

**Foreign Governments' Misuse of
Federal RICO: The Case For Reform**

by

Ignacio Sanchez and Kevin O'Scannlain

DLA Piper Rudnick Gray Cary US LLP

WLF

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INTRODUCTION

Civil actions alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act¹ have always been a lightning-rod for criticism.² RICO defendants complain that the statute was intended for mobsters and their ilk, and defendants of federal government civil actions especially allege abuse of power and intimidation when they face the substantial penalties of this 1970 statute. But the clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by *foreign* governments. In the last few years, trial lawyers began soliciting foreign governments to seek the civil damages remedies of RICO against American companies in U.S. courts despite the lack

¹Pub.L. 91- 452, Title IX, 84 Stat. 941 *reprinted in* U.S.C.C.A.N. 1095 (current version at 18 U.S.C. §§ 1961-1968 (2005)).

²*See, e.g.,* Richard Morton, *The Stifling of Legitimate Businesses: The Growing Threat of the Pattern of Racketeering Element to Business in RICO Actions*, 2 DEPAUL BUS. L.J. 197, 226 (Fall 1989); Nicholas R. Mancini, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193, 213 (Fall 2002); and two recent cases illustrating the point: *Martinez v. Martinez*, 62 Fed.Appx. 309 (10th Cir. 2003) (wife claims husband violated civil RICO by concealing assets in divorce proceeding); and *Parents for the Defense of Pop Warner Fundamentals v. Pop Warner Little Scholars*, 5:03-CV-682 (N.D.N.Y. Sept. 21, 2004) (little league football parents sued under civil RICO for dispute over cheerleading uniforms).

of evidence that Congress ever intended to provide such standing to foreign governments. These cases reveal the biggest leap away from the original intent of RICO since its enactment. Furthermore, numerous federal judges have strongly urged Congress to clarify this issue, but their calls have gone unheeded thus far. Still further, the U.S. Department of Justice believes that our courts lack competence to decide these kinds of cases – which essentially deal with tax collection and alleged crimes in foreign countries – and that these lawsuits raise serious separation of powers concerns.

This WORKING PAPER discusses the need for reform to restore the original meaning of the RICO statute. The first section explores the nature of these lawsuits and why they are better adjudicated in the courts of the countries that bring them. The next two sections illuminate RICO's legislative history and demonstrate how U.S. courts have unilaterally expanded the meaning of this statute over the past twenty or so years. The fourth section examines one of the most troubling aspects of the judicial expansion of the statute: the separation of powers concerns that it raises. Finally, the paper examines one possible reform that could restore the original scope of the statute and prevent the adverse consequences of failing to take corrective action.

I. BACKGROUND OF FOREIGN GOVERNMENT CIVIL RICO LAWSUITS

While the RICO statute was enacted in 1970, lawsuits brought by foreign governments under RICO against American companies began in 1999 after the courts dramatically expanded the meaning of the statute over the years. While foreign governments could seek reparation in their own countries, they file these lawsuits in

the U.S. because of the extraordinary damages available under the RICO statute.

In reality, RICO suits simply seek to hold companies responsible for what happens after they sell their goods in international trade. Foreign governments typically allege in these lawsuits that a deep-pocketed business has “conspired” with smugglers or money launderers to deprive a foreign government of revenue. For example, Deep Pocket Company A, based in the United States, sells its products into a duty-free zone somewhere in the world. That product is then sold and re-sold several times and, at some point, is smuggled into Foreign Country B. Foreign Country B’s government, instead of pursuing what would likely be a futile prosecution of the actual criminals, instead files a civil claim against Company A under RICO for damages – usually claiming lost government revenues like taxes or tariffs. Despite the fact that the alleged wrongdoing and damages take place overseas, these cases are filed in U.S. courts.

These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyers convert the government’s evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and *replace* them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged “schemes.” The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

The foreign governments carefully tailor their complaints to meet the statutory requirements of a RICO lawsuit. This requires an allegation that the American

business engaged in “racketeering activity” along with the co-conspirators, and committed a number of predicate acts which form a “pattern” of racketeering activity. The complaint in these cases then lists multiple “injuries to the state,” its economy and law enforcement costs. Naturally, these cases always seek treble damages, costs, pre-judgment interest, and attorneys’ fees in addition to the actual damages. In addition to these alleged damages, these cases will invoke the court’s equitable powers under § 1964(a) to demand full RICO injunctive relief and a disgorgement of defendants’ profits under § 1964(c).

The first foreign government lawsuit against an American company came in 2000. Since then, the plaintiffs’ trial bar has enlisted over 30 foreign governments to bring the kind of civil RICO damage and equitable claims described above. These plaintiffs include: Canada³, the European Community (on behalf of Belgium, Finland, France, Germany, Italy, Luxembourg, Greece, Netherlands, Portugal and Spain)⁴, Colombia and over 15 Colombian “departamentos” (states)⁵, Ecuador, Belize and Honduras.⁶

Most of these cases have been dismissed on the basis of a long-standing common law doctrine called “the revenue rule.” This rule, as it has been applied thus far, prohibits a court from enforcing a foreign sovereign’s revenue laws. Because the measure of damages asserted in most of the foreign government RICO lawsuits has

³*Att’y Gen. of Canada v. R.J. Reynolds Tobacco Holdings Inc., et. al.*, 103 F. Supp. 2d 134, 139 (N.D.N.Y. 2000) *aff’d* 268 F.3d 103, 113 (2d Cir. 2001) *cert den.* 537 U.S. 1000 (2002).

⁴*European Community v. RJR Nabisco, Inc., et. al.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001) *aff’d* 355 F.3d 123 (2d Cir. 2004) *vacated and remanded* 125 S. Ct. 1968 (2005).

⁵ Recently filed and held in abeyance pending result in *European Community* remand.

⁶ *Honduras v. Phillip Morris*, 341 F.3d 1253 (11th Cir. 2003).

been based on the lost taxes or tariffs the foreign government failed to collect, the courts have applied the rule. The total amount sought in these cases is usually in the billions of dollars. The amount sought, however, is less relevant to the companies being sued than the amount of money it costs to defend these cases. The real cost at this point is not any adverse judgments, because there have not been any yet, but rather the time and financial resources it costs defendant companies to defend these suits.

However, with each dismissal, the trial lawyers scour the court's opinion for nuances that might enable them to retool future complaints or argue new theories on appeal so as not to trigger the revenue rule. In a case recently filed by the Colombian governments, the plaintiffs are attempting to re-characterize their claim for damages as "commercial" losses instead of tax revenues. The U.S. Department of Justice is wary of this attempt to thwart the purpose of the rule,⁷ but it is clear that unless the standing issue is clarified, the risk exists that the trial bar will eventually find a sympathetic court that will allow pleading to circumvent the revenue rule.

II. LEGISLATIVE HISTORY

RICO formed Title IX of the Organized Crime Control Act of 1970.⁸ It was originally drafted as a criminal statute "to seek the eradication of organized crime"

⁷See Brief of the U.S. as *Amicus Curiae* at 13, *Atty. Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc., et al.*, 103 F. Supp. 2d 134 (2002), warning of the dangers in allowing allegations of lost tax revenues to be re-pled around the revenue rule:

If foreign sovereigns could avoid the revenue rule by recharacterizing a foreign tax claim as a cause of action based on domestic law, such as common law fraud, or unjust enrichment, or breach of contract, or injury from a pattern of racketeering, the revenue rule would lose much of its force. Many, if not most, tax schemes to avoid the payment of taxes can be recharacterized in such terms.

⁸See *supra* note 1.

through criminal prohibitions.⁹ It also provided that civil injunctive relief could only be pursued by the United States.¹⁰ As such, the civil remedies in the bill passed by the Senate¹¹ were limited to injunctive actions by the United States.¹² These provisions ultimately became §§ 1964(a), (b), and (d). The RICO law does provide a private civil action to recover treble damages for injury “by reason of a violation of” its substantive provisions.¹³ Section 1964(c) contains the private civil action language:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.¹⁴

“Person” is in turn defined in Section 1961(3) to include “any individual or entity capable of holding a legal or beneficial interest in property.”

Although the legislation which became RICO bears a Senate bill number, the relevant history on the issue of standing to bring civil actions comes from the House of Representatives. Both the hearings and the floor action in the House reveal an understanding that the treble damages provision did not apply to governmental entities.

A. A “Private” Civil Remedy

During the hearings on S. 30 before the House Judiciary Committee,

⁹*Statement of Findings and Purpose*, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970), reprinted in 1970 U.S.C.C.A.N. 1073.

¹⁰*Id.*

¹¹S. 30, which became the RICO law.

¹²In fact, in prior versions of the legislation a provision for private treble-damages actions failed. See S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967).

¹³18 U.S.C. § 1964(c).

¹⁴*Id.*

Representative William Steiger of Wisconsin proposed, with the support of the American Bar Association, adding to the RICO bill “a *private* civil damage remedy ... similar to the private damage remedy found in the anti-trust laws.”¹⁵ The civil damages remedy to which he was referring did not provide a civil damages remedy for governmental entities – domestic or foreign.

Another indication that the applicability of the treble damages provision is exclusive to private parties comes from Virginia Representative Richard H. Poff in a statement when the committee was considering the Steiger amendment. He believed that subsection (c) of § 1964 was added to the Senate bill so “that *private* persons injured by reason of a violation of the title may recover treble damages in Federal courts.”¹⁶ Over the dissent of three members, who feared the treble damages provision would be used for malicious harassment of business competitors, the committee approved the amendment.¹⁷ The understanding of Representatives Steiger and Poff of the new treble damage provision was echoed in the House Judiciary Committee Report’s preliminary description of the main features of the Organized Crime Control Act of 1970: “The title, as amended, also authorizes civil treble damage suits on the part of *private* parties who are injured.”¹⁸

B. Extension to Government Suits Rejected

Several amendments related to the treble damages provision were considered

¹⁵*Organized Crime Control: Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (emphasis added).

¹⁶116 CONG. REC. 35,295 (1970) (statement of Rep. Poff) (emphasis added).

¹⁷H.R.REP. NO. 91-1549, at 58, 187 (1970) *reprinted in* 1970 U.S.C.C.A.N. 4007, 4010.

¹⁸H.R.REP. NO. 91-1549, at 57 *reprinted in* U.S.C.C.A.N. 4007, 4010 (emphasis added).

during the debate on S. 30 on the House floor. Representative Steiger offered an amendment that would have allowed private injunctive actions, among other revisions.¹⁹ More significantly, he also proposed an amendment to provide for damage actions by the government. Again, implicit in making such a proposal is the belief that the current language did not allow for such governmental actions.²⁰ The amendment was eventually withdrawn because it had not first been considered by the Judiciary Committee.²¹ The House also rejected a proposal to create a complementary treble damages remedy for those injured by being named as defendants in malicious private suits, again indicating that Members of Congress believed the treble damages provision to apply only to private parties.²²

These attempts to revise the bill language to allow governmental lawsuits for treble damages reflects the same understanding of the Supreme Court that there is in our laws a “longstanding interpretive presumption that ‘person’ does not include the sovereign.”²³

The Senate adopted the bill as amended in the House, without further deliberation on the treble damages provision.²⁴

¹⁹116 CONG. REC. at 35,226-35,227, 35,346.

²⁰*See id.* at 27,739 (suggesting that “title IX could be improved by amending that provision to allow private antitrust type remedies to deal with organized crime”) (statement of Rep. Steiger); *see also id.* at 35,227-28 (1970) (“Title IX fails to provide... compensatory damages to the United States when it is injured in its business or property...”) (statement of Rep. Steiger).

²¹*Id.* at 35,346-47.

²²*Id.* at 35,342-43.

²³*Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 782 (2000), citing *U.S. v. Cooper Corp.*, 312 U.S. 600 (1941) and *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947).

²⁴116 CONG. REC. at 36,296.

III. THE JUDICIAL EXPANSION OF STANDING UNDER RICO

Despite the apparent and clear intention of Congress, the federal government, then state governments, and eventually foreign governments all sought to bring actions for treble damages under RICO. In each incremental expansion along the way, courts have struggled with the standing issue for treble damages as applied to governmental entities. In the last expansion – to foreign governments – the courts have been most anxious in asking Congress for guidance on whether such entities are proper plaintiffs for treble damages actions. A review of the case law reveals that each expansion builds on the unstable foundation established, however reluctantly, in the previous expansion.

A. The Seed for Governmental Suits is Planted (*Illinois Department of Revenue*)

In 1985, the Illinois Department of Revenue filed suit in federal court for treble damages under RICO against a retailer who filed fraudulent state sales tax returns. The district court granted the retailer's motion to dismiss the RICO complaint and the state appealed.²⁵ The Seventh Circuit described the essence of the standing issue:

The question before us . . . *is one of first impression*: under RICO may a state governmental unit use federal courts and take advantage of attractive federal remedies to enforce state laws? In other words, where the language of the statute and its legislative history do not seem to forbid it, can a state governmental unit be a proper plaintiff under civil RICO, particularly to collect state taxes?²⁶

The court cited the fact that the civil damages provision of RICO was modeled after Section 4 of the Clayton Act and that states had long been able to sue as a person

²⁵ *Ill. Dep't of Revenue v. Phillips*, 771 F.2d 312 (7th Cir. 1985).

²⁶ *Id.* at 314 (emphasis added).

under the Clayton Act for antitrust treble damages either in their proprietary capacity or as *parens patriae*, but had been held unauthorized to sue under the Clayton Act for damages for an injury to its general economy allegedly attributable to a violation of the antitrust laws. However, the court found that the antitrust analogies were “insufficiently determinative to settle the question before us.”²⁷

The court then cited numerous cases – every one of which has only a *non-governmental* plaintiff – for the proposition that RICO must be given broad effect:

This circuit has been in the forefront of RICO interpretation since the statute’s inception. We have insisted from our earliest cases that RICO be given the broad effect its plain language suggests. In *Schacht* we wrote:

We agree that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered this issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of the statute. *Schacht*, 711 F.2d at 1353 (citations omitted). See also *Sutliff*, 727 F.2d at 654.

In *Haroco*, a case involving the improper calculation of interest by a commercial bank, we added:

Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or inartfully drafted. RICO may be very broad, but there was nothing careless about its drafting. When Congress deliberately chooses to unleash such a broad statute on the nation, in the absence of constitutional prohibitions, complaints must be directed to

²⁷*Id.* at 315.

Congress rather than to the courts.²⁸

The appeals court thus reversed the trial court's dismissal of the claim because "[a]lthough we have doubts about the application of RICO to the facts of this case, we cannot say that it does not come within the framework of the statute."²⁹ The court then raised a "distress flag" to Congress:

We can only hope that this decision appears to Congress as the distress flag that it is, and that Congress will act to limit, as only it is empowered to, the statute's application to cases such as the one before us now.³⁰

Notwithstanding the distress flag, Congress failed to act. As a result, the *Illinois Department of Revenue* case and its self-described tortured conclusion serves as the seminal case for the proposition that state governments are proper plaintiffs when seeking to assert a civil RICO damage claim.

B. Roots Begin to Form (*Philippines*)

The first foreign government RICO claim followed suit shortly on the heels of the dubious precedent of *Illinois Department of Revenue*. The Republic of the Philippines brought a civil suit against its former president, Ferdinand Marcos, and his wife Imelda, in 1986 asserting civil claims under RICO. In spite of a motion to dismiss that raised, *inter alia*, a foreign government's lack of standing to bring the claims, the district court entered a preliminary injunction enjoining the Marcoses from disposing of any of their assets save for the payment of attorneys' fees and normal living expenses.

²⁸*Id.* at 316-317.

²⁹*Id.* at 317.

³⁰*Id.*

District Judge Pfaelzer qualified her opinion upfront by stating, “I don't think any lawsuits are like this one.”³¹ She added, “As far as I know, this is the only time this has been attempted.”³² In her oral order granting the preliminary injunction, she noted that “[RICO] is probably broad enough to include almost anything and we finally pushed it to its outer limit here”³³

The Marcoses appealed. While a three-judge panel of the Ninth Circuit reversed the decision,³⁴ a larger *en banc* panel affirmed the district court.³⁵ In so doing, the entirety of the court’s rationale on whether a foreign government is a proper plaintiff to bring a treble damages action is reduced to the following paragraph:

Contrary to the contention of the Marcoses, the Republic as a governmental body is a person within the meaning of 18 U.S.C. § 1961(3). *Illinois Dept. of Revenue v. Phillips*, 771 F.2d 312 (7th Cir.1985). The foreign nature of the Republic does not deprive it of statutory personhood. *Cf. Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). Accordingly the Republic has standing to assert the RICO claims.³⁶

The court completely ignores the legislative history of the civil RICO provisions and the “distress flag” raised by the *Illinois Department. of Revenue* court. It also fails to offer any justification for extending the reluctant holding of *Illinois Department of Revenue* to foreign governments. In short, the *Philippines* court glossed over a very uncertain and controversial area of the law.

³¹Brief of Defendants-Appellants at 8, n.5, *Phil. v. Marcos*, 862 F.2d 1355 (9th Cir. Aug. 5, 1986).

³²*Id.*

³³*Id.*

³⁴*Phil. v. Marcos*, 818 F.2d 1473 (9th Cir. 1987).

³⁵*Phil. v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc).

³⁶*Id.* at 1358.

C. *Bonanno* Court Temporarily Stalls the Growth

A few years later, in *U.S. v. Bonanno*,³⁷ a court undertook the most extensive analysis on this issue yet and concluded that the U.S. government was *not* entitled to recover treble damages under 18 U.S.C. § 1964(c). The court reasoned that under RICO a “person” can sue or be sued because the statutory definition of “person” does not distinguish between a potential plaintiff or defendant. Because the U.S. government, as sovereign, is immune from suit unless it expressly consents, the court reasoned that it should not read RICO to waive the U.S. government’s immunity. The legislation showed no specific intent to waive the U.S. government’s immunity. That intent being absent, the court concluded that the U.S. government was not a “person” under RICO.

This case began in 1987, when the United States filed a civil suit against “the Bonanno Organized Crime Family of La Cosa Nostra.” An amended complaint contained fourteen separately denominated claims for relief, thirteen of which were predicated on violations of RICO. The government sought extensive injunctive relief pursuant to § 1964(a) and an award of treble damages pursuant to § 1964(c). On motions to dismiss, the trial judge ruled that the federal government lacked standing to sue under 18 U.S.C. § 1964(c) and the district court dismissed all claims against the Bonanno Organized Crime Family and all monetary damage claims based on RICO.³⁸

³⁷879 F.2d 20 (2d Cir. 1989).

³⁸*Id.* at 21.

1. *Legislative History and Rules of Statutory Construction Point to a Lack of Standing*

On appeal, the Second Circuit affirmed the dismissal.³⁹ The court based its decision on a finding that the legislative history of RICO did not reveal an intent by Congress to grant such a cause of action to the federal government. The court rejected the United States' argument that the plain and obvious meaning of the relevant statutory text supported inclusion of the United States as a "person" because it is capable of holding a legal or beneficial interest in property. The court reasoned the ability to bring suit for treble damages depends on whether a "person" may be sued:

Under RICO, 'a "person" can sue or be sued, and the statute does not distinguish between the definition of a potential plaintiff and defendant.' Brief for the Appellant at 17. The disadvantage of being a 'person' within the meaning of RICO is that it subjects qualifying entities to the powerful and expansive criminal and civil liability provisions of the Act. Whether the government has standing to sue and whether it has waived its sovereign immunity may, in the abstract, be different questions, but in this case the answer to one is apparently the answer to both. *See Firestone v. Howerton*, 671 F.2d 317, 320 n. 6 (9th Cir.1982) (when same terms are used in different sections of statute, they receive the same meaning); *2A Sutherland Statutory Construction*, § 47.07, at 133 (4th ed. 1984) ('Legislative declaration of the meaning that a term shall have ... is binding, so long as the prescribed meaning is not so discordant to common usage as to generate confusion.').⁴⁰

The court then cited a previous case on the requirement for express waivers of sovereign immunity:

It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.' *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769-770, 85 L.Ed. 1058 (1941). A waiver of sovereign immunity 'cannot be implied

³⁹*Id.*

⁴⁰*Bonanno*, 879 F.2d at 22-23.

but must be unequivocally expressed.’ [citation omitted].⁴¹

“[O]ur analysis,” the court continued, “must be informed by the following question: Do the relevant sources of congressional intent on the meaning of Section 1964(c), separately or collectively, evince an unequivocal expression of congressional intent to expose the government to RICO liability?”⁴²

To answer the question, the court turned to maxims of statutory construction and found that the “general language” used in the statute points to an exclusion of governmental entities from the treble damages provision:

That the United States is capable of owning property and is, perhaps, an ‘entity’ is no better than ambiguous evidence on this issue since

[s]tatutory provisions which are written in such general language as to make them reasonably susceptible to being construed as applicable both to the government and to private parties are subject to a rule of construction which exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances.⁴³

The court thus concluded that “the legislative history is, without significant exception, stronger and more direct than the text of the Act in its support of an interpretation of ‘person’ that excludes the United States.”⁴⁴

2. *Comparison to Antitrust Statute Weighs against Standing*

The court also analyzed the antitrust precedents, specifically the Supreme

⁴¹ *Id.* at 23 (citing *United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351, 63 L.Ed.2d 607 (1980) and *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)).

⁴² *Id.*

⁴³ *Id.* (citing 3 *Sutherland Statutory Construction*, § 62.01, at 111 (4th ed. 1986)).

⁴⁴ *Id.* at 26.

Court's decision in *United States v. Cooper Corporation*,⁴⁵ which held that the United States could not maintain an action for treble damages under Section 7 of the Sherman Act which contained the nearly identical prototype for RICO's civil damage provision.⁴⁶ Reviewing *Cooper*, the court in *Bonanno* found that the interpretation of the analogous Sherman Act section dictated against governmental suits:

Disclaiming reliance on a 'hard and fast rule of exclusion,'...the Court nonetheless concluded that the phrase 'any person' does not authorize actions by the government because 'the ordinary dignities of speech would have led' to [the government's] mention by name' had Congress so intended,... And, the Court further observed, unless Congress used the term 'person' in two different senses in the same sentence, Section 7, which authorized a 'person' to sue any 'person' who violated the Act, would have exposed the United States to liability for treble damages... The Court's reasoning in *Cooper* applies with equal force here. It is therefore fair to say that *the primary source of congressional intent--the language of the section under consideration--does not support the government's position.* (citation omitted; emphasis added).⁴⁷

Importantly, the *Bonanno* court pointed out that in 1955, fourteen years after the Supreme Court in *Cooper* declined to read Section 7 of the Sherman Act as granting the United States a right to seek treble damages, Congress amended the Clayton Act by adding a separate provision explicitly authorizing the United States to seek recovery of actual (as opposed to treble) damages for violations of the antitrust laws. Analyzing this later legislative change, the court put great weight on the fact that RICO provided no explicit right for governmental actions:

Whether viewed as a departure from the structure of the antitrust laws as

⁴⁵312 U.S. 600 (1941).

⁴⁶Section 7 of the Sherman Act read: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor ... and shall recover three fold the damages by him sustained..." *Cooper*, 312 U.S. at 604.

⁴⁷*Bonanno*, 879 F.2d at 27-28.

they existed after 1955, or as a conformation to their framework as they existed before, *the omission of an express provision for damage actions by the government in RICO must be viewed as informed and intentional*. To say, as does the government, that Congress might simply have 'opted in RICO not to distinguish between sovereign and non-sovereign litigants' is illogical and completely contrary to the above-mentioned judicial presumptions. (citation omitted) (emphasis added).⁴⁸

Finally, summarizing its rejection of standing for governmental entities, the court concluded that that the government was essentially asking for the statute to be re-written:

To give RICO the construction requested by the government in the face of the language, structure, and legislative history of the Act, the inferences and presumptions to be drawn from Congress' intentional use of the Clayton Act as a model, and the strong judicial presumption against waivers of sovereign immunity, would not be liberal construction but liberal re-writing of the statute.⁴⁹

The *Bonanno* court provided the most comprehensive analysis of the treble damages provision to date. This opinion, however, would not hold governmental plaintiff cases in abeyance forever. Just over a decade later, foreign governments began their siege on U.S. courts.

D. Foreign Government Suits Begin to Bloom (*Canada, EC, et al.*)

Starting in 1999, foreign governments first began to file treble damage claims under RICO for recovery of billions of dollars in taxes and tariffs allegedly lost from smuggled goods (as discussed in Section I above). The first of these cases was filed by

⁴⁸*Id.* at 26.

⁴⁹*Id.* at 27.

the Canadian Government.⁵⁰ The Attorney General of Canada commenced the action alleging RICO violations arising out of an alleged smuggling scheme designed to avoid the payment of Canadian taxes. The defendants argued that the claims were barred because a foreign state is not a “person” under 18 U.S.C. § 1961(3). The court recognized the defendants’ arguments under *Bonanno*, but they avoided the detailed analysis of legislative history and the sovereign immunity implications in that case. Instead, the court based its decision on two unrelated points.

First, while the court recognized the general rule that the term “person” does not include the sovereign, it concluded that this was not a “hard and fast rule of exclusion.”⁵¹ Working from the fact that the definition of person includes “entity”, the court cited Black’s Law Dictionary in combination with the holding in *Philippines v. Marcos*, to support its ruling:

An ‘entity’ includes ‘state, United States, and foreign government.’ BLACK’S LAW DICTIONARY 532 (6th ed.1990) (citing REV. MODEL BUS. CORP. ACT § 1.40.) Thus, applying the plain language of the statute and the common understanding of the words employed therein, the definition of a ‘person’ includes foreign states. *See Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir.1988) (‘[A] governmental body is a person within the meaning of 18 U.S.C. § 1961(3)... The foreign nature of the [plaintiff] does not deprive it of statutory personhood.’), *cert. denied* 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989)...⁵²

This analysis ignores the detailed study of the legislative history performed by the court in *Bonanno*. Nowhere does the court adequately address the defendants’

⁵⁰*Att’y Gen. of Canada v. R.J. Reynolds Tobacco Holdings Inc., et. al.*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000).

⁵¹*Id.* at 147

⁵²*Id.*

arguments concerning sovereign immunity either. Moreover, this simplistic analysis is based on a dictionary and the one paragraph finding of the court in *Philippines v. Marcos*, which in turn is based on the precarious ruling in *Illinois Department of Revenue*. The *Canada* court makes no attempt to conduct an analysis of those cases and their underpinnings.

Second, the court bizarrely reasoned that *Bonanno* did not apply when a foreign sovereign's standing is at issue apparently because foreign states cannot otherwise enforce the RICO statute: "Unlike the United States that has several potent ways of enforcing RICO, foreign sovereigns lack any remedy other than an action for treble damages under RICO."⁵³ Comparing to the antitrust laws, the court states:

As with the antitrust laws, the RICO laws allow the United States several specific remedies including the rights to: (1) commence criminal prosecutions; (2) obtain injunctive relief; (3) seize property, (citation omitted); and (4) commence a civil action. (citation omitted). These rights are not, however, afforded to foreign states. Thus, if foreign states do not fall within the definition of 'person' and, accordingly, may not sue under §1964(c), then they would be deprived of a RICO remedy for any injuries they may have sustained as a result of racketeering activity. There is nothing in the legislative history or elsewhere tending to suggest that Congress intended to exclude foreign states from the civil remedies afforded in §1964.⁵⁴

There are numerous flaws with this passage. To begin, there is nothing in the legislative history tending to suggest that Congress intended to *include* foreign sovereigns in the civil remedies afforded in § 1964. To the contrary, as discussed in Section II above, the legislative history reveals RICO was intended as a criminal statute with a civil damages provision for *private* litigants. In fact, the treble damages

⁵³*Id.* at 148-149.

⁵⁴*Id.* at 149 citing *Marcos*, 862 F.2d at 1358.

incentive makes no sense for a government plaintiff. Furthermore, the court ignores the foreign sovereigns' own law enforcement powers (which may or may not include RICO-like laws, but that is up to their respective countries). Still further, the court again buttresses its statement with the superficial *Marcos* decision, in turn built on the tortured *Illinois Department of Revenue* decision.

Finally, as with the *Illinois Department of Revenue* court, the *Canada* court recognized the anomaly created by its decision and again sent a message to Congress: "The court is cognizant that . . . foreign states will 'have a more potent remedy than the United States in seeking monetary damages for violations of the RICO laws' [H]owever, the resolution of this anomaly lies with the Congress; [sic] not the courts."⁵⁵ Congress has not yet acted, however, so the foreign governments continue these claims.

The next big foreign government case came in 2001, when the European Community (EC) filed a civil RICO claim for lost taxes and tariffs against various cigarette manufacturers. A related claim was filed by several Colombian states alleging the same type of claim and the cases were consolidated.⁵⁶

Among other points, the defendants raised the lack of standing by the foreign governments to assert civil RICO damage claims. As in *Canada*, the court relied on a dictionary:

That the EC is capable of holding a 'legal or beneficial interest in property' cannot seriously be doubted. All that remains, therefore, is to

⁵⁵*Canada*, 103 F. Supp. 2d at 149, n.8.

⁵⁶See *European Community v. RJR*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001); *European Community v. RJR*, 186 F. Supp. 2d 231 (E.D.N.Y. 2002); *European Community v. RJR*, 355 F. 3d 123 (2d Cir. 2004) vacated 125 S. Ct. 1968 (2005).

determine whether or not Plaintiff qualifies under the statute as an 'entity.' Used in legal contexts, the term 'entity' generally means '[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members.' Black's Law Dictionary (7th ed.1999). The term encompasses the sub-definition 'public entity,' which is '[a] governmental entity, such as a state government or one of its political subdivisions.' Black's Law Dictionary (7th ed.1999). Accordingly, I conclude that foreign governmental entities fall within the plain statutory meaning of the term 'person' in §1964(c).⁵⁷

Using reasoning similar to the *Canada* court, the *European Community* court also rejected defendants' legislative history arguments because Congress did not expressly limit the treble damages provision to "private" parties only:

Defendants argue that the legislative discussions of 'private' parties evinces an intent to exclude public plaintiffs from bringing suit. I disagree. The mere iteration of the word 'private' in the record carries little weight. First, Congress has explicitly excluded governmental units from otherwise expansive statutory definitions. *See, e.g.*, 11 U.S.C. §101(41) (excluding governmental units from the definition of 'person'). Congress could have made such an intention clear by placing the adjective 'private' in the text of §1964(c) or §1961(3)(citation omitted) ("To argue otherwise is to tag Congress with an extravagant preference for the opaque when the use of a clear adjective or noun would have worked nicely"). Nevertheless, despite the use of the phrase 'private persons' in the legislative history, Congress omitted the adjective and chose instead to enact the statute as written.⁵⁸

The court went on to distinguish intent of individual legislators versus the intent of Congress as a whole:

[T]he mention of the word 'private' does not compel even the limited conclusion that individual *drafters* intended to restrict access to RICO's civil provisions to private individuals. The drafters of §1964(c) may very well have had as their primary purpose to compensate private persons. Even so, there is no basis for concluding that Congress also intended this as the exclusive purpose; I hesitate to infer, in the absence of substantial support, that these references to specific examples, made in an attempt to adduce primary intent, necessarily relegate all secondary effects to the

⁵⁷*European Community*, 150 F. Supp. 2d at 487.

⁵⁸*Id.* at 488.

status of undesired consequences. Because the statute as enacted does not contain a textual basis for inferring a 'private' limitation, I must conclude that the above references to the congressional record indicate (if they indicate anything at all) Congress' primary, though not exclusive, purpose. Congress enacted the statute without the 'private' qualifier. And although the phrase 'private persons' may at the time of drafting have had its proponents, it would be entirely improper for me to hold such an inference to be controlling.⁵⁹

Thereafter, the court cited a litany of cases that are the progeny of *Illinois Department of Revenue* for the proposition that the term 'person' in RICO includes public sector entities.

As in *Canada*, the court not only dismissed the legislative history, but also failed to analyze the statute in its totality. At no point does the *European Community* court ask why Congress would authorize any government to have a *treble* damages incentive. Governments are not given and do not need that type of incentive (or recovery of attorneys' fees) to defend its citizens. By contrast, the treble damages provision makes sense if Congress intended § 1964 (c) to apply to *private* litigants only. This is precisely why the court in *Bonanno* highlighted Congress' amendment of the antitrust law to permit a claim for actual damages as opposed to treble damages.

The *European Community* court then distinguished *Bonanno* on the same strange only-means-of-RICO-enforcement grounds as the *Canada* court:

Foreign governmental entities, in contrast to the United States, do not benefit from any specifically enumerated power of enforcement under RICO, other than the civil right of action. The advantages provided to the United States cannot serve as a basis for denying to foreign governmental entities all access to civil RICO. In other words, the fact that Congress specifically intended to ensure that the United States would be able to effectively punish racketeering cannot serve as a basis for the conclusion that Congress intended to prevent foreign

⁵⁹ *Id.*

governments injured by racketeering from seeking redress under RICO.⁶⁰

Again, the court ignored the fact that (a) the complaint before it contained requests for equitable relief – injunctions and disgorgement of defendants’ profits, and (b) why foreign governments must necessarily have to enforce some part of the RICO statute at all.

The defendants in this case also cited the *Bonanno* court for the proposition that a foreign sovereign can only be a RICO “person” if it could also be a RICO defendant, but the *European Community* court said its application was “limited to the narrow issue before the court in that case.”⁶¹ “I read *Bonanno*,” Judge Garaufis wrote, “only as employing a general presumption . . . to support its narrow and otherwise fully defensible holding; and it is the holding and not the general presumption by which I am bound.”⁶²

Finally, the court referenced the lack of congressional action to support its conclusion that foreign governments may bring treble damages actions:

My conclusion would be different, of course, if Congress had indicated that civil RICO was not available when the effect of the alleged racketeering is to deprive a foreign sovereign of tax revenues. In fact, Congress has been invited by the courts to enact precisely such a limitation upon the scope of the RICO statute.⁶³

The court then returns to the seed that was planted, along with a distress flag to Congress, when a court first considered the question of whether governmental entities

⁶⁰*Id.* at 490.

⁶¹*Id.* at 491.

⁶²*Id.*

⁶³*European Community*, 150 F. Supp. 2d at 485-486.

could bring treble damages actions:

In the more than fifteen years since the Seventh Circuit raised its ‘distress flag,’ *Congress has done nothing to limit the ability of governmental entities to seek redress for harms suffered as a result of racketeering activity in violation of civil RICO*, even where the effect of such activity is to deprive those entities of tax revenue.⁶⁴

Both *Canada* and *European Community* were ultimately dismissed on the basis of the revenue rule. In both appeals, the Second Circuit affirmed on the basis of the revenue rule and did not address the other grounds or arguments raised below.⁶⁵ Nonetheless, while these types of cases are being dismissed on other grounds now, the problem still looms. As noted in Section I above, foreign government plaintiffs are already repleading their cases to circumvent this rule, and it is only a matter of time before they succeed.

IV. SEPARATION OF POWERS CONSIDERATIONS

Apart from the statutory interpretation question is the question of whether it makes sense to have foreign governments suing American companies for what are essentially foreign tax collection concerns. The U.S. government strongly believes that this practice raises a number of serious constitutional and foreign policy concerns. As discussed in note 7 *supra*, the U.S. Solicitor General filed an *amicus curiae* brief on the petition for writ of certiorari to the Supreme Court in *Canada*. In this brief, the Department of Justice responded to the question of whether the revenue rule precludes a foreign sovereign from

⁶⁴*Id.* (emphasis added).

⁶⁵The U.S. Supreme Court vacated the *European Community* decision (which was pending on a petition for writ of certiorari) and ordered the Second Circuit to evaluate the Court’s holding in *Pasquantino v. U.S.*, 544 U.S. 349 (2005). See *EC v. Reynolds*, 125 S. Ct. 1968 (2005).

bringing a civil RICO claim where the alleged injury is lost tax revenue. The U.S. government cited several “important separation of powers interests” for its conclusion that such lawsuits should not be permitted.⁶⁶

First and foremost, the U.S. government doubts that its courts have the institutional competence to decide when it is in the interest of the United States to permit a foreign country to enforce its revenue laws in the United States. By way of example, the brief argues that U.S. courts “are not well-positioned to address whether the interests of the United States are served by enforcing a tax that is designed to discourage the sale of a United States newspaper, or that makes it prohibitively expensive to use United States parts”⁶⁷ U.S. courts are also not well-positioned to determine “which foreign countries should be able to use the courts of this country to collect taxes and which should not.”⁶⁸ Additionally, courts can provide “no guarantee that the United States may enforce a similar claim in the courts of the foreign sovereign.”⁶⁹

Furthermore, the federal government expressed concern that if such suits were permitted, they would deprive the executive branch of the leverage it might need to secure reciprocity through negotiation of bilateral treaties in this area. “[J]udicial enforcement of such a claim,” the brief adds, “would intrude on the Executive Branch’s treaty making authority and the policy judgments

⁶⁶Brief of the U.S. *supra* note 7, at 6.

⁶⁷*Id.* at 10.

⁶⁸*Id.*

⁶⁹*Id.* at 13.

reflected in specific United States treaties.”⁷⁰ When courts dismiss these cases, the President and the Senate are free to decide through the treaty-making process the extent to which exceptions should be made. In short, the U.S. Government contends that dismissing these cases “avoids involving the judiciary in making judgments about foreign tax policies interwoven through foreign policy considerations.”⁷¹

The Solicitor General also considered whether Congress rejected this long-standing common law rule when it enacted the RICO statute: “[C]ourts may take it as a given that Congress has legislated with an expectation that the principle will apply except ‘when a statutory purpose to the contrary is evident.’”⁷² The federal government concluded that RICO did not provide any such contrary purpose. “There is no evidence,” the Solicitor General states, “that Congress intended...to permit civil damages actions by foreign sovereigns to recover alleged tax losses.”⁷³

After unequivocally asserting its belief that U.S. courts should not be deciding these cases, and that the RICO statute did not override this longstanding practice, the Solicitor General notes that Canada “has means to vindicate its interest in attacking international smuggling operations by filing suit to enforce its laws in Canadian courts and by requesting cooperation from

⁷⁰*Id.*

⁷¹Brief of the U.S. *supra* note 7, at 7.

⁷²*Id.* at 11 (internal citation omitted).

⁷³*Id.*

the United States under mutual assistance treaties.”⁷⁴ Indeed, this rationale would apply to any foreign sovereign seeking to avail itself of U.S. courts for its matters that ought to be handled in their own courts.

V. CORRECTING THE “ANOMALY” – A POTENTIAL REFORM

“The court is cognizant that . . . foreign states will ‘have a more potent remedy than the United States in seeking monetary damages for violations of the RICO laws’ [H]owever, the resolution of this anomaly lies with the Congress; [sic] not the courts.”⁷⁵

Congress could address this looming problem by simply adding a new subsection to §1964 that reads: “A foreign governmental entity may not sue under this section.” There is no indication that Congress, when enacting RICO, ever anticipated that foreign governments would be allowed to pursue treble damages claims – and there are many indications that it intended for only private parties to avail themselves of this remedy. Thus, the above amendment would simply restore RICO to its original meaning.

The cases set forth above demonstrate that our courts have expanded civil RICO jurisdiction by building one wobbly platform upon another. With each expansion, the courts, however reluctantly, have taken the statute beyond what was envisioned by Congress. And with each expansion, the courts signal Congress to respond.

Without a legislative solution, trial lawyers will continue to evade or erode the revenue rule. They will continue to manipulate RICO to enable them and their foreign clients to saddle U.S.-based companies, not racketeers, with defense costs and possibly

⁷⁴*Id.* at 17.

⁷⁵*Canada*, 103 F. Supp. 2d at 149, n.8. (emphasis added).

ruinous liabilities. Some of America's most vital companies are the victims trial lawyers seek to target for staggering liability. They include producers of consumer goods and household appliances, banks – essentially any deep-pocketed company whose products or services can be misused in a foreign smuggling or money laundering scheme is at risk from a foreign government RICO lawsuit for treble damages from lost taxes.

But the issue is larger than just opportunistic foreign governments seeking deep-pockets of American companies. Congress must also consider that if a foreign government is a “person” who can sue under RICO, it may be subject to suit as well – again, a result that Congress likely never intended. The fact is that the foreign governments that are forum shopping in U.S. courts under RICO already have, or have the power to enact, adequate judicial remedies in their own countries – and there is no reason to continue to allow them to abuse the U.S. judicial system. It is only a matter of time before governments with ties to terrorism look to these lawsuits as a potential means to finance illicit activities.

There is no legitimate policy reason to grant foreign governments more power under U.S. laws than that of the U.S. government.⁷⁶ When Congress was faced with the issue of whether foreign entities could challenge U.S. regulations on Trade Promotion Authority in ways that U.S. entities could not, it made clear its objection.

⁷⁶Arguably, another means to resolve the “anomaly” would be to allow the United States government to bring these same civil RICO lawsuits that some courts are allowing foreign governments to bring. However, such a resolution would further extend the statutory misinterpretation problem. While subsection (b) of § 1964 empowers the attorney general to sue under “this section,” subsection (c) limits its relief to any “person” injured by a violation of the statute. The more specific authorization in subsection (c) prevails over the more general authorization in subsection (b) (*see, e.g., Kosak v. United States*, 465 U.S. 848, 855 (1984) (finding specific subsection prevailed over more general subsection), and as discussed above in sections II.A-B and III.C.1-2, governmental entities are not “persons” and thus may not bring suits for the treble damages relief provided for in that subsection.

Congress directed the Administration to “ensure that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States.”⁷⁷ Congress recognized that foreign countries should not be favored in U.S. courts in this trade agreement, and they can reaffirm this same policy with respect to foreign government civil RICO lawsuits as well.

CONCLUSION

Congress can make clear that foreign governments are not “persons” eligible to bring civil RICO damage claims with one small revision to §1964. Requests from U.S. courts to clarify statutory language must be taken seriously. Requests from the U.S. executive branch to maintain the proper separation of powers should be taken seriously as well – particularly when the adverse consequences could be as costly as they are in this matter.

⁷⁷This language became 19 U.S.C. § 3802(b)(3).