DISSONANT TAXATION: HOW THE REVENUE RULE AND INCOME TAX TREATIES LEAD TO INCONGRUITIES IN INTERNATIONAL REVENUE COLLECTION

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ABSTRACT

Historically, the so-called revenue rule has, for centuries, barred actions in common law jurisdictions that involve foreign tax law. A few tax treaties have patched over the revenue rule, and the United States now has two countering postures towards international cooperation in the collection of revenue: openness to cooperation for income taxes and non-cooperation as to other forms of taxes. What remains is inconsistent U.S. cooperation and disparate treatment of claims depending on the type of tax that gives rise to the claims. This Note will examine the degree of engagement that the United States has towards international tax collection and cooperation. By analyzing a number of cases contending with U.S. courts' disparate treatment of revenue collection actions, this Note will further suggest how to close the gaps created by an irregular system in order to minimize revenue loss.

I. INTRODUCTION: *DILENG* AND *R.J. REYNOLDS*: A CASE STUDY

On January 15, 2016, the U.S. District Court for the Northern District of Georgia handed down a decision in favor of the Commissioner of the Internal Revenue Service (IRS) to collect taxes owed to the

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Kingdom of Denmark by Plaintiff Torben Dileng, a Danish citizen temporarily residing in the United States.[1] Dileng was seeking an injunction to stop the IRS from collecting taxes, because the collection action was based on a foreign assessment and judgment.[2] Curiously absent from the judicial opinion is the very topic that prompted much discussion amongst tax commentators: the status of the so-called revenue rule of international law.[3] The revenue rule is a judicially-created doctrine that limits a domestic court's ability to enforce or apply the tax laws of a foreign country.[4] Most common law jurisdictions recognize and have applied some form of the revenue rule.[5] The revenue rule bars courts from applying or enforcing the revenue rules of foreign nations.[6] Just a few years ago, the Second Circuit invoked the vitality of the revenue rule in *Attorney General of Canada v. R.J. Reynolds*, a case brought by Canada against a tobacco manufacturer for smuggling cigarettes made in Puerto Rico and sold in Canada without paying a high Canadian import tax on tobacco.[7] The court in *R.J. Reynolds* refused to rule on the merits of the case, a complex case involving Racketeer Influenced and Corrupt Organizations Act (RICO) counts, stating that because of the import taxes involved in the case and owed to Canada, the revenue rule precluded the court from reviewing the case.[8] Given the seeming imperviousness of the revenue rule asserted by the Second Circuit in *R.J. Reynolds*, why did the court in *Dileng* not even consider the revenue rule?

In *Dileng*, Denmark, under the Convention Between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed in Washington on August 19, 1999, together with a Protocol (hereinafter Denmark Income Tax Convention), requested that the United States

1. Dileng v. Comm'r of Internal Revenue Serv., 157 F. Supp. 3d 1336, 1339 (N.D. Ga. 2016).

2. *Id.* at 1340.

3. *See, e.g.*, Diane Ring, *Uncle Sam as Danish Tax Collector*, THE SURLY SUBGROUP (June 8, 2016), https://surlysubgroup.com/2016/06/08/uncle-sam-as-danish-tax-collector/; Keith Fogg, *Why is the IRS Collecting Taxes for Denmark?*, PROCEDURALLY TAXING (Feb. 16, 2016), http://proceduralltaxing.com/why-is-the-irs-collecting-taxes-for-denmark-2/.

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

5. *Id.* at 88-97.

6. Curtis A. Bradley, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 1, 9 (2d ed. 2015).

7. Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002).

8. *Id.* at 1129.

collect Danish taxes from the Plaintiff.[9] The Denmark Income Tax Convention aims to help further international cooperation in the collection of taxes and requires that states party to the agreement endeavor to collect taxes requested through a finalized assessment.[10] The finalized assessment is submitted by one country to the other and is to be fulfilled through the other country's domestic administrative mechanisms.[11] The Commissioner for the IRS was a party to the suit because he was collecting on behalf of the Danish revenue collection agency, the *Skatteministeriet*, which made a collection request to the IRS after issuing a final judgment assessing and computing taxes owed by Dileng.[12] Importantly, the computation and assessment of taxes owed to Denmark were made according to Danish domestic tax law, calculated at Danish tax rates.[13] The IRS moved to dismiss on a number of grounds, asserting the Court's lack of personal jurisdiction because the government had not waived its sovereign immunity and applying the Anti-Injunction Act, a federal statute that bars suits from being brought against the U.S. government to restrain its tax assessment or collection efforts.[14] The Court granted the Commissioner's motion on these jurisdictional grounds precluding the review of substantive issues, effectively ensuring that the IRS could enforce a foreign tax judgment on someone in the United States.[15] All the procedural and jurisdictional impositions to *Dileng* stem from the fact that the case essentially arises from a completely different avenue to collect taxes. The Denmark Income Tax Convention created a new avenue for transnational cooperation between the United States and Denmark in the collection of taxes to circumvent the courts, but only for income taxes.[16] Every other form of tax is still subject to the revenue rule because no administrative channel exists for collection, and the only remaining route is the courts, which will not review a case involving foreign tax law.[17]

Dileng aside, the commentators questioning the status of the revenue rule are correct in a way: now is an opportune moment to reconsider

9. *Dileng*, 157 F. Supp. 3d at 1339.

10. Convention Between the Gov't of the U.S. and the Gov't of the Kingdom of Den. for the Avoidance of Double Tax'n and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Den.-U.S., Aug. 19, 1999, T.I.A.S. No. 11089.

11. *Id.*

12. *Dileng*, 157 F. Supp. 3d at 1340.

13. *Id.* at 1339.

14. *Id.*

15. *Id.* at 1349.

16. Convention, *supra* note 10, at 3.

17. *Id.* (exclusively defining taxes covered as income taxes).

the international implications of the revenue rule, explore in which ways the revenue rule still carries importance, in which ways it does not, and most importantly, to consider the future of the revenue rule. This endeavor is particularly timely considering that the Organization for Economic Cooperation and Development (OECD) published a report in late 2016 estimating $100-240 billion in annual revenue loss due to base erosion and profit shifting for governments around the world.[18]

The revenue rule has attracted scholarly discussion in the past. Every few years (particularly when a case involving the rule is decided), scholars seize the opportunity to lament or commend the gradual chipping away of the revenue rule.[19] Despite the differing views among proponents and detractors of the revenue rule, few serious scholars challenge the notion that the basis for relying on the revenue rule as judicially binding is not as impermeable as it was once considered.[20] In areas where the revenue rule has been displaced, a new regime of cooperation has been instated. In some cases, tax treaties have patched over the revenue rule, and the United States now has two countering postures towards international cooperation in the collection of revenue: full cooperation with a handful of countries (Denmark, Canada and the Netherlands) for income taxes, and non-cooperation for other forms of taxes. What remains is inconsistent U.S. cooperation and disparate treatment of claims depending on the type of tax that gives rise to the claims.

This Note examines the degree of engagement that the United States has towards international tax collection and cooperation. Part II tracks the sources and explains the justifications for the continued application of the revenue rule, as well as how the revenue rule controls the default position of the United States on enforcement of foreign tax law domestically. Part III goes on to evaluate how a tax treaty with Denmark has facilitated transnational cooperation in the collection of taxes. Finally, Part IV argues that expanding cooperation with all countries beyond Denmark, Netherlands and Canada as well as to other non-income based forms of revenue collection would benefit the United States and could be easily addressed in treaties that commit to full cooperation in collection of taxes.

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18. OECD, WORK ON TAXATION BROCHURE 9 (2016), http://www.oecd.org/ctp/treaties/centre-for-tax-policy-and-administration-brochure.pdf.

19. *Compare* Barbara A. Silver, *Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments*, 22 GA. J. INT'L & COMP. L. 609 (1992) *with* Mallinak, supra note 4.

20. *See, e.g.*, Silver, *supra* note 19, at 615; Mallinak, *supra* note 4, at 97.

II. What is So Special About Tax?

A. *Tax Judgments in U.S. Courts*

Application of foreign law is not an unusual concept for U.S. courts. Given certain choice of law principles and rules of decision, U.S. courts routinely apply foreign or international commercial law in deciding cases involving a breach of contract if the facts of the case suggest that foreign or international law governs the contract.[21] Similarly, a court may decide to enforce a judgment made by a foreign court and based on foreign law as long as a court has appropriate jurisdiction. And yet, the revenue rule has barred courts from specifically applying provisions of foreign tax law domestically, even when appropriate jurisdiction could otherwise be established.[22] The revenue rule has also precluded enforcement of finalized judgments issued by foreign courts if the underlying claim arises from, or the effect of enforcement would contribute to, the application of a foreign country's revenue laws.[23]

The U.S. Constitution's Full Faith and Credit Clause requires courts of every U.S. state to recognize and enforce the judgments of other states.[24] The Full Faith and Credit Clause does not, however, create any obligation for state or federal courts to enforce judgments from foreign jurisdictions. The enforcement of foreign judgments is almost exclusively a matter of state law.[25] Nearly half of the states have codified versions of the Uniform Foreign-Country Money Judgments Recognition Act.[26] The remaining states use common law principles to determine the enforceability of foreign judgments.[27] It is notable that, to different degrees, both state common law and the Uniform Foreign-Country Money Judgments Recognition Act carve out exceptions on the enforceability of judgments based on revenue laws, leaving the status of the revenue rule in U.S. courts for purposes of enforcing finalized judgments from foreign jurisdictions practically untouched.[28] It is also

21. Bradley, *supra* note 6, at 9.

22. Mallinak, *supra* note 4, at 118.

23. Silver, *supra* note 19, at 626.

24. U.S. Const. art. IV, § 1.

25. Bradley, *supra* note 6, at 10.

26. *Foreign-Country Money Judgments Recognition Act Enactment Status Map*, United Laws, http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Apr. 21, 2017).

27. *Id.*

28. *See* Restatement (Third) of Foreign Relations Law of the United States § 483 (Am. Law Inst. 1988); Unif. Foreign-Country Money Judgments Recognition Act § 3 cmt. at 7 (Unif. Law Comm'n 2005).

important to note that, by definition, the Uniform Foreign-Country Money Judgments Recognition Act only speaks to finalized judgments and does not contend with direct application of U.S. courts of foreign revenue laws.[29]

B. *Three Justifications for the Revenue Rule*

The earliest formulation of the revenue rule is found in 1775 by Lord Mansfield in *Holman v. Johnson*.[30] The case involved a French contract for tea smuggled into England for which import taxes were not paid.[31] The smuggling party failed to pay consideration, and when sued by the French tea seller, the smuggling party argued that the contract was unenforceable because it violated the laws of England.[32] Lord Mansfield held for the plaintiff, ordering payment from the defendant on the basis that the governing law for the contract was French law and a French court would not invalidate a contract based on an English statute.[33] Lord Mansfield's oft-quoted quip, "no country ever takes notice of the revenue laws of another," became the maxim for the revenue rule doctrine.[34] Lord Mansfield cited no source for his statement but matter-of-factly relied on its authority. Since then, courts have developed different reasons for applying the revenue rule.[35] Some of those reasons reflect deep policy concerns over sovereignty, foreign policy, and respect for stare decisis. Conversely, reliance on the revenue rule can sometimes demonstrate how policy concerns appear in judicial decisions and reflect conceptions of the state that are dissonant to current understandings of globalized and interdependent legal systems. Typically, courts have relied on three justifications to apply the revenue rule: (1) a public laws justification, suggesting that revenue laws are part of a larger set of public laws, including penal laws, which courts do not apply if they are foreign; (2) a diplomatic justification, where courts reason that applying foreign revenue laws could lead to courts passing judgment on or misapplying such laws, causing international policy

29. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 3 (UNIF. LAW COMM'N 2005).

30. Holman v. Johnson (1775) 98 Eng. Rep. 1120; 1 Cowp. 342.

31. *Id.*

32. *Id.* at 1121; 1 Cowp. at 343.

33. *Id.*; 1 Cowp. at 343-44.

34. *Id.*

35. *See generally* Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring) (citing separation of powers issues if courts meddle in international affairs by applying certain foreign laws) *and* Milwaukee Cty. v. M.E. White Co., 296 U.S. 268, 273 (1935) (citing inapplicability of foreign public laws in domestic courts).

concerns for the United States; and (3) a historical justification, where courts will not engage with policy implications of the revenue rule but rely on the doctrine's long tradition to justify its continued application.

One of the earliest uses of the public laws justification is found in *Milwaukee County v. M.E. White Co.*, in which the U.S. Supreme Court reasoned that tax laws and penal laws are inextricably linked to a U.S. state's sovereignty and that they should be treated similarly and off-limits for other states' courts.[36] *M.E. White* is important for raising questions about the distinction between the enforcement of a finalized foreign judgment arising out of foreign public law and the direct interpretation and application of foreign public laws.[37] The case involved foreign judgments from a sister state within the United States and not a foreign country.[38] However, the Court's reasoning gained traction and has been subsequently used to justify the application of the revenue rule.[39] It has been pointed out that, more recently, U.S. courts do not necessarily find these arguments persuasive.[40] One such example is found in *State v. Rodgers*, where the court distinguished revenue laws from penal laws and found that they are similar "only in the sense that they are both state regulations of a civic duty, but intrinsically they are different. A penal law is punitive in nature, while a revenue law defines the extent of the citizen's pecuniary obligation to the state, and provides a remedy for its collection."[41]

More recent commentators have developed this line of thinking by pointing out a critical distinction: within a jurisdiction, enforcement of penal laws tends to be fueled by a retributive sense of justice, while enforcement of revenue laws is primarily a form of revenue collection.[42] Because they serve different purposes, there is no reason to treat them similarly. A rule barring domestic courts from enforcing the penal laws of a foreign jurisdiction makes sense, because the retribution would not be felt in the original jurisdiction, making the enforcement all but moot. In the case of revenue laws, however, the enforcement of foreign judgments based on revenue laws does not lose its core function: the revenue is still there.[43] Although revenue laws and penal laws are both

36. *M.E. White*, 296 U.S. at 273 (involving a back tax assessment of $52,165.84 by a corporate citizen of a different state).

37. *Id.* at 271.

38. *Id.* at 270.

39. *See, e.g.*, City of Philadelphia v. Austin, 429 A.2d 568, 569 (N.J. 1981).

40. Silver, *supra* note 19, at 619.

41. State *ex rel.* Okla. Tax Comm'n v. Rodgers, 193 S.W.2d 919, 926 (Okla. 1946).

42. Silver, *supra* note 19, at 620.

43. *Id.*

public in nature in the sense that they define the citizens' relationship to the state, their purposes are different and they define different ways in which the citizen is a member of the state. Revenue collection obligations are thus independent from the very localized purpose and remedy of penal laws.

The second justification for the application of the revenue rule, the diplomatic and foreign affairs justification, stems from an early case, *Moore v. Mitchell*, where Judge Learned Hand's concurring opinion stated that "the provisions of the public order of another state . . . involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities," and that judicial review of the public law of a different state "may commit the domestic state to a position which would seriously embarrass its neighbor."[44] In other words, the courts and the judicial branch are the least equipped to review issues that involve foreign policy. Judge Hand was concerned that reviewing and passing judgment on the revenue laws of a foreign country would pose difficulties for the United States.[45] If such measures should be taken at all, the political branches, not the courts, should take those actions.[46] *Moore* concerned the executors of a will and the estate being sued by the county treasurer of Grant County, Indiana, who was attempting to collect taxes alleged to be overdue and unpaid.[47] Once again, the case involved a finalized assessment of taxes, which the court refused to enforce, holding that a court would not review the tax laws of a foreign jurisdiction.[48] Commentators have argued that diplomatic concerns over application of foreign tax laws are unfounded, and the overall system benefits from streamlining tax collection across jurisdictions.[49] These arguments, in large part, have been raised by decisions such as those in *Moore*, where the court, in dicta, explained that tax laws are part of a state's public order, and provisions in those tax laws should be out of reach for a court of a foreign state.[50] Silver astutely points out that this has not actually been the case in practice.[51] What the court in *Moore* seems to be most worried about is a ruling of one country clumsily furthering the tax policies of another

44. Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring).
45. Silver, *supra* note 19, at 612.
46. *Id.* at 626.
47. *Moore*, 30 F.2d at 601.
48. *Id.* at 602.
49. Silver, *supra* note 19, at 623.
50. *Moore*, 30 F.2d at 603.
51. Silver, *supra* note 19, at 624.

state.[52] Practice has shown that courts do not usually delve into questions of policy when presented with tax issues of a foreign jurisdiction, because for the most part, courts simply recognize a final judgment and do not interpret the underlying policies that led to the judgment.[53] Enforcing a judgment arising out of a foreign tax claim by a foreign administrative tax collection agency is no different from enforcing a foreign judgment issued by a foreign court arising out of a contractual claim.

The diplomatic affairs justification does not reflect the practical realities of the revenue rule. Evidence suggests that the majority of claims barred by the revenue rule involve a finalized judgment and would not require judicial application of foreign law.[54] Subject to U.S. state foreign judgment recognition rules, domestic judges would not be tasked with analyzing a foreign tax code, and further, the party bringing the dispute and wanting it to be resolved is the very party with whom good diplomacy is to be maintained.[55] Importantly, the subset of concerns suggesting that U.S. courts would embarrass another country by applying its laws, or that U.S. courts are not equipped or prepared to faithfully apply another country's tax laws, is misguided. In most cases, courts would not have to interpret or pass judgment on foreign tax laws.

Finally, the historical justification for the continued application of the revenue rule is the most difficult to uproot. Some courts, when applying the revenue rule, have shied away from examining the policy implications of its application and consider the longevity of the revenue rule sufficient reason to continue its application.[56] Barbara Silver, in examining the historical justifications for the revenue rule, argues that the revenue rule was crafted to further economic development in England at a time when refusing to apply foreign laws could result in local economic gains; however, the world's economies are now globalized and interdependent, and refusing to cooperate with application of foreign law harms economic development.[57] At its inception, the rule was used to incentivize commerce by ensuring a contract did not go

52. *Moore*, 30 F.2d at 604.

53. Silver, *supra* note 19, at 624.

54. *Id.*

55. *Id.*

56. *See, e.g.*, Her Majesty Queen in Right of B.C. v. Gilbertson, 597 F.2d 1161, 1166 (9th Cir. 1979) ("The revenue rule has been with us for centuries and as such has become firmly embedded in the law. There were sound reasons which supported its original adoption, and there remain sound reasons supporting its continued validity.").

57. Silver, *supra* note 19, at 617.

unenforced simply because it violated the revenue laws of a foreign nation.[58] Silver also suggests that when the revenue rule was first developed, England was mainly a commercial and trading economy, and that British courts' allowance of foreign powers to tax British citizens and foreign traders doing business in Britain would have stunted British economic growth.[59] And though the development of the revenue rule was a convenient policy at the time, Silver argues that today, the opposite is the case: disallowing international cooperation hurts global economic growth.[60]

The three typical justifications for the continued application of the revenue rule do not reflect current policy realities. The United States should strive to further international collaboration and reinforce governmental institutions. Arcane arguments that underlie doctrines should be distinguished from the actual effect that such doctrines have on their intended purpose. Although the revenue rule no longer furthers the interests that it intended, the revenue rule is the U.S. baseline position on transnational collection of foreign taxes. As such, the revenue rule is a good place to begin. The revenue rule allows the political branches to decide which countries the United States wants to cooperate with through the establishment of treaties that create domestic administrative procedures. It also helps courts avoid having to decide on a case-by-case basis what claims the United States is prepared to administer. Courts cannot operate as a matter of policy, but must operate as a matter of law. Arguments based on policy do not address the legal process required to change the policy on the ground.

C. *The Exception to Comity*

As stated, in the United States, the enforcement of foreign judgments is an area governed by state law. There are, however, principles that apply across states. The U.S. Supreme Court in *Hilton v. Guyot*, decided in 1895, introduced the notion that a showing of reciprocity is a requirement for enforcing a foreign judgment.[61] It also found, albeit in dicta, that the revenue rule is part of the doctrine of comity.[62] Comity is also a judicially-made doctrine that allows courts to decline the exercise of jurisdiction over a case if a more appropriate forum

58. *Holman*, 98 Eng. Rep. at 1120.
59. Silver, *supra* note 19, at 617-19.
60. *Id.*
61. Hilton v. Guyot, 159 U.S. 113, 210 (1895).
62. *Id.* at 140.

exists elsewhere.[63] Sometimes, courts consider whether there can be a fair trial elsewhere that would be more appropriate for the claims, the existence and location of evidence required to prove a case based on such a claim, and particularly, the likelihood of a court in the foreign country to accept or reject jurisdiction to review the claims in a similar situation.[64] Comity is purely a discretionary doctrine. The Court in *Hilton* notes that "[c]omity in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[65] The Court goes on to cite the revenue rule as an exception to comity.[66] In other words, courts considering exercising comity must be sure that: (1) reciprocity exists between the United States and the other country involved in the dispute, and (2) that the case does not involve foreign tax obligations.

The court in *Her Majesty v. Gilbertson* applied the *Hilton* doctrine of comity with a twist.[67] In the case, Canada sought enforcement of a finalized assessment of taxes against U.S. loggers who logged in British Columbia and escaped the country without paying the required taxes nearly a century after *Hilton*.[68] The Ninth Circuit followed the formulation set up by the Supreme Court in *Hilton*, but incorporated a reciprocity requirement into the revenue rule itself.[69] The Ninth Circuit held that because the suit was brought by the government of Canada, the claims were mainly tributary in nature and thus the revenue rule barred the Court from reviewing the suit's claims.[70] Interestingly, the Court considered whether such a suit would be received by Canadian courts if brought by the United States.[71] It found that such a scenario was unlikely and thus application the revenue rule would be reciprocal.[72] Although the reciprocity element did not make a difference in the case, the fact that the *Gilbertson* court considered it is remarkable. It demonstrates, at the very least, the potential permeability in the revenue rule when a foreign jurisdiction is able to prove reciprocity.

William Dodge calls the collection of rules dealing with international jurisdiction, rules of decisions, and enforcement of judgments "the

63. Bradley, *supra* note 6, at 14-15.
64. *Id.* at 14.
65. *Hilton*, 159 U.S. at 163.
66. *Id.* at 205.
67. *Gilbertson*, 597 F.2d at 1163-6.
68. *Id.*
69. *Id.* at 1163.
70. *Id.* at 1166.
71. *Id.* at 1165.
72. *Id.* at 1166.

structural rules of transnational law."[73] Although the revenue rule is not framed in a way that entails its application as discretionary, the *Gilbertson* court's consideration of reciprocity suggests that courts may have some discretion in its application. But the courts are not the only actors setting out the structural rules of transnational law, and perhaps they are not even the main ones. The political branches must take the lead deciding said structural rules.

III. Busting Up the Revenue Rule: Treaties in Aid of Transnational Cooperation in the Collection of Taxes

The *Gilberston* court pinpoints an interesting fact: at least by its own account, *Gilbertson*, decided in 1979, is the first instance where a foreign state has itself brought suit in the United States hoping to have its revenue judgment enforced.[74] In other words, this is the first case where the issue before a U.S. court was whether or not to recognize another state's direct claim to enforce a tax assessment calculated against someone currently in the United States. In *Gilbertson*, the court takes this fact to mean that the revenue rule is so well-established that no serious state would question it by bringing suit itself.[75] But a different interpretation is possible: developments in domestic and international law now make the enforcement of foreign judgments possible, or at the very least, not absurd.

Notice how factually different *Gilbertson* is from *Dileng*. In *Gilbertson*, it was the Canadian state which was bringing an action against a defendant in a U.S. court.[76] In *Dileng*, the defendant is the Commissioner of the IRS, who has initiated an action against an individual to collect its taxes.[77] Dileng then sued in court to stop the action, claiming, among other things, that the IRS, a federal agency in the executive branch, has no right to collect taxes from him owed to a foreign state.[78] Already, this description clarifies the degree to which international cooperation has increased in the last forty years in the world of international tax collection, mainly through the ratification of treaties dealing with international tax issues, such as the multiple bilateral treaties eliminating double taxation between the United States and other countries.

73. William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 162 (2002).
74. *Gilbertson*, 597 F.2d at 1164.
75. *Id.*
76. *Id.* at 1162.
77. Dileng v. Comm'r of Internal Revenue Serv., 157 F. Supp. 3d 1336 (N.D. Ga. 2016).
78. *Id.* at 1340.

Throughout the twentieth century, the United States, as well as many other nations around the world, began negotiating and entering into treaties aimed at eliminating double taxation on income and tax avoidance.[79] Since then, the United States has entered into similar treaties with over sixty countries,[80] but only a few contain the key provision that facilitates enforcement. The treaty with Denmark, allows administrative cooperation, giving rise to the claims in *Dileng*. Treaties such as the Denmark Income Tax Convention are structured to facilitate transnational enforcement of tax judgments through executive and administrative procedures to minimize tax evasion in cases where an evader flees to a country party to such a treaty.[81] Although every instance of this type of treaty... Convention), not all contain the key administrative cooperation provisions in the Denmark Income Tax Convention.[82] For this reason, it is useful to examine the Model Income Convention as a proxy for current U.S. commitments to transnational cooperation in revenue collection, keeping in mind the limited scope of the Model Income Convention in administrative cooperation.[83] For this reason, it will be useful to examine the Model Income Convention as a proxy for current U.S. commitments to transnational cooperation in revenue collection.

Article 25 of the Model Income Convention establishes the Mutual Agreement Procedure.[84] This provision sets the means by which to clarify applications of the treaty and establish remedies and compliance obligations for treaty parties in the case of a dispute.[85] Although the provision is framed in terms of interpretive disputes of treaty provisions, more generally, it also establishes a procedure whereby an individual can avoid double taxation. Paragraphs 1 and 2 of Article 25 establish the procedure that the states party to the treaty agree to undertake if a person claims that one of the parties to the treaty is trying to tax her in a way that contradicts the purposes of the treaty.[86] In such a situation, the individual may "present its case to the competent

79. U.S. Income Tax Treaties - A to Z, INTERNAL REVENUE SERVICE, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited Apr. 21, 2017).

80. *Id.*

81. *Id.*

82. U.S. Model Income Tax Convention (Internal Revenue Serv. 2016) [hereinafter Model Income Convention].

83. U.S. Income Tax Treaties, *supra* note 79.

84. Model Income Convention, *supra* note 82, art. 25.

85. *Id.* ¶¶ 1-2.

86. *Id.*

authority of one or both of the contracting states."[87] The competent authority is then tasked with endeavoring to resolve the situation by agreement with the individual and the other contracting state.[88] If an agreement cannot be reached, the Mutual Agreement Procedure establishes that the competent authorities of the contracting states shall arrange to arbitrate the dispute.[89]

The provision references a "competent authority" who will review, decide, and negotiate a proper avenue to address disputes on behalf of the individual.[90] Article 3 of the Model Income Convention, in its General Definitions section, defines "competent authority" as "in the United States: the Secretary of Treasury or his delegate."[91] Conversely, the administrative agency in charge of revenue in the other country must also be a competent authority. The Model Income Convention thus makes the executive branch the authority in determining liabilities in a broader sense. Also telling is the fact that disputes are to be resolved through arbitration between competent authorities.[92] In other words, representatives of the executive branch of each country party to the treaty that gives rise to the dispute would take the dispute to arbitration without involving either country's court system. In this way, the Model Income Convention circumvents the courts and the issue of the revenue rule altogether and establishes alternative administrative routes for transnational cooperation in tax collection.

Article 26 of the Model Income Convention establishes that the contracting states shall exchange information when requested and provide administrative assistance.[93] States party to the treaty agree to exchange information that is instrumental in accomplishing the goals of the treaty.[94] This information can include "information relating to the assessment or collection, or administration of, the enforcement or prosecution in respect of, or determination of appeals in relation to, such taxes."[95] The Model Income Convention secures access to information that relates to both the factual scenario that gives rise to the claim, such as information about the individual's assets and taxable income, as well as information about the legal system and how tax laws

87. *Id.* ¶ 1.
88. *Id.* ¶ 2.
89. *Id.* ¶ 6.
90. *Id.* ¶ 2.
91. *Id.* art. 3.
92. *Id.* art. 25.
93. *Id.* art. 26.
94. *Id.*
95. *Id.*

are applied, such as how the assessment was computed.[96] The United States is a party to a number of Tax Information Exchange Agreements with a number of countries which provide that parties will exchange relevant tax information on potential evaders.[97]

Article 23 of the Model Income Convention establishes the procedure for relief from double taxation,[98] allowing individuals or corporations to object to having their income taxed by one of the contracting states if that portion of their income has already been taxed by the other contracting state.[99] The contracting state that did not receive the tax can petition, through Article 26 information about the tax payment of the individual or the corporation, to either verify that the individual or corporation has indeed paid taxes on the income or, alternatively, gather evidence of potential evasion of taxes.[100] Here, we see what cooperation entails: on the one hand, cooperation means that contracting states must fairly divide collected taxes amongst each other, as individuals and corporations cannot be taxed twice for the same portion of income. Cooperation also makes it easier to spot tax evaders and ensure compliance with the help of foreign governments.

While true that, in many ways, the Model Income Convention and its more than sixty iterations to which the United States is a party have the potential to provide an alternative method by which to collect taxes, only three such iterations actually include provisions intended to do that. These treaties work well because they incorporate some of the concerns that courts have expressed when justifying their application of the revenue rule.

First, the reciprocity concerns brought by the *Hilton-Gilbertson* line of cases are preempted by the existence of a treaty. The United States has been selective in its negotiation of treaties involving avoidance of double taxation and cooperation in the elimination of income tax evasion.[101] The list of sixty countries with which the United States has entered into such treaties reveals a list of mostly developed countries with sophisticated legal systems and stable governments capable of enforcing the obligations set out in the treaties.[102] Further, the very act of signing a treaty is a signal of expected reciprocal collaboration.

96. It is worth noting that the Model Income Convention covers individual as well as corporate income tax.

97. Model Income Convention, *supra* note 82, art. 26.

98. Model Income Convention, *supra* note 82, art. 23.

99. *Id.*

100. *Id.* art. 26.

101. U.S. Income Tax Treaties, *supra* note 79.

102. *Id.*

Finally, the procedure for settling disputes through arbitration ensures that steps will be taken by both countries to minimize exposure to arbitration of claims.

Secondly, the subset of concerns expressed by courts about the possible misapplication of foreign tax law that inform the diplomatic affairs justification for the application of the revenue rule are similarly displaced by the operative structure of the Denmark Income Tax Convention. The procedure for enforcing a tax judgment under the treaty requires a finalized assessment of taxes.[103] This assessment would be prepared by the revenue collection agency of the country where the petition is made in accordance with its domestic law, ensuring that U.S. courts or officers are not tasked with interpreting and applying foreign law. Further, Article 26's procedure for exchange of information and administrative guidance ensures that the other contracting state's revenue collection agency provides all necessary information for the IRS to effectively complete all administrative procedures. Conversely, the United States would be able to cooperate with foreign governments to ensure tax evaders are brought into compliance.

More importantly, the negotiation between executives and approval by the Senate in the advice and consent procedure to treaty creation fully address the diplomatic concerns that courts have cited.[104] The political branches define the extent of the treaty and its application. The procedure for enforcing finalized judgments ensures courts do not have to interpret and analyze foreign law. Additionally, establishing tax collection procedures in a bilateral treaty makes the entire foreign public law justification for the application of the revenue rule moot. Ratifying a treaty would signal the incorporation of tax collaboration law into U.S. law through the supremacy clause of the U.S. Constitution.[105]

The Denmark Income Tax Convention thus addresses and preempts some of the concerns that courts have expressed when justifying their continued application of the revenue rule. It is surprising that the OECD has created a Tax Model Treaty that is nearly identical to the United States' Model Income Convention in both structure and substance, but does not include the key provision in the Denmark Income

103. Denmark Income Tax Convention, *supra* note 10, art. 27.

104. Recall, for instance, the international affairs justification for the revenue rule in *Moore v. Mitchell*, 30 F.2d 600, 603 (2d Cir. 1929).

105. U.S. CONST. art. VI, cl. 2. An interesting aside is the difference between self-executing and non-self-executing treaties. Tax treaties based on the Model Income Convention are self-executing.

Tax Convention that makes cooperation and collection of taxes so effective.[106] Articles 25 and 26 in OECD's Tax Model Treaty correspond directly to the procedures established in the United States' Model Income Convention.[107] The OECD's Tax Model Treaty has served as a basis for many bilateral treaties around the world, including those of the United States.[108] More recently, the OECD has published its proposal for a Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.[109] This proposed multilateral treaty would further efforts to implement international collaboration in the collection of taxes.

These kinds of treaties promote international cooperation in the application of revenue laws, as aforementioned. The treaties, by their own terms, do not seek to limit any domestic law. For the most part, they delineate a procedure for executives from foreign countries to engage with each other in the taxation of people across borders.[110] Treaties like these involve regulatory agencies (such as the IRS in the case of the United States) and set the limits for the collaboration in which agencies can engage with their counterparts in foreign nations.[111] Such treaties can provide an avenue for foreign nations to collect revenue from tax evaders with assets in the United States without having to deal with the courts.

However, problems in international collection of taxes persist. It is also important to note that this set of treaties only deals with issues relating to income tax. Each treaty allows for international cooperation in the collection of taxes only if the tax is income-based. Such treaties do nothing to further cooperation in the collection of taxes on imports or exports, as was the case in *R.J. Reynolds* and *Gilbertson*. The real issue concerning the revenue rule is, thus, not what is so special about tax, but instead, what is so special about income tax.

106. Org. for Econ. Cooperation and Dev. [OECD], *Model Tax Convention on Income and on Capital* (July 14, 2014), https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#page3 (last visited May 14, 2018).

107. *Id.* arts. 25-26.

108. *Id.* ¶ 14.

109. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Nov. 24, 2016, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

110. *Id.* art. 16.

111. *Id.* art. 19.

IV. What is So Special About Income Tax?

William Dodge pointed out how courts' application of the revenue rule can lead to inconsistent results when a case indirectly involving a tax law will sometimes be ruled on despite leading to the application of a foreign tax law.[112] Equally disconcerting is how the dual regimes of the revenue rule and income tax treaties have effectively created two postures on how the United States engages in international efforts to eliminate tax evasion: full cooperation with three developed nations when the evasion relates to income taxes and non-cooperation with other nations.

This Note urges closing the gap created by the dual regimes of transnational tax collection by proposing all income tax treaties include the cooperation provisions in the Denmark Income Tax Convention, and by proposing a Model Treaty. This proposed Model Export Tax Treaty could mimic the structure of the Model Income Convention by providing an avenue for claims from administrative revenue collection agencies through a mechanism like that of Article 25 and pledging collaboration in the exchange of relevant information in the same way that Article 27 does for the Denmark Income Tax Convention. Doing so would ensure that the same concerns that fuel the revenue rule and are addressed and preempted in the Model Income Convention would be addressed and preempted in the Model Export Tax Treaty. Having the United States enter into this treaty with a select number of other nations would help improve global efforts to collect taxes and reduce tax evasion. This would ensure that the United States no longer presents an inconsistent position towards cooperation in tax collection depending on the type of taxes. It would also ensure that U.S. collaboration no longer depend on the meritless contingency of the type of tax being collected, but instead depend exclusively on the identity of the counterparty and whether the United States wants to cooperate with it.

The structure of the proposed Model Export Tax Treaty mimics the Model Income Convention because, as we have seen, the Model Income Convention incorporates the policy concerns that the revenue rule poses. Three elements are important in guaranteeing the success of the Model Export Tax Treaty: (1) clear definition in scope of the taxes covered,[113] (2) replication of the Mutual Assistance Procedure and exchange of information and administrative guidance procedures

112. Dodge, *supra* note 73, at 176-77.

113. The *Model Income Convention* does this in Articles 1-22.

found in Articles 25 and 26 of the Model Income Convention, and (3) entrance into the treaty only by countries with similar administrative revenue collection capabilities as the IRS in the United States.

Elements (2) and (3) are covered by inertia. The treaty signing process would lead the United States to select nations with similar goals and capabilities to negotiate and eventually sign the proposed treaty. Similarly, establishing identical procedures for cooperation in income and import and export taxes makes sense from an administrative standpoint. The more difficult part is establishing the scope of the treaty. The Model Income Convention devotes an article to each form of income tax and illustrates how each source of income will be treated (income from services, as opposed to income from capital gains, etc.).[114] Consideration must be given to the different potential exports and how each state decides to treat each export. It would be useful to link the different import rates to the tariff schedule published by the U.S. International Trade Commission.[115] For any given country with which the United States would enter into the treaty, the particular provisions for each import and export would reflect the treatment settled by the tariff schedule. Further, Article 28 of the Model Income Convention establishes that contracting states must notify counterparties of any subsequent changes in domestic law that affect the provisions of the treaty.[116] Apart from providing notifications about changes in the law, states are given the flexibility of amending the treaty or, if the resulting changes in domestic law are contradictory to the purposes of the treaty, deciding not to enforce sections affected by the changes in the law.[117] A similar provision in the proposed Model Export Tax Treaty would ensure that the treaty is regularly amended to remain consistent with domestic law.[118] Doing this would serve the dual purposes of minimizing potential conflict with domestic law and addressing concerns of sovereignty in a globalized system, while at the same time allowing the IRS to work together with other nations to collect taxes owed.

Reluctance on the part of the United States to enter into a single treaty meant to further cooperation in the collection of taxes involving

114. Model Income Convention, *supra* note 82, arts. 6-21.

115. U.S. Int'l Trade Comm'n, No. 4660, Harmonized Tariff Schedule of the U.S. (2017).

116. Model Income Convention, *supra* note 82, art. 28 ¶ 1.

117. *Id.*

118. One possible explanation for why the United States may be reluctant to pursue the enactment of a Model Export Tax Treaty is the administrative difficulties created by a tariff schedule that changes much more quickly than tax rates. But once again, the proposed treaty's Subsequent Changes in Law provision would not commit the United States to rates that are inconsistent with domestic law.

imports and exports signals that the political branches—executive and legislative—are not ready to enter a world of full international cooperation in tax collection. However, this has led to the dual regimes described previously and seen in the contrary results between *Gilbertson* and *R.J. Reynolds* on the one hand and *Dileng* on the other, merely because of the distinction in the source of the underlying tax obligation. How can we account for this disparate treatment of transnational tax collection?

There are presumably two arguments that explain the contrary postures of the United States to the international collection of income taxes and import and export taxes. The first presumptive argument is that import taxes are inherently different from income taxes. The second is that committing to helping root out import and export tax evaders would not be cost-beneficial to U.S. interests. As to the first putative argument, recall Barbara Silver's point regarding the difference between purely tributary tax laws and retributive penal laws.[119] A similar distinction is relevant here: it is easy to see how import and export taxes are sometimes about more than pure revenue collection. Import and export taxes can help shape trade. Tariffs are often used to develop domestic economic interests.[120] Contrary to this, income taxes are purely about revenue collection. While the distinction is accurate, it does not foreclose the possibility that there may be money left on the table by refusing to engage in the collection of import taxes.

Another way in which income taxes and import and export taxes are different is that claims based on income tax evasion are typically single claims unencumbered by complex intertwined legal issues, while claims for import and export tax evasion tend to bring a cluster of other claims ranging from fraud to contract breach.[121] This could presumably dissuade the political branches of government from treating income tax and import and export taxes alike, because issues like these raise questions over governing law and proper venue for claims. However, the proposed Model Export Tax Treaty would potentially simplify these issues. Given that the Model Export Tax Treaty, modeled after the Model Income Convention, would be an administrative procedure, the alleged evader would be forced to go to court to seek an injunction

119. Silver, *supra* note 19, at 620.

120. *See e.g.*, Rodney Ludema, Anna Maria Mayda & Prachi Mishra, *Protection for Free? The Political Economy of U.S. Trade Suspensions* 2 (Mar. 2011), https://canvas.harvard.edu/files/1729712/download?download_frd=1&verifier=MjHO9kHozCkvmYVVgIg9suzAIwYJ5L87FpRjRWfM (last visited May 15, 2018).

121. Recall, for instance, how *R.J. Reynolds* involved a number of RICO claims that went unsettled.

against the enforcement of the administrative procedure as Dileng tried and failed to do. Having the potential evader as a plaintiff in court is probably the best scenario in terms of discovery of evidence, as the U.S. government would then be able to counterclaim other entangled legal issues.

The second potential reason why the United States might be disinclined to enact the Model Export Tax Treaty is that doing so may overburden the IRS, and returns may not account for that. Notwithstanding, the OECD has pointed out that there are hundreds of billions of dollars in lost revenue that governments worldwide lose for non-cooperation in the collection of taxes.[122] Further, it is unlikely that additional procedures would overburden the IRS, given its size and capacity. Just as was done before the United States entered into sixty income tax treaties, before entering into the proposed Model Export Tax Treaty with any foreign nation, the United States could set highly selective standards to decide which countries are likely to devote equal resources to claims involving the United States to maximize possibilities that return from collection of taxes does not yield losses for the United States.

V. Conclusion

The degree of engagement by the United States in international cooperation for the collection of taxes is internally contradictory. The relationship between the default common law position imposed by the revenue rule and the series of tax treaties that inch towards international cooperation, but only for a particular kind of revenue collection, is inconsistent. Most importantly, the United States faces millions in lost revenue if it does not take action to treat evasion of import and export taxes with the same full-fledged cooperation it treats evasion of income taxes from developed nations. Given how well-crafted and thorough the Denmark Income Tax Convention is in addressing U.S. policy concerns towards international cooperation, it would be in the United States' interests to export its cooperation provisions, apply them to all double-taxation treaties, and structure them into a Model Export Tax Treaty. Enacting the proposed Model Export Tax Treaty would be a confident first step towards that cooperation. Doing so would also be an important step towards consistency of doctrine, ensuring that the U.S. legal system does not have to second-guess itself when examining claims involving back taxes.

122. Org. for Econ. Cooperation and Dev., *OECD Work on Taxation*, at 9 (2018), http://www.oecd.org/ctp/treaties/centre-for-tax-policy-and-administration-brochure.pdf.