, North Korea, Sudan, or Syria are generally not creditable for years beginning after December 31, 1986, Rev. Rul. 2005-3 and IRC Section 901(j); other pariah countries have been on the list from time to time.

³⁹⁵ Convention on Diplomatic Relations, Vienna, Apr. 18, 1961, 500 UNTS 95, No. 7310, art. 34; Convention on Consular Relations, Vienna, Apr. 24, 1963, 596 UNTS 262, No. 8638, art. 49; host countries do not necessarily assert their right to tax local income of diplomatic and quasi-diplomatic personnel: *McFayden v. The Queen*, Docket No. 97-2037-IT-G (Tax Ct. Can. 2000) (spouse of Canadian diplomat in Japan).

³⁹⁶ Canada-U.S. Treaty, art. XIX; U.K.-U.S. Treaty, art. 19(1); OECD Model Convention, art. 19(1). The France-Germany Treaty, as amended, art. 14(1), is similar: "Wages, salaries and similar remuneration, as well as retirement pensions paid by one of the contracting states, a geographic subdivision of a body corporate formed under public law thereof to a private individual resident in the other state in consideration of present or past civil or military service are only taxable in the first state. However, this provision shall not apply when the payments

and military pensions.³⁹⁸ Also relevant are rules relating to military service: status of forces agreements³⁹⁹ and statutes regarding foreign military personnel⁴⁰⁰ promulgated under NATO, and various bilateral agreements providing for exemption from direct tax and zero-rating for value added tax. Diplomatic and official status of individuals connected to foreign missions and international organizations, including particularly NATO, its foreign ("visiting") forces, and the forces' ancillary (non-appropriated fund) activities. The free-movement rights of persons within the European Union, Benelux, the Nordic Council countries and the British Isles Common Travel Area, respectively, create interesting, if minor, tax exemption anomalies.⁴⁰¹ As for indirect tax, goods legitimately entered for consumption under franchise (and in the case of NATO forces zero-rating for VAT purposes) in the state of official assignment will generally be characterized as tax paid in other states of a free trade area. The special quality of diplomatic and quasi-diplomatic personnel extends also to the few cases of permanent residents of the United States otherwise subject to the fiscal expatriation statute who surrender resident status to assume a diplomatic or international organization post within the United States.⁴⁰²

Like diplomatic personnel, charitable organizations encounter tax problems from the nature of their status, unique to one or more specified jurisdictions. In the absence of specific statutory⁴⁰³ or treaty⁴⁰⁴ provision or intermediation through a locally-qualified charitable

are made to persons holding the nationality of the other state without at the same time holding that of the first state; in this case the payments are only taxable in the state of which such persons are residents." [Informal translation] Article 14(1) was held consistent with art. 48 of the EC Treaty in *Gilly v. Services fiscaux du Bas-Rhin*, [1998] E.C.R. I-2793.

³⁹⁷ *Dufton v. The Queen*, 98 D.T.C. 3416 (Tax Ct. Can. 1988) (issue at bar was deductibility of child care expenses by border-commuter Canadian Government employee resident in the United States).

³⁹⁸ Cf. OECD Model Convention, art. 19(2), Canada-U.S. First Protocol, art. 9(2) amending Treaty, art. XVIII(2)(b), U.K.-U.S. Treaty, art. 19(2).

³⁹⁹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces of 19 June 1951, 199 UNTS 67, No. 2678 (1954) and supplementary agreement of 3 Aug. 1959, 490 UNTS 28, No. 7153 (1964).

⁴⁰⁰ UK: Visiting Forces Act 1952, c. 67; Income and Corporation Taxes Act 1988, c. 1, ss. 320, 223; Taxation of Chargeable Gains Act 1992, c. 12, s. 11; Finance Act 1960, c. 44, s. 74 (stamp duty); International Headquarters and Defence Organisation Act 1964, c. 5; *Cherwell District Council v. Tatum*, [1992] 1 W.L.R. 1261 (Ct. App.) (community charge ("poll tax") imposed, nonetheless, on British-citizen dependents of visiting forces personnel); *R. v. Berry*, [1969] 2 Q.B. 73 (Ct. App.) (similarly as to liability for customs and excise duties and, presumably, VAT).

⁴⁰¹ E.g., *Ying v. Commissioner*, 99 T.C. 273 (1992); *R. v. Berry*, [1969] 2 Q.B. 73.

⁴⁰² The mixed status of such persons was illustrated in *Vlandis v. Kline*, 412 U.S. 441 (1973) and *Elkins v. Moreno*, 435 U.S. 647 (1978), cases involving residence for purposes of concessional state university fees and by a handful of U.S.-born and -settled persons who have expatriated themselves in order to run for public office in or take up official posts for foreign countries: Roman Woronowycz, Roman Zvarych, Former New Yorker, Now Ukrainian Parliamentarian, UKRAINIAN WEEKLY, May 24, 1998. See also the Kahane cases, *supra*, n. 299.

⁴⁰³ U.S. estate tax: PLR 200019011, Rev. Rul. 74-523, 1974-2 C.B. 304; 26 U.S.C. § 2055(a)(2) (2005), Estate Tax Regulations Sec. 20.2055-1(a)(4); *Old Colony Trust Company v. United States*, 438 F.2d 684 (1st Cir. 1971); *National Savings and Trust Company v. United States*, 436 F.2d 458 (Ct. Cl. 1971); *Kaplun v. United States*, 436 F.2d 799 (2d Cir 1970) (bequest to foreign charity).

⁴⁰⁴ Canada-U.S. Third Protocol, art. 10 (Treaty, art. XXI(6), revised); Israel- U.S. Treaty, art. 15-A, added by art. X of protocol signed May 30, 1980; Mexico-U.S. Treaty, art. 22(2); 26 U.S. Code § 2055 (2001) and I.R. Reg. 20.2055-1 (2005).

entity a foreign charitable organization may not necessarily receive contributions free of income tax or death duties to the donor or estate; nor may it claim exemption from tax on earnings from a source in another country.⁴⁰⁵ This is a matter easily finessed by major foreign charitable organizations through the establishment of local supporters' ("friends'") organizations, but nonetheless a potential problem for individuals and estates taxable in two jurisdictions. The conflict is similar to that of foreign pension funds, involving the treatment of both contributions to and earnings of the tax-exempt body. Clearly, national views may differ as to the charitable nature of certain organizations, particularly those with a political or religious connection. In particular, the status of sects and new religions has been a matter of some controversy in a number of countries⁴⁰⁶, including the United States.⁴⁰⁷ In *Darby v. Sweden*⁴⁰⁸ the European Court of Human Rights found a Convention violation where there was unjustifiable distinction in the matter of the (religious) Dissenter's Tax Act with respect to nonresidents of Sweden employed in that country. Another area of possible public policy concern might be a demand for cross-border enforcement of a tax claim dependent upon non-recognition of a particular civil status⁴⁰⁹ or, perhaps, tribal or similar tax benefit.⁴¹⁰ The problem of nonrecognition of the character assigned by foreign jurisdictions to a particular entity is most common as regards pensions, trusts, associations and new forms of legal personality such as limited liability companies and limited liability partnerships.

The 2000 protocol to the Canada-U.S. Tax Treaty, the 1996 Model U.S. Treaty and IRS proposed regulations would apply a "subject-to-tax" criterion to the granting of certain treaty benefits.⁴¹¹ Such a provision was judicially constructed by the Authority for Advance Rulings in India as condition precedent for treaty relief.⁴¹² It would seem to be an alternative

⁴⁰⁵ *Camille and Henry Dreyfus Foundation Inc. v. Inland Revenue Comm'rs*, [1954] Ch. 672 (Ct. App.); cf. Mexico-U.S. Treaty, art. 22(1).

⁴⁰⁶ *Hoffmann v. Austria*, ECHR, June 23, 1993, A255 and *Kokkinakis v. Greece*, ECHR, May 25, 1993, A260-A (Jehovah's Witnesses); *Riera Blume v. Spain*, Oct. 14, 1999 ("Centro Esotirico de Investigaciones" sect).

⁴⁰⁷ *Church of Spiritual Technology v. United States*, 26 Cl.Ct. 713 (1992), *aff'd* 991 F.2d 812 (Fed. Cir. 1993) (denial of tax exemption to Church of Scientology and related entities). In Israel, the status of recognized religious group is limited to those religious communities "established and exercising jurisdiction at the date of" the Palestine Order in Council 1922; see art. 51, reprinted in *Laws of Palestine, 1926-1931* at 2581.

⁴⁰⁸ ECHR, Case No. 17/1989/177/233, Oct. 25, 1990.

⁴⁰⁹ France: Cour constitutionnel, decision No. 99-419 DC, Nov. 9, 1999, Arrêt sur la loi relative au pacte civil de solidarité; Canada: *Egan v. Canada*, [1995] 2 S.C.R. 513, but from 2001 (optionally for 1998-2000) tax benefits and obligations are extended to all couples who have been cohabiting in a conjugal relationship for at least one year or live in a conjugal relationship and have a child in common, Income Tax Act, Ch. I-3.3, R.S.C. 1985, Chapter 1 (5th Supp.), art. 252(4); cf. U.S.: Defense of Marriage Act, Pub. L. 104-199, § 2(a), 110 Stat. 2419, 28 U.S.C. § 2838C (2005).

⁴¹⁰ *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

⁴¹¹ Technical Explanation, U.S. Model Income Tax Convention of September 20, 1996, art. 4, para. 1.

⁴¹² *In re Cyril Eugene Pereira*, (1999) 239 I.T.R. 650, 658 (A.A.R.) (national of India resident and employed in the United Arab Emirates); *but compare* *Modern Threads (India) Ltd. v. Dy. C.I.T.*, (2000) 243 I.T.R. 60, 67 (I.T.A.T.) ("agreement [for the avoidance of double taxation] must prevail over the provisions of the Income Tax Act"); *similarly*, *Commissioner v. Davy Ashmore India Ltd.*, (1991) 190 I.T.R. 626 (Cal.). Cf. *Johansson v. United States*, 336 F.2d 829 (5th Cir. 1964), *Aiken Inds. Inc. v. Commissioner*, 56 T.C. 925 (1971) (treaty shopping cases); *Beame v. The Queen*, Can. Fed. Ct. App., Docket A-59-03, decision of Feb. 4, 2004 ("section 3 of Canada's *Income Tax Conventions Interpretation Act* ... permit[s] the evolution of treaty terms consistent with changes in Canadian income tax law."

approach to the general anti-avoidance rules applied or proposed elsewhere⁴¹³ and the judicial practice of collapsing pre-ordained step transactions⁴¹⁴ and those without business purpose.⁴¹⁵ The UK Inland Revenue (now HM Customs and Revenue) addressed the issue of hybrid entities with the coming into force of the Limited Liability Partnership Act 2000⁴¹⁶ in cases where such entities are sought to be used for investment purposes rather than to conduct professional business with limited liability. In the latter case, they are transparent for tax purposes; in the former they are treated for tax purposes as corporations in the same manner as foreign limited liability companies. The intentional use of hybrid entities for cross-border tax advantage is fairly recent and governments are quick to respond to a perception of abuse, as the negotiation of the U.S.-Canada Fifth Protocol in 2000 and the U.K. Finance Bill 2001 have demonstrated.

Conclusions

The argument that foreign tax claims and judgments could and should be enforced as money judgments is based upon an oversimplification, in ignoring competing claims of different states and parties at interest. It makes sense to discourage inconsistent declarations to different tax authorities and other fraud by exchanging relevant data among national tax authorities, but mandating specific collection assistance, and in particular the enforcement of a foreign tax judgment as a simple money judgment and without addressing the resolution of possible conflicts, may well be inconsistent with overriding policy in the forum state. Most cases of collection assistance are by way of treaty derogation from common law or *ordre public* principles. To do so outside the parameters of negotiated, considered tax treaty provisions, perhaps unilaterally by modification of the Uniform Foreign-Country Money-Judgments Recognition Act, may inadvertently favor foreign over domestic tax and other creditor claims because of the very limited defenses allowed in such actions.

On the other hand, existing law introduces obstacles to rational treatment of some foreign tax claims where the obligation to pay that foreign tax arises on account of a judicial act in the forum state. Anomalies in bankruptcy proceedings and in cross-border decedents' estates can lead to inequitable incidence of tax. Foreign tax debts arising from liquidation of an estate in bankruptcy are particularly vexing because of the sovereign immunity of the claimant, the inability of the forum to resolve issues of foreign law and the adversarial relationship of debtor and creditors. This may deny foreign tax debts priority status and make them impossible of either liquidation or discharge. The foreign sovereign claimant's remedy, but not its right, may have been extinguished in bankruptcy; the debt may be enforceable everywhere except in the country of discharge.

The maintenance of an inflexible rule regarding foreign taxes, especially in the context of opt-outs and reservations, can yield either of the very situations tax treaties are

⁴¹³ GRAEME S. COOPER, ED., *TAX AVOIDANCE AND THE RULE OF LAW* (1997); NABIL OROW, *GENERAL ANTI-AVOIDANCE RULES: A COMPARATIVE INTERNATIONAL ANALYSIS* (2000); see UK Inland Revenue, *General Anti-avoidance Rule for Direct Taxes: Consultative Document* (1998); *The Queen v. Central Supply Company (1972) Ltd.*, 97 D.T.C. 5295, [1997] 3 F.C. 674.

⁴¹⁴ *Furniss v. Dawson*, [1984] A.C. 484.

⁴¹⁵ *McDowell & Co. Ltd. v. Commercial Tax Officer*, (1985) 154 I.T.R. 148, (1985) 3 S.C.C. 230 (India Sup. Ct.), citing *Furniss v. Dawson* as well as *W.T. Ramsay Ltd. v. I.R.C.*, [1982] A.C. 300; *Kirti Chand Tarawati Charitable Trust v. Director of Income Tax*, (1998) 232 I.T.R. 11 (Delhi) (citing other cases).

⁴¹⁶ C. 12. See Inland Revenue Tax Bulletin Issue 50 (2000); Finance Act 2001 (2001 ch. 9), ss. 75-76 and sched. 25 ("investment LLPs and property investment LLPs").

intended to avoid: double taxation or fiscal evasion. Given efforts to limit the availability of tax havens and the misuse of bank secrecy it would be well to focus on the matter of conflict in paramount national interests and the problem of unrelieved double taxation, especially of capital gains. Not to do so has adverse diplomatic and human rights implications. To some degree pre-bankruptcy and pre-immigration planning can avoid double taxation, although even here perception of abuse has led to legislative countermeasures and incidental or accidental hardship to ordinary wage earners. Untoward consequences of exit tax imposition may be minimized by an election to defer the tax provided that the taxpayer has the means to provide any required bond, or by actual sale of the property to avoid later capital gains tax on accrued gain by the country of immigration. Problems of inconsistent characterization and other temporal conflicts may be incapable of resolution, at least without the willingness or ability of the respective fiscal authorities to compromise their claims. The pension issue, however, is so pervasive as to call out for multilateral resolution. It is mainly in circumstances involving large numbers of cross-border investors, workers and migrants political and diplomatic solutions have been found, and for this reason the intra-European Union and the U.S.-Canada and U.S.-U.K. experiences are particularly instructive.

Inevitably the most intractable, and academically perhaps most interesting, conflicts are generated by United States imposition of income and estate tax based upon nationality, and by certain United Kingdom and U.S. state taxes imposed by reason of domicile as well as the residence and source tests commonly applied. Because neither U.S. nationality nor English (or Scottish or Northern Irish) domicile (and the jurisdiction to tax which they attract) is easily lost, the taxpayer, executor or trustee may be dependent upon the terms of a particular tax treaty for relief. Yet tax laws are enforceable only to the extent of the coercive power of the state and to the degree that the taxpayer or fiduciary, or assets or beneficiaries are located in the taxing country. The reluctant or accidental expatriate citizen of limited means is left to ignore the tax obligation, the tax becomes uneconomic to collect and the system itself loses respect. The most important safety valve for U.S. expatriate taxpayers, earned income exclusion, applies only in limited fashion to the self-employed and its overall impact was attenuated by the Tax Increase Prevention and Reconciliation Act of 2005⁴¹⁷; exemptions and deductions are limited and particular treaty reliefs are haphazard. Limiting availability of the exclusion to cases where a return has been filed prior to an assessment being made may put an unreasonable burden on the unsophisticated, low-paid expatriate dual national who may never have resided in the U.S. The limited scope of relief available in matters of cross-border pension arrangements and the obstacles to addressing bankruptcy-related tax matters are further sources of hardship for those affected.

Use of the tax code by way of diplomatic retaliation, denying tax credits to residents of pariah and unrecognized states, likewise fails to distinguish between those who voluntarily do business or engage in economic activity, and those who are bound to the country by birth or family connection and as to whom an unpayable US tax claim may serve as an obstacle to reintegration in the United States should personal circumstances change. It also gives a cynical flavor to the tax law. The "emigration to avoid tax" provisions distinguish persons with a family or birth connection to a second country of nationality from those with more spontaneous motivation for emigrating, but still create anomalies and presume base motivation on the part of persons exercising free movement rights. On the other hand, unlike some countries' exit-tax provisions its impact is principally on U.S.-based investments.

The explosion in numbers of persons subject to tax in multiple jurisdictions through

⁴¹⁷ Public Law No. 109-222, 120 Stat. 345.

greater incidence of dual nationality and residence, expansion of the tax net (notably through inflationary broadening of application of AMT) and increased cross-border trade, investment and employment all add to the incidence of conflict even at modest income levels. If EU assertion of authority over direct taxation leads it to view expanded US taxation of citizen and former-citizen expatriates (as allowed by recent bilateral treaties) as exorbitant, both the bilateral, member-state based, treaties and the enforcement of claims based on expatriation may be questioned.⁴¹⁸ The *Micheletti*⁴¹⁹ decision requires that EU member states must resolve any conflict of nationalities by recognizing the European Union citizenship status of a dual national, thus expanding the scope of possible conflict. As it is, only examination of the substance of a foreign tax claim will enable a tribunal in which enforcement is sought to distinguish between those cases where a foreign state's tax claim impinges on a forum state's paramount national interests and those where it does not. The principal argument for the Revenue Rule has been to avoid the need for such examination of foreign public law. To discard the Rule will require application of an alternative, complex regime of tests encompassing bankruptcy, human rights (or constitutional) norms and public policy. Yet even now some flexibility and cross-border cooperation are called for, since an iron-clad rule invites hardship where a judicial act in one state has created an unpayable tax liability in another.

⁴¹⁸ Art. 1(4) of the 2001 draft U.S.-U.K. treaty provides: "Notwithstanding any provision of this Convention except paragraph 5 of this Article, a Contracting State may tax its residents (as determined under art. 4 (Residence)), and by reason of citizenship may tax its citizens, as if this Convention had not come into effect" and art. 1(6) preserves the U.S. claim to tax certain former citizens and residents. Under Art. 24(6) the U.K. need not grant a tax credit against U.S. tax upon third-country source income and gains. Although the art. 3(4)(d) tie breaker provision provides that the competent authorities "shall endeavour to settle the question by mutual agreement", and although non-domiciled U.K. residents may be taxed by the U.K. on their foreign-based income and gains only on a remittance basis, the opportunity for conflict is obvious. *See* Grimm v. Newman, [2002] E.W.C.A. Civ 1621 (citing cases).

⁴¹⁹ *Micheletti v. Delegación del Gobierno en Catabria*, [1992] E.C.R. I-4239; observations, Jessurun d'Oliveira, 30 COM. MARKET L. REV. 623 (1993).