

PROFESSOR LOWENFELD AND THE ENFORCEMENT OF FOREIGN PUBLIC LAW

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I. INTRODUCTION

The purpose of this contribution is to demonstrate the foresight shown by Professor Lowenfeld in his writings more than 20 years ago in an area in which he (in common with this writer) has long been interested, the enforcement of foreign public law. Since at least 1979 he has been skeptical about the merits of the application of the almost universal principle expressed most notably in what is now Rule 3 of Dicey:

[C]ourts have no jurisdiction to entertain an action . . . for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State.¹

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1. Now in DICEY, MORRIS & COLLINS, *CONFLICT OF LAWS* ¶ 5R-01 (14th ed. 2006). In the first edition, Rule 40 was: “The Court has no jurisdiction to

There is a similar rule in the United States, except that it is not settled whether the principle extends beyond penal and revenue laws to a residual category of other public laws. The point was left open by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.²

In Australia it has been said:

[T]he principle of law renders unenforceable actions of a particular kind. Those actions are actions to enforce the governmental interests of a foreign State. There is nothing in the statement of the principle, nor in the underlying considerations on which it rests, that could justify the making of an exception or qualification for actions by a friendly State. The friendliness or hostility of the foreign State seeking to enforce its claims in the court of the forum has no relevant connection with the principle.³

Professor Lowenfeld, in his Hague Lectures, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*,⁴ and in his review essay on the eleventh edition (1987) of Dicey and Morris, *Conflict of*

entertain an action, directly or indirectly, of a penal law of a foreign country." DICEY, *CONFLICT OF LAWS* 220 (1st ed. 1896). The reference to "enue" was added in the third edition, 1922, in what was then Rule 54. DICEY, *CONFLICT OF LAWS* 230 (3d ed. 1922). That part of Rule 3(1) of Dicey which refers to "other public law" has its origin in Rule 54 of the fourth edition, 1927, by Berriedale Keith, when it appeared as "political law," citing *Emperor of Austria v. Day and Kossuth*, (1861) 3 De G.F. & J. 217 and distinguishing proprietary rights from claims to enforce political laws. DICEY, *CONFLICT OF LAWS* 224 (4th ed. 1927). The expression "political law" was replaced by "other public law" in Rule 21 of the seventh edition, 1958. DICEY & MORRIS, *CONFLICT OF LAWS* 159 (7th ed. 1958). This was in response to criticism of the expression "political law" by Dr. F.A. Mann, in *Prerogative Rights of Foreign States and the Conflict of Laws*, 40 *GROTIUS SOC.* 25 (1955) (reprinted in F.A. MANN, *STUDIES IN INTERNATIONAL LAW* 492, 500 (1973)), and by Parker L.J. in *Regazzoni v. K.C. Sethia (1944) Ltd.* [1956] 2 Q.B. 490, at 524. The new expression, "public law," was intended to be equivalent to "prerogative right," the term used by Dr. Mann. See DICEY & MORRIS, *CONFLICT OF LAWS* 162 n.60 (7th ed. 1958); *Government of Iran v. Barakat Galleries Ltd.* [2007] EWCA Civ. 1374, [2009] Q.B. 22, [113].

2. 376 U.S. 398, 414 (1964).

3. *Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty. Ltd.* (1988) 165 C.L.R. 30, 47.

4. 163 *RECUEIL DES COURS* 311 (1979) [hereinafter Lowenfeld, Hague Lectures].

Laws,⁵ criticized the operation of Rule 3 particularly as regards the international enforcement of securities law and the recovery of national heritage. He was particularly critical of two decisions, one on the failure of the English court to assist the efforts of the United States Securities and Exchange Commission to trace the proceeds of fraud in England, and the other on the failure of the English court to assist New Zealand's efforts to reclaim historic artifacts illegally exported from New Zealand and put on sale in London.

A. *Enforcement of Securities Laws*

In *Schemmer v. Property Resources Ltd.*,⁶ a case arising out of the IOS frauds, the SEC had begun proceedings in the United States under the Securities Exchange Act of 1934 against Mr. Robert Vesco and his confederates, alleging an elaborate scheme of fraudulent practices by persons controlling Value Capital Limited, a Bahamian company.

The New York federal court appointed Mr. Schemmer as receiver to take possession of the assets of Value Capital Limited and its subsidiaries (including the shares and assets of another Bahamian corporation). In the proceedings in England, Mr. Schemmer sought to be appointed receiver and manager to receive and administer the English assets of the companies over which he had been appointed receiver by the New York court. The SEC's receiver was not recognized in the English proceedings. The principal reason was that the relevant company was not incorporated in the United States, and there was no evidence that the courts of the Bahamas would recognize the New York decree. Goulding J. said:

The situation relied on . . . is that (the company) is actively or passively concerned in a violation of the laws of a foreign country, and a court in that country has in consequence appointed a receiver of its assets. Under those circumstances (and in the absence of any other ground of foreign jurisdiction) the English court ought not . . . to regard the appointment as having any effect on assets outside the foreign court's

5. *Conflict of Laws English Style*, 37 AM. J. COMP. L. 353 (1989).

6. [1975] Ch. 273. This account follows Lawrence Collins, *Problems of Enforcement in the Multinational Securities Market: A United Kingdom Perspective*, 9 U. PA. J. INT'L. BUS. L. 487, 511-12 (1987).

territorial limits. A little imagination will show that any different rule might produce a multiplicity of claims and confusing and unnecessary questions of competing priorities.⁷

The second ground for the decision was that the Securities Exchange Act of 1934 was unenforceable in England. Goulding J. said:

The Act of 1934 is, in my judgment, a penal law of the United States of America and, as such, unenforceable in our courts. . . . [I]t was passed for public ends and . . . its purpose is to prevent and punish specified acts and omissions which it declares to be unlawful. It was, of course, enacted not merely in the interests of the nation as an abstract or political entity, but to protect a class of the public. In that it resembles the greater part of the criminal law of any country. Like many other penal laws, the Act of 1934 also provides in some cases a private remedy available to the victims of the offences which it forbids, and it may possibly be that a private plaintiff who recovers a judgment in a federal court under the Act of 1934 can enforce it by action here. . . . [H]ere, however, I have nothing of that sort. Mr Schemmer comes before this court, in effect, as a public officer charged to reduce the London funds into possession in order to prevent the commission or continuation of offences against federal law. In my judgment, and in the absence of specific legislation founded on treaties, preventive criminal justice is no more a proper subject of international enforcement than retributive criminal justice. The point would be obvious if the plaintiff here were the plaintiff in the district court, namely the commission (in effect the financial police of the American Union) and its character is not altered by the substitution of Mr Schemmer, the receiver appointed on the commission's application.⁸

7. *Schemmer v. Property Resources Ltd.* [1975] Ch. 273, 288.

8. *Id.*

In his 1979 Hague lectures, Professor Lowenfeld criticized the decision in *Schemmer*.⁹ He thought that the judge wrongly saw the matter not as one of co-operation among countries and their courts to salvage what could be salvaged from one of history's great defalcations, but rather as a problem in enforcement of foreign judgments. What disappointed Professor Lowenfeld was the judge's anxiety to avoid competing priorities. The task of the conflict of laws was not to avoid competing priorities (or competing interests) but to resolve them. Preserving the savings of thousands of investors might have a greater priority, and greater weight, than a jurisdictional claim based on a nominal distinction between two corporate links in the same corrupt corporate chain. In particular he criticized the judge's suggestion that it would have been obvious that the action was a penal action if the plaintiff were the SEC. Professor Lowenfeld accepted that whether or not the Securities Exchange Act was correctly characterized as penal, it was clearly public law, but he questioned whether that made the Act unable to travel in the way that the law of torts or contracts or wills could travel.

B. *Heritage Claims: Att-Gen of New Zealand v. Ortiz*

In *Att-Gen of New Zealand v. Ortiz*,¹⁰ New Zealand was seeking to recover a Maori carving, which had been unlawfully exported to England contrary to the Historic Articles Act 1962 of New Zealand. It had been lawfully purchased in New Zealand by the exporter, and ultimately sold to George Ortiz, a well-known collector who put it up for sale at Sotheby's in order to pay a ransom to the kidnappers of his daughter. Under a New Zealand statute historic articles exported without permission were forfeited to the Crown. New Zealand sued Ortiz and the auctioneers. Ortiz and his associate resisted the action on two principal grounds: (a) that under New Zealand law the forfeiture was not automatic and did not take effect unless the goods were seized by the authorities (which they had not been), and (b) that the New Zealand statute could not be enforced because it was a penal or public law.

9. Lowenfeld, Hague Lectures, *supra* note 4, at 414-17.

10. [1984] A.C. 1 (C.A. and H.L.).

At first instance¹¹ Staughton J. decided in favor of the New Zealand Government on the basis that (a) under New Zealand law forfeiture was automatic and it was therefore not necessary for the New Zealand Government to have seized the carving, and (b) the law was not penal and there was no general category of non-enforceability of foreign public law. He considered that the better approach was to consider in each individual case whether there was a special ground of public policy which required the law in question not to be enforced.

In the Court of Appeal his decision was reversed, (a) unanimously on the basis that forfeiture was not automatic, and (b) by Lord Denning M.R. on the basis that the statute was a public law which would not be enforced, and by Ackner and O'Connor L.JJ., on the basis that it was a penal law. Ackner L.J. did not reach a concluded view on whether there was a residual public law category, but indicated some support for Staughton J.'s conclusion.

Lord Denning M.R. accepted that the point was of vast importance, and continued:

Most countries have legislation to prevent the export of their historic articles unless permitted by licence. This legislation may provide for automatic forfeiture on export or attempted export. It might be very desirable that every country should enforce every other country's legislation on the point – by enabling such articles to be recovered and taken back to their original home. But does the law permit of this?¹²

Having said that nobody had ever doubted that the courts will not entertain a suit brought by a foreign sovereign to enforce the penal or revenue laws of that foreign state, he went on to explain why he considered that the rule extended to "other public laws," i.e. laws "which are *eiusdem generis* with 'penal' or 'revenue' laws." He said:

Then what is the genus? Or, in English, what is the general concept which embraces 'penal' and 'revenue' laws and others like them? It is to be found, I think, by going back to the classification of acts taken in international law. One class comprises those acts

11. Att-Gen of New Zealand v. Ortiz [1982] Q.B. 349.

12. Att-Gen of New Zealand v. Ortiz [1984] A.C. 1, at 20.

which are done by a sovereign 'jure imperii,' that is, by virtue of his sovereign authority. The others are those which are done by him 'jure gestionis,' that is, which obtain their validity by virtue of his performance of them. . . . Applied to our present problem the class of laws which will be enforced are those laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they may be. But other laws will not be enforced. By international law every sovereign state has no sovereignty beyond its own frontiers. The courts of other countries will not allow it to go beyond the bounds. They will not enforce any of its laws which purport to exercise sovereignty beyond the limits of its authority. If this be right, we come to the question: what is meant by the 'exercise of sovereign authority'? It is a term which we will have to grapple with, sooner or later. It comes much into the cases on sovereign immunity and into the State Immunity Act 1978. . . . I suggest that the first thing in such a case as the present is to determine which is the relevant act. Then to decide whether it is of a sovereign character or a non-sovereign character. Finally, to ask whether it was exercised within the territory of the sovereign state-which is legitimate, or beyond it-which is illegitimate.¹³

He reached the following conclusion:

[I]f any country should have legislation prohibiting the export of works of art, and providing for the automatic forfeiture of them to the state should they be exported, then that falls into the category of "public laws" which will not be enforced by the courts of the country to which it is exported, or any other country, because it is an act done in the exercise of sovereign authority which will not be enforced outside its own territory.¹⁴

13. *Id.*

14. *Id.* at 24.

Ackner L.J.'s view¹⁵ was that New Zealand was seeking to enforce a penal statute, and he would have dismissed the claim on what he described as "this point of public international law." The claim was to enforce a foreign penal law because the New Zealand Government was seeking to vindicate its right to preserve historic articles in New Zealand by confiscating them if they were illegally exported. Without reaching any firm conclusion, he said that he was impressed by the reasoning of Staughton J. at first instance that there was no such vague general residual category of "public law." O'Connor L.J.¹⁶ concurred in holding that the law could not be enforced in England because it was a penal law.

The reason why the action failed, as ultimately held by the House of Lords, was that the forfeiture provisions of the 1962 Act did not, as New Zealand alleged, effect a transfer of property in the carving from the exporter to New Zealand upon the exporter attempting to export it unlawfully, but only if and when the carving was actually seized by the New Zealand authorities, which it never was. In the House of Lords Lord Brightman gave the only speech, with which the other members of the House agreed. He upheld the decision of the Court of Appeal on the ground that New Zealand acquired no title to the carving. He added that, so far as the views to which we have referred above were concerned, these were *obiter* and "I venture to think that, in any event, your Lordships would not wish to be taken as expressing any conclusion on the correctness or otherwise of the opinions so expressed."¹⁷

In his 1989 book review Professor Lowenfeld was critical of *Attorney General of New Zealand v. Ortiz*. He said that although the case had no political element at all, and no conceivable element of public policy in the forum, yet New Zealand's effort failed, "the most recent victim of the revenue rule, and of the curious literalism that distinguishes the English from the American approach to law."¹⁸ He asked whether or not the result encouraged smuggling and theft. The idea that there should be a public policy objection to restoration of a work of art to its rightful place made no sense,

15. *Id.* at 34.

16. *Id.* at 35.

17. *Id.* at 46.

18. Lowenfeld, *Conflict of Laws English Style*, *supra* note 4, at 389.

and the “other public laws” exclusion was unpersuasive. He concluded that, in effect, the rule lent “comfort to swindlers, organizers of cartels, tax evaders, and others whom the law ought not to stretch its principles to protect.”¹⁹

He wondered whether the result encouraged smuggling and theft, and said that Lord Denning had passed the buck, by stating that the retrieval of such works of art must be achieved by diplomatic means, and there should be an international convention on the matter. He thought that the idea that there should be a public policy objection to restoration of a work of art to its rightful place made no sense, and therefore the “other public laws” exclusion accepted by Lord Denning largely on the basis of Dicey and Morris was equally unpersuasive. His conclusion was that he was not persuaded by either the revenue or the penal aspect of the rule, and to enlarge the rule with a general, elastic category that might include practically any legislation that went beyond the traditional common law seemed to be inconsistent with the co-operation (or comity) that he would have thought nations ought to develop in their relations with one another.

II. SOME INTERMEDIATE DEVELOPMENTS

In Canada and Australia the courts have allowed the United States government, or office holders appointed by it, to enforce United States judgments, or make civil claims, based on United States public law. In Canada, the non-enforceability of “other public laws” was said in *United States v. Ivey*²⁰ to rest on a shaky foundation. In that case the United States government was held entitled to enforce in Ontario default judgments obtained in a federal court in Michigan. The judgments were obtained under United States legislation which entitled the government to sue for reimbursement of the cost of remedial measures undertaken by the United States Environmental Protection Agency in relation to a waste disposal site operated by the defendants. At first instance it was held that even if the rule extended to “other public laws” it did not apply because (a) the claim was not an attempt by a foreign State

19. *Id.* at 394.

20. (1995) 130 D.L.R. (4th) 674, *aff'd* (1996) 139 D.L.R. (4th) 570 (Ont. C.A.); *see also* *United States of America v. Shield Development Co.* (2004) 74 O.R. (3d) 583, *app. dismissed* (2005) 74 O.R. (3d) 595 (Ont. C.A.).

to assert its sovereignty in Ontario; and (b) considerations of comity favored enforcement of regulatory schemes aimed at environmental protection and control in North America. The Ontario Court of Appeal agreed, and held that the cost recovery action, although asserted by a public authority, was close to a common law claim for nuisance and was in substance of a commercial or private law nature.

So also in Ontario the United States Government was granted a *Mareva* injunction (an injunction restraining the disposal of assets pending trial and judgment) in aid of United States proceedings in connection with the illegal resale of Canadian lottery tickets in the United States;²¹ and in two decisions at first instance in British Columbia, United States judgments in favor of the SEC in civil actions for disgorgement of the proceeds of securities fraud have been enforced.²²

In Australia the leading case in this area is the *Spycatcher* case, *Att-Gen (UK) v. Heinemann Publishers Australia Pty. Ltd.*²³ The British government sought to enforce against Australian publishers the duty of confidentiality owed by Mr. Peter Wright, a former intelligence officer. In form the action was a private law action based on allegations of breach of fiduciary duty, and breach of equitable and contractual obligations of confidence. It was held that the action was not maintainable. The majority (Mason C.J., Wilson, Deane, Dawson, Toohey, and Gaudron JJ.) held that the claim was not enforceable on the broad ground that it was a claim to vindicate the governmental interests of a foreign state. The rule applied "to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government"²⁴ and the principle of law rendered unenforceable "actions to enforce the governmental interests of a foreign State."²⁵ The action was to be characterized by reference to the substance of the interest sought to be enforced, rather than the form of the action.

21. *United States v. Levy* (1999) 45 O.R. (3d) 129. *Cf.* *United States v. Yemec* (2003) 233 D.L.R. (4th) 169 (Ont.).

22. *United States (Securities and Exchange Commission) v. Shull*, Vancouver A980249 [1999]; *United States (Securities and Exchange Commission) v. Cosby*, [2000] BCSC 338.

23. (1988) 165 C.L.R. 30.

24. *Id.* at 42.

25. *Id.* at 47.

The *Spycatcher* decision was applied in *Evans v. European Bank Ltd*²⁶ to hold that a receiver appointed by the United States Federal Trade Commission could sue in New South Wales to recover the proceeds of a credit card fraud. The proceedings were not to be characterized as proceedings to secure a governmental interest. *Schemmer v. Property Resources Ltd*.²⁷ was distinguished on the ground that there was no statutory provision relied upon in those proceedings capable of leading to compensatory orders. The fact that some of the funds might not be able to be distributed to the consumers who were defrauded, and that in that event provision was made for the payment of any surplus to the United States Treasury, might indicate that there was a penal element in the orders made. But that was no more than an allowance for a contingency which was not expected to eventuate, and could not characterize the nature of the proceedings. As a matter of substance, it was a proceeding designed to compensate persons who had been defrauded.

The modern developments in England begin with *Mbasogo v. Logo Ltd*.²⁸ The background facts were colorful. The Republic of Equatorial Guinea has a population of not much more than 500,000, but it is rich in oil and gas. It is the third-largest producer in sub-Saharan Africa after Nigeria and Angola. President Obiang has been the President of Equatorial Guinea since 1979. In 2002 he won re-election with 97.1% of the vote.

In March 2004 Zimbabwean police in Harare impounded a plane from South Africa with 64 alleged mercenaries on board, including Simon Mann. The following day others were arrested in Equatorial Guinea. President Obiang announced that there had been a complex plot to overthrow him which allegedly involved the intelligence services of the United States, United Kingdom, and Spain, together with Mark Thatcher (the son of the former Prime Minister) and Simon

26. [2004] NSWCA 82, (2004) 61 N.S.W.L.R. 75.

27. [1975] Ch. 273. For subsequent efforts by the SEC abroad see Michael D. Mann, Joseph G. Mari & George Lavdas, *Developments in International Securities Law Enforcement and Regulation*, 29 INT'L LAW. 729, 768-76 (1995).

28. [2006] EWCA Civ. 1370, [2007] Q.B. 846. The account of this litigation here derives from Lawrence Collins, *Revolution and Restitution: Foreign States in National Courts*, 326 RECUEIL DES COURS 11, 28-35 (2007).

Mann. The Government alleged that the individuals arrested were involved in an attempt to overthrow the Government of Equatorial Guinea by means of a privately hired force of mercenaries armed with weapons (including machine guns, rocket grenade launchers, mortars, mortar bombs, and hand grenades acquired in Zimbabwe) and to seize control of the state and its assets, in particular its substantial oil and gas reserves, to kill, severely injure, or abduct the President, and to install Mr. Severo Moto, who was in exile in Spain, as President. They alleged that this was pursuant to a conspiracy plotted and financed in England and elsewhere.

The Government claimed that the attack was to comprise an assault force of some seventy experienced former Special Forces soldiers who had served in South Africa. Further, an advance group of twenty, including experienced former South African Special Forces soldiers, had gone to Malabo to gain intelligence and to prepare and participate in the attack.²⁹

Simon Mann was convicted in Zimbabwe of offences relating to unlawful procurement of munitions and, on 10 September 2004, sentenced to seven years imprisonment, reduced on appeal to four years. The main body of mercenaries received lesser sentences for immigration offences. At the end of 2004 and beginning of 2005, others, including Sir Mark Thatcher, son of the former British Prime Minister, pleaded guilty and were convicted of offences contrary to the South African Regulation of Foreign Military Assistance Act 1998. Those arrested in Equatorial Guinea, as members of the advance group, were prosecuted and convicted in October 2004 of offences relating to the coup attempt. They were given long prison sentences.

The President of Equatorial Guinea then sued Mann and his companies in England for damage caused by the unsuccessful attempt at revolution, and obtained orders in Guernsey for a bank to give information about the ownership of various companies and bank accounts which the Government had traced.³⁰ The Privy Council, sitting on appeal from the Court of Appeal of Guernsey, decided that the orders should be up-

29. *See also* Kaunda v. President of the Republic of South Africa 2005 (44) I.L.M 173 (CC) at 198 (S. Afr.) (obligation of South Africa to co-operate with Zimbabwe and Equatorial Guinea).

30. *Equatorial Guinea v. Bank of Scotland International & Ors* (Guernsey) [2006] UKPC 7.

held, despite an argument by the interveners that disclosure should not be ordered in favor of the Government because the English court could not control the use made of it. It was a serious thing to impugn the good faith of a friendly foreign sovereign. But the Privy Council (in an opinion written by Lord Bingham and Lord Hoffmann) expressed disquiet at the fact that no argument was addressed, whether to the courts in Guernsey or to the Privy Council, on the question of whether the Guernsey court lacked jurisdiction to make the order which it did on the ground that it could be regarded as the enforcement, direct or indirect, of the public law of a foreign state.

It was arguable that the claims which the Government of Equatorial Guinea said it wished to make in the English proceedings represented an exercise of sovereign authority, namely the preservation of the security of the state and its ruler. The apprehension and trial of suspects, the imposition of security measures, obtaining diplomatic assistance: these heads of damage alleged in the English proceedings could all be regarded as aspects of sovereign authority. As the High Court of Australia had said in the *Spycatcher* case, *Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty Ltd.*,³¹ the application of the rule depends upon whether the “central interest” of the state bringing the action is governmental in nature. In that case the court held that notwithstanding the private law character of the cause of action (confidentiality) and the relief sought (an injunction), the claim arose out of “an exercise of the prerogative of the Crown, that exercise being the maintenance of the national security.”

The Government argued that its claims were personal and proprietary: threats to the safety of the President and the property of the State as well as the expense of suppressing a coup. But there could be few revolutions which are guaranteed not to cause any injury or damage or that could be suppressed without putting the ruling power to expense. It might therefore be that the question was not whether the claim was framed by reference to personal injury or damage to property but whether, as the Australian High Court said, the “central interest” of the state in bringing the action is governmental in nature.

31. (1988) 165 C.L.R. 30, 46.

There were sound reasons of policy for the rule that the courts should not become involved in providing remedies, whether by way of injunction or compensation, for foreign governments faced with revolutionary activities. The Guernsey court rightly declared itself unable to resolve the questions of whether the government of Equatorial Guinea was an oppressive tyranny or not and whether it could be trusted to honor its undertakings. To refuse to provide assistance on such grounds to the government of a state with which there were friendly diplomatic relations would be invidious. For that reason, the principle was to refuse to assist in enforcing the public law of any foreign state.³²

Because of its doubts about the justiciability of the claim, and since the same questions in relation to English law were likely to come before the English Court of Appeal, the Privy Council decided that the order should be suspended until the Court of Appeal had decided whether the Government had a cause of action enforceable in English law.

*Mbasogo v. Logo Ltd.*³³ was the decision of the English Court of Appeal anticipated by the Privy Council. The first claimant was the President of the Republic of Equatorial Guinea. The question before the Court of Appeal was (*inter alia*) whether the claim was justiciable in a national court. The consequences of the attempted coup were fundamental to the allegations. It was alleged that the President was caused great apprehension and fear, particularly for his own and his family's safety. He believed that both he and his family were likely to be injured or killed in the course of the attack.

The Court of Appeal held that the claim was not justiciable. The court accepted that it was not in doubt that the

32. The Privy Council referred to what Kingsmill Moore J. said in *Buchanan Ltd. v. McVey* [1955] A.C. 516, 529, "safety lies only in universal rejection"; and to *Moore v. Mitchell*, 30 F.2d 600, 604 (2d. Cir. 1929), where Learned Hand, J., said: "To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of the court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

33. [2006] EWCA Civ. 1370, [2007] Q.B. 846.

courts of one country would not enforce the penal and revenue laws of another country. The court accepted that the basis of non-justiciability was that a claim by a foreign State was an illegitimate assertion of sovereign authority by that State within the territory of another.³⁴ The assertion of such authority might take different forms. Claims to enforce penal or revenue laws were good examples of acts done by a sovereign by virtue of sovereign authority (“*jure imperii*”). The Court of Appeal approved Dr. F. A. Mann’s statement:

Where the foreign State pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the State’s access to the courts is unrestricted. Thus a State whose property is in the defendant’s possession can recover it by an action in detinue. A State which has a contractual claim against the defendant is at liberty to recover the money due to it. If a State’s ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign State cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle.³⁵

The critical questions were whether in bringing a claim, a claimant was doing an act which was of a sovereign character or which was done by virtue of sovereign authority, and whether the claim involved the exercise or assertion of a sovereign right. If so, then the court would not determine or enforce the claim. On the other hand, if in bringing the claim the claimant was not doing an act which was of a sovereign character or by virtue of sovereign authority and the claim did not involve the exercise or assertion of a sovereign right and the claim did not seek to vindicate a sovereign act or acts, then

34. *Government of India v. Taylor*, [1955] A.C. 491, 511.

35. F.A. Mann, *supra* note 1, at 34; approved in *Att-Gen of New Zealand v. Ortiz* [1984] A.C. 1, 21 (Lord Denning M.R.); *see also* F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT’L L. & POL. 604, 629-30 (1987) (stating that the decisive question was whether the plaintiff asserts a claim that, by its nature, involves the assertion of a sovereign right).

the court would both determine and enforce it. In deciding how to characterize a claim, the court must examine its substance, and not be misled by appearances.³⁶

It was necessary to look at all the circumstances to see whether in substance the losses which were the subject of the claim had been suffered by virtue of an exercise of sovereign authority. If the losses had in truth been suffered as a result of the claimants' ownership of property, then the fact that the claimants were a foreign state and its President would not render their claims non-justiciable. But the claims which were pleaded were not founded on the claimants' property interests. The alleged losses arose as a result of decisions taken by the claimants to protect the state and citizens of Equatorial Guinea. The defense of a state and its subjects was a paradigm function of government. The special damages claimed by both claimants were in respect of losses incurred as a direct result of their response to the alleged conspiracy. They were (i) costs incurred in investigating the conspiracy and attending meetings to discuss issues of national security; (ii) costs incurred in the detention of suspects; (iii) costs incurred in the prosecution of suspects; (iv) damage to the Republic's commercial interests and infrastructure as a result of the declaration of a state of emergency and security checks carried out on foreign nationals leading to economic disruption and delay; and (v) costs of increased security. It was impossible to characterize these heads of loss as property losses. With one possible exception, they were losses which could only be suffered by the governing body of the State. They arose as a direct result of the government's decisions as to how to respond to the conspiracy and (subject to the possible exception) were of a kind that could not be suffered by anyone else.

If the claim were held to be justiciable it was likely that the defendants would seek to persuade the court to refuse relief on the grounds of the claimants' behavior in responding to the alleged attempted coup. To refuse relief on such grounds to the government of a state with which the United Kingdom had friendly diplomatic relations would be invidious. The court would be asked to decide whether some or all of the steps taken by the claimants were reasonable. For example, was the investigation into the alleged conspiracy reasonably

36. *Huntington v. Attrill* [1893] A.C. 150.

undertaken and the costs of doing so reasonable? Was it reasonable to detain all or any of the suspects, the cost of whose detention was claimed? Were the costs of the prosecution reasonably incurred? Was it reasonably necessary to declare and maintain the state of emergency which resulted in the alleged losses? Was it reasonable to incur the costs of increased security? The claim was therefore not justiciable.

III. HERITAGE CLAIMS AND INTERNATIONAL SECURITIES LAWS REVISITED

There has been a distinct change in attitude since the 1970s and 1980s, when the cases criticized by Professor Lowenfeld were decided. First, in *Government of Iran v. Barakat Galleries Ltd.* the English Court of Appeal held: “[T]here are positive reasons of policy why a claim by a state to recover antiquities which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out by the general principle [that foreign public laws will not be enforced].”³⁷ Second, in *United States Securities and Exchange Commission v. Manterfield* the Court of Appeal upheld an interim injunction in favor of the SEC to preserve assets in England pending the prosecution of civil proceedings for disgorgement in the United States against fraudsters.³⁸

A. *Heritage Claims: Government of Iran v. Barakat Galleries Ltd.*³⁹

This was a claim by the Iranian Government to recover artifacts which it claimed had been illegally exported from Iran, and which (it said) were owned by the State. On a preliminary issue as to whether the claim was maintainable the importer argued that the law under which Iran claimed the artifacts was penal, and that the claim was not justiciable because it was founded on public law.

The Court of Appeal held that the action could be maintained. On the question whether the law was penal, the court

37. [2007] EWCA Civ. 1374, [2009] Q.B. 22, [154]. This author was a member of the court.

38. [2009] EWCA Civ. 27, [2009] 2 All E.R. 1009.

39. *Government of Iran v. Barakat Galleries Ltd.* [2007] EWCA Civ. 1374, [2009] Q.B. 22, [113].

proceeded on orthodox lines. Whether a foreign law, or a claim based on foreign law, was to be characterized as penal depended on English law. It did not depend on the label given to the law by the foreign system of law, nor on whether the claim was in form a private law claim. The court had to determine the substance of the right sought to be enforced, and whether its enforcement would, directly or indirectly, involve the execution of the penal law of another state.⁴⁰

It followed that a law may be characterized as penal even if it does not form part of the criminal code of a foreign country. Similarly, the fact that a provision was found within a law which contains criminal sanctions, such as penalties or forfeiture, did not mean that the provision itself was penal in nature. The Court of Appeal specifically criticized *Schemmer v. Property Resources Ltd.*⁴¹ for having overlooked the latter point. It will be recalled that Goulding J. had held (as an alternative ground of the decision) that the English court would not recognize the title of a receiver appointed by the United States court to get in the assets of a group of companies (based in the Bahamas) which had been used as the vehicle for the IOS frauds in the 1970s. The basis of that part of the decision was that the receiver had been appointed pursuant to the U.S. Securities Exchange Act of 1934, and that Act was a penal law. But the receiver had not been appointed to enforce the penal provisions of the Act, but to preserve and recover the property of the company.

The Iranian heritage law was in large part penal in that it created criminal offences with criminal penalties for unlawfully excavating or dealing with antiquities. But the fact that some of the provisions of the law imposed penalties did not render penal all the other provisions of the law. The changes that it made in relation to ownership of antiquities were not penal or confiscatory. They did not take effect retroactively. They did not deprive anyone who already owned antiquities of their title to them. They altered the law as to the ownership of antiquities that had not yet been found, with the effect that

40. *Huntington v. Attrill* [1893] A.C. 150; *Banco de Vizcaya v. Don Alfonso de Borbon y Austria* [1935] 1 K.B. 140; *Att-Gen of New Zealand v. Ortiz* [1984] A.C. 1, 32 (Ackner L.J.); *United States v. Inkley* [1989] Q.B. 255 (C.A.).

41. [1975] Ch. 273.

these would all be owned by the State, subject to the entitlement of the chance finder to a reward. These were not penal provisions, and the claim in this case did not fail on that ground.

In *Government of Iran v. Barakat Galleries Ltd.* the Court of Appeal pointed out that the *Equatorial Guinea* case in the Court of Appeal was not in fact a case involving the attempted enforcement of foreign public law. Although the court approved the residual category of "other public law" the ratio was that a claim involving the exercise or assertion of a sovereign right is not justiciable. That was not far removed from the test adopted by the High Court of Australia in the *Spycatcher* case. Nor was it far removed from the approach in civil law countries. The French Cour de Cassation decided that the claims by the Republic of Haiti against Baby Doc Duvalier for looting the Haitian treasury were inadmissible because they related to relations between a state and its officers, and to the exercise of public power.⁴²

The Court of Appeal concluded that on the authorities as they stood the only category outside penal and revenue laws which was the subject of an actual decision, as opposed to dicta, was a claim which involved the exercise or assertion of a sovereign right. The test laid down by the High Court of Australia was not only consistent with the English authorities, including the *Equatorial Guinea* case in the Court of Appeal, but was a helpful and practical test.

It was possible, but by no means certain, that export restrictions might be within this category.⁴³ But the claim was not an attempt to enforce export restrictions, but to assert rights of ownership. The claim by Iran was maintainable even though it had not taken possession of the objects. Where the foreign state had acquired title under its law to property within its jurisdiction in cases not involving compulsory acquisition of title from private parties, there was no reason in principle why the English court should not recognize its title in accordance with the general principle. Consequently, when a state owned

42. *Etat d'Haiti v. Duvalier*, Cass. civ. I, May 29, 1990, 1991 *Clunet* 137, 1991 *Rev. Crit.* 386.

43. *Cf. King of Italy v. de Medici* (1918) 34 T.L.R. 623, as discussed in *Att-Gen of New Zealand v. Ortiz* per Lord Denning M.R., [1984] A.C. 1, at 23; *Kingdom of Spain v. Christie, Manson & Woods Ltd.* [1986] 1 W.L.R. 1120.

property in the same way as a private citizen there was no impediment to recovery. The Court of Appeal asked itself whether the position was different where there had been compulsory acquisition. If the State had acquired title under public law by confiscation or compulsory process from the former owner then it would not be able to claim the property in England from the former owner or his successors in title unless it had had possession. If it had taken the property into its possession then its claim would be treated as depending on recognition; if it had not had possession it would be seeking to exercise its sovereign authority. But in these proceedings Iran did not assert a claim based on its compulsory acquisition from private owners. It asserted a claim based upon title to antiquities which formed part of Iran's national heritage, title conferred by legislation that was nearly thirty years old. This was a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights. This was not within the category of case where recognition of title or the right to possess under the foreign law depended on the State having taken possession.

The Court of Appeal referred to the fact that in the United States the patrimonial rights of the foreign State had been recognized in the context of criminal proceedings, even where the State never had possession. In *United States v. Schultz*,⁴⁴ Schultz, a successful art dealer in New York City, was convicted of conspiracy to receive stolen property, Egyptian antiquities, which had been transported in interstate and foreign commerce. The underlying substantive offence was violation of the National Stolen Property Act. The Court of Appeals for the Second Circuit decided that an Egyptian patrimony law, declaring all antiquities found in Egypt after 1983 to be the property of the Egyptian government, had the effect of making the Egyptian government the owner of the antiquities, and that "ownership" was recognized by the United States for the purposes of prosecution under the Act.⁴⁵

The court also added that if it were wrong in the view that it was not a claim to enforce foreign public law, then it should

44. 333 F.3d 393 (2d Cir. 2003).

45. *Cf. R v. Tokeley-Parry* [1999] Crim. L.R. 578 (also a case of handling stolen Egyptian antiquities: conviction under Theft Act 1968 in relation to door taken from the Tomb of Hetepka).

not be precluded by any general principle that the American court will not entertain an action whose object is to enforce the public law of another State. There were positive reasons of policy why a claim by a State to recover antiquities which formed part of its national heritage and which otherwise complied with the requirements of private international law should not be shut out by the general principle. It was contrary to public policy for such claims to be shut out. A degree of flexibility in dealing with claims to enforce public law had been recommended by the *Institut de droit international*⁴⁶ and by the International Law Association.⁴⁷

There was international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities. There were a number of international instruments which had, in part, the purpose of preventing unlawful dealing in property which is part of the cultural heritage of States, although there still remained a question about their effectiveness. The United Kingdom was party to some of them.⁴⁸

46. In particular where it is justified by reason of the subject-matter of the claim and the needs of international co-operation or the interests of the States concerned: Institut de droit international, *Annuaire*, 1977, vol. 57-II, p. 328.

47. International Law Association, Report of the 63rd Conference, at 29-30, 719-57 (1988).

48. On August 1, 2002 the United Kingdom ratified, with effect from November 1, 2002, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. More than 100 States have ratified the Convention, including Iran, which ratified it in 1975, and the United Kingdom (2002). The Convention was implemented in the United States through the Cultural Property Implementation Act of 1983. The United Kingdom Dealing in Cultural Objects (Offences) Act 2003 provides for criminal offences in the case of dealing with cultural objects which have been illegally removed (after the Act came into force in December 2003) from an archaeological site. It is immaterial whether the excavation was done in the United Kingdom or elsewhere, or whether the offence is committed under the law of a part of the United Kingdom or under the law of any other country: section 2(3). Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State was incorporated into English law with effect from March 2, 1994 by the Return of Cultural Objects Regulations 1994, SI 1994/501, as amended by SI 1997/1719 and SI 2001/3972. A Member State has the right to take proceedings against the possessor, or failing him the holder, for the return of a cultural object which has been unlawfully removed from its territory: Regulation 3(1). The court may order the re-

These instruments illustrated the international acceptance of the desirability of protection of the national heritage. A refusal to recognize the title of a foreign State, conferred by its law, to antiquities unless they had come into the possession of such State, would in most cases render it impossible for the United Kingdom to recognize any claim by such a State to recover antiquities unlawfully exported to this country.

B. *Securities Laws: United States Securities and Exchange Commission v. Manterfield*

In *United States Securities and Exchange Commission v. Manterfield*⁴⁹ the SEC had brought proceedings in the United States District Court in Massachusetts, alleging that the defendants, Manterfield and Anderson, fraudulently induced over sixty investors, all of whom were Taiwanese, to invest approximately \$34 million in a fund, and that they misappropriated millions of dollars, withdrawing \$8 million of which it was alleged Manterfield received \$2.35 million.

The SEC made an application to the English court for interim freezing orders in support of their proceedings in Massachusetts, relying on Section 25(1) of the Civil Jurisdiction and Judgments Act 1982, which gives the English court the power to grant interim relief in support of proceedings in foreign countries.

It was argued on behalf of Manterfield that the SEC's action in Massachusetts was seeking to enforce a penal law and that thus any judgment obtained in Massachusetts would be unenforceable in England, and that no freezing order should be made at the interim stage which had as its object the enforcement of the penal law of a foreign state. The Court of Appeal looked to see the nature of the relevant part of the judgment which the SEC was seeking in Massachusetts. If in reality that part of the judgment was, in substance, a claim for damages which in England might have been brought in a civil case, the fact that it was all part of a judgment in a criminal

questing member State to pay compensation: Regulation 7(1). See also the Unidroit Convention on Stolen or Illegally Exported Cultural Objects, signed in June 1995, but which has not been ratified by many potentially importing countries.

49. [2009] EWCA Civ. 27, [2009] 2 All E.R. 1009.

case would not bring it within Dicey's Rule 3.⁵⁰ It was the substance of what was being sought to be enforced which was important for the purposes of the rule, flowing from the reasoning in *Evans v. European Bank Ltd.*⁵¹ and *Government of Iran v. Barakat Galleries Ltd.*,⁵² discussed above. The substance of what the SEC would seek to enforce (if they were to prevail in the action), and in relation to which they sought to preserve the assets, was the disgorgement of what they alleged to be the proceeds of fraud. They also intended to seek orders, which would provide for the proceeds to be returned to the investors. Such a judgment would not, if obtained, fall foul of Rule 3.

No doubt Professor Lowenfeld would approve of the decisions on securities law and heritage laws. What of the final category, "revenue laws"?

IV. REVENUE LAWS

The revenue rule is well-entrenched⁵³:

One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.⁵⁴

50. See *Raulin v. Fischer* [1911] 2 K.B. 93.

51. (2004) 61 N.S.W.L.R. 75.

52. [2009] Q.B. 22. Leave to appeal to the House of Lords was refused.

53. See, e.g., *Municipal Council of Sydney v. Bull* [1909] 1 K.B. 7; *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265 (1888); *Oklahoma v. Gulf, Colo. & Santa Fe Ry.*, 220 U.S. 290, 299 (1911); *Moore v. Mitchell*, 30 F.2d 600, 603-04 (2d Cir. 1929), *affid. on other grounds*, 281 U.S. 18 (1930). But in England it has not prevented extradition for an offence committed in a revenue context. See, e.g., *R v. Chief Metropolitan Stipendiary Magistrate* [1988] 1 W.L.R. 1204 (Div. Ct.). Nor has it prevented the execution of letters rogatory in connection with civil proceedings in Norway to set aside a tax assessment. See, e.g., *In re State of Norway's Application* [1990] 1 A.C. 723.

54. *Government of India v. Taylor* [1955] A.C. 491, 511.

But Story, in his *Commentaries on the Conflict of Laws*,⁵⁵ approved Pothier's view that the revenue rule is "inconsistent with good faith and moral duties of nations." Professor Lowenfeld criticized the revenue rule in these terms:

Are capital gains taxes, assessments for street repairs, and seamen's benefit plans contrary to the public policy of England? Is there in such claims an affront to the sovereignty of England? Would denial of some claims of this kind be such an affront to the sovereignty of the plaintiff government that it is better to deny them all? My answer to all of these questions, as the reader must have guessed, is no. I think I detect some sympathy for my view in *Dacey and Morris* . . . but constrained by the limitations they have placed on themselves, the editors voice no outright rejection of the prevailing view, and remain content to emphasize the distinction between recognizing and enforcing a foreign public law.⁵⁶

He was also responsible for a section of the Restatement of the Law of Foreign Relations which states that "[i]n an age when . . . instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete."⁵⁷

This is the background to some exceptionally interesting recent judgments in the United States involving conspiracies to smuggle tobacco into Canada in order to take advantage of the difference in taxation on tobacco between the United States and Canada.

A. Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.⁵⁸

This was a RICO action by the Canadian Government against United States and Canadian tobacco companies for damages based on lost revenues as a result of their participa-

55. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 21 (1st ed. 1834).

56. Lowenfeld, *Conflict of Laws English Style*, *supra* note 5, at 386.

57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 483, Reporter's Note 2 (1987).

58. 268 F.3d 103 (2d Cir. 2001); *see also* Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003); European Cmty. v. RJR Nabisco,

tion in schemes to avoid taxes by smuggling cigarettes across the Canadian border. The complaint was dismissed because the action was barred by the revenue rule. It was held that Canada was directly seeking to enforce its tax laws. The United States and Canada had negotiated a treaty providing for limited extraterritorial tax enforcement assistance but it stopped well short of the type of assistance involved in the present case. The language, structure, and legislative history of RICO revealed no Congressional intent to afford a civil remedy to foreign nations for evasion of foreign taxes.

The court said, "The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns."⁵⁹ It had been defended on several grounds, including respect for sovereignty, concern for judicial role and competence, and separation of powers. Examination of both the policies underlying the revenue rule, and the rule's congruence with the international tax policies pursued by the political branches of government, supported the conclusion that the revenue rule was applicable. Tax laws embodied a sovereign's political will. They mirrored the moral and social sensibilities of a society.

Canada asserted that the revenue laws at issue were the product of an assessment of its public health priorities. Canada had taken the position that tobacco duty and tax increases, and the resulting higher tobacco prices, held the promise of deterring young people from becoming addicted to a harmful drug. It was unlikely that enforcing a foreign tax regime aimed at deterring smoking would offend most citizens of New York, Connecticut, or Vermont, whatever their personal habits or vices. But the court asked how the United States would respond if a foreign sovereign asked the court to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation, or a tax raised to deter the sale of United States pharmaceuticals in that country. Those questions demonstrated the sensitive nature of the issues that could be raised through a foreign sovereign's exercise of its taxation powers.

Inc., 355 F.3d 123 (2d Cir. 2004); *European Cmty. v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005).

59. *Att'y Gen. of Can. v. R.J. Reynolds*, 268 F.3d 103, 109 (2d Cir. 2001).

The revenue rule did not always bar United States courts from furthering the tax policies of foreign sovereigns. The Second Circuit had held the revenue rule inapplicable to a United States criminal action premised on violations of foreign tax laws.⁶⁰ But the fact that Canada was directly seeking to enforce its tax laws, and that the United States government had negotiated and signed a treaty with Canada providing for limited extraterritorial tax enforcement assistance but stopping well short of the assistance requested, led the court to be wary of becoming the enforcer of foreign tax policy.

When a foreign nation appeared as a plaintiff seeking enforcement of its revenue laws, the judiciary risked being drawn into issues and disputes of foreign relations policy that were assigned to, and better handled by, the political branches of government. With regard to the domestic collection of foreign taxes and the enforcement of United States taxes abroad, the political branches had consistently acted on behalf of the United States in establishing and managing the nation's relationships with other countries. There were only five countries with which the United States had entered into income tax treaties under which the contracting parties have agreed to provide general assistance in collecting tax judgments. There was a continuing policy preference against enforcing foreign tax laws. The treaty with Canada provided for assistance with the enforcement of certain fully adjudicated foreign tax judgments, but also allowed the executive branch to consider and determine, in each instance, whether a particular Canadian tax liability should be enforced by the United States. The enforcement provisions applied only where the State seeking collection assistance certified that the revenue claim had been finally determined. Accordingly, the treaty did not abrogate the rule that courts of one nation should not adjudicate the unresolved tax claims of another.

For the court to adjudicate on foreign revenue laws raised issues of foreign relations which were assigned to and better handled by the legislative and executive branches of govern-

60. *United States v. Trapilo*, 130 F.3d 547, 551 (2d Cir. 1997), *cert. denied*, 525 U.S. 812 (1998); *see also* *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000). *But see* *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996).

ment.⁶¹ Although a scheme to defraud a foreign nation of its right to impose taxes may be punished under appropriate circumstances by the United States government, in United States courts, using United States penal laws,⁶² it did not follow that United States courts, in a civil case, may determine the validity of a foreign tax law or the extent of liability thereunder and award that amount to a foreign sovereign.

RICO did not bar the application of the revenue rule. When an interpretation of a broad, general statute would implicate foreign relations, there should be a clear expression of congressional intent as to the statute's scope.⁶³ In 1978, Congress amended RICO to include inter-state trafficking. Although Congress knew that there was widespread traffic in cigarettes moving in or otherwise affecting interstate or foreign commerce, Congress did not prohibit smuggling between countries or in violation of foreign tax laws.

Canada was seeking to have a United States court require the defendants to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO's treble damages provision. Canada's object was clearly to recover allegedly unpaid taxes. Canada's claim for damages based on law enforcement costs was in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the revenue rule. The primary purpose identified by Canada for using its police forces to stop the smuggling was to enforce its customs and excise taxes. In effect, Canada was requesting that the defendants pay the salary of the tax enforcers; such police costs are thus derivative of the taxes Canada sought to enforce.

Judge Calabresi dissented. His views can be summarized in this way. The revenue rule had nothing to do with the case. The action arose from a violation of a United States statute, namely the civil enforcement provision of RICO, which created the cause of action. Canada, in suing for damages resulting from the violation of a United States statute, neither was seeking to have non-Canadian courts enforce Canadian judgments, laws, or policies, nor was basing the action on the viola-

61. See *Boots*, 80 F.3d 580.

62. *Trapilo*, 130 F.3d at 551; see also *Pierce*, 224 F.3d 158.

63. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

tion of the Canadian statute. He accepted that the original basis for the revenue rule was as a bar against the assertion of foreign sovereignty within domestic borders. But that had no meaning whatever when what was enforced by imposing damages or penalties was, in fact, a domestic law, that is, a law enacted by the legislative and executive branches. What Canada alleged was a violation of the RICO statute. By enacting RICO, the United States government had determined that the action suit advanced American interests, and any collateral effect furthering the governmental interests of a foreign sovereign was, therefore, necessarily incidental. The concern that enforcement of particular foreign laws by American courts might not reflect United States policy was misplaced whenever the legislative and executive branches had created the cause of action. Under the circumstances, the courts could not be said to be formulating foreign policy. They were simply implementing the policy established by the other branches. The rationale for the revenue rule that was based on the desire to avoid analysis of foreign statutes had been effectively rejected by the Second Circuit.⁶⁴

Judge Calabresi was critical of the extraordinary scope of the RICO statute, and said that he would not be displeased if the Supreme Court, faced with the possible effects of civil RICO in a case like the present one, were to retreat from its insistence on an identical scope for civil and criminal RICO.

B. *Pasquantino v. United States*⁶⁵

This case involved a conviction for federal wire fraud for carrying out a scheme to smuggle liquor into Canada from the United States. It was held, by a 5-4 majority, that a plot to defraud a foreign government of tax revenue violates the statute. Its plain terms criminalized the scheme. That construction did not derogate from the common law revenue rule.

The reasoning of the majority was as follows. The wire fraud statute dated from 1952. There was no common law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes. The tradi-

64. See *Trapilo*, 130 F.3d at 551; *Pierce*, 224 F.3d 158.

65. 544 U.S. 349 (2005).

tional rationales for the revenue rule did not plainly suggest that it swept so broadly. Since the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the rule that “[t]he Courts of no country execute the penal laws of another.”⁶⁶

The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws. At its core, the revenue rule prohibited the collection of tax obligations of foreign nations. The wire fraud prosecution was not a suit that recovered a foreign tax liability, like a suit to enforce a judgment. It was a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct. Nor was it indirect enforcement of foreign revenue laws, in contrast to the direct collection of a tax obligation. A prohibition on the enforcement of *foreign* penal law did not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension was unprecedented in the long history of either the revenue rule or the rule against enforcement of penal laws.

The majority rejected the argument that the recovery of taxes was indeed the object of the suit, because restitution of the lost tax revenue to Canada is required under the Mandatory Victims Restitution Act of 1996.⁶⁷ It did not matter whether the provision of restitution was mandatory in the prosecution. The wire fraud statute advanced the Federal Government’s independent interest in punishing fraudulent domestic criminal conduct. The purpose of awarding restitution was not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct. In any event, if awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later-enacted restitution statute impliedly repealed the wire fraud statute as applied to frauds against foreign sovereigns.

The prosecution posed little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of

66. *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.).

67. 18 U.S.C. §§ 3663A-3664 (2006).

other sovereigns. The action was brought by the Executive to enforce a statute passed by Congress. The Court could assume that by electing to bring the prosecution, the Executive had assessed its prosecution's impact on relations with Canada, and concluded that it posed little danger of causing international friction. The prosecution embodied the policy choice of the political branches to free the interstate wires from fraudulent use, irrespective of the object of the fraud. It therefore posed no risk of advancing the policies of Canada illegitimately. In answer to Justice Ginsburg's dissent, the majority considered that its interpretation of the wire fraud statute did not give it extraterritorial effect. The accused used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offence was complete the moment they executed the scheme inside the United States.

The majority concluded:

It may seem an odd use of the Federal Government's resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so, and no canon of statutory construction permits us to read the statute more narrowly.⁶⁸

The Supreme Court declined to express a view as to "whether a foreign government, based on wire or mail fraud predicate offences, may bring a civil action under [RICO] for a scheme to defraud it of taxes."⁶⁹

Justice Ginsburg dissented on three grounds, on all of which Justice Breyer agreed. Justices Scalia and Souter agreed with her on the second and third grounds only. The first ground was that extra-territorial effect was being given impermissibly to the wire fraud statute. The presumption against extraterritoriality, which guided courts in the absence of congressional direction, provided ample cause to conclude that the wire fraud statute did not extend to the scheme. The United States and Canada had negotiated, and the Senate had ratified, a comprehensive tax treaty, in which both nations had committed to providing collection assistance with respect to each other's tax claims. The treaty applied only to tax claims

68. *Pasquantino*, 544 U.S. at 372.

69. *Id.* at 354 n.1.

that had been fully and finally adjudicated under the law of the requesting nation. The wire fraud statute should not be understood to provide the assistance that the United States, in the considered foreign policy judgment of both political branches, had specifically declined to promise.

The second ground was that the prosecution directly implicated the revenue rule, and it was plain that Congress did not endeavor, by enacting the statute, to displace that rule. The application of the Mandatory Victims Restitution Act of 1996 to wire fraud offences was an indication that Congress did not envisage foreign taxes to be the object of a scheme to defraud. The Government had acknowledged that it did not urge the district court to order restitution on the theory that it was not appropriate, since the victim was a foreign government and the loss derived from tax laws of the foreign government. The Government disavowed the concession, but the fact that the Government effectively invited the District Court to overlook the mandatory restitution statute out of concern for the revenue rule was revealing.

The third ground was that, when confronted with two rational readings of a criminal statute, one harsher than the other, the court should choose the harsher only when Congress had spoken in clear and definite language. It had not so spoken.

C. European Community v. RJR Nabisco, Inc.⁷⁰

In this action the European Community, several Member States of the European Community, and departments of the Republic of Colombia brought RICO claims against tobacco manufacturers for damages for conspiracy to smuggle tobacco in the EC and Colombia. The Second Circuit had held, applying its decision in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*,⁷¹ that the revenue rule barred the foreign sovereigns' civil claims for recovery of lost tax revenue and law

70. 424 F.3d 175 (2d Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006); *see also* Republic of Colombia v. Diageo N. Am. Inc., 531 F. Supp. 2d 365 (E.D.N.Y. 2007).

71. 268 F.3d 103 (2d Cir. 2001); *see also* Republic of Honduras v. Philip Morris Cos., 341 F.3d 1253 (11th Cir. 2003); European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004); European Cmty. v. RJR Nabisco, Inc., 424 F.3d 175 (2d Cir. 2005).

enforcement costs: *European Community v. RJR Nabisco, Inc.*⁷² A petition for certiorari was presented, and while the petition was pending, the Supreme Court issued its opinion in *Pasquantino v. United States*. The Supreme Court vacated the judgment of the Second Circuit and remanded it for further consideration in light of its decision.⁷³

The Second Circuit re-asserted its adherence to the revenue rule. It held that the involvement of the United States government was a key factor in determining the outcome of *Pasquantino*. The present civil lawsuit, on the other hand, was brought by foreign governments, not by the United States. The executive branch had given the court no signal that it consented to the litigation. The United States government had argued that the revenue rule did not apply to criminal prosecutions, but agreed that the rule applied to civil cases brought by foreign governments involving any direct or indirect attempt to enforce their tax laws.⁷⁴

The Second Circuit said that in *Pasquantino* the Supreme Court found that “the link between this prosecution and foreign tax collection is incidental and attenuated at best, making it not plainly one in which ‘the whole object of the suit is to collect tax for a foreign revenue.’”⁷⁵ But the same paragraph also used the phrases “main object” and “primary object” to describe the inquiry, implying that a suit which had secondary objects irrelevant to revenue collection might still be barred by the rule. The Second Circuit acknowledged that, although it seemed reasonable to assume the Supreme Court intended the three formulations to be treated as roughly synonymous, the language in *Pasquantino* was not entirely clear. But the “whole object” of the present suit was to collect tax revenue and the costs associated with its collection. Thus, under any of the available formulations of the revenue rule, the plaintiffs’ claims were barred.

What mattered was not the form of the action, but the substance of the claim. The substance of the claim was that the defendants violated foreign tax laws. In *Pasquantino*, any

72. 355 F.3d 123 (2d Cir. 2004).

73. *European Cmty. v. RJR Nabisco*, 544 U.S. 1012 (2005).

74. Brief for the United States at 15 n.4, *Pasquantino v. United States*, 544 U.S. 349 (2005) (No. 03-725).

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

concern the judiciary risked being drawn into issues and disputes of foreign relations policy that were assigned to the political branches of government was alleviated by the direct participation of the political branches in the litigation.

It is not for this author to express a view on the correctness of decisions in an area which remains controversial, but it is possible, as it was in relation to the enforcement of securities laws and heritage laws, to ask what would Professor Lowenfeld make of these decisions, and to suggest that he would approve the majority decision of the Supreme Court and be skeptical about the decisions of the Second Circuit.

