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# The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule

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# The U.S. as Tax Haven? Aiding Developing Countries by Revoking the Revenue Rule

Samuel D. Brunson\*

## *Abstract*

*Over the years, many OECD countries, including the United States, have identified tax havens as a significant problem, and have acted to limit the ability of their taxpayers to use tax havens to reduce their taxes. The United States has implemented tax regimes, including subpart F and the passive foreign investment company rules, and disclosure regimes, such as the recently-enacted FATCA rules, to prevent U.S. taxpayers from taking advantage of tax haven jurisdictions.*

*But the intersection of a number of U.S. tax rules, it turns out, makes the United States an attractive place for foreigners to invest—and hide—their money. Principal among these is the revenue rule, an eighteenth-century common law rule that prevents the United States from recognizing and enforcing foreign tax judgments. As a result, if a foreign taxpayer hides money in the United States and fails to pay taxes at home, her government has no recourse to satisfy the tax debt with the taxpayer's U.S. assets. Such hidden money disparately impacts developing countries by reducing their ability to finance government through developing tax infrastructure, and instead forcing them to remain dependent on foreign aid.*

*The revenue rule stands in stark contrast to the general default rule that U.S. courts will enforce foreign final judgments. But the revenue rule is not grounded in any compelling policy considerations. Moreover, to the extent that the U.S. revokes the revenue rule, not only will the U.S. aid other countries—including, especially, developing countries—but it may receive reciprocal aid in collecting taxes from U.S. taxpayers with assets held overseas. This Article argues that the U.S. should revoke the revenue rule, both from a moral obligation to aid developing economies in becoming self-sufficient and to receive reciprocal aid in collecting taxes being held overseas.*

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## I. INTRODUCTION

Nobody likes tax havens.<sup>1</sup> No country in the Organization for Economic Cooperation and Development (“OECD”), at any rate. In 2000, the OECD released a blacklist of tax havens that had not cooperated with its attempts to eliminate harmful tax practices.<sup>2</sup> It gave those thirty-five countries one year to reform their harmful practices, at which point member states would begin to impose sanctions on the remaining blacklisted tax havens.<sup>3</sup>

While nearly a decade and a half has passed since the OECD began its crackdown on tax havens, they still exist, and U.S. taxpayers continue to funnel money through tax havens to reduce their taxes. The U.S. loses an estimated \$40 billion to \$70 billion in governmental revenues annually to taxpayers’ abusive use of tax havens.<sup>4</sup> Major U.S. corporations, including Microsoft, Hewlett-Packard, and Apple, have faced public condemnation at disclosures that they have used tax havens to avoid U.S. taxes.<sup>5</sup>

The U.S. has enacted a number of tax provisions intended to check taxpayers’ ability to reduce their taxes through the use of tax havens. Subpart F, for example, taxes certain U.S. shareholders currently on their share of a foreign corporation’s income, while the passive foreign investment company rules eliminate the benefits of deferral on offshore passive investments. As I’ve previously written, the United States imposes punitive taxes on certain tax haven investments even when the investor is acting in a manner consistent with congressional intent.<sup>6</sup>

But what if the United States is a tax haven? Or, more specifically, what if federal tax law makes the United States an attractive place for foreign individuals to hide their money?<sup>7</sup> Though it sounds counterintuitive, even the OECD has acknowledged that member states (including the United States) engaged in certain harmful tax practices.<sup>8</sup>

If in fact the United States is offended by and committed to attacking tax havens, it must address those parts of its tax law that make it attractive to foreign persons who want to hide assets from their governments. One easy way to reduce the attractiveness of the U.S. to tax evaders—while not discouraging legitimate foreign investment—would be to revoke the revenue rule, which prevents U.S. courts from enforcing foreign tax judgments. Without the revenue rule, individuals evading taxes in their home countries would risk losing the assets they had hidden in the United States; foreign taxpayers current on their foreign taxes, on the other hand, would face no such risk. As a result, the United States could help other countries—and especially developing countries—at

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<sup>1</sup> This is not completely true, of course. Some privacy advocates and libertarian think tanks argue that tax havens, among other things, promote tax competition, thus reducing the rates of tax and spending of high-tax countries. See, e.g., David D. Stewart, *Privacy Advocates Praise Tax Evasion*, 125 TAX NOTES 649, 649 (2009).

<sup>2</sup> Robert Goulder, *OECD Releases Tax Haven Blacklist*, 88 TAX NOTES 32, 32 (2000).

<sup>3</sup> *Id.*

<sup>4</sup> Samuel D. Brunson, *Repatriating Tax-Exempt Investments: Tax Havens, Blocker Corporations, and Unrelated Debt-Financed Income*, 106 NW. U. L. REV. 225, 237 (2012).

<sup>5</sup> See Editorial, “A” Is for Avoidance, N.Y. TIMES, May 26, 2013, at SR10 (“Rampant corporate tax avoidance may not be illegal, but that doesn’t make it right or fair.”).

<sup>6</sup> See Brunson, *supra* note 4, at 271 (“However, Congress clearly never intended for tax-exempt entities to pay taxes on their investment income. Moreover, the IRS has blessed investment by a tax-exempt entity through offshore blocker corporations as being nonabusive.”).

<sup>7</sup> See *infra* notes 51–77 and accompanying text.

<sup>8</sup> See Goulder, *supra* note 2, at 33–34 (listing the U.S. foreign sales corporation regime as a harmful tax practice).

minimal expense to itself, while acting consistently with its desire to protect its own revenue from countries engaging in harmful tax practices.

This article proceeds as follows. Part II discusses tax havens. It looks specifically at the legal regimes that allow a country to act as a tax haven. It also discusses the ways in which tax havens impede developing countries from establishing the administrative capacity to collect the revenue they need to become self-sufficient. It finally describes ways in which the United States resembles a tax haven, imposing little, if any, tax on certain types of U.S.-source income earned by foreigners, with significant secrecy, and with its unwillingness to enforce foreign tax judgments.

Part III then discusses the ways in which victorious foreign litigants can enforce non-revenue money judgments awarded by foreign courts in the U.S. Part IV looks at the revenue rule, which prevents U.S. courts from recognizing or enforcing foreign revenue judgments. I conclude that there is no compelling justification for maintaining the revenue rule, and that the revenue rule should be revoked in the interest of international tax fairness.

Parts V and VI then provide a framework for how such revocation should proceed. Part V goes through a number of policy issues that must be considered in the process of eliminating the revenue rule, including why its revocation is a better solution to the problem of the U.S. as tax haven than other solutions. Finally, Part VI looks at the practical and administrative aspects of revoking the revenue rule.

## II. CAPITAL FLIGHT FROM DEVELOPING COUNTRIES

Every year, developing countries lose hundreds of billions of dollars to capital flight. In 2010, the Center for International Policy estimated that developing countries lost between \$783.2 billion and \$1.138 trillion in *illicit* capital flight alone.<sup>9</sup> To put this amount in context, developing countries receive only about \$70 billion in official development assistance, and about \$250 billion in foreign direct investment, annually.<sup>10</sup> Capital flight, moreover, creates real problems for developing countries.<sup>11</sup> For purposes of this Article, the most salient effect of capital flight is its ability to undermine a developing country's tax system and public finances.<sup>12</sup> "Tax evasion undermines the funding of the state and, thus, the legitimacy associate with the state through the delivery of public services[.]"<sup>13</sup> Developing countries rely on capital taxes for a large percentage

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<sup>9</sup> DEV KAR & SARAH FREITAS, GLOBAL FINANCIAL INTEGRITY, ILLICIT FINANCIAL FLOWS FROM DEVELOPING COUNTRIES: 2001–2010, at 6, *available at* [http://iff.gfintegrity.org/documents/dec2012Update/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries\\_2001-2010-HighRes.pdf](http://iff.gfintegrity.org/documents/dec2012Update/Illicit_Financial_Flows_from_Developing_Countries_2001-2010-HighRes.pdf).

<sup>10</sup> Peter Reuter, *Policy and Research Implications of Illicit Flows*, in DRAINING DEVELOPMENT? CONTROLLING FLOWS OF ILLICIT FUNDS FROM DEVELOPING COUNTRIES 483, 484 (Peter Reuter ed. 2012).

<sup>11</sup> Among other things, it removes from developing countries assets that could be invested, it can encourage rent-seeking, and can negatively affect a country's balance of payments. A. Albakin & J. Whalley, *The Problem of Capital Flight from Russia*, 22 WORLD ECON. 421, 433–34 (1999). At the extremes, capital flight can even destabilize an economy or trigger international chain reactions. *Id.* at 421.

<sup>12</sup> GOV'T COMM'N ON CAPITAL FLIGHT FROM POOR COUNTRIES, TAX HAVENS AND DEVELOPMENT 10 (2009).

<sup>13</sup> Max Everest-Phillips, *The Political Economy of Controlling Tax Evasion and Illicit Flows*, in DRAINING DEVELOPMENT? CONTROLLING FLOWS OF ILLICIT FUNDS FROM DEVELOPING COUNTRIES 69, 71 (Peter Reuter ed. 2012).

of their tax receipts; as capital disappears from the country, either the government's revenue decreases or it must impose higher taxes on a narrower tax base.<sup>14</sup>

For developing economies to grow, they must pursue a policy of "strong public investment," which will allow them to develop the necessary infrastructure and skills to support future growth.<sup>15</sup> This public investment requires money. Developing countries have a number of ways that they can obtain revenue, including selling natural resources,<sup>16</sup> obtaining foreign aid,<sup>17</sup> and taxing their citizens and residents.<sup>18</sup> Though developing countries can fund infrastructure and other programs using money from any of these sources, arguable, to fully develop, a country needs tax revenue. A country that cannot effectively collect taxes faces significant limitations on "the extent to which [it] can provide security, meet basic needs or foster economic development."<sup>19</sup> With widespread poverty, developing countries need social insurance programs more than developed countries.<sup>20</sup> They need to invest in education, which many believe key to development.<sup>21</sup> And some developing countries need tax revenue to ensure the survival of government.<sup>22</sup> And developing countries' need for an effective tax regime may go beyond merely funding essential infrastructure: arguably, "bargaining over tax is the basis of the social contract between the state and its citizens and a key building block in the development of democracy."<sup>23</sup>

#### A. Tax Havens

Half of world trade passes through tax havens, including half of bank assets and one-third of foreign direct investment.<sup>24</sup> In the mid-2000s, an estimated \$11 trillion (or one-third of the world's GDP) in assets were held in tax haven jurisdictions.<sup>25</sup> Approximately a "quarter of global wealth is stashed in havens."<sup>26</sup> Although the secrecy inherent in tax haven makes it difficult to know for certain, these assets likely include a significant portion of the capital flight from developing countries.

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<sup>14</sup> GOV'T COMM'N ON CAPITAL FLIGHT FROM POOR COUNTRIES, *supra* note 12, at 10. Perhaps for this reason, foreign borrowing increases concurrently with capital flight. Valerie Cerra, et al., *Robbing the Riches: Capital Flight, Institutions and Debt*, 44 J. DEV. STUDIES 1190, 1197 (2008) ("Many studies find that an increase in foreign borrowing, particularly by the public sector, is concurrent with outflows by domestic residents and firms.")

<sup>15</sup> COMMISSION ON GROWTH & DEVELOPMENT, THE GROWTH REPORT: STRATEGIES FOR SUSTAINED GROWTH AND INCLUSIVE DEVELOPMENT 34 (2008), *available at* [http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth\\_Commission\\_Final\\_Report.pdf](http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth_Commission_Final_Report.pdf).

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 35–36.

<sup>19</sup> Deborah A. Bräutigam, *Introduction: Taxation and State-Building in Developing Countries*, in TAXATION AND STATE-BUILDING IN DEVELOPING COUNTRIES: CAPACITY AND CONSENT 1, 1 (Deborah A. Bräutigam et al. eds. 2008).

<sup>20</sup> Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1640 (2000).

<sup>21</sup> *Id.* at 1640–41.

<sup>22</sup> *Id.* at 1640.

<sup>23</sup> Paul Collier et al., *Managing Resource Revenues in Developing Economies*, 57 IMF Staff Papers 84, 104 (2010).

<sup>24</sup> Lee A. Sheppard, *A Tax Haven by Any Other Name*, 131 TAX NOTES 1111, 1111 (2011).

<sup>25</sup> John Cristensen & Richard Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the Bottom Line*, DEVELOPMENT, Sept. 2004, at 37, 39. Currently the International Monetary Fund recognizes more than sixty tax haven jurisdictions. *Id.* at 39–40.

<sup>26</sup> Sheppard, *supra* note 24, at 1112.

In spite of the centrality of tax havens in the global economy, attempts to define what constitutes a tax haven generally "devolve into some form of totality of the circumstances analysis . . . or, even worse, an 'I know it when I see it' approach"<sup>27</sup> Broadly speaking, though, a tax haven is a "low-tax jurisdictions that provide investors opportunities for tax avoidance."<sup>28</sup> Various organizations, including the International Monetary Fund,<sup>29</sup> the OECD,<sup>30</sup> the Tax Justice Network,<sup>31</sup> and even the U.S. Congress,<sup>32</sup> have published lists of tax haven jurisdictions. The lists of tax havens tend to include primarily non-OECD nations, including various Caribbean islands, Bermuda, Hong Kong, Singapore, Jersey, and Mauritius.<sup>33</sup>

The OECD has attempted to move beyond merely knowing tax havens when it sees them. It listed four key factors for identifying harmful preferential tax regimes: low or zero effective tax rate, ring-fencing, lack of transparency, and lack of effective information exchanges.<sup>34</sup> A tax haven jurisdiction, the OECD explained, would "be characterized by a combination of a low or zero effective tax rate and one or more other" key factor.<sup>35</sup>

In evaluating the first factor—whether a country has a low tax rate—the OECD looks not only at the statutory rate, but at the way the country defines its tax base.<sup>36</sup> It does not, however, delineate what constitutes harmfully low tax rate and what does not. Some countries, such as Bermuda and Anguilla, impose no income tax, and clearly meet this criterion.<sup>37</sup> Other countries that impose taxes, such as Ireland and Switzerland, have nonetheless been accused of being tax havens.<sup>38</sup> Ireland has a corporate tax rate of 12.5

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<sup>27</sup> Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 940 n.49 (2010).

<sup>28</sup> Mihir A. Desai et al., *The Demand for Tax Haven Operations*, 90 J. PUB. ECON. 513, 514 (2006).

<sup>29</sup> See Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 151 n.1 (2002) ("An International Monetary Fund (IMF) study lists nearly seventy tax havens . . .").

<sup>30</sup> Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 62 NAT. TAX J. 727, 728 (2009) ("The Organisation for Economic Co-operation and Development (2000) created an initial list of tax havens.").

<sup>31</sup> *Id.* at 731–32.

<sup>32</sup> *Id.* at 728–29.

<sup>33</sup> See *id.* at 729 (listing countries on various tax haven lists). Though not all tax havens are islands, islands represent the prototypical tax haven. Some commentators argue, though, that the biggest island tax havens are Manhattan and London. See, e.g., Marshall J. Langer, *Harmful Tax Competition: Who Are the Real Tax Havens?*, 21 TAX NOTES INT'L 2831, 2832–33 (2000).

<sup>34</sup> OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 27 (1998), available at <http://www.oecd.org/dataoecd/33/0/1904176.pdf> [hereinafter, OECD, HARMFUL TAX COMPETITION]. Though the OECD calls these "harmful preferential tax regimes," they serve essentially the same function as tax havens. See *id.* at 8 ("The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally."). Because "tax haven" is not a term of art, but is a more familiar terminology than "harmful preferential tax regime," I will use the two terms interchangeably in this Article.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 26.

<sup>37</sup> Alex Cobham, *Tax Havens and Illicit Flows, in DRAINING DEVELOPMENT? CONTROLLING FLOWS OF ILLICIT FUNDS FROM DEVELOPING COUNTRIES* 337, 340 (2012).

<sup>38</sup> See, e.g., *id.* (tax havens include "countries with low taxation (e.g., Switzerland, the Channel Islands)"); Jeremy Scott, *Apple and Ireland Try to Win Spin Battle With the Senate*, 139 TAX NOTES 1089, 1089 (2013) ("PSI Chair Carl Levin basically called Ireland a tax haven . . .").

percent, while Switzerland taxes corporate income at a rate of 8.5 percent.<sup>39</sup> While both rates are comparatively low—in 2013, the average OECD corporate tax rate was about 23 percent<sup>40</sup>—it is not clear why 8.5 percent or 12.5 percent is the appropriate cut-off for a low tax rate.

A tax haven's low tax rates do not apply to everybody, though. As its second factor, the OECD looks at whether a country ring-fences its preferential rates to ensure that they get the revenue they need. "Ring-fencing" means that the tax haven prevents residents from benefiting from the low- or no-tax regime, while preventing foreigners from accessing domestic markets.<sup>41</sup> That is, they "offer a zero tax rate to nonresidents who park their money there but tax residents fully."<sup>42</sup> Ring-fencing their preferential tax regime allows tax haven jurisdictions to attract foreign capital with the promise of low or no taxes while concurrently raising revenue to fund governmental services by collecting taxes from residents.

The third factor requires a lack of transparency. A transparent tax regime clearly lays out how the tax applies to taxpayers and makes the details of the regime available to the tax authorities of other interested countries.<sup>43</sup> A tax regime lacks transparency when, for example, the "tax laws are negotiable or employed selectively in favor of foreign investors as a matter of practice."<sup>44</sup> This lack of transparency can arise as the result of favorable administrative rulings that allow a particular sector to pay less tax, special administrative practices, or even a country's decision not to enforce its tax laws against certain taxpayers.<sup>45</sup>

The OECD's final key factor is that a tax haven lacks the ability or willingness to effectively exchange information.<sup>46</sup> This lack of effective information exchange can result from secrecy laws.<sup>47</sup> Switzerland, for example, has strict bank secrecy laws, the violation of which can result in criminal sanctions.<sup>48</sup> Similarly, Cayman Islands law makes revealing certain financial information a criminal offense.<sup>49</sup> Even where a country

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<sup>39</sup> Andrew Pike, *U.S. Taxes Corporate Income at Comparatively Low Rate*, 134 TAX NOTES 1533, 1546 (2012).

<sup>40</sup> [http://www.oecd.org/tax/tax-policy/tax-database.htm#C\\_CorporateCapital](http://www.oecd.org/tax/tax-policy/tax-database.htm#C_CorporateCapital) (follow the "Basic (non-targeted) corporate income tax" link for an Excel spreadsheet containing tax rates).

<sup>41</sup> Joann M. Weiner & Hugh J. Ault, *The OECD's Report on Harmful Tax Competition*, 51 NAT. TAX J. 601, 604 (1998). That is, they "offer a zero tax rate to nonresidents who park their money there buy tax residents fully."

<sup>42</sup> NICHOLAS SHAXSON, *TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS* 12 (2011).

<sup>43</sup> OECD, *HARMFUL TAX COMPETITION*, *supra* note 34, at 28.

<sup>44</sup> Keith Engel, *Tax Neutrality to the Left, International Competitiveness to the Right, Stuck in the Middle With Subpart F*, 79 TEX. L. REV. 1525, 1559 (2001).

<sup>45</sup> OECD, *HARMFUL TAX COMPETITION*, *supra* note 34, at 28–29.

<sup>46</sup> *Id.* at 29.

<sup>47</sup> *Id.*

<sup>48</sup> Kristen A. Parillo, *Switzerland, U.S. Sign FATCA Agreement*, 138 TAX NOTES 803, 803 (2013). Under a recently-enacted intergovernmental agreement, however, entities subject to the agreement (including Swiss banks) can disclose certain information to the U.S. without violating secrecy laws. *Id.*; see Agreement Between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA, Art. 2(7), (9), U.S.-Switz., Feb. 14, 2013, available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf> (including "Custodial Institutions" within the definition of financial institutions subject to FATCA). For more on these intergovernmental agreements, see *infra* notes 208–222 and accompanying text.

<sup>49</sup> Shaxon, *supra* note 42, at 101 ("Fearing that Field would spill his clients' secrets, exposing the Caymans to a major international scandal, an oppressive new secrecy law was drafted, the now infamous



does not require its financial institutions to maintain depositor secrecy by law, however, it still may lack effective information exchange where, for example, its administrative policies or practices do not allow for such exchange, or even where the country is just uncooperative with other countries.<sup>50</sup>

#### B. Capital Flight to the United States

Even though the OECD has laid out criteria to determine whether a country acts as a tax haven, its definition is underinclusive. Most notably, the definitions used to classify countries as tax havens "exclude some of the practices of developed countries that are OECD members,"<sup>51</sup> with the OECD "spell[ing] out a contorted definition of tax havens that excluded its own members."<sup>52</sup> Among other things, OECD countries have preferential tax regimes, exempt certain types of income earned by nonresidents from taxation, and refuse to share information with other countries.<sup>53</sup> Countries classified as tax havens have pointed to this hypocrisy, arguing that "when it comes to secrecy, money laundering, and tax fraud," the U.S. and the U.K. represent the most significant offenders.<sup>54</sup>

The United States has long functioned as a repository for foreign assets. With the repeal of U.S. tax on portfolio interest paid to non-U.S. persons in the 1980s, Latin American money began to flow into U.S. bank accounts and other U.S. portfolio investments.<sup>55</sup> By 2011, about \$240 billion of Latin American wealth had found its way to the United States, primarily Miami and New York.<sup>56</sup> In fact, in 2009 the U.S. topped the list of countries that served as homes for private foreign deposits in total dollar amount, with nonresidents holding nearly \$2.2 trillion in private deposits in the U.S.<sup>57</sup>

At first blush, thinking of the United States as a tax haven makes no sense. Nonresident alien individuals and entities pay taxes on their U.S. source trade or business income at the same marginal rates that apply to U.S. taxpayers.<sup>58</sup> Currently the U.S. has the highest marginal corporate tax rate of OECD countries, at 35 percent,<sup>59</sup> and with a top

Confidential Relationships (Preservation) Law, making it a crime punishable by prison to reveal financial or banking arrangements in the Caymans.").

<sup>50</sup> OECD, HARMFUL TAX COMPETITION, *supra* note 34, at 29–30.

<sup>51</sup> Karen B. Brown, *Harmful Tax Competition: The OECD View*, 32 GEO. WASH. J. INT'L L. & ECON. 311, 315 (1999).

<sup>52</sup> Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"*, 4 COLUM. J. TAX L. 1, 38 (2012).

<sup>53</sup> See, e.g., Langer, *supra* note 33, at 1236.

<sup>54</sup> Charles Gnaedinger, *U.S., Cayman Islands Debate Tax Haven Status*, 123 TAX NOTES 543, 543 (2009). See also Langer, *supra* note 33, at 2832 ("Even worse, most OECD member states are guilty of egregious unfair tax competition that is much more serious and harmful than that of which the OECD is complaining.").

<sup>55</sup> Avi-Yonah, *supra* note 20, at 1584–85.

<sup>56</sup> BOSTON CONSULTING GROUP, GLOBAL WEALTH 2012: THE BATTLE TO REGAIN STRENGTH 11 (2012), available at [https://www.bcgperspectives.com/Images/BCG\\_The\\_Battle\\_to\\_Regain\\_Strength\\_May\\_2012\\_tcm80-106998.pdf](https://www.bcgperspectives.com/Images/BCG_The_Battle_to_Regain_Strength_May_2012_tcm80-106998.pdf). Moreover, Asian-Pacific residents held \$200 billion in the U.S., while residents of the Middle East and Africa held another \$40 billion in the U.S. *Id.*

<sup>57</sup> ANN HOLLINGSHEAD, GLOBAL FINANCIAL INTEGRITY, PRIVATELY-HELD, NON-RESIDENT DEPOSITS IN SECRECY JURISDICTIONS 15 (Mar. 2010), available at [http://www.gfip.org/storage/gfip/documents/reports/gfi\\_privatelyheld\\_web.pdf](http://www.gfip.org/storage/gfip/documents/reports/gfi_privatelyheld_web.pdf). The next two largest holders of private foreign deposits were the Cayman Islands and the U.K., with about \$1.5 trillion each. *Id.*

<sup>58</sup> I.R.C. §§ 871(b)(1), 882(a)(1) (2012).

<sup>59</sup> Diana Furchtgott-Roth, *Corporate Tax Reform Should Come First*, 137 TAX NOTES 901, 902 (2012).

individual marginal rate of 39.6 percent,<sup>60</sup> the U.S. seems an unlikely repository for foreign tax-evaders. Moreover, foreign persons are subject to a 30 percent flat tax on their U.S. source passive income.<sup>61</sup> As such, using the U.S. as a tax haven appears downright laughable.

However, U.S. tax law exempts significant portions of foreigners' U.S. source income from taxation. For more than ninety years, nonresident aliens and foreign corporations have owed no U.S. tax on interest they earn on bank deposits in U.S. banks.<sup>62</sup> As a result, nonresidents hold hundreds of billions of dollars in U.S. bank deposits.<sup>63</sup> In addition, nonresident aliens and foreign corporations who receive U.S.-source "portfolio interest" owe no taxes on that interest,<sup>64</sup> even though U.S. persons holding the same securities would owe taxes on the interest.<sup>65</sup>

Nonresident aliens can also hold U.S. equity securities in their portfolios with minimal U.S. tax consequences. True, a nonresident alien owes a 30 percent tax on her dividends from U.S. corporations,<sup>66</sup> but provided she invests for growth rather than income, she can essentially eliminate her tax liability. This is because the Internal Revenue Code generally requires a realization event before it will tax asset appreciation, so an investor who holds non-dividend-paying U.S. securities as they appreciate pays no taxes on that appreciation.<sup>67</sup> Moreover, if a nonresident alien chooses to realize that income, she will still pay no U.S. taxes. The tax law sources gains from the sale of personal property—including securities—to the residence of the seller.<sup>68</sup> If our nonresident alien sells her shares of U.S. securities, then, any gain she realizes will be foreign-source gain. But the U.S. generally only taxes non-resident aliens on their U.S.-source passive income, ignoring any foreign-source passive income they might have.<sup>69</sup>

As a result of the confluence of rules governing the taxation of a foreign person's interest and capital gains, a nonresident alien can invest broadly in the United States without subjecting herself to any significant U.S. taxation. Moreover, the U.S. has

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<sup>60</sup> I.R.C. § 1(a) (2012).

<sup>61</sup> *Id.* §§ 871(a), 881.

<sup>62</sup> *Id.* § 871(i)(1), (2); *see also* Langer, *supra* note 33, at 2833 ("Bank deposits held by foreign persons have been effectively exempt from U.S. income tax since 1921.").

<sup>63</sup> Langer, *supra* note 33, at 2833.

<sup>64</sup> I.R.C. § 871(h)(1) (2012). "Portfolio interest" includes interest on government bonds, notes, Treasury bills, and many corporate bonds. Langer, *supra* note 33, at 2834.

<sup>65</sup> I.R.C. § 61(a)(4) (2012).

<sup>66</sup> I.R.C. § 871(a)(1)(A) (2012). Moreover, the paying corporation must withhold this tax from the dividend and pay it over to the government. *Id.* § 1441(a) (2012). This ensures that even though the recipient of the dividend is outside of the jurisdiction of the United States, the government can collect the tax revenue.

<sup>67</sup> *See* Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 IND. L.J. 77, 79 (2011) ("The U.S. income tax . . . has always embraced a realization requirement, thereby deferring the taxation of asset appreciation until the occurrence of a realization event . . ."). The Code has a small handful of situations in which, rather than wait for a realization event, taxpayers mark their assets to market. *See, e.g.*, I.R.C. §§ 475 (mark-to-market mandatory for brokers in securities and commodities, elective for traders), 1256 (certain futures and foreign currency contracts and certain options marked to market), 1296 (elective mark-to-market for owners of passive foreign investment companies).

<sup>68</sup> I.R.C. § 865(a) (2012).

<sup>69</sup> *See* I.R.C. § 871(a)(1) (2012) (imposing taxes on income received from U.S. sources).

effectively ring-fenced these provisions—they do not apply to U.S. citizens or residents, who must pay taxes on their worldwide income (including interest and capital gains).<sup>70</sup>

The United States resembles non-OECD tax havens in other respects, as well. Absent some sort of treaty obligation, the I.R.S. cannot disclose tax information to foreign governments.<sup>71</sup> Moreover, even if the I.R.S. faced no legal bar on disclosing taxpayer information, it could not disclose information that banks do not provide.<sup>72</sup> And the law only began to obligate banks to report to the I.R.S. their interest payments to nonresident alien account holders in 2013.<sup>73</sup> That obligation was enacted, moreover, not in the interest of increasing transparency, but so that foreign governments would enter into information exchange agreements with the U.S. pursuant to the Foreign Account Tax Compliance Act.<sup>74</sup>

Even with the increased information that the I.R.S. may be able to provide to foreign governments, nonresidents still hide assets in the U.S. In 2009, the Tax Justice Network published its first Financial Secrecy Index.<sup>75</sup> The U.S. topped its list of secretive jurisdictions, largely because states like Delaware, Florida, Nevada, and Wyoming "offer high levels of banking secrecy to non-residents, and have no requirement for details of beneficial ownership of corporations and trusts to be placed on public record."<sup>76</sup>

Finally, even if a foreign government discovered its citizen or resident has assets hidden in the United States, either through its own efforts or because of I.R.S. disclosure, it has no way to access those assets if the citizen or resident has evaded her taxes. The law of the United States includes the common law revenue rule, which prevents U.S. courts from enforcing foreign tax judgments.<sup>77</sup>

### III. ENFORCING FOREIGN JUDGMENTS IN U.S. COURTS

In general, U.S. courts both recognize and enforce foreign judgments. Litigants who have received a judgment from a foreign court have "little trouble convincing courts in the United States to recognize and enforce that judgment."<sup>78</sup> The Restatement (Third) of Foreign Relations Law explains that, in general, judgments of foreign courts are "conclusive between the parties, and [are] entitled to recognition in courts in the United

<sup>70</sup> See, e.g., Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 702 (2012) ("It is perfectly clear that U.S. citizens and residents must pay U.S. taxes on their worldwide income, including income that accrues to an offshore account.").

<sup>71</sup> I.R.C. § 6103(a), (k)(4) (2012); see also Langer, *supra* note 33, at 2835.

<sup>72</sup> See Letter from Mark J. Mazur, Assistant Secretary (Tax Policy), to Senator Rand Paul (Oct. 10, 2012), 2012 TAX NOTES TODAY 201-18.

<sup>73</sup> Treas. Reg. § 1.6049-4(b)(5) (2012).

<sup>74</sup> See T.D. 9584, 2012-20 I.R.B. 901 ("These regulations will facilitate intergovernmental cooperation on FATCA implementation by better enabling the IRS, in appropriate circumstances, to reciprocate by exchanging information with foreign governments for tax administration purposes."); see *infra* notes 208-222 and accompanying text.

<sup>75</sup> John Christensen, *The Hidden Trillions: Secrecy, Corruption, and the Offshore Interface*, 57 CRIME, L. & SOC. CHANGE 325, 329 (2012).

<sup>76</sup> *Id.* at 335. Not everybody is sanguine about calling the U.S.—or these particular states—tax havens, of course. See, e.g., Howard M. Liebman, Letter to the Editor, *Tax Haven Claim Overstated for U.S. States*, 54 TAX NOTES INT'L 147, 147 (2009) ("Without wishing at all to cast aspersions on any government leader, I think it overstates the case rather seriously to claim that Delaware, Nevada, and Wyoming are tax havens.").

<sup>77</sup> See *Pasquantino v. United States*, 544 U.S. 349 (2005).

<sup>78</sup> William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 266 (2000).

States.<sup>79</sup> Even though the judgments of foreign courts are not entitled to full faith and credit in the United States, recognizing and enforcing them furthers public policy by ensuring an end to litigation.<sup>80</sup>

Exceptions exist, of course. Defendants have a number of defenses against recognition that they can present.<sup>81</sup> If the defendant demonstrates that the foreign country does not have impartial tribunals or procedures that comport with due process, or that the foreign court did not have jurisdiction over the defendant, U.S. courts cannot recognize or enforce the judgment.<sup>82</sup> Moreover, defendants can present additional defenses, including that the cause of action or the judgment contravenes U.S. public policy, that give U.S. courts the option of not recognizing or enforcing the judgment.<sup>83</sup>

State law governs the recognition and enforcement of foreign judgments, which could provide for significant variation, notwithstanding the Restatement, in the recognition and enforcement of foreign judgments.<sup>84</sup> The actual variation, though, is slight: all states either follow a common law standard derived from *Hilton v. Guyot*,<sup>85</sup> or they have adopted a version of Uniform Act governing the recognition of foreign judgments.<sup>86</sup>

In *Hilton*, the Supreme Court established the common law rule that foreign judgments can be recognized and enforced by U.S. courts where

there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.<sup>87</sup>

In addition to these criteria, the Supreme Court held that foreign judgments would only be enforced by U.S. courts if the foreign country enforced U.S. judgments; international law, it held, "is founded upon mutuality and reciprocity."<sup>88</sup> If the foreign judgment met these criteria, the merits of the case should not be retried in a U.S. court.<sup>89</sup> Rather, absent the defendant's demonstrating that the judgment was unfair, courts generally find foreign judgments presumptively valid.<sup>90</sup>

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<sup>79</sup> RESTATEMENT (THIRD) OF FOREIGN REL. L. § 481(1) (1987).

<sup>80</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b (1971).

<sup>81</sup> *Id.* § 482 cmt. 1.

<sup>82</sup> *Id.* § 482(1).

<sup>83</sup> *Id.* § 482(2)(d).

<sup>84</sup> Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 148 (2001).

<sup>85</sup> 159 U.S. 113 (1895).

<sup>86</sup> Chao & Neuhoff, *supra* note 84, at 148; *see infra* notes 96-97 and accompanying text.

<sup>87</sup> *Hilton*, 159 U.S. at 202.

<sup>88</sup> *Id.* at 228.

<sup>89</sup> *Id.* at 203.

<sup>90</sup> Chao & Neuhoff, *supra* note 86, at 149.

States that followed the common law often faced a problem, however: foreign countries did not always understand that U.S. courts would enforce foreign judgments.<sup>91</sup> If the foreign country did not believe that the state's courts would enforce foreign judgments, it would often refuse to enforce judgments from the state's courts.<sup>92</sup> The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgments Recognition Act of 1962 (UFMJRA) to respond to this concern. The drafters intended for the UFMJRA to codify the common law, not to change it.<sup>93</sup> By doing so, they believed, foreign governments would be more likely to recognize the judgments of U.S. courts by providing a statutory basis to which foreign courts could look in determining whether a state court granted reciprocity.<sup>94</sup> More than four decades later, the Commissioners drafted the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) to update, clarify, and correct problems with the UFMJRA.<sup>95</sup> Seventeen states, the District of Columbia, and the Virgin Islands have enacted some version of the UFMJRA,<sup>96</sup> while seventeen states have adopted the UFCMJRA.<sup>97</sup> In states that have adopted either of the Uniform Acts, courts treat foreign judgments as enforceable, unless the defendant can prove a reason for non-enforcement.<sup>98</sup>

As a practical matter, the method of enforcing a foreign judgment is determined under state law, and can vary from state to state.<sup>99</sup> The Uniform Acts, however, provide some sense of order. The UFMJRA provides that foreign judgments will be enforced in the same method as sister-state judgments would be enforced.<sup>100</sup> The drafters of the UFCMJRA decided to simplify the method even more, writing that a foreign country money judgment "is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable."<sup>101</sup> No uniform procedure exists for a successful foreign plaintiff

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<sup>91</sup> See, e.g., Barbara Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act*, 18 BUFF. L. REV. 1, 1 (1968) ("Their concern has not been so much with the substantive law now in force in most of the states but with the comprehension—or lack of it—of that law on the part of foreign countries."); Adolph Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 370 (1970) (the common law recognition of foreign judgments "a serious problem of communication between two legal systems, one grounded on the doctrine of precedent and the other on the supremacy of code law.").

<sup>92</sup> 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, 255 (1991) ("In the international arena, enforcement of United States judgments overseas is often possible only if the United States court rendering the judgment would enforce a similar decision of the foreign enforcing court.").

<sup>93</sup> Kulzer, *supra* note 91, at 5.

<sup>94</sup> 13 U.L.A. (pt. II) 40 (2002).

<sup>95</sup> 13 U.L.A. (pt. II) 27 (Supp. 2012).

<sup>96</sup> *Id.* at 39.

<sup>97</sup> *Id.* at 18.

<sup>98</sup> UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. (pt. II) 49 (2002); UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(a), 13 U.L.A. (pt. II) 26 (Supp. 2012).

<sup>99</sup> See Robert V. von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401, 404 (1977) ("Consideration of U.S. procedures and remedies available to enforce foreign judgments is complicated by the fact that each of the fifty states has its own detailed rules governing these matters.").

<sup>100</sup> UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. (pt. II) 49 (2002) ("The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.").

<sup>101</sup> UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 7 cmt. c, 13 U.L.A. (pt. II) 37 (Supp. 2013).

to have a U.S. court enforce a foreign judgment.<sup>102</sup> In many states that have adopted one of the Uniform Acts, however, plaintiffs may choose to initiate the enforcement through an expedited procedure (such as a motion for summary judgment) rather than filing a complaint.<sup>103</sup>

#### IV. THE REVENUE RULE

One significant exception exists to U.S. courts' willingness to enforce foreign money judgments: tax judgments. "Under the 'revenue rule,' the courts of the United States are under no obligation to recognize or enforce a foreign tax judgment."<sup>104</sup> Beyond merely having no obligation, though, the revenue rule may in fact prohibit U.S. courts from recognizing foreign tax judgments.<sup>105</sup> And codification of the enforcement of foreign judgments did not affect the revenue rule; as part of the codification, the UFMJRA removed judgments for taxes from its definition of a "foreign judgment,"<sup>106</sup> while the UFCMJRA states that it does not apply to judgments for taxes.<sup>107</sup>

##### A. Roots of the Revenue Rule

The revenue rule traces its roots to the English common law. In two cases in the eighteenth century, Lord Mansfield established in dicta that English courts would not enforce foreign tax judgments. In *Holman v. Johnson*, a case resolving a contractual dispute, Mansfield wrote that "no country ever takes notice of the revenue law of another."<sup>108</sup> Then, four years later, he held that a ship's avoiding French customs duties did not constitute fraud because "[o]ne nation does not take notice of the revenue laws of another."<sup>109</sup>

Although originally dicta, the revenue rule continued to play a part in British law and, even today, continues to be the law of the United Kingdom.<sup>110</sup> Moreover, the United States imported the revenue rule as part of its common law.<sup>111</sup> Originally, U.S. courts applied the revenue rule even to tax judgments from sister states.<sup>112</sup> In 1935, though,

<sup>102</sup> RESTATEMENT (THIRD) OF FOREIGN REL. L. § 481 cmt. g (1987).

<sup>103</sup> *Id.*

<sup>104</sup> Kovatch, *supra* note 78, at 267.

<sup>105</sup> According to the Restatement, courts' nonrecognition of foreign tax judgments is permitted, but is not required. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 483 cmt. a. It is not clear, however, that the Restatement is correct; even as the Supreme Court narrowed the scope of the revenue rule in *Pasquantino*, it explained that the revenue rule "prohibited the collection of tax obligations of foreign nations." *Pasquantino v. United States*, 544 U.S. 349, 361 (2005).

<sup>106</sup> UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 1(2), 13 U.L.A. (pt. II) 44 (2002).

<sup>107</sup> UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 3(b)(1), 13 U.L.A. (pt. II) 23 (Supp. 2012).

<sup>108</sup> *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (1775).

<sup>109</sup> *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (1779).

<sup>110</sup> See generally Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. COMP. & INT'L L. 79, 89–92 (2006).

<sup>111</sup> *Id.* at 84 ("State courts adopted the revenue rule as part of the common law heritage inherited from England . . .").

<sup>112</sup> See, e.g., *Henry v. Sargeant*, 13 N.H. 321, 331 (1843) ("It is said that the court will not notice the penal laws, or the revenue laws, of another state."); *State of Colorado v. Harbeck*, 133 N.E. 357, 359 (1921) ("Under the due process clause of the United States Constitution, where the delinquents are nonresidents of the taxing state and outside its jurisdiction, so that no personal liability or enforceable duty may be established as against them, and where the property involved is without the taxing state, so that no res exists upon which the taxing state may impose a lien, the state is powerless to collect the tax in its own courts, and powerless to invoke the aid of a sister state to collect its revenue.").

based on the Full Faith and Credit Clause of the Constitution, the U.S. Supreme Court eliminated the revenue rule's prohibition on enforcing tax judgments as between states.<sup>113</sup>

In 1979, the Ninth Circuit addressed whether the Supreme Court's decision in *Milwaukee* also eliminated the revenue rule with respect to foreign governments. *Her Majesty the Queen ex rel. British Columbia v. Gilbertson* concerned several U.S. citizens who engaged in logging in British Columbia.<sup>114</sup> The government of British Columbia assessed tax on their logging income, and filed a certificate of assessment in the Supreme Court of British Columbia.<sup>115</sup> This certificate of assessment had the same effect as a final judgment under British Columbia law.<sup>116</sup>

British Columbia then filed a suit in the United States seeking recognition and enforcement of the tax judgment.<sup>117</sup> British Columbia argued that the same reasoning that overturned the revenue rule between sister states should apply to eliminate the revenue rule with respect to tax judgments of foreign governments, too.<sup>118</sup> The court held, however, that the Constitution contains "no provision similar to the full faith and credit clause . . . which would require that the courts of this country extend full faith and credit to the judgments of a foreign country."<sup>119</sup> As a result of the revenue rule, the court held that it could not enforce Canada's tax judgment.<sup>120</sup>

When the Ninth Circuit affirmed the continuing validity of the revenue rule, it pointed to both its long history as a part of the law and the valid reasons that originally underlay (and continue to underlie) its existence.<sup>121</sup> At the same time, it said that if the rule were to be changed, that would be the role of the "policy-making branches of our government."<sup>122</sup> In general, however, the policy-making branches of government have made no move toward changing the revenue rule.<sup>123</sup> Congress has not passed any legislation that would permit courts to enforce foreign tax judgments.<sup>124</sup>

#### B. The Revenue Rule Today

Not content with merely passively permitting the revenue rule to continue, in several instances, the government has expressly acted to perpetuate it. The 2006 Model Income Tax Convention, for example, does not include any provisions permitting the enforcement of tax judgments.<sup>125</sup> Likewise, of the United States' sixty-eight income tax

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<sup>113</sup> *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 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.").

<sup>114</sup> 597 F.2d 1161, 1162 (9th Cir. 1979).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1163.

<sup>118</sup> *Id.* at 1164 n.8.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1166. Interestingly, though the court did not rely on reciprocity, it pointed out that Canadian law also includes the revenue rule, and Canadian courts have refused to enforce U.S. tax judgments. *Id.*

<sup>121</sup> *Her Majesty the Queen ex rel. British Columbia*, 597 F.2d at 1166.

<sup>122</sup> *Id.*

<sup>123</sup> The United States has embraced five exceptions by treaty. *See infra* note 249 and accompanying text.

<sup>124</sup> *See, e.g.*, JOINT COMMITTEE ON TAX'N, TAX COMPLIANCE AND ENFORCEMENT ISSUES WITH RESPECT TO OFFSHORE ACCOUNTS AND ENTITIES 43 (2009) ("Although its vitality and scope have been questioned, . . . the [revenue rule] doctrine remains a cornerstone of all common law jurisdictions . . .").

<sup>125</sup> Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing Continue?*, 138 TAX NOTES 253, 254 (2013) ("The U.S. treaty with Canada contains an 'assistance in collection' article, which does not appear in the U.S. model treaty, in addition to the standard information exchange article.").

treaties currently in force,<sup>126</sup> only five include provisions permitting the enforcement of foreign tax judgments.<sup>127</sup> Moreover, the U.S. originally ratified treaties with four of the five countries in the 1930s and 1940s.<sup>128</sup> By the 1950s, the Senate had become disillusioned with the collection provisions, and declined to ratify new treaties with collection provisions.<sup>129</sup>

And the government's perpetuation of the revenue rule does not limit itself to passively perpetuating a model treaty that does not include a collection provision. In 1989, the U.S. signed the OECD Convention on Mutual Administrative Assistance in Tax Matters, the first multilateral tax treaty of its kind.<sup>130</sup> The Convention includes provisions requiring signatories to assist in the collection of taxes on behalf of other signatory countries.<sup>131</sup> The United States, however, adopted a reservation to the reciprocal collection provisions.<sup>132</sup> By adopting this reservation, the United States surrendered its ability to require other parties to the treaty to provide assistance in collecting U.S. taxes.<sup>133</sup> The United States apparently decided, however, that the value of the revenue rule outweighed the value of any revenue other countries could help it recover.

As recently as 2005, the Supreme Court confirmed the continuing viability of the revenue rule. In its decision in *Pasquantino v. United States*,<sup>134</sup> the Supreme Court had to determine whether a scheme to defraud the Canadian government of tax revenue violated the federal wire fraud statute.<sup>135</sup> While in New York, Carl and David Pasquantino ordered liquor from discount stores in Maryland by phone.<sup>136</sup> Then, to avoid the heavy Canadian excise taxes on imported liquor, they hired others to smuggle the liquor over the Canadian border.<sup>137</sup>

Though the jury found them guilty, and the Court of Appeals eventually agreed, the Pasquantinos claimed that they had not committed wire fraud.<sup>138</sup> Because the revenue rule prevents the U.S. from "tak[ing] cognizance of the revenue laws of Canada,"<sup>139</sup> they argued, the wire fraud statute should be construed "to except frauds directed at evading

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<sup>126</sup> Allison Christians, *How Nations Share*, 87 *IND. L.J.* 1407, 1419 (2012).

<sup>127</sup> *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 115 (2d Cir. 2001).

<sup>128</sup> Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 *DUKE J. COMP. & INT'L L.* 79, 94 (2006).

<sup>129</sup> *Id.* at 95.

<sup>130</sup> Marian Nash Leich, *U.S. Practice*, 84 *AM. J. INT'L L.* 237, 245 (1990).

<sup>131</sup> OECD Convention on Mutual Administrative Assistance in Tax Matters art. 11, June 28, 1989, 27 *I.L.M.* 1160.

<sup>132</sup> 136 *Cong. Rec.* S13,295 (daily ed. Sept. 18, 1990) (ratifying convention except "[t]hat the United States will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for any tax"); see also Council of Europe Treaty Office, *List of declarations made with respect to treaty No. 127* (2014), available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=127&CV=1&NA=&PO=999&CN=99&VL=1&CM=9&CL=ENG>.

<sup>133</sup> See *JT. COMM. TAX'N, EXPLANATION OF PROPOSED CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS* 22 (1990) ("A party that has made a reservation is not permitted to require another party to observe that reserved provision of the convention.")

<sup>134</sup> 544 U.S. 349 (2005).

<sup>135</sup> *Id.* at 353.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 353–54.

<sup>139</sup> *Id.* at 354.



foreign taxes."<sup>140</sup> They failed, however, to convince the Supreme Court, which found that the case law did not establish that the revenue rule barred the United States from punishing criminal conduct, even where an element of that conduct is failure to pay taxes to a foreign country.<sup>141</sup> This was not, the Court held, "a suit that recovers a foreign tax liability, like a suit to enforce a judgment."<sup>142</sup> Because this was a criminal prosecution, and not an attempt to enforce a foreign tax judgment, the revenue rule did not apply here.

Although the Supreme Court confirmed that the revenue rule still prevents U.S. courts from enforcing foreign tax judgments, it also limited the scope of the revenue rule. The Pasquantinos argued not only that an attempt to defraud a foreign government of tax revenue could not support a wire fraud conviction, but that their prosecution did, in fact, enforce Canada's tax judgment. If the Court upheld their conviction, they pointed out, the Mandatory Victims Restitution Act of 1996<sup>143</sup> would require them to pay the lost tax revenue to Canada.<sup>144</sup> Effectively, then, by convicting them of wire fraud, the U.S. also aided Canada in its collection of tax revenue, in derogation of the revenue rule.

While the Supreme Court acknowledged that the Pasquantinos would have to pay to Canada the tax liability they had attempted to evade, the Court did "not think it matters whether the provision of restitution is mandatory in the prosecution."<sup>145</sup> The purpose of the restitution requirement was to "mete out appropriate criminal punishment,"<sup>146</sup> a purpose not at odds with the revenue rule. Under *Pasquantino*, it appears that U.S. courts have the ability to aid foreign governments with their collection of taxes provided such collection is merely a secondary result of permissible judicial action.

### C. Rationales for the Revenue Rule

The rationale proffered to justify the revenue rule has changed significantly since its inception. Originally, courts used the revenue rule to diminish "the commercial disruption caused by the high tariffs" of the eighteenth century.<sup>147</sup> By the middle of the twentieth century, though, the rationales for the revenue rule had shifted. In its modern form, commentators explain that the revenue rule principally works to prevent "judicial evaluation of the policy-laden enactments of other sovereigns,"<sup>148</sup> avoid giving domestic effect to the foreign policies embodied in revenue laws,<sup>149</sup> and avoid forcing courts to evaluate the validity of foreign tax regimes, an inquiry that U.S. courts understandably lack competence to perform.<sup>150</sup> Essentially, the principal current justification for the revenue rule is that not enforcing foreign judgments prevents U.S. courts from impinging on foreign countries' sovereignty by reviewing their revenue laws.<sup>151</sup>

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<sup>140</sup> *Id.* at 359.

<sup>141</sup> *Id.* at 362.

<sup>142</sup> *Id.*

<sup>143</sup> 18 U.S.C. §§ 3663A-3664 (2012).

<sup>144</sup> *Pasquantino*, 544 U.S. at 365.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Pasquantino v. United States*, 544 U.S. 407, 366 (2005).

<sup>148</sup> *Id.* at 368.

<sup>149</sup> *Id.* at 369.

<sup>150</sup> *Id.* at 370.

<sup>151</sup> *See, e.g.*, Mallinak, *supra* note 110, at 123–24 ("The concern that underlies, at least in part, the revenue rule is that courts are reluctant to engage in evaluation of another state's decision to raise revenue in any particular way or to discourage or encourage behavior through social engineering in the tax system."); Kovatch, *supra* note 78, at 277 ("The justification for the revenue rule, as stated by Judge Learned Hand, is to avoid the examination of the revenue laws and policies of other nations by U.S. courts."); Richard E. Smith,

This justification rings hollow, though. In non-revenue contexts, U.S. courts routinely evaluate foreign judgments, and then enforce them or refuse to enforce them.<sup>152</sup> In enforcing foreign judgments, U.S. courts must make judgments about the enforcement of or policies underlying foreign law.

If a foreign plaintiff asks a U.S. court to recognize and enforce a foreign judgment other than a tax or a penal judgment, the court can and does evaluate, among other things, the fairness of the tribunal and whether the cause of action on which the plaintiff won the judgment violates U.S. public policy.<sup>153</sup> Neither courts nor commentators, in laying out the justification for the revenue rule, have explained why evaluating foreign revenue laws is more sensitive than, for example, evaluating foreign contract law or a foreign court's fairness. Whether the U.S. court looks at revenue laws or other laws or procedures, should it decline to enforce the judgment, the U.S. court impinges on the sovereignty of the foreign country.

And U.S. courts do, where appropriate, refuse to enforce foreign judgments, even where such refusal challenges a foreign country's sovereignty. In *Bank Melli Iran v. Pahlavi*,<sup>154</sup> for example, Pahlavi, the sister of the former Shah of Iran, had signed a number of promissory notes held by two Iranian banks.<sup>155</sup> As a result of the Iranian revolution, the Shah and his family fled Iran; the banks brought collection actions against Pahlavi in Iranian courts.<sup>156</sup> The banks obtained default judgments of \$32 million against her and sought to enforce those judgments under the California Uniform Foreign Money-Judgments Recognition Act.<sup>157</sup> Pahlavi filed a motion to dismiss, claiming the courts had not provided for due process of law.<sup>158</sup> The Court of Appeals found the Iranian courts' judgments deficient: "Pahlavi could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf."<sup>159</sup> Because the Iranian justice system lacked even the most rudimentary due process, U.S. courts would not enforce the judgment.<sup>160</sup>

Moreover, U.S. courts do not limit their careful scrutiny to judgments emanating from hostile states.<sup>161</sup> Even defendants from our allies can raise affirmative defenses to final judgments from their home countries. Recently, U.S. courts have refused to recognize and enforce several final judgments from Mexican courts.<sup>162</sup> In one, Pegaso

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Note, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, 1981 U. ILL. L. REV. 241, 256 (1981) ("The most persuasive argument against recognition of foreign nation tax claims or judgments is that the courts' public policy review will inevitably lead to selective enforcement of such claims, creating the possibility of offending a foreign government and hindering the conduct of foreign relations.").

<sup>152</sup> See *infra* Section **Error! Reference source not found.**

<sup>153</sup> I.R.C. § 482(1), (2)(d) (2012).

<sup>154</sup> 58 F.3d 1406 (9th Cir. 1995).

<sup>155</sup> *Id.* at 1408.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1413.

<sup>160</sup> *Id.*

<sup>161</sup> Hossein Mousavian, *An Opportunity for a U.S.-Iran Paradigm Shift*, WASH Q., Winter 2013, at 129, 138 (both 2012 presidential candidates identifying Iran as U.S.'s chief Middle Eastern threat).

<sup>162</sup> Timothy G. Nelson, *Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption*, 44 INT'L LAW. 897, 913 (2010).

sued Bell Helicopter for breach of contract in Mexico City Civil Court.<sup>163</sup> Pegaso ultimately won, and both companies provided the Mexican trial court with expert damage reports.<sup>164</sup> The experts' damages calculations differed by more than \$10 million, though, so the judge appointed an independent expert.<sup>165</sup> Bell claimed that the judge did not follow Mexican law in selecting the independent expert, and that the expert solicited a bribe from Bell.<sup>166</sup> When Bell refused to pay the bribe, the expert issued a report finding damages that exceeded even those calculated by Pegaso's expert.<sup>167</sup> The Delaware court found that it could not enforce the Mexican judgment, inasmuch as the evidence indicated it had been fraudulently obtained, with both the judge and the expert acting illegally.<sup>168</sup>

In a second Mexican judgment involving judicial fraud, U.S. courts also refused to enforce the foreign final judgment.<sup>169</sup> Richard Greene and John Robert Burke started a restaurant and cantina in Cabo San Lucas, Mexico.<sup>170</sup> The business soon ran into trouble, and Burke allegedly signed an I.O.U. for \$250,000.<sup>171</sup> Greene eventually filed a lawsuit in the Court of First Instance in Cabo San Lucas, and, Burke alleged, he bribed the judge to enter the I.O.U. into the court system without informing Burke.<sup>172</sup> By the time a U.S. court was asked to enforce the judgment, evidence existed indicating that not only had Green bribed the judge, but later the judge had become Greene's attorney.<sup>173</sup> Moreover, the settlement agreement had other serious problems.<sup>174</sup> As a result, the U.S. court held that the judgment was "so deficient—or to use Judge Blackburn's term, 'riddled'—with questionable features, irregular court proceedings, disputed legitimacy and contested translations, an absence of due process and, yes, evident fraud, that the Court cannot conclude that [it is] valid, legitimate or that [it] should not be set aside."<sup>175</sup>

In each of these cases, a U.S. court judged whether a foreign court's decision resulted from a fair process. In determining that the judges had acted fraudulently and that defendants had not received due process, the U.S. courts judged the actions of foreign government actors. Notwithstanding the sovereignty of these foreign nations, the U.S. courts decided not to recognize and enforce their final judgments. There is no reason to think that U.S. courts would not similarly exercise such judgments when asked to enforce foreign revenue claims. The sovereignty justification for the revenue rule thus appears to fall flat.

#### V. A FRAMEWORK FOR REVOCATION: POLICY CONSIDERATIONS

As discussed above, the revenue rule does not present the sole, or perhaps even the most significant, obstacle to foreign governments' preventing tax evasion by their citizens and residents. Why, then, do I advocate eliminating the revenue rule, rather than

<sup>163</sup> *Transportes Aeroeos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc.*, 623 F. Supp. 2d 518, 523 (D. Del. 2009).

<sup>164</sup> *Id.* at 524.

<sup>165</sup> *Id.* at 524–25.

<sup>166</sup> *Id.* at 525–26.

<sup>167</sup> *Id.* at 526.

<sup>168</sup> *Id.* at 538.

<sup>169</sup> *In re Burke*, 374 B.R. 781, 784 (Bankr. D. Colo. 2007).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 785. Burke denied ever signing an I.O.U., though he admitted to having signed blank letterhead, onto which the I.O.U. may have later been written. *Id.* at 786.

<sup>172</sup> *Id.* at 787–88.

<sup>173</sup> *Id.* at 796.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 800.

tackling these other problems? Primarily because there are justifications for the other rules, or federalism impediments to reforming them. The justifications for the initial creation of the revenue rule, on the other hand, no longer have the same relevance in today's economy, and the federal government could statutorily eliminate the revenue rule. Moreover, the fact that the United States has effectively eliminated the revenue rule in five treaties indicates that, notwithstanding its common law pedigree and age, the revenue rule is not an irrevocable piece of U.S. law.

A. Other Potential Reforms, While Meritorious, Are Less Achievable

Congress could, if it desired, repeal the various exclusions for interest income received by nonresident aliens. Such a repeal seems unlikely, though. Interest on bank deposits has been exempt in the hands of nonresident aliens for a long time, in spite of attempts to repeal it. The reasoning behind the exemptions—to facilitate the flow of foreign funds into the U.S.—seems as relevant today as it has been in the past. Moreover, Congress has expanded, rather than contracted, the types of interest income exempt from U.S. taxation.

More than ninety years ago, Congress exempted nonresident aliens from paying taxes on bank deposit interest they received.<sup>176</sup> The Revenue Act of 1921<sup>177</sup> exempted nonresident aliens from paying taxes on interest earned from U.S. bank deposits to "encourage deposits in American banks by nonresident aliens."<sup>178</sup> The Treasury Department testified that these deposits were often related to business transactions, and that exempting the interest would aid foreign and international trade.<sup>179</sup> By 1966, Congress decided to repeal this exemption, questioning whether interest paid to nonresident aliens on U.S. bank deposits, "which is so clearly derived from U.S. sources, should . . . escape U.S. taxation."<sup>180</sup> Recognizing that repealing this exclusion could affect the amount of foreign direct investment in the U.S., however, Congress delayed the implementation of the repeal.<sup>181</sup> Ultimately, instead of going through with the repeal, Congress chose to make the exemption for bank deposit interest permanent,<sup>182</sup> presumably after "considering the impact that the removal of this exemption would have on the balance-of-payments."<sup>183</sup>

Moreover, in 1984, Congress expanded the types of U.S.-source interest nonresident aliens could receive tax-free by enacting the portfolio interest rules.<sup>184</sup> The portfolio interest rules exempt nonresident aliens from tax on certain U.S.-source interest income they receive.<sup>185</sup> Congress passed these rules to facilitate U.S. companies'

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<sup>176</sup> See *Martin-Montis v. Comm'r*, 75 T.C. 381, 384 (1980).

<sup>177</sup> Pub. L. No. 67-98, 42 Stat. 227 (1921).

<sup>178</sup> *Hearings on H.R. 8245 Before the S. Comm. on Finance*, 67th Cong. 65 (1921) (statement of Dr. T.S. Adams, Tax Advisor, Treasury Dep't).

<sup>179</sup> *Id.*

<sup>180</sup> Foreign Investors Tax Act of 1966, H.R. 13103, 89th Cong., *reprinted in* 1966-2 C.B. 1059, 1066.

<sup>181</sup> *Id.* ("At the same time, however, your committee realizes that an immediate alteration of the present source rule might have a substantial adverse effect on our balance of payments. To meet these two quite different problems your committee has adopted the provisions of the House bill which repeal this special foreign-source rule (exclusion from taxable U.S. income) but also postpone the effective date of the repeal until after 1971.")

<sup>182</sup> *Martin-Montis v. Comm'r*, 75 T.C. 381, 384 (1980).

<sup>183</sup> H.R. 13103, *supra* note 180, at 1066.

<sup>184</sup> Deficit Reduction Act of 1984, H.R. 4170, 98th Cong. § 127 (1984).

<sup>185</sup> I.R.C. § 871(h) (2012).

borrowing from foreign lenders on the Eurobond market.<sup>186</sup> Because borrowers on the Eurobond market must pay interest net of taxes, U.S. borrowers would have to pay interest and, in addition, taxes, raising their borrowing costs.<sup>187</sup> To avoid these additional borrowing costs, U.S. corporations formed offshore finance subsidiaries to borrow without facing U.S. withholding taxes.<sup>188</sup> Concerned that taxing portfolio interest paid to nonresident aliens would impair the flow of foreign money to U.S. businesses, Congress chose to exempt it instead.<sup>189</sup>

Congress has had the chance to impose taxes on U.S.-source interest flowing to nonresident aliens. Not only has it decided to keep the exemption, it eventually expanded the types of interest exempt from U.S. taxation. Congress's actions demonstrate its belief that reducing the tax burden on foreigners increases the inflow of foreign money to U.S. borrowers and banks, and that receiving foreign portfolio investment is desirable. Because the justification for exempting interest paid to foreigners from taxation has proven durable and convincing, Congress is unlikely to change it solely to prevent tax evasion by foreign persons. This aspect of the U.S. tax system is therefore likely to continue to be attractive for foreigners who want to hide their assets from their governments.

Congress is also unlikely to eliminate the secrecy available to the owners of business entities in some states. In the United States, state governments, rather than the federal government, provide the bulk of regulation of business entities.<sup>190</sup> And states have 'strong interests in regulating their corporations' internal affairs."<sup>191</sup> Since the 1930s, scholars have debated whether state-regulated corporation law leads to a race to the bottom or to the top,<sup>192</sup> but, either way, states, and not the federal government, have controlled how much a non-publicly-traded business entity must disclose about its ownership structure.<sup>193</sup> The federal government is unlikely to try to overrule state laws to help foreign governments discover tax evaders.

Unlike the preceding issues, the federal government can easily overrule the revenue rule. All Congress needs to do is pass a law permitting (or requiring) courts to enforce foreign governments' tax judgments; statutory law "displaces any conflicting common law rules."<sup>194</sup> Not only can the U.S. overrule the revenue rule: it has done so in a handful of situations. Eliminating the revenue rule would do no harm to the United States. In fact, it could actually assist the I.R.S. in collecting taxes from United States taxpayers hiding assets in foreign countries.

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<sup>186</sup> STAFF OF JOINT COMM. ON TAX'N, 98TH CONG., 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 389 (Joint Comm. Print 1984).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 391.

<sup>190</sup> Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1438 (1992).

<sup>191</sup> Douglas G. Smith, *A Federalism-Based Rationale for Limited Liability*, 60 ALA. L. REV. 649, 668 (2009).

<sup>192</sup> See Lawrence A. Cunningham, *A New Product for the State Corporation Law Market: Audit Committee Certifications*, 1 BERKELEY BUS. L.J. 327, 364 & n.116 (2004).

<sup>193</sup> See DEP'T OF THE TREASURY FINANCIAL CRIMES ENFORCEMENT NETWORK, THE ROLE OF DOMESTIC SHELL COMPANIES IN FINANCIAL CRIME AND MONEY LAUNDERING: LIMITED LIABILITY COMPANIES 8-9 (2006), available at [http://www.fincen.gov/LLCAssessment\\_FINAL.pdf](http://www.fincen.gov/LLCAssessment_FINAL.pdf).

<sup>194</sup> Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 888 (1991).

## B. Reciprocity and Revocation

That the U.S. *could* revoke the revenue rule does not mean that it *will*. It has had openings to do so in the past and, with the exception of the U.S.-Canada income tax treaty, has chosen not to. If the revenue rule went away, some portion of the foreigners hiding their assets from their home governments would move those assets to another country that provided secrecy, low taxes, and that would not enforce foreign judgments. To keep foreign investment, would seem to entail a race to the bottom, with every country (the United States included) trying to offer a better tax package to attract foreign investment.<sup>195</sup>

Even if capital-importing countries engage in a race to the bottom, though, the U.S. should not, as a normative matter, permit foreigners to use it as a tax haven.<sup>196</sup> Although each country fundamentally and necessarily exercises sovereignty over its own tax system, the OECD, in its attempts to control harmful tax competition, has begun to articulate in implied international social contract.<sup>197</sup> Under this implied social contract, countries have the responsibility of "creating a level playing field for all countries."<sup>198</sup> To the extent that the U.S. works to attract foreign investment by undercutting other countries' tax regimes, the U.S. violates this implied social contract.

But justifying the repeal of the revenue rule need not rest solely on the United States altruistically following an implied international norm. Abolishing the revenue rule could provide tangible benefits to the United States. In determining whether it will enforce another country's non-revenue judgments, courts often look at whether the other country would reciprocally enforce *its* judgments.<sup>199</sup> If the United States revoked the revenue rule and began to enforce foreign countries' tax judgments, other countries would potentially reciprocate, enforcing U.S. tax judgments against assets in those countries.

Reciprocity is neither necessary nor sufficient, of course, to cause other countries to enforce U.S. tax judgments. British common law, for example, does not require reciprocity for courts to enforce foreign judgments.<sup>200</sup> Likewise, in the United States, it appears that reciprocity is not absolutely necessary.<sup>201</sup> Even though reciprocity is

<sup>195</sup> See, e.g., Rosenzweig, *supra* note 27, at 954 ("[M]ost of the incentive-based analyses of tax havens in the legal literature . . . assume[s] a 'race to the bottom' model that can be resolved through common interests in cooperation."); Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT'L L. 411, 413 (2004) ("One problem with this strategy is that it might lead to a 'race to the bottom.' If one country seeks to attract foreign investment by offering preferential tax treatment . . ., other countries might be more generous still.").

<sup>196</sup> Kovatch, *supra* note 78, at 282–83 ("The United States should not allow itself to be used as a haven for those who have rightfully incurred a tax liability in another nation and wish to evade that liability.").

<sup>197</sup> Allison Christians, *Sovereignty, Taxation and Social Contract*, 18 MINN. J. INT'L L. 99, 101–02 (2009).

<sup>198</sup> *Id.* at 127.

<sup>199</sup> See, e.g., *Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1163–64 (9th Cir. 1979) ("Before comity may be extended, generally there is a requirement of reciprocity, which is the principle that the courts of one jurisdiction will recognize a judgment from a second jurisdiction only if the courts of the second jurisdiction would recognize a judgment from the first jurisdiction's courts."); *Hilton v. Guyot*, 159 U.S. 113, 227 ("[T]he rule of reciprocity has worked itself firmly into the structure of international jurisprudence.").

<sup>200</sup> *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 429 n.136 (S.D.N.Y. 2002).

<sup>201</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f (1988) ("Except when otherwise required by local statute, the great majority of State and federal courts have extended recognition to judgments of foreign nations without regard to any question of reciprocity.").

unnecessary in the U.S., however, courts still evaluate whether the foreign country would reciprocate, at least in the revenue context.<sup>202</sup> Moreover, even if the United States and Britain do not require reciprocity, many countries *do* require it before they will enforce foreign judgments.<sup>203</sup>

If the U.S. decided to revoke the revenue rule through treaties, rather than through a change in domestic law, reciprocity would assume a central role in the revocation. The terms of bilateral income tax treaties are reciprocal, at least formally.<sup>204</sup> If the U.S. agreed to enforce a treaty partner's tax judgments, that treaty partner would simultaneously agree to enforce U.S. tax judgments. The multilateral treaty context illustrates even more strongly the centrality of reciprocity. The OECD Convention on Mutual Administrative Assistance in Tax Matters expressly allows for signatories to take a reservation to the mutual enforcement provisions.<sup>205</sup> If a country makes such a reservation, however, it cannot require other signatories to enforce its tax judgments, even if they took no such reservation.<sup>206</sup>

Moreover, recent history indicates that even a *unilateral* decision by the United States to enforce foreign tax judgments could affect significant worldwide change. In 2010, in the wake of the UBS tax-evasion scandal, Congress passed the Foreign Account Tax Compliance Act ("FATCA").<sup>207</sup> FATCA requires foreign financial institutions to report information about accounts held by U.S. persons and about foreign entities with significant U.S. ownership.<sup>208</sup> The reportable information includes, among other things, identifying information about the owner of the account and the balance of the account.<sup>209</sup> Foreign financial institutions that failed to make the disclosures required under FATCA would face a 30 percent withholding on certain payments from withholding agents.<sup>210</sup>

The United States indicated that it could, by virtue of the coercive value of FATCA's withholding provisions, use FATCA to obtain information about hidden foreign accounts unilaterally.<sup>211</sup> Rather than asking foreign governments to share information, the U.S. would leverage "the combined weight of U.S. financial markets and financial institutions that must, as a practical matter, do business in the U.S. marketplace"

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<sup>202</sup> *Her Majesty the Queen in Right of Province of British Columbia*, 597 F.2d at 1165–66 ("While reciprocity may no longer be a requirement, it certainly remains a factor which may be considered in deciding whether to recognize a foreign country's judgment for taxes.").

<sup>203</sup> *Dow Jones & Co.*, 237 F. Supp. at 429 n.136 ("[Reciprocity] remains a recognized practice or consideration in giving recognition to judgments or proceedings of [non-British] sovereign states.").

<sup>204</sup> Diane Ring, *Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation*, 9 FLA. TAX REV. 555, 584 (2009). The formal reciprocity may not always translate into reciprocal treatment, though, if one of the countries is a net capital exporter, while the other is a net capital importer. *Id.*

<sup>205</sup> OECD Convention on Mutual Administrative Assistance in Tax Matters art. 30(1)(b), *supra* note 131.

<sup>206</sup> *Id.* art. 30(5) ("A Party which has made a reservation in respect of a provision of this Convention may not require the application of that provision by any other Party . . .").

<sup>207</sup> Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 334 (2012) ("In 2010, following the UBS scandal and President Obama's campaign commitment to crack down on offshore tax evasion, the U.S. Congress enacted sections 1471 to 1474 (generally known as FATCA) of the Internal Revenue Code.").

<sup>208</sup> I.R.C. § 1471(b) (2012).

<sup>209</sup> *Id.* § 1471(c).

<sup>210</sup> *Id.* § 1471(a).

<sup>211</sup> Lee A. Sheppard, *Getting Serious About Offshore Evasion?*, 125 TAX NOTES 493, 493 (2009) ("[FATCA] continues the unilateral approach to address tax evasion by U.S. residents.").

to force compliance.<sup>212</sup> But even as the U.S. implemented FATCA, it appears to have understood the problematic nature of such unilateral action.<sup>213</sup>

In mid-2012, Emily McMahon, Acting Treasury Assistant Secretary for Tax Policy, acknowledged that complying with FATCA could conflict with some countries' laws, including laws prohibiting financial institutions from disclosing information about account holders.<sup>214</sup> The U.S. could resolve these problems by entering into intergovernmental agreements.<sup>215</sup> The United States, France, Germany, Italy, Spain, and the United Kingdom issued a joint statement proposing an alternative, and less problematic, framework.<sup>216</sup> Instead of each foreign financial institution providing information directly to the U.S., a country could enter into an agreement in which its financial institutions would report the required information to their government, which would, in automatically provide that information to the I.R.S.<sup>217</sup> The U.S. would provide reciprocal promises to its partner countries.<sup>218</sup>

And this bilateral approach to FATCA appears to be working: the U.S. has held discussions about intergovernmental FATCA agreements with more than seventy-five countries.<sup>219</sup> These discussions have resulted in nine agreements so far.<sup>220</sup> What began as a unilateral move by the United States to address tax evasion by U.S. persons is transforming into a multilateral attempt to disclose hidden financial accounts.<sup>221</sup> Similarly, by revoking the revenue rule, either unilaterally or through bilateral or multilateral treaties, the U.S. could encourage other countries to likewise enforce foreign tax judgments. Providing developing economies with the ability to satisfy their tax

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<sup>212</sup> Grinberg, *supra* note 207, at 336.

<sup>213</sup> Among other problems with the unilateral imposition of FATCA, it does not give foreign governments any control of what information their resident financial institutions must provide to the U.S., how the U.S. collects that information, or how the U.S. can use the information. David T. Moldenhauer, *FATCA and Fiscal Sovereignty*, 132 TAX NOTES 528, 529 (2011). Moreover, its withholding provisions could "create a precedent for other countries to use confiscatory taxation of the global financial system as a tool to achieve their own tax or foreign policy goals." *Id.* at 530.

<sup>214</sup> Shamik Trivedi, *FATCA Final Regs Expected by Summer's End, McMahon Says*, 135 TAX NOTES 1559, 1559 (2012).

<sup>215</sup> *Id.*

<sup>216</sup> Press Release, U.S. Dep't of Treasury, Joint Statement From the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (Feb. 7, 2012), *available at* <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf>.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* Note, however, that the reciprocity offered by the United States may not be perfect. Under current law, FATCA demands more information from other countries than the U.S. is capable of providing to them. Stephen Nauheim & Nils Cousin, *The Evolving FATCA Guidance*, 54 TAX MGMT. MEMORANDUM 163, 177 (2013). Although the United States has promised to pursue legislation and regulations that would provide its counterparties with the same level of information it requires from them, "it is less certain whether such changes are feasible." *Id.*

<sup>219</sup> Randall Jackson, *ABA Section of Taxation Meeting: Treasury Looking to Accelerate IGA Creation*, 139 TAX NOTES 889, 889 (2013).

<sup>220</sup> As of June 11, 2013, the U.S. had entered into intergovernmental FATCA agreements with the United Kingdom, Denmark, Mexico, Ireland, Switzerland, Norway, Spain, Germany, and Japan. U.S. Dept. of the Treasury, *FATCA-Archive*, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx> (last visited Aug. 16, 2013).

<sup>221</sup> See Itai Grinberg, *Emerging Countries and the Taxation of Offshore Accounts* 12 (April 22, 2013) (unpublished manuscript) ("Indeed, a number of technical features of the Model I [intergovernmental agreement] are structured to allow FATCA to become a global model.").



judgments with assets held offshore will help them develop the tax-collection infrastructure they need to truly become independent of foreign assistance.

### C. Economic Imperialism

Although recognizing and enforcing any foreign judgments risks evaluating foreign legal regimes, and thus impinging on foreign sovereignty, refusing to enforce revenue judgments also arguably prevents economic imperialism by the United States. Repealing the revenue rule would risk economic imperialism if it pressured developing countries to enact tax regime that conformed with U.S. standards. And foreign countries—especially developing countries—would risk feeling this pressure if they believed that the U.S. would enforce their tax judgments, but only if they enacted a U.S.-style income tax. If they believed that U.S. courts would refuse to enforce tax laws that differ radically from the U.S. tax regime, or that are not based on U.S. conceptions of tax fairness, developing economies would face significant pressure to design tax systems that look like the U.S.'s, even where they would prefer to impose tax in a different manner.

The risk of large economies forcing smaller economies to adopt specific tax regimes is very real. In an explicit example of economic imperialism, the OECD has attempted to force tax havens to adopt specific tax policies.<sup>222</sup> At the same time, policies that may not intend to force foreign countries to adopt (or reject) certain taxes may, nonetheless, impose a developed country's tax preferences on a developing country. The United States, for example, allows taxpayers to take a credit for income, war profits, and excess profits taxes they pay to foreign governments.<sup>223</sup> To qualify as a creditable tax, however, the foreign tax's "predominant character" must be "that of an income tax in the U.S. sense."<sup>224</sup> Empirical evidence indicates that non-creditable taxes have a significant impact on foreign direct investment in a country.<sup>225</sup> Effectively, then, capital-importing countries that want U.S. persons to invest in their domestic industries face some pressure to enact income taxes in the U.S. sense in place of these non-creditable taxes, even if they would prefer to raise revenue in a different manner.

Moreover, the U.S.'s ability to discriminate against specific tax regimes by finding that they do not have the predominant character of a U.S. income tax is not just hypothetical. Historically, many Latin American countries have imposed so-called "soak-up" taxes.<sup>226</sup> But under the Treasury regulations, soak-up taxes—that is, taxes where the amount due is determined by reference to the maximum foreign tax credit a taxpayer can receive—do not qualify as income taxes in the U.S. sense.<sup>227</sup> U.S. taxpayers

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<sup>222</sup> See Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 534 (2010) ("Another major complaint was more substantive, that the OECD, by imposing domestic tax policies on small offshore jurisdictions was practicing 'economic imperialism' and discriminating against 'small states.'").

<sup>223</sup> I.R.C. § 901 (2012).

<sup>224</sup> Treas. Reg. § 1.901-2(a)(ii) (2012).

<sup>225</sup> Mihir A. Desai, C.Fritz Foley, & James R. Hines Jr., *Foreign Direct Investment in a World of Multiple Taxes*, 88 J. PUB. ECON. 2727, 2742 (2004).

<sup>226</sup> Walter F. O'Connor, *Tax on Foreign Banks: How Times Have Changed*, 15 INT'L TAX J. 323, 330 (1989).

<sup>227</sup> Treas. Reg. § 1.901-2(c)(1) (2012). Essentially, a country that passes a soak-up tax uses another country's foreign tax credit to shift the cost of the tax from the taxpayer to the taxpayer's home government. Assume, for example, that Costa Rica has a soak-up tax. A U.S. corporation earns \$100 in Costa Rica. Because the United States taxes its residents on their world-wide income, the corporation will owe \$35 of taxes to the U.S. I.R.C. § 11 (2012). It can receive a foreign tax credit, however, for any qualifying foreign

cannot, therefore, credit soak-up taxes against their U.S. tax liability. This creates a real dilemma for developing countries in designing their tax regimes. In Costa Rica, for example, a significant portion of the economy relies on U.S. investment.<sup>228</sup> In 1972, Costa Rica enacted a soak-up provision permitting its tax administrator to exempt a foreign taxpayer from paying all or part of her Costa Rican taxes if she could demonstrate that she did not get a foreign tax credit in her home country.<sup>229</sup> The exemption was rarely invoked, however.<sup>230</sup> Nonetheless, in 2003, the I.R.S. announced that the Costa Rican withholding tax was a soak-up tax, and thus ineligible for the foreign tax credit.<sup>231</sup> As a result, the Costa Rican tax administration issued a ruling amending its tax law.<sup>232</sup> Because Costa Rica needed U.S. investment, it yielded to the U.S.'s vision of appropriate taxes at the expense of its preferred tax regime.

A developing country would be justified in reading the U.S. position on soak-up taxes as applying more broadly than to just the foreign tax credit. In those rare occasions where the U.S. has abrogated the revenue rule, one factor it has considered has been the structure of the foreign country's tax. For example, when the United States and Canada decided to include a collection assistance provision in their tax treaty,<sup>233</sup> the government "carefully considered whether and to what extent extraterritorial tax enforcement was advisable."<sup>234</sup> The negotiators found the similarities between U.S. and Canadian tax laws and procedures "of critical importance."<sup>235</sup> A developing country could logically conclude, reading this explanation, that if it wanted the U.S. to recognize and enforce its tax judgments, it, too, should enact an income tax patterned after the U.S. federal income tax.

Limiting taxpayers to taking a foreign tax credit for U.S.-style income taxes paid to foreign governments may make sense; the foreign tax credit exists to prevent taxpayers from paying tax on the same income twice.<sup>236</sup> Paying a non-income tax—a sales or property tax, for example—to a foreign government and income tax to the U.S. government does not cause a taxpayer to pay taxes on the same income twice, and thus

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income taxes it pays. *Id.* § 901(a). The foreign tax credit reduces the corporation's U.S. tax liability dollar for dollar. See Michael J. Graetz & Michael M. O'Hear, *The "Original Intent" of U.S. International Taxation*, 46 DUKE L.J. 1021, 1045 (1997). Thus, the corporation would be indifferent to taxes if Costa Rican taxes did not exceed \$35, because, with the foreign tax credit, its net tax liability would be \$35. The only difference would be the recipient of those tax dollars.

<sup>228</sup> Humberto Pacheco & Diego Salto, *Costa Rica's Soak-Up Tax Provision*, 46 TAX NOTES INT'L 59, 59 (2007).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Rev. Rul. 2003-8, 2003-1 C.B. 290.

<sup>232</sup> Pacheco & Salto, *supra* note 228, at 59.

<sup>233</sup> See *infra* notes 247-251 and accompanying text.

<sup>234</sup> Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 121 (2d Cir. 2001).

<sup>235</sup> DEPARTMENT OF THE TREASURY, TECHNICAL EXPLANATION OF THE PROTOCOL AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND CANADA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL SIGNED AT WASHINGTON ON SEPTEMBER 26, 1980, AS AMENDED BY THE PROTOCOL SIGNED AT OTTAWA ON JULY 14, 1983 AND THE PROTOCOL SIGNED AT WASHINGTON ON MARCH 28, 1984 art. 15, available at <http://www.irs.gov/pub/irs-trty/canatech.pdf> [hereinafter TREASURY TECHNICAL EXPLANATION].

<sup>236</sup> See Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation*, 2009 U. ILL. L. REV. 697, 714 (2009) ("The basic notion behind the [foreign tax] credit is to mitigate double taxation—that is, prevent taxpayers from having to pay taxes on the same income twice, once in a foreign jurisdiction and again in the United States.").

provides no reason to allow a foreign tax credit for non-income taxes. And yet even this provision puts pressure on developing countries to eliminating non-conforming taxes.

If developing countries believed that the U.S. would only recognize and enforce their tax judgments if their tax systems mimicked the U.S. tax system, they would presumably feel significant pressure to enact a U.S.-style tax system. To prevent such economic imperialism, any revocation of the revenue rule would have to make clear, in a convincing manner, that U.S. courts' willingness to recognize and enforce foreign tax judgments would not be predicated on the foreign country having a familiar tax system.<sup>237</sup>

#### D. U.S. Citizens and the End of the Revenue Rule

Congress's principal objection to revoking the revenue rule seems to lie in an aversion to enforcing tax judgments against U.S. citizens. Even in the five treaties in which the U.S. has agreed to abrogate the revenue rule, the United States generally will not aid in the collection of taxes owed by U.S. citizens and certain corporate residents.<sup>238</sup> When the United States considered ratifying the Convention on Mutual Administrative Assistance in Tax Matters, the Joint Committee on Taxation noted that some people argued that a reservation on the issue of enforcing foreign tax judgments "[was] appropriate, in that the United States should not be obligated to help all the potential signatory governments of the convention collect their uncontested tax claims against U.S. residents or to collect their claims against their own residents."<sup>239</sup>

The Joint Committee on Taxation failed to explain why, however, the United States should not help collect tax claims against U.S. citizens and residents. Provided the foreign country imposes the tax in a fair manner and uses a fair judicial process to come to the final judgment, there is no compelling policy reason to refuse to enforce the tax judgment. When courts enforce non-revenue judgments, they do not differentiate between citizen-defendants and non-citizen defendants. To the extent a U.S. citizen earned income reasonably taxable by a foreign country, there is no reason why she should not pay that tax.

Moreover, the United States does not protect its citizens from foreign tax obligations. When a U.S. person earns income taxable by a foreign country, nothing in

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<sup>237</sup> For a discussion of how the law could fairly and non-coercively evaluate unfamiliar tax regimes, see *infra* Section **Error! Reference source not found.**

<sup>238</sup> Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital, U.S.-Fr., art. 28(5), Aug. 31, 1994, S. TREATY DOC. NO. 103-32 ("The assistance provided for in this Article shall not be accorded with respect to citizens, companies, or other entities of the Contracting State to which application is made . . ."); Convention for the avoidance of double taxation and the preservation of fiscal evasion with respect to taxes on income, U.S.-Den., art. 27(8)(a), Aug. 19, 1999, T.I.A.S. No. 13,056 (no assistance "where the taxpayer is an individual, the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested State"); Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, with exchanges and notes, U.S.-Neth., art. 31(4), Dec. 18, 1992, 2291 U.N.T.S. 3 ("The assistance provided for in this Article shall not be accorded with respect to the citizen, corporations, or other entities of the State to which application is made . . ."); Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, U.S.-Swed., art. 27(4), Sept. 1, 1994 ("The assistance provided for in this Article shall not be accorded with respect to the citizens, companies, or other entities of the State to which the application is made . . ."); Convention with respect to taxes on income and capital, U.S.-Can., art. XXVI A(8)(a), Sept. 26, 1980, T.I.A.S. 11,087 (no assistance "[w]here the taxpayer is an individual, the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested State.").

<sup>239</sup> JOINT COMMITTEE ON TAX'N, EXPLANATION OF PROPOSED CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS 8 (1990).

U.S. law waives her obligation to pay taxes on that income. Even tax treaties, which work to limit the double taxation of the same income, acknowledge that a foreign country can tax a U.S. person in certain circumstances.<sup>240</sup> Provided the U.S. person acted in a way that subjected her to the jurisdiction of the foreign tax law, she owes the foreign taxes.

Although the U.S. does not shield its citizens from paying foreign taxes, the U.S. does have revenue reasons to prefer not to enforce foreign tax judgments against residents. The U.S. allows taxpayers to apply a credit against their U.S. taxes in the amount of foreign taxes they pay.<sup>241</sup> To the extent the U.S. enforced a foreign tax judgment, then, the taxes the U.S. collected on behalf of the foreign sovereign would reduce U.S. revenue dollar for dollar.<sup>242</sup> Because the foreign tax credit would reduce U.S. revenue, enforcing a foreign tax judgment against a U.S. citizen or resident would cost the U.S. government money. As such, even as it repeals the revenue rule, the U.S. may have a legitimate incentive to carve out of its enforcement obligation taxes owed by citizens.<sup>243</sup>

## VI. A FRAMEWORK FOR REVOCATION: ADMINISTRATIVE CONSIDERATIONS

### A. Judicial Inquiries

To avoid economic imperialism, any repeal of the revenue rule would need to cabin the inquiries U.S. courts can make. Specifically, courts being asked to recognize and enforce foreign tax judgments must be limited to two inquiries. First, they can look at the fairness of the judicial procedure in the foreign country. If the procedure would not qualify for enforcement under the current common law or the applicable Uniform Act, it should not qualify in the revenue context.

Second, courts should have the ability to look at the actual imposition of the tax. In general, the United States should not make judgments about foreign tax systems. Defendants should, however, have the ability to demonstrate that the tax was targeted specifically at them, rather than being generally applicable. If the tax captured a small group of people for a purpose contrary to U.S. public policy and one without a revenue explanation (e.g., because of their political beliefs, rather than because of their level of income or their business organization), a U.S. court should be able to decline to enforce the tax judgment.

### B. Using Treaties to Revoke the Revenue Rule

Treaties represent a natural starting point for revoking the revenue rule. The United States is a signatory of the OECD Convention on Mutual Administrative Assistance in Tax Matters,<sup>244</sup> which provides for mutual assistance in collecting taxes.<sup>245</sup> More than sixty countries, including a number of developing economies in Latin America

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<sup>240</sup> See, e.g., United States Model Income Tax Convention of 2006 art. 16(1) (allowing treaty partner to tax income of U.S. entertainers and athletes earned in the treaty country).

<sup>241</sup> I.R.C. § 901(a) (2012).

<sup>242</sup> *Id.*

<sup>243</sup> For a discussion of how to respond to the incentives raised by the foreign tax credit, see *infra* Section **Error! Reference source not found..Error! Reference source not found.**

<sup>244</sup> See OECD, Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol—19 March 2014 [hereinafter, Status of the Convention], available at [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf) (listing signatories to the Convention).

<sup>245</sup> OECD Convention on Mutual Administrative Assistance in Tax Matters art. 11, *supra* note 131.

and Africa, have either signed the convention or stated their intention to sign the convention.<sup>246</sup> If the United States eliminated its reservation, it would, through a single action, eliminate the revenue rule with respect to all of the countries that had signed the OECD Convention. And, as an additional benefit, the United States would enjoy a network of countries willing to enforce its tax judgments.

Alternatively, the United States could revoke the revenue rule on an individualized basis through bilateral tax treaties. Models exist for how to draft such a provision. The OECD model tax treaty includes a provision requiring mutual assistance in enforcing revenue claims.<sup>247</sup> Moreover, even without the OECD model, the United States already has five tax treaties—with France, Denmark, Sweden, the Netherlands, and Canada—that provide for assistance in collecting taxes.<sup>248</sup> These five treaties use similar language; that language could serve as a model for further revoking the revenue rule on a country-by-country basis.<sup>249</sup>

And the U.S. government may be more comfortable addressing the revenue rule on a country-by-country basis. A protocol to the U.S.-Canada tax treaty providing for the mutual enforcement of tax judgments entered into effect in 1995,<sup>250</sup> shortly after the U.S.'s 1991 ratification of the OECD Convention.<sup>251</sup> In contrast to its reservation in the Convention, the U.S.-Canada tax treaty provided for mutual enforcement of tax judgments.<sup>252</sup> The Joint Committee on Taxation explained that the reservation may have been appropriate in the context of a multilateral agreement.<sup>253</sup> In the context of a bilateral treaty, on the other hand, the United States can evaluate the other country's taxes, both

<sup>246</sup> See Status of the Convention, *supra* note 244.

<sup>247</sup> OECD Model Tax Convention on Income and on Capital art. 27 (2010) ("The Contracting States shall lend assistance to each other in the collection of revenue claims."). Moreover, looking to the OECD model treaty makes sense; though the U.S. has its own model tax treaty, it has based various of its treaties on OECD tax treaties. See *Nat. Westminster Bank, PLC v. United States*, 512 F.3d 1347, 1352 (Fed. Cir. 2008) ("The 'entire context' of the 1975 Treaty is informed by, and is based on, the Office of Economic Cooperation and Development's . . . 1963 Draft Double Taxation Convention on Income and Capital.").

<sup>248</sup> *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 116 n.11 (2d Cir. 2001). The United States signed treaties with the first four of these countries in the 1930s and 1940s; by the end of the 1940s, the Senate "sought to limit the extent to which United States courts and agencies would be obligated to render foreign tax collection assistance." *Id.* at 116.

<sup>249</sup> U.S.-France Income Tax Treaty art. 28, *supra* note 238 ("The Contracting States undertake to lend assistance and support to each other in the collection of the taxes to which this Convention applies . . . in cases where the taxes are definitively due according to the laws of the State making the application."); U.S.-Denmark Income Tax Treaty art. 27, *supra* note 238 ("The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in Article 2 (Taxes Covered), together with interest, costs, additions to such taxes, and civil penalties, referred to in this Article as a 'revenue claim.'"); U.S.-Netherlands Income Tax Treaty art. 31, *supra* note 238 ("The States undertake to lend assistance and support to each other in the collection of the taxes which are the subject of the present Convention, together with interest, costs, and additions to the taxes and fines not being of a penal character."); U.S.-Sweden Income Tax Treaty art. 27, *supra* note 238 ("The Contracting States undertake to lend assistance and support to each other in the collection of the taxes to which this Convention applies, together with interest, costs, and additions to such taxes."); U.S.-Canada Income Tax Treaty art. XXVIA A, *supra* note 238 ("The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a 'revenue claim'").

<sup>250</sup> *Attorney Gen of Canada*, 268 F.3d at 119.

<sup>251</sup> Benjamin Berk, et al., *United States Activities Of Foreigners And Tax Treaties*, 45 TAX LAW. 1391, 1393 (1992).

<sup>252</sup> U.S.-Canada Income Tax Treaty art. XXVI A, *supra* note 238.

<sup>253</sup> JOINT COMMITTEE ON TAX'N, EXPLANATION OF PROPOSED PROTOCOL TO THE INCOME TAX TREATY BETWEEN THE UNITED STATES AND CANADA 42-43 (1995).

substantively and from a procedural perspective, as well as evaluating broader policy issues.<sup>254</sup>

Renegotiating its existing treaties would require a significant investment of time and effort by the United States. Still, such renegotiation is at least possible.<sup>255</sup> Renegotiating income tax treaties would not significantly help developing countries establish their revenue systems, however, unless the United States had treaties with developing countries. And, by and large, the United States does not.<sup>256</sup> Of the roughly 62 countries with which the United States has entered into tax treaties, only 16 are developing countries.<sup>257</sup> This lack of tax treaties with developing countries does not result solely from the United States' lack of interest in such treaties.<sup>258</sup> Structurally, though, tax treaties generally give preference to the residence country's tax claim.<sup>259</sup> Countries that export capital and services in roughly similar amounts believe their revenue losses under the treaty will be roughly equivalent to their revenue gains.<sup>260</sup>

Developing countries, however, tend to be net capital importers, and thus the source, rather than the residence, countries.<sup>261</sup> Inducing them to enter into a treaty often requires concessions that either decrease the treaty's ability to eliminate double taxation (the primary goal of treaties)<sup>262</sup> or reduces revenue for the United States without the reciprocal increase that developed countries generally expect from their treaties.<sup>263</sup> As such, as long as the United States will only relinquish the revenue rule as part of a bilateral income tax treaty, the revenue rule will continue to impede developing countries' requests that the U.S. enforce their tax judgments.<sup>264</sup>

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<sup>254</sup> *Id.* at 43.

<sup>255</sup> See, e.g., Anthony C. Infanti, *Curtailing Tax Treaty Overrides: A Call to Action*, 62 U. PITT. L. REV. 677, 686–87 (2001) (Congress believes "it is 'extremely difficult' to renegotiate treaties.").

<sup>256</sup> See, e.g., Adam H. Rosenzweig, *Thinking Outside the (Tax) Treaty*, 2012 WIS. L. REV. 717, 721 (2012) ("The problem is that certain countries, and in particular smaller, less developed countries, generally have not entered into tax treaties, at least not with the United States . . ."); Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing Continue?*, 138 TAX NOTES 253, 255 (2013) ("Latin American countries mostly don't sign treaties with the United States, and for good reason. They don't like giving up tax jurisdiction over the affiliates of American multinationals that would do business in their countries even without tax treaties.").

<sup>257</sup> Allison D. Christians, *Tax Treaties for Investment and Aid to Sub-Saharan Africa: A Case Study*, 71 BROOK. L. REV. 639, 666 (2005).

<sup>258</sup> See Rosenzweig, *supra* note 256, at 723 ("But no matter how many times the wealthier countries 'roared their terrible roars and gnashed their terrible teeth and rolled their terrible eyes and showed their terrible claws' in an attempt to force the other countries to sign on to a global tax information sharing regime, they just seem to continue to say, no!").

<sup>259</sup> Christians, *supra* note 257, at 661.

<sup>260</sup> *Id.* at 660.

<sup>261</sup> *Id.* at 661.

<sup>262</sup> *Id.* at 665 ("The consequence of preserving source-country taxation to overcome non-reciprocal capital flows, however, is that it undermines the relief of double taxation ostensibly sought as the primary purpose for entering into the treaty in the first place.").

<sup>263</sup> One reason that developing countries are unwilling to negotiate tax treaties with the United States is that the United States is unwilling to include tax sparing provisions in its treaties, while developing countries are often unwilling to sign tax treaties that do not include tax sparing. See H. David Rosenbloom & Stanley I. Langbein, *United States Treaty Policy: An Overview*, 19 COLUM. J. TRANSNAT'L L. 359, 392 (1981).

<sup>264</sup> If the U.S. continues to prefer to eliminate the revenue rule on a country-by-country basis using bilateral treaties, it may have an alternative route to the income tax treaty. Since the 1980s, the U.S. has pursued Tax Information Exchange Agreements ("TIEAs") with certain developing countries. Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 Geo. Wash. Int'l L. Rev. 331, 331 (2003). The U.S. currently has TIEAs with twenty-nine

### C. Jurisdictional Issues

Even with the revenue rule out of the way, a foreign government may face some impediments in its enforcement of foreign tax judgments. In the first instance, the foreign country would need to determine the forum in which it sought recognition and enforcement. In the second instance, it would need to demonstrate that the court it chose had jurisdiction to hear its claim.

A foreign country could request enforcement of its tax judgments in state courts or, in most cases, in federal courts.<sup>265</sup> To sustain the case in federal court would require either diversity jurisdiction or federal question jurisdiction.<sup>266</sup> Diversity jurisdiction requires that the defendant be a citizen of a state and that the amount of the tax judgment exceed \$75,000.<sup>267</sup> Federal question jurisdiction, on the other hand, would require that federal law or a treaty provide for the enforcement of foreign tax judgments.<sup>268</sup>

Either way, absent the revenue rule, U.S. courts would clearly have jurisdiction if the defendant were a U.S. citizen or resident who had not paid her foreign taxes. Until now, however, even where the U.S. has agreed to enforce another country's tax judgments, it has not agreed to enforce those judgments against U.S. citizens.<sup>269</sup> The United States' continued refusal to enforce judgments against U.S. citizens would not matter, even in federal courts, if states chose to revoke the revenue rule—in recognizing foreign judgments, most courts have held, a federal court looks to state law.<sup>270</sup>

If foreign governments could only collect tax judgments from U.S. citizens and residents, though, revoking the revenue rule would provide little help to developing countries. In the more common case, the defendant will be a nonresident hiding assets in the U.S. Where the defendant is neither a citizen nor a resident of a state, the question of jurisdiction becomes significantly more difficult. The foreign country could probably not avail itself of diversity jurisdiction, because diversity jurisdiction requires that, where the plaintiff is a foreign country, the defendant be a "citizen[] of a State."<sup>271</sup>

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countries. Jeremiah Coder, *Officials Say Cross-Border Discovery Is Slow, Cumbersome*, 138 Tax Notes 1397, 1397 (2013). If developing countries are willing to enter into TIEAs, perhaps including mutual assistance provisions in TIEAs would allow the U.S. to use bilateral treaties to eliminate the revenue rule in a targeted matter.

Alternatively, it is possible that an offer from the United States to eliminate the revenue rule through a bilateral income tax treaty could function as a carrot, encouraging developing countries to negotiate tax treaties in spite of the United States' unwillingness to include tax sparing and without undermining the relief of double taxation.

<sup>265</sup> John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 669 (2004) ("Foreign plaintiffs may choose to file their claims in state courts, which have jurisdiction over most types of lawsuits, or in federal courts . . .").

<sup>266</sup> Brand, *supra* note 92, at 263 n.32 ("Most federal cases involving enforcement of foreign judgments arise under diversity jurisdiction. Exceptions include those cases arising under federal law, for which 'federal question jurisdiction' exists.").

<sup>267</sup> 28 U.S.C. § 1332(a) (2012).

<sup>268</sup> *Id.* § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

<sup>269</sup> See *infra* notes 238–300 and accompanying text.

<sup>270</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1988) ("The consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit.").

<sup>271</sup> 28 U.S.C. § 1332(a)(4) (2012).

For a court to have personal jurisdiction over a defendant, the Supreme Court does not require that the defendant be present within the jurisdiction.<sup>272</sup> She must, however, "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>273</sup> In the end, the defendant must "purposefully avail" herself of the jurisdiction before a court can exercise personal jurisdiction over her.<sup>274</sup> The personal jurisdiction requirement would appear to significantly impede a foreign government's ability to enforce tax judgments against assets its residents have hidden in the United States, even if the U.S. revoked the revenue rule and allowed courts to enforce foreign tax judgments.

Even without personal jurisdiction, however, the existence of hidden assets in a state should generally provide a U.S. court with jurisdiction to recognize and enforce foreign judgments. A state can exercise judicial jurisdiction in some cases to seize assets within the state if it otherwise would have jurisdiction.<sup>275</sup> Additionally, the Supreme Court has held that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction."<sup>276</sup>

In the case of a final judgment for taxes due by a person hiding assets in the United States, the claim is for the hidden assets, and their presence in a state generally provides *in rem* jurisdiction. Even if the presence of the assets were insufficient to create jurisdiction underlying a claim, however, the Supreme Court allows that "a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."<sup>277</sup> Either way, even where the defendant is a nonresident alien, if she hides assets in the U.S., U.S. courts have jurisdiction to enforce foreign tax judgments.

#### D. Evaluating the Foreign Country's Revenue Judgment

Courts have proven adept at evaluating the procedure leading to foreign judgments. While final judgments from foreign courts are presumptively conclusive,<sup>278</sup> where the defendant can demonstrate that the foreign process was unfair, fraudulent, or otherwise compromised, the U.S. court can decline to recognize and enforce the judgment.<sup>279</sup> And it appears that U.S. courts do, in fact, evaluate the fairness of the process and do, in fact, decline to recognize and enforce fraudulent judgments, judgments that lacked due process, and other judgments that violated U.S. public policy.<sup>280</sup> There is no reason to believe that courts that have the ability to evaluate procedural fairness in non-revenue cases would lose that ability where the underlying judgments were for unpaid tax liabilities.

Revenue claims potentially implicate a second layer of fairness, though: the fairness of the imposition of the foreign tax. Unlike foreign contract claims, where the parties presumably negotiated at arm's length and came to a mutually-agreeable solution,

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<sup>272</sup> *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

<sup>273</sup> *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>274</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>275</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66(1)(a) (1988).

<sup>276</sup> *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977).

<sup>277</sup> *Id.* at 210.

<sup>278</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481(1) (1987).

<sup>279</sup> *Id.* § 482.

<sup>280</sup> See *supra* notes 154–174 and accompanying text.



tax laws are enacted and enforced by the sovereign. Though some taxpayers may, by virtue of being voters, have some indirect input into the tax laws, the tax laws do not represent an explicit agreement between taxpayers and the government. As such, it would appear necessary for a U.S. court to look not only at the fairness of the judicial procedure, but the fairness of the imposition of the tax in the first instance.

With an inquiry into the fairness of a foreign tax, U.S. courts would begin to enter perilous waters. Such an evaluation, with no explicit parameters, would create a significant risk of infringing on a country's sovereignty. Here, rather than just determining if fair procedure occurred, U.S. courts would evaluate whether the country had designed an appropriate law. The foreign country could see a U.S. court's refusing to enforce a tax judgment on the grounds that the tax system did not meet U.S. public policy as a direct challenge to its right to make its own laws. Moreover, judging the fairness of a foreign tax system risks economic imperialism. The safest way for a foreign country to demonstrate that its tax system met U.S. standards of fairness would be for that country to adopt a U.S.-style income tax.

A law revoking the revenue rule could cabin these problems, even as it left discretion to judges to make this evaluation. For example, it could limit the permissible inquiries a court could make into the fairness of the tax system. A foreign tax system would presumably be unfair, for example, if it imposed tax, or determined the amount of the tax, based on the taxpayer's identity. Additionally, if the tax law provided no mechanism for appeal of a tax determination, U.S. courts could determine that the tax law was unfair and decline to enforce the judgment.

Alternatively, if the U.S. found crafting such rules too burdensome, it could, instead, opt to use a blacklist or a whitelist. If the U.S. opted for a blacklist, it would determine which countries did not have a fair tax system, and it would not enforce tax judgments from those countries. Alternatively, if the U.S. chose to implement a whitelist, it would determine the countries with presumptively fair tax systems, and would generally enforce tax judgments from those countries (subject, of course, to the affirmative defenses available to any defendant in any enforcement suit).

The foreign tax credit and the subpart F provisions of the tax law currently blacklist certain countries. Corporate income earned in these blacklisted countries is automatically treated as subpart F income,<sup>281</sup> and U.S. taxpayers cannot take a foreign tax credit for taxes paid to blacklisted countries.<sup>282</sup> A country finds itself on this blacklist if the U.S. does not recognize it, if the U.S. has severed diplomatic relations or does not conduct such relations, or if the Secretary of State has designated it as repeatedly providing support for acts of terrorism.<sup>283</sup>

A country can come off of the blacklist in one of two ways: first, the Secretary of State can certify to the Secretary of the Treasury that the country no longer meets the criteria for inclusion.<sup>284</sup> Second, the President can waive the criteria if the President determines such waiver is, among other things, in the national interest of the United

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<sup>281</sup> I.R.C. § 952(a)(5) (2012).

<sup>282</sup> I.R.C. § 901(j)(1)(A) (2012).

<sup>283</sup> *Id.* § 901(j)(2)(A).

<sup>284</sup> *Id.* § 901(j)(2)(B)(ii).

States.<sup>285</sup> Though fourteen countries have found themselves on the blacklist at one time or another, currently the blacklist contains only five countries.<sup>286</sup>

The foreign tax credit/subpart F blacklist would not work for revenue rule purposes, however. The purpose of such a list associated with the revocation of the revenue rule would be to establish which countries' tax procedures were insufficiently fair to warrant U.S. enforcement of tax judgments. A country's inclusion on the foreign tax credit/subpart F blacklist, on the other hand, has nothing to do with its tax law; instead, countries find themselves on the list because of other bad actions.

If the U.S. implemented a blacklist or a whitelist, it would need to lay out clear steps a country could take to get off of, or on to, the list. Moreover, the administrator of the list should be responsive and flexible, so that the list can change quickly when a country meets the specified criteria. The foreign tax credit/subpart F blacklist does not appear to have that flexibility: it has not changed since 2005.<sup>287</sup> While it is possible that none of the countries' positions have changed in a manner that warrants their removal, such a slow rate of change nonetheless does not seem to fit the needs of a revenue rule blacklist or whitelist.<sup>288</sup>

#### E. Final Judgment

As part of the revocation of the revenue rule, the U.S. government would need to determine procedures for the recognition and enforcement of foreign tax judgments. Tax judgments are not exceptional, though—they differ from other judgments only in subject matter. As a result, no reason exists why the procedures for recognizing and enforcing a tax judgment should differ materially from the procedures currently in place for recognizing and enforcing other foreign judgments. Like the enforcement of non-revenue judgments, the enforcement of revenue judgments should provide for an expedited judicial procedure to enforce the judgment.<sup>289</sup> Notwithstanding the expedited procedure, though, the defendant should have the ability to raise certain affirmative defenses.<sup>290</sup> And, importantly, a country seeking enforcement should exhaust present and final judgments so that U.S. courts do not need to adjudicate the merits of the dispute.<sup>291</sup>

Final judgment may appear to be a high hurdle for requesting mutual assistance. In the U.S., the I.R.S. can assess a taxpayer's taxes.<sup>292</sup> Within sixty days after making the assessment, it must provide notice to the taxpayer of her unpaid tax and demand the payment.<sup>293</sup> If she fails to pay, the United States automatically gets a lien against all of her property and rights to property in the amount of the liability plus interest, penalties, and other additional amounts.<sup>294</sup> All of this happens without any judicial intervention.

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<sup>285</sup> *Id.* § 901(j)(5)(A).

<sup>286</sup> Rev. Rul. 2005-3; 2005-1 C.B. 334.

<sup>287</sup> *Id.*

<sup>288</sup> Even if the U.S. figured out a viable way to both create and maintain the blacklist or whitelist, such a regime would still risk encouraging jurisdiction-shopping among people intent on hiding their income. The jurisdiction-shopping issue would not be too large an impediment, however: avoiding the U.S. enforcement of a tax judgment would require an individual to subject herself only to the tax jurisdiction of blacklisted countries or of countries not on the whitelist. While she may be willing to do so, doing business in a way that avoids such jurisdiction generally represents real economic choices, not just formal structuring.

<sup>289</sup> *See supra* note 103 and accompanying text.

<sup>290</sup> *See supra* notes 91–83 and accompanying text.

<sup>291</sup> *See supra* notes 78–79- and accompanying text.

<sup>292</sup> I.R.C. § 6201(a) (2012).

<sup>293</sup> I.R.C. § 6303(a) (2012).

<sup>294</sup> I.R.C. § 6321 (2012).

Moreover, if, after the notice and demand, she continues to decline to pay, the I.R.S. can collect the taxes by levy or by seizure.<sup>295</sup> In the end, then, the I.R.S. has the ability to collect unpaid taxes without requiring a final judgment.

Notwithstanding the ability to administratively collect taxes, though, requiring a final judgment before helping to collect a foreign tax accords with the United States' current practice. In each of the tax treaties providing for collection assistance, the tax claim of the requesting country must be "finally determined."<sup>296</sup> For a tax to be "finally determined," not only must the country have the right to collect the revenue (which the U.S. can have at the administrative level), but "all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted."<sup>297</sup>

In addition to roughly corresponding to the United States' current practices, requiring a final judgment from the other country before enforcing a tax judgment offers further safeguards to ensure that the tax is fair. Rather than trusting a foreign administrative agency, U.S. courts can rely on at least a second review of the tax assessment.

#### F. U.S. Citizen Exceptionalism

As a practical matter, repealing the revenue rule except in the case of U.S. citizens does not create significant problems. As long as the defendant in a foreign tax judgment can demonstrate that she was a U.S. citizen at the time the tax became due, the legislation revoking the revenue rule can provide that U.S. courts will not recognize or enforce the foreign tax judgment. If, however, for fairness or other reasons, we believe that the revenue rule should be revoked entirely, such complete revocation is still feasible. In addition to the federal revocation of the revenue rule as applied to non-citizens, individual states could revoke their versions of the revenue rule for U.S. citizens. Although the UFMJRA and the UFCMJRA, adopted by many states, have codified the revenue rule, the states have generally not adopted the Acts wholesale. Instead, states have tailored the Acts to their own situations, making certain alterations as they saw necessary.<sup>298</sup> The states could further alter these laws to eliminate the revenue rule altogether. Moreover, states do not risk the same revenue loss as the federal government: the vast majority of states do not allow their residents to take a credit for taxes paid to foreign governments against their state income taxes.<sup>299</sup>

<sup>295</sup> I.R.C. § 6331(a), (b) (2012).

<sup>296</sup> Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, With Exchanges of Notes, U.S.-Fr., art. 28, Aug. 31, 1994, 1963 U.N.T.S. 67; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, With Protocol, U.S.-Den., art. 27(2), Aug. 19, 1999, T.I.A.S. No. 11089; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, With Understanding and Exchange of Notes, U.S.-Neth., art. 31(2), Dec. 18, 1992, 2291 U.N.T.S. 3; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, With Exchange of Letters, U.S.-Swed., art. 27(2), Sept. 1, 1994, T.I.A.S.; Protocol Amending the Convention of September 26, 1980, With Respect to Taxes on Income and Capital, With Exchange of Letters, U.S.-Can., art. XXVI A(2), June 14, 1983, T.I.A.S. No. 11087.

<sup>297</sup> TREASURY TECHNICAL EXPLANATION art. 15, *supra* note 235.

<sup>298</sup> See, e.g., Richard J. Graving & Jon H. Sylvester, *Is the Uniform Foreign Money-Judgments Act Potentially Unconstitutional? If So, Should the Texas Cure Be Adopted Elsewhere?*, 25 GEO. WASH. J. INT'L L. & ECON. 737, 739 n.9 (1992) ("[T]he versions [of the UFMJRA] adopted in some states depart significantly in certain respects from the uniform model law.").

<sup>299</sup> Seven states have no personal income tax, and therefore no credits against taxes. Carol Rosenberg & Kim Reuben, *State Individual Income Tax Rates*, 127 Tax Notes 697, 697 (2010) ("Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming do not tax personal income . . ."). Of the

As a practical matter, however, states may not have sufficient incentive to allow foreign governments access to their courts to collect revenue claims. Perhaps, if a state enforced foreign revenue judgments, the foreign country would likewise enforce the state's tax judgments. Though there is no data available on the amount of revenue states lose as a result of their citizens hiding money offshore, state tax revenue is significantly lower than federal revenues.<sup>300</sup> Consequently, states likely lose significantly less revenue than the federal government. And with less money at stake, states have less incentive to seek reciprocity.

As a result, placing the primary emphasis for revoking the revenue rule at the federal level makes more sense than revoking it at the state level. At the federal level, such revocation would require the passage of a single law, rather than requiring fifty legislatures, acting independently, to each revoke the revenue rule. Such a federal revocation would likely not apply to U.S. citizens, based both on the language of the current treaties in which the U.S. has agreed to enforce foreign judgments and on the potential revenue loss to the government resulting from the foreign tax credit. Such federal revocation would not prevent a state from also revoking its revenue rule. As a secondary matter, some states may want to ensure that foreign courts will enforce their tax judgments, contribute to developing countries' establishing effective tax infrastructure, or ensure that they contribute to the implied social contract.<sup>301</sup> Irrespective of whether or how the federal government permitted the enforcement of foreign tax judgments, such a state could allow its courts to enforce foreign tax judgments against both citizens and non-citizens.

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remaining forty-three states and the District of Columbia, only six allow their residents to deduct taxes paid to any foreign country. ALA. CODE § 40-18-21(a)(1) (2013); ARIZ. REV. STAT. ANN. § 43-1071(A) (2013); HAW. REV. STAT. § 235-55 (2013); IOWA CODE § 422.8(1) (2013); MONT. CODE ANN. § 15-30-2302(1)(a) (2013); N.C. GEN. STAT. § 105-153.9 (2013). Maine allows a foreign tax credit for taxes paid to subdivisions of foreign countries that are equivalent to U.S. states. ME. REV. STAT. ANN. tit. 36, § 5217-A (2013). Massachusetts and Michigan permit a credit for Canadian taxes, and New York and Vermont allow a credit for taxes paid to Canadian provinces. MASS. GEN. LAWS ANN. ch. 62, § 6(a) (2013); MICH. COMP. LAWS ANN. § 206.255(1) (West 2013); N.Y. TAX LAW § 620(a) (McKinney 2013); VT. STAT. ANN. tit. 32, § 5825(a) (2013). The remaining thirty-two states and the District of Columbia do not provide a credit for foreign taxes. ARK. CODE ANN. § 26-51-504(a)(1) (West 2013); CAL. REV. & TAX CODE § 18001(a) (West 2013); COLO. REV. STAT. ANN. § 39-22-108(1) (West 2012); CONN. GEN. STAT. ANN. § 12-704(a)(1) (West 2013); DEL. CODE ANN. tit. 30, § 1111(a) (West 2013); D.C. CODE § 47-1806.04(a) (2008); GA. CODE ANN. § 48-7-28 (West 2013); IDAHO CODE ANN. § 63-3029(1) (West 2013); 35 ILL. COMP. STAT. ANN. 5/601(b)(3) (West 2011); IND. CODE ANN. § 6-3-3-3 (West 2013); KAN. STAT. ANN. § 79-32,111(a) (West 2013); KY. REV. STAT. ANN. § 141.070(1) (West 2013); LA. REV. STAT. ANN. § 47:33(A) (2013); MD. CODE ANN., Tax-Gen. § 10-703(a) (West 2013); MINN. STAT. ANN. § 290.06, subd. 22 (West 2013); MISS. CODE ANN. § 27-7-77(1) (West 2012); MO. ANN. STAT. § 143.081(1) (West 2013); NEB. REV. STAT. ANN. § 77-2730(1) (West 2013); N.H. REV. STAT. ANN. § 77:4 (2013); N.J. STAT. ANN. § 54A:4-1(a) (West 2013); N.M. STAT. ANN. § 7-2-13 (2013); N.D. CENT. CODE § 57-38-30.3(4)(a) (West 2013); OHIO REV. CODE ANN. § 5747.05(B) (West 2013); OKLA. STAT. ANN. tit. 68, § 2357(B)(1) (West 2013); OR. REV. STAT. ANN. § 316.082(1) (West 2013); 72 PA. CONS. STAT. ANN. § 7314(a) (West 2013); R.I. GEN. LAWS ANN. § 44-30-18(a) (West 2013); S.C. CODE ANN. § 12-6-3400(A)(1) (2013); TENN. CODE ANN. § 67-2-122 (West 2013); UTAH CODE ANN. § 59-10-1003 (West 2013); VA. CODE ANN. § 58.1-332(A) (West 2013); W. VA. CODE ANN. § 11-21-20(a) (West 2013); WIS. STAT. ANN. § 71.07 (West 2014).

<sup>300</sup> In 2011, the states collectively collected about \$268 billion from their individual income taxes. U.S. CENSUS BUREAU, QUARTERLY SUMMARY OF STATE AND LOCAL GOVERNMENT TAX REVENUE (2012), available at <http://www2.census.gov/govs/qtax/2012/q4t2.xls>. By contrast, the federal government collected approximately \$1.1 billion in individual income taxes, or four times as much. CONG. BUDGET OFFICE, THE U.S. FEDERAL BUDGET: A CLOSER LOOK AT REVENUES (2012), available at [http://www.cbo.gov/sites/default/files/cbofiles/attachments/BS\\_Revenues\\_print.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/BS_Revenues_print.pdf).

<sup>301</sup> See *supra* notes 196–197 and accompanying text.

## VII. CONCLUSION

The United States does not need to be a tax haven. It does not need to shield taxpayers in developing countries from paying their tax liabilities while, at the same time, providing foreign aid to those countries. By permitting developing countries to collect taxes from their citizens, the U.S. would help them develop self-sustaining revenue.

The easiest and most immediate step the U.S. could take in this direction is to revoke the revenue rule. Every state in the United States already stands willing to enforce most foreign judgments, whether under the common law or by statute. Tax judgments are not so different that they should be excluded; moreover, the justifications that supported the creation and continuance of the revenue rule are no longer compelling.

Not only is revoking the revenue rule easy; it is also virtually costless to the United States. Eliminating the zero rate of tax on interest paid to nonresident aliens on bank accounts and portfolio interest would discourage foreigners from putting money in U.S. banks or investing in portfolio debt instruments. Changing the source rules for capital gains would make nonresident aliens think twice before investing in passive U.S. assets, including the securities of U.S. companies. But eliminating the revenue rule will not discourage legitimate investment. True, the U.S. will no longer represent an attractive location for nonresident aliens to hide assets from their governments. In a world without the revenue rule, if their governments find the assets hidden in the United States, they will be able to use those assets to satisfy their taxpayers' unpaid taxes. But because the nonresident aliens presumably paid little, if any, tax in the United States, losing that tax haven-style investment will not significantly affect the United States' revenue collection. Moreover, eliminating the revenue rule would not discourage non-evasive foreign investors from investing in the United States.

Still, a couple questions potentially remain. Why *should* the U.S. discourage individuals from hiding assets here? Although those assets do not provide tax revenue for the government, they presumably increase market liquidity and provide benefits to other investors by increasing the value of their investments. Rather than revoke the revenue rule, the U.S. could double down, becoming a full-blown tax haven itself.<sup>302</sup>

Becoming a tax haven, though, would violate the implied international social contract. It would demonstrate significant hypocrisy from a country that invests so much in preventing its own taxpayers from taking advantage of tax havens. And it would prevent other countries from helping the U.S. collect taxes from taxpayers hiding their assets offshore. As a corollary, the willingness of the U.S. to enforce foreign tax judgments would allow other countries to reciprocally recognize and enforce U.S. tax judgments.

Would U.S. enforcement of foreign tax judgments really help developing countries, though, or would the tax evaders merely shift assets to another tax haven jurisdiction? If evaders merely shifted the location of their hidden assets, the United States' revocation of the revenue rule would not have significantly improved developing countries' revenue collection.

The answer is not clear. Presumably, individuals hiding assets in the U.S. have a reason to prefer investment in the U.S. to investment in other jurisdiction that provide

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<sup>302</sup> Though not a common proposal, recently Representative Devin Nunes advocated changing the corporate income tax in a way that would "make the U.S. the largest tax haven in human history." Ramesh Ponnuru, *How to Make America a Global Tax Haven*, BLOOMBERGVIEW (Mar. 25, 2013, 6:30 PM), <http://www.bloomberg.com/news/2013-03-25/how-to-make-america-a-global-tax-haven.html>.

secrecy, low taxes, and non-enforcement of foreign judgments. The other reasons may be sufficient for foreign evaders to keep their money in the United States, even without the revenue rule. If such reasons turned out to be insufficient, though, the intergovernmental FATCA agreements and negotiations demonstrate that effecting change in the United States can lead to international change. The United States' willingness to enforce foreign tax judgments, whether unilaterally or by treaty, could similarly spread to other jurisdictions, crowding out the ability of tax evaders to hide their assets in a place that will not enforce tax judgments.

The revenue rule serves no legitimate purpose in the current world. As a moral and as an economic matter, the United States should repeal the revenue rule and enforce foreign tax judgments.