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Civil RICO, Foreign Defendants, and "ET"*  

Michael Goldsmith**  
and Vicki Rinne***  

* This article is dedicated to the late Irving Younger.  

A year after his death, it is still difficult for me to write about Irving Younger. Although I co-authored an evidence text with Irving, I really did not know him well. He was an intensely personal man, and so his battle with cancer was very much a private affair.  

Reflecting on Irving Younger, I realize that I knew him principally as others did—as a whirlwind of energy captivating every lecture hall in which he appeared. Part stand-up comic, part sage, Irving was loved by students because he both kept them laughing and provided a beacon of clarity in an environment that too often fostered tension and ambiguity. Practitioners admired Irving for his skill in marshaling anecdotes and history to create marvelous lectures that set new standards of excellence for continuing legal education. Finally, faculty colleagues, although occasionally uncomfortable with Irving's popularity, viewed him as a scholar capable of making important contributions to our jurisprudence. These qualities allowed Irving Younger to dominate our legal landscape for more than a decade. We benefited richly as a result.  

Irving's success did not deprive him of his humanity. As a newcomer to teaching, I initially approached him with caution. I assumed that his stature and busy schedule would make his time too scarce to be spent with me. I was wrong. Through the years, Irving never failed to return a phone call, never failed to provide assistance when requested, and never failed to provide encouragement. Perhaps through these qualities, Irving best taught others how to live.  

I am honored that the Minnesota Law Review has asked me to contribute to this issue commemorating Irving Younger. I hope that this article would have appealed to him. As a former federal prosecutor, Irving was intrigued by the character of organized crime in our society. As a practitioner, he loved the challenge of complex litigation. As an instructor of civil procedure, Irving thrived on the jurisdictional nuances that underlie our legal process. And, as a legal scholar, Irving must have been fascinated by the application of a racketeering statute to white-collar crime.  

As I began to write the piece, I paused to consider that my topic was geared too much to litigating lawyers—that it was too practical and not sufficiently "academic." On further thought, however, I remembered that the practicing bar was Irving Younger's principal audience and that his true skill lay in converting academic complexities into practical realities. On this basis, I hope this article does justice to Irving Younger's memory.  

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"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [a defendant] had been present at the effect, if the State should succeed in getting him within its power."1

"[T]he extraterritorial application of the Racketeer Influenced and Corrupt Organization Act ('RICO') may far exceed the securities and antitrust laws both in terms of the scope of its reach and the hostility of the reaction of the international community."2

The controversial Racketeer Influenced and Corrupt Organization law ("RICO")3 soon may have extraterritorial effect. Increasingly, civil RICO suits have been filed against foreign defendants. Because no extraterritorial RICO case has yet resulted in judgment,4 no international reaction has emerged. United States litigation involving foreign parties, however, traditionally has encountered domestic procedural barriers5 and foreign resistance.6 RICO, given its problematic past,7 likely

4. See infra note 59.
5. See 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 5.02 (1958) ("To say that [a United States law] will apply to foreign corporations does not assure its application, for the court must be satisfied that the foreign defendant has sufficient ties with the United States to justify bringing it into an American forum."). Procedural barriers include establishing jurisdiction over the conduct, see infra notes 74-93 and accompanying text; over the parties, see infra notes 94-154 and accompanying text; and enforcing court orders and judgments, see infra notes 155-81 and accompanying text.
7. Controversy has centered on the application of RICO to white-collar crime and "legitimate businesses." See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 506 (1985) (Marshall, J., dissenting) (arguing that Court's reading of civil RICO provision as applying to legitimate businesses has caused "dislocations" of congressional purpose); id. at 523-24 (Powell, J., dissenting) ("I write separately to emphasize my disagreement with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses . . . ."); Blakely, The RICO Civil Fraud Action In Context: Reflection on Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 264 n.78, 268-79 (1983) (noting opposition to RICO's application to legitimate organizations); see also infra notes 62-65 and accompanying text (noting examples of criticism directed at RICO).
will be no exception.

United States laws frequently have been applied to foreign conduct. For example, in 1951 several companies began creating a cartel to control the watch export market. The cartel violated United States antitrust laws and a United States District Court accordingly entered a consent decree barring the cartel's conduct. This application of antitrust law was unusual, however, in that the cartel consisted of foreign companies and was formed abroad with the encouragement and support of a foreign government. The case demonstrates that foreign persons and transactions do not automatically escape regulation by United States law.

Extraterritoriality ("ET") concerns the application of domestic law to foreign conduct. The doctrine, which dates back

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9. Id.
10. Id.
11. See Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984) ("Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its 'sovereign' walls, while its own regulatory efforts are reflected back in its face.").
13. Gotlieb, supra note 12, at 449; see also Statement of the British-North American Committee to Accompany the Report, quoted in A. HERMANN, CONFLICTS OF NATIONAL LAWS WITH INTERNATIONAL BUSINESS ACTIVITY: ISSUES OF EXTRATERRITORIALITY (1982) (stating that extraterritoriality concerns "the application of one country's domestic legislation and/or judicial decisions to acts or omissions within the territory of another"); But cf. Baxter, Standards for the Application of United States Antitrust Law in an International Environment, 1982 B.Y.U. L. REV. 841, 843 ("The problem . . . seems much more closely akin to . . . the choice of law rules under the conflict of laws doctrine."); Griffin, A Primer on Extraterritoriality: "ET" Isn't Going Home, INT'L BUS. LAW., Jan. 1985, at 23, 23 ("The proper question [is] not ET per se, but rather when a nation may legitimately apply its domestic law to entities and events outside its territory when that nation and another have valid jurisdictional claims."); Robinson, Conflicts of Jurisdiction and the Draft Restatement, 15 LAW & POL'Y INT'L BUS. 1147, 1147 (1983) (stating that the term extraterritoriality "is not conducive to dispassionate analysis. The phrase 'conflicts of jurisdiction,' . . . is preferable"); Smith, Extraterritorial Application of U.S. Laws Outlined by Smith, 186 N.Y.L.J. 3, col.1 (1981) ("The true character
to ancient times, has grown in importance and become more controversial with the rapid rise of international trade and investment and the appearance of multinational enterprises. The recent application of United States business laws to the international commercial community has encountered pronounced hostility. International reaction to the extraterritorial

of the problem... is one of conflict over which nation's law and policy is to apply and prevail"). Note that limiting extraterritoriality to choice of law rules, however, ignores another dimension. In addition to determining which nation's laws apply, extraterritoriality also involves a jurisdictional dimension—whether United States courts can exercise jurisdiction over foreign defendants.

14. In Roman and medieval times, citizens were subject to their sovereign's jurisdiction wherever they traveled. Later, consuls of some powerful states exercised criminal and civil jurisdiction over their nationals in foreign countries. During much of the nineteenth century, the United States wielded extraterritorial jurisdiction in China and the Ottoman Empire. See Dam, Extraterritoriality and Conflicts of Jurisdiction, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 24-25 (C. Olmstead ed. 1984). In this century, the Permanent Court of International Justice recognized the doctrine of extraterritoriality in the Lotus case. See The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, Sept. 7. Lotus concerned a high seas collision between French and Turkish ships that resulted in the death of a Turkish crew member. Id. at 32. When the French ship docked in Constantinople, the French master was arrested, charged, and convicted of manslaughter. Id. at 26. France protested Turkey's jurisdiction to proceed and the case was sent to the Permanent Court of International Justice. Id. at 27. The court held that international law did not interfere with Turkey's right to bring a criminal prosecution in these circumstances. Id. at 32. Thus, in some circumstances, a nation may exercise jurisdiction over acts committed by foreigners outside its territorial boundaries. Id. at 31.

15. See A. HERMANN, supra note 13, at 1 ("[C]onflicts of jurisdiction have been increasing in frequency and importance in the last twenty years."); Dam, Economic and Political Aspects of Extraterritoriality, 19 INT'L LAW 887, 888 (1985) ("Extraterritoriality has become a bigger issue as the world economy has grown more integrated."); Comment, Extraterritoriality: Current Policy of the United States, 12 SYRACUSE J. INT'L L. & COM. 493, 493 (1986) ("International businessmen and their counsel have increasingly been confronted by... extraterritoriality.").

16. For example, at the end of 1987, United States direct investment abroad totaled $308.8 billion. At the same time, foreign investment in the United States equaled $261.9 billion. 68 U.S. DEP'T OF COM., SURVEY OF CURRENT BUSINESS 42, 69 (1988).

17. Multinational corporations center operations in several countries, in contrast to international corporations, which also do business globally but are based in one country. BLACK'S LAW DICTIONARY 916 (5th ed. 1979); see also Baxter, supra note 13, at 841 (stating multinational character of many corporations leads several countries to assert that their laws should apply to such corporations' conduct).

18. See Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 INT'L LAW. 257, 257 (1980) ("In the past twenty-five years the United States has had three major exports: rock music, blue
rial enforcement of United States law has resulted in withdrawal of foreign investment, blocking of corporate acquisitions and mergers, and damage to foreign relations.

Extraterritorial conflicts are particularly serious between the United States and its democratic allies, because United States law recognizes defenses less likely to arise in democratic nations. Defenses such as foreign compulsion, act of state, and sovereign immunity potentially shield private defendants from litigation by excusing acts intertwined with government rule. See infra note 35. Thus, defendants from countries with strong government control over business and industry escape suit. By comparison, citizens of more democratic nations, which encourage the private control of business, may not enjoy the same protection. See Grosfield & Rogers, A Shared Values Approach to Jurisdictional Conflicts in International Economic Law, 32 INT'L & COMP. L.Q. 931, 933-34 (1983) (stating that citizens of a liberal (democratic) state have fewer defenses to a United States lawsuit than those of states in which government control is paramount). Former Secretary of State George Shultz has voiced concern that extraterritorial conflicts may jeopardize the unity of the democratic nations and consequently threaten United States security, freedom, and property. Comment, supra note 15, at 494 (citing 84 DEP'T ST. BULL. 35-37 (1984)).

19. In 1982, the United States imposed export controls to prevent foreign businesses, as United States licensees, from selling equipment to the Soviet Union for construction of a natural gas pipeline. Italy expressed opposition to the sanction and threatened to suspend its agreement to buy 30 McDonnell Douglas Corporation DC-9 jets. See Zaucha, The Soviet Pipeline Sanctions: The Extraterritorial Application of U.S. Export Controls, 15 LAW & POLY INT'L BUS. 1169, 1176 (1983). Estimates place United States losses due to the Soviet pipeline sanctions at $800 million in direct sales. Id. at 1177 (citing Mufson, Anatomy of Continuing Soviet Pipeline Controversy, Wall St. J., Aug. 31, 1982, at 29, col.1). In addition, former Secretary of State George Shultz has noted that "[f]oreign aircraft manufacturers, for example, are already avoiding U.S. made-high-technology navigational devices for fear that some day new U.S. export controls might be imposed, preventing sales or drying up supplies or parts." Comment, supra note 15, at 511 (citing 84 DEP'T ST. BULL. 33, 34 (1984)). Because of the uncertainty created by applying United States laws to foreign business, at least one Asian telecommunications company has decided against using United States technology. See Dam, supra note 15, at 890 n.17.

20. For example, the British Monopolies and Mergers Commission blocked a proposed merger between a British firm and a United States corporation. The Commission feared that the merger would subject the British firm to United States export controls and thereby hurt its export potential. Dam, supra note 15, at 890 n.16. In addition, a number of United States businesses have expressed concern that, as a result of extraterritorial export controls, foreign businesses would be reluctant to establish joint ventures and cooperative agreements with United States companies. See Zaucha, supra note 19, at 1178 (citing Reauthorization of the Export Administration Act: Hearings Before the Subcomm. on International Finance and Monetary Policy of the Senate Comm. on Banking, Housing and Urban Affairs, 98th Cong., 1st Sess. 215-373, 472-713 (1983)).

21. Joel Davidow, former Director of Policy Planning, Antitrust Division, United States Department of Justice, estimates that "there have been five dip-
Despite such adverse consequences, the United States continues to apply its laws extraterritorially in an effort to protect the policies underlying those laws. For example, absent extraterritorial application of the antitrust laws, United States producers and consumers could be victimized by foreign anticompetitive activity. Multinational corporations regularly market their products across national boundaries. If United States laws stopped at the "water's edge," a multinational corporation's global reach would allow it to evade government regulations, damaging the United States's ability to protect its
diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support, and three [statutes blocking the enforcement of U.S. court orders] for every cooperation agreement." Davidow, Extraterritorial Antitrust and the Concept of Comity, 15 J. WORLD TRADE L. 500, 502 (1981). In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980), illustrates the negative impact of extraterritoriality on foreign relations. When the foreign defendants refused to appear at trial, default judgments were entered against them. Id. at 1250. The Seventh Circuit affirmed the default while dismissing arguments made by foreign governments on behalf of the defendants. Id. at 1256, 1259. The court stated, "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction." Id. at 1256. As a result, Robert Owen, the Legal Advisor of the United States Department of State, wrote to then-Associate Attorney General John Shenefield declaring that the opinion had caused "serious embarrassment to the United States in its relations with some of our closest allies." Shenefield, Extraterritoriality in Antitrust, 15 LAW & POL'Y BUS. 1109, 1117 (1983).

22. Senator George voiced this concern as follows:

Then if these conspirators are foreigners and remain at home... and there make the combination or agreement they escape the criminal part of this law; and proceedings carrying out the combination may be carried on with impunity in the United States. The raising of prices and the prevention of free and full competition may all take place in the United States, and yet no crime has been committed.

21 CONG. REC. 1766 (1890), cited in 1 J. ATWOOD & K. BREWER, supra note 5, at § 2.03.

23. See Gotlieb, supra note 12, at 45L. Former Secretary of State George Shultz has commented that the multinational corporation affects every type of trade and industry. See 84 DEP'T. ST. BULL. 33 (1984), cited in Comment, supra note 15, at 498.

24. Davis R. Robinson, Legal Advisor to the United States Department of State, has written:

It is apparent that commercial decision-making and transactions are not neatly contained within territorial boundaries in our interdependent world. As a result, the United States often cannot protect or promote legitimate and important national interests by legal regimes of protection or regulation that stop at the water's edge.

Robinson, The State Department View, in ACT OF STATE AND EXTRATERRITORIAL REACH 57 (J. Lacey ed. 1983); see also, A. LOWE, EXTRATERRITORIAL JURISDICTION 5 (1983) (stating that limiting reach of United States antitrust laws to United States soil would permit United States multinational corporations to evade these laws).

citizens.\textsuperscript{26} Thus, extraterritorial enforcement furthers significant national interests embodied in United States laws.\textsuperscript{27} Although critics charge that extraterritoriality violates other nations' sovereignty,\textsuperscript{28} the doctrine is intended to protect the

(S.D.N.Y. 1952). In the \textit{Imperial} case, the United States district court found that Imperial and duPont had used patents and patent licenses to divide world markets and to restrain trade in chemical products. \textit{Id.} at 220. After litigation began, duPont assigned its British patents to Imperial in order to thwart any judgment against the patent rights. To defeat this evasion, the court ordered Imperial to reassign the rights to duPont. \textit{Id.} Imperial claimed it could not comply with the court's order because it already had assigned irrevocable and exclusive licenses to another British company, BNS. The court attempted to preserve jurisdiction over the patents and refused to recognize BNS's contract with Imperial. \textit{Id.} An English court upheld those rights, however, and ordered specific performance of the Imperial-BNS license contract. See British Nylon Spinners, Ltd. v. Imperial Chem. Indus., [1953] Ch. 18; Kahn-Freund, \textit{English Contracts and American Antitrust Law: The Nylon Patent Case}, 18 MOD. L. REV. 65 (1955) (discussing \textit{Imperial} case).

26. Former Attorney General William French Smith told the 29th Congress of the Union Internationale des Avocats, an organization of lawyers from countries throughout the world:

\begin{quote}
We do not wish through our laws or their enforcement to impair the sovereignty or rights of other nations. We do not wish to police the world and proscribe foreign conduct merely because it fails to conform to our own interests. Nevertheless, we intend to influence the conduct of those international activities that have a foreseeable and substantial impact on the legitimate concerns of our people.
\end{quote}

Smith, \textit{supra} note 13, at 3, col. 2; \textit{see also} Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (en banc) ("Congress intended the Exchange Act to have extraterritorial application . . . to protect domestic investors . . ."), cert\textit{ denied}, 395 U.S. 906 (1969).

27. In addition to antitrust, other national laws extended abroad include criminal laws and laws governing securities transactions, foreign corrupt practices, transportation, foreign assets control, and tax policy. Robinson, \textit{supra} note 24, at 58. In the antitrust context, one scholar has stated:

\begin{quote}
[T]he legal regime of antitrust and securities and commodities market regulation could be undermined if transactions across borders were beyond the reach of our legal system. National security might be eroded if we could reach only the initial consignee of a sensitive export and had no right to impose foreign end-use or end-user restrictions.
\end{quote}

Dam, \textit{supra} note 15, at 888-89; \textit{see also} Davidow, \textit{supra} note 21, at 500 (stating that United States uses extraterritoriality "not to test abstract theories of jurisdiction or to make work for diplomats of affected countries, but because prosecution under national law is the only practical way to punish, remedy and deter international offenses which cause direct, substantial injury to important economic and legal interests").

28. Canadian Ambassador to the United States Allan Gotlieb has depicted needless extraterritorial actions as "intrusions into another's domestic affairs and as a challenge going to the heart of [the] notion of sovereignty." Gotlieb, \textit{supra} note 12, at 452. Thus threatened, several nations have passed legislation to block enforcement of foreign laws, regulations, or court orders. \textit{See gener-
Among those statutes designed to protect United States interests is the Racketeer Influenced and Corrupt Organizations law. Although principally aimed at the “eradication of organized crime,” RICO also has been applied against white collar businesses that engage in racketeering activity. Because United States citizens are not the exclusive perpetrators of racketeering activity affecting domestic interests, RICO’s application ought not be limited to domestic defendants. Otherwise, foreign “racketeers” who defraud United States citizens could escape both criminal and civil liability.


29. Former United States Attorney General Griffen Bell addressed this issue in a speech to the Law Council of Australia. He stated: “Thus, right from the beginning, our government concluded that if you never applied the antitrust laws to persons or actions located outside your territory, the result will be that the values of others, alien to our own values, will be forced upon us in our territory.” A. LOWE, supra note 24, at 4-5 (emphasis in original).


31. S. REP. No. 617, 91st Cong., 1st Sess. 2 (1969); see also Russello v. United States, 464 U.S. 16, 26 (1983) (stating that RICO “was intended to provide new weapons of unprecedented scope for an assault upon organized crime”).


33. See infra notes 67-69 and accompanying text.

34. See Fricano, supra note 2, at 206 (stating that allowing foreign “racketeers” to escape prosecution would defeat goal of eliminating organized crime from United States economy). RICO’s extraterritorial application also supports the extraterritorial application of other United States laws. For example, Professor G. Robert Blakey observed that of the three types of force to which a company may resort—violence, or the threat of it, deception, and market power—antitrust law regulates only the last, while RICO concentrates on the first two. Blakey, In Antitrust, tort and RICO Reform, Obvious Goals Cover up Deep Issues, Nat’l L. J., Oct. 13, 1986, at 26, col. 4. RICO cannot reach all fraud committed by foreign defendants against United States citizens.
Even so, attempts to enforce RICO extraterritorially are likely to face serious jurisdictional obstacles.35 Each claim re-

In addition to limitations imposed by extraterritorial jurisdictional requirements, discussed in this Article, RICO contains self-imposed restrictions. For example, because RICO requires that the criminal acts be committed in a “pattern,” see infra notes 50-51, only serious frauds fall within its scope.

35. In addition to the jurisdictional problems discussed in this Article, various defenses may defeat extraterritorial claims. The doctrine of sovereign compulsion shields a defendant from liability if the defendant can show that a foreign government compelled the prohibited action. See, e.g., Inter-American Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). In Texaco Maracaibo, the defendants allegedly participated in a boycott by refusing to sell Venezuelan crude oil to Inter-American Refining Corp. The district court granted Texaco Maracaibo’s motion for summary judgment on the ground that Venezuelan regulatory authorities compelled the boycott, giving Texaco Maracaibo a complete defense. Id. at 1301. The court stated: “When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign.” Id. at 1298.

The Swiss Watchmakers case, see supra notes 8-10 and accompanying text, illustrates an exception to the sovereign compulsion doctrine. The United States district court refused to acknowledge sovereign compulsion because the Swiss government merely had endorsed, encouraged, and approved of the defendants’ conduct; it had not actually compelled it. United States v. Watchmakers of Switz. Information Center, Inc., 1963 Trade Cas. 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. 71,352 (S.D.N.Y. 1965). In addition, the United States Justice Department maintains that the compelled act must take place within the territory of the compelling government. See ANTITRUST DIVI-

SION, U.S. DEP’T. OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERA-

TIONS 51, 55 (1977). In Texaco Maracaibo, for example, the Justice Department argued that because the boycott occurred in the United States, the sovereign compulsion doctrine did not apply. Joelson, International Antitrust: Problems and Defenses, 15 LAW & POL’Y INT’L BUS. 1121, 1130-31 (1983).

A second defense to extraterritorial jurisdiction, sovereign immunity, prevents a foreign government from being sued in United States courts for its public acts. Congress enacted this doctrine as the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1602-1611 (Supp. IV 1986)). Under the statute, however, foreign states are not immune if:

“[1] the action is based upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .”

28 U.S.C. § 1605(a)(2) (Supp. IV 1986); see, e.g., Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 394-95 (D. Del. 1978) (holding that Polish government’s manufacture and importation of golf carts constituted commercial activity and therefore trading company could not rely on sovereign immunity). The court refused to apply the commercial exception to sovereign immunity in International Ass’n of Machinists v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979), and dismissed antitrust claims against the Organization of Petroleum Exporting Countries (OPEC) on the ground that OPEC’s price-setting methods constituted protected government
quires jurisdiction over both the legal claim\(^\text{36}\) and the parties.\(^\text{37}\) In extraterritorial litigation, these requirements pose special problems\(^\text{38}\) that may restrict RICO's reach.


Under the act of state doctrine, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." \textit{Underhill v. Hernandez}, 168 U.S. 250, 252 (1897). The act of state doctrine differs from sovereign immunity in that a private party may claim the former defense, for which no clearly recognized exception for commercial activities exists. \textit{J. ATWOOD & K. BREWSTER, supra} note 5, \S 8.03. The act of state doctrine also differs from the sovereign compulsion doctrine in that the sovereign need not actually compel the defendant's action under the former doctrine. \textit{Id. in Republic of the Philippines v. Marcos}, 818 F.2d 1473 (9th Cir. 1987), the district court used the act of state doctrine to bar extraterritorial RICO claims against former Philippines ruler Ferdinand Marcos. Because Marcos gained Philippine assets through the exercise of governmental authority, United States courts could not assert jurisdiction. The court of appeals affirmed, stating: "Once the acts in question are identified as governmental in character, our courts have uniformly refused to question the integrity or nobility of the reasons underlying them." \textit{Id.} at 1485 (citations omitted).

\(^{36}\) \textit{See infra} notes 74-93 and accompanying text.

\(^{37}\) \textit{See infra} notes 94-154 and accompanying text.

\(^{38}\) \textit{American Banana Co. v. United Fruit Co.}, 213 U.S. 347 (1909), the first extraterritorial antitrust case, illustrates these problems. The American Banana Company complained that the United Fruit Company had monopolized and restrained Central America's banana trade with the United States by driving American Banana off its plantation, gratuitously overbidding, inducing employees to leave their jobs, and committing conspiratorial acts within the United States. \textit{Id.} at 355. The Supreme Court addressed American Banana's assertion of jurisdiction as follows:

\begin{quote}
it is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress. \textit{Id.; see J. ATWOOD & K. BREWSTER, supra} note 5, \S 6.03 (discussing the \textit{Banana} case, its applicability today, and how courts have distinguished the case); \textit{see also United States v. Addison-Wesley Publishing Co.}, 1978-2 Trade Cas. (CCH) 61, 225 (S.D.N.Y. 1976) (involving suit solely against United States publishing houses for exclusive cross-licensing of copyrighted books, although British firms likely were predominantly responsible). The United States Justice Department revealed that the British publishing houses were excluded from the \textit{Addison-Wesley} case "because of issues of personal jurisdiction." Proposed Consent Judgment and Competitive Impact Statement Thereon, 41 Fed. Reg. 32,615, 32,618 (1976).
\end{quote}

This Article considers potential barriers to civil RICO litigation against foreign defendants and provides a framework for analyzing the extraterritorial application of RICO. In large part, this framework draws on current practice under other United States statutes applied to foreign conduct.39 To the de-


39. For example, United States antitrust laws have been applied extraterritorially for more than 40 years. See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (stating that alleged foreign "agreements would clearly have been unlawful, had they been made within the United States; and it follows . . . that both were unlawful, though made abroad, if they were intended to affect imports and did affect them"); see also J. ATWOOD & K. BREWSHER, supra note 5, §§ 2.01-16 (discussing history of antitrust extraterritoriality). Federal securities laws also have a history of extraterritorial application. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (en banc) (stating that even though challenged transactions were effected outside United States, "Congress intended the Exchange Act to have extraterritorial application"), cert. denied, 395 U.S. 906 (1969); see generally Thomas, Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy, 7 J. CORP. L. 189 (1982) (discussing foreign application of United States securities law).

RICO's link to antitrust and securities laws provides a sound basis for borrowing solutions to extraterritorial problems. Professor G. Robert Blakey, judicial drafter of the statute, has noted that RICO was modeled on both of these statutory schemes. Blakey, supra note 34, at 26. In addition, all three statutes share parallel public and private, and criminal and civil, enforcement mechanisms. Id. Indeed, RICO's history establishes the government's intent to use antitrust approaches in dealing with organized crime. See generally Blakey, supra note 7, at 249-80 (noting that Department of Justice attempted to combat organized crime by using antitrust theories imaginatively). At one time, the Department of Justice attacked the criminal infiltration of various unions by using antitrust theories. See, e.g., Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962) (affirming finding of Sherman Act violations by union); United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806, 807 (3d Cir. 1966) (affirming finding of Sherman Act violations by association of refuse firms), cert. denied, 384 U.S. 961 (1966). Later, as Congress drafted RICO, Senator Hruska observed: "The bill is innovative in the sense that it vitalizes procedures which have been tried and proved in the antitrust field and applies them into the organized crime field where they have been seldom used before." Blakey, supra note 7, at 261 n.65 (citing 115 CONG. REC. 6993 (1969)). Senator McClellan noted that RICO "draws heavily upon the remedies developed in the field of antitrust. . . . The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill." Id. at 263 n.71 (citing 115 CONG. REC. 9567 (1969)). The Supreme Court recently traced the similarities between RICO and the antitrust laws. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 107 S. Ct. 2759 (1987). In Malley-Duff, the Court held that all treble damage RICO actions would be governed by the four-year statute of limitations found in the Clayton
gree that existing extraterritorial jurisprudence does not address these problems adequately, however, this Article proposes legislative solutions that go well beyond current law. Part I reviews the nature and structure of RICO. Part II sets out jurisdictional barriers to the extraterritorial application of RICO and offers solutions drawn from other laws that have been applied extraterritorially. Finally, Part III examines the extraterritorial provisions in recent RICO reform proposals and offers new solutions for consideration.

I. THE NATURE AND STRUCTURE OF RICO

RICO provides both civil and criminal sanctions against persons engaged in "enterprise criminality." Because RICO

Act. Id. at 2767. The Court borrowed from the Clayton Act because RICO's civil provisions were expressly patterned on this antitrust statute and because both statutes remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees. Id. at 2765. The Court stressed that "we believe that [the Clayton Act] offers the closest analogy to civil RICO." Id. at 2764. See also Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 241 (1987) (stating that "'clearest current in [RICO] history is reliance on the Clayton Act model!'" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489 (1985))); see generally Nathan, Opinion, 6 RICO L. REP. 658 (Nov. 1987) (discussing Malley-Duff and McMahon as providing evidence that antitrust precedent applies to civil RICO analysis).

In addition to the antitrust and securities statutes, federal drug control laws also have been extended extraterritorially. For example, in 1970 Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801 (1982)), several provisions of which apply specifically to conduct outside the United States. Thus, 21 U.S.C. § 959 makes it unlawful to manufacture or distribute controlled substances intending or knowing that they will be imported unlawfully into the United States. 21 U.S.C. § 959 (1982). Section 959 states: "This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." Id.; see, e.g., United States v. Winter, 509 F.2d 975, 990-91 (5th Cir.) (affirming finding of jurisdiction over Jamaican nationals charged with conspiring to import controlled substance), cert. denied, 423 U.S. 825 (1975); see generally N. ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 352-407 (1986) (discussing extraterritorial jurisdiction under § 959). Federal drug control laws and RICO alike are aimed at eradicating criminal activity; indeed, the Drug Enforcement Agency relies on RICO as a valuable tool in combating drug traffickers. See 8 CONTEMP. DRUG PROBLEMS 291, 299 (1979) (citing COMPTROLLER GENERAL OF THE U.S., 1979 REPORT TO CONGRESS) ("DEA believes that traffickers' financial resources can be attacked through effective use of ... the RICO statute ... .").


See United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) (stating that enterprise criminality consists of "all types of organized criminal behavior ... [ranging] from simple political corruption to sophisticated white-collar
focuses on enterprises, it strikes at the organizational foundation of systemic crime. RICO’s civil sanctions authorize treble damages and reasonable attorney’s fees, and may subject violators to reorganization, divestiture, and other equitable remedies. RICO also subjects violators to enhanced criminal crime schemes to traditional Mafia-type endeavors” (quoting Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 TEMP. L.Q. 1009, 1013-14 (1980)), cert. denied, 465 U.S. 1005 (1984); see also United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) (discussing “central role” of enterprise criminality in development of RICO statute).

42. Crime, in combination with an enterprise, may flourish as long as that association remains connected to criminal activity. Therefore, although individuals are prosecuted and convicted, the criminal enterprise may continue to exist and perpetuate any illegal objectives. RICO’s strength lies in its ability to combat continuing criminal activity by attacking the enterprise. See generally Goldsmith, RICO and Enterprise Criminality: A Response to Gerard E. Lynch, 88 COLUM. L. REV. 774, 774-76 (1988). The Supreme Court examined this notion of enterprise and continuity in United States v. Turkette, 452 U.S. 576 (1981):

The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct . . . . The . . . [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. Id. at 583.


18 U.S.C. § 1964(a) states:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

penalties that include fines, imprisonment, and forfeiture of assets.\textsuperscript{44}

RICO generally prohibits four types of enterprise-related activity:\textsuperscript{45} investing income derived from a pattern of racketeering activity in an interstate enterprise (section 1962(a));\textsuperscript{46} acquiring or maintaining an interest in an interstate enterprise through a pattern of racketeering activity (section 1962(b));\textsuperscript{47}

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\textsuperscript{44} 18 U.S.C. § 1963 states in part:
Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of [RICO], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established operated, controlled, conducted, or participated in the conduct of, in violation of [RICO].


\textsuperscript{45} RICO encompasses every manner in which an enterprise may be used to promote crime. Cf. United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) (“The central role of the concept of enterprise under RICO cannot be overstated. It is precisely the criminal infiltration and manipulation of organizational structures that created the problems which led to the passage of RICO.”); see also infra note 51.

\textsuperscript{46} 18 U.S.C. § 1962 states in part:
It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.


\textsuperscript{47} 18 U.S.C. § 1962(b) states:
“It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in,
conducting the affairs of an enterprise through a pattern of racketeering activity (section 1962(c)); and conspiring to violate any of the preceding provisions (section 1962(d)).

Each of these terms is defined more specifically elsewhere in the statute. Racketeering activity, for example, encompasses a broad range of offenses, including white collar crimes such as mail fraud, wire fraud, and securities fraud. To trigger RICO liability, such activity usually must constitute a "pattern"—a minimum of two racketeering acts occurring within a ten-year period—and must have some connection with an "enterprise" that affects "interstate or foreign commerce." any of the preceding provisions (section 1962(d)).

   "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

49. 18 U.S.C. § 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1982).

50. 18 U.S.C. § 1961(1) (1982). Racketeering as defined may be broken into four categories: 1) violence; 2) provision of illegal goods and services; 3) corruption in labor or among public officials; and 4) commercial and other forms of fraud. Blakey, supra note 7, at 300-08.


52. See supra notes 41-44 and accompanying text. To fall within RICO's proscriptions, racketeering activity must connect in some way to an enterprise. See 18 U.S.C. § 1962(a)-(d) (1982). Thus, a pattern of such activity can be conducted against an enterprise, through an enterprise, or to benefit an enter-
RICO defines enterprise broadly to include both licit and illicit entities, and subjects to liability "any individual or entity capable of holding a legal or beneficial interest in property." In civil actions, such violators are liable to anyone injured in business or property by reason of statutory misconduct.

Moreover, just as RICO does not exclude legitimate businesses from its scope, neither the statutory language nor case

prize. Id. The enterprise may act, depending on the case, as a perpetrator of the illicit conduct, see, e.g., United States v. Hartley, 678 F.2d 951, 990-91 (11th Cir. 1982) (shrimp business operated by pattern of mail fraud and interstate transportation of money obtained by fraud), cert. denied, 459 U.S. 1170 (1982), as a prize targeted for illicit acquisition, see, e.g., United States v. Goins, 593 F.2d 83, 89-90 (6th Cir.) (bribe money used to purchase tavern), cert. denied, 444 U.S. 827 (1980), as the victim of racketeering activity, see, e.g., United States v. LeRoy, 697 F.2d 610, 617 (2d Cir. 1983) (embezzlement of union funds), cert. denied, 459 U.S. 1174 (1982), or as an instrumentality aiding the commission of crimes, see, e.g., United States v. Palmeri, 630 F.2d 192, 159 (3d Cir. 1980) (kickback scheme in union contracting), cert. denied, 450 U.S. 967 (1981). For further discussion, see Blakey, supra note 7, at 307-25. As the cited cases suggest, the enterprise requirement encompasses cases involving white collar crime. See, e.g., United States v. Bennv, 766 F.2d 1410, 1413 (9th Cir.) (personal real estate business operated by fraud), cert. denied, 479 U.S. 1017 (1986); United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) (theater operated through pattern of securities and bankruptcy fraud), cert. denied, 449 U.S. 871 (1980).


54. RICO's definition of enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982).


57. See supra note 32. The legislative history demonstrates that Congress intended RICO to apply to white collar crimes. Forerunners to the RICO statute, S. 2187, S. 1623, and S. 1861, excluded white collar offenses from the list of predicate crimes. See S. 1861, 91st Cong., 1st Sess., 111 CONG. REC. 9558-71 (1965); S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6975-96 (1969); S. 2187, 89th Cong., 1st Sess. § 2(a), 111 CONG. REC. 14,680 (1965). When S. 1861 was finally integrated with the proposed Organized Crime Control Act of 1969,
law excludes businesses not located domestically. Only recently, however, has RICO been used against foreign violators. Because RICO targets activity recognized as criminal in

which Congress eventually enacted, predicate offenses pertaining to white collar crime were added. 116 CONG. REC. 551 (1970) (text of RICO after integration); see Blakey, supra note 1, at 265-68; see generally Goldsmith, supra note 42, at 776-80 (discussing RICO's application to enterprises).


In United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), the court held that a foreign corporation may be a RICO enterprise, rejecting efforts to contain RICO's extraterritorial scope: "RICO's legislative history leaves no room for doubt that Congress intended to deal generally with the influences of organized crime on the American economy and not merely with its infiltration into domestic enterprises." Id. at 439 (emphasis added). The court further stated:

[W]e are not breaking new ground in applying federal criminal sanctions to activities involving both American and foreign contacts . . . . The Sherman Act . . . has been held to proscribe conspiracies in restraint of trade which were entered into in the United States but carried out both here and abroad, assuming the requisite effect on commerce. . . . And, in dealing with one of the antifraud provision of the Securities Exchange Act of 1934, . . . we have held that, where there is substantial United States activity and Americans are hurt, it is immaterial that the corporation is foreign.


59. Plaintiffs have filed approximately one dozen extraterritorial RICO cases in United States courts, four of which were dismissed for failure to prove jurisdiction. See Michelson v. Merrill Lynch, Pierce, Fenner & Smith, 709 F. Supp. 1270, 1285 (S.D.N.Y. 1989) (finding no jurisdiction over foreign defendants); Huang v. Sentinel Gov't Sec., 657 F. Supp. 485, 491-92 (S.D.N.Y. 1987) (same); Ancilla Domini Health Servs. v. Communications Assocs., No. 84-C-2711a (N.D. Ill. Nov. 5, 1985) (LEXIS, Genfed library, Dist file) (same); Nordic Bank PLC v. Trend Group, L., 619 F. Supp. 542, 564 (S.D.N.Y. 1985) (same); Soltex Polymer Corp. v. Fortex Indus., 590 F. Supp. 1453, 1460 (E.D.N.Y. 1984) (same), aff'd, 832 F.2d 1325 (2d Cir. 1987). In another five cases, plaintiffs established jurisdiction, but their RICO claims were stayed or dismissed. See Republic of Phil. v. Marcos, 818 F.2d 1473, 1490 (9th Cir. 1987) (holding RICO claims barred by act of state and political question doctrines); S.A. Mineracao da Trinidad-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 191 (2d Cir. 1984) (staying "non-arbitrable" RICO claims pending arbitration of other claims); FMC Corp. v. Varonos, No. 87-C-9640 (N.D. Ill. Oct. 20, 1988) (LEXIS, Genfed library, Dist
most nations, it may not be vulnerable to some foreign criticism historically directed against extraterritorial litigation. Given RICO's controversial domestic status, however, its extraterritorial extension is likely to encounter hostility from both United States and foreign critics. Controversy surrounding RICO stems, for example, from its opponents' argument that the "racketeering" label is prejudicial to defendants and provides unfair leverage in settlement negotiations. Critics also claim that the availability of treble damages encourages ex-


61. Most nations agree that a nation's law can be applied to criminal acts committed outside national borders but having adverse effects within these borders, but nations sometimes differ as to whether a given act is a crime. Therefore, attempts to assert authority over foreign acts that affect the domestic economy but are deemed criminal only by the complaining nation create conflict. A. Hermann, supra note 13, at 7; see generally infra note 89 (discussing conflict arising from such assertions of jurisdiction). The foreign application of United States antitrust laws, for example, provoked considerable controversy precisely because the activities prohibited by those laws were not deemed illegal in other nations. The British Attorney General thus told the House of Lords: "The formation of a cartel and other activities against which anti-trust legislation is directed are not universally recognized as unlawful. Offences in the anti-trust category are wholly different from such offences as piracy which are universally regarded as unlawful." Submission of the British Attorney-General to the House of Lords, cited in In re Westinghouse Elec. Corp. Uranium Contracts Litigation, [1978] A.C. 589, 594, quoted in Joelson, supra note 35, at 1123.


63. See, e.g., RICO Reform: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 1st & 2nd Sess., pt.1, 153, 182 (1985) ("The 'racketeering' label . . . can work severe damage on professional and business reputations.").
tortionate civil claims and permits windfall recoveries. In addition, the use of RICO against defendants other than stereotypical mobsters provokes attacks on the statute and continual attempts at reform by white-collar institutions.

RICO does not merit these criticisms. Moreover, given the pervasive nature of fraud, the statute warrants both do-


65. See Boucher, Closing the RICO Floodgates in the Aftermath of Sedima, 31 N.Y.L. SCH. L. REV. 133 (1988). According to Boucher, RICO has created: "a new form of extortion sweeping the country. Business people of all types, and professionals such as accountants, bankers, insurance agents, and securities brokers are among its primary victims. They are being threatened with a weapon that can inflict huge damages and bring unjustified shame and ruin upon them."

66. For a rebuttal of these criticisms, see generally Goldsmith, supra note 64.

67. Many RICO suits against legitimate businesses involve allegations of fraud. The Department of Justice has released statistics that place losses due to fraud at more than $200 billion annually. United States Dep't of Justice, Annual Report of the Attorney General 42 (1984); see Goldsmith, supra note 64, at 833 n.31 (discussing economic losses caused by fraud; see also J. BOLOGNA, CORPORATE FRAUD 9 (1984) (noting 1980 survey reported that 117 of largest corporations in United States were convicted of white-collar crimes during 1970s). During 1988, the Beach-Nut, Hertz, and defense procurement scandals demonstrated that fraud and white-collar crime continue to plague society. Cf. N.Y. Times, Apr. 9, 1989, § 3, at 4, col. 3 (discussing Beach-Nut fraud case); id. Aug. 6, 1988, § 1, at 29, col. 1 (discussing Hertz fraud case); id. Apr. 14, 1989, § A, at 1, col. 1 (discussing defense procurement fraud case).

In assessing the noneconomic impact of fraud, a survey conducted by the New York Times and CBS News found that trust in United States institutions and officials is eroding. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, UPDATE OF CRS REPORT ENTITLED "WHITE COLLAR CRIMES: THE PROBLEM AND THE FEDERAL RESPONSE" 2-3 (1986). For example, only 32% of those polled believe that United States corporate executives are honest. Id. Furthermore, 85% said that most white collar offenders get away with their violations. Id. A 1984 congressional report on fraud in the nation's financial institutions noted:

Despite such enormous losses, neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud. The few insiders who are singled out for civil sanctions by the banking agencies are usually either fined de minimis amounts or simply urged to resign. The few who are crimi-
mestic and extraterritorial application. For example, foreign groups have engaged in schemes that systematically defraud United States citizens. Such foreign activity harms its victims in the United States no less than does fraudulent activity of domestic origin.

II. JURISDICTIONAL BARRIERS TO EXTRATERRITORIAL RICO SUITS

Although courts have held that RICO applies to foreign as well as to United States defendants, no extraterritorial RICO case has resulted in a judgment. Jurisdictional requirements have raised serious obstacles. To accept an extraterritorial RICO case, a court must have prescriptive, adjudicative, and enforcement jurisdiction. Although lack of adjudicative jurisdiction usually serves little, if any, time in prison for thefts that often cost millions of dollars.

MODEL STATE LEGISLATION ON SOPHISTICATED CRIMINAL ACTIVITY 45 (1985).

68. See FMC Corp. v. Varonos, No. 87-C-8640 (N.D. Ill. Oct. 20, 1988) (LEXIS, Genfed library, Dist file). In denying the foreign defendants' motion to dismiss for forum non conveniens, the Varonos court stated: "There is a strong public policy interest in providing a remedy in this forum for an Illinois corporation allegedly victimized by a foreign national who systematically effectuated a fraudulent scheme by communications directed into this forum."


70. See supra note 58 and accompanying text.

71. See supra note 59.


(a) jurisdiction to prescribe, i.e., the authority of a state to make its
tion appears to be the most frequent basis for rejecting an extraterritorial case, each jurisdictional predicate merits careful consideration.

A. JURISDICTION TO PRESCRIBE

Jurisdiction to prescribe, also known as subject matter jurisdiction, provides judicial authority over the topic of a dispute. Under international law, prescriptive authority may derive from territorial, nationality, passive personality, universality, or protective principles. These principles often work

law applicable to persons or activities; (b) jurisdiction to adjudicate, i.e., the authority of a state to subject particular persons or things to its judicial process; and (c) jurisdiction to enforce, i.e., the authority of a state to use the resources of government to induce or compel compliance with its law.

Restatement (Third) of the Foreign Relations Law of the United States Part IV, introductory note (1988) [hereinafter Restatement]. The Restatement recognizes that adjudication deals primarily with judicial function while enforcement often encompasses executive or administrative action in addition to the judicial process. 74

74. The Restatement uses the term jurisdiction to prescribe to avoid confusion with the term subject matter jurisdiction as used in a national context. Jurisdiction to prescribe addresses transnational activity. Restatement, supra note 73, § 401 comment c; see also Moessle, The Basic Structure of United States Securities Law Enforcement in International Cases, 16 Cal. W. Int'l L.J. 1, 7 (1986) (stating that jurisdiction to prescribe is preferable term); see generally Lowenfeld, Antitrust, Interest Analysis, and the New Conflict of Laws (Book Review), 95 Harv. L. Rev. 1976, 1980-84 (1982) (reviewing J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d ed. 1981)).

75. See supra note 73. Prescriptive jurisdiction occurs when a nation, by legislative action, executive decree, administrative regulation, or judicial decision, declares a principle or legal norm. J. Sweeney, C. Oliver & N. Leech, supra note 73, at 89. In practice, a court considering an extraterritorial case first must ask if national law applies to the conduct in dispute.

together in practice, but are best understood when treated separately.

Territoriality derives from the internationally accepted right to govern persons and events occurring within national boundaries. The territorial principle therefore fixes jurisdiction at the site of an occurrence, conferring jurisdiction on

77. The passive personality principle, for example, is similar to the protective principle, and the nationality, territorial, and protective principles also interrelate. I. Brownlie, supra note 76, at 306; see, e.g., King, 552 F.2d at 851-52 (finding jurisdiction established under both nationality and territorial principles); United States v. Daniszewski, 380 F. Supp. 113, 115-16 (E.D.N.Y. 1974) (finding jurisdiction established under nationality principle and indicating court was prepared to rely on protective principle as well).

78. See Aldisert, Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?, 5 J.L. & Com. 415, 423 (1984) ("Because every state has a right to dictate laws governing the conduct of its inhabitants, the territorial basis of jurisdiction is universally recognized. Territoriality is the most pervasive and basic principle underlying the exercise by states of prescriptive regulatory power."); see also RESTATEMENT, supra note 73, § 402 comment c ("The territorial principle is by far the most common basis for the exercise of jurisdiction to prescribe, and it has generally been free from controversy."); I. Brownlie, supra note 76, at 300 (noting territorial principle has "received universal recognition"); Higgins, The Legal Bases of Jurisdiction, in EXTRA-TErritorial APPLICATION OF LAWS AND RESPONSES THERETO 5 (C. Olmstead ed. 1984) ("The existence of the territorial principle is devoid of controversy.").

79. In The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, (1812), Chief Justice Marshall recognized the importance of territoriality in defining sovereignty:

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

Id. at 135; see also I. Brownlie, supra note 76, at 300 (noting that territorial principle is "but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has"); Higgins, supra note 78, at 6 (stating that "[a] state has competence to prescribe law for persons and resources within its territory").

80. According to the Restatement, prescriptive jurisdiction exists over "conduct that, wholly or in substantial part, takes place within [a nation’s] territory." RESTATEMENT, supra note 73, § 402(1)(a); see, e.g., Judgment of Oct. 27, 1966, Cass. civ. 2e, Fr., 1966 Bull. Civ. 2 699, 47 I.L.R. 135 (1974) (holding provision of French law applicable to "anyone who performs such an activity on French territory" because "[t]o exempt aliens from [its] scope would require the addition to the text of an exception for which it does not provide"); Judgment of May 30, 1961, Supreme Court, Spain, 34 I.L.R. 49 (1967) (asserting that "Spanish courts have jurisdiction in all civil law questions that might be raised in Spanish territory"); Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (noting
United States courts, for example, over RICO violations occurring within the United States. By comparison, nationality supports prescriptive jurisdiction based on the citizenship of the offender. Hence, this principle does not grant prescriptive jurisdiction in an extraterritorial RICO suit against foreign defendants. The third principle, passive personality, is the obverse of nationality, conferring jurisdiction based on the nationality of the victim. United States victims have not bene-

that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; see also 1 W. Fugate, supra note 6, § 2.4 (discussing territoriality principle as it relates to antitrust law).

81. See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952) ("Congress in prescribing standards of conduct for American citizens may project the impact of its laws beyond the territorial boundaries of the United States.") (emphasis added); Blackmer v. United States, 284 U.S. 421, 436 (1932) ("By virtue of the obligations of citizenship, the United States retained its authority over [an American citizen in France] and he was bound by its laws made applicable to him in a foreign country."). Nationality, as a basis of jurisdiction, stems from national sovereignty—the right of a nation to rule over its citizens. It raises issues of what constitutes a person's nationality, or citizenship, and how a change in nationality may affect jurisdiction. See Restatement, supra note 73, § 402(2); L. Brownlie, supra note 76, at 303. When nationality jurisdiction is asserted over a domestically owned subsidiary incorporated and operating in another country, for example, a conflict of nationality occurs. See, e.g., United States v. Vetco, Inc., 691 F.2d 1281, 1290 (9th Cir.) (requiring United States parent company to produce documents belonging to and in possession of Swiss subsidiary), cert. denied, 454 U.S. 1098 (1981); see also A. Hermann, supra note 13, at 66 (participants in 1980 Ditchley Conference, experts from United States, United Kingdom, France, Germany, and Japan, brought together by Ditchley Foundation, reached consensus that "directives given by the US government to foreign subsidiaries of US companies should not be in conflict with the law of the host country"). United States officials insist that a foreign place of incorporation or the inconsistent policies of a host state cannot be used by an American-owned company to evade its obligations under United States law. See CURRENT ISSUES IN INTERNATIONAL ANTITRUST 43-45 (J. Grif-fin ed. 1981) (statement of Kingman Brewster, Jr. during interview); Davidow, supra note 21, at 508.

82. Prescriptive jurisdiction in an extraterritorial RICO case could be based on the nationality of United States defendants located abroad, however. In Santi Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955), for example, the court found no difficulty in exercising authority over antitrust violations allegedly committed abroad by United Fruit and its subsidiaries. Notwithstanding the foreign location of the alleged violations, jurisdiction existed due to the company's United States citizenship. Id. at 766.

83. See, e.g., The Cutting Case Letter, Secretary of State to United States Ambassador to Mexico (1887), reprinted in J. Sweeney, C. Oliver & N. Lieech, supra note 73, at 95-98. Cutting involved the alleged libel of a Mexican citizen by statements made and printed in the El Paso Sunday Herald, a Texas newspaper. Id. Although the crime was committed outside of Mexico and the offender was not a Mexican national, the Chihuahua Supreme Court exercised jurisdiction and sentenced Mr. Cutting to prison. The Mexican government defended the court's decision, maintaining that jurisdiction was proper because
fited from this principle, however, because United States law does not recognize its force. The fourth principle, universality, provides jurisdiction over acts such as piracy, which are condemned unconditionally by international law. RICO viola-

the victim was a citizen of Mexico. Id. See also The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 22-23 (Sept. 7). (reserving opinion on validity of the passive personality principle); supra note 14 (discussing Lotus case).

Scant authority supports the passive personality principle of prescriptive jurisdiction. The Restatement recognizes it only in cases of terroristic attacks targeting victims based upon their citizenship and in assassinations of government officials. Restatement, supra note 73, § 402 comment g. One authority comments that it is "the least justifiable ... of the various bases of jurisdiction, and in any case certain of its applications fall under the principle of protection and universality." I. BROWNLE, supra note 76, at 303. Although certain hijacking treaties seem to rely on passive personality for jurisdiction, what actually may be involved is universality, that is, a crime universally condemned. Higgins, supra note 78, at 14.


It has constantly been laid down in the United States as a rule of action, that citizens of the United States can not be held answerable in foreign countries for offenses which were wholly committed and consummated either in their own country or in other countries not subject to the jurisdiction of the punishing state. ... To say that he may be tried in another country for his offense, simply because its object happens to be a citizen of that country, would be to assert that foreigners coming to the United States bring hither the penal laws of the country from which they come, and thus subject citizens of the United States in their own country to an indefinite responsibility. Such a pretension can never be admitted by this Government.

The Cutting Case Letter, supra note 83, at 99.

85. Piracy is a universal crime because it threatens the international need for freedom of navigation on the high seas. J. SWEENEY, C. OLIVER & N. LEECH, supra note 73, at 120-21. Because no international penal tribunal exists, any state that seizes the pirate may assert jurisdiction, even though the act of piracy was not committed within national territory, was not committed by a national, and was not within any other form of national authority. See United States v. Smith, 18 U.S. (5 Wheat.) 153, 161-62 (1820) (noting that pirate violates law of nations and is deemed "an enemy of the human race"); 2 MOORE, INTERNATIONAL LAW § 311 (1905). Although the word piracy evokes images of an ancient crime, piracy still creates problems in some parts of the world. For example, piracy occurs commonly in the waters off Southeast Asia, as the plight of the Indochinese refugees demonstrates. J. SWEENEY, C. OLIVER & N. LEECH, supra note 73, at 203.

86. Universality authorizes any state that apprehends offenders to exercise jurisdiction over their acts. See, e.g., supra note 85 (discussing piracy). Thus, the punishing state may lack any connection to the act, for example, though its territory or through the nationality of the offender or victim. Restatement, supra note 73, § 404 comment a. In the United States, however, a person cannot be tried in federal courts for an international crime in the ab-
tions by a foreign business ordinarily would not fit into this category. Finally, the protective principle confers jurisdiction over foreign acts that threaten national security.

International agreements have recognized certain acts other than piracy as offenses against universal law. J. Sweeney, C. Oliver & N. Leech, supra note 73, at 121 (listing acts of violence against diplomats, genocide, hijacking, sabotage of civil aircraft, slave trade, and war crimes). These agreements must be examined to determine the circumstances allowing jurisdiction over acts other than piracy, and are effective only among signatory nations. Id. Thus, the universality principle presumably does not justify exercising jurisdiction over a national from a nonsignatory nation. Once these agreements are widely accepted, however, prohibited offenses become subject to universal jurisdiction under customary international law. See Restatement, supra note 73, reporter's note 1. Based on this analysis, the Restatement includes within the universality principle the following acts other than piracy: "slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism." Id. § 404 & comment a.


87. Universal jurisdiction usually corresponds in some way to criminal law. The Restatement notes, however, that international law does not preclude the use of noncriminal law through universality jurisdiction. Restatement, supra note 73, § 404 comment b. Civil laws such as RICO thus arguably may provide a remedy in tort or restitution for victims of universally recognized crimes. Authors of proposed RICO reforms have considered just such a possibility. For example, a provision permitting foreign service of process was included to "increase the effectiveness of RICO against international terrorism." S. Rep. No. 459, 100th Cong., 2d Sess. 21 (1988). But see supra note 86 (discussing questionable status of terrorism as offense under universality principle).

88. In United States v. Pizzaruso, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968), the court upheld jurisdiction over a foreign defendant charged with making false statements on immigration papers, finding that "a state 'has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions.'" Id. at 10 (quoting Restatement (Second) of the Foreign Relations Law of the United States § 23 (1965)). The offenses threatening the security of a state include: espionage; counterfeiting of the state's seal or currency; falsification of official documents; perjury before con-
Among these narrowly tailored principles, the territorial principle furnishes the most likely basis for prescriptive jurisdiction over a foreign defendant in a RICO case. In particular, courts have expanded the concept of "territory" to encompass conduct outside national boundaries that has a substantial effect within such boundaries. This so-called "effects doctrine," which some foreign governments view with hostility,

sular officials; and conspiracy to violate the immigration or customs laws. RE-

Some courts have expanded the protective principle to encompass any act that threatens the security of citizens through its potential effects. See, e.g. United States v. Daniszewski, 380 F. Supp. 113 (E.D.N.Y. 1974) (relying on nationality principle, but prepared to rely on protective principle, in finding jurisdiction over United States citizen charged with distributing heroin in Thailand with intent to import it into United States). The Daniszewski court stated:

There is artificiality of limitation in treating jurisdiction based on the Protective Principle as confined to those species of conduct abroad that threaten certain narrowly defined interests in the security of the enacting state and in the integrity of its governmental operations (e.g., visa fraud, counterfeiting) and in excluding those acts abroad which threaten the peace of the enacting state as that peace lies in the security of its citizens from criminal intrusion.

Id. at 115-16; see also United States v. Keller, 451 F. Supp. 631, 635 (D.P.R. 1978) (exercising jurisdiction over defendants charged with conspiracy and attempt to import marijuana into United States because "[t]he planned invasion of the customs territory of the United States is sufficient basis for invocation of jurisdiction under the protective theory"). But cf. United States v. Rodriguez, 182 F. Supp. 479, 488 (S.D. Cal. 1960) (stating that when "the effect is felt by private persons within the State, penal sanctions rest on the ... territorial principle," but when "the effect of the acts committed outside the United States is felt by the government, the protective theory affords the basis [for jurisdiction]") (emphasis added), aff'd sub nom. Rocha v. United States, 288 F.2d 545 (9th Cir.), cert denied, 366 U.S. 948 (1961).

90. The effects doctrine can be illustrated by the classic example in which a man standing in State X shoots across the border and injures a man in State Y. The man shooting from State X technically has not committed an act in State Y because the gun was shot in State X. Under a narrow interpretation of the territorial principle, State Y does not have jurisdiction. The effects doc-
is critical to jurisdiction in an extraterritorial RICO case whenever the location of an act cannot be fixed precisely. For exam-

trine gives State $Y$ authority to prosecute the man who shot the gun, however, because his act of injuring the man in State $Y$ has a substantial effect on State $Y$. Cf. Simpson v. State, 33 Ga. 41, 42-46, 17 S.E. 984, 985-96 (1889) (standing in South Carolina, defendant shot at victim in Georgia).

At one time, the United States refused to recognize the effects doctrine. In an early antitrust case, Justice Holmes, writing for the majority of the United States Supreme Court, stated:

But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

American Banana Co. v United Fruit Co., 213 U.S. 347, 356 (1909); see supra note 38 (discussing American Banana).

Subsequent antitrust cases have undercut Justice Holmes's broad language in American Banana. Thus, in 1962, the Supreme Court declared that "[a] conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries." Continental Ore Co. v. Union Carbide & Carbon Corp, 370 U.S. 690, 704 (1962); see also Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613-14 (9th Cir. 1976) (basing jurisdiction on effects of foreign conduct); United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) (basing jurisdiction on consequences in United States of conduct committed abroad).

91. Jurisdiction over foreign acts based on effects within a nation's territory does not always result in controversy. If the offense is an act generally recognized as criminal, such as a shooting or sending libelous publications across a national border, most nations concede that the affected nation has jurisdiction. See Gotlieb, supra note 12, at 450; supra note 61. When the offense violates an economic law, however, and causes primarily economic effects, asserting jurisdiction generates disputes. See Dam, supra note 15, at 891 ("Antitrust presents vexing problems of extraterritoriality because it involves differences in national competition policies, as well as rival national economic interests."); Davidow, supra note 21, at 502 (stating "there have been five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support"); Griffin, supra note 13, at 23 ("Foreign governments respond that international law does not recognize the validity of jurisdiction based upon effects of economic conduct and does not authorize such jurisdictional claims."). Nevertheless, the effects doctrine remains a viable basis for extraterritorial jurisdiction. See supra note 89.

In addition to the effects doctrine, application of the territoriality principle raises other issues. See RESTATEMENT, supra note 73, § 403 comment c (identifying controversies). Conflict sometimes arises, for example, when a nation exercises jurisdiction over foreign products or technology because they originated within domestic territory, as when the United States imposed export controls on Siberian pipeline equipment and technology originating in the United States. See supra note 19. These controls required foreign firms to obtain a validated license before exporting any equipment based on technology of United States origin if use of the data was subject to a licensing agreement or
ple, by using modern international communications, parties to a business deal can conduct a transaction by telephone, by telex, on a computer terminal, or through a combination of these means. Under the effects doctrine, the site at which a transaction takes place becomes irrelevant to jurisdictional analysis. This doctrine would establish prescriptive jurisdiction over RICO violations committed abroad by foreign defendants when those violations have a substantial impact in the United States.

92. See, e.g., Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393 (S.D. Fla. 1986). Faced with the dilemma of determining whether a RICO violation had taken place in the United States, the *Chisholm* court decided that the locus of the act was unimportant and asserted jurisdiction under the effects doctrine. *Id.* at 1401. Because the defendants' acts had "a direct effect in the United States . . . where the acts actually occurred is irrelevant." *Id.*

93. The effects doctrine has been used to reach securities fraud in extra-territorial cases. See, e.g., Bersch v. Drexel Burnham, 519 F.2d 974, 981 (2d Cir.) (upholding jurisdiction in a 10b-5 securities fraud case, because "action in the United States is not necessary when subject matter jurisdiction is predicated on a direct effect [in the United States]"), *cert. denied,* 423 U.S. 1018 (1975); see also Schoenbaum v. Firstbrooke, 405 F.2d 200, 206 (2d Cir.) (finding jurisdiction where securities fraud committed by Canadian defendants created effects in United States), *rev'd on rehearing,* 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 906 (1969); Kaufman v. United States, 163 F.2d 404, 411 (6th Cir. 1947) (upholding jurisdiction over mailings of allegedly fraudulent materials posted in Canada that used United States mails and harmed United States investors); United States v. Van Caunenbreghe, 827 F.2d 424, 430 (9th Cir.) (upholding jurisdiction over foreign defendants charged with wire fraud involving telex originating in Switzerland and sent to California), *cert. denied,* 108 S.Ct. 773 (1987).

In *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976), the court observed that the effects doctrine takes a limited view of extraterritoriality by neglecting to consider the impact of asserting jurisdiction on foreign relations. *Id.* at 611-12. The court therefore proposed a tripartite analysis that modifies the effects doctrine: first, a court must determine whether an act caused some effect on American commerce; second, the court must evaluate the effect in view of the antitrust laws to ascertain whether a cognizable injury exists; finally, the court must compare the nexus between the act and the United States with the act's relationship to other nations. *Id.* at 613. The *Timberlane* court provided a list of eight factors to consider in balancing United States interests against foreign claims in the third stage of its analysis. *Id.* at 614.

Courts deciding extraterritorial antitrust cases since *Timberlane* have adopted its balancing test or some modification thereof. See, e.g., Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884-85 (5th Cir. 1982), *vacated on other grounds,* 480 U.S. 1007, *holding reinstated,* 704 F.2d 785 (5th Cir.), *cert. denied,* 446 U.S. 961 (1983); Montreal Trading Ltd. v. Amex Inc., 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982); Manning Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979); see also Calvani & Schmidt, *RICO and the Jurisdictional Rule of Reason: Giving Extraterritory-
B. JURISDICTION TO ADJUDICATE

Adjudicative jurisdiction refers to a court's authority to apply extraterritorial RICO cases. But see Laker Airways v. Sabena, 731 F.2d 909, 948-53 (D.C. Cir. 1984) (doubting feasibility and appropriateness of balancing as a judicial function). Although the Timberlane line of cases concern antitrust law, the Restatement provides a list of factors to be applied in extraterritorial cases generally. These factors are designed to moderate the effects doctrine and introduce comity into a court's decision. Restatement, supra note 73, § 403.

They are:

1. the extent to which the activity occurs within the nation or has substantial, direct, and foreseeable effects;
2. the nexus between the nation and the persons responsible for the activity;
3. the character of the activity, the importance of the regulation to the nation, the extent to which other nations regulate the activity, and the degree to which the regulation is generally accepted;
4. the existence of justified expectations that might be protected or damaged by the regulation;
5. the importance of the regulation to the international system;
6. the extent to which the regulation is consistent with international traditions;
7. the extent to which another nation has an interest in regulating the activity;
8. the potential for conflict with other nations.

Id. § 403(2).

Some of these factors are particularly important in RICO cases. For example, with respect to the third factor, RICO's value to the United States cannot be overemphasized. See Goldsmith, supra note 64, at 830-38 (discussing merits of civil RICO); see also supra notes 67-68 and accompanying text (same). In addition, with respect to the fifth factor, RICO has the potential to benefit the international system in combating organized crime which is not contained by national boundaries. Finally, with reference to the eighth factor, RICO is directed against acts recognized as criminal by other nations, making its extraterritorial application less controversial than such application of economic laws. See supra note 61 and accompanying text.

Each of the Restatement's general factors could support a court's decision to exercise jurisdiction in an extraterritorial RICO case. Some factors, however, might militate against jurisdiction. For example, RICO's treble damage provision might generate objections from other nations, creating conflict with those nations. See Restatement, supra note 73, § 403(2)(8); see, e.g., Cira, supra note 28, at 264 (noting that "perhaps the major difficulty experienced by foreign governments through the extraterritorial enforcement of United States antitrust laws results from private treble damages actions" (quoting Australian Attorney General)); Griffin, Possible Resolution of International Disputes Over Enforcement of U.S. Antitrust Laws, 18 STAN. J. INT'L L. 279, 280-81 (1982) (noting call of Commonwealth Law Ministers for coordinated resistance to United States treble damage judgments). But see infra note 158 (discussing importance of treble damages).

94. Establishing that a United States law such as RICO applies prescriptively to a foreign defendant does not assure its applicability in litigation. The court must be satisfied that a sufficient nexus exists between the foreign defendant and the United States to justify action in a United States forum. See 2
bind defendants personally or to exercise jurisdiction over the defendant's property located within the territory of the forum. Jurisdiction to adjudicate requires personal jurisdiction, proper service of process, and appropriate venue.

1. Personal Jurisdiction

Personal jurisdiction over resident defendants usually

J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE ¶ 4.02(3) (2d ed. 1988) (stating that "[w]ithout jurisdiction over the person or the res, the court cannot render a valid judgment, even if it has subject-matter jurisdiction").

95. Judicial power over a person, or in personam jurisdiction, is required in cases involving defendants' personal rights. Therefore, a court lacking jurisdiction over the defendant personally also lacks power to issue a personal judgment against the defendant. BLACK'S LAW DICTIONARY 711 (5th ed. 1979); see Pennoyer v. Neff, 95 U.S. 714, 727 (1877) (stating that in personam jurisdiction exists when "object of action is to determine the personal rights and obligations of the defendants").

96. Quasi in rem jurisdiction consists of judicial authority over a person's interest in property located within the forum. BLACK'S LAW DICTIONARY 1121 (5th ed. 1979). In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court stated: "The effect of a judgment in [a quasi in rem] case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court." Id. at 199. In a footnote, the Court defined two types of quasi in rem jurisdiction: "In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him." Id. at 199 n.17.

When a court bases jurisdiction on property in the forum state, the property's presence satisfies constitutional standards of due process if the property is the subject matter of the case. See 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1070 (2d ed. 1987). If the property is not the subject matter of the suit, however, the same due process analysis that governs in personam jurisdiction applies. In other words, the presence of property alone does not support jurisdiction. Shaffer, 433 U.S. at 207.

97. Personal jurisdiction, service of process, and venue are related but separate requirements. Personal jurisdiction requires that a court have jurisdiction over a defendant's person or property. See 4 C. WRIGHT & A. MILLER, supra note 96, § 1053. In contrast, service of process notifies a defendant that his, her, or its rights are to be adjudicated. Grooms v. Greyhound Corp., 287 F.2d 95, 97-98 (6th Cir. 1961) ("The purpose of the summons is to give notice to the defendant that it has been sued."). Venue, on the other hand, requires that a case be instituted and decided in the proper location. Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985) (stating that venue "relates to the place where judicial authority may be exercised").

All three concepts exist to protect the defendant, yet the defendant may waive any one of them by making a personal appearance. See Leroy v. Great W. United Corp., 446 U.S. 172, 180 (1979) (noting both personal jurisdiction and venue "are personal privileges of the defendant . . . and both may be waived by the parties"); FED. R. CIV. P. 12(h)(1).
arises from their presence in the forum's territory.\textsuperscript{98} When United States litigation targets nonresident foreign defendants, due process\textsuperscript{99} limits personal jurisdiction by requiring that at least minimum contacts\textsuperscript{100} exist between the defendants and the United States.\textsuperscript{101} In addition, any exercise of extraterritorial jurisdiction is subject to the due process limits imposed by the Fifth Amendment and the Fourteenth Amendment. The due process clause of the Fifth Amendment limits federal court jurisdiction, while the Fourteenth Amendment due process clause limits state court jurisdiction. Both due process clauses state that a person shall not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. V, XIV, § 1. These due process clauses also apply in determining personal jurisdiction over foreign litigants. See, e.g., Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 n.7 (9th Cir. 1977); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 339 (E.D. Mich. 1977); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 225 (D.N.J. 1966); see also infra note 101 (discussing application of due process clauses to extraterritorial RICO cases).

98. At one time, presence in the forum state was the sole basis for personal jurisdiction. The Supreme Court summarized this requirement in \textit{International Shoe v. Washington}, 326 U.S. 310 (1945): "Historically the jurisdiction of courts to render judgment \textit{in personam} is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." \textit{Id.} at 316 (citing \textit{Pennoyer v. Neff}, 95 U.S. 714, 733 (1877)). \textit{See generally 4 C. Wright & A. Miller, supra} note 96, § 1064 (discussing history of personal jurisdiction).

99. The due process clause of the Fifth Amendment limits federal court jurisdiction, while the Fourteenth Amendment due process clause limits state court jurisdiction. Both due process clauses state that a person shall not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. V, XIV, § 1. These due process clauses also apply in determining personal jurisdiction over foreign litigants. See, e.g., Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 416 n.7 (9th Cir. 1977); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 339 (E.D. Mich. 1977); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 225 (D.N.J. 1966); see also infra note 101 (discussing application of due process clauses to extraterritorial RICO cases).

100. \textit{See International Shoe}, 326 U.S. at 316 (asserting that out-of-state defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). Minimum contacts requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum...thus invoking the benefits and protections of its laws." Hanson v. DeNeckla, 357 U.S. 235, 253 (1958) (citing \textit{International Shoe}, 326 U.S. at 319); see, e.g., Calder v. Jones, 465 U.S. 783, 788-89 (1984) (upholding personal jurisdiction based on article defendants wrote and edited for national magazine circulated in plaintiff's resident state); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957) (upholding personal jurisdiction based on defendant's delivery of contract to forum state, in which insured plaintiff was resident and from which premiums were paid). Those acts which result in purposeful availment must be "continuous and systematic" if the cause of action does not arise from the defendant's contact with the forum, but need only be sporadic if the cause of action arises directly out of the defendant's contacts with the forum. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 nn.8-9, 415-16 (1984).

Although Supreme Court cases discussing minimum contacts generally involve domestic defendants, the same standards apply to actions against foreign defendants. See, e.g., Asahi Metal Indus. Co., Ltd. v. Superior Court, 107 S. Ct. 1026, 1039-34 (1987) (plurality opinion) (dismissing cases for lack of personal jurisdiction over Japanese corporation); \textit{Helicopteros}, 466 U.S. at 416 (dismissing case for lack of personal jurisdiction over Columbian corporation).

101. Under the RICO statute, the defendant need have only some connection with the United States as a whole, and not with any particular state. FTC v. Jim Walters Corp., 651 F.2d 251, 256 (5th Cir. 1981) (stating that when na-
tional jurisdiction must be reasonable and fair.\textsuperscript{102}

\textsuperscript{102} See Asahi Metal Indus. Co., Ltd. v. Superior Court, 107 S. Ct. 1026, 1033-35 (1987) (examining "traditional notions of fair play and substantial justice" apart from minimum contacts and suggesting balancing test to determine whether personal jurisdiction is reasonable); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The \textit{Burger King} Court emphasized that once minimum contacts have been established, a court should consider whether "jurisdiction would comport with 'fair play and substantial justice'". \textit{Id.} at 476; see supra note 94. The \textit{Restatement} expressly limits extraterritorial jurisdiction to adjudicate by imposing a reasonableness standard: "A state may . . . exercise jurisdiction to adjudicate with respect to a person or thing, if the relationship of the person or thing to the state is such as to make the exercise of such jurisdiction reasonable." \textit{Restatement}, supra note 73, § 421(1). In deciding what constitutes fairness and reasonableness, the court may consider whether the forum has a special interest in granting the plaintiff relief, and may weigh the relative convenience for the parties and factors associated with the forum non
Difficulties obtaining personal jurisdiction over foreign defendants are likely to occur in every extraterritorial case. Several well established approaches that meet due process requirements, however, are particularly applicable to extraterritorial RICO cases. The existence of minimum contacts between a foreign defendant and the United States may be established not only on the basis of the defendant's own contacts, but also through the presence of a domestic agent for the defendant. Thus, a domestic subsidiary of a foreign company may serve as a jurisdictional conduit through which judicial authority over the parent may be obtained. Merely proving the existence of a parent-subsidiary relationship between two companies does not, however, establish minimum contacts. The subsidiary and the parent must be sufficiently close to justify the exercise of jurisdiction over the parent. In one extraterritorial


103. To establish personal jurisdiction over a defendant based on the presence of a domestic agent, a plaintiff must show that an agency relationship exists. The plaintiff therefore must establish that the defendant requested the agent's performance, was benefited by the agent's domestic activity, and exercised some control over the agent. Como v. Commerce Oil Co., 607 F. Supp. 335, 340 (S.D.N.Y. 1985); cf. Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir.) (finding personal jurisdiction over British defendants lacking because importer was not British defendants' agent), cert. denied, 449 U.S. 1062 (1980). Once the agency relationship is established, other agency principles may become relevant. Thus, under the doctrine of ratification, a foreign defendant may be held responsible for acts committed by the agent outside of the agency's scope. See, e.g., Dorothy K. Winston & Co. v. Town Heights Dev., Inc., 376 F. Supp. 1214, 1216 (D.D.C. 1974).

104. Transure, Inc. v. Marsh & McLennan, Inc., 766 F.2d 1297, 1299 (9th Cir. 1985); see also Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 905 (1st Cir. 1980) (holding that even if nonresident parent is sole owner of resident subsidiary, presumption of corporate separateness must be overcome to establish jurisdiction over parent); 2 J. Moore, J. Lucas, H. Fink & C. Thompson, supra note 94, ¶ 4.41-1[6] (discussing parent-subsidiary basis for establishing minimum contacts).

105. In Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1222 (E.D.N.Y. 1981), the court identified two approaches for determining whether jurisdiction over a foreign parent may be established through its domestic subsidiary. First, an agency relationship may exist between the parent and the subsidiary; second, the parent may control the subsidiary so completely that, in fact, the subsidiary is a mere department of the parent. Id. at 1334; see, e.g., Coca-Cola Co. v. Procter & Gamble Co., 595 F. Supp. 304, 308 (N.D. Ga. 1983) (holding that due process and "fair play and substantial justice" do not prevent jurisdiction over parent that controls subsidiary to extent that it is merely division or department of parent).

In determining whether a parent and a subsidiary are sufficiently close, a court may consider the following factors: 1) whether the parent arranges financing for and capitalizing of a subsidiary; 2) whether separate books, tax re-
territorial RICO case, for example, the court recognized the parent-subsidiary relationship as a basis for jurisdiction, but found the plaintiff had failed to make the necessary showing of closeness between the two.\footnote{106}

Another method of obtaining personal jurisdiction is especially useful in extraterritorial RICO litigation. The absent co-conspirator\footnote{107} theory permits a court to assert jurisdiction over an absent person based on a co-conspirator’s presence in the forum state.\footnote{108} Courts interpret this theory strictly, however.

turns, and financial statements exist; 3) whether the parent and the subsidiary have separate officers and directors; 4) whether the parent holds out its subsidiary as an agent; 5) the subsidiary’s method of paying the parent; and 6) the extent to which the parent controls the subsidiary’s day-to-day affairs. Midwest Petroleum Co. v. American Petrofina, Inc., 603 F. Supp. 1089, 1112 (E.D. Mo. 1985); cf. Miller v. Honda Motor Co., 779 F.2d 769 (1st Cir. 1985). In Honda Motor Co., the court found that no personal jurisdiction existed over a Japanese parent company because the company and its domestic subsidiary operated with different sets of officers; the parent reimbursed the subsidiary for warranty repairs and charged interest for delayed payments; and the subsidiary controlled its own advertising, marketing, personnel, financial, and real estate planning. \textit{Id.} at 772-73.

The parent-subsidiary analysis also may work in the converse. That is, given sufficient closeness, jurisdiction over a foreign subsidiary may be established through the presence of a domestic parent. See Rea v. An-Son Corp., 79 F.R.D. 25, 32 (D. Okla. 1978) (finding personal jurisdiction over Venezuelan subsidiary based upon Oklahoma parent’s control).

Finally, personal jurisdiction over a foreign corporation does not guarantee that jurisdiction exists over its officers and directors. Under the fiduciary shield doctrine, corporate employees are granted personal immunity for acts done in their employee capacity. See Gregoris Motors v. Nissan Motor Corp. in USA, 630 F. Supp. 902, 914 (E.D.N.Y. 1986) (holding foreign corporate officers not individually subject to personal jurisdiction for acts done as employees); Idaho Potato Comm’n v. Washington Potato Comm’n, 410 F. Supp. 171, 180, 181 (D. Idaho 1975) (holding exercise of personal jurisdiction over employees based on contacts between employer and forum state would contravene “fair play” and “substantial justice”); see also Nordic Bank PLC v. Trend Group, Ltd., 619 F. Supp. 542, 570 (S.D.N.Y. 1985) (finding that fiduciary shield doctrine protected individual defendants in extraterritorial RICO case); \textit{infra} note 109 (addressing fiduciary shield doctrine in co-conspirator context).

\footnote{106.} Huang v. Sentinel Gov’t Sec., 657 F. Supp. 485, 489-90 (S.D.N.Y. 1987) (noting plaintiffs could not demonstrate "'degree of domination and control necessary'" to base jurisdiction over parent or acts of its subsidiary); see also Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1462 (E.D.N.Y. 1984) (discussing application of \textit{Bulova Watch} standards to RICO counterclaim against foreign defendants), aff’d, 832 F.2d 1325 (2d Cir. 1987).


\footnote{108.} \textit{See}, e.g., Bonavire v. Wampler, 779 F.2d 1011, 1014 (4th Cir. 1985) (finding jurisdiction over defendants involved in fraudulent scheme but never present in forum state based on presence of one individual in state); Dixon v. Mack, 507 F. Supp. 345, 349-52 (S.D.N.Y. 1980) (finding that jurisdiction over
Jurisdiction must be supported by "specific facts that, if proven, would demonstrate the defendant's membership in the conspiracy." Finally, some courts have suggested that minimum contacts could be established by showing that a foreign defendant's acts had a foreseeable impact on the United States—a sort of "effects doctrine" of personal jurisdiction. Supreme Court rulings in this area, however, remain unclear. For example, the Court expressly rejected this standard for personal jurisdiction in an interstate child custody dispute, but later relied on it in an interstate libel case as one element supporting jurisdiction. In the area of prescriptive jurisdiction, the effects test nonresident defendant in civil rights action charging conspiracy did not violate due process).

109. See, e.g., Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir.) (finding unsupported allegations of conspiracy did not establish personal jurisdiction over Spanish corporation), cert. denied, 454 U.S. 893 (1981); see also Soltes, 550 F. Supp. at 1457 (finding no personal jurisdiction over foreign RICO defendants under co-conspirator theory). The Soltes court also noted that, had there been a prima facie showing of conspiracy, jurisdiction still would have failed based on the fiduciary shield doctrine. Id. The court stated that Second Circuit cases "have recognized that if an individual has contact with a particular state only by virtue of his acts as a fiduciary of the corporation, he may be shielded from the exercise by that state of jurisdiction over him personally on the basis of that conduct." Id. (quoting Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 902 (2d Cir. 1981)); see also supra note 105 (discussing fiduciary shield doctrine in parent-subsidiary context).

110. See supra notes 89-93 and accompanying text.

111. See, e.g., Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir. 1985) (recognizing that "effects doctrine" may serve as basis for personal jurisdiction); Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1267 n.5 (5th Cir. 1978) (upholding personal jurisdiction over Idaho officials where application of Idaho statute to Texas corporation caused corporation to alter business practices, thereby having direct effect in Texas), rev'd on other grounds sub nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979); Leasco Data Process Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340-41 (2d Cir. 1972) (holding effects doctrine relevant to in personam jurisdiction over foreign defendants); Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467, 476 (D.C. Cal. 1985) (upholding personal jurisdiction in breach of employment contract case based on effects of defendant's wrongful conduct); see also Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241, 1255 (S.D.N.Y. 1984) (limiting personal jurisdiction based on effects to instances in which defendant knows or has good reason to know conduct will have effects in the forum). The Restatement also endorses the use of effects to establish jurisdiction over the parties. RESTATEMENT, supra note 73, § 421(2)(j) (stating that jurisdiction is reasonable if "the person . . . carried on outside the state an activity having a substantial, direct or foreseeable effect within the state, which created liability, but only in respect of such activity").


focuses on acts of an absent defendant that have a foreseeable effect in the forum state. In the area of personal jurisdiction, however, due process requires that "being haled into court" in a particular state be foreseeable. Foreseeable effects thus may not be sufficient to establish personal jurisdiction unless they encompass foreseeable litigation.

114. See, e.g., ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977). According to the Antitrust Guide: "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." Id. at 6 (emphasis added).


116. See Asahi Metal Indus. Co., Ltd. v. Superior Court, 107 S. Ct. 1026, 1033-35 (1987). In Asahi, a plurality of the Court appeared to reject mere foreseeability as a standard satisfying due process. Instead, the plurality required that the defendant's contact with the forum state "come about by an action by the defendant purposefully directed toward the forum State." Id. at 1033 (emphasis in original); see also World-Wide Volkswagen Corp., 444 U.S. at 297 (rejecting foreseeability as sole basis for personal jurisdiction in product liability case when consumer introduced product into forum state); Dommel's Hotel, Inc. v. East West Helicopter, Inc., 580 F. Supp. 15, 18 (E.D. Pa. 1984) (finding defendant sellers' knowledge that product would be used in forum state insufficient contact to support personal jurisdiction). But see First Am. First, Inc. v. National Ass'n of Bank Women, 802 F.2d 1511, 1571 (4th Cir. 1986) (upholding personal jurisdiction over nonresident defendant who should have known that allegedly defamatory letter would inflict greatest harm in forum state); Donovan v. Grim Hotel Co., 747 F.2d 966, 974 (5th Cir.) (subjecting defendant to personal jurisdiction based on foreseeable consequence in forum state), cert. denied, 471 U.S. 1124 (1984).

117. In World-Wide Volkswagen, the Court announced:

"[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."

444 U.S. at 297. In Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the Court stressed that foreseeability of litigation, not foreseeability of causing injury in another state, was the key inquiry for personal jurisdiction. Id. at 474; see also Leab v. Streit, 584 F. Supp. 748, 757 n.9 (S.D.N.Y. 1984) (holding that basing personal jurisdiction on foreseeability of occurrences in forum state is improper, but court may consider foreseeability of suit in forum).

In an extraterritorial RICO case, the court suggested that even if the effect of the defendant's acts included the foreseeability of litigation, the court also must find that the claim arose out of these acts. See Huang v. Sentinel Gov't Sec., 657 F. Supp. 485, 490-91 (S.D.N.Y. 1987) (finding defendant had not purposefully availed itself of privilege of conducting activities in forum and stating in dicta that even if it had, jurisdiction would fail because plaintiffs had not shown "causal nexus between defendant's acts and their claims"). If the defendant's acts in Huang were sporadic, as it appears, then special jurisdiction requirements control and the court correctly required that the claim arise
2. Service of Process

Adjudicative jurisdiction in an extraterritorial RICO case also requires valid service of process. While personal jurisdiction requirements protect defendants' constitutional rights, service of process constitutes the "physical means by out of the acts. See supra note 100. If the defendant's acts had been continuous and systematic, however, then under Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8-9, 415-16 (1984), a nexus between the acts and the claims should not have been required. See supra note 100. As with the effects doctrine in prescriptive jurisdiction, establishing personal jurisdiction based on the foreseeable effect a foreign defendant creates could be limited or modified by a balancing approach. See supra note 93 (discussing blancing factors in case law and Restatement). The Supreme Court advocated this approach in Asahi. After a plurality of the Court discussed defendant's lack of minimum contacts, eight justices agreed that the reasonableness of personal jurisdiction depended on an evaluation of several factors. 107 S. Ct. at 1034. The Court described this balancing process:

A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It also must weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Id. at 1034 (citation omitted). In the case of a foreign defendant, the Court noted that the "unique burdens" of "defending oneself in a foreign legal system should have significant weight in assessing the reasonableness" of personal jurisdiction. Id. The Court also recognized, however, that when minimum contacts exist, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." Id.

118. See Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925) (holding valid service necessary for personal jurisdiction in absence of defendant's voluntary appearance); Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir. 1982) (same); Royal Lace Paper Works, Inc. v. Pest-Guard Prods., Inc., 240 F.2d 814, 816 (5th Cir. 1957) (finding federal court lacked jurisdiction absent service of process under either United States or state statutes).

Note, however, that a party may waive the right to proper service of process. See supra note 97. By so doing, a defendant submits voluntarily to the jurisdiction of a court. See Alger v. Hayes, 452 F.2d 841, 842-43 (8th Cir. 1972) (finding right to proper service waived when defendant failed to allege defect in service in his answer, never filed a written motion regarding improper service, and proceeded to try case).

In addition, a defendant may consent to service of process by methods other than those provided for by rule or by statute. For example, parties to a contract may provide in its terms for consent to service of process. See National Equip. Ltd. v. Szkuhent, 375 U.S. 311, 315-16 (1964) (affirming right to determine service of process by contract but noting that consent may not be upheld under all circumstances); AAMCO Automatic Transmissions, Inc. v. Hagenbarth, 296 F. Supp. 1142, 1143 (E.D. Pa. 1968) (involving franchise agreement that contained consent to jurisdiction in Pennsylvania and service by registered mail to last known address of licensee).

119. In particular, due process requires that service of process notify the
which . . . jurisdiction is asserted."

Service of process on foreign defendants may be difficult. The Federal Rules of Civil Procedure describe methods of service in foreign countries, but do not independently authorize foreign service of process. Such authorization must be conferred by state or federal statute, which RICO does not do. Nevertheless, a RICO plaintiff may obtain service on a foreign defendant in three ways: by properly serving the foreign defendant in the United States; by using a state long-arm statute; or by relying on an independent claim for which a statute authorizes foreign service of process.
Service of process in the United States may be accomplished by serving the defendant personally, by serving a United States agent of the foreign business, or, under RICO, by properly serving one defendant in the United States and thereby acquiring the right to serve all others in the same case by showing that the ends of justice so require. Personal service requires the defendant's presence in the forum country. Thus, a foreign defendant residing abroad must enter the United States, temporarily at least, in order for service to be achieved.

In addition, if a foreign defendant having contact with the United States has designated an agent for the service of process in the United States, service on the agent effectively serves the foreign defendant. Service through agency also may be

127. See supra note 98 and accompanying text; see also 4A C. Wright & A. Miller, supra note 96, § 1095 (noting "[t]he usual and most desirable method of service is by personal delivery of a copy of the summons and complaint to defendant within the state").


129. See, e.g., Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 270 (5th Cir. 1985) (concluding that "when the defendant is present within the forum state, notice of the suit through proper service of process is all the process to which he is due"). But cf. Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 125, 34 A. 714, 729 (1895) (noting transient jurisdiction offers "premiums to scavengers of sham and stale claims at every center of travel"); 4 C. Wright & A. Miller, supra note 96, §§ 1054 n.15, 1073 n.20 (noting widespread criticism of rule providing for transient jurisdiction).

130. Designation may be made by contract, see supra note 118, or by operation of law, see Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935) (upholding Iowa statute containing implied consent provision for service by office managers involved in securities sales); Hess v. Pawloski, 274 U.S. 352, 356-57 (1927) (upholding Massachusetts statute that deemed state official as service of process agent for nonresident motorists using state highways and noting that some method for notice to defendant of service existed). Some state statutes generally require that foreign corporations doing business in the state designate an agent for service of process. 4A C. Wright & A. Miller, supra note 96, § 1116; see, e.g., Randolph Labs., Inc. v. Specialties Dev. Corp., 62 F. Supp. 897, 899 (D.N.J. 1945) (upholding service on agent required to be designated by New Jersey law). Federal statute also may authorize an agent to accept service of process. See, e.g., 28 U.S.C. § 1694 (1982) ("In a patent infringement action commenced in a district where the defendant is not a resident but has a regular and established place of business, service of process ... upon such defendant may be made upon his agent or agents conducting such business.").

131. If the defendant is an individual, Federal Rules of Civil Procedure rule 4(d)(1) applies, prescribing that service be made "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(d)(1). The rule has been
made on a United States subsidiary of a foreign parent corpora-

tion, or on the representative of a foreign business, if the re-

presentative is so "integrated with the corporation sued as to

make it likely that he will realize his responsibilities and know

what he should do with any legal papers served on him."133

Finally, RICO section 1965(b)134 authorizes service of pro-

cess on defendants residing in other districts when one defend-

ant otherwise has been properly served.135 Thus, in some

circumstances, this section provides for service of process on de-

interpreted to require actual appointment of the agent to accept service. See, e.g., Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 619 F. Supp. 727, 742 (S.D.N.Y. 1985) (finding service of defendant's law firm ineffective because no member of firm was authorized to accept service on defendant's behalf); Gipson v. Township of Bass River, 82 F.R.D. 122, 125 (D.N.J. 1979) (finding township clerk not authorized to receive service for members of township zoning board of adjustment).

If the defendant is a corporation, Federal Rules of Civil Procedure rule 4(d)(3) applies, prescribing that service on a foreign corporation be made "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4(d)(3); see, e.g., Heise v. Olympus Optical Co., 111 F.R.D. 1, 6 (N.D. Ind. 1986) (upholding service on president of Japanese company's United States subsidiary); American Can Co. v. Crown Cork & Seal Co., 433 F. Supp. 333, 337 (E.D. Wis. 1977) (upholding service on managing agent of corporation).

132. See supra notes 104-06 and accompanying text.


134. Section 1965(b) states:

In any action under section 1964 [civil remedies] of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.


135. RICO's legislative history and the application of § 1965(b) indicate congressional intent in drafting this provision to provide for nationwide service of process in certain circumstances. Congress planned for RICO to be a tool in the eradication of organized crime. See supra note 31 and accompanying text. Nationwide service of process avoids "jurisdictional gaps" that would be created if no single court could assert jurisdiction over all of the defendants in a RICO conspiracy case. "[M]erely naming persons in a RICO complaint," however, "does not, in itself, make them subject to Section 1965(b)'s nationwide service provisions." Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986) (noting that plaintiffs may sue separately nonresident defendants who did not participate in single racketeering enterprise).
fendants not within the court's territorial boundaries. Specifically, in a case in which at least one of multiple RICO defendants is properly before the court, the "ends of justice may require that other parties . . . be brought before the court . . . as well." This provision can be used to centralize an action by requiring defendants located in various districts to appear before a single federal court. Although sound policy arguably favors its application to foreign defendants, the statutory text does not encompass such situations and the case law is divided.

Because rule 4(i) of the Federal Rules of Civil Procedure allows foreign service of process if authorized by state law, direct service on nonresident foreign defendants in extraterritorial RICO cases may be accomplished through state long-arm statutes. The long-arm statute must, of course, comport with

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136. See supra note 134. The "ends of justice" so require if venue is laid properly as to one defendant and no other district exists in which venue would be appropriate as to all defendants. See, e.g., Butcher's Union, 788 F.2d at 539; Miller Brewing Co. v. Landau, 616 F. Supp. 1285, 1290 (E.D. Wis. 1985); Soltex Polymer Corp. v. Fortex Indus., Inc., 590 F. Supp. 1453, 1459 (E.D.N.Y. 1984), aff'd, 832 F.2d 1325 (2d Cir. 1987).

137. See, e.g., Butcher's Union, 788 F.2d at 539; Miller Brewing, 616 F. Supp. at 1290.

138. See Soltex Polymer, 590 F. Supp. at 1460 (rejecting use of § 1965(b) for foreign service of process and noting RICO contains no language authorizing foreign service of process). But see Shulton, No. 85-2925 (using § 1965(b) to assume jurisdiction over RICO defendants from Panama and Guatemala).

The section's language must be the starting point in any analysis of whether it extends service to foreign countries. The statute specifically states that once personal jurisdiction has been obtained over one defendant, "other parties residing in any other district [may] be brought before the court." 18 U.S.C. § 1965(b) (1982) (emphasis added). "District" may imply an area within the United States; thus, based on the statutory language alone, it does not appear that § 1965(b) contemplates service in a foreign country. Courts have suggested, however, that Congress created § 1965(b) as a vehicle for filling jurisdictional gaps. See supra note 135. Although no statutory or congressional evidence exists for extending § 1965(b) to foreign defendants such an extension would fill gaps created when those defendants have minimum contacts with the United States but cannot be served because no federal or state statute authorizes process.

139. See Fed. R. Civ. P. 4(i); see also supra note 122 (providing statutory language and examples of cases authorizing service of process under state law).

140. Plaintiffs in federal district court usually rely on state long-arm statutes when jurisdiction is based on 28 U.S.C. § 1332 (1982) (authorizing federal diversity jurisdiction). A state long-arm statute also may be available in cases in which jurisdiction is based solely on a federal question under 18 U.S.C. § 1331 (1982). See United States v. First Nat'l City Bank, 379 U.S. 378, 381 (1965) (upholding service on Uruguayan corporation under state long-arm statute in federal question case); 4A C. WRIGHT & A. MILLER, supra note 96,
due process requirements. The statute also must contemplate reaching the defendants—that is, the statutory language must support extraterritorial scope. Using such state long-arm statutes to reach defendants in foreign countries further the purposes underlying RICO.  

A statute authorizing foreign service of process for an independent accompanying claim also may provide for foreign service in a RICO case. In other words, service of process
under a non-RICO count in a complaint may encompass all other claims within the same cause of action, including RICO claims.\textsuperscript{145} For example, courts have interpreted section 27 of the Securities Act of 1934 as authorizing foreign service of process.\textsuperscript{146} Thus, when a complaint alleges RICO and securities violations, foreign service of process for all violations may be accomplished through the securities law provision.\textsuperscript{147}

3. Venue

Proper venue is the final element of jurisdiction to adjudicate.\textsuperscript{148} Venue concerns the appropriate location of a lawsuit.\textsuperscript{149}

\textsuperscript{145} Service of process acts as the vehicle for providing the defendant with notice and is the physical means by which a court asserts jurisdiction. See supra note 119. Delivery of a complaint accomplishes that for all included counts regardless of which count authorizes service. Allowing a RICO count to ride along with a claim under a separate statute that authorizes service in a foreign country also furthers judicial economy and convenience to the parties, and recognizes the federal policy against piecemeal litigation. Cf. Cooper v. North Jersey Trust Co., 226 F. Supp. 972, 981-82 (S.D.N.Y. 1964) (upholding service under Securities Exchange Act for accompanying state claims involving same rights); 6 C. WRIGHT & A. MILLER, supra note 96, § 1588 (discussingpendent personal jurisdiction in joinder of claims).

\textsuperscript{146} See, e.g., Travis v. Anthes Imperial Ltd., 473 F.2d 515, 529 (8th Cir. 1973); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972); Ferraioli v. Cantor, 259 F. Supp. 842, 847 (S.D.N.Y. 1966).

\textsuperscript{147} See Chamrac Properties, N.V. v. Fike, No. 86-Civ.-7819 (S.D.N.Y. Apr. 19, 1988) (LEXIS, Genfed library, Dist file). In Chamrac, the court refused to dismiss the RICO count for improper service of process. Id. Noting that the defendant had been served properly in Hong Kong under accompanying securities claims, the court declared: “To dismiss the RICO counts as [the defendant] urges defies logic. The goal of service of process is to ensure that defendants are sufficiently and timely apprised of the charges against them.” Id. Because the defendant clearly was notified of the RICO claim in the papers served “he clearly suffers no prejudice.” Id. The Chamrac court also emphasized that because it previously had approved the securities law claims, the plaintiff obviously did not “bootstrap” the securities claim to effect foreign service of the RICO claim. Id.

\textsuperscript{148} 4 C. WRIGHT & A. MILLER, supra note 96, § 1063 (noting that “all four requirements [subject matter jurisdiction, venue, jurisdiction over the person, and service of process] must be satisfied in every case”). Note that a court without proper venue over the case may proceed, however, if the defendant does not make a proper and timely objection. 28 U.S.C. § 1406(b) (1982)
RICO contains a special venue provision that supplements the general federal venue statute, section 1391 of title 28. Because the general venue statute provides that "[a]n alien may be sued in any district," however, courts may establish proper venue over foreign defendants without resort to RICO's "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."); see, e.g., Hoiness v. United States, 335 U.S. 297, 301-02 (1948).

A motion to dismiss for improper venue usually results in transfer of the case to another district rather than in dismissal. See 28 U.S.C. § 1406(a) (1982) (providing for dismissal or "if it be in the interest of justice, transfer . . . to any district or division in which [the case] could have been brought"); see, e.g., Sinclair v. Kleindienst, 711 F.2d 291, 294 (D.C. Cir. 1983) (reversing district court's dismissal because transfer would not prejudice defendant's position on merits and dismissal would result in barring of action under statute of limitations).

In distinguishing venue from subject matter jurisdiction, Justice Frankfurter stated:

The jurisdiction of the federal courts . . . is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.

Nelbo Co v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939); see also Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1313 (9th Cir. 1985) ("[J]urisdiction is the power to adjudicate, while venue, which relates to the place where judicial authority may be exercised, is intended for the convenience of the litigants." (quoting Still v. Rossville Crushed Stone Co., 370 F.2d 324, 325 (6th Cir. 1966) (per curiam), cert denied, 387 U.S. 918 (1967))) (emphasis in original).

150. 18 U.S.C. § 1965(a) (1982) states: "Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."


C. JURISDICTION TO ENFORCE

While prescriptive jurisdiction focuses on the offense alleged by a plaintiff and adjudicative jurisdiction focuses on the parties involved, enforcement jurisdiction is a court's power to execute its orders and judgments, and is necessary to conclude a RICO case meaningfully.

154. The Supreme Court noted that "Section 1391(d) is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special." Brunette Mach., 406 U.S. at 714. The statutory language has been interpreted literally and an alien now can be sued in any district. See, e.g., Oil & Gas Ventures—First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749-50 (S.D.N.Y. 1966) (rejecting former "district of service of process" limitation on § 1391(d)); see also General Elec. Co. v. Bucyrus-Erie Co., 550 F. Supp. 1037, 1039 (S.D.N.Y. 1982) (holding venue under § 1391(d) applies in antitrust action); RCA Records v. Hanks, 549 F. Supp. 879, 892 (D.D.C. 1982) (holding alien defendants who were not agencies or instrumentalities of foreign nation can be sued in any district); Transatlantic Cement, Inc. v. Lambert Freres et Cie, 448 F. Supp. 816, 819 (S.D.N.Y. 1978) (holding alien defendants can be sued in any district for breach of contract and tortious interference with contractual relations). Therefore, in a case involving both foreign and domestic defendants, suit is proper in any district in which the domestic defendants may be sued. See, e.g., Japan Gas Lighter Assoc. v. Ronson Corp., 257 F. Supp. 219, 225 (D.N.J. 1966); Maryland ex rel. Mitchell v. Capital Airlines, 199 F. Supp. 335, 337 (S.D.N.Y. 1961).

155. For example, enforcement jurisdiction is needed to obtain discovery. Under United States law, a court may order a party within its jurisdiction to produce all relevant documents owned or controlled, wherever located. Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir.), cert. denied, 463 U.S. 1215 (1983); United States v. First Nat'l City Bank, 396 F.2d 897, 900-01 (2d Cir. 1968); Federal Maritime Comm'n v. DeSmedt, 366 F.2d 464, 468-69 (2d Cir.) (dicta), cert. denied, 385 U.S. 974 (1966).

156. Once a court issues a judgment against a foreign defendant, the judgment may be impossible to execute unless the court has enforcement jurisdiction. See 4A C. WRIGHT & A. MILLER, supra note 95, § 1133 (noting difficulty of enforcing judgment in foreign countries).

Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), illustrates the problems that can arise without enforcement jurisdiction. Laker Airways brought an antitrust suit against its competitor in a United States district court, charging predatory price fixing. Id. at 915, 917. In response, several defendants filed for antisuit injunctions in a British court to prevent Laker from continuing its treble damage suit against them. Id. at 918. During the antisuit proceedings, the British Secretary of State for Trade and Industry directed the Laker defendants not to comply with any discovery orders or judgment issued by the United States court. Id. at 920. The British Court of Appeals affirmed the Secretary's order and, in reversing a lower court denial, enjoined Laker from continuing its antitrust suit. British Airways Bd. v. Laker Airways, [1984] Q.B. 142, 202-03 (C.A. 1983), rev'd, [1985] App. Cas. 58 (1984). Meanwhile, Laker filed in the United States court for an
Prescriptive and adjudicative jurisdiction are prerequisites to enforcement jurisdiction.157 In addition, any enforcement measures must be both related to the laws or regulations at issue and proportional to the seriousness of the violations involved.158 Finally, enforcement jurisdiction may not violate

injunction to stop the British antisuit, which the district court granted and the D.C. Circuit Court of Appeals affirmed. Laker Airways, 731 F.2d at 915-16. Had the case ended at this point, enforcement jurisdiction would have been critical, for without it, Laker could not obtain relief in a United States court. In the latest episode of this case, however, the House of Lords vacated the British court’s injunction against Laker’s United States suit. British Airways Bd. v. Laker Airways, [1985] App. Cas. 58, 96 (1984). Because British law contains no cause of action encompassing Laker’s complaint, the House of Lords reasoned, the merits of the case must be decided in a United States court. Id. at 79-80 (opinion of Lord Diplock). To escape suit, the defendants therefore would have to show that they were entitled under English laws not to be sued in the United States action. See id. at 80; see also Aldisert, supra note 78, at 416-18 (discussing Laker Airways case).

157. See, e.g., Arret Fornage, 84 Journal du Palais 229 (Cass. crim. Fr. 1873), reprinted in J. SWEENEY, C. OLIVER & N. LEECH, supra note 73, at 123 ("[T]his jurisdiction, however broad it may be, cannot extend to crimes committed outside the territory by aliens who, in respect to those acts are not punishable in French courts."). But cf. Pennoyer v. Neff, 95 U.S. 714, 723 (1877) (stating in dicta that court with subject matter and personal jurisdiction may compel transfer of property located outside court’s territorial reach). The Restatement provides:

(1) A state may employ judicial or nonjudicial measure to induce or compel compliance or punish noncompliance with its laws or regulations, provided those laws or regulations are based on jurisdiction to prescribe . . . .

(2) Enforcement measures may be employed against persons located outside the territory of the enforcing state only if:

. . .

(c) when enforcement is through the courts, if the state has jurisdiction to adjudicate.

RESTATEMENT, supra note 73, § 431(1), (2)(c).

In one sense, however, a court need not have either prescriptive or adjudicative jurisdiction to exercise enforcement jurisdiction. A court lacking these aspects of jurisdiction may enforce a valid judgment entered by another court that did have jurisdiction to prescribe and adjudicate.

158. See RESTATEMENT, supra note 73, § 431(3) ("Enforcement measures must be reasonably related to the laws or regulations to which they are directed, and punishment for noncompliance must be proportional to the gravity of the violation."). The comments to § 431 emphasize that this provision embodies a requirement of reasonableness. Id. comments d, f. Professor F.A. Mann characterized “reasonableness” as the master principle of jurisdiction in international law. Meessen, International Law Limitations on State Jurisdiction, in EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 41 (C. Olmstead ed. 1984). However, reasonableness defies easy definition. In the conflict of laws context, reasonableness encompasses public policy and constitutional standards. Id. In the international setting, nations rarely agree on a common standard of public policy, and constitutional standards differ. Id.
another nation's sovereignty.\textsuperscript{159}

Because no extraterritorial RICO case has yet resulted in judgment against a foreign defendant,\textsuperscript{160} enforcement issues have not yet arisen in this context. Extraterritorial enforcement under other federal laws, however, provides insight into the potential difficulties of RICO enforcement.\textsuperscript{161} This experi-

Professor Meessen therefore suggests that extraterritorial jurisdiction should be legal under international law so long as it is "not unreasonable." \textit{Id.}

The \textit{Restatement} gives examples of enforcement measures not in proportion to the violation. Thus, lying on an application for a visa reasonably may result in denial of the visa or deportation, but would not justify seizure of assets; failure to disclose material information on a stock prospectus reasonably may result in delisting of the stock or enjoining its sale, but would not justify seizure of assets or denial of export privileges. \textit{Restatement, supra note 73, § 431 comment f.} Proportionality raises concerns about RICO's treble damages provision, 18 U.S.C. § 1964(c), which has provoked considerable criticism and unsuccessful attempts at reform. See supra note 64; see also Goldsmith, \textit{supra} note 64, at 837, 871-72, appendix (proposing reform of § 1964(a)). Much of this criticism, however, ignores the seriousness of organized criminality. \textit{See id. at 833 & n.31.} Furthermore, the Supreme Court recently recognized that although RICO treble damages deter criminal activity, their primary purpose is to compensate the victim. \textit{See Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332, 2345 (1987).} Finally, few RICO plaintiffs would undertake the expense and uncertainties of extraterritorial litigation if the damages did not exceed the costs. \textit{See J. Atwood & K. Brewster, supra note 5, § 16.09 (discussing importance of and need for private attorneys-general inherent in antitrust multiple damages provision).} The State Department summed up the value of treble damages in the antitrust context:

The private treble damage action is a crucial aspect of U.S. antitrust enforcement. It was adopted as a complement to governmental enforcement tools, in recognition of the limited resources available to governmental agencies to investigate and take action against all violations of the law. It acts as a deterrent to illegal activity in the same manner as governmental enforcement, and provides an incentive to the victims to act as "private attorneys-general."

Note No. 56 of the United States Embassy, London (Nov. 9, 1979), \textit{quoted in J. Atwood & K. Brewster, supra note 5, § 1418.}

\textsuperscript{159} See, e.g., \textit{Service of Summons in Criminal Proceedings Case}, 38 I.L.R. 133 (Aus. Sup. Ct. 1969) ("[A] summons in criminal proceedings can be served abroad only in accordance with the procedure laid down in treaties between Austria and the foreign country concerned."); \textit{Restatement, supra note 73, § 432(2) (providing for enforcement in another state only after authorized officials give consent)}; \textit{I. Brownlie, supra note 76, at 306-07 ([A] state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter.").
ence demonstrates that enforcement jurisdiction is most problematic when it threatens another nation's sovereignty. Nations perceiving United States extraterritorial jurisdiction as a threat have taken measures to defeat enforcement of judgment and discovery orders. Such measures usually are accomplished through statutes that block enforcement of foreign laws, regulations, or court orders. At least sixteen nations, including the United Kingdom and Australia, have enacted legislation of foreign patent and trademark rights, see United States v. Imperial Chem. Indus., 105 F. Supp. 215, 222 (S.D.N.Y. 1952); orders requiring reasonable efforts to promote sale and distribution of products in foreign countries, see United States v. Holphane Co., 119 F. Supp. 114, 119 (S.D. Ohio 1954), aff'd, 352 U.S. 903 (1956); and orders instructing foreign defendants to amend an agreement made in a foreign country, see United States v. Watchmakers of Switz. Information Centre, Civil No. 96-170 (S.D.N.Y. Jan. 1, 1965) (LEXIS, Genfed library, Dist file). See generally Griffin, supra note 13, at 25 (enumerating types of orders issued by United States courts to redress violations of domestic law).

162. The Canadian ambassador to the United States characterized extraterritorial enforcement as "intrusions into another's domestic affairs and as a challenge going to the heart of its notion of sovereignty." Gotlieb, supra note 12, at 452. In connection with In re Uranium Antitrust Litig., 617 F.2d 1248 (7th Cir. 1980), the United States Department of Justice sent letters rogatory to British courts, not only to aid discovery in the civil case, but also for purposes of a criminal investigation. The British House of Lords, in deciding that the letters rogatory should not be enforced, explained that "the sovereignty of this country had been prejudiced" by the reach of United States law. In re Westinghouse Uranium Contract, [1978] App. Cas. 547, 630 (1977) (opinion of Viscount Dithorne); see also Schellenberg, The Proceedings Against Two French Customs Officials in Switzerland for Prohibited Acts in Favor of a Foreign State, Economic Intelligence Service and Violation of the Banking Law, 9 INT'L BUS. LAW. 139, 139-40 (1981) (discussing Swiss convictions of two French Customs officials). Schellenberg notes that the two French officials had entered Swiss territory and interrogated a former Swiss bank official about French citizens hiding taxable funds in Swiss banks. Id. at 139. The officials were charged with and convicted of violating Swiss banking and economic intelligence laws. Id.

163. Examples of legislation designed to defeat enforcement include: Act No. 254 of 8 June 1967, Limitation of Danish Shipowners' Freedom to Give Information to Authorities of Foreign Countries (Den.); Law Prohibiting a Shipowner in Certain Cases to Produce Documents, 4 Jan. 1968 (Finland); Shipping Documents Act of 1980 (Italy); and Evidence Amendment Act of 1989 (N.Z.). The texts of these laws are reprinted in A. Lowe, supra note 24, at 114-15, 120-21, 124-27. In addition to legislative action, foreign nations fighting extraterritorial enforcement may resort to diplomatic protests, threats of economic or political retaliation, judicial noncooperation, and retaliatory action. See generally Comment, supra note 15, at 503-12 (discussing foreign response to extraterritorial application of United States law).

164. See generally J. Atwood & K. Brewster, supra note 5, § 4.17-18 (discussing foreign legislation to block United States laws); W. Fugate, supra note 6, §§ 2.16, 3.11 (same); Cira, supra note 28, at 248-60 (same).
islation of this type.\footnote{165} Of special concern are the so-called “claw-back” provisions found in some blocking statutes, which authorize recovery of some or all multiple damages enforced in judgments in a foreign nation.\footnote{166} The British statute,\footnote{167} for example, precludes enforcement of certain multiple damages judgments in Great Britain\footnote{168} and permits recoupment of the “punitive”\footnote{169} portion of an enforced judgment through countersuit.\footnote{170} The Canadian


\footnote{166} Nations enacting clawback provisions claim that such measures are merely defensive tactics to protect national sovereignty from intrusions by United States private damages suits. See Jioelson, supra note 35, at 1126; see generally Cira, supra note 28, (discussing events giving rise to blocking and claw-back statutes).

\footnote{167} Protection of Trading Interests Act, 1980, ch. 11. Aware of British intent to pass the statute, the United States urged that it not be enacted. The United States argued that it would “encourage a confrontational rather than cooperative approach to resolving issues in which both our countries are interested.” Note No. 55 of the U.S. Embassy, London (Nov. 9, 1979), quoted in J. Atwood & K. Brewster, supra note 5, § 4.18. The British responded that cooperation “so far had only limited success.” Note No. 225 of the U.K. Embassy, Washington, D.C. (Nov. 27, 1979), quoted in J. Atwood & K. Brewster, supra note 5, § 4.18.

\footnote{168} The Protection of Trading Interests Act § 5 states in part: “5.—(1) A [multiple damages] judgment to which this section applies shall not be registered ... and no court in the United Kingdom shall entertain proceedings at common law for the recovery of any sum payable under such a judgment.” Protection of Trading Interests Act, 1980, ch. 11, § 5.

\footnote{169} See Amicus Curiae Brief of Gov’t of U.K. of Gr. Brit. & N. Ir., at 8 n.11, In re Uranium Antitrust Litig., 617 F.2d 1248 (2d Cir. 1980), cited in Jioelson, supra note 35, at 1122 (noting multiple damages are considered penal in United Kingdom); Comment, supra note 15, at 508 n.113 (noting that in British view multiple damages are awardable only in proceedings protected by criminal trial guarantees). But cf. Shearson/American Express Inc. v. McMahon, 107 S. Ct 2332, 2345 (1987) (stating United States view that RICO and antitrust treble damages are primarily compensatory).

\footnote{170} See Protection of Trading Interests Act, 1980, ch.11, § 6. The Act states in part:

6.—(1) This section applies where a court of an overseas country has given a judgment for multiple damages ... against— (a) a citizen of the United Kingdom and Colonies; or (b) a body corporate incorporated in the United Kingdom or a terri-
claw-back provision reaches even further by allowing for complete recovery of multiple damages judgments in antitrust suits. Such foreign blocking measures may pose severe enforcement problems for treble damages judgments under RICO.

Blocking statutes also may thwart discovery in extraterritorial RICO cases. The French blocking statute, for example, makes it illegal for a foreign person even to request discovery from a French company. Because discovery is critical to...
most commercial litigation, such statutes have generated considerable controversy and may defeat an extraterritorial action before the court renders a judgment.\textsuperscript{774}

Some enforcement problems can be solved through domestic judicial action. A court with jurisdiction over defiant foreign defendants may impose any sanction listed in rule 37 of the Federal Rules of Civil Procedure,\textsuperscript{775} including assessing reasonable expenses, issuing a contempt order, striking pleadings and defenses, and entering a default judgment.\textsuperscript{776}

The effectiveness of such sanctions, however, remains limited. In particular, judicial sanctions cannot compete with foreign laws forbidding defendants from submitting to United States discovery.\textsuperscript{777} Moreover, because a foreign defendant already faces treble damages under RICO, an order to pay costs is

\begin{quote}
by a fine of at least 10,000 and not more than 120,000 francs or by either such imprisonment or such fine.
\end{quote}

\textit{Id.} § 3. Foreign persons seeking discovery information in France must use the government of France as an intermediary rather than approaching private individuals directly. Note from the French Embassy to the U.S. Dep't of State Regarding the FTC Investigation of Compagnie de Saint-Gobain-Pont-A-Mouson, reprinted in in FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980).

\textsuperscript{774} See Restatement, supra note 73, § 437 reporter's note 1 ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents . . ."); see also 1 W. Fugate, supra note 6, § 3.11 (noting extraterritorial discovery has generated considerable friction); Davidow, supra note 21, at 509 (noting extraterritorial discovery has caused "many jurisdictional and diplomatic difficulties"); Griffin, supra note 13, at 24 (noting extraterritorial discovery has resulted in more protests than "effects" doctrine).

\textsuperscript{775} Fed. R. Civ. P. 37 governs the sanctions a United States court may impose for a party's failure to make or cooperate in discovery.


unlikely to induce compliance with discovery orders.\textsuperscript{178} Default judgments also have limited utility, because a court may not impose such a judgment absent "willfulness, bad faith, or any fault."\textsuperscript{179} Furthermore, once a court enters a default judgment, the enforcement problem remains.\textsuperscript{180} Resolving this issue may require administrative and executive action.\textsuperscript{181}

\textsuperscript{178} In \textit{Marc Rich \\& Co.}, some documents unearthed during a government investigation of the company allegedly proved the existence of a $100 million tax fraud scheme. \textit{Marc Rich \\& Co.}, 707 F.2d at 665. When the defendant repeatedly refused to produce additional documents, the district court ordered the defendant to pay $50,000 per day until production, limited to 18 months. \textit{In re Marc Rich \\& Co.}, 739 F.2d 834, 835 (2d Cir. 1984); \textit{see also In re Grand Jury Subpoena Duces Tecum}, 731 F.2d 1032, 1035 n.1 (2d Cir. 1984) (noting company had paid $7,950,000 in fines rather than comply with courts' orders).

\textsuperscript{179} Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958); \textit{see also} Wilson v. Volkswagen of Am., Inc., 551 F. 2d 494, 503 (4th Cir.) (holding sanction for default should be imposed only in rare cases involving flagrant bad faith and callous disregard of parties' obligations), cert. denied, 434 U.S. 1020 (1977); Independent Pros. Corp. v. Loew's Inc., 283 F.2d 730, 733 (2d Cir. 1960) ("The dismissal of an action with prejudice or the entry of a judgment by default are drastic remedies, and should be applied only in extreme circumstances."); \textit{cf. In re Oil Spill by Amoco Cadiz}, 93 F.R.D. 840, 842-43 (N.D. Ill. 1982) (holding dismissal unwarranted because French law prohibited disclosure of information so that refusal to provide documents was not willful or in bad faith).

\textsuperscript{180} Enforcing a judgment against a foreign defendant often will require either its recognition by the nation holding the defendant's assets or the presence of assets in the United States. \textit{See} 4A C. WRIGHT \\& A. MILLER, supra note 96, § 1133. Enforcing a RICO judgment therefore may prove to be impossible in countries with statutes blocking multiple damages awards. \textit{Cf. supra} notes 166-71 and accompanying text (discussing blocking statutes). Moreover, under the claw-back provisions, even if the foreign defendant has holdings in the United States, it may be able to recoup the value of any assets executed upon domestically. \textit{Id.}

\textsuperscript{181} Unlike judicial measures, administrative and executive actions do not require adjudicative jurisdiction. \textit{See} \textit{RESTATEMENT}, supra note 73, ch. 3 introductory note. Thus, even without personal jurisdiction or service of process, the United States government may take any of the following measures against RICO violaters: 1) deny or terminate export or import rights; 2) remove the defendant from a list of those eligible to bid on government contracts; 3) deny or terminate a permit or license to engage in a particular business activity; and 4) freeze the defendant's United States assets. \textit{Id.} § 431 comment c.


Administrative and executive actions, however, also have certain disad-
Ultimately, jurisdiction to enforce may prove the most serious barrier to extraterritorial RICO suits. Legislative reform, however, at least partially could resolve this issue and other procedural obstacles to extraterritorial RICO jurisdiction.

III. EXTRATERRITORIAL RICO REFORM

RICO reform has maintained a place on the congressional agenda since the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.* That opinion suggested that remedial legislation would better solve problems associated with RICO than would judicial attempts to rewrite the statute. Reform efforts have focused primarily on substantive changes, but two bills have addressed extraterritorial procedural concerns. The Senate and the House both have considered proposals to extend RICO's summons and subpoena provisions to reach parties and witnesses outside the United States. This change, although helpful, does not address fully the problems of extraterritorial RICO litigation. Sponsors of both bills cite the need for RICO to reach foreign defendants, but neither bill considers other advantages. For example, the government may choose not to become involved in private litigation. In one case, the court requested the United States government to submit its views on the issues, but the government refused. *International Ass'n of Machinists v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 557-58, 560 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). In addition, administrative and executive measures often involve much more than the issues in a particular case. Once the government does enter into an enforcement action against a foreign defendant, foreign policy concerns probably will take precedence over the plaintiff's interests.


183. *Id.* at 499-500 (noting RICO's breadth is "inherent in the statute as written, and its correction must lie with Congress"). The Court stated: "It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications . . . ." *Id.*


(1) striking out "residing in any other district;" (subsection (b));
(2) striking out "in any judicial district of the United States by the marshal thereof." and inserting "anywhere the party may be found." (subsection (b));
(3) striking out "in any other judicial district" and inserting "anywhere the witness is found" (subsection (c));
(4) striking out "in another district" (subsection (c)); and
(5) striking out "in any judicial district in which" and inserting "where" (subsection (d)).

185. The report accompanying S. 1523 states that the proposed change "broadens the scope of RICO by providing for international service of process
changes that would help to reach foreign defendants located abroad.

For example, extraterritorial litigation depends on three types of jurisdiction, each of which poses potential obstacles to litigation. Although legislation cannot address many of these barriers, amendments to RICO can correct some problems associated with each type of jurisdiction. Providing express legislative recognition of the effects doctrine may facilitate prescriptive jurisdiction. Adopting a broader service of process provision can reduce problems of adjudicative jurisdiction. Finally, limiting the treble damages provision can reduce the controversy accompanying enforcement jurisdiction.

Addressing these needs and drawing on the application of other United States statutes extended abroad, extraterritorial RICO reform should authorize: 1) prescriptive jurisdiction in extraterritorial cases based on effects; 2) foreign service of process; 3) designation of domestic agents for service of process; and 4) reduction of treble damages at a plaintiff's request to facilitate enforcement jurisdiction. Such reform would rectify the most pressing difficulties associated with extraterritorial litigation. The proposed amendments and accompanying commentary are set forth below.

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for both parties and witnesses" and that the revision's purpose is "to increase the effectiveness of RICO against international terrorism." S. REP. No. 459, 100th Cong., 2d Sess. 21 (1988). The section-by-section analysis of H.R. 2983 also declares that the proposed amendment extends "RICO's service of process provision for summons and subopena [sic] to parties and witnesses who are outside the United States." Id. at 22 (statement of Rep. Conyers). The revision intends to "remedy the defect identified in [RICO extraterritorial cases dismissed for lack of foreign service of process]."

186. See supra Part II.

187. For example, legislation cannot dispense with many of the problems and limitations inherent in enforcement jurisdiction. Because enforcing court orders and judgments abroad depends to a certain degree upon the cooperation of foreign governments, United States legislative solutions are limited. In addition, some adjudicative jurisdiction requirements, such as due process and minimum contacts, are constitutionally constrained and cannot be removed legislatively.

188. See infra Part III(A); cf. supra notes 89-93 and accompanying text (describing effects doctrine).

189. See infra Part III(B)-(C); cf. supra notes 118-44 and accompanying text (discussing service of process).

190. See infra Part III(D); cf. supra notes 163-68 and accompanying text (discussing foreign statutes designed to thwart multiple damages awards).

191. See supra note 39 (discussing extraterritorial application of other United States laws).
A. Authorizing RICO Application Based Upon Effects

The Congressional Statement of Findings and Purpose for chapter 96 of title 18, United States Code, last paragraph should be amended to read as follows:

It is the purpose of this Act [see Short Title note above] to seek the eradication of organized crime in the United States, and the effect of foreign organized crime in the United States, by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Section 1962 should be amended by adding subsection (e), which reads as follows: This chapter applies to prohibited conduct that occurs to a substantial extent within the United States. This chapter also applies to prohibited conduct that occurs outside the United States but causes a substantial domestic effect as a direct and reasonably foreseeable result of the conduct.

COMMENTARY

Lacking clear statutory guidance, courts faced with extraterritorial RICO suits have relied on principles derived from international law to establish prescriptive jurisdiction. This amendment makes clear that RICO does embrace conduct occurring outside the United States and uses the territorial principle and the effects doctrine as bases for jurisdiction, recognizing their successful application and acceptance under other federal laws.

B. Authorizing Foreign Service of Process

Section 1965 of title 18, United States Code, should be amended to read, in part, as follows:


193. For example, cases grounded on the territorial principle and the effects doctrine have been brought under the federal securities laws, see supra note 93; antitrust laws, see supra note 90; and mail and wire fraud statutes, see supra note 93. In addition, the territorial principle and effects doctrine garner support from the Restatement. Restatement, supra note 73, § 402.
(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served wherever the party may be found.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas [sic] issued by such court to compel the attendance of witnesses may be served wherever the witness is found, except that in any civil action or proceeding no such subpena [sic] shall be issued for service upon any individual who resides at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person wherever such person resides, is found, has an agent or transacts his affairs.

COMMENTARY

This amendment provides for foreign service of process, without which the prescriptive jurisdiction established by the foregoing amendment cannot be maintained.\textsuperscript{194} Thus, for example, although only a handful of extraterritorial RICO cases have been brought, several have been dismissed for failure to serve foreign defendants.\textsuperscript{195} The proposed amendment mirrors the language of H.R. 2983 and S. 1523,\textsuperscript{196} and is derived from the service of process provisions of federal securities\textsuperscript{197} and antitrust laws.\textsuperscript{198} Although these statutes only implicitly authorize foreign service of process, courts unanimously have upheld

\textsuperscript{194} See supra note 118 and accompanying text.


\textsuperscript{196} See supra note 184.

\textsuperscript{197} See Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa (West. Supp. 1988) (emphasis added) ("Any suit or action to enforce any liability or duty created by this chapter . . . may be brought in any such district . . . and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."); see also H.R. 2983, 100 CONG. REC. E3359 (Daily ed. Aug. 7, 1987) (statement of Rep. Conyers) (stating that proposed RICO change authorizing foreign service of process "reflects current securities law").

\textsuperscript{198} Clayton Act § 12, 15 U.S.C. § 22 (1982) (providing that in "[a]ny suit, action, or proceeding under the antitrust laws against a corporation . . . all process . . . may be served in the district of which [the corporation] is an inhabitant, or wherever it may be found").
this application and the intent here is to continue this practice.

C. SPECIFYING AN AGENT FOR SERVICE OF PROCESS

Section 1965(d) of title 18, United States Code, is amended by inserting after the last sentence the following text: “When the defendant is not a resident of the United States but has a regular and established place of business therein, service of process, summons, or subpoena may be made on the defendant’s agent or agents conducting such business.”

COMMENTARY

Although service of process through an agent ordinarily may not be accomplished unless the principal has authorized the agent to accept such service, federal statutes may vest an existing agent with authority to accept service of process on the defendant. The proposed amendment therefore parallels the language of 28 U.S.C. § 1694 (1982), which permits service in patent infringement actions on agents of foreign defendants that maintain a place of business in the United States. The provision expressly confers on agents conducting a defendant’s business authority to accept service, whether or not the defendant already has given such authorization.

D. AUTHORIZING REDUCTION OF TREBLE DAMAGES ON THE PLAIN'r'T’S REQUEST

Section 1964(c) of title 18, United States Code, should be amended by inserting after the last sentence the following text: “Successful claimants under section 1964 may request a reduction of treble damages to facilitate extraterritorial enforcement.”


200. See supra notes 127-28 and accompanying text.


This amendment recognizes the value of treble damages, yet also acknowledges that a judgment unenforced does not benefit the plaintiff. The proposed amendment therefore allows successful claimants discretion to reduce the treble portion and thereby increase the likelihood of collecting judgment.

Conclusion

Chief Justice John Marshall once declared:

It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.203

Once domestic law deems an act unlawful, extraterritorial jurisdiction properly permits recourse against violators. Because RICO protects vital United States interests, judicial and legislative solutions must be found to overcome existing barriers to extraterritorial jurisdiction. This Article has proposed a variety of judicial and legislative mechanisms for addressing these barriers. If RICO is to continue to evolve, our jurisprudence should accommodate its extraterritorial application.