FOREIGN PUBLIC LAW AND THE COLOUR OF COMITY: WHAT'S THE DIFFERENCE BETWEEN FRIENDS?

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I. INTRODUCTION

It has often been said that in civil disputes, the courts of one country will not give effect to the public laws of another.[1] At its core, the rule appears to have remained largely intact since its first articulation more than two centuries ago.[2] However, courts seem to continue to find it a challenge when applying the rule to articulate its elusive rationale and to chart its scope. Further, despite widespread agreement on the basic rule, the judges of common law countries have continued to pronounce subtly different formulations of the rationale underlying it and this has resulted in different understandings of its proper scope of application.

One striking example of this divergence of interpretation was evident in the recent decision of the U.S. courts in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*[3] to deny Canada the opportunity to make a RICO Act[4] claim for losses suffered by it through a smuggling operation conducted by American tobacco companies. Although Canada was held to have standing as a "person" under the Act to seek relief, the U.S. courts held that the action

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1. L. Collins, ed., *Dicey and Morris on the Conflict of Laws,* 13th ed. (London, Sweet and Maxwell, 2000), ch. 5; P. North and J.J. Fawcett, *Cheshire and North's Private International Law,* 13th ed. (London, Butterworths, 1999), ch. 8; P. Nygh and M. Davies, *Conflict of Laws in Australia,* 7th ed. (Sydney, Butterworths, 2002), ch. 18; J.-G. Castel and J. Walker, *Canadian Conflict of Laws,* 5th ed. (Markham, Ont., Butterworths, 2002), ch. 8.
2. *Boucher v. Lawson* (1734), 95 E.R. 53 (K.B.); *Holman v. Johnson* (1775), 98 E.R. 1120 (K.B.); *Planché v. Fletcher* (1779), 99 E.R. 164 (K.B.).
3. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.,* 268 F.3d 103 (2nd Cir. 2001), cert. denied 123 S.Ct. 513 (2002) (hereafter *Reynolds*).
4. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 (hereafter RICO Act) permits civil actions pursuant to §1964(c) against offenders under the statute by persons harmed in their business or property.

was barred by the revenue rule because they could not entertain tax claims made by foreign governments. The task of this comment is not to review the decision in *Reynolds* and to place it in its proper jurisprudential context. There exists already a rich literature in which many academics have argued that the rule has been applied mechanically and too broadly.[5] Nor is it the task of this comment to assess the soundness of the ruling in *Reynolds* or the quality of the contribution that it has made to the law. This has been done, and in a way that leaves little to be added, by Vaughan Black in his article "Old and in the Way? The Revenue Rule and Big Tobacco".[6] Rather, this comment-on-a-comment seeks only to pick up where Black's article leaves off, by offering a suggested approach to the perplexing questions raised at the end of his analysis. Those questions are: Why, if the only plausible justification for the foreign public law exception is reciprocity, do the courts of common law countries seem to take so little account of the way in which the foreign public law exception is applied by the courts of the country whose public law is sought to be vindicated in local proceedings; and why do the courts of different countries seem so determined to set different standards for the application of the rule?

II. TWO RATIONALES

Some brief observations on the history and rationale of the foreign public law exception will assist. Although courts will apply foreign law to claims brought before them, they will not apply foreign penal laws, revenue laws or other public laws, and, although they will enforce many of the judgments of foreign courts, they will not enforce judgments in which the claims are based on foreign penal laws, revenue laws or other public laws. In most

5. J.-G. Castel, "Foreign Tax Claims and Judgments in Canadian Courts" (1964), 42 Can. Bar Rev. 277; P.B. Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984), 55 Brit. Yearbook Int'l L. 111; (1989), 48 C.L.R. 417; P. St. J. Smart, "International Insolvency and the Enforcement of Foreign Revenue Laws" (1986), 35 I.C.L.Q. 704; B. Silver, "Modernizing the Revenue Rule: The Enforcement of Foreign Tax Judgments" (1992), 22 Ga. J. Int'l and Comp L. 609 at p. 617; F. Strebel, "The Enforcement of Foreign Judgments and Foreign Public Law" (1999), 21 Loyola L.A. Int'l & Comp. L.J. 55 at p. 57; F. Kovatch Jr., "Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule" (2000), 22 Houston J. Int'l L. 266 at p. 267.

6. V. Black, "Old and in the Way? The Revenue Rule and Big Tobacco", *supra*, this issue, p. 1.

common law countries this is called "the foreign public law exception" or the "exclusion of foreign law"; in the United States the rough equivalent of this rule, which is directed specifically at revenue laws, is called the "revenue rule".[7] While the rule has a single origin in the common law, it has developed into various doctrines in common law countries. The rationales ascribed to it appear to have been shaped by the adjudicative traditions in those countries in ways that suggest a continuing divergence in scope and application of the rule in the years to come.

Black has described and criticized five arguments for the rule: the sovereignty argument, the embarrassment argument, the difficulty argument, the governmental interest argument, and the executive-action argument.[8] These arguments appear to be based on two related sets of concerns — those of justiciability and sovereignty. Thus, for example, when the Supreme Court of Canada refused to enforce an American tax judgment in *United States of America v. Harden,*[9] it cited the two rationales previously given for the foreign public law exception by the House of Lords in *Government of India (Ministry of Finance) v. Taylor.*[10]

One rationale, which was cited by the House of Lords and later adopted by the Supreme Court of Canada in *Harden*, was originally articulated by Hand J. in *Moore v. Mitchell*[11] — that courts are incompetent to deal with questions that require the evaluation of the revenue laws of other states. Such questions "are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbours. . . . No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notion of what is proper."[12] Although, as will be discussed, this explanation incorporates some of the sovereignty concerns — those related to interfering in matters that are best addressed by the executive and best resolved through diplomacy — it has less to do with the courts' obligation to support the country's sovereignty and more to do with courts'

7. There may be considerations that distinguish the application of the rule to penal laws and to other public laws from its application to revenue laws, but the underlying concerns are broadly similar.
8. See Black, *supra*, footnote 6.
9. [1963] S.C.R 366, 44 W.W.R. 630 (hereafter *Harden*).
10. [1955] A.C. 491 (H.L.) (hereafter *Taylor*).
11. *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929), affd on other grounds 281 U.S. 10 (1930).
12. *Ibid.*, at p. 604.

fundamental incapacity to address the kinds of issues that are integral to such matters.

The other rationale is that the rule applies to prevent the courts from giving effect in their adjudication of a civil dispute to the sovereign will of a foreign power. As the court explained, "enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes and . . . an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties".[13] Thus, the first rationale primarily addresses concerns for manageable judicial standards and the second rationale primarily addresses concerns for sovereignty.

III. MANAGEABLE JUDICIAL STANDARDS

When it was first articulated and applied, it is arguable that the rule was not primarily concerned with sovereignty, but with the maintenance of manageable judicial standards in private law disputes. The rule required the court to segregate issues that would necessitate an evaluative inquiry into a foreign sovereign's policies and to determine the claim without regard to those issues. Thus, in the leading decision in *Holman v. Johnson,* when Lord Mansfield held that "no country ever takes notice of the revenue laws of another",[14] this was intended to prevent the parties from introducing issues of government policy into the determination of their rights and obligations to one another. In the same way that an equitable entitlement might be considered in the absence of legally enforceable rights, so too would the courts entertain as much of the claim as was cognizable in a private law determination, by taking no notice of the foreign revenue laws that might apply. While a court cannot ignore local revenue laws, it could ignore foreign revenue laws so as to maximize the private law regulation of crossborder trade.

The fact that this was not merely a colourable assertion of a concern for sovereignty was clear on the facts of *Holman v. Johnson.* In the dispute between Holman and Johnson their mutual rights and obligations were held to be governed by French law. Johnson's defence was that Holman knew that the contract was

13. *Taylor, supra,* footnote 10, at pp. 511-12.
14. *Holman v. Johnson, supra,* footnote 2, at p. 1121.

illegal under English law and therefore unenforceable. The court rejected Johnson's attempt to cite Holman's knowledge of Johnson's intention to violate English customs duties as a reason for avoiding his obligation to pay Holman for the tea he had purchased from Holman. In this case, it was clear that the ruling had nothing to do with sovereignty because the "foreign" public law which the English court refused to apply was an English law.

In *Moore v. Mitchell*[15] the American courts simply took the requirement to segregate issues of the policies of foreign sovereigns to its logical conclusion: if the basic viability of a claim depended upon a determination entailing an inquiry into the policies of a foreign sovereign, the claim must fail. For example, taxes levied in a deceased's former residence would not be recoverable through estate proceedings in another jurisdiction. If the basis of the right sought to be vindicated consisted solely in the taxation law of a different jurisdiction, it would be impossible to determine its validity without engaging in an assessment of the policy of a foreign sovereign and the court was not equipped to do this. While it has been thought that with the assistance of experts of foreign law courts are well equipped to assess the strengths and weaknesses of claims based on foreign private laws, it has been thought that they are not so readily able to assess the strengths and weaknesses of claims based on foreign public laws. Pursuant to the rule pronounced in *Holman v. Johnson* and *Moore v. Mitchell*, then, courts would determine only the rights and obligations of the parties *inter se* that were not purely derivative of the sovereign authority of a foreign state. In some cases this would prove fatal to the claim, in others it would not, or it would prevent only a portion of the claim from being entertained.

There could be something to be said for this. Specialized administrative tribunals are established from time to time in legal systems that are otherwise composed of courts of general jurisdiction for the purpose of resolving disputes in areas of the law that are the subject of particular government initiatives, and the decisions of these tribunals are often required to be given a degree of deference by the courts on the basis that the courts lack the specialized expertise required to adjudicate such matters. Similarly, but to a lesser extent, specialized *courts* have been established to deal with local revenue matters in legal systems that otherwise favour the

15. *Supra*, footnote 11.

use of courts of general jurisdiction. For example, in Canada, although the Federal Court now has a mandate to address a range of subjects arising under federal law — including intellectual property, maritime law, tax and citizenship — when it was first created in 1875 as the Exchequer Court of Canada, it was established expressly for the purpose of determining matters of revenue and the Crown in right of Canada. Moreover, in recent years it has been thought to be necessary to create from the Federal Court an even more specialized tribunal, once again to be devoted exclusively to the adjudication of tax claims — first as the Tax Review Board, and then as the Tax Court of Canada in adjudicating income tax appeals.[16]

Since local revenue matters have long been accepted as presenting special adjudicative challenges sufficient to require the maintenance of specialized tribunals, it is not surprising that concerns about manageable judicial standards could arise in the adjudication of claims based on foreign revenue laws. Still, in local revenue matters, it seems that the specialized courts are created for the sake of administrative efficiency and not to address any fundamental or absolute lack of competence in the ordinary courts. Moreover, the lack of manageable judicial standards would not explain the application of the rule in cases involving the recognition and enforcement of foreign judgments based on foreign public laws because the process of recognition and enforcement is not supposed to involve any adjudication or any review of the merits of the claim or defence. Accordingly, the need to maintain judicially manageable standards does not provide a complete account of the reason for applying the rule.

Similarly, the lack of manageable judicial standards would not appear to explain the application of the rule to claims that are cognizable under the law of the forum but that involve some reference to a foreign revenue law, as appears to have happened in the *Reynolds* case. For example, where this occurred in an estates matter[17] it was described by Adrian Briggs as a situation in which "a judicial phobia against aiding the enforcement of foreign revenue laws prevents the court doing what is required by the otherwise

16. The Tax Court of Canada was created in 1983 to replace the Exchequer Court: Tax Court of Canada Act, R.S.C. 1985, c. T-2.

17. *Damberg v. Damberg*, [2001] N.S.W.C.A. 87.

applicable *lex fori*".[18] Briggs suggested that the better approach in such a situation was for the courts not to characterize the *law* so as to consider whether to exclude it, but to characterize the *claim* and to permit it to be made when it is well founded under the law of the forum, but not otherwise. As will be seen, this appears to be the approach that Canadian courts have taken to these situations.

IV. SOVEREIGNTY

Regardless whether courts are capable of adjudicating disputes entailing the application of foreign public law, it has been said that they should not do so, because this would be tantamount to giving effect in one country to the sovereign will of another country. There are bound to be some cases in which the sovereignty and the justiciability rationales are both cited as warranting the application of the rule. For example, the segregation of the issues necessitating inquiry into the policy of a foreign sovereign could alone have proved fatal to the claim in *British Columbia v. Gilbertson,*[19] a claim brought in the U.S. courts by the province of British Columbia for logging taxes. However, perhaps because the claimant was a foreign sovereign seeking enforcement of a judgment for a non-commercial debt, the court in *Gilbertson* was prompted to rely on the sovereignty rationale for the revenue rule.

The sovereignty rationale is, however, necessary to explain the application of the rule in situations in which the claim, though framed as a private law claim or one that resembles a private law claim, is brought by a foreign government, and in situations in which the claim, though brought by a private sector plaintiff, includes some public law feature. Mr. Briggs observed that, "there are probably two elements which go to identify a revenue law as such: the legal basis for the demand for payment, and the identity of the payee".[20] However, many claims in which the rule may apply have no such *indicia*, and they do not raise concerns about manageable judicial standards. In these situations the potential for the adjudication of the claim to infringe the sovereignty of the forum must be taken as the measure of whether the matter should be entertained by the court.

18. A. Briggs, "The Revenue Rule in the Conflict of Laws: Time for a Makeover" (2001), Sing. J. Legal Stud. 280.
19. 597 F.2d 1161 (9th Cir. 1979).
20. Briggs, *supra*, footnote 18.

Nowadays, with the expansion of government regulation and participation in the economy and with the alternating allocation to public and private sector of the entitlement to seek recovery for collective losses and to vindicate public interests, the identity of the claimant and the way in which the claim is framed seem less likely to be determinative of whether the rule should apply to the claim. In certain respects these features have never been completely determinative and the substance of the claim has always been subject to scrutiny.[21] In *Huntington v. Attrill*[22] the Privy Council considered but rejected an argument that a claim made pursuant to the availability of a private right of action under a regulatory statute should be dismissed as based on a foreign public law. Thus the court considered the argument that claims brought by those acting as private attorneys general could be subject to the rule even though the claimant was not a foreign sovereign and even though the beneficiary of the award was also a private person.

The application of the rule to these kinds of cases is of considerable practical significance to Canadians in view of the fact that the inclusion of a private right of action in regulatory regimes such as those relating to organized crime,[23] securities regulation[24] and consumer protection is not uncommon in the United States and in view of the fact that judgments sought to be enforced in Canadian courts are overwhelmingly of American origin. Further, since the results of such claims are often awards of treble damages, which are unenforceable in England,[25] there is little opportunity for Canadian courts to refer to common law developments on this point in the English courts. Awards of damages that would appear in substance to be fines or otherwise unrelated to the compensatory function of private law have routinely escaped the application of the rule in enforcement actions in Canadian courts, even when the law providing for treble damages was applied in breach of the parties' agreement that some other law should apply[26] and even when compensation for the harm had already been determined through an

21. *Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516.
22. [1873] A.C. 150 (P.C.).
23. RICO Act, *supra*, footnote 4.
24. Securities Exchange Act, §10(b)(5).
25. Under the Protection of Trading Interests Act, 1980 (U.K.) 1980, c. 11.
26. *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573, 184 W.A.C. 186 (B.C.C.A.).

arbitral process and the outstanding claim was based solely on a statutory entitlement to a fixed amount.[27]

Canadian courts have seemed so determined to enforce foreign judgments to which this exclusionary rule might apply that the Canadian government thought it was necessary to restrain them from doing so by legislation, should the opportunity arise in respect of judgments granted under Title III of the Cuban Liberty and Solidarity (Libertad) Act (the Helms-Burton legislation). That Act was passed with the express purpose of giving effect to a U.S. foreign policy that conflicted with Canadian foreign policy on transactions between Canadians and other non-Americans outside the United States. The Canadian blocking legislation provided that judgments made pursuant to the Libertad Act were not enforceable in Canada.[28]

Just as the fact that the claimants were private persons does not preclude the application of the rule, so too does the fact that the claimants are governments not guarantee the application of the rule. For example, in *Taylor*[29] the House of Lords emphasized the distinction between the sovereign claims of foreign governments, which could not be entertained, and the patrimonial claims of foreign governments, which could be entertained. The entertainment of a patrimonial claim by a foreign government, or the enforcement of a judgment of a patrimonial nature, would not interfere with local sovereignty. This distinction has been particularly important in recent years in Canada, in determining whether entertaining a claim or enforcing a judgment by the U.S. government would be giving effect to the will of a foreign sovereign. For example, the Ontario courts in *United States of America v. Ivey*[30] ordered the enforcement of a judgment in favour of the United States government for the costs of an environmental clean-up operation pursuant to the Comprehensive Environmental Response, Compensation and Liability

27. *United Laboratories, Inc. v. Abraham*, [2002] O.J. No. 3985 (QL), 117 A.C.W.S. (3d) 813 (S.C.J.).
28. Section 7.1 of the Foreign Extraterritorial Measures Act, R.S.C. 1985, F-29, as am., provides that "Any judgment given under the law of the United States entitled Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 shall not be recognized or enforceable in any manner in Canada." The LIBERTAD Act is found at 22 U.S.C. §6021 (supp. III, 1998).
29. *Taylor, supra*, footnote 10.
30. (1995), 26 O.R. (3d) 533, 130 D.L.R. (4th) 674 (Gen. Div.), affd 30 O.R. (3d) 370, 139 D.L.R. (4th) 570 (C.A.), leave to appeal to S.C.C. refused [1997] 2 S.C.R. x, 145 D.L.R. (4th) vii (hereafter *Ivey*).

Act 1980.[31] Citing the decision of the High Court of Australia in *A.G. v. Heinemann Publishers Australia Pty.*,[32] the court adopted the following clarification of the foreign public law exception provided in *Heinemann*: "It would be more apt to refer to 'public interests' or, even better, 'governmental interests' to signify that the rule applies to claims enforcing the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government."[33]

In *Heinemann*, the action, though framed in breach of contract and breach of fiduciary duty, was held to be "in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service . . .". The Ontario court in *Ivey* distinguished the claim before it as one that could not "fairly be characterized as an attempt by a foreign state to assert its sovereignty within the territory of Ontario". As the court explained, "the defendants chose to engage in the waste disposal business in the United States and the judgments at issue here go no further than holding them to account for the cost of remedying the harm their activity caused".[34]

Although the requirement of examining the substance of the claim seems to be fairly obvious, the results of the analysis cannot readily be understood solely as a product of considering whether the claim advances the sovereign interests of a foreign government. In *Heinemann*, a claim that was readily cognizable as a private law claim (for a breach of the fiduciary duty of a departing employee) was dismissed because the duty of confidentiality related not to trade secrets but to national security. In *Ivey*, a judgment that was based on a government program for imposing liability and seeking recovery for environmental remediation was enforced because the government program had its roots in a private law claim. As the Court of Appeal for Ontario explained,

> In this case the cost recovery action is unlike the laws typically associated with the other "public law" public law exception, such as import and export regulations, trading with the enemy legislation, price control and anti-trust legislation.

31. Comprehensive Environmental Response, Compensation and Liability Act, 1980 42 USC, s. 9607(a).
32. (1988), 165 C.L.R. 30 (hereafter *Heinemann*).
33. *Heinemann, ibid.*, at p. 42.
34. *Ivey* (Gen. Div.), *supra*, footnote 30, at pp. 548-49.

> The cost recovery action, although asserted by a public authority, is so close to a common law claim for nuisance that it is, in substance, of a commercial or private law character.
>
> The cost recovery action under this statutory regime is not the unique right of government; it may be asserted against government and it may be asserted by between [*sic*] private parties.[35]

In neither *Heinemann* nor *Ivey* did the claims present difficulties of manageable judicial standards, and in both cases, the claims, though asserted by governments for governmental purposes, were framed in ways that resembled or were derived from private law claims. It is difficult then to explain the different results in those cases as a function simply of the sovereignty concern underlying the rule.

V. EMBARRASSMENT AND THE EXCEPTION FOR FRIENDLY FOREIGN STATES

Perhaps the best explanation for the operation of the rule in these cases comes from the area of overlap between the justiciability and sovereignty rationales. This area of overlap was described by Black in his discussion of the "embarrassment" and the "executive action" arguments. These arguments reflected the concern that in attempting to adjudicate a claim that might give effect to a foreign government's policies, a court might make a pronouncement that would embarrass its own government by undermining a position that its own government wished to take or to maintain on the issue in its dealings with the foreign government.

The evolution of this concern in the English jurisprudence was traced by Justice Lawrence Collins in the 2001 F.A. Mann lecture under the descriptive heading "the one voice principle".[36] As Collins J. explained, it has been considered important in matters of foreign relations for the executive and the judiciary to speak with one voice. Among the various implications this has had for the courts has been the requirement to decline to decide matters where it might not be possible for the courts to speak in one voice with the executive and to maintain their impartiality in deciding the case. Interestingly, Collins J. noted at the outset that this was a subject that had attracted far more attention in the United States than in England. The difference in the approach taken in various countries

35. *Ivey* (C.A.), *ibid.*, at p. 374.
36. L. Collins, "Foreign Relations and the Judiciary" (2002), 51 I.C.L.Q. 485.

to the problem underlying the "one voice principle" could hold the key to the questions posed at the end of Black's paper.

The problem that gives rise to the concern to speak with one voice has been particularly evident in situations in which the rule was considered for application to the policies of "friendly foreign states". Just as the concern for manageable judicial standards could not fully explain the application of the rule in cases involving the recognition and enforcement of judgments, so too the concern for sovereignty cannot readily explain the application of the rule to claims made by foreign sovereigns. By making these claims, foreign sovereigns seem to be waiving any entitlement to have their policies shielded from scrutiny by the courts. The concern does not, therefore, relate to the risk of embarrassing the foreign sovereign, but rather the risk of conflict with a policy of the forum government in its relations with the foreign state in question and, hence, embarrassment to the forum government.[37]

It was the "executive action" argument, or "one voice principle" that prompted the High Court of Australia to reject the suggestion made to it in *Heinemann* that an exception to the rule should be made for friendly foreign states where close relationships exist such as those between Australia and the United Kingdom, and presumably for claims in which there is no obvious controversy about the right to be enforced. The suggestion was rejected by the High Court because if a less friendly state were to resort to the courts for a similar purpose, the courts would not be competent to assess the degree of friendliness, and the determination could embarrass Australia in its international relations. Interestingly, the court described this result as a function of "international comity". Citing the House of Lords decision in *Buttes Gas and Oil Co. v. Hammer,* the court further explained that the comity principle was "one of 'judicial restraint or abstention' ".[38]

A very different perspective was evident in decision of the Ontario courts in *Ivey.* In *Ivey* the court at first instance refused to characterize the claim as one based on a foreign public law because "[t]he principle of comity . . . should . . . inform the development of this area of the law" and "it would be highly undesirable in

37. This was the concern that Black considered to be the only plausible argument in support of the rule.

38. [1982] A.C. 888 (H.L.) at pp. 931-32.

principle to interpret and expand the 'public law' defence to encompass the circumstances of the case at bar".[39] Comity was given as a reason for *not* applying the rule, and for enforcing the foreign judgment because the foreign law in question was the law of a neighbouring state, and it was a law that dealt with an obvious and significant transborder issue. As the court concluded,

> There is clearly a public purpose at stake, but in my view, the presence of that public purpose does not defeat the plaintiff's case. Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement. In an area of law dealing with such obvious and significant transborder issues, it is particularly appropriate for the forum court to give full faith and credit to the laws and judgments of neighbouring states.[40]

It is interesting that the Ontario courts would describe this very different result from that reached by the Australian courts in *Heinemann* as equally a function of comity. As Collins J. noted, "[c]omity is a chameleon word".[41] Perhaps, though, just as the chameleon's colour changes to match its environment, so too there is a logic to the varying interpretations of the requirements of comity in the application of the rule that can be explained by properly identifying the environment that establishes its requirements.

At the very least, it would seem that in situations of uncertainty, the inclination of Canadian courts has not been to exercise restraint and to decline to decide a case, but rather to interpret the rule narrowly, and to exercise discretion to adjudicate the claim and to apply the foreign law out of a spirit of international cooperation that they associate with "comity". In the name of comity and international judicial cooperation, Canadian courts have shown an extraordinary preparedness in recent years to grant restitutionary remedies to the United States as plaintiff in connection with breaches of American regulatory standards. In *United States of American v. Levy*[42] the United States sought injunctive relief in Ontario including an order tracing and freezing the defendants' assets. This order was intended to support interlocutory relief

39. *Ivey* (C.A.), *supra*, footnote 30, at p. 549.
40. *Ivey* (C.A.), *ibid.*
41. Collins, *supra*, footnote 36, at p. 504. This point is explored in greater detail in Lawrence Collins, "Comity in Modern Private International Law" in James Fawcett, ed., *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford, Oxford University Press, 2002).
42. (1999), 45 O.R. (3d) 129 (Gen. Div.).

granted by the U.S. court to a court-appointed receiver in proceedings in the United States District Court for restitutionary relief and the recovery of funds paid by American consumers to the Canadian defendants in the course of the defendants' fraudulent lottery ticket telemarketing scheme. The Ontario court rejected the submission that the relief sought was for the enforcement of the American penal, revenue or public laws and should be refused. Then, in *United States (Securities and Exchange Commission) v. Cosby,*[43] the Securities and Exchange Commission (SEC) sought an order enforcing the disgorgement portion of the relief granted in a default judgment of the Southern District of New York. The defendant objected that under a concurrent criminal indictment for the same delict, the United States Attorney General had sought a forfeiture order that would supersede any disgorgement order requiring the SEC to turn over the funds it obtained to the authorities prosecuting the criminal complaint. Following a precedent of the British Columbia Supreme Court in *United States Securities and Exchange Commission v. Shull*[44] the court held that the criminal proceedings initiated by the U.S. Attorney General were distinct from the civil proceedings brought by the SEC. The existence of the criminal proceedings based on the same events did not prevent the SEC from pursuing enforcement remedies in British Columbia. Further, the fact that the SEC judgment in the U.S. District Court also imposed "civil penalties" did not prevent the British Columbia court from enforcing the disgorgement order even if the portion of the judgment ordering "civil penalties" was not enforceable.

All in all, Canadian courts have shown a remarkable determination to limit the effect of the foreign public law exception upon the ordinary application of foreign law in resolving private disputes. Despite the *Harden* decision of the Supreme Court of Canada some 40 years ago, it seems that this tendency has been evident for some time. In one of the few cases on these issues to reach the Supreme Court of Canada, *Laane v. Estonian State Cargo & Passenger Steamship Line,*[45] the court felt the need, in rejecting the claim based on a decree of the Estonian Soviet Socialistic Republic that purported to nationalize all Estonian merchant ships, to add that the decrees were of an evident confiscatory nature and that it was

43. [2000] B.C.J. No. 626 (QL), 95 A.C.W.S. (3d) 1058 (S.C.).
44. [1999] B.C.J. No. 1823 (QL), 43 W.C.B. (2d) 247 (S.C.).
45. [1949] S.C.R. 530, [1949] 2 D.L.R. 641.

therefore contrary to public policy to enforce them. In stark contrast with the approach evident in *Heinemann* that the courts should at all costs avoid situations that would require them to pass judgment on the public laws of foreign states, the Supreme Court of Canada regarded it appropriate to express disapproval of the foreign law to support the refusal to apply it.

Accordingly, in cases that challenge the courts to reconsider the rule, questions such as whether the rule should continue to be applied routinely to claims brought by foreign governments, and what rationale would account for the rule in a way that would permit its evolution, have been answered in very different ways by the courts of the various common law countries. Why would common law courts take such very different approaches to the operation of the rule, particularly when this is done in the name of comity, a principle that would seem to urge upon the courts the importance of taking similar approaches?

VI. THE SEPARATION OF POWERS AND THE COLOUR OF COMITY

Surprising though it may seem, as suggested above, it may be that the courts have taken dramatically different approaches in the name of comity because they have different understandings of the principle of comity itself. This is perhaps most clearly illustrated by the way in which the rule was interpreted in recent decisions of the U.S. courts arising from tobacco smuggling. In *Reynolds*, the reason for applying the rule may have seemed obvious in that the harm suffered by Canada was clearly one of lost revenues pursuant to the smuggling of cigarettes across the Canada-U.S. border. However, the pressure to relax the rule was considerable.

The need to dismiss the claim for a lack of judicially manageable standards was obviated by the fact that the claim was made pursuant to U.S. federal legislation — the RICO Act. In this way, it could be said that the claim was not based on a foreign public law at all, but rather on a local public law. This was demonstrated by the decisions in the related criminal actions in *United States v. Trapilo* and *United States v. Pierce*,[46] in which the court segregated the

46. *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), cert. denied 525 U.S. 812 (1998); *United States v. Miller*, 26 F.Supp 2d 415 (N.D.N.Y. 1998); *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000). The *Pierce* convictions were overturned because no evidence of the Canadian tax was presented at the trial and the court could not take judicial notice of the relevant Canadian law. As in Canadian courts, foreign law is generally treated as a fact that must be proved in evidence.

Canadian governmental policy issues that were potentially put in issue in a claim for taxes evaded by a cigarette smuggling operation, but was still able to consider issues of liability under the federal wire fraud statute for conspiracy to defraud the Canadian government.

The need to dismiss the claim to avoid passing judgment on a foreign sovereign's policies was also obviated, at least in part, by the fact that the foreign sovereign was making the claim and thereby waiving any entitlement to keep its relevant laws free from scrutiny; and it was further obviated by the fact that the foreign sovereign was accepted as having standing as a "person" under a provision of the legislation that invited persons who had suffered loss as a result of an offence under the legislation to act as private attorneys general in prosecuting a claim under the legislation.

The only concern that seemed to remain pressing was that of the potential for the court's adjudication to interfere with the management of foreign relations by the executive branch of the U.S. government. Permitting Canada to seek recovery for lost revenue in the U.S. courts could interfere with other international arrangements that the executive might have made or might wish to make in relation to revenue. In other words, the main concern related not to the courts' role in international relations, but to the courts' role within the constitutional structure of the forum government.

That the U.S. court was most concerned about the separation of powers was brought home in a parallel case, *European Community v. R.J.R. Nabisco, Inc.*, in which another court in the Eastern District of New York considered the revenue rule in the context of the smuggling of cigarettes into Europe. The court refused to apply the revenue rule to strike the claim, and instead it adopted the reasoning of the Second Circuit in *Trapilo,* when it said, "[w]hether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collections of taxes, is not our Court's concern". As the court observed:

> The court's emphasis is clear: the object of the prosecution in that case was to vindicate the interest of the United States by punishing the use of the wires in the scheme to defraud Canada of its money or property. By exercising its jurisdiction over such a prosecution, the court assumed its instrumental role in effectuating the will of Congress as expressed in the civil RICO statute. As in *Pierce,* the fact that Plaintiff's recovery here, should they succeed in demonstrating liability, will be measured in terms of lost tax revenue does not amount to a usurpation of congressional authority. In fact, the opposite is true. The object of the civil RICO statute is to punish racketeering activity, whatever

> form it may take. If that end is realized, this court's exercise of its jurisdiction will have been in the service of a clearly expressed congressional objective. As in *Pierce,* the fact that some collateral benefit may accrue to the EC in its efforts to defeat smuggling and recoup lost tax revenues cannot serve as a basis for declining jurisdiction.[47]

This approach to the revenue rule displays a principled indifference to the policies and interests of foreign sovereigns. Where the policies of foreign sovereigns happen to coincide with local policies, as would happen with the vindication of local public interests in permitting the pursuit of claims such as those under RICO, then the foreign sovereign's policies are facilitated; where the policies of foreign sovereigns happen to be at odds with local policies, they are not facilitated. But the critical point is that the reasons why U.S. courts would apply the rule or would not apply the rule differ from the reasons why Canadian courts would apply the rule or would not apply the rule. Regardless of the outcome, the principal concern of the U.S. courts in deciding whether to apply the revenue rule remains one of the extent to which adjudicating a case is consistent with the court's "instrumental role in effectuating the will of Congress". Any benefit that might accrue to a foreign sovereign in its interests is purely incidental.

This is different from the Canadian courts' evident willingness to support private law adjudications that serve a regulatory function in areas of significant transborder interest, subject only to clear limits imposed by statutes such as the Foreign Extraterritorial Measures Act,[48] or clear breaches of international law and of public policy such as occurred in *Laane.*

It would seem that the requirements of comity are not set primarily by the courts' responsibilities in international dealings, but by the courts' responsibilities vis-à-vis the other organs of government within their own constitutional structures. This is the environment that determines the colour of comity. The different approaches to the rule are determined not by international relations, but by internal relations — not by the transborder responsibility to the courts of friendly foreign states on matters of shared concern, but by obligations to the other branches of the government of the forum.

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47. *European Community v. R.J.R. Nabisco, Inc.,* 150 F. Supp. 2d 456 at pp. 484-85 (E.D.N.Y. 2001).
48. *Supra,* footnote 28.

Where the English courts may have been concerned historically to ensure in matters affecting foreign relations that they and the executive speak with one voice, it appears that the American courts have been concerned that in matters that could affect foreign relations they speak only as and when directed to do so by an Act of Congress. In this regard, there is no doubt that a deeply held commitment to parliamentary sovereignty urges upon the English courts the importance of deferring to the political branches of government in support of the one voice principle, even where this would mean failing to fulfil their mandate in providing a facility for dispute resolution. However, they appear to be afforded a measure of discretion in determining whether there is genuinely a risk of presenting a divided front in deciding a particular case. In contrast, a deeply held commitment to the separation of powers appears to urge upon the American courts the importance of refraining from speaking independently at all[49] — whether or not their pronouncement might accord with positions taken by the other branches of government — even where this might undermine the courts' mandate domestically in effectuating the will of Congress as expressed in federal legislation.

In Canada, the commitments to parliamentary sovereignty and to the separation of powers are less pressing. In its jurisprudence,[50] the Supreme Court of Canada has expressed the view that the courts' adjudicative role is not merely as an instrument of government policy. In respect of their adjudication of crossborder disputes the court said in *Hunt*: "The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction.[51] They are not mere local courts for the administration of the local laws."[52] And in *Tolofson,* the court elaborated on this view by saying: "The court takes jurisdiction not to administer local law, but for the convenience of

49. Which appears to be the position of the Australian courts as well following *Heinemann, supra,* footnote 32.

50. *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256; *Hunt v. T&N plc,* [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16; *Tolofson v. Jensen,* [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.

51. *Hunt, ibid.,* at pp. 311-12, quoting Estey J. in *Canada (Attorney General) v. Law Society of British Columbia,* [1982] 2 S.C.R. 307 at pp. 326-27, 137 D.L.R. (3d) 1.

52. *Hunt, ibid.,* at p. 13, quoting Ritchie J. in *Valin v. Langlois* (1879), 3 S.C.R. 1 at p. 19, leave to appeal to P.C. refused 5 App. Cas. 115.

litigants, with a view to responding to modern mobility and the needs of a world or national economic order."[53]

In a country such as Canada, where there is a deeply held commitment to the participation of the courts in governance through dialogue with the political branches of government on sensitive issues,[54] there seems to be less need to secure complete unanimity from the outset in their resolution of particular issues or to avoid entirely any risk of dissent. It may be important for the various branches of government to speak in concert, and in this regard for the courts to be sensitive to pressing government policies. However, it does not seem to be imperative for courts to restrain their adjudication of private law claims while they wait for another branch of government to make a pronouncement on any given issue. Indeed, even where Parliament has made a pronouncement on justiciability, such as it has in the State Immunity Act,[55] Canadian courts do not feel bound by the plain language of the legislative text. They feel free to consult a wide range of sources in order to in interpret and apply the legislation in a manner that complies with the government's constitutional and treaty obligations.[56]

Other exclusionary doctrines, such as the "political questions" doctrine, by which courts restrain themselves from passing judgment upon matters that are reserved for other organs of government, have comparatively slight impact on the ordinary course of adjudication in Canada in local disputes,[57] and this seems to set the pattern for the adjudication of international disputes. This approach reflects the sense in which Canadian courts regard themselves as operating not merely as an instrumentality for the effectuation of the policies of the local legislative and executive government, but as a pre-political form of governance distinct from the territorially confined mandate of local political government.[58]

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53. *Tolofson, supra,* footnote 50, at p. 1070.
54. P. Hogg and A. Bushell, "The Charter Dialogue between Courts and Legislatures: Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All" (1997), 35 Osgoode Hall L.J. 75; P. Hogg and A. Bushell, "Reply to Six Degrees of Dialogue" (1999), 37 Osgoode Hall L.J. 529.
55. State Immunity Act, R.S.C. 1985, c. S-18.
56. *Bouzari v. Iran (Islamic Republic),* [2002] O.J. No. 1624 (QL), 114 A.C.W.S. (3d) 57 (S.C.J.).
57. *Operation Dismantle v. Canada,* [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.
58. J. Walker "The Constitution of Canada and the Conflict of Laws" (D.Phil. Thesis, Oxford University, 2001) [unpublished].

To the extent that this explanation for the distinctive approach taken by Canadian courts to the rule is a valid one, there would seem to be little scope for the application of the foreign public law exception at all in Canada. There may be some basis for its application in cases where a private law claim is merely a colourable attempt by a foreign government to assert in Canada a policy that is at odds with the policy of the Canadian government, and the courts regard it inappropriate to give effect to the foreign policy, but they are reluctant to pass judgment on it. For example, this situation might have arisen in respect of judgments granted by U.S. courts pursuant to the Helms-Burton legislation[59] where Canadian and U.S. foreign policies differed, and the enforcement of U.S. judgments would have given effect to the U.S. policy in Canada had FEMA not been amended. Apart from this, Canadian courts seem generally comfortable in making assessments of foreign public laws and in excluding them where appropriate. This means that in most situations the public policy exception to the application of foreign public law is probably sufficient in Canada as an exclusionary rule.

To the extent that there is an increasing expectation that governmental policies will not impede crossborder dealings where those dealings are primarily of a *private* law nature, and to the extent that there is an increasing expectation that governmental policies of primarily *public* law nature will conform to international standards, it is less likely that courts in many countries will feel the need to resort to the rule as a means of abstaining from passing judgment on foreign public laws. Where a foreign public law improperly interferes with private transactions or dealings, or where it is clearly at odds with an international consensus, the courts will exclude it explicitly for these reasons, and not on the basis of some form of obligation to abstain from adjudicating the matter. This was demonstrated in the decision of the House of Lords in *Kuwait Airways Corp. v. Iraqi Airways Co.* when the House of Lords refused to treat the appropriation of Kuwait Airways airplanes as an act of the Iraqi state within its own territory, because the decree rendering the territory part of Iraq had been condemned by the United Nations Security Council and its validity had been rejected by international consensus.[60] In that case, it was considered a matter of public policy for the courts not to permit the

59. The Cuban Liberty and Democratic Solidarity Act of 1996, *supra*, footnote 28.
60. [2002] 3 All E.R. 209 (H.L.).

defendant to shield itself from accountability for wrongful conduct by an internationally rejected assertion of sovereign entitlement.

Perhaps, in time, it will become clear to the courts in most countries that the *pro forma* exclusion of foreign public laws is, as Black suggests, a rule that is old and in the way. Its persistence in some countries seems to be better understood as a function of the internal constitutional structure of those countries than as a function of the courts' inability to grasp the importance of their role in the regulation of international trade. Accordingly, it would be a mistake to follow the usual common law practice of treating the evolution of the rule as simply a history of ideas without regard to the constitutional context in which the doctrine has developed, and in this way to regard the decisions of some courts as misguided or uninformed.

Still, it does not follow from the recognition of the way in which the different constitutional contexts colour the rule that each approach is equally sound or equally suitable to the challenges ahead for the courts in common law countries generally in resolving disputes arising in international dealings. Nor does it follow, with the greatest of respect to Black, that it would be appropriate for Canadian courts to adjust their approach based on insight into the operation of the rule in Canada's trading partners to one based on strict reciprocity for the sake of strategic advantage in bilateral relations, where this would not constitute a principled improvement to the law. On the contrary, it would seem that Canadian courts are, in fact, acting responsibly in reducing the distortive effect of parochial public laws on crossborder trade and in maximizing the public regulation of crossborder trade where this is based on shared concerns and compatible standards. As with the dialogue that has developed between courts and legislatures in Canada over Charter rights, it seems unlikely that decisions made by courts in areas where there are no incompatible forum policies, particularly where these decisions are based on standards that are supported by an international consensus, are likely to preclude the other branches of the Canadian government from developing distinctive national policies where that is desired. The development of distinctive national policies following such a ruling by the courts would only be part of the dialogue. Rather, in taking a leadership role in their approach to determining when foreign public law should be excluded, Canadian courts may ultimately be participating in setting the international standard for comity itself.