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## Recognizing Civil RICO in Foreign Courts: Since They Came, Should We Build It?

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# RECOGNIZING CIVIL RICO IN FOREIGN COURTS: SINCE THEY CAME, SHOULD WE BUILD IT?

“The periods in which countries have produced their greatest jurists, and exercised the widest influence, are those in which the concerns these jurists addressed were the least national.”<sup>1</sup>

## INTRODUCTION

Like a Hollywood blockbuster, this case contains an irresistibly thrilling set of ingredients: a transnational conspiracy implicating a prominent financial institution, an Eastern European crime syndicate facilitating transactions, billions of dollars changing hands, a public scandal, a high profile FBI investigation, a Department of Justice (“DOJ”) nonprosecution agreement, and, to top it off, a House Committee on Financial Services hearing.<sup>2</sup> All of this transpired almost a decade ago, but only recently did the drama culminate when Russia’s Federal Customs Service<sup>3</sup> (“FCS”) filed a lawsuit against the Bank of New York<sup>4</sup> (“BONY”). To ponder the lawsuit’s aftermath and highlight its legal nuances will require us to take a few steps back and proceed with caution.

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1. James Gordley, *Comparative Legal Research: Its Function in the Development of Harmonized Law*, 43 AM. J. COMP. L. 555, 567 (1995).

2. See generally *Russian Money Laundering Before H. Comm. on Banking and Financial Services*, 106th Cong. 152 (1999) (testimony of Thomas A. Renyi, Chairman of the Board and Chief Executive Officer, The Bank of New York Company, Inc.), available at <http://financialservices.house.gov/banking/92299ren.htm> [hereinafter Committee Hearing on Russian Money Laundering]; Roger Parloff, *Can a U.S. Bank get a Fair Trial in Moscow?*, FORTUNE, Sept. 29, 2008, at 126; Michael D. Goldhaber, *RICO Goes to Russia*, AM LAW DAILY, June 30, 2008, <http://amlawdaily.typepad.com/amlawdaily/2008/06/from-russia-wit.html>; Devin Montgomery, *Russia Resumes Racketeering Lawsuit Against US Bank*, JURIST, July 28, 2008, <http://jurist.law.pitt.edu/paperchase/2008/07/russia-resumes-racketeering-lawsuit.php>.

3. “The Federal Customs Service is an authorized federal executive authority, which [carries] out its duties and functions in accordance with the Law of the Russian Federation with regard to the development of state policy and legal regulations, oversight and control over the customs issues . . . .” *Sobranie Zakonodatel’sтва Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation]*, 2006, No. 459, Item 2162, available at <http://www.customs.ru/en/about/regulations/gprovisions/>.

4. The Bank of New York Mellon, a \$189 billion bank holding company, is the 12th largest in the nation. Letter from Kenneth H. Thomas to Ben S. Bernanke, Chairman, Federal Reserve System (June 20, 2008), [http://www.russianbanksuit.com/Ken\\_Thomas\\_letter\\_to\\_Ben\\_Bernankere\\_re\\_BONY.pdf](http://www.russianbanksuit.com/Ken_Thomas_letter_to_Ben_Bernankere_re_BONY.pdf). The Bank “was established by Alexander Hamilton as New York’s first bank.” *Id.*

In May 2007, the FCS filed a lawsuit in Russia against BONY in the *Arbitrazh* Court of the City of Moscow<sup>5</sup> (“the Moscow *Arbitrazh* Court”). The FCS sought to recover customs duties<sup>6</sup> that it allegedly should have collected on the \$7.5 billion that a BONY employee, along with her accomplices, helped to transfer out of Russia during the 1990s.<sup>7</sup> The FCS also sought \$22.5 billion in treble damages<sup>8</sup> under the Racketeer Influenced and Corrupt Organization Act’s (“RICO”) civil component as damages for the massive capital flight caused by the illegal wire transfers that nearly crippled Russia’s economy.<sup>9</sup> It is the first RICO claim filed in a foreign court.<sup>10</sup> The unprecedented nature of the case makes it unusual and inevitably raises numerous questions.<sup>11</sup> Blindsided by the Moscow *Arbitrazh* Court’s decision to apply civil RICO, BONY was exposed to potential liability equivalent to \$7.5 billion for the unlicensed wire transfers, as well as three times that amount in damages under civil RICO.<sup>12</sup>

A civil RICO claim litigated in a Russian court against an American bank (the “Russian RICO case”) is a novel, if not bizarre, lawsuit with regard to procedural posture and choice-of-law principles. On the one hand, the Russian RICO case is the product of an innovative approach to transnational litigation<sup>13</sup> where a foreign plaintiff seeking a civil remedy

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5. Press Releases, The Bank of New York Mellon, Key Facts: Russia Litigation 1, <http://www.bnymellon.com/Russiaincase/keyfacts.pdf> (last visited Oct. 3, 2008) [hereinafter Key Facts].

6. See generally Ugolovnyi Kodeks RF [UK] [Criminal Code] art. 194 (Russ.), translated at <http://www.russian-criminal-code.com/PartII/SectionVIII/Chapter22.html> (last visited Nov. 25, 2008). While BONY was alleging that this was a typical lost revenue claim, FCS denied the allegations. See Goldhaber, *supra* note 2. Custom duties are a tax in an economical sense, but if the statute, as it is here, appears in the Criminal Code, it may be argued that, legally speaking, the claim for custom duties is not for the revenue. Regardless, BONY would presumably have attempted to defend the recognition action as contrary to the revenue rule. See Key Facts, *supra* note 5, at 4.

7. Parloff, *supra* note 2, at 131.

8. 18 U.S.C. § 1964(c) (2006). Section 1964(c) of RICO creates a private cause of action allowing “[a]ny person injured in his business or property by reason of a violation of [RICO to] sue . . . [and] recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .” *Id.*

9. See generally Goldhaber, *supra* note 2; Key Facts, *supra* note 5.

10. See Parloff, *supra* note 2, at 128; Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 1.

11. See, e.g., Goldhaber, *supra* note 2.

12. See, e.g., Goldhaber, *supra* note 2.

13. Cf. Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT’L L. 251, 278 (2006), reprinted in 1 TRANSNATIONAL LITIGATION: A PRACTITIONER’S GUIDE COMMENTARY 2, at 12 (John Fellas ed., 2007) (criticizing the revenue rule that has been the roadblock to effective “transnational regulatory” litigation to recover lost revenue).

asks a court in its home forum to apply U.S. federal regulatory law<sup>14</sup> against a U.S. defendant.<sup>15</sup> On the other hand, the FCS's RICO claim may be described as the next "act" in the ongoing "saga" of foreign sovereign plaintiffs "knocking on the doors" of the U.S. courts to litigate similar claims.<sup>16</sup> In these cases, foreign plaintiffs have lost revenues due to unpaid taxes or various duties that resulted from a pattern of transnational racketeering activity.<sup>17</sup> Having suffered damages, they have brought RICO claims in U.S. courts in order to enforce their domestic revenue laws but have been unsuccessful.<sup>18</sup> The FCS's attorneys, however, chose to file their claim in Russia, the FCS's home forum.<sup>19</sup> But some have argued that their claim is still essentially for lost revenue.<sup>20</sup>

Transnational regulatory litigation—that is, litigation to obtain a remedy for economic harm resulting from cross-border transactions—has gained momentum and is likely here to stay.<sup>21</sup> Because domestic regulation is inherently limited to its borders, the growing volume of cross-border transactions and economic interaction creates an ever-expanding regulatory gap.<sup>22</sup> Plaintiffs from around the world are increasingly seeking redress for malfeasance caused by foreign and multinational businesses

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Professor Buxbaum defines transnational regulatory litigation as private actions where national courts apply foreign or domestic economic regulatory law to remedy "cross-border regulatory harm." *Id.* at 255.

14. See JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 657–58 (3rd ed. 2003).

15. See Parloff, *supra* note 2, at 128; Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 3; Montgomery, *supra* note 2.

16. See generally Buxbaum, *supra* note 13, at 278–80 (discussing some of the recent claims that have failed due to the revenue rule); Elizabeth J. Farnam, Note & Comment, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 WASH. L. REV. 843, 846 (2002).

17. See generally Buxbaum, *supra* note 13, at 278–80.

18. *Att'y Gen. of Can. v. R. J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 103 (2d Cir. 2001) (holding that the revenue rule barred Canada's civil RICO lawsuit for lost tax revenues caused by R. J. Reynolds' extensive tobacco smuggling scheme); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987) (stating that courts in the United States are not required to recognize or to enforce judgments for the collection of taxes). See generally Buxbaum, *supra* note 13, at 278–80 (discussing the revenue rule and its role in "transnational regulatory" litigation); Farnam, *supra* note 16, at 846 (arguing that the revenue rule should be abandoned).

19. See Goldhaber, *supra* note 2; see also Key Facts, *supra* note 5, at 1.

20. See sources cited *supra* note 19.

21. See generally Buxbaum, *supra* note 13, at 251.

22. See Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 251–52 (2002).

situated in remote corners of the world, far from the reach of their home courts and legislatures.<sup>23</sup> Many recognize that the U.S. civil litigation system—the world's most developed—may play a significant role in filling the gap in the global regulatory system should it hear transnational litigation.<sup>24</sup>

The international civil society and its legal community, however, may justifiably distrust empowerment of one nation's judiciary resulting from its adjudication of significant economic disputes with high financial and political stakes.<sup>25</sup> One possible solution—where jurisdictional and choice-of-law rules permit—is to foster proper application of a nation's regulatory law in courts other than those of the home forum where the law originates. The Russian RICO dispute is arguably a case-in-point. Such “legal tourism”—where plaintiffs seek application of a foreign regulation in their domestic courts—is likely to grow in the coming decades.<sup>26</sup> The Russian RICO case's legal nuances and implications are important factors in considering whether the U.S. judiciary, or Congress, as a matter of policy, should recognize similar claims in the future.

The Russian RICO case settled on October 22, 2009, for \$14 million,<sup>27</sup> but despite the settlement, the case still sets a precedent in that it is likely to spur similar lawsuits abroad. Indeed, the plaintiffs' litigation strategy has permanently altered the “legal ontology” of transnational litigation, and this means U.S. courts will need to articulate a legal position in response. Had a money judgment actually been awarded—or, if such a judgment is awarded in the future—the judgment creditor would likely seek to enforce the judgment in a recognition action in the United States.<sup>28</sup> The U.S. courts will eventually face a dilemma: they may either

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23. See generally Buxbaum, *supra* note 13, at 251

24. See *id.* at 267–68.

25. See Buxbaum, *supra* note 13, at 272 (making a similar argument only with respect to litigation in U.S. courts); cf. Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT'L L. 449, 452 (2008). “Transnational regulatory cases [have been criticized for] . . . [shifting] power to the courts of particular countries in a way that . . . infringe[s] the sovereignty of other countries. Because the regulatory cases apply domestic rather than international law, they are also criticized as vehicles for the illegitimate application of national law to foreign conduct.” Buxbaum, *supra* note 13, at 272. It is noteworthy that the Russian RICO case stands squarely to face this criticism head on.

26. Cf. Buxbaum, *supra* note 13, at 252–53 (discussing relevance and prevalence of transnational regulatory litigation).

27. Joint Press Release, Federal Customs Service of the Russian Federation & Bank of New York Mellon Corporation, Litigation Settlement (Oct. 22, 2009), <http://www.bnymellon.com/pressreleases/2009/pdf/pr102209.pdf>.

28. A recognition action is filed in a court as a first step in a judgment enforcement process. See generally Katherine R. Miller, *Playground Politics: Assessing the Wisdom of*

dismiss such recognition actions, rejecting the notion that a foreign plaintiff may bring a civil RICO claim in its home forum, or, in the spirit of international comity,<sup>29</sup> they may embrace the new development in “transnational regulatory”<sup>30</sup> litigation and recognize the foreign court’s judgment. If or when a U.S. court chooses to recognize a foreign court’s civil RICO judgment, that court will have to account for the judgment’s novel element, namely the application of civil RICO by a foreign forum.

This Note will examine a hypothetical action for recognition in U.S. courts and the various threshold issues that would arise.<sup>31</sup> Essentially, I will discuss the ways in which a U.S. court should analyze these nuanced issues under existing precedent. I will argue that U.S. courts—especially in the Russian RICO case scenario—may recognize a foreign money judgment rendered abroad under civil RICO because nothing in the Russian case triggers mandatory nonrecognition<sup>32</sup> under the Recognition Act.<sup>33</sup> Thereafter, I will conclude that, as a matter of sound legal policy,<sup>34</sup>

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*Writing a Reciprocity Requirement Into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT’L L. 239, 281 (2004).

29. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (finding that in order for U.S. courts to extend comity to a foreign judgment, courts of that foreign nation must reciprocate by extending comity to U.S. judgments).

Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Id. But cf.* Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT’L L. 563 (2000) (arguing that the significance of international comity is diminishing). *See generally* Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L. J. 1, 37 (1991) (giving historical and comparative background on comity in international law and suggesting that the U.S.S.R., as a civil code jurisdiction, generally rejected the notion of comity).

30. *See* Buxbaum, *supra* note 13, at 278. In fact, the FCS claim is the type that has been categorized as a “transnational regulatory” claim because collection of lost tax revenue falls within the ambit of economic regulation. *See id.* at 278–80.

31. For the purpose of the analysis herein, I will assume that FCS succeeded on the merits in the Moscow *Arbitrazh* Court and will now attempt to have the judgment recognized in a U.S. court.

32. *See generally* Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L. J. 341, 362 (1993); Violeta I. Balan, Comment, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 230–34 (2003) (discussing the various aspects of foreign money judgment recognition analysis).

33. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Part II U.L.A. 155 (2005) [hereinafter RECOGNITION ACT].

U.S. courts should recognize a hypothetical Russian RICO judgment. Finally, in light of the Russian RICO case offering a “new paradigm” in “transnational regulatory” litigation,<sup>35</sup> I will propose a modification to the recognition analysis that will account for issues presented should a foreign court apply U.S. law against an American defendant. Accordingly, Part I will lay out the background of the Russian Court case as well as the RICO Act in general. Part II will discuss the current recognition regime. Part III will explain why civil RICO may be applied by a foreign court. Part IV will discuss the strongest available defenses against recognition of a hypothetical Russian RICO case judgment in the United States. And, finally, Part V will propose a modification to the recognition analysis under the Recognition Act.

## I. THE FACTS AND THE LAW

### A. *The Facts*

Let us start from the beginning—the early 1990s. BONY first established its operations in Eastern Europe<sup>36</sup> and opened a branch in Moscow after the disintegration of the Soviet Union.<sup>37</sup> At that time, BONY became the leading U.S. bank in Russia in terms of its business volume with Russian banks and citizens.<sup>38</sup> Lucy Edwards, a Russian expatriate, worked for BONY as a midlevel bank official during the 1990s.<sup>39</sup> Together with her husband, Peter Berlin, and another junior BONY employee, Edwards used BONY accounts and software to arrange unlicensed wire transfers totaling nearly \$7.5 billion from Russia to the U.S. over the course of three years.<sup>40</sup>

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34. See Simeone, *supra* note 32, at 362; Balan, *supra* note 32, at 230–34. See generally RALPH H. FOLSOM, MICHAEL W. GORDON, & JOHN A. SPANOGLE, JR., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS, TRADE & ECONOMIC RELATIONS 730 (2005) (discussing the framework for recognition of foreign money judgments in the U.S.).

35. Cf. Buxbaum, *supra* note 13, at 278.

36. See generally Parloff, *supra* note 2; Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 1.

37. See generally Parloff, *supra* note 2 (discussing the background facts of the Russian Court case).

38. Final Brief of the Russia's FCS at para. 33, available at <http://www.russianbanksuit.com/documents/FinalBrief.pdf> [hereinafter The Final Brief] (last visited Oct 9, 2009).

39. Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 1.

40. Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 1; The Final Brief, *supra* note 38, at para. 35.

In 1996, Berlin, claiming to run an import-export business, opened accounts at a BONY branch in Manhattan.<sup>41</sup> Subsequent investigation revealed<sup>42</sup> that the accounts were used in Russia to perform illicit money transfers<sup>43</sup> by another Russian bank's customers, some of whom carried "machine guns."<sup>44</sup> The investigation showed that, to hide her scheme from the BONY officials, Edwards "bribed a subordinate and falsified records."<sup>45</sup> Further, to enable the transfers, Edwards supplied Berlin with BONY's proprietary software that enabled them to conceal the wire transfers from BONY's auditors.<sup>46</sup> In compensation for the transfers, the couple was paid \$1.8 million.<sup>47</sup> As a result of the BONY employees' conduct, Russia suffered massive capital flight during the 1990's that further exacerbated Russia's economic crisis at the time.<sup>48</sup> The FBI began its investigation in 1999.<sup>49</sup> The scope and breadth of the fraud was so wide that it became the subject of the testimony of BONY's CEO before the House Committee on Banking and Financial Services.<sup>50</sup>

In February 2000, Berlin and Edwards pled guilty to "conspiring to violate U.S. laws."<sup>51</sup> The couple also "'pled guilty to, among other things, conspiracy to . . . promote wire fraud,' and they admitted that their accounts were used 'among other things, to launder money.'"<sup>52</sup> In November 2005, BONY entered into a nonprosecution agreement with the U.S. Attorney for the Southern District of New York.<sup>53</sup> BONY agreed to pay a \$14 million fine and to implement "new anti-money-

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41. Parloff, *supra* note 2, at 130.

42. See Non-prosecution Agreement Between the Bank of New York and the U.S. Attorney's Offices for the Eastern and Southern Districts of New York ¶ 2, <http://www.law.virginia.edu/pdf/faculty/garrett/bankofnewyork.pdf> (last visited Oct. 9, 2008) [hereinafter Non-prosecution Agreement] (where BONY "accept[ed] and acknowledge[d] responsibility for the conduct of its employees").

43. Parloff, *supra* note 2, at 130.

44. Goldhaber, *supra* note 2.

45. Parloff, *supra* note 2, at 129.

46. See generally Parloff, *supra* note 2; Goldhaber, *supra* note 2.

47. See generally Parloff, *supra* note 2; Goldhaber, *supra* note 2.

48. G. Robert Blakey & Alan Dershowitz, Podcast: Key Issues Discussed on July 16, 2008 Conference Call, held by Bank of New York's Money Laundering Suit: What You Need to Know, (July 16, 2008), <http://www.russianbanksuit.com/podcasts.html>.

49. See Parloff, *supra* note 2.

50. See *Committee Hearing on Russian Money Laundering*, *supra* note 2.

51. Parloff, *supra* note 2, at 131; *Russian Money Launderers Plead Guilty*, BBC, Feb. 16, 2000, <http://news.bbc.co.uk/2/hi/americas/645717.stm>.

52. Goldhaber, *supra* note 2.

53. Goldhaber, *supra* note 2; see Non-Prosecution Agreement, *supra* note 42.



laundering policies and procedures, including the creation of a new compliance position.”<sup>54</sup>

### B. The Litigation

On June 30, 2008, BONY's attorneys filed a motion in the Moscow *Arbitrazh* court to dismiss the FCS suit on grounds that a Russian trial court may not apply civil RICO to this case.<sup>55</sup> The judge<sup>56</sup> requested briefs on the issue from both sides.<sup>57</sup> A month later, on July 28, the Court denied the motion and decided to proceed under civil RICO.<sup>58</sup> Then, pre-trial hearings began in Moscow at the end of October.<sup>59</sup> On October 6, the court granted the FCS's request for a continuance and stayed the action six weeks.<sup>60</sup> And thereafter, the case was adjourned until June 10, 2009 pending settlement agreement.<sup>61</sup> Even now that the case has settled, the legal implications of the lawsuit remain significant, but we are left to ponder what could have been. If BONY had lost at trial, it could have pursued three levels of appeal: the appellate *arbitrazh* courts, the federal circuit *arbitrazh* courts, and the Supreme *Arbitrazh* Court.<sup>62</sup> As one

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54. Goldhaber, *supra* note 2; cf. Jeannie Shawl, Bank of New York Settles Fraud, Money Laundering Charges, JURIST, Nov. 9, 2005, <http://jurist.law.pitt.edu/paperchase/2005/11/bank-of-new-york-settles-fraud-money.php> (referring to federal prosecutors' announcement that BONY will pay \$38 million: \$26 million to the federal government and \$12 million to the fraud victims).

55. Goldhaber, *supra* note 2.

56. One common procedural feature among a common and civil law systems is that, in both, judges decide questions of law. See SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE ANALYSIS 13 (James J. Fawcett ed., 2004). One significant difference, however, is that in a common law system, juries decide questions of fact. See *id.* In most civil law systems, judges decide questions of fact. See *id.*

57. Goldhaber, *supra* note 2.

58. See Montgomery, *supra* note 2. Moscow *Arbitrazh* Court, being a court of first instance, does not have a website. At the time of this writing, there are no public documents or press releases available from the governmental source in Russian. Thus, I must rely primarily upon non-Russian sources. It is unclear whether this leaves us with a more, or less, objective view of the case.

59. Parloff, *supra* note 2, at 135. “If the case cannot be resolved through governmental channels, however, the bank may have no choice but to settle rather than risk litigating in a forum that appears to lack both the expertise and independence to render an impartial result . . .” *Id.* at 135.

60. Bank of New York Money Laundering Suit: What You Need to Know, Case Chronology, <http://www.russianbanksuit.com/chronology.html> (last visited Oct. 9, 2009).

61. See Will Bland, *Russian Judge Adjourns BONY Suit, Seeks Deal*, WALL ST. J., May 28, 2009, at C4.

62. Goldhaber, *supra* note 2.

commentator had aptly put it: “If at the end of the day a Russian judgment still stands, a worldwide war would begin over its enforcement.”<sup>63</sup>

Several commentators have raised the obvious question: why was this case not being brought in the U.S.?<sup>64</sup> Could the FCS’s claim be *res judicata*? In *Pavlov v. Bank of New York*,<sup>65</sup> private Russian parties brought a civil RICO claim arising out of the same core facts.<sup>66</sup> In *Pavlov*, depositors of another Russian bank<sup>67</sup> sued BONY to recover damages that were allegedly caused by unauthorized money transfers and money laundering that were the subject of the FBI’s investigation of BONY.<sup>68</sup> The *Pavlov* plaintiffs claimed that the illicit money transfers—those at the heart of the FCS’s claim—caused their bank’s insolvency and thus caused them to lose their deposits.<sup>69</sup> United States District Judge Lewis Kaplan, in a memorandum opinion, dismissed the claim on *forum non conveniens* grounds.<sup>70</sup> Nowhere in his decision did Judge Kaplan con-

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63. *Id.*

64. *Id.*; see Parloff, *supra* note 2, at 132.

65. *Pavlov v. Bank of New York, Inc.*, 135 F. Supp. 2d 426, 426 (S.D.N.Y. 2001) (finding that the complaint failed to state a RICO claim because it did not allege an enterprise extending beyond the objectives of the racketeering acts charged or a structural hierarchy, and dismissing the two remaining plaintiffs’ state law claims for forum non conveniens), *vacated*, 25 F. App’x 70 (2d Cir. 2002) (vacating the district court’s decision, *but* disagreeing *only* with the Court’s dismissal of plaintiffs’ RICO claim for failure to adequately plead a RICO enterprise, and remanding for consideration of other bases for dismissal), *remanded to* No. 99 Civ. 10347, 2002 WL 31324097 (S.D.N.Y. 2002) (finding plaintiffs in default and dismissing with prejudice for lack of prosecution).

66. *Id.*

67. *Id.*

68. *Id.* at 428–29.

69. *Id.* at 426.

70. *Id.* at 428–29.

template that the FCS, with the help of its U.S. lawyers,<sup>71</sup> would bring a civil RICO claim in Russia arising out of *Pavlov's* same core facts.<sup>72</sup>

The *Pavlov* decision, however, is unlikely to preclude the FCS's current claim from U.S. courts because the FCS and the *Pavlov* plaintiffs are not in privity.<sup>73</sup> The FCS is a sovereign, while the *Pavlov* plaintiffs are private parties. The more likely reason that the case was not brought in the U.S. was that the FCS acts as a foreign sovereign that was arguably seeking to recover lost tax revenue.<sup>74</sup> As a foreign sovereign, the FCS may be barred from bringing a civil RICO claim in U.S. courts because of the "revenue rule."<sup>75</sup> The revenue rule is not categorical and is not a clear cut bar for the purposes of judgment recognition because of the rule's fragile doctrinal and policy foundations. In light of the novel post-

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71. The U.S. lawyers lined up a phalanx of prominent U.S. academics as expert witnesses to the Moscow *Arbitrazh* Court on the issue whether it may apply civil RICO. Goldhaber, *supra* note 2. One of them was Robert Blakey, one of the RICO statute's principal drafters, who testified on behalf of Russian FCS that it would not be inconsistent with the Congressional intent for a foreign court to apply civil RICO. The Final Brief, *supra* note 38, at para. 87, 90. Alan Dershowitz, a Harvard Law School Professor and a leading expert on civil RICO, also testified for the Russian FCS that, *inter alia*, BONY is not prejudiced to being held accountable under civil RICO as it is a U.S. corporation that must conform to U.S. laws. *Id.* at para. 100. Also, the Honorable Judge George Pratt, who served as a U.S. District Judge and then sat on the United States Court of Appeals for the Second Circuit until 1995, interpreted the civil RICO and its elements for the Moscow *Arbitrazh* Court. *Id.* at para. 108.

72. See *Pavlov*, 135 F. Supp. 2d at 435–38. Moreover, in ruling on the motion for forum non conveniens, the Court relied on the assumption that the plaintiff's claim would be adjudicated under Russian law. *Id.* For a discussion of the consequences of dismissal based on forum non conveniens, see *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 944 (1st Cir. 1991) and *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1446 (9th Cir. 1990). See, e.g., *Zen-Noh Grain Corp. v. M/V Theogennitor*, No. Civ.A. 97-543, 2002 WL 31886745, at \*6 (E.D. La. Dec. 18, 2002) (noting that "[d]ismissal on the grounds of forum non conveniens is appropriate even though it may result in a foreign jurisdiction applying American law.").

73. In *Pavlov*, the plaintiff's claims were eventually dismissed with prejudice for lack of prosecution. *Pavlov v. Bank of New York, Inc.*, No. 99 Civ. 10347, 2002 WL 31324097 (S.D.N.Y. Oct. 16, 2002). While dismissal with prejudice is considered to have res judicata effect, the parties must be identical or in privity. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 19–20 (1982).

74. See Goldhaber, *supra* note 2. See generally Farnam, *supra* note 16 (providing a thorough discussion of lost revenue claims).

75. See *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 103 (2d Cir. 2001); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987). "The courts recognized the discretionary nature of the rule, acknowledging that U.S. courts can choose, in light of the need for international comity and cooperation between countries, to give effect to a foreign claim." Buxbaum, *supra* note 13, at 279.

ure of the Russian RICO case, however, the preliminary issue for recognition is whether a Russian court may apply civil RICO.

*C. Racketeer Influence and Corrupt Organizations Act*

Congress enacted RICO<sup>76</sup> in 1970 as part of an effort to improve law enforcement's ability to prosecute organized crime.<sup>77</sup> RICO is, at heart, a criminal statute.<sup>78</sup> If found guilty of "racketeering," defendants can receive lengthy prison sentences and be subject to large fines.<sup>79</sup> But RICO also contains a civil component.<sup>80</sup> While civil RICO provides for treble damages<sup>81</sup> under the statute's forfeiture provision, defendants can also be forced to disgorge any property acquired through the predicate illegal activity.<sup>82</sup> In enacting this "private attorney general" mechanism, Congress evidently intended to allow private plaintiffs to fully recover losses caused by racketeering; in doing so, Congress sought RICO to function as a deterrent.<sup>83</sup>

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76. See 18 U.S.C. §§ 1961–68 (2006).

77. RICO was part of the Organized Crime Control Act. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961–68 (2006)).

78. "Racketeer Influenced and Corrupt Organizations Act . . . [was] one of the 'new remedies' to deal with organized crime in the United States, a 'highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.'" Judith A. Morse, Note, *Treble Damages under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 526 (1986) (quoting Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922 (Statement of Findings and Purpose)).

79. *Id.* at 526. The essential elements of a civil RICO action are: (a) a pattern of racketeering activity; (b) the existence of an enterprise engaged in or affecting interstate or foreign commerce; (c) a nexus between the pattern of racketeering activity and the enterprise; and (d) a resulting injury to the plaintiff's business or property. See *id.*

80. See 18 U.S.C. § 1964(c) (2006).

81. *Id.* "Like compensatory damages, treble damages are mandatory once the victim establishes liability and the extent of the harm [and] . . . [u]nlike punitive damages, treble damages are not discretionary either in award or amount . . . ." Morse, *supra* note 78, at 528.

82. See 18 U.S.C. § 1964(c) (2006).

83. "The appeal of civil RICO is obvious . . . [it] entitles a successful plaintiff to treble damages as well as attorneys' fees. As a result, it provides a powerful litigation weapon and a strong lever in settlement negotiations." Robert M. Jarvis, *The Use of Civil RICO in International Arbitration: Some Thoughts after Shearson/American Express v. McMahon*, 1 TRANSNAT'L LAW 1, 6 (1988). "[S]tatutory language and statutory construction . . . reflect Congress' intent that RICO's treble damage provision serve broad remedial purposes." Morse, *supra* note 78, at 530.

Civil RICO gained wide use during 1980's.<sup>84</sup> Some have criticized the use of the statute to pursue conduct that is arguably less extreme than the era's typical criminal "racketeering," which served as the impetus for the statute and which RICO's broad provisions were designed to combat.<sup>85</sup> The Supreme Court, however, has stated that RICO is to "be liberally construed to effectuate its remedial purposes."<sup>86</sup> The Court noted in 1981 that RICO "has become a tool for everyday fraud cases brought against 'respected and legitimate' enterprises."<sup>87</sup> In sum, civil RICO is a powerful litigation tool in the hands of a resourceful plaintiff.

While RICO permits foreign governments<sup>88</sup> to recover losses resulting from racketeering activity, Congress did not consider at the time of enactment whether RICO could be applied by a foreign court.<sup>89</sup> Congress's sole focus was merely to enact a law to be applied, first and foremost, by U.S. courts to combat organized crime domestically.<sup>90</sup> There is simply no evidence of Congressional intent as to civil RICO's effect or applicability abroad beyond what Congress intended to effec-

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84. Jarvis, *supra* note 83, at 6 (recounting that "civil plaintiffs started to include RICO counts in their suits, often accompanied by fraud and antitrust claims").

85. *See generally* O'SULLIVAN, *supra* note 14, at 657–58. In enacting RICO, the "legislature was . . . addressing . . . pervasive public interest [in a governmental response] to unprecedented domestic strife and violence, [thus] Congress sought to provide federal law enforcement officials with a weapon against organized crime." Jarvis, *supra* note 83, at 5.

86. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985). In *Sedima*, a Belgian corporation filed a civil RICO claim against an American corporation based on mail and wire fraud. *Id.* at 483–84. The *Sedima* court also stated that a civil RICO claim does not require a finding of a predicate criminal act. *Id.* at 485.

87. *Id.* at 499; *see also* *United States v. Turkette*, 452 U.S. 576, 587 (1981) (holding that both legitimate and illegitimate businesses could be prosecuted under civil RICO).

88. RICO defines a person as "any . . . entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1961(3) (2006). Thus, "a foreign government is considered a person for the purposes of the RICO statute, allowing foreign governments to file RICO claims," Farnam, *supra* note 16, at 846 (citing *Phil. v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988); *cf. Ill. Dep't of Revenue v. Phillips*, 771 F.2d 312, 316 (7th Cir. 1985) (holding that state governmental units can sue under RICO)).

89. But RICO does not contain a mandatory provision requiring litigation in U.S. courts. *Cf. Transunion Corp. v. PepsiCo., Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) ("A review of the legislative history of RICO, however, discloses no mandate that the doctrine of forum non conveniens should not apply[.]"); *see also* *Gemini Capital Group, Inc. v. YAP Fishing Corp.*, 150 F.3d 1088, 1092 (9th Cir. 1998) (holding that a RICO action "does not implicate any United States law which mandates venue in the United States district courts."). In *Transunion*, the court affirmed dismissal of a civil RICO claim even though the Philippine court might apply civil RICO law. *Transunion Corp.*, 811 F.2d at 130.

90. *See generally* O'SULLIVAN, *supra* note 14, at 657–58.

tuate on the domestic front.<sup>91</sup> But criminal laws are public laws and may only be enforced by the enacting sovereign and applied only by its courts, never by a foreign judiciary.<sup>92</sup> Importantly, while RICO is a criminal law, and thus public, RICO's civil component may be conceptualized as a quasi-public law<sup>93</sup> because it provides a private cause of action based on a criminal violation of public law.<sup>94</sup>

The key to solving the Russian Court case puzzle is to delineate how a potential plaintiff obtains a cause of action under civil RICO. The BONY employees' criminal conduct was imputed to BONY in the course of the DOJ white-collar crime investigation that resulted in a nonprosecution agreement where BONY admitted responsibility for its conduct.<sup>95</sup> The FCS's attorneys, thus, argued that the Moscow *Arbitrazh* Court would not need to resolve whether a predicate criminal violation took place for two reasons. First, Lucy Edwards, BONY's employee, was convicted in federal court on July 26, 2006, and, second, BONY has admitted wrongdoing in its nonprosecution agreement with the DOJ.<sup>96</sup> The predicate violation was the U.S. money laundering statute, 18 U.S.C. § 1956, which is a valid predicate act under RICO.<sup>97</sup> Because a corporation is a legal fiction that can only act through its employees, BONY is vicariously liable for Edwards' conduct.<sup>98</sup> Thus, the Moscow *Arbitrazh* court's task

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91. *See id.*

92. Jarvis, *supra* note 83, at 16 n. 64. In the United States, the ban on enforcing penal legislation can be traced to *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), in which Chief Justice Marshall held that "[t]he Courts of no country execute the penal laws of another. . . ." *Id.* at 123. *The Antelope* involved a question whether slaves on ships seized by the United States should be returned to Spanish and Portuguese slave traders. *The Antelope*, 23 U.S. 66. The Court rejected the argument that it should enforce the Spanish and Portuguese laws against the slave trade. *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 165 (2002).

93. *See generally* Dodge, *supra* note 92, at 161 (arguing that "nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.").

94. *Cf. Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 485 (1985). "Supreme Court in *Sedima* recognized that civil RICO, despite being part of a comprehensive criminal statute, is an independent civil cause of action." Jarvis, *supra* note 83, at 15.

95. *See* Non-Prosecution Agreement, *supra* note 42.

96. *See id.*

97. *See* 18 U.S.C. §§ 1961–68 (2006).

98. *See Brady v. Dairy Fresh Products*, 974 F.2d 1149 (9th Cir. 1992). Ninth Circuit stated with respect to respondeat superior liability for violations of §1962(c):

We hold that an employer that is benefited by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise. Corporations and other employers that have benefited from their employees or

would be simplified. It would not need to interpret the money laundering statute, nor would it need to find BONY guilty under U.S. criminal law. The predicate investigation and conviction was conducted in the U.S., where it belonged. The genius of the FCS attorney's innovative strategy was perhaps that, once they convinced the Moscow *Arbitrazh* court that it may do so, the court would have needed only to interpret and apply civil RICO to award civil damages, without meddling in the U.S. criminal justice system.

Because its employees'—and, thus, BONY's—"racketeering activity" allegedly caused damage in Russia, a Russian plaintiff (here the FCS) has a cause of action under civil RICO.<sup>99</sup> On the one hand, the fact that the FCS is seeking remedy for allegedly unpaid customs duties places the Russian lawsuit among the "garden variety" civil RICO claims for lost revenue that are regularly brought in the U.S.<sup>100</sup> On the other hand, FCS and its attorney were asking for a civil remedy in the form of treble damages pursuant to civil RICO. In that sense, they were not looking to recover unpaid duties or taxes, but simply seeking damages for the predicate wrongful conduct. This, the attorneys argue, places their civil RICO claim outside the typical revenue claims and would thus make the revenue rule inapplicable. Nevertheless, the Russian RICO case raises numerous issues for the purposes of recognition in the U.S.

## II. RECOGNITION OF FOREIGN JUDGMENTS IN THE U.S.

The United States is not a party to any bilateral or multilateral treaty on recognition and enforcement of foreign judgments.<sup>101</sup> Furthermore, there is no national, uniform approach to recognition and enforcement of for-

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agents' RICO violations will be forced to compensate the victims of racketeering activity. Respondeat superior and agency liability will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities. Thus, respondeat superior liability furthers both the compensatory and deterrent goals of the RICO statute.

Brady v. Dairy Fresh Products, 974 F.2d at 1154–55.

99. See Buxbaum, *supra* note 13, at 278. See generally Farnam, *supra* note 16 (discussing the lost revenue claims).

100. See Buxbaum, *supra* note 13, at 278.

101. See Simeone, *supra* note 32, at 362 (discussing the unsuccessful attempt of the United States and United Kingdom to negotiate a bilateral treaty in the 1970s); Balan, *supra* note 32, at 230 (noting that, while "other countries have entered into such reciprocal agreements," the U.S. remains an outsider). Other countries are reluctant to enforce U.S. jury awards, which they consider to be "exuberant." Simeone, *supra* note 32, at 362.

eign judgments in the U.S.<sup>102</sup> Because recognition actions come from abroad, they must be filed in federal district courts under diversity jurisdiction.<sup>103</sup> The *Erie* doctrine<sup>104</sup> has led federal courts to conclude that state law governs judgment recognition in diversity cases.<sup>105</sup> As a result, federal courts around the country apply standards from one of the following sources:<sup>106</sup> Uniform Foreign Money-Judgments Recognition Act<sup>107</sup> (“Recognition Act”) or “a similar statute”,<sup>108</sup> Restatement (Third) of Foreign Relations Law,<sup>109</sup> “prior state court decisions setting forth local common law rules”,<sup>110</sup> or “prior federal court decisions determining as best as possible the law the state court would have applied if it had been faced with the same issue.”<sup>111</sup> The New York recognition statute reflects the common array of doctrinal principles in the Recognition Act, which in turn mirrors the Restatement.<sup>112</sup> Any recognition discussion, however, must begin with the common law antecedent to the modern law of recognition.

*A. The Rule Based on Comity: Hilton v. Guyot*

Originally, the U.S. inherited the old English common law rule that a foreign money judgment was only “prima facie evidence of the matter

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102. Ronald A. Brand, *Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 257 (1991) (explaining that Congress has not passed a statute and that the federal courts have yet to find common ground, and arguing further that the judiciary should adopt a uniform rule for recognition and enforcement of foreign judgments).

103. *Id.* at 262. “Diversity jurisdiction is founded on the article III jurisdiction of the federal courts, U.S. CONST. art. III, and is statutorily prescribed by 28 U.S.C. § 1332 (1988) . . . .” *Id.* at 262 n.32.

104. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 64 (1938).

105. See *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003–04 (5th Cir. 1990); *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981); *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1971); *Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009, 1011–12 (E.D. Ark. 1973).

106. Brand, *supra* note 102, at 262 (listing possible sources in an effort to demonstrate lack of uniformity as a premise for an argument that the judiciary should prescribe a uniform standard).

107. RECOGNITION ACT, *supra* note 33. The Recognition Act was proposed because “[c]odification by a state of its rules on the recognition of money judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.” *Id.* at prefatory note.

108. Brand, *supra* note 102, at 262.

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481–482 (1987).

110. Brand, *supra* note 102, at 262.

111. *Id.*

112. N.Y. C.P.L.R. §§ 5301–05 (Consol. 2004).



decided.”<sup>113</sup> Under this rule a foreign judgment was “not conclusive of the merits of the dispute between the parties”<sup>114</sup> and, thus, was likely to be subject to a thorough review.<sup>115</sup> In 1895, the Supreme Court rejected the English rule in an influential case *Hilton v. Guyot*.<sup>116</sup> The *Hilton* Court adopted a rule based on comity.<sup>117</sup> In lowering the bar to recognition, the *Hilton* decision afforded deference to a foreign judgment.<sup>118</sup> But it required further analysis of a number of the judgment’s aspects.<sup>119</sup>

Specifically, the foreign court rendering the judgment must have had jurisdiction over the cause of action and the judgment “must have been rendered . . . upon regular proceedings and due notice”<sup>120</sup> by a court within a “system of jurisprudence” that provides an “impartial administration of justice.”<sup>121</sup> The *Hilton* Court required absence of prejudice or fraud in the proceedings, as well as in the court and in the system of laws.<sup>122</sup> The Court held that in the absence of any other “special reason,” if the judgment satisfied the above criteria, the merits of the case should not be tried again “upon the mere assertion”<sup>123</sup> by a defendant that the original “judgment was erroneous in law or in fact.”<sup>124</sup>

In order to approach the discussion of the Russian RICO case objectively, it is necessary to dispel the pervasive perception of Russian courts’ partiality, which is contrary to the *Hilton* “impartiality” requirement. Frequently, when a case is heading to a court in Russia, litigants and non-litigants with vested interests question the forum’s integrity by raising issues of partiality or political favoritism in order to frustrate the litigation.<sup>125</sup> Not surprisingly, the party that raises the issue is usually the

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113. See FOLSOM, GORDON, & SPANOGLE, JR., *supra* note 34, at 730.

114. Balan, *supra* note 32, at 235 (citing RALPH H. FOLSOM, MICHAEL WALLACE GORDON, & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 1109 (2d ed. 2001)).

115. FOLSOM, GORDON, SPANOGLE, JR., *supra* note 34, at 730.

116. *Hilton v. Guyot*, 159 U.S. 113, 116 (1895).

117. *Id.* at 170; see also FOLSOM, GORDON, SPANOGLE, JR., *supra* note 34, at 730.

118. See *Hilton*, 159 U.S. at 158.

119. *Id.* at 163–64.

120. *Id.* at 166–67.

121. *Id.* at 158.

122. *Id.*

123. *Id.*

124. *Id.*

125. For example, on October 17, 2008, the Moscow *Arbitrazh* Court, the venue for the FCS’s claim, “overturned most of [the] Russian government’s tax claims against the British Council, the British government’s cultural relations arm.” Ximena Marinero, *Russia Arbitration Court Rules Most Tax Claims Against British Council Unlawful*, JURIST, Oct. 18, 2008, <http://jurist.law.pitt.edu/paperchase/2008/10/russia-arbitration-court-rules-most-tax.php>. This dispute over unpaid taxes was highly publicized and took place in the

party that is likely to benefit from being in a forum other than Russia. For example, the Russian plaintiffs in *Pavlov*, in resisting BONY's motion for *forum non conveniens*, claimed that Russia would not be an appropriate forum because its courts are believed to be prone to partiality.<sup>126</sup> Nevertheless, BONY persisted with its *forum non conveniens* motion despite Russian plaintiffs' allegation of partiality in the Russian forum,<sup>127</sup> which would, if it were true, adversely affect BONY as a foreign litigant. As a result, BONY would now be unlikely to be able to persuade a U.S. court that a Russian judgment should not be recognized<sup>128</sup> on grounds of Russian courts' alleged partiality.<sup>129</sup> While the inference here is simple, it is an important one: litigants' allegations of a Russian forum's inadequacy due to partiality<sup>130</sup> of the Russian judi-

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context of a diplomatic standoff between Russia and Great Britain. *Id.* It appears that the Moscow *Arbitrazh* court has thwarted the Kremlin's attempt to corner the British Counsel. This is indicative of Russia's courts' burgeoning independence, assertiveness, and commitment to rule of law.

126. See *Pavlov v. Bank of New York, Inc.*, 135 F. Supp. 2d 426, 433 (S.D.N.Y. 2001). As matter of speculation, if a Russian court displayed bias against a party—as it may have during the Soviet era that was marred by the State control over the judiciary—it would likely be against a foreign party, not its national.

127. *Id.* at 435. “In view of BNY[M]’s staunch assertion here that the Russian legal system provides an adequate alternative forum, it quite likely would be estopped to mount such a challenge to a Russian money judgment in this case. Moreover, at least one U.S. court has recognized and enforced a Russian custody decree.” *Id.* at 435.

128. On the other hand, the Russian Court case’s press coverage makes it clear that, to assuage its shareholders, BONY was attempting to sway the “proverbial jury in the court of public opinion.” Claiming to be a victim of political influence and corruption in the Russian judiciary, BONY attempted to discredit the case in the press, a litigation tactic equally utilized by domestic litigants. BONY argued that the courts’ partiality is likely to impede equitable resolution on the merits. Parloff, *supra* note 2, at 127; Key Facts, *supra* note 5, at 3; see also Press Release, Bank of New York Mellon, The Fundamental Flaws in the Federal Customs Service’s Case, <http://www.bnymellon.com/russiacase/rebuttal.pdf> (last visited Oct. 4, 2009). This position, however, is contrary to the one BONY had taken on a motion for *forum non conveniens* in *Pavlov*. See *supra* text accompanying notes 72–73.

129. “Parties may seek recusal of judges . . . on several grounds, primarily relating to partiality.” Glenn P. Hendrix, *Business Litigation and Arbitration in Russia*, 31 INT’L LAW. 1075 (1997), reprinted in A LEGAL GUIDE TO DOING BUSINESS IN RUSSIA & THE FORMER REPUBLICS OF THE U.S.S.R. 135, 163 (Aviva Yakren ed., 2000) (updating original article). Unless BONY raises the issue of partiality at trial in Russia, it should be precluded from challenging a recognition action on the same grounds.

130. Moreover, commentators have described Russia’s *arbitrazh* courts as a place where the State’s influence is no longer as palpable as it was during the Soviet era. See generally Kathryn Hendley, *Remaking an Institution: The Transition in Russia from State Arbitrazh to Arbitrazh Courts*, 46 AM. J. COMP. L. 93, 93 (1998) (discussing the transition of the *arbitrazh* courts toward an independent judiciary).

ciary<sup>131</sup> must be viewed skeptically in light of a litigant's posture at trial.<sup>132</sup>

*B. Normative Standards in the Recognition Act and the Restatement*

It is noteworthy that the *Pavlov* court recognized that, had the plaintiffs sued BONY in Russia, a Russian judgment would be subject to recognition proceedings in the U.S. In response to plaintiffs' concern about having to re-litigate a substantial portion of a judgment from a Russian court, the *Pavlov* court stated:

The Uniform Foreign Country Money-Judgments Recognition Act, which has been adopted in New York, insofar as it is relevant here, would permit a court to refuse enforcement to a Russian money judgment only if it concluded that the Russian legal system "does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . ."<sup>133</sup>

The Recognition Act<sup>134</sup> and Restatement (Third) of Foreign Relations Law<sup>135</sup> are the prevailing sources of normative principles and criteria for judgment recognition in a majority of American jurisdictions.<sup>136</sup> The

131. Cf. Dmitry Dyakin & Alexander Vaneev, *New Perspectives for Business Litigation in Russia*, THE EUROPEAN LAWYER, Sept. 2007, at 44, 44–45. Dyakin and Vaneev note:

The effectiveness of *arbitrazh* courts in Russia has grown. . . . Numerous efforts were made in order to create uniformity in application of law. Since 2000, the Supreme *Arbitrazh* Court of the Russian Federation has introduced a number of rulings and governing interpretations aimed at stabilisation of the judicial practice. These clarifications particularly have to do with such essential aspects of commercial relationship as protection of shareholders rights, turnover of securities, performance of insurance contracts, state guarantees for foreign investors, disputes with state and state-owned enterprises, bankruptcy procedures, and a huge variety of tax issues.

*Id.*

132. Historically, "*arbitrazh* was relatively free of corruption . . . because the stakes in an economic dispute between state-owned enterprise[s] were generally lower than . . . in criminal cases," Hendrix, *supra* note 129, at 153.

133. See *Pavlov v. Bank of New York, Inc.*, 135 F. Supp. 2d 426, 435 (S.D.N.Y. 2001).

134. See RECOGNITION ACT § 1(2), *supra* note 33.

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 481–482 (1987).

136. See Brand, *supra* note 102, at 268 (juxtaposing each criterion in both sources and finding merely "cosmetic" differences between the Recognition Act and the Restatement). Brand continues:

[T]here are only two significant differences between the Recognition Act and the Restatement. Whereas the Act treats lack of subject matter jurisdiction as a

Recognition Act and the Restatement are also substantially similar.<sup>137</sup> In an action for recognition, U.S. courts focus on a common array of issues<sup>138</sup> entailing the presence or absence of the following elements: finality and conclusiveness of the judgment;<sup>139</sup> due process;<sup>140</sup> in personam and in rem jurisdiction;<sup>141</sup> subject matter jurisdiction;<sup>142</sup> notice and opportunity to be heard;<sup>143</sup> fraud;<sup>144</sup> public policy;<sup>145</sup> inconsistent judg-

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mandatory ground for nonrecognition, it is only a discretionary ground under the Restatement rule. In addition, the Act includes a limited forum non conveniens ground in its list of discretionary grounds for nonrecognition.

*Id.*

137. *See id.* Recognition is conceptually and procedurally different from enforceability—a judgment must first be recognized by U.S. courts in order to be enforced. Enforceability is regulated by the Enforcement of Foreign Judgments Act, which deals mainly with the procedure, or the “how,” for judgment collection. *See id.*

138. *Id.* at 269.

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. e. “[A] judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated.” RESTATEMENT OF JUDGMENTS § 41 cmt. a (1942).

140. RECOGNITION ACT § 4(a), *supra* note 33. “[A] mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.” *Id.* “The . . . due process [issue] has arisen principally in the context of discussions of personal jurisdiction. United States courts apply United States concepts of due process developed in *International Shoe v. Washington*[, 326 U.S. 310 (1945),] and its progeny, rather than looking to similar concepts applicable in the foreign jurisdiction.” Brand, *supra* note 102, at 270; *see* CIBC Mellon Trust Co. v. Mora Hotel, 100 N.Y.2d 215, 222 (2003) (holding that New York State law does not demand that the foreign tribunal’s procedures exactly match those of New York—rather, the statute is satisfied if the foreign court’s procedures are compatible with the requirements of due process of law).

141. RECOGNITION ACT § 4(a), *supra* note 33, at 268; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1)(b). In *Hilton*, the Court required that “[e]very foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.” *Hilton v. Guyot*, 159 U.S. 113, 166–67 (1895).

142. RECOGNITION ACT § 4(a)(3), *supra* note 33, at 268; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(a). Under the Restatement, lack of subject matter jurisdiction is a discretionary ground for non-recognition. But under the Recognition Act, lack of subject matter jurisdiction is a mandatory ground for non-recognition. Brand, *supra* note 102, at 273 n.71.

143. “Courts have required proper notice, generally in the form of proper service of process, as a prerequisite to granting recognition or enforcement of a foreign judgment.” Brand, *supra* note 102, at 274.

144. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482; *see also* *Hilton*, 159 U.S. at 206. Generally, “fraud [is] a defense to the recognition of a foreign-nation judgment. . . . [A] foreign judgment can be impeached only for extrinsic fraud, which

ments<sup>146</sup> or judgments contrary to party agreement,<sup>147</sup> and convenience of forum.<sup>148</sup> In the Russian Court case, public policy and due process are the most fertile grounds for defenses against the recognition of the Russian Court's judgment.

Judging by the history of the proceedings in Moscow and by what issues BONY has raised in the court and in the press, most of the above criteria will not present an obstacle for the recognition of the Russian Court's judgment. At this stage, BONY has not alleged any irregularities or foul play in the Russian RICO case, except that initially it has challenged the court's subject matter jurisdiction,<sup>149</sup> instinctively objected to

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deprives the aggrieved party of an adequate opportunity to present his case to the court." Brand, *supra* note 102, at 274.

145. A judgment violates public policy when it "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty, or of private property . . ." Brand, *supra* note 102, at 276 (quoting *Somportex v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (1971)); *see* *Bachchan v. India Abroad Publ'n*, 585 N.Y.S.2d 661, 662-63 (N.Y. Sup. Ct. 1992) (holding that enforcement of the English judgment violates U.S. public policy because English courts afford lesser protection of rights to free speech on matters of public concern than U.S. courts under the U.S. CONST. amend. I.).

146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. g. "Inconsistent judgments may arise either in the context of two conflicting foreign judgments or of a foreign judgment in conflict with a judgment from another United States court." Brand, *supra* note 102, at 276.

147. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. h.

148. The Recognition Act allows nonrecognition where the judgment is "rendered in a foreign country on the basis only of personal service," and where the court "believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*." Brand, *supra* note 102, at 277; *see also* RECOGNITION ACT § 4 cmt., *supra* note 33, at 268-69. The *forum non conveniens* exception . . . is available only when personal jurisdiction is based solely on personal service. . . . [If] jurisdiction exists on any other ground, recognition may not be refused because the foreign court was a seriously inconvenient forum." Brand, *supra* note 102, at 277.

149. While there is a dearth of information available, from what has surfaced in the U.S. press, it appears that BONY initially sought to transfer the lawsuit to a Russian Tax court. *See* Parloff, *supra* note 2, at 128; Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 3. At the time, that motion failed and the Arbitrazh court asserted jurisdiction over the case. Parloff, *supra* note 2, at 128. Moreover, BONY had entered appearance in several hearings. *See* Parloff, *supra* note 2, at 128. Because the subject matter jurisdiction is a discretionary nonrecognition ground, BONY would have likely lost this argument at the recognition stage. Moreover, regarding litigation of RICO claims in the U.S., its courts have held that when a RICO claim involves foreign events or conduct in a foreign country, subject matter jurisdiction to hear a RICO action exists as long as one of two alternative tests are satisfied: the conduct test or the effects test. *See* *Madanes v. Madanes*, 981 F. Supp. 241, 250 (S.D.N.Y. 1997); *see also* *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1046 (2d Cir. 1996).

application of civil RICO and has argued that the lawsuit is improper because it is contrary to the U.S. public policy that a judiciary of one nation will not enforce public laws of another nation.<sup>150</sup> The BONY's arguments in the Moscow *Arbitrazh* Court foreshadowed some of the difficult issues that a U.S. court will have to wrestle with during a recognition action.

### III. A CIVIL RICO CLAIM MAY BE FILED ABROAD

The U.S. courts do not have exclusive jurisdiction over civil RICO claims.<sup>151</sup> The U.S. Supreme Court in *Shearson/American Express v. McMahon*<sup>152</sup> has held that a foreign arbitrator may apply civil RICO in a foreign arbitral tribunal. This has effectively eliminated U.S. courts' exclusive monopoly over civil RICO. The pertinent question here is whether a U.S. court, in a recognition action, will tolerate a foreign court's application of civil RICO against an American defendant. The *Shearson* decision at least provides an analytical point of departure.

In June 1987, the Supreme Court in *Shearson* held that claims brought under the civil provisions of the federal RICO statute are "arbitrable regardless of whether such claims arise in a domestic or international setting."<sup>153</sup> The Court explained:

In sum, we find no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims. [Plaintiffs] may effectively vindicate their RICO claim in an arbitral forum, and therefore there is no inherent conflict between arbitration and the purposes underlying § 1964(c).<sup>154</sup>

The Court justified its reasoning with respect to RICO's arbitrability by referencing its prior decision in *Mitsubishi Motors Corp. v. Soler*

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150. Dodge, *supra* note 92, 161 (arguing that "nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.").

151. For example, one prominent American practitioner and a prolific author noted that "[a]t least in theory, some foreign courts' choice-of-law rules may permit or require application of RICO." GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 24 n.30 (2d ed. 2000). This makes sense because U.S. courts may be equally required to apply Russian law if the U.S. choice-of-law rules mandate.

152. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 220 (1987).

153. *Id.* at 242; *see also* Jarvis, *supra* note 83, at 1. *See generally* Glenn P Hendrix, International Judicial Assistance from American Courts in Russian Litigation and Arbitration Proceeding (Jun. 29, 2004) (unpublished manuscript), <http://www.abanet.org/intlaw/committees/disputes/litigation/Assistance.pdf>.

154. *See Shearson/American Express*, 482 U.S. at 240-41.

*Chrysler-Plymouth, Inc.*<sup>155</sup> The Court rejected the idea that “RICO claims are too complex to be subject to arbitration” abroad.<sup>156</sup> The Court further rejected the idea that “‘overlap’ between RICO’s civil and criminal provisions renders § 1964(c) claims nonarbitrable.”<sup>157</sup> In order to conceptually sever civil RICO from its penal host, the Court “rejected the view that § 1964(c) ‘provide[s] civil remedies [only] for offenses criminal in nature.’”<sup>158</sup> The Court concluded that “criminal provisions of RICO do not preclude arbitration of bona fide civil actions brought under § 1964(c).”<sup>159</sup> As to the final obstacle, the Court disposed of the claim that public policy dictates nonarbitrability:

Emphasizing . . . compensatory function . . . , *Mitsubishi* concluded that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” The legislative history of § 1964(c) reveals the same emphasis on the remedial role of the treble-damages provision.<sup>160</sup>

The Court’s decision in *Mitsubishi* provided the impetus for the decision in *Shearson*.<sup>161</sup> In essence, the Court in *Shearson* transplanted its reasoning with respect to arbitrability under the Sherman Act in *Mitsubishi* into its justification with respect to civil RICO arbitrability abroad. Civil RICO’s application abroad by foreign arbitrators and its underlying policy rationale—allowing foreign plaintiffs to vindicate their rights abroad, in a foreign forum, under U.S. law—is best summarized in the Court’s following statement:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.<sup>162</sup>

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155. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985) (holding that nothing in the nature of the federal antitrust laws prohibits parties from agreeing to arbitrate antitrust claims arising out of international commercial transactions).

156. *Shearson/American Express*, 482 U.S. at 239–40.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (internal citations omitted).

161. *See Jarvis*, *supra* note 83, at 2.

162. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

The Court's intuition in *Mitsubishi* and *Shearson* is further highlighted by the following statement:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>163</sup>

In sum, the *Shearson* decision represents the Court's willingness to relinquish the U.S. courts' monopoly over civil RICO's application.<sup>164</sup> Of course, the *Shearson* decision is not a green light to a foreign plaintiff to file a civil RICO claim in her home forum against an American defendant. In other words, the *Shearson* decision is not a precedent on point that the Russian FCS, or any other foreign judgment creditor, could cite to argue that the Moscow *Arbitrazh* court, or any other non-U.S. court, could apply civil RICO. *Shearson* is distinguishable because there was a valid arbitration clause at the heart of the parties' agreement.<sup>165</sup> The *Shearson* decision was thus by and large driven by a pro-arbitration policy.<sup>166</sup>

Significantly, however, the *Shearson* decision signaled the Court's willingness to tolerate foreign arbitral awards under civil RICO and, thus, foreign application and interpretation of civil RICO.<sup>167</sup> Therefore, the U.S. pro-arbitration policy in *Shearson* has arguably carried civil RICO into the international arena. The Court's emphasis on pro-arbitration policy, however, does not diminish *Shearson*'s significance for the Russian RICO case because, logically, even in light of the pro-arbitration policy, had it not been civil RICO with its attributes at issue, the *Shearson* Court may not have reached the decision it did. Thus, it is civil RICO's particular attributes that stand equally behind the *Shearson* decision, alongside its pro-arbitration policy. Moreover, the Court decisions in *Mitsubishi* and *Shearson* highlight the Court's deference to foreign courts' competency to resolve civil RICO claims.

The Court further indicated its commitment to international commerce and its commitment to strengthen the ability of foreign plaintiffs to vin-

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163. *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

164. *See generally* *Jarvis*, *supra* note 83, at 4.

165. *Shearson/American Express*, 482 U.S. at 239–40.

166. *See* *Jarvis*, *supra* note 83, at 6.

167. *See id.* at 10 (“[While] *Shearson* is not an international decision since it arose in a domestic setting and involved a dispute about the stock market, . . . the international implications of the decision are clear.” *Id.*



dicating their legal rights abroad under U.S. law against U.S. entities. These decisions provide a strong argument to a petitioner in an action for recognition of a judgment under civil RICO rendered by a foreign judge. Moreover, the language in the above cases indicates that the Court considered foreign arbitral tribunals, as well as foreign courts, to be competent to apply civil RICO.<sup>168</sup> After all, from the standpoint of applicability of civil RICO, the sole difference between arbitration and a judicial proceeding is that whereas the judiciary is a branch of government, an arbitral forum is a private enterprise. But under the recognition analysis, this distinction has no significance because U.S. courts allow substantial deference to a forum's impartiality and competence, and, thus, place the burden on the opponent to the judgment to make a specific showing of fraud, lack of due process, or affront to U.S. public policy.<sup>169</sup> That showing may be made equally with respect to an arbitral award or a judgment. Thus, it would not be a stretch of the legal imagination to extend *Shearson's* reasoning with respect to foreign arbitral tribunals to apply to the Russian RICO case.

This argument is further amplified by contrasting the characteristics of arbitration with those of litigation. Foreign arbitrators are often free to apply substantive legal norms differently than the judiciary of a national that generates those norms.<sup>170</sup> By rendering civil RICO claims arbitrable abroad, the Court signaled its high tolerance for U.S. law's application abroad<sup>171</sup> against U.S. respondents in a fashion likely diverging<sup>172</sup> from its traditional application by U.S. courts. Courts around the world, although some more than others, pay attention to their colleagues abroad and are presumably self-conscious for the sake of legitimacy and comity

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168. *Cf. id.* at 14. For example, "[t]he International Chamber of Commerce . . . [is] the most important of the world's international arbitration centers[,] . . . [but] its arbitrators' familiarity with civil RICO is likely to be limited at best." *Id.* at 14 n.59.

169. *See Bachchan v. India Abroad Publ'ns, Inc.*, 585 N.Y.S.2d 661, 662-63 (N.Y. Sup. Ct. 1992) (holding that enforcement of the English judgment violates U.S. public policy).

170. *See Linda Silberman, International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9, 13 (2002). *See generally* Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 453 (1999).

171. *See Silberman, supra* note 170, at 10. "[W]hen [parties] have adopted [arbitration], they must be content with its informalities. . . . They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery." *See FOLSOM, GORDON, & SPANOGLE, JR., supra* note 34, at 732 (quoting *American Almond Products Co. v. Consolidated Pecan Sales Co., Inc.*, 144 F.2d 448, 451 (2d Cir. 1944)).

172. *See Jarvis, supra* note 83, at 18-19.

in the age of high-volume, transnational intercourse. Unlike arbitrators, however, a foreign court<sup>173</sup> is likely to apply a foreign law analogously to its counterpart abroad where the law originates.<sup>174</sup> Thus, arbitration arguably is not the optimal place<sup>175</sup> to employ a law like civil RICO that is notorious for its broad elements and high penalties.<sup>176</sup> It is noteworthy that foreign arbitral awards under civil RICO are highly likely to be recognized in the U.S. in a streamlined, “rubber-stamp” fashion under the New York Convention.<sup>177</sup> This provides further impetus for recognition of the Russian Court case judgment under civil RICO.

One aforementioned point merits clarification as it is a common source of confusion. The proceeding in the Moscow *Arbitrazh* court is not an arbitration proceeding. The Moscow *Arbitrazh* court is not even an arbitral tribunal.<sup>178</sup> It is a commercial court titled “*arbitrazh*” that many non-Russian speakers confuse with commercial arbitration. The Russian term *arbitrazh*<sup>179</sup> is only an approximation and, therefore, a misleading translation of the English term “arbitration.”<sup>180</sup> If the proceeding in Moscow was in fact a commercial arbitration, it would place the Russian RICO case squarely within the ambit of the *Shearson* decision. But the only parallel between Russian *arbitrazh* and arbitration is that the two terms are homonymous. The actual commercial arbitration tribunal in Russia is the International Commercial Arbitration Court at the Chamber

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173. See Silberman, *supra* note 170, at 10 (arguing that disputes implicating public policy should remain in the hands of the national judiciary or, alternatively, there must be a higher authority to review these arbitral awards).

174. See generally FOLSOM, GORDON, & SPANOGLE, JR., *supra* note 34, at 732. “International Commercial Arbitration procedures are often informal and not laden with legal rights.” *Id.*

175. See Jarvis, *supra* note 83, at 16. “Many civil RICO claims . . . fail due to the inability to have evidence admitted, especially with respect to proving that the respondent was engaged in a racketeering enterprise.” *Id.*

176. See *id.* at 17. “The lack of discovery can be fatal to a civil RICO claim, since much of the evidence needed to prove that the respondent engaged in racketeering activities often will be obtainable only by culling through the business records of the respondent.” *Id.*

177. See FOLSOM, GORDON, & SPANOGLE, JR., *supra* note 34, at 732 (citing Convention on Recognition and Enforcement of Arbitral Awards, concluded June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38).

178. See Dmitry Mareshin, *The Russian Style of Civil Procedure*, 21 EMORY INT’L L. REV. 543, 547 n.43 (2007) (citing WILLIAM BURNHAM ET AL., LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 50 (3d ed. 2004)).

179. The reason for the linguistic dissonance is likely that when Russia imported the term arbitration, it simply chose to apply it in a distinctive fashion, calling its wide network of commercial courts *arbitrazh* courts.

180. Hendrix, *supra* note 129, at 148–49.

of Commerce and Industry of the Russian Federation (ICAC) in Moscow.<sup>181</sup> The lawsuit against BONY in the Moscow *Arbitrazh* court is in fact equivalent to a civil lawsuit in a court of first instance in the U.S. rather than an arbitration proceeding. While civil courts of other nations may apply foreign private law, they may not enforce strictly public or criminal laws of another nation.

#### IV. POTENTIAL DEFENSES TO RECOGNITION

##### *A. Is Civil RICO a Public Law?*

BONY has objected to the Moscow *Arbitrazh* Court's decision to apply civil RICO on the grounds that it is a public law.<sup>182</sup> But even if there was any doubt beforehand, the Court in *Shearson* effectively rendered civil RICO a private law. The U.S. courts routinely apply foreign laws where conflicts-of-law and choice-of-law rules permit or mandate application of foreign law.<sup>183</sup> For example, in the case of *Films by Jove, Inc. v. Berov*, a United States court applied Russian copyright laws.<sup>184</sup> But enforcement of public laws is customarily the exclusive domain of a judiciary in a nation where these laws originate.<sup>185</sup> For example, where courts in a civil proceeding apply foreign law, that foreign law must be a private law, because in civil cases parties are subject to the court's juris-

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181. "The main international commercial arbitration institution in Russia is the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) in Moscow. It is the successor to the Foreign Trade Arbitration Commission (VTAK) which was established in 1934. ICAC has dozens of years of experience and thousands of arbitrated cases. Currently, ICAC resolves about 600 disputes annually. Its awards are routinely enforced all over the world." International Commercial Arbitration Russia, Arbitration Institutions, <http://www.geocities.com/jdhevhl/institutions.html> (last visited Oct. 4, 2009). This international arbitral tribunal does not have an official website, but the other two main arbitral tribunals, serving mainly domestic parties, can be found at <http://www.mosarbitration.ru>.

182. See Parloff, *supra* note 2; Goldhaber, *supra* note 2. See generally Dodge, *supra* note 92, at 61.

183. See GEEROMS, *supra* note 56, at 1; Dodge, *supra* note 92, at 161. "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . .," Dodge, *supra* note 92, at 161 n.1 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 145(1) (1971)).

184. *Films by Jove, Inc. v. Berov*, 154 F. Supp. 2d 432, 448 (E.D.N.Y. 2001).

185. See Dodge, *supra* note 92, at 161 (arguing that "nations should break the public law taboo because cooperation in the enforcement of public law would be mutually beneficial.").

diction due to private conduct.<sup>186</sup> On the other hand, if a foreign party is subject to a court's jurisdiction for criminal conduct, that court will apply its own criminal or public law because a court in a criminal proceeding has jurisdiction over criminal conduct only in its own jurisdiction.<sup>187</sup>

Accordingly, if Russian authorities were to prosecute an American defendant under criminal RICO, this would cause a seismic cataclysm in the legal community. Only the DOJ may prosecute a federal criminal case under U.S. criminal laws. Thus, if civil RICO is deemed inseparable from its penal host, rendering it a public law in the eyes of a U.S. court, then the Russian RICO case will be contrary to U.S. public policy and therefore unrecognizable. But the Court in *Shearson* concluded that private parties may arbitrate civil RICO claims arising in an international business context.<sup>188</sup> The Court further suggested that civil RICO may provide civil remedies even without a predicate criminal violation.<sup>189</sup> Thus the *Shearson* decision has affirmatively rendered civil RICO a private law rather than public. A private law that may resolve a commercial dispute, applicable abroad notwithstanding any criminal violation, cannot function as a public law. To illustrate, the notion that civil RICO is a public law yet applicable in a foreign forum, would, by analogy, render any and every public law enforceable by a foreign judiciary. The U.S., and other States, would lose sovereignty over their criminal law enforcement regimes. BONY's argument that civil RICO is a public law is unlikely to withstand the Court's decision in *Shearson*. BONY may have a better chance of persuading a U.S. court that the Moscow *Arbitrazh* court overstepped its jurisdictional limits or that, in electing to apply civil

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186. *See id.* The "public law taboo" resulted from a rule against enforcing foreign penal laws, as well as the "revenue rule," which barred enforcement of foreign revenue laws. *Id.* at 165.

187. "The prohibition against applying foreign penal law and (if it exists) the prohibition against applying foreign public law come into play only when a suit is brought by the government." Dodge, *supra* note 92, at 165. The dispute whether civil RICO is public or private law was at the heart of BONY's argument during early stages of the trial. Namely, BONY sought dismissal of the case precisely because of the "public law taboo." *See* Goldhaber, *supra* note 2. If civil RICO is a private law, then, on the surface, there is no "public law enforcement" problem in the Russian Court case. That, of course, does not answer the question whether civil RICO may be applied by a foreign court to award the plaintiff, a sovereign entity, lost revenue.

188. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239–40 (1987).

189. *Id.* In a dissenting opinion in the Canadian lost revenue case under RICO, Judge Calabresi stated: "[B]y enacting RICO, our government has determined that this suit advances our own interests, and any collateral effect furthering the governmental interests of a foreign sovereign is, therefore, necessarily incidental." *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 136 (2d Cir. 2001) (Calabresi, J., dissenting) (rejecting the civil-criminal distinction made by the majority).

RICO, it did not apply its choice-of-law rules in good faith. Success on either one of those arguments may render the Russian Court's judgment unrecognizable.

### *B. The Arbitrazh Courts' Jurisdiction*

The first and easy issue is whether the Moscow *Arbitrazh* court has jurisdiction over FCS's claim. While subject matter jurisdiction is a prerequisite for recognition, U.S. courts tend to apply jurisdictional rules of a foreign court.<sup>190</sup> Russia's *arbitrazh* courts' jurisdiction is statutory<sup>191</sup> and is narrower than Russia's courts of general jurisdiction.<sup>192</sup> *Arbitrazh* courts assert jurisdiction over economic disputes between separate "legal entities" and between a "legal entity" and the government.<sup>193</sup> Their jurisdiction, *inter alia*, extends to property and tax disputes.<sup>194</sup> As part of the judicial reform,<sup>195</sup> the amendment of the Code of *Arbitrazh* Procedure in 1995 granted *arbitrazh* courts jurisdiction over foreign entities.<sup>196</sup> While Russia's courts of general jurisdiction retained jurisdiction over foreign parties, many foreign litigants opt for the *arbitrazh* courts "because of their greater expertise in commercial matters."<sup>197</sup> In the Russian RICO case, the Moscow *Arbitrazh* Court properly asserted jurisdiction over FCS's claim because FCS is a governmental entity and BONY is a foreign commercial entity. Further, because FCS was seeking to collect allegedly unpaid customs duties or lost tax revenue, its claim may be

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190. Brand, *supra* note 102, at 273.

191. See Hendrix, *supra* note 129, at 149. Further, "[m]ost commercial litigation is conducted in the *arbitrazh* courts." *Id.* at 151.

192. See Hendley, *supra* note 130, at 95 (describing the transition of *arbitrazh* court from state agency to professional and independent judiciary).

193. *Id.* *Arbitrazh* courts also have jurisdiction over physical persons who are registered as "entrepreneurs." Hendrix, *supra* note 129, at 149.

194. See Hendrix, *supra* note 129, at 149. *Arbitrazh* courts also hear bankruptcy cases, contract disputes, and claims of injury to business reputation. *Id.* They review executive administrative acts in the economic sphere, and rule on government liability in tort, confiscation of land and other valuables, and the imposition of fines and other penalties. *Id.*

195. The reform began earlier after disintegration of the Soviet Union during the early 1990s with enactment of the *Arbitrazh* Court Act in 1991 followed by the Code of *Arbitrazh* Procedure in 1992. As a result, arbiters became judges and were afforded the same protections. Hendrix, *supra* note 129, at 155. The legislation also provided for permanent tenure, independence, and judicial immunity. *Id.* at 155. Further, the enactment of Federal Constitutional Law on *Arbitrazh* Courts in 1995 granted *arbitrazh* courts federal status and established a framework of intermediate appellate courts, "circuit courts." See *id.* It appears that the closest analogs to Russia's *arbitrazh* courts in the U.S. are the U.S. District Courts.

196. See Hendrix, *supra* note 129, at 150.

197. See *id.* at 151.

characterized as an “economic dispute” within Russia’s jurisdictional terminology. Similarly, FCS’s claim arguably, at least in part, amounts to a tax claim, which *arbitrazh* courts may properly hear. Consequently, BONY’s argument that the court lacks subject matter jurisdiction would likely fail.

### C. Russia’s Choice-of-Law Rules

Although BONY did not assert lack of due process as a defense, it objected to the Russian court’s decision to apply civil RICO.<sup>198</sup> BONY could argue in defense to recognition that the Moscow proceeding was “irregular” or that the court’s decision to apply civil RICO was arbitrary and capricious and thus lacked due process.<sup>199</sup> Before concluding that the Russian *Arbitrazh* proceeding was “irregular”<sup>200</sup> under *Hilton*, or lacked due process of law under the Recognition Act, a U.S. court would have to determine whether the Russian Court applied its choice-of-law rules in good faith, since U.S. courts defer to foreign courts’ application of their own rules.

First, it is important to note that the overall theme of Russia’s choice-of-law principles contained in Russia’s Civil Code<sup>201</sup> is to allow application of foreign law in comparatively many more<sup>202</sup> instances than, say, a U.S. court would.<sup>203</sup> In general, Russia’s courts may apply foreign law anytime a party is foreign or where the dispute arises in a transnational

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198. See generally Goldhaber, *supra* note 2; Key Facts, *supra* note 5, at 1.

199. The argument here would rely on due process because the exuberant monetary penalties authorized under civil RICO provide a lucrative motive for abuse of legal process.

200. It may be argued that because of the unusual nature of the civil RICO claim in Russia, the proceeding in the Moscow *Arbitrazh* Court was “irregular.” Although it may be argued, for example, that by virtue of the unprecedented nature of the lawsuit, BONY lacked sufficient notice. But such interpretation of “regular proceeding” under *Hilton* would likely foreclose any creative application of jurisdictional or choice-of-law principles and, thus, is unlikely to withstand judicial scrutiny. Arguably, a more concrete affront is required for a proceeding to be irregular under *Hilton*, such as violations of due process requirements under the Recognition Act.

201. See generally Maleshin, *supra* note 178; Dimitry Y. Maleshin, *Some Cultural Characteristics of the New Russian Code of Civil Procedure of 2002*, 10 *Zeitschrift für Zivilprozess Int'l* 385, 385–89 (2005).

202. The drafters’ willingness to allow foreign law into Russia’s courts to supplement its own legal norms reflects their implicit intuition that Russia’s post-Soviet legal system, in its current incarnation, remains relatively young, as it is still undergoing gradual transformations that started in the early 1990s. See generally B. L. ZIMMENKO, *INTERNATIONAL LAW AND THE RUSSIAN LEGAL SYSTEM 1* (William E. Butler ed., 2007) (discussing the relationship between Russian law and international law).

203. See generally RESTATEMENT (SECOND) CONFLICTS OF LAW §§ 6–8 (1971).

context.<sup>204</sup> Until the enactment of Part III of the Russian Federation Civil Code<sup>205</sup> (“RFCC”) in 2001, choice-of-law was governed by the Fundamentals of Civil Legislation (“FCL”), which was enacted in 1991.<sup>206</sup> Part III has a separate Article, titled “International Private Law,” which sets out currently effective choice-of-law rules.<sup>207</sup> Part III of RFCC is significantly different from FCL choice-of-law rules in that the latter no longer operate as a set of statutory defaults dictating choice-of-law on the basis of the type of transaction underlying the dispute.<sup>208</sup> The discussion below will assume that the Moscow *Arbitrazh* Court could have reasonably applied either set of choice-of-law rules. Because the conduct and transactions underlying the FCS’s lawsuit against BONY occurred during the late 1990s, prior to enactment of the RFCC’s Part III in 2001, the Moscow *Arbitrazh* Court may have reasonably chosen to apply the choice-of-law rules that were in force at the time, namely the FCL. As illustrated below, both the FCL and the RFCC allow the Moscow *Arbitrazh* Court to apply U.S. law to the FCS’s claim against BONY.

The FCL provided an array of statutory defaults that dictated whose law applied in a dispute between two foreign parties.<sup>209</sup> For example, in a tort action, the *arbitrazh* courts applied the law of the country where the tort occurred.<sup>210</sup> Importantly, in an action for unjust enrichment, *arbitrazh* courts applied the law of the country where enrichment ultimately

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204. See Hendrix, *supra* note 129, at 163–65. For example, the Code of Arbitrazh procedure gives judges broad discretion to “determin[e] the ‘existence and contents’ of foreign law, if applicable to the dispute.” *Id.* at 163.

205. Graždanskii Kodeks RF [GK] [Civil Code] art. 6 (Russ.), *translated at* <http://www.russian-civil-code.com/PartIII/> (last visited Oct. 4, 2009).

206. See Hendrix, *supra* note 129, at 163.

207. See *id.* at 164.

208. See *id.* It seems that Russia’s choice-of-law rules have traveled evolutionary paths similar to those of the choice-of-law rules in the U.S., having shifted away from rigid defaults dictated by the nature of the cause for action and toward a more rigorous policy and interest based analysis. See generally William M. Richman, *Diagramming Conflicts: A Graphic Understanding on Interest Analysis*, 43 OHIO ST. L.J. 317, 319 (1982).

209. See Hendrix, *supra* note 129, at 164–65. For example, under Fundamentals of Civil Legislation, art. 166.1 (1), sale contracts were governed by the law of the seller’s country. See *Id.* Where a party is acting as a lessor, licensor, bailee, agent carrier, freight forwarder, insurer, lender, donor, guarantor, or pledgor, statutory default requires application of the law of that party’s country. *Id.*

210. See Hendrix, *supra* note 129, at 165. This is similar to the American choice of law rule based on the place of injury. See Richman, *supra* note 208, at 319. This rule, however, has been supplanted by Currie’s interest analysis in most modern American jurisdictions. *Id.*

occurred.<sup>211</sup> For example, where a Russian company mistakenly wired money to an account abroad, the *arbitrazh* court found that unjust enrichment<sup>212</sup> occurred in the country in which the wire payment was received or credited.<sup>213</sup> Thus, that country's law governed.<sup>214</sup> By analogy, if the Moscow *Arbitrazh* Court applied the FCL choice-of-law rules, characterizing the customs claim as one for unjust enrichment, it would reasonably and in good-faith be able to proceed under applicable U.S. law against BONY. Since FCS is a Russian customs authority seeking to recover customs duties, revenue allegedly lost due to "racketeering activity," and damages arising from a bank doing business on its territory, civil RICO would be the applicable law.<sup>215</sup> It is an appropriate analog to a similar suit in the U.S. where unpaid taxes, lost due to cross-border "racketeering activity," may be recovered in a civil RICO lawsuit.<sup>216</sup> Accordingly, since this line of analysis is available to the Moscow *Arbitrazh* Court under the FCL choice-of-law rules, BONY would be unable to argue "irregularity," or lack of due process under the Recognition Act.

The currently effective code of civil procedure (Part III of the RFCC) changes the choice-of-law rules in Russia.<sup>217</sup> It states in pertinent part:

The law applicable to civil legal relations involving . . . [a] foreign citizen[] or foreign legal entities or civil legal relations complicated by another foreign factor, in particular, in cases when an object of civil rights is located abroad shall be determined on the basis . . . [of] the

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211. Richman, *supra* note 208, at 319. "At its heart, a civil RICO claim is an action for fraud." Jarvis, *supra* note 83, at 14.

212. In the U.S., unjust enrichment is a common law contractual cause of action for restitution. E. ALLAN FARNSWORTH, *CONTRACTS* 824-29 (4th ed. 2004). But in Russia, unjust enrichment applies where a party gets "something for nothing." See Hendrix, *supra* note 129, at 165.

213. Hendrix, *supra* note 129, at 165 (illustrating the application of this principle in a case where a Russian company sought to recover a mistaken remittance to Latvian bank account, and the court held that enrichment occurred in Latvia and that Latvian law must therefore be applied).

214. *Id.*

215. "The Second Circuit has recognized that lost tax revenue is a cognizable RICO injury," Farnam, *supra* note 16, at 846; see Buxbaum, *supra* note 13, at 267.

216. See Buxbaum, *supra* note 13, at 267; Farnam, *supra* note 16, at 844 n.7 (citing *Mo. v. W.E.R.*, 55 F.3d 350, 357 (8th Cir. 1995) (holding that the State has a cause of action under civil RICO); *United States v. Porcelli*, 865 F.2d 1352, 1355 (2d Cir. 1988); *Ill. Dep't of Revenue v. Phillips*, 771 F.2d 312, 313 (7th Cir. 1985) (finding that the government stated a claim for civil RICO for repeated mailing of false tax returns, a mail fraud violation)).

217. *Grazhdanskii Kodeks RF [GK] [Civil Code] art.1186* (Russ.), *translated at* <http://www.russian-civil-code.com/PartIII/SectionVI/Subsection1/Chapter66.html> (last visited Oct. 4, 2009).



present Code, . . . and usage recognised in the Russian Federation. . . .  
If under [the above] . . . it is impossible to determine [the applicable  
law] . . . the law of the country with which a civil legal relation compli-  
cated by a foreign factor is most closely related shall apply.<sup>218</sup>

On its face, it appears that application of a foreign law may be triggered when a foreign party is present, when a lawsuit is “complicated by another foreign factor,” or “when an object” of the claim “is located abroad.” The last clause in Russian, as in English translation, means that the law of the country with which the lawsuit (“civil legal relation”) is most closely related will apply.<sup>219</sup> This leaves tremendous room for interpretation of the “most closely related” element. This clause does not define criteria by which to evaluate “closeness,” and the term “civil legal relation,” meaning the lawsuit, is equally vague.

Applying RFCC choice-of-law rules, the Moscow *Arbitrazh* Court could again have reasonably decided, in good faith, to apply U.S. law. BONY is a foreign party and the lawsuit is seriously complicated by a “foreign factor” that the allegedly illicit money transfers were facilitated by “racketeering activity” abroad and the money went to the U.S. Moreover, considering the number of foreign factors in totality, this lawsuit is arguably “most closely related” to the U.S., except for the harm that was allegedly suffered by Russian deposit holders and the Russian economy as a whole. Again, civil RICO, being the proper cause of action in an analogous suit in the U.S., would properly apply to FCS’s claim against BONY. At the minimum, there are no legal obstacles in Russian law for the Moscow *Arbitrazh* court to apply civil RICO. In sum, BONY would have been unlikely to defend against recognition on the ground that the Moscow *Arbitrazh* Court, in electing to apply civil RICO, did not apply its choice-of-law rules in good faith.

#### *D. The Revenue Rule*

A critical issue remains after resolution of the procedural issues discussed above: the so-called revenue rule.<sup>220</sup> The revenue rule is a U.S. “conflict of laws doctrine that allows a court to decline to enforce a for-

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218. *Id.*

219. This “most closely related” element is arguably parallel to the modern U.S. choice-of-law framework whose guiding principle is to determine the state with the strongest interest. Richman, *supra* note 208, at 319.

220. The rule is over two hundred years old. It emerged in England, when Lord Mansfield stated that “no country ever takes notice of the revenue laws of another.” *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120 (K.B.). “In these cases, 18th Century British courts chose to uphold contracts that violated foreign law in order to protect the British smuggling trade.” Farnam, *supra* note 16, at 849 n.65.

eign government's tax claim or judgment."<sup>221</sup> Canada recently brought a lawsuit in the U.S. under civil RICO to recover lost tax revenues.<sup>222</sup> The Second Circuit held that the "revenue rule bars Canada's claim because the RICO damages would be calculated based on lost revenues" and that would amount to enforcing Canada's tax laws.<sup>223</sup> The revenue rule has been widely criticized<sup>224</sup> and many commentators argue that the revenue rule should be abandoned<sup>225</sup> because the rule rests on an archaic policy

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221. Farnam, *supra* note 16, at 843 (arguing that Reynolds was wrongly decided because the court misapplied the revenue rule, and articulating a policy rationale for why the revenue rule should not bar civil RICO claims); see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §483 (1987).

222. *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106-07 (2d Cir. 2001). During the 1990s, R.J. Reynolds allegedly was part of a scheme to smuggle tobacco to avoid Canadian tax laws. *Id.* The Court framed the problem in the following way: "The illicit tobacco . . . has become a global problem. In recent years, American tobacco companies have apparently smuggled cigarettes into Canada, the European Union, Ecuador, Honduras, Belize, and Colombia. Following the Reynolds [ ] decision, other civil RICO cases have been pursued, most recently in Florida." Farnam, *supra* note 16, at 844 (citing *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 125 (2d Cir. 2001); *Ecuador v. Philip Morris*, 188 F. Supp. 2d 1359 (S.D. Fla. 2002); *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002); *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 460 (E.D.N.Y. 2001)).

223. *Att'y Gen. of Can.*, 268 F.3d at 106-07. "RICO allows foreign states to assert claims to remedy racketeering injuries, [but] the Reynolds . . . decision now effectively nullifies their cause of action if they seek to recover lost tax revenue in the Second Circuit." Farnam, *supra* note 16, at 844. There is a strong criticism that, in the tobacco cases, courts applied the revenue rule in a formulaic and artificial manner because the foreign governments argued that at issue were violations of U.S. law and determining liability under civil RICO "required merely the recognition of the tax laws in question." See Buxbaum, *supra* note 13, at 284 (citing Brief for Plaintiff-Appellant the Attorney General of Canada at 3, *Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 103 (2d Cir. 2001)).

224. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483. Notably, the Second Circuit in *United States v. Trapilo*, held that

the revenue rule did not mandate dismissal every time a foreign revenue law was implicated. Instead, the revenue rule should be applied only in cases that would interfere with the separation of powers. For example, the claim might be barred if the court would otherwise have to decide a foreign relations question more properly reserved to the political branches.

Farnam, *supra* note 16, at 855 (citing *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997)).

225. See Buxbaum, *supra* note 13, at 283-92; Farnam, *supra* note 16. See generally William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 265 (2000).

rationale that is no longer valid.<sup>226</sup> BONY probably would have defended against the recognition action arising out of the Russian RICO case by characterizing the FCS's claim as a civil RICO claim for violation of Russia's revenue laws.<sup>227</sup> The issue would present a U.S. court with the opportunity to evaluate the validity of the revenue rule in light of the novel approach of filing a lost revenue lawsuit abroad, rather than in the U.S., which is arguably a major innovation from a strategic standpoint when it comes to "transnational regulatory" litigation.<sup>228</sup> The "revenue rule" policy rationales are grounded in the "foreign revenue claims" domestic effects.<sup>229</sup> These rationales arguably crumble in light of the claim being brought abroad rather than in the U.S.<sup>230</sup> Thus, the question of whether it would be a bar to Russia's RICO case recognition should be re-evaluated. Evidently, to the extent that U.S. entities violate foreign revenue laws, there is a continual demand from foreign plaintiffs to litigate "lost revenue" claims in U.S. courts. To any transnational litigation observer, the Russian RICO case is a foreseeable outcome of U.S. courts' commitment to the revenue rule. If the Russian Court case had succeeded, it would have been likely to serve as a "green light" for civil RICO litigation in other countries to recover lost tax revenues. U.S. courts' continual commitment to the revenue rule signals to potential foreign claimants that U.S. courts have little regard for their legal rights under their domestic revenue laws against U.S. entities. Nonrecognition pursuant to the "revenue rule" is discretionary. U.S. courts are not required, though permitted, to refuse recognition of claims where such recognition would amount to enforcement of foreign revenue laws.<sup>231</sup> Accordingly, if U.S. courts recognize the Russian Court's judgments, then that will amount to the final "nail in the coffin" of the revenue rule.

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226. See Buxbaum, *supra* note 13, at 283–90; Farnam, *supra* note 16, at 852–54.

227. Cf. Farnam, *supra* note 16, at 854 (citing *United States v. Boots*, 80 F.3d 580, 587 (1st Cir 1996)).

228. See *supra* text accompanying note 99.

229. See Buxbaum, *supra* note 13, at 278 (discussing the revenue rule and its role in "transnational regulatory" litigation); Farnam, *supra* note 16, at 846 (arguing that the revenue rule should be abandoned).

230. See Buxbaum, *supra* note 13, at 283–92. See generally Farnam, *supra* note 16, at 846

231. *European Cmty. v. RJR Nabisco*, 150 F. Supp. 2d 456, 483–84 (E.D.N.Y. 2001) (holding that the revenue rule does not bar a suit by a foreign sovereign to recover civil RICO damages for lost tax revenues and that application of the revenue rule was discretionary). The *Nabisco* court eventually held that the European Community was unable to demonstrate injury separate from that of the member states and thus failed to allege the injury needed to bring suit under RICO. *Id.* at 501–02.

There are strong arguments for recognition and relaxation, or complete abandonment, of the revenue rule with respect to “transnational regulatory” judgments. As a matter of policy, the U.S. should send a signal that a U.S. court will tolerate foreign “lost revenue” judgments rendered under civil RICO.<sup>232</sup> Currently, U.S. entities conducting business abroad are, in effect, allowed to avoid foreign tax laws with impunity because U.S. courts will not hear foreign revenue claims under civil RICO or otherwise.<sup>233</sup> Recognition of a foreign action for lost revenue would encourage “transnational regulatory” litigation,<sup>234</sup> namely, it would allow foreign sovereign claimants to litigate their “lost revenue” claims abroad. This is arguably a desirable effect because it implements Congress’s intent behind RICO in eliminating “racketeering” activity and remedying the damages such activity causes.<sup>235</sup> It would serve both remedial and deterrent functions, which preoccupied the Supreme Court in *Shearson*. Moreover, litigation over “lost revenue,” taking place in a foreign forum where injury actually occurred, would preserve U.S. judicial resources as those cases tend to be complex and protracted.<sup>236</sup> In fact, the revenue rule’s application has been uneven, fragmented, and controversial.<sup>237</sup> Existing scholarly criticism of the revenue rule coupled with the novelty of the Russian RICO case scenario should ultimately move U.S. courts to relax the revenue rule with respect to “transnational regulatory” judgments.

#### V. A MODIFIED STANDARD FOR RECOGNITION

Throughout their history, U.S. courts have helped law evolve to accommodate the changing domestic and global conditions that come with increased cross-border activity.<sup>238</sup> The current regime for recognition of foreign money judgments, however, works well; it has been fine-tuned for over a century since the decision in *Hilton*.<sup>239</sup> But if U.S. courts are to

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232. The *Nabisco* court stated that U.S. courts have the ability to interpret foreign revenue laws. See *European Cmty.*, 150 F. Supp. 2d at 484 n.16.

233. See Buxbaum, *supra* note 13, at 265–57.

234. *Id.* at 255. “Transnational regulatory” litigation, as coined by Professor Buxbaum, encompassed “certain cases brought under U.S. regulatory law including antitrust law, securities law and [RICO], that operate similarly to transnational public law cases: they seek to apply a shared norm, in domestic courts, for the benefit of the international community.” *Id.*

235. *Cf.* Farnam, *supra* note 16, at 857.

236. See generally Buxbaum, *supra* note 13 (discussing the type of cases that fall into the category of “transnational regulatory” litigation).

237. See generally Farnam, *supra* note 16, at 858; Kovatch, Jr., *supra* note 225, at 265.

238. See Buxbaum, *supra* note 13, at 280.

239. *Hilton v. Guyot*, 159 U.S. 113,163–64 (1895).

take the approach described above to the Russian Court's now-hypothetical judgment, the recognition regime will require either some stretching of its extant elements to accommodate foreign judgments or a modification to account for judgments under U.S. law. For example, in *Mitsubishi*, where the Court allowed foreign arbitrators to apply the private cause of action under the Sherman Act against U.S. parties, the Court expressed its concern over the consequences of releasing its monopolistic control of the antitrust laws: "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."<sup>240</sup> The recognition of the Russian Court judgment would echo the "customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign court."<sup>241</sup> The *Mitsubishi* court concluded that "[w]hile the efficacy . . . requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."<sup>242</sup>

Similarly, in addition to traditional recognition analysis, a U.S. court should conduct a minimal inquiry to determine whether a foreign court "took cognizance" of the civil RICO claim and "actually decided" it. One way U.S. courts might meet the challenge presented by the Russian RICO case is to allow the common law defense of "manifest disregard for the law"<sup>243</sup> in an action for recognition of foreign money judgments. Currently, this defense may be invoked with respect to recognition of arbitral awards where a foreign tribunal applied arbitrable U.S. law against a U.S. party.<sup>244</sup> This is an appropriate "doctrinal transplant" from

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240. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

241. *Id.*

242. *Id.*

243. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208–09 (2d Cir. 2002). The court's "standard of review under this judicially created doctrine is 'severely limited.' To vacate the award . . . [the court] must find 'something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law.'" *Id.* (citing *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); see also *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) ("In order to advance the goals of arbitration, courts may vacate awards only for an overt disregard of the law and not merely for an erroneous interpretation."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("Although the bounds of this ground have never been defined, it clearly means more than error or misunderstanding with respect to the law.") (internal citations omitted).

244. *Daihatsu Motor Co.*, 304 F.3d at 209. The court explained:

the law of recognition of foreign arbitral awards to the recognition of foreign money judgments. Both legal regimes “favor” minimal substantive review of the underlying merits, and both presume the competency of foreign forums to apply and decide U.S. law.<sup>245</sup> Incorporating a “manifest disregard for the law” defense into recognition proceedings would allow just the necessary amount of protection to U.S. defendants. A defendant should bear the burden of establishing that the foreign court manifestly disregarded the substance of the U.S. law.<sup>246</sup> This approach strikes an equitable balance between both parties in the litigation. It protects the integrity of the laws and the judiciary of both nations. It provides a minimal normative standard to foreign courts applying U.S. law. Finally, this approach fosters desirable predictability and furthers the equitable goals of “transnational regulatory” litigation.

#### CONCLUSION

A judgment from the Russian Court case will never reach U.S. shores, but if it had—or, if and when another of its kind does indeed arrive—it will raise a number of complex issues that will have to be resolved during the recognition action. As illustrated above, nothing in terms of legal doctrine prevents a foreign court from applying civil RICO. Moreover, the U.S. Supreme Court has given a “green light” to foreign courts to entertain civil RICO claims. Moreover, BONY will not be able to challenge the Russian Court’s judgment on the grounds of “irregularity” or lack of due process. The nature of the lawsuit does not reveal any issues contrary to U.S. public policy so as to bar recognition under the Recognition Act. A U.S. court, however, will likely face an objection by BONY to the recognition based on the revenue rule. Nevertheless, the archaic revenue rule should not preclude recognition of the Russian Court’s judgment. Litigation in Russia’s courts, as a matter of U.S. policy, is a salutary development that does not offend any of the archaic policies behind the

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The two-prong test for ascertaining whether an arbitrator has manifestly disregarded the law. . . . We first consider whether the “governing law alleged to have been ignored by the arbitrators [was] well defined, explicit, and clearly applicable.” We then look to the knowledge actually possessed by the arbitrator. The arbitrator must “appreciate[] the existence of a clearly governing legal principle but decide[] to ignore or pay no attention to it.” Both of these prongs must be met before a court may find that there has been a manifest disregard of law.

*Id.* (internal citation omitted).

245. See *Daihatsu Motor Co.*, 304 F.3d at 204.

246. See *id.* at 200.

revenue rule. But U.S. courts should adopt a safeguard that will protect U.S. parties from arbitrary or bad faith application of U.S. law in foreign courts in violation of due process. U.S. courts should modify the current recognition doctrine by adopting a defense that will focus on the manner in which foreign courts apply such complex statutes as civil RICO. The recognition of the Russian Court's judgment will advance a number of significant interests: namely, comity, "transnational regulatory" litigation, international cooperation in law enforcement, and the integrity of foreign and domestic judicial processes.

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\* B.A., Rutgers University (2006); J.D., Brooklyn Law School (expected 2010). This Note is dedicated to my parents, Irina and Richard Brownstein, and to my sister, Natalia Naomi Brownstein, for their unending love and support. Special thanks to Professor Robin Effron for her insightful comments on the earlier drafts, and all the editors of the *Brooklyn Journal of International Law* for their hard work and dedication. All errors and omissions are solely my own. "Physical concepts are free creations of the human mind, and are not, however it may seem, uniquely determined by the external world. In our endeavor to understand reality we are somewhat like a man trying to understand the mechanism of a closed watch. He sees the face and the moving hands, even hears its ticking, but he has no way of opening the case. If he is ingenious he may form some picture of a mechanism which could be responsible for all the things he observes, but he may never be quite sure his picture is the only one which could explain his observations. He will never be able to compare his picture with the real mechanism and he cannot even imagine the possibility or the meaning of such a comparison." Albert Einstein & Leopold Infeld, *THE EVOLUTION OF PHYSICS* 31 (1938).