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James D. Harmon, Jr.

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RICO Meets *Keiretsu:* A Response to Predatory Transfer Pricing

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ABSTRACT

Japanese cartels known as keiretsu *pursue illegal transfer pricing policies which cost American taxpayers billions of dollars and place American businesses at a competitive disadvantage.* Keiretsu-*controlled subsidiaries located in the United States buy goods, financial products or services from their Japanese parent at fraudulently inflated prices. Their dual purpose is to create artificial business expenses and costs (thereby reducing taxable income and paying little or no United States corporate income tax) and to gain an edge on American businesses through tax evasion.*

Mr. Harmon proposes that American businesses respond to this problem with techniques normally used against organized crime. The Racketeer Influenced and Corrupt Organizations Act (RICO) can combat the anti-competitive market effects of keiretsu. *When transfer pricing damages American businesses through tax evasion and money laundering,*

* The author was the Executive Director and Chief Counsel of the President's Commission on Organized Crime during the Reagan Administration (1984-1986), is currently a partner in the New York law firm of Bower & Gardner and has successfully argued before the United States Supreme Court. B.S., United States Military Academy, 1965; J.D., Dickinson School of Law, 1971; L.L.M., New York University School of Law, 1977.

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RICO's treble damage provisions provide them with the means to recover lost profits.

RICO provides a juridical approach to what has been treated as a matter of international diplomacy. By offering a domestic legal solution to curb corporate Japan's predatory trade practices, Mr. Harmon undertakes to neutralize Japan's powerful political resources and provide a private remedy for harmful trade practices which the Government has been unable to control.

TABLE OF CONTENTS

I. INTRODUCTION

Keiretsu, Japan's closed loop production and financial enterprises, give Japanese business the advantage of an uneven playing field when they do business in the United States. For the past several years, a debate has raged in the business community on what to do about it. For example, Charles Ferguson of the Massachusetts Institute of Technology's Center for Technology, Policy and Industrial Development argues that *keiretsu*, engaging in "techno-industrial Prussianism,"[1] have all but caused United States manufacturers to lose the ten billion dollar world semiconductor market.[2] As a response, economist and author George Gilder favors the trickle-up effect of American individualism combined with new technology as a defense.[3] Ferguson, however, rejects Gilder's

1. Charles H. Ferguson, *America's High Tech Decline*, 74 FOREIGN POL'Y 123, 140 (1989).

2. Charles H. Ferguson, *Computers and the Coming of the U.S. Keiretsu*, HARV. BUS. REV., July-Aug. 1990, at 55, 56.

3. George Gilder, *The Revitalization of Everything: The Law of the Microcosm*, HARV. BUS. REV., Mar.-Apr. 1988, at 49; *see also* GEORGE GILDER, MICROCOSM: THE

faith in small entrepreneurial companies as an inadequate response to the Japanese challenge to the computer industry. Labelling Gilder's "law of the microcosm" as voodoo competitive doctrine, Ferguson proposes United States *keiretsu*, rather than individualism, as the answer.[4]

Silicon Valley innovators cannot agree either. T.J. Rodgers, CEO of Cypress Semiconductor, endorses Gilder's ode to rugged entrepreneurialism. On the other hand, Robert Noyce, CEO of Sematech, the industry and government-funded semiconductor research consortium, calls Rodgers' approach false hope and high-tech fiction. Noyce hopes for a "well aimed light" to help American business find the way.[5]

As the debate continues, beseiged American business seems content only to hope that American government subsidy or a change in government trade policy present a solution. IBM and Apple Computer seem a notable exception. Their recently-announced research collaboration to develop *the* personal computer for the 1990s may be a big step in Ferguson's direction, although IBM's recent reorganization plan, which counts on innovation fostered through decentralization, seems to adopt the Gilder/Rodgers' approach.[6]

Congressional lawmakers of all stripes have jumped on the bandwagon seizing the opportunity to bash foreign corporations as the cause of everything from the budget deficit to higher taxes, but with little to show for their tub-thumping.[7]

Meanwhile, virtually the entire American business lobby in Washington rails at the federal anti-racketeering statute known as the Racketeer Influenced and Corrupt Organizations Act (RICO)[8] pressuring Congress

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QUANTUM REVOLUTION IN ECONOMICS AND TECHNOLOGY (1989).

4. Charles H. Ferguson, *From the People Who Brought You Voodoo Economics*, HARV. BUS. REV., May-Jun. 1988, at 55, 62.

5. T. J. Rodgers & Robert Noyce, *Debating George Gilder's* Microcosm: *T.J. Rodgers vs. Robert Noyce*, HARV. BUS. REV., Jan.-Feb. 1990, at 24, 36. T. J. Rodgers practices what he preaches. Cypress Semiconductor is operated through a system of "perpetual entrepreneurship" in which semi-independent companies are spun off to design and manufacture new products. Richard Brandt, *The Bad Boy of Silicon Valley*, BUS. WK., Dec. 9, 1991, at 64-70.

6. *It's Official: IBM and Apple Tie The Knot*, BUS. WK., Oct. 14, 1991, at 54; John W. Verity et al., *The New IBM*, BUS. WK., Dec. 16, 1991, at 112.

7. Limited congressional activity has focused on barring foreign investment and increasing reporting requirements. In 1988, 'as amended in 1990, Congress gave the President limited power to block foreign investment which threatened national security interests. The Omnibus Trade and Competition Act of 1988. Other bills introduced, but not enacted, would have required foreign investors to make public filings with respect to their United States based operations. H.R. 5, 101th Cong., 1st. Sess. (1989).

8. 18 U.S.C.A. §§ 1961-68 (West 1984 & Supp. 1991).

to water it down to the point where it is so diluted that it loses its potency.[9] With typical shortsightedness, American business misses the point that RICO could reverse the tide of *keiretsu* transfer pricing practices that cost the Internal Revenue Service (IRS) billions of dollars and give Japanese companies a competitive advantage in certain American markets. They should rethink their position on RICO. RICO is the hammer that American business has been looking for, but now seems prepared to throw away without even using.

II. NEW RULES OF ENGAGEMENT

This Article introduces into the debate a step-by-step plan of legal action for American business to combat some of the market effects of *keiretsu*, a key element of Japan Inc.'s industrial order of battle. It is premised on viewing the problem from an American perspective and using a uniquely American approach now within the control of U.S. companies—hardnosed litigation on the scale of Godzilla meets King Kong.

The plan would be to seize the initiative and play by American rules in United States markets, thus neutralizing the advantages of *keiretsu* activity through means normally used to prosecute organized crime.

One word of caution—the approach advanced is only a solid counterattack intended to stabilize segments of certain industries. It would only buy time for the resolution of the principles of Gilder and Ferguson, both of whom seem to know what they are talking about. I cannot speak with their authority on economic theory. But I do accept their mutual premise that the martial nature of Japanese business methods poses a real challenge, if not a threat, to American business if left unanswered.

III. MODUS OPERANDI

Japanese *keiretsu* engage in cartel-like conduct characterized by supplier-buyer relationships impenetrable to American companies, by groups of companies related financially, through mutual shareholding[10] and interlocking directorates, and by technological interdependence. Ri-

9. *See* H.R. 101-975, 101st Cong., 2d Sess. (1990); H.R. 1717, 102d Cong., 2d Sess. (1991); S. 438, 101st Cong., 2d Sess. (1991).

10. *See, e.g.*, Kozo Yamamura, *Will Japan's Economic Structure Change? Confessions of a Former Optimist, in* JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 13, 28-36 (Kozo Yamamura ed. 1990) [hereinafter JAPAN'S ECONOMIC STRUCTURE]; *see also* John O. Haley, *Weak Law, Strong Competition, and Trade Barriers: Competitiveness as a Disincentive to Foreign Entry Into Japanese Markets, in* JAPAN'S ECONOMIC STRUCTURE, *id.*, at 203, 213-24.

valry is suppressed with the goal of displacing foreign competitors.[11] *Keiretsu* enterprises give Japanese firms some significant advantages, including easy access to low cost capital, a long term focus secured through stable shareholding, and a captive market for their goods and services.[12] Organized crime infiltration of the financial arms of some *keiretsu*—an idea once thought of as xenophobic drivel—no longer can be dismissed.[13]

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11. *See, e.g.*, Giovanni Dosi et al., *Trade, Technologies and Development: A Framework for Discussing Japan, in* POLITICS AND PRODUCTIVITY: THE REAL STORY OF WHY JAPAN WORKS 3, 32-34 (Chalmers Johnson et al. eds. 1989) [hereinafter POLITICS AND PRODUCTIVITY]; Michael Gerlach, Keiretsu *Organization in the Japanese Economy: Analysis and Trade Implications, in* POLITICS AND PRODUCTIVITY, *id.*, at 141.

12. Marie Anchordoguy, *A Challenge to Free Trade? Japanese Industrial Targeting in the Computer and Semiconductor Industries, in* JAPAN'S ECONOMIC STRUCTURE, *supra* note 10, at 301, 325-27.

13. Recently, the presidents of two major Japanese securities firms, Nomura Securities Co. and Nikko Securities Co., resigned after reports in the Japanese press that Susumu Ishii, a retired leader of the Yakuza mob, made millions through these firms. Karen L. Miller, *Suddenly the Japanese Mob Is Out of the Shadows,* BUS. WK., July 8, 1991, at 29. According to press accounts, affiliates of these firms and a bank loaned Ishii about $300 million, which he used to purchase stock in a railway company whose stock then appreciated as a result of questionable trading. This reaped huge profits to Ishii, which were then illegally invested overseas. Ishii, who also reportedly purchased an interest in a Houston software company and a New York financial services company, made about $287 million when Nikko and Nomura affiliates and others purchased worthless golf club membership certificates from a club that Ishii owned. *Id.* In testimony before Parliament, Nomura's former chairman testified that he could not remember who introduced Ishii to Nomura—an introduction that he had recalled until the day of his testimony. James Sterngold, *Testimony On Brokers in Tokyo,* N.Y. TIMES, Aug. 30, 1991 at D6.

More recently, press reports have detailed how between one and three billion dollars in loans from some of Japan's most prominent banks were funnelled through a trucking company to Yakuza controlled businesses and to Japanese politicians. The loans to the trucking company are said to be uncollectable. *Another Scandal in Japan, This Time Involving Billions,* N.Y. TIMES, Feb. 23, 1992, at D3.

The Yakuza does not operate in the shadows as does the Mafia. Instead, it chooses to be a highly visible part of Japanese society earning annual revenues estimated at about $10 billion and holding $3.6 billion of stock in legitimate companies. Miller, *supra*, at 29. Its techniques of corporate extortion include *sokaiya*, a form of blackmail whereby Yakuza members intimidate board members at annual public shareholders meetings by threatening to disclose damaging information about a company or its management. The Yakuza is adaptable enough to make its *sokaiya* services available to management as a means to silence dissenting shareholders. ALBERT J. ALLETZHAUSER, THE HOUSE OF NOMURA: THE INSIDE STORY OF THE LEGENDARY JAPANESE DYNASTY 281-82 (1990). Forty percent of 2,000 companies responding to a police survey said they had received extortionist threats, and one-third of those paid off in amounts from $750 to $775,000. The problem has gotten so bad that thousands of shareholders' meetings are held on the

Keiretsu are the means by which Japan Inc. is pursuing a national business strategy for dominance in the global marketplace. Historically, *keiretsu* penetration of the United States market has followed a now familiar two step process. First, huge quantities of equivalent or superior products (such as color televisions, VCRs, and stereo components) are shipped to the target United States market at very low prices, that is, prices below the level at which American competitors could profitably sustain production over some reasonable term. Short-term profitability does not matter because the process is sustained by: a pre-existing cartel serving the Japanese market in which high prices can be charged; reciprocal institutional equity ownership that precludes stock sale (and devaluation) on low profit outcomes; a lower cost of capital; and the strategy itself, which operates over a long time-horizon.

Ultimately the United States target market's producers and competitors are driven out with a few stragglers resorting to off-shore production. The target national market gradually accepts the low-value-added role of a warehouser or, at best, an assembler. Once this occurs, the second phase begins. Distribution channels can be intimidated and dominated. And more significantly, transfer prices to the warehouser or assembler can be raised to almost any level. Political resistance can be neutralized, or at least contained, by nationally coordinated lobbying, public relations, and promotional efforts.

Domestic corporations are victimized when tax schemes are exported into the United States, along with the goods the *keiretsu* produce and the finances and services they offer. Some *keiretsu* apparently charge artificially high prices known as transfer prices when selling goods or providing services to their United States based subsidiaries and distributors. This causes their United States operations to operate perennially at a loss or with uneconomically low profit margins, notwithstanding steadily increasing sales.[14] In effect, profits are laundered out of the United States, resulting in a substantial underpayment of federal and state income taxes. A purely domestic corporation inflating expenses to reduce taxable income undoubtedly would face a criminal tax evasion prosecution. American competitors have yet to find a legal remedy to counter the

same day to minimize the Yakuza's efforts to disrupt. *Police Unprecedently Demand Business Groups to Cut Yakuza Ties*, Asahi News Service, June 28, 1991, available in LEXIS, Nexis Library, ASAHI File; Greedy Gansters are Putting the Squeeze on Corporate Japan, Reuters, Dec. 31, 1990, *available in* LEXIS, Nexis Library, Reuters File.

14. *Tax Underpayments By U.S. Subsidiaries of Foreign Companies: Hearings Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 101st Cong., 2d Sess. 149 (1990) [hereinafter *Tax Underpayments*] (statement of IRS Case Manager Neil McNulty).

competitive advantage gained through this foreign initiated form of tax evasion.

The potential for transfer price manipulation should increase with Japan Inc.'s escalating direct investment in the United States. From 1986 through 1989, corporate Japan's direct investment through affiliate companies increased by ninety-eight percent. During the same period, corporate Japan increased its United States direct investment tenfold through corporate acquisitions.[15]

The success of *keiretsu's* predatory and monopolistic transfer pricing practices has forced many segments of American business into a veritable defensive perimeter. The RICO hammer offers a strategic counterstroke, attacking the tax fraud Achilles heel of Japan Inc., to re-establish genuine competitiveness. A more precise definition of *keiretsu* is no more necessary to address transfer pricing schemes than it was necessary to define organized crime in order to reach gangster Al Capone for tax evasion.[16]

This process of profit laundering is not unique to Japan Inc. Italian financier Michele Sindona, a man with political, Vatican, and mob ties who caused the collapse of the Franklin National Bank,[17] first described cross-border tax evasion through inflated prices to me when I was analyzing the phenomenon of money laundering for the President's Commission on Organized Crime.[18] He offered this service to his clients which made his law firm the most successful in Milan, Italy.[19] Sindona saw the process for what it was—tax evasion—so that when Italy made tax evasion a crime, he claimed to have stopped doing it.[20]

Federal anti-money laundering laws, which the President's Commission proposed and which Congress adopted in 1986, owe much to Sindona's insights. Sindona's grandiose sounding, but correct, view that the real evil of money laundering is its power "to consume entire sectors

15. Alan J. Auerbach and Kevin Hassett, *Taxation and Foreign Direct Investment in the United States: A Reconsideration of the Evidence* at 16, 17 presented as a working paper at the Conference on the International Aspects of Taxation, Cambridge: National Bureau of Economic Research, Inc. (Sept. 27, 1991). However, a recent press report indicates that the Japanese are reducing their investment abroad, James Sterngold, Japanese Shifting Investment Flow Back Home, N.Y. Times, Mar. 22, 1992, at A1.

16. Capone v. United States, 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932).

17. Sindona v. Grant, 619 F.2d 167 (2d Cir. 1980); PRESIDENT'S COMMISSION ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS AND MONEY LAUNDERING 83 n.3 (1984).

18. NICK TOSCHES, POWER ON EARTH 87-98 (1986).

19. *Id.*

20. *Id.*

of . . . economies, transforming them into *feudi* of an international . . . oligarchy beyond the reach of the law,"[21] is an apt description of the Bank of Credit and Commerce International (BCCI) which succumbed to these anti-money laundering laws[22] Federal anti-money laundering laws, when used in combination with the RICO statute, also could reach transfer pricing schemes involving income tax evasion.

IV. TAX FRAUD IN THE BILLIONS

The United States Treasury loses billions of dollars in tax revenues annually through transfer pricing techniques which launder profits overseas to tax havens. The precise amount of lost tax revenues is difficult to quantify, but the indications and estimates are staggering. IRS Commissioner Fred T. Goldberg has concluded that, as a result of transfer pricing abuses, the United States government is being shortchanged billions of dollars annually.[23] Foreign controlled corporations doing business in the United States paid only 4.4 billion dollars in federal income taxes in 1987 [See Chart #1], but reported taxable income as a percentage of their gross receipts that was less than half the taxable income reported by American companies doing business in the United States.[24] [See Chart #2]. One Congressional investigator has estimated that foreign companies operating in the United States underpaid 16.5 billion dollars in federal income taxes in 1987 alone.[25]

A House Ways and Means Committee study of ten years of income tax returns of thirty-six foreign owned automobile, motorcycle, and electronics equipment distributors indicated that one-half of them paid little or no United States taxes. [See Box #1] One foreign-owned company sold more than 3.5 billion dollars in goods in the United States, had gross profits of almost 600 million dollars and paid only 500 dollars in federal income taxes during that ten-year period.[26]

If these figures even approach the norm, transfer pricing schemes could account for a significant part of the international trade deficit with

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21. *Id.* at 89.

22. Jonathan Beaty & S.C. Gwynne, *The Dirtiest Bank of All*, TIME, July 29, 1991, at 42-47.

23. *Tax Underpayments, supra* note 14, at 62 (testimony of Fred T. Goldberg, IRS Commissioner).

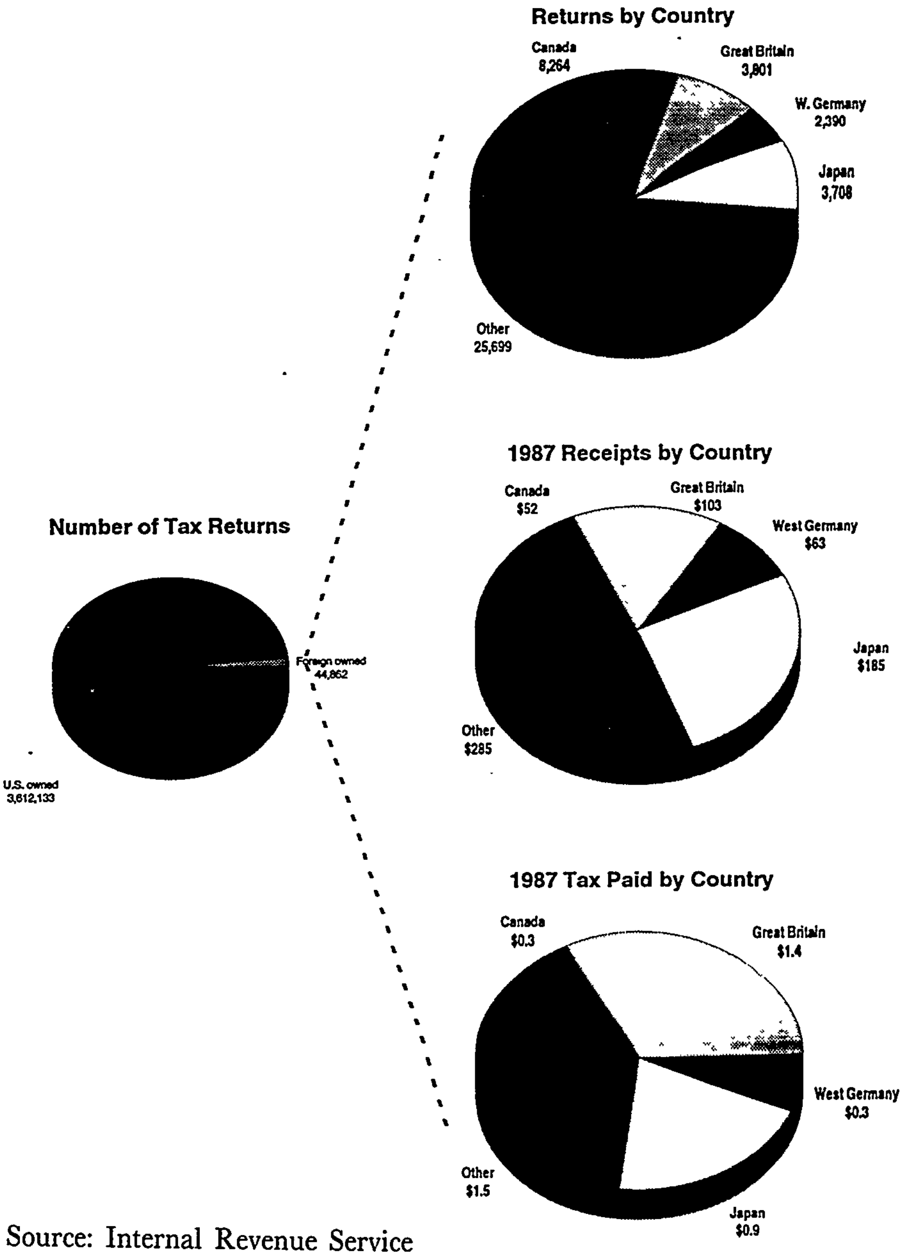
24. *Id.* at 65.

25. William Triplett, Staff Member, Senate Foreign Relations Committee, Remarks of the U.S. Business & Industrial Council News Conference, Oct. 9, 1990, *available in* LEXIS, Nexis Library, Current File.

26. *Tax Underpayments, supra* note 14, at 15 (opening Statement of Chairman J.J. Pickle).

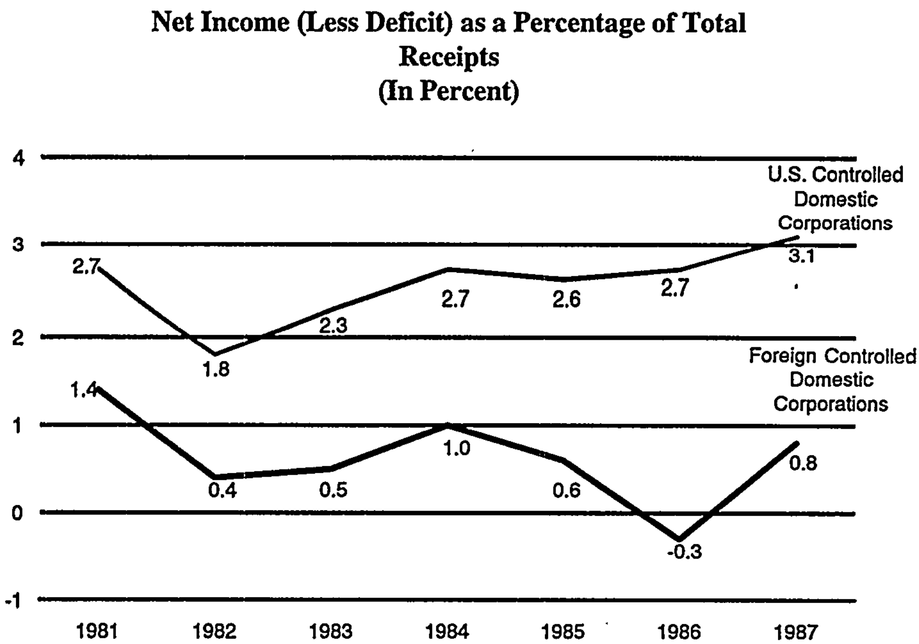
CHART 1

Foreign-Controlled U.S. Corporations
(in billions of dollars)



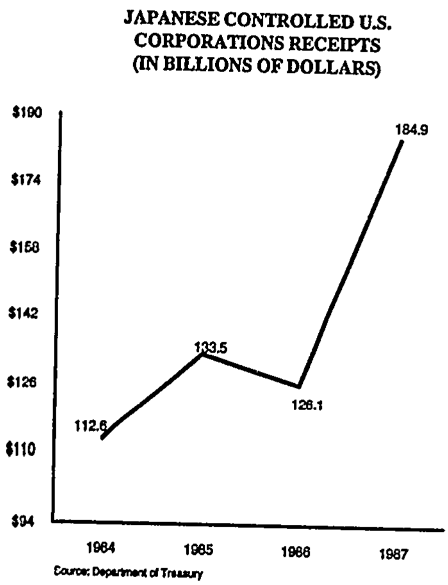
Source: Internal Revenue Service

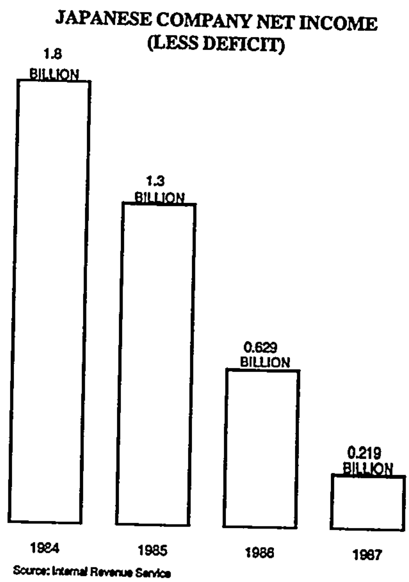
CHART 2



Source: Internal Revenue Service

CHART 3





BOX NO. 1

A TEN YEAR SNAPSHOT

The House Ways and Means Committee analyzed the federal income tax returns filed over a ten year period by 36 foreign owned U.S. distributors of automobiles, motorcycles and electronics equipment including televisions, stereos, FAX machines and VCR's. The study produced the following conclusions:

- One-half of the companies paid little or no federal income tax;
- The major tax issue for these companies before the IRS is reduction in taxable income through transfer pricing;
- Most of the 36 companies engaged in questionable transfer pricing practices;
- The 18 electronics distributors reported $116 billion in gross receipts and paid only $654 million, or one half of 1 percent, in Federal income tax;
- Only nine electronics companies reported positive taxable income;
- Eight of the automobile and motorcycle companies paid no federal income tax and IRS has proposed $2.5 billion in adjustments to income;
- A foreign parent sold television sets to an unrelated distributor for $150, while its subsidiary paid $250 for the same model;
- One foreign automobile manufacturer sold cars to its U.S. distributor at prices averaging $800 more than identical cars shipped to its Canadian distributor.

Source: House Ways and Means Committee
Based on Internal Revenue Service data.

Japan, over fifty percent of which is in autos and auto parts.[27] Furthermore, the problem is likely to worsen. The Office for the Study of Automotive Transportation at the University of Michigan predicts that the automobile and auto parts trade deficit with Japan will widen from 31.1 billion dollars in 1990 to 45.7 billion dollars in 1994 in current dollars.[28] Japanese automotive companies have a clear predisposition towards importing parts from Japan for assembly in the United States. Edward M. Graham and Philip R. Krugman, fellows at the Institute for International Economics, have concluded that United States based Japanese manufacturing operations are three times as likely to import parts from Japanese suppliers for assembly in the United States than the average foreign-controlled affiliate does from its domestic suppliers.[29] Reports published during President Bush's January 1992 trip to Japan indicated that corporate Japan will increase the output at its United States transplants by roughly fifty percent in the next two or three years.[30] Economist Clyde Prestowitz of the Economic Strategy Institute calculates that the net impact of Japanese auto transplants has been a loss of about eighty-three thousand jobs and 6.3 billion dollars in gross national product.[31]

Available evidence suggests that either Japan Inc. is committing tax evasion on a massive scale or it does not know the value of the goods and services it produces. Japan Inc. has earned steadily increasing revenues in the United States during 1983 to 1987, yet produced an anomalous decrease in net income during the same period. [*See* Chart #3]. A congressional study of IRS tax return data concluded that foreign subsidiaries of United States companies operating abroad "generally earn at 8 to 10 percent pretax net operating profit on their business receipts," while United States subsidiaries of companies from Japan, Canada, United Kingdom and West Germany operating in the United States earned only 0.1 percent on receipts, hardly a reason to do business here.[32]

27. SEAN P. MCALINDEN ET AL., THE UNIV. OF MICHIGAN TRANSP. RESEARCH INST., Report No. UMTRI 91-20, THE U.S.-JAPAN AUTOMOTIVE BILATERAL 1994 TRADE DEFICIT 2 (1991).

28. *Id.* at 72.

29. EDWARD M. GRAHAM & PAUL R. KRUGMAN, INST. FOR INTERNAT'L ECONOMICS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 78 (2d ed. 1991).

30. David E. Sanger, *Trade Mission Ends in a Tense Meeting About Autos*, N.Y. TIMES, Jan. 10, 1992, at A1, A11.

31. CLYDE PRESTOWITZ ET AL., ECONOMIC STRATEGY INST., THE CASE FOR SAVING THE BIG THREE 2 (1992).

32. *Tax Underpayments*, *supra* note 14, at 96 (testimony of Charles S. Triplett, Deputy Assoc. Chief Counsel, IRS).

A separate study of federal corporate income tax returns from 1980 to 1987 found various reasons for the low rate of return for foreign corporations in the United States. The authors of the study found, for example, that one-half of the difference in profitability could be explained by a maturation process that all foreign corporations undergo in the United States market, or by exchange rates having a significant effect on foreign corporations' profitability, or by asset revaluation distorting the ratio of taxable income to assets, or, finally, by the effect on profits of outside purchases and investment income. The authors, however, concluded that the other half of this profitability differential was unable to be explained "by forces other than transfer pricing."[33] Whatever the actual tax revenue loss, transfer pricing appears to have effectively subsidized Japanese entry into United States markets at the expense of American business interests.

Lack of an effective IRS response to international transfer pricing abuses either represents a triumph of diplomatic nicety over evenhanded enforcement of the nation's revenue laws or, more likely, shows that IRS is seriously outgunned. As of February 1990, the IRS was handling 294 cases of transfer pricing abuses involving proposed income adjustments of over thirteen billion dollars.[34] Congressional testimony refers to press accounts that seventeen Japanese companies—including the Daiichi-Kangyo Bank, NEC, Nissan, Sony America and Yamaha USA—have

33. The study, which used Treasury Department data, analyzed the federal corporate income tax returns (IRS form 1120) for the year 1987 of a cross section of 4000 domestically-controlled and 600 foreign-controlled corporations (excluding finance, insurance, and real estate corporations). In addition, the authors constructed a second data set, called a panel, using IRS Form 1120 data from 1980 to 1987 for firms with assets of $50 million or more. The panel data set included about 1300 domestically-controlled firms and 110 foreign-controlled firms. According to the authors, the panel was valuable in identifying the role of startup costs and exchange rates in evaluating the profits of foreign and domestic corporations. Measuring return on investment as the ratio of taxable income over assets, the ratio was only 0.58 for foreign-controlled companies compared with 2.14 for domestically-controlled companies in 1987. The authors of the study also analyzed the returns of 86 Japanese companies in a cross section of 528 foreign-controlled companies. According to the study, corporate Japan's 1987 profitability taxable income/assets ratio is -0.025 and, the authors noted, its debt/assets ratio is 0.097 which is a full 10 percentage points higher than domestically-controlled companies. Timothy Goodspeed et al., *Explaining the Low Taxable Income of Foreign Controlled Companies in the United States 1, 2, 4-6, Tables 1.1 and 2.4* presented at the Conference on the International Aspects of Taxation, Cambridge; National Bureau of Economic Research, Inc. (Sept. 28, 1991).

34. *Tax Underpayments, supra* note 14, at 53 (statement of Patrick G. Heck, Assistant Counsel, Subcomm. on Oversight, Comm. on Ways and Means).

BOX NO. 2

SONY'S 1989-1990 BOX SCORE

The Sony 20-F SEC filings disclosed the following for the years ended 1989 and 1990 (in thousands of dollars and percentage):

	Sony Corporation			
	1989		1990	
Sales:				
Japan	$5,540,129	34.1%	$5,538,077	30.2%
U.S.	4,441,500	27.3	5,463,771	29.8
Europe	3,771,530	23.2	4,556,828	24.8
All Other	2,499,333	15.4	2,784,356	15.2
Total	$16,252,492	100.0%	$18,343,032	100.0%
Income before Taxes::				
Japan	775,689	61.9%	$996,293	68.8%
Foreign	478,220	38.1	452,299	31.2
Total	$1,253,909	100.0%	$1,448,592	100.0%
Income Taxes Current:				
Japan	$491,614	71.2%	$568,866	69.8%
Foreign	198,757	28.8	246,529	30.2
Total	$690,371	100.0%	$815,395	100.0%

Sony is representing that in 1989 and 1990 sales in Japan by the Japanese parent and its domestic subsidiaries generated 32% of total sales, 65.6% of pre-tax income and 70.4% of income tax payments. Or in other words, foreign sales (i.e., sales of the foreign subsidiaries of Sony) of 68% generated only 34.4% of the income before tax and only 29.6% of 1989 and 1990 tax payments. Sony has stated publicly that its tax returns have been prepared in compliance with IRS regulations and that IRS routinely has audited those returns.

Source: House Ways and Means Committee and Sony's 20-F SEC filings for 1989 and 1990 been under IRS investigation for transfer pricing abuses.[35] Since IRS administrative proceedings are confidential, these reports cannot be verified. Tax court dockets disclose only litigation against Yamaha,[36] as of March 1992. IRS claims that Yamaha underreported its income and underpaid income taxes by a total of $133 million from 1977 to 1984, and is attempting, as well, to collect $13 million in assessed penalties.[37]

Not every low-performing, foreign-controlled corporation engages in tax evasion through transfer pricing. For example, concluding solely from Sony's 1989 and 1990 SEC filings that the company has engaged in tax evasion through transfer pricing could be unfair, even though goods sold abroad by Sony's foreign subsidiaries earned approximately two-thirds of pretax income, but accounted for less than one-third of income taxes paid. [*See* Box #2]. No two industries are alike. Firms within an industry may do business in very different ways. Conceivably, interest and depreciation, costs often associated with startups, or fluctuations in exchange rates, could account for the low tax rates of a given foreign owned company. Perhaps a particular Japanese company was less profit driven due to the low cost of capital.

Suggested responses to the problem have focused on governmental action. Graham and Krugman believe that widespread transfer price manipulation could represent an "important additional cost" of foreign direct investment in the United States, such that those who evaded taxes through transfer schemes should be "prosecuted to the full extent of the law."[38] Prestowitz summarizes the pernicious effect of transfer pricing abuses as follows:

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35. *Id.* at 298 (statement of Rep. Duncan Hunter from California).

36. Yamaha Motor Corp. U.S.A. and Subsidiaries v. Commissioner, No. 2674-88 (T.C. filed Feb. 11, 1988). *The Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income,* Mar. 8, 1971, U.S.-Japan, 23 U.S.T. 969, T.I.A.S. 7365 (1971), *reprinted in* 1973-1 C.B. 630 (hereinafter *"Convention on Double Taxation"*) may account for the lack of court action on transfer pricing cases involving "inbound" products. The *Convention on Double Taxation* gives a taxpayer the option to elect an arbitration procedure in which competent United States and Japanese tax authorities participate, "notwithstanding the remedies provided by the national laws of the contracting states." *Id.*, art. 2(f) & art. 25; Rev. Pro. 91-23, 1991-11 I.R.B. 18 *as clarified by* Rev. Pro. 91-26, 1991-17 I.R.B. 7. Corporations elect this arbitral process so often that "inbound" transfer pricing cases rarely see the light of day through litigation. Whether the *Convention on Double Taxation* provides an alternative means of dispute resolution or a mandatory condition precedent to IRS-initiated transfer price litigation is beyond the scope of this Article.

37. Robert Pear, *Investigating Foreign Companies For Tax Cheating,* N.Y. TIMES, Feb. 18, 1990, at A1.

38. GRAHAM & KRUGMAN, *supra* note 29, at 82-83.

> Components imported by the transplants from their parent companies in Japan are priced at levels almost equal to the cost of the completed vehicle imported fully built-up from Japan. This results in a significant profit drain from the United States entity in favor of the Japanese parent company.
>
> * * *
>
> As a consequence, United States operations have incurred huge losses with a proportionate surge in Japanese profits. No taxes are paid in the United States because of the large loss carry forwards booked by the transplants.
>
> * * *
>
> Behind this phenomenon is the *keiretsu* structure of Japanese industry. . . .[39]

To counter these practices, Prestowitz urges continuous IRS audits of *keiretsu* transfer pricing.[40] Increased IRS scrutiny would serve the interest of recouping lost tax dollars and would have an important deterrent effect. IRS activity, however, would produce no tangible result for American businesses already harmed by transfer pricing abuses.

V. RICO's Terrible Swift Double-Edged Sword

Conventional wisdom holds that the private sector has no remedy for injury- producing tax evasion or other *keiretsu* practices. The only time that a reported federal court opinion even mentioned the word "*keiretsu*" was during the 1981 to 1983 "television cases," which attempted unsuccessfully to use the antitrust laws to counter collusive Japanese business practices.[41] What is needed for a wrong perceived to be beyond the law is a solution not bounded by convention. Only RICO could provide a means for American companies injured by these practices to take matters into their own hands and recover compensation for damages sustained from any provable *keiretsu* tax evasion scheme. RICO should only be used in this way as a response to evidence that tax evasion through transfer pricing formed a conscious and effective part of an exploitative business strategy of a particular Japanese company.

Enacted in 1970, RICO has proven to be the most powerful law ever used against organized crime. Mafia trials around the country—in New

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39. PRESTOWITZ, *supra* note 31, at 57.

40. *Id.* at 113.

41. Although the subject is beyond the scope of this Article, RICO and mail fraud may be a possible response to some *keiretsu* anticompetitive practices beyond the reach of the antitrust laws and that do not necessarily involve tax evasion. *See* United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990) (prosecution under 18 U.S.C. § 1343).

York, Chicago, Kansas City, and Boston—as well as the government's successful effort to impose court supervision on the Teamsters Union and other labor unions, attest to its effectiveness.

The source of RICO's potency, at least partly, is that under RICO, the "pattern" of criminal activity is the crime. By using a common sense approach to the nature of organized crime—that is, collective criminality to further institutional Mafia interests rather than isolated crime committed for individual gain—RICO makes it a criminal offense to "engage in a pattern of racketeering activity,"[42] the very lifeblood of Mafia enterprise. RICO's application is not limited to organized crime[43] as Drexel Burnham and Michael Milken found out.[44]

Crimes prosecuted as part of a RICO pattern must include two or more specific criminal offenses, among them mail and wire fraud and money laundering.[45] Each mailing and wire transmission used in furtherance of a scheme to defraud and each money laundering transaction is a separate racketeering act. *Ipso facto* RICO's pattern materializes when two or more such offenses are linked in a way which transgresses RICO's bar against institutionalized crime.[46]

RICO does more than simply define criminality. RICO provides victims of racketeering with the civil right to hold racketeers accountable, whether or not they are certified mobsters. In the tradition of victims' rights, RICO permits those injured by a "pattern of racketeering activity" to recover treble damages and collect attorneys fees.[47] This monetary triple threat openly encourages private attorneys general[48] to police the mob, or those who behave like the mob.

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42. 18 U.S.C.A. § 1961(5) (West 1984 & Supp. 1991).

43. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

44. William Glaberson, *Racketeering Cases Are Popping Up in Several Varieties*, N.Y. TIMES, Feb. 18, 1990, at D6.

45. 18 U.S.C.A. § 1961(1)(B) (West 1984 & Supp. 1991).

46. In general, the elements of a RICO claim are as follows:

> (1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce.

Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). A threat of continued racketeering must also be present. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989).

47. 18 U.S.C.A. § 1964(c) (West 1984 & Supp. 1991).

48. *See* Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 151 (1987) (RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate.").

The civil side of RICO's two-edged sword is every bit as sharp as its criminal edge. Unfortunately, business has often found itself on the receiving end of nuisance civil RICO cases which accounts for much of its ongoing campaign to lobby for changes in RICO's civil side. On occasion, though, RICO exposure can be terminal. Hundreds of millions of dollars may be at stake, for example, when a public utility is alleged to have committed fraud during the utility rate making process.[49] The principle at work in the utilities cases also underlies the *keiretsu* tax evasion model—RICO can redress the fraudulent subversion of governmental processes.

Business' anti-RICO lobbying efforts do not take into proper account RICO's positive side. For example, IBM, in its well-known civil case against Hitachi, used RICO (with a notable assist from an FBI undercover investigation) to collect reportedly 300 million dollars in damages after the Japanese firm pleaded guilty to stealing IBM trade secrets.[50]

VI. RICO AND *KEIRETSU* TAX EVASION

RICO can be just as effective where the issue is not industrial espionage, but tax evasion. To use RICO in the *keiretsu* setting, two criteria must be met: first, a Japanese company must have sold products or services at higher than their real market value to a related United States company and, second, this must have been done, at least in part, with the intention to evade the payment of federal or state income taxes that would have been due otherwise had these products or services been priced at their true market value.

To understand the law's application in this setting, the assumed components of a tax evasion scheme must be reduced to their simplest terms. A foreign parent company provides goods or services to a related United States based entity at artificially high prices, thereby reducing United States taxable income. The entity transfers funds to the Japanese parent to pay for those goods or services, files corporate tax returns and then pays lower United States taxes as a result of the shift of profit from the

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49. *See, e.g.,* Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1405 (E.D.N.Y. 1988), *aff'd in part and rev'd in part,* 907 F.2d 1295 (2d Cir. 1990).

50. *See* International Business Machines Corp. v. Hitachi Ltd., No. C-82-4976 (N.D. Cal. filed Sept. 16, 1982); United States v. Nakazawa et al., No. 184 MB (N.D. Cal. filed June 22, 1982); United States v. Kanzuma, No. 187 MB (N.D. Cal., filed June 22, 1982). Mike Van Deelen, Analyst for Ranscher Pierce Refshes, Inc., Investest Report No. 400510 (Dec. 6, 1983) *available in* LEXIS, Company Library, RPR File. Court records, however, did not reveal the precise settlement terms.

United States to Japan. American competitors are placed at a disadvantage and are hurt in some quantifiable way. If these assumptions are proved true in a given case, then RICO's "pattern of racketeering activity" would consist of mail or wire fraud and money laundering violations.

Mail or wire fraud is simply a scheme to defraud furthered by the use of the mails or wire transmission.[51] In the *keiretsu* model, the United States government and American businesses are generally both the intended and actual victims of this racketeering scheme. The IRS loses tax dollars and businesses lose market share and profits.

Money laundering is the conduct of[52] or attempt to conduct:[53] financial transactions involving the proceeds of specified unlawful activity[54] (in this instance, mail or wire fraud); the international transportation of the proceeds;[55] or monetary transactions in property constituting or derived from the proceeds of a criminal offense.[56] The profit-shifting (representing fraudulently concealed taxable income) from a foreign controlled corporation to Japan, Inc. could be viewed as laundering transactions and transportation. Using RICO this way privatizes enforcement of public tax policy, a controversial and untested idea.[57]

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51. 18 U.S.C.A. §§ 1341, 1343 (West 1984 & Supp. 1991).
52. 18 U.S.C.A. § 1956(c)(2) (West 1984 & Supp. 1991).
53. 18 U.S.C.A. §§ 1956(a)(1)-(2), 1957(a) (West 1984 & Supp. 1991).
54. 18 U.S.C.A. §§ 1956(a), (c)(7) (West 1984 & Supp. 1991).
55. 18 U.S.C.A. § 1956(a)(2).
56. 18 U.S.C.A. § 1957(a).
57. Using civil RICO to address federal income tax evasion unquestionably is novel. The Fourth, Seventh, Eighth, and Ninth Circuits appear prepared to permit the use of RICO premised on mail or wire fraud in tax fraud cases. *See* United States v. Computer Sciences Corp., 689 F.2d 1181, 1187-88 n.13 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); United States v. Miller, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), *cert denied*, 430 U.S. 930 (1977); United States v. Mirabile, 503 F.2d 1065, 1066-67 (8th Cir. 1974), *cert. denied*, 420 U.S. 973 (1975); United States v. Flaxman, 495 F.2d 344, 348-49 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). The Second Circuit called it a "disputed issue." United States v. Regan, 937 F.2d 823, 827 (2d Cir. 1991). *But see* United States v. Porcelli, 865 F.2d 1352 (2d Cir. 1989) (affirming RICO conviction premised on state tax evasion).

United States Department of Justice policy permits the use of RICO in criminal tax fraud cases if "exceptional circumstances" exist "when individuals, through no deliberate fault of their own, were demonstrably victimized as a result of a defendant's fraudulent scheme and use of a [RICO] mail fraud charge is necessary to achieve some legitimate, practical purpose like securing restitution for the individual victims." DEPARTMENT OF JUSTICE MANUAL § 6-4.211(1) (Supp. 1990-1). This is the precise effect of a *keiretsu* tax evasion scheme.

Even if civil RICO does not give victims a remedy for federal income tax fraud, no

VII. INTENT IS THE KEY

The most difficult element to prove in the *keiretsu* transfer pricing context would be state of mind or intent. The key question would be: Did the transfer pricing have an economic justification, or was it intended to shift profits out of the United States for the purpose of reducing taxable income? Any willful failure to report income, knowing it was taxable or possessing an intent to evade taxes and defraud the government would establish this type of RICO violation.[58]

In any RICO transfer pricing case, the issue of intent would first turn on whether the transfer price was too high. A *keiretsu's* deliberate decision not to use market value (which the IRS judges by what it calls the "arms length" standard)[59] in establishing transfer price makes a compel-

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such limitation exists with respect to state tax fraud. United States v. De Fiore, 720 F.2d 757 (2d Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); United States v. Brewer, 528 F.2d 492 (4th Cir. 1975); United States v. Melvin, 544 F.2d 767 (5th Cir.), *cert. denied*, 430 U.S. 910 (1977); Illinois Dep't of Revenue v. Phillips, 771 F.2d 312 (7th Cir. 1985); United States v. Mirabile, 503 F.2d 1065 (8th Cir.), *cert. denied*, 420 U.S. 973 (1975). Since a *keiretsu* tax evasion scheme is likely to have state tax authorities as ancillary victims, as well as the IRS, RICO's applicability to federal income tax fraud is of little consequence. All that matters is that tax evasion (whether federal or state) injured a United States company. *See also* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 908 n. 153 (1990) ("Retailers that have to compete with tax cheating competitors are put at a substantial and often disabling competitive disadvantage. This problem also implicates RICO's core concerns. Unfair competition, rooted in the profits of illegal behavior, goes to RICO's basic rationale.").

Some states tax multinational corporations based on profits derived from within the state. GRAHAM & KRUGMAN, *supra* note 29, at 135. Others, such as California, Florida, New York, and Massachusetts, utilize what is known as a "worldwide unitary taxation" formula permitting taxation of profits from in-state operations wherever derived. *Id.;* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983). Under either approach, deliberate understatement of income through transfer pricing abuses could result in evasion of state income taxes.

58. *See* United States v. Bishop, 412 U.S. 346, 360-61 (1973); United States v. Gelb, 700 F.2d 875, 879 (2d Cir.), *cert. denied*, 464 U.S. 853 (1983); *see also* 18 U.S.C.A. §§ 1341, 1343, 1956(1)(A)(ii); I.R.C. §§ 7201, 7206 (West 1988).

59. The Internal Revenue Code allows the IRS to allocate income deductions between commonly controlled taxpayers "to prevent evasion of taxes or clearly to reflect the income" of those taxpayers. I.R.C. § 482 (West 1988). The standard used for making those allocations is called the arm's length method, that is, an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer. Treas. Reg. § 1-482-1(b)(1) (1990). Under the regulation, a "controlled" taxpayer means "any one of two or more organizations, trades or businesses owned or controlled directly or indirectly by the same interests". Treas. Reg. § 1.482-1(a)(4).

ling case for an intent to evade taxes. Paradoxically, a RICO transfer pricing case would turn on the purposeful use of a false valuation, a simple fact, though not so simple to prove. It would not turn on the complex tax formulation used in IRS transfer pricing civil audits, which seeks to allocate taxable income between a foreign parent and its United States subsidiary. In any event, these income allocation methods are intended "to prevent evasion of taxes," not to be used as a means to commit tax evasion.[60]

False book entries or alterations, phony invoices, a consistent pattern of under-reporting large amounts of income,[61] or any conduct likely to mislead or conceal,[62] would justify an inference that the purpose was to evade taxes. That transfer pricing did, in fact, reduce United States taxable income also would be relevant evidence of intent. Laundering profits through third country tax havens also would tend to prove a tax evasion motive.[63]

The IRS uses four methods to determine the appropriate transfer price: the controlled price method based on comparable sales, the resale price method based on an appropriate resale profit margin, the cost profit method based on a cost plus analysis, and a residual category, usually based on financial ratios such as return on equity, when the first three methods do not apply. Treas. Reg. § 1.482-2(e)(1)-(4) (1990); *see, e.g.*, Eli Lilly & Co. v. Commissioner, 84 T.C. 996 (1985), *aff'd in part and rev'd in part*, 856 F.2d 855 (7th Cir. 1988).

On January 27, 1992, the Treasury Department proposed new transfer pricing regulations that clarify the arm's length standard as follows:

> In determining whether controlled taxpayers have dealt with each other at arm's length, the general principle to be followed is whether uncontrolled taxpayers, each exercising sound business judgment on the basis of reasonable levels of experience (or, if greater, the actual level of experience of the controlled taxpayer) within the relevant industry and with full knowledge of the relevant facts, would have agreed to the same contractual terms under the same economic conditions and other circumstances.

The proposed regulations added the following definitions:

> 1.482-1(a)(4) The term "uncontrolled taxpayer" means any one of two or more organizations, trades, or businesses not owned or controlled directly or indirectly by the same interests.
>
> (5) The terms "uncontrolled group" and "group of uncontrolled taxpayers" means the organizations, trades, or businesses not owned or controlled directly or indirectly by the same interests.

Prop. Treas. Reg. § 1.482-1(b)(1) *available in* LEXIS, Fedtax Library, TNT File. The comment period on the proposed regulations ends May 31, 1992.

60. I.R.C. § 482 (1988).

61. *See* United States v. Gardner, 611 F.2d 770 (9th Cir. 1980).

62. *See* Spies v. United States, 317 U.S. 492, 499 (1943).

63. The precise direct monetary benefit to Japan Inc. of a transfer pricing scheme could be determined through an analysis of the ultimate repatriation of the laundered

VIII. THE LONG ARM OF RICO

United States courts have jurisdiction over United States subsidiaries of foreign companies, but the issue is whether RICO can reach the Japan-based controller of a *keiretsu* tax evasion conspiracy. In other words, do United States courts have jurisdiction over the Japanese parent corporation or partner? RICO can reach beyond United States borders through a principle of international law known as extraterritorial jurisdiction,[64] but only if some racketeering activity took place or had a substantial effect in the United States.[65] RICO's global reach is particularly clear when racketeering involves money-laundering because Congress explicitly gave federal anti-money laundering laws an international scope.[66] Therefore, the foreign parent of a United States subsidiary could be a defendant in a civil RICO action. Similarly, relevant information may be secured from the Japanese parent of a United States-based subsidiary through the discovery provisions of the Federal Rules of Civil Procedure since the court would have *in personam*[67] jurisdiction over the

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taxable income to Japan or its subsequent use outside of Japan. Tax treatment in Japan of such funds repatriated through a third nation is beyond the scope of this Article.

64. James D. Harmon, Jr., *United States Money Laundering Laws: International Implications*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 1, 18-23 (1988).

65. Alfadda v. Fenn, 935 F.2d 475 (2d Cir. 1991) (subject matter jurisdiction); *see also* 18 U.S.C.A. § 1965.

Congress enacted § 6038(C) to give the IRS the power to force foreign parent corporations to produce records dealing with transfer pricing. I.R.C. § 6038(C) (West 1990). *See* H.R. REP. 881, 101st Cong., 2d Sess., 318-20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2320-32. This creates no independent private right to secure these records. RICO does not provide for international service of process. Jurisdictional issues with respect to the production of documentary materials located outside of the United States is beyond the scope of this Article.

66. 18 U.S.C.A. §§ 1956(f), 1957(d) (West 1984 & Supp. 1991).

67. Courts find *in personam* jurisdiction over foreign parents of United States subsidiaries, branches, or agencies by virtue of the parent's activities in the United States. Matter of Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir. 1982), *cert. denied* 463 U.S. 1215 (1983); In re Grand Jury Proceedings, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom* Bank Of Novia Scotia v. U.S., 462 U.S. 1119 (1983); United States v. Toyota Motor Corp., 561 F. Supp. 354 and 569 F. Supp. 1158 (C.D. Cal. 1983). Effective service was made on the subsidiary or branch office in the United States in these cases.

Courts first determine whether there is statutory authority for the *in personam* jurisdiction. In a transfer price audit IRS sought certain books and records located in Japan. Service on Toyota, Japan was made on Toyota, U.S.A. in California. The court concluded that Toyota Japan could be "found" within the meaning of the IRS service of process statute, I.R.C. § 7604(a), for jurisdictional purposes in Torrance, California, where its subsidiary was located. *Toyota Motor Corp.*, 561 F. Supp. at 357. According to foreign parent, or through letters rogatory.[68]

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press reports, IRS claimed that Toyota together with Nissan Motor Corp. owed one billion dollars in federal income taxes. Toyota and Nissan reportedly settled for hundreds of millions of dollars to be paid to IRS. Both Toyota and Nissan were reportedly reimbursed by the Japanese government for the deficiency. *Japan, U.S. Agree to Prevent Double Taxation,* Japan Economic Newswire, Oct. 31, 1988 *available in LEXIS,* Nexis Library, Jeni File; Gary Klott, *Texaco Case Part of Growing Crackdown,* N.Y. TIMES, Jan. 15, 1988, p.4.

RICO's service of process provision contains language similar to that of I.R.C. § 7604(a), which was at issue in *Toyota Motor Co.* RICO process "may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." 18 U.S.C.A. § 1965(d). Given RICO's purposefully broad scope, its public interest function and its role as an adjunct to law enforcement, courts should resolve *in personam* jurisdictional issues in RICO transfer pricing as they have done in criminal, grand jury and IRS summons enforcement proceedings. *E.g.,* Matter of Marc Rich & Co., A.G.; In re Grand Jury Proceedings. Service on the United States subsidiary in the United States should be sufficient regardless of its status as a distinct corporate entity. Toyota Motor Co., 561 F.Supp. at 360.

Due process permits such an approach with respect to U.S. based *keiretsu* operations. *See* Lisak v. Mercantile BanCorp., Inc., 834 F.2d 668, 672 (7th Cir. 1987) (RICO contains an explicit grant of nationwide service which does not violate the Due Process clause). A foreign corporation that has purposefully delivered "its products into the stream of commerce with the expectation that they will be purchased by consumers" in the United States is within the jurisdiction of its courts. World-Wide Volkswagen Corp. v. Woolson, 444 U.S. 286, 297-98 (1980).

Such jurisdiction may be defined as either "general" or "limited" depending upon how substantial and systematic the contacts are with the forum. General jurisdiction permits *in personam* jurisdiction even if the cause of action is unrelated to the defendant's forum activities. Limited jurisdiction arises from activity in the forum related to the cause of action. Data Disc., Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1287 (9th Cir. 1977); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 413 (9th Cir. 1977). Contacts with the United States, not any individual state, should be determinative. *See* Marc Rich & Co., A.G., 707 F.2d at 667 (The court did not examine New York's long arm statute because "[t]he subject of the grand jury's investigation is the possible violation of federal revenue statutes, and the right to inquire of appellant depends upon appellant's contacts with the entire United States, not simply the State of New York"). *Toyota Motor Corp.* found limited jurisdiction in the "purposeful exploitation of the forum by Toyota, Japan." 561 F. Supp. at 359. The court concluded that "there is no obstacle to jurisdiction over the foreign parent if it uses its subsidiary as a marketing conduit." *Id.* United States courts should exercise jurisdiction under either theory—limited or general jurisdiction—when faced with transfer pricing abuses linked to access to United States markets.

68. A letter rogatory is a formal request by a United States court to a foreign court seeking the performance of some judicial act. James P. Springer, *An Overview of International Evidence And Asset Gathering in Civil and Criminal Tax Cases,* 22 GEO. WASH. J. INT'L L. & ECON. 277, 312 (1989). The procedure is fraught with time delays and dependent upon foreign and domestic bureaucracies and foreign judicial procedures over which the United States courts and litigants have no control. *Id.* at 312-13. The

IX. DAMAGES AND PROOF

Proving a RICO violation, predicated upon tax fraud through transfer pricing is only half the battle. An American competitor still must prove that it sustained, either directly or indirectly, damages "by reason of" a tax evasion racket.[69] The Supreme Court recognizes that RICO damages include "competitive injury,"[70] or as Justice Marshall explained it, loss to "competitors and investors whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market."[71] In *Sedima S.P.R.L. v. Imrex Co.*, the Supreme Court postulated at some length those scenarios that would produce "competitive injury" cognizable under RICO. These seem to anticipate application to *keiretsu* racketeering as follows:

> If a "racketeer" uses "[t]hreats, arson and assault [or other racketeering conduct] . . . to force competitors out of business and obtain larger shares of the market" . . . [t]he pattern of those acts is designed to accomplish, and accomplishes, the goal of monopolization. Competitors thereby injured or forced out of business could allege "RICO" injury and recover damages for lost profits.
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> * * *
>
> [I]f the enterprise conducts its business through a pattern of racketeering activity to enhance its profits or perpetuate its economic power, competitors of that enterprise could bring a civil RICO action alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts . . . .
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> * * *
>
> Alternatively, if the infiltrated business operates a legitimate business to a businessman's disadvantage because of the enterprise's strong economic base derived from perpetration of predicate acts, the competitor could bring civil RICO action alleging injury to his competitive position.[72]

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letters rogatory process has been streamlined and standardized in civil and commercial disputes by the *Convention on the Taking of Evidence Abroad in Civil & Commercial Matters, opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *reprinted in* USCS Conventions, Taking Evidence Abroad Conv. (1983). To date, Japan is not a signatory to that convention.

69. 18 U.S.C.A. § 1964(c).

70. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n.15 (1985); *see also*, Holmes v. Securities Investor Protection Corp., No. 90-727, 1992 WL 52846, at *8 n.20 (U.S. Mar. 24, 1992) (plaintiffs may recover damages under RICO for injury proximately caused by the defendant, which determination is made on a case by case basis). In a concurring opinion, Justice Scalia proposed a "zone of interests" test that would "vary according to the nature of the criminal offenses upon which those causes of action are based." *Id.* at *14.

71. *Sedima*, 473 U.S. at 519 (Marshall, J., dissenting).

72. *Id.* at 521-22 (Marshall, J., dissenting). The majority in *Sedima* adopted a broader view, concluding that recoverable RICO damages include "but are not limited to, the sort of competitive injury for which the dissenters would allow recovery." *Id.* at 497, n. 15.

BOX NO. 3

A SMOKING GUN

What follows is a copy of a FAX to a Japanese parent automobile company from a U.S. subsidiary responding to a complaint from the parent that the subsidiary was making too much profit in the U.S.

(TRANSLATION)

[redacted]

[redacted] - (illegible)

[redacted]

To: [redacted]

Dated: Dec. 28, '82.

From: [redacted]

Subject: Price of 83 Models (file)

Re 12/28 fax from Overseas Sales Division.

The kind of letter which one doesn't care to read so close to the year's end or that something which one has always been fearing might happen, has finally arrived.

[redacted] announcement that it was expecting increased earnings for next term (or this term, more correctly speaking), gives us the impression that it is determined to maximize profits in the U.S. market. Apparently, [redacted] has a strong aversion to the [redacted] companies making excessive profits. This was expressed quite clearly by Mr. [redacted] who told us quite bluntly that the biggest problem with [redacted] is that we are making too much profit. Mr. [redacted] also relayed to us a message from Mr. [redacted] that he wanted us to sell more trucks. Any way, frankly speaking, we cannot understand why they have sent us this long fax.

In the past one year, we have been screaming at them every time they wanted to raise the prices. Is this a sort of pre-emptive strike to discourage our attempt to obtain a price reduction? Or are they proposing it to [redacted] importers? I have not had a chance to talk with [redacted]. In the meantime, I am still wondering how I should respond. If you have any suggestions, please let me know.

In other woreds, they are telling us that they will not talk about any price reduction and that we should put up with the deficit and spend money for sales promotion of trucks.

Should we just meekly do what we are told to do without complaining or should we assert that we believe to be right? Please give us your guidance on this point.

At least, we would like to reserve to ourselves the right to raise the retail price to maintain our profitability.

We plan to call on [redacted] in early March, the reason being:

1) That our '82 earnings and the '83 January earnings are expected to be positive, which make our presentations less convincing. Besides, our presentation materials won't be ready until after the end of January.

2) Both sides are likely to be very busy.

3) It may be better to go in March with the deficit figures of February in hand.

Your comments are invited.

We would like to take this opportunity to thank you for your cooperation throughout the year and wish you a happy New Year. Say hello to all.

Sincerely,

P.S. The seal on the fax is that of Mr. [redacted] or of Mr. [redacted]. It's illegible.

The FAX, written in Japanese, was given to the IRS by the subsidiary which claimed it meant nothing. Upon translation, IRS concluded that its purpose was to increase earnings in Japan by raising the transfer price of cars to the United States. Any such FAX or memo would be evidence of a tax evasion intent because the transfer price was set without any regard to the intrinsic value of the cars sold to the U.S. subsidiary. The identities of the companies involved have not been disclosed.

Source: House Ways and Means Committee and Internal Revenue Service

The measure of damages could be gain to any proven tax evader computed as enhanced revenues or, possibly, loss to the IRS resulting from a *keiretsu* tax scheme, or consequent loss to a particular American business. Consistent with the "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' "[73] ultimate recovery could be multiples of lost tax dollars. Little beyond this is certain. RICO damages theory is early in its evolution with little precedent. Theory is one thing; proof quite another. As is true in any case, a RICO violation may be proven by either direct or circumstantial evidence. The best cases would rely on both. The primary facts to be proven would be the tax evasion scheme of Japan Inc. and its United States based subsidiary and competitive injury sustained as a result of racketeering, not some other cause like management incompetence or product inferiority.

Direct evidence is likely to come only from insiders or former insiders. Whistleblowers may come forward given the incentive from federal bounty hunter laws of sharing on a percentage basis (possibly up to twenty-five percent) in any recovery to the IRS resulting from detection of a transfer pricing tax evasion scheme.[74] The existence of a single memorandum, or its destruction or alteration, could prove devastating. [See Box #3] Sophisticated investigative techniques may be required to develop such evidence before the commencement of a case, because pretrial discovery remains the only other, less efficient, option for developing insider information.

Given the government's tight control over information held by the IRS,[75] alternative means must be used to determine the tax treatment of

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73. *Id.* at 498 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

74. A person who provides information of tax evasion is eligible to receive a reward "normally not to exceed" ten percent of taxes, penalties, and fines then collected as a result of the information. I.R.C. § 7623 (West 1988); Treas. Reg. § 301.7623-1 (1990). One who brings a civil fraud suit for treble damages on behalf of the government under the False Claims Act based on conduct before October 27, 1986 may be entitled to 25 percent of any recovery by the government. 31 U.S.C. §§ 3729(e), 3730(d) (West Supp. 1991). A number of states have similar privateering laws.

To give more incentive to whistleblowers, Congress should amend the False Claims Act to make it applicable to post-October 27, 1986 conduct rising to the level of tax evasion in violation of I.R.C. § 7201 that is committed by foreign-controlled corporations through transfer pricing abuses.

75. IRS obtains information from three sources: taxpayers, third parties, and other tax authorities. Whether any of this information could be available to a private litigant in a civil RICO action depends on the relevant international treaty, Internal Revenue Code and Federal Rules of Civil Procedure provisions. The *Convention on Double Taxation* permits IRS to exchange information for the purpose of "preventing fraud or fiscal evasion". *Convention On Double Taxation, supra* note 36, art. 26(1). Through this infor-

inflated transfer prices. The most obvious source of evidence of *keiretsu*

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mation sharing process IRS may already have secured evidence of *keiretsu* transfer pricing abuses between Japanese parents and their United States subsidiaries. IRS may disclose such information in court proceedings:

> The competent authorities of the Contracting States shall exchange such information as is pertinent to carrying out the provisions of this Convention or preventing fraud or fiscal evasion in relation to the taxes which are the subject of this Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any persons other than those (including a court or administrative body) concerned with assessment, collection, enforcement or prosecution in respect of the taxes which are the subject of this Convention.

Convention On Double Taxation, supra note 36, art. 26. The secrecy provisions of the *Convention On Double Taxation*: "[do] not prohibit disclosure in the course of a *court proceeding*" (emphasis added). Technical Explanation concerning the *Convention on Double Taxation* prepared by the Staff of the Joint Committee on Internal Revenue Taxation for the Senate Foreign Relations Committee, appended to statement by Edwin S. Cohen, Assistant Secretary of the Treasury, 1973-1 C.B. 630, 668.

Apart from the *Convention on Double Taxation*, the Internal Revenue Code provides guidelines for the disclosure of IRS information. I.R.C. § 6103(a) (West Supp. 1991) sets forth the "general rule" that "returns" and "return information", I.R.C. § 6103(b)(1), (2) (West Supp. 1991), are confidential and may not be disclosed except, *inter alia,* in a federal or state judicial or administrative proceeding "pertaining to tax administration". I.R.C. § 6103(h)(4)(A) (West Supp. 1991). *See also, United States v. Mangan,* 575 F.2d 32, 40 & n.9 (2d Cir. 1978) ("This language does not evidence an intention to adopt a restrictive interpretation of 'tax administration'."). At least one court has determined that I.R.C. § 6103 does not bar discovery of IRS tax information in private civil non-tax cases. *See, McSurley v. McAdams,* 502 F. Supp. 52, 56 (D.D.C. 1980) ("The legislative history surrounding § 6103 indicates that Congress simply never addressed the issue of access to tax information by private parties in non-tax civil cases, pursuant to court discovery orders. . .[j]udicial supervision of the discovery process will ensure that access is far from wholesale, moreover, the institution of properly tailored protective orders will minimize any resulting invasion of privacy").

Accordingly, in the event that IRS should commence a civil or criminal action which parallels a private civil RICO action, neither the *Convention on Double Taxation* nor I.R.C. § 6103 would bar disclosure of any IRS information regardless of its origins.

In the absence of such a parallel IRS-initiated action, disclosure of foreign source information would depend on whether a private civil RICO action standing alone, was found to be: (a) a court proceeding "concerned with assessment, collection, enforcement or prosecution in respect of [income taxes within the meaning of the Convention]", or (b) a federal judicial proceeding "pertaining to tax administration" within the meaning of I.R.C. § 6103, or (c) that discovery within the RICO action is permitted under the Federal Rules of Civil Procedure. Of course, disclosure of other non-foreign source information would be premised solely on meeting the requirements of I.R.C. § 6103 or the discovery provisions of the Federal Rules of Civil Procedure.

Neither the *Convention on Double Taxation* nor the Internal Revenue Code should prevent the disclosure of tax information in a private civil RICO action premised on transfer price manipulation. By definition, such a civil RICO action requires proof of tax evasion. Therefore, it is "concerned with" and "pertain[s] to" the assessment and admintransfer pricing practices is previous IRS transfer pricing audits and cases. The problem of access to tax information could be alleviated were the IRS to join the RICO suit in order to recover lost taxes, a prospect which would seem likely given allegations of massive tax fraud.[76]

Circumstantial evidence is often as compelling as direct evidence. In the tax evasion scenario posited here, expert testimony could establish the causal link between racketeering and damages sustained by an American competitor of a *keiretsu*, in much the same way as is done in dumping cases.[77] Such things as reduced profits and loss of market share are relevant. For example, economist Prestowitz determined that United States car makers operate with a cost disadvantage of two thousand dollars per car as compared with the Japanese auto industry.[78] If this cost differential is partly the product of tax evasion, then this evidence would support RICO's damage causation element. A reasonable hypothesis is that loss of price advantage produced a decline in market position.

Chronology, the relation of things in time, is especially important. If goods or services were sold to a foreign-controlled United States based corporation at a transfer price determined only at fiscal year-end, then the inference would be that taxes, not economics, determined that price.

X. Injunction, Risks, and Political Blindsiding

An injunction may be used to secure an immediate cessation of transfer pricing abuses. An injunction is a front-loaded strategy intended to produce real market results at the outset and to protect American competitors from further loss during the pendency of the case. If the evidence shows a likelihood of prevailing and a threat of irreparable harm, then a

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istration of income taxes. This is especially so since a judgment could have a preclusive effect through collateral estoppel with respect to the issue of tax evasion, thus giving IRS a direct stake in the outcome of the case. *See United States v. Mendoza,* 464 U.S. 154, 158 (1984); *Allen v. McCurry,* 449 U.S. 90, 94-95 (1980) (offensive collateral estoppel).

76. One court has held that the government has no right of action for treble damages under RICO. United States v. The Bonano Organized Crime Family, 839 F.2d 20 (2d Cir. 1989). The government's participation may be based on a theory other than RICO.

77. Dumping cases are handled by the International Trade Administration of the United States Department of Commerce and the International Trade Commission. In a bifurcated process, a determination is made whether an import is being sold below fair market value, such that United States industry is injured or threatened with injury. *See* 19 U.S.C.A. § 1673(a)-(g) (West 1980 & Supp. 1991); 19 C.F.R. §§ 201, 207 (1990). The result is the imposition of antidumping duties on imported goods, not the damages to injured United States companies that RICO might provide.

78. Prestowitz, *supra* note 31, at 3.

federal court could enjoin[79] the Japanese company and its United States counterpart from setting artificially high transfer prices. This would have the significant advantage of testing the theories upon which the case is premised, producing an early result for an American competitor, and sending an unequivocal message to corporate Japan.

All litigation has risk. The use of RICO in the *keiretsu* setting is novel, and a court could impose monetary sanctions against the plaintiff, but only if the legal theory is found by the court to be frivolous and unsupported by the facts.[80] The best defense to sanctions is a complaint thoroughly grounded on solid investigation. The litigation would be massive and likely to provoke a full retaliatory response, including counterclaims, because of what is at stake. If an injunction were granted, a court might order a bond to be posted.[81] The need for a bond is questionable, however, given that an injunction would only direct that transfer prices have an economic, not tax, justification. Japan Inc. would be hard pressed to claim the need for a bond, when the injunction merely ordered it not to evade taxes.

Litigation would occur in a highly charged political context. Japan Inc., using its considerable lobbying resources in Washington,[82] is likely to pressure the Department of Justice and the IRS not to cooperate with the suit or actively interfere with its progress. The Department of State would be likely to object to a RICO suit as interference with foreign policy objectives. Free trade advocates who would view this as a diplomatic rather than a business problem would also likely attempt to prevail. If successful, their efforts would be evident in the absence of overt government cooperation with any RICO action.

The free trade advocates make the faulty assumption that corporate Japan is a trading partner. It is not. Trade implies reciprocity and give-

79. Opinion apparently diverges on whether injunctive relief is available under RICO or through a federal court's general equitable powers. *Compare* Aetna Casualty & Sur. Co. v. Liebowitz, 570 F. Supp. 908 (E.D.N.Y. 1983) (equitable power), *aff'd on other grounds*, 730 F.2d 905 (2d Cir. 1984) and In re Fredeman Litigation, 843 F.2d 821 (5th Cir. 1988) (RICO statutory authority) *with* Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1080-89 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) (holding that RICO's legislative intent does not permit the granting of equitable relief). Federal courts also retain the power to enjoin the commission of a crime. In re Debs, 158 U.S. 564, 593 (1895).

80. FED. R. CIV. P. 11.

81. *See, e.g.*, FED. R. CIV. P. 65(c); Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961).

82. *See* PAT CHOATE, AGENTS OF INFLUENCE, chs. 4, 5 (1990); John B. Judis, *The Japanese Megaphone*, THE NEW REPUBLIC, Jan. 22, 1990, at 20, 22.

and-take, concepts that trade deficit figures show are nearly absent in United States-Japan business. Responding to predatory practices with the concept of free trade is like regarding freedom as an adequate response to aggression. If government chooses not to intervene, then it should allow the private sector to present its best case. This requires some form of cooperation.

Because of political overtones, the choice of venue may be as critical as would be the choice of courts.[83] State courts have concurrent jurisdiction over civil RICO cases, which means that such cases may be brought in state, as well as in federal court.[84] Many states have their own civil RICO statutes.[85] The state court option should not be overlooked since local courts and juries would probably be more responsive to localized economic conditions and less concerned with international politics.

XI. THE COLOR TELEVISION CASES

Any RICO action must take into account the political context in which it would occur. Prior experience shows that Japan Inc. has no reservation about using political clout when its interests are threatened by litigation. In the early 1980s American television manufacturers led by Zenith unsuccessfully used the antitrust laws to try to block what they saw as a conspiracy by Japanese firms to drive them out of business. Allegedly, the Japanese did this by selling television sets in Japan at artificially high prices and then using the profits to finance the sale of televisions at artificially low prices in the United States. In its brief to the United States Supreme Court in the antitrust case, the Japanese government admitted imposing controls on the exportation of Japanese goods, which the American TV industry alleged were unlawful.[86] The Justice Department intervened and actually supported the Japanese position that its companies merely observed Japanese government regulations limiting the price, quantity, and other conditions of export from Japan to foreign markets. This is known as the "foreign sovereign compulsion defense." The Justice Department found that there was "no evidence of concerted predatory conduct intended to destroy and supplant

83. A RICO action may be brought in any district in which a defendant "resides, is found, has an agent, or transacts his affairs." 18 U.S.C.A. § 1965(a).

84. Tafflin v. Levitt, 493 U.S. 455 (1990).

85. New Jersey, Ohio, Indiana, Washington, and Illinois are among those states with their own civil RICO statutes. Blakey & Perry, *supra* note 56, at 988-1011 (detailing in chart form federal and state RICO legislation).

86. Brief of the Gov't of Japan at 3, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *available in* LEXIS, Genfed library, Briefs File.

the [United States] color TV industry," and that the "simple economic illogic" of such a plan disproved its existence.[87]

The Supreme Court, in a five to four vote, accepted the Justice Department's "economic illogic" theory,[88] but not before hearing the position of the government of Japan in a related dumping case.[89] The Court did not decide the "foreign sovereign compulsion defense" issue. In the related dumping case, the United States Solicitor General presented to the Court, at the request of the State Department, a letter that originated from the Japanese government. The letter warned that a decision against Japan's interests would damage United States-Japan trade and "adversely affect world trade generally."[90] The submission of this letter was so far out of line that Justice Blackmun asked the Solicitor General whether the letter was "a threat to this Court" and whether he was doing his "best to uphold the position espoused by the government of Japan."[91]

In retrospect, the Justice Department position supporting Japan Inc. would be merely quaint and dated, were it not for the resulting destruction of the American color television industry. Zenith remains the only major United States based firm producing color televisions, maintaining only one television and one picture tube plant in the nation.[92] The bulk of Zenith's television manufacturing now occurs in Mexico.[93]

The high-powered lobbying apparent in the television cases may be in the process of being repeated. United States Customs Service auditors reportedly have concluded that Honda owed about 20 million dollars in tariffs on 1989 and 1990 model cars imported into the United States from Canada.[94] Although these cars could be imported duty-free provided that at least half of the value added to them originated in North

87. Brief for the United States at 18, Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), *available in* LEXIS, Genfed library, Briefs File.

88. Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

89. Zenith Radio Corp. v. United States, 437 U.S. 443 (1978).

90. CHOATE, *supra* note 82, at 93.

91. *Id.* at 93-94. In the related dumping case, United States television manufacturers also lost by unanimous vote in their attempt to force the Department of Treasury to collect 382 million dollars in assessed, but uncollected, duties on imported color televisions. Presumably after much lobbying, Japanese companies paid only 16 million dollars. *Id.* at 97.

92. GRAHAM & KRUGMAN, *supra* note 29, at 52-53.

93. *Id.*

94. The United States Customs Service denied the author's Freedom of Information Act request for the Honda audit report and a memorandum of the Customs Commissioner approving their findings. Although the author appealed the decision, the United States Customs Service affirmed its original decision on February 4, 1992.

America, customs auditors concluded the actual North American content was only forty percent. The Customs Commissioner originally decided to initiate collection action on the tariff, then concluded that the matter needed further investigation after a visit from Honda's attorney, a former Treasury Department general counsel,[95] then finally upheld the initial findings of Customs auditors.[96] Japan's minister of International Trade and Industry characterized Custom's action as "discrimination against a Japanese company."[97] Honda has announced its intention to appeal.

RICO could neutralize Japan Inc.'s political operatives. Given the RICO statute's purposefully broad scope, it appears unlikely that the foreign sovereign compulsion defense could defeat a RICO action premised on tax evasion. The counterargument is simple; the direction of a foreign government is no defense to tax evasion.[98]

XII. CONCLUSION

Evidence of tax-dodging by Japanese controlled corporations through transfer pricing techniques is compelling. Billions in tax revenues have been lost. American business has also paid a price. All that is left to do is a case-by-case analysis to fix individual responsibility. RICO's "well-aimed light" should be able to do that.

Someone else will argue later—it is sure to be an American lawyer—that what I propose is no solution at all, and nothing more than a lawyer's proscription for high-intensity conflict. To the contrary, this is a battle that should be fought to begin to change the order of things. Even

95. Paul Magnusson et al., *Honda Is It An American Car?*, BUS. WK., Nov. 18, 1991, at 108.

96. Robert Pear, *Duties Set on Honda Over Parts,* N.Y. TIMES, Mar. 3, 1992, at D1.

97. *U.S. Move on Honda Triggers Complaints by Japanese Official,* WALL ST. J., Mar. 4, 1992, at 6.

98. In a true assertion of the foreign sovereign compulsion defense, a defendant admits its own conduct has been unlawful, but argues that dismissal is warranted because a foreign government compelled the unlawful conduct. *See* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3rd Cir. 1979); Interamerican Ref. Corp. v. Texaco Maracaibo, 307 F. Supp. 1292, 1297-98 (D. Del. 1970). Essentially, courts are asked to abstain from exercising jurisdiction, a dubious prospect for private litigants in light of recent Supreme Court decisions. W.S. Kilpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400 (1990) (Act of state doctrine did not bar RICO action predicated upon the payment of bribes to a foreign official to secure the award of a foreign government contract); New Orleans Pub. Serv. v. New Orleans, 491 U.S. 350, 358 (1989) ("federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred").

the general media are beginning to press to "get on with the struggle where there is no way out . . . [when] the Japanese system is being used deliberately against us."[99] The alternative to decisive action is America-the-Warehouse or, at best, "Japan's subcontractor," as the Speaker of Japan's lower house of Parliament predicted recently.[100] This is also a battle which "the [United States] government is very unlikely" to join, at least with respect to the automotive industry, notwithstanding the downside domestic political risk in such an abdication.[101] *Realpolitik* aside, government should support a private sector RICO initiative because it is premised upon countering unlawful business methods, while respecting the views of both protectionist and free market advocates.

The problem will not simply go away. Economists Graham and Krugman conclude that the insular trade practices of Japan, Inc., including a propensity to source heavily from outside the United States, will be a "source of tension . . . for a long time to come."[102] Japan Inc.'s "economic nationalism" is coherent and directional, not open-ended, and is driven by a logic that defines the end-game as dominance, not mutuality.[103]

More is at stake than mere dollars. The fight concerns the hearts and minds of the American consumer and whether product image and consumer preference will be affected by allegations of tax cheating in tough economic times. The point of decision finally will occur, as it should, in the marketplace, not in the courtroom.

RICO should be considered only as a last resort to counter *keiretsu* conduct that violates United States law. In his controversial book, *The Enigma of Japanese Power*, Karel van Wolferen argues that corporate Japan will continue its practice of adversarial trade premised on *boeki masatsu*, or trade friction, until "angry outsiders resort to coercion" to force them to change their ways.[104] He is not alone in this view. Kozo Yamamura, professor of Japanese studies at the University of Washington, believes that Japanese firms "must be forced or induced" to undermine their belief in the "economic rationality" of their *keiretsu* mode if

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99. A.M. Rosenthal, *Presenting Hypocrisy Inc.*, N.Y. TIMES, Jan. 7, 1992, at A15.

100. *A Top Japanese Politician Calls U.S. Work Force Lazy*, N.Y. TIMES, Jan. 21, 1992, at D1.

101. MCALINDEN, *supra* note 27, at 77.

102. GRAHAM & KRUGMAN, *supra* note 29, at 148, 160.

103. These observations are simply an application in a limited context of the thesis that history has an end-point. FRANCIS FUKUYAMA, The End of History and the Last Man, Part II (1992).

104. KAREL VAN WOLFEREN, The Enigma of Japanese Power 6, 49 (1990).

they are to become more open to competition.[105] RICO could certainly do that.

United States business seems ever the compliant victim. Whether it be corporate Japan or unscrupulous junk bond promoters and takeover artists, or government regulation (too much or too little), someone else always seems to be to blame for business setbacks. Because the root of the problem lies elsewhere, so it seems to American business does the solution.

Yet, RICO is available now for those with the will to act. As they think about it, market share continues to shrink and RICO's four year statute of limitations ticks away.

105. Yamamura, *supra* note 10, at 51.