AGORA: REFLECTIONS ON *RJR NABISCO V. EUROPEAN COMMUNITY*

DOUBLING DOWN ON LITIGATION ISOLATIONISM

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Last year in the Stanford Law Review, I described an emerging trend in U.S. courts: litigation isolationism.[1] Through developments in personal jurisdiction, *forum non conveniens*, international comity, and the presumption against extraterritoriality, I argued, courts have developed increasingly strong tools for avoiding transnational litigation. Decisions advancing litigation isolationism often fail to accomplish their stated goals—typically promoting separation of powers, avoiding interstate friction, and protecting defendants from the inconvenience of U.S. litigation. They also undermine important U.S. interests, often by excluding or dismissing cases that have close ties to the United States. At the end of that article, I cautioned against the continuation of the trend.

Unfortunately, *RJR Nabisco, Inc. v. European Community*[2] continues and expands litigation isolationism. If past is precedent, I expect that *RJR*, combined with other litigation isolationism developments, will contribute to shifting regulation of transnational enterprises away from the United States and will encourage foreign nations to open their courts to similar suits. This trend will yield uneven effects on international comity and uncertain results for U.S. litigants abroad. It will also exclude more transnational litigation from U.S. courts—including cases that have "the United States written all over [them]."[3]

In these comments, I will first explain three ways in which *RJR* contributes to litigation isolationism and then I will discuss the expected consequences of these developments for international comity and for the future of transnational litigation around the world.

RJR*'s Contributions to Litigation Isolationism*

The focus of the *RJR* decision—the presumption against extraterritoriality—is one of a number of ways that U.S. courts have recently intensified the barriers to transnational litigation. *RJR* does not just reinforce, but actually strengthens these barriers in at least three ways. First, the Court appears to raise the hurdle Congress must overcome to demonstrate its intent that a statute applies extraterritorially. The presumption now requires the statute to "affirmatively and unmistakably"[4] instruct that the statute applies extraterritorially, which seems potentially more restrictive than *Morrison v. Australia National Bank*'s requirement that a statute give a "clear

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[1] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

[2] RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016).

[3] *Id.* at 2115, slip op. at 1 (Ginsburg, J., dissenting).

[4] *Id.* at 2100, slip op. at 7.

indication"[5] of Congress's intent to have it apply abroad. This difference may or may not be semantic, but it reinforces the Court's other structural fortifications of the presumption.

Second, and more structurally, in *RJR* the Court applied the presumption against extraterritoriality not just to each act of Congress, but to each *provision* individually, notwithstanding cross-references to other provisions within the same statute that overcome the presumption.[6] The Justices held unanimously that Section 1962 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961–1968, which sets forth the prohibitions that can form the basis of a RICO violation, can apply to extraterritorial conduct[7] (here, a global money-laundering scheme involving Colombian and Russian drug traffickers). But the Justices split on whether Section 1964(c), which permits "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue, overcomes the antiextraterritoriality presumption. The Court says it does not because "[n]othing in §1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[8] Nothing—except, as Justice Ginsburg points out, the reference to Section 1962, which the Court just said "encompasses foreign injuries."[9]

Third, the *RJR* decision undermines the historical understanding that the presumption against extraterritoriality applies only to statutes that regulate conduct.[10] The decision makes it more difficult for federal statutes to have any kind of extraterritorial reach because the Court emphasizes that the presumption applies to any and all kinds of statutes. The Court relies on *Kiobel v. Royal Dutch Petroleum Co.*[11] to reach this conclusion. In *Kiobel*, the Court (for the first time) applied the presumption to a "purely jurisdictional" statute.[12] But *Kiobel* might have been an outlier because the purely jurisdictional statute at issue was the extraordinary Alien Tort Statute, and the Court made this extension in large part because the Court had previously held that the Alien Tort Statute permitted the *courts* to create a cause of action.[13] That reasoning seemed to prevent courts from applying the presumption to other purely jurisdictional statutes, like the federal diversity jurisdiction statute, 28 U.S.C. Section 1332. The Court in *RJR*, however, states affirmatively and unmistakably that the presumption applies "whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[14]

[5] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

[6] Bill Dodge notes elsewhere in this symposium that a provision-by-provision approach is consistent with recent applications of the presumption in Morrison, 561 U.S. at 265; Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455-56 (2007). *See* William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45 (2016).

[7] The Court "assume[s] without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially." RJR, 136 S. Ct. at 2105, slip op. at 18.

[8] *Id.* at 2108, slip op. at 22.

[9] *Id.* at 2113, slip op. at 3 (Ginsburg, J., dissenting). As Anthony Colangelo puts it elsewhere in this symposium, the Court "'looked through 'the RICO statute to the underlying predicate statutes to discern RICO's geographic coverage as to certain racketeering activities," but it "was not willing to look through RICO" when interpreting the scope of the statute creating the private right of action. *See* Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality*, 110 AJIL UNBOUND 51 (2016).

[10] For an overview of the state of the presumption against extraterritoriality ten years ago, see Pamela K. Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 749, 784 (2006).

[11] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[12] The Court has applied principles inspired by the antiextraterritoriality presumption to other parts of statutes, but not the presumption itself, which sets a higher bar. *See, e.g.*, Small v. United States, 544 U.S. 385, 389 (2005) (noting that "the presumption against extraterritorial application does not apply directly" in cases determining whether statutory provision "convicted in any court" includes convictions in foreign courts, and interpreting "any" as limited to domestic context); cf. *id.* at 395 (Thomas, J., dissenting) (objecting to interpretation limiting "any" to describe only domestic courts); RJR, 136 S. Ct. at 2108, slip op. at 22 ("The word 'any' ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality.").

[13] *See* Kiobel, 133 S. Ct. at 1665 ("we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS").

[14] RJR, 136 S. Ct. at 2101, slip op. at 9.

This extension saddles an additional swath of statutes with the burden of having to overcome the presumption. Section 1332 may now bar diversity cases between U.S. citizens of different states involving "matters[s] in controversy" that arose abroad.[15] Such an application of the presumption seems ludicrous,[16] but also a natural extension of the analysis in *RJR*. Other statutes will more certainly be cabined by the decision. The Second Circuit recently held that the Stored Communications Act, 18 U.S.C. §§ 2701 et seq., limits the reach of "warrants" to search data stored in off-shore facilities.[17] It seems that *RJR* would bar litigation under the sex tourism statute, 18 U.S.C. Section 2423(b).[18] Although that law contains language that likely overcomes the presumption, the provision establishing a cause of action to sue for sex tourism violations does not,[19] as Ted Folkman has pointed out.[20] *RJR* even suggests that the presumption might now bar the extraterritorial application of Title VII, even though Congress amended that statute to tell the Supreme Court (I'm paraphrasing here): We *want* Title VII to apply extraterritorially. Congress amended some provisions of Title VII to effectuate this message, but not the part of the statute that creates a cause of action for private citizens to sue.[21]

The Consequences of More Litigation Isolationism

RJR's fortification of the presumption against extraterritoriality thus will make it even harder to extend the reach of federal laws to many claims that do "touch and concern"[22] the United States, but apparently do so with insufficient force.

The decision also likely has two related unintended consequences that should raise concerns: first, the effects on international comity; second, the effects on Congress's ability to regulate U.S. citizens' conduct abroad.

First, *RJR*, like many litigation isolationist decisions in recent years, states that it is serving the ends of international comity—but it is questionable whether it does so. The majority and dissents debate the decision's likely effect on international comity. Writing for the Court, Justice Alito argues that Section 1964(c), which creates the private right of action, should be subject to the presumption against extraterritoriality "independently of its application to § 1962,"[23] because opening U.S. courts to foreign plaintiffs bringing civil RICO claims alleging

[15] 28 U.S.C. 1332 ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state . . . ").

[16] See William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM).

[17] The Second Circuit in United States v. Microsoft, No. 14-2985, July 14, 2016, stated it did not believe itself to be "at liberty" to disregard the presumption against extraterritoriality in evaluating the scope of the word "warrant" in the SCA.

[18] 18 U.S.C. § 2423(b) ("[A] United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined . . . or imprisoned . . .").

[19] 18 U.S.C. § 2255 ("Any person who, while a minor, was a victim of a violation of section . . . 2243 . . . and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court . . .").

[20] Ted Folkman, *Case of the Day RJR Nabisco v. European Community*, LETTERS BLOGATORY (June 29, 2016).

[21] To reverse the effect of the EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991), which applied the presumption against extraterritoriality to find that Title VII does not apply extraterritorially, Congress amended the statute to define "employee" to include U.S. citizens employed in a foreign country, 42 U.S.C. § 2000e(f), and to reach U.S. employers abroad, 42 U.S.C. § 2000e-1(c). But the statute allowing private parties to sue for violations of Title VII, 41 U.S.C. § 2000e–5(f), does not itself contain an indication of extraterritorial application. *RJR* suggests that Congress's fix was insufficient.

[22] Kiobel, 133 S. Ct. at 1669.

[23] RJR, 136 S. Ct. at 2095, slip op. at 18.

foreign injuries could present a "danger of international friction."[24] Justice Ginsburg counters that discriminating against foreign plaintiffs in this manner might "spark, rather than quell, international strife."[25] And Justice Breyer writes separately to point out that the Solicitor General's office gave him little reason to trust their allegation that recognizing a cause of action for foreign conduct would itself compromise comity.[26] (In any event, the threat to international comity is the majority's reason for *applying* the presumption to interpret RICO, not its reason for finding that the statute fails to overcome the presumption.)

How do we know which Justice is right? One way of evaluating the question is examining the Justices' stated evidence. The majority relies on the SG's brief and on the submissions by foreign sovereigns (some of whom are also the respondents in this case) as amici in other cases. The SG's brief provides weak support: as Justice Breyer mentions, the Executive branch did little to substantiate its position. Even the majority does not explain why it finds the SG's argument convincing; in fact, you could read *RJR* quickly and miss the SG reference. And in past antiextraterritoriality cases, the Court has made clear that Congress—not the Executive—is the final arbiter of a statute's impact on foreign relations.[27]

The majority does not defer to the SG. Instead, it harps on the foreign sovereign amicus briefs from other cases to demonstrate that creating a private right of action itself can offend foreign nations and to undermine the plaintiffs' argument that this time it won't. Reliance on foreign sovereigns' briefs in this manner is, as far as I can tell, unprecedented.[28] Although the Court purports to be preserving international relations, its "gotcha" style of argument itself is not a model of diplomacy.[29] This is all the more true because it fails to consider foreign sovereigns' understanding of the relationship between international comity and international law.

The amicus briefs do not prove the point. The Court fails to acknowledge important distinctions between the cases that spurred the cited amicus briefs and this one. The Court cites foreign sovereign amicus briefs from two cases—*Empagran* and *Morrison*—in which foreign countries like Germany, the United Kingdom, and Canada argued that private enforcement of U.S. antitrust and securities laws in foreign-cubed cases interfered with those countries' regulatory regimes. Those cases did not involve extraterritorial regulation of U.S. citizen defendants, which is within the scope of the United States' power under international law (as the *Sosa* amicus brief would have recognized) and less likely to cause friction.[30] And those decisions did not require the statutory-interpretation acrobatics that *RJR* had to perform to circumvent the clear extraterritorial application of the RICO predicates.[31]

In sum, the *RJR* plaintiffs' positions in this case are consistent with the positions they took in *Morrison* and *Empagran* in part because the defendant here is a U.S. citizen. They are likewise consistent with the amicus brief

[24] *Id.* at 2095, slip op. at 19.

[25] *Id.* at 2115, slip op. at 7 (Ginsburg, J., dissenting).

[26] *Id.* at 2116, slip op. at 2 (Breyer, J., dissenting).

[27] Kiobel, 133 S. Ct. at 1664.

[28] *See* Kristen Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016).

[29] It is interesting to note that the Solicitor General, in pushing the interpretation the Court ultimately adopted, did not take this approach. *See* Brief for the United States as Amicus Curiae Supporting Vacatur, RJR Nabisco, Inc., v. European Community, 15-138 (Dec. 2015).

[30] *See, e.g.*, Brief for the Republic of France as Amicus Curiae in Support of Respondents, Morrison v. National Australia Bank, No. 08-1191, Feb. 26, 2010, at 2 (criticizing "[t]he extraterritorial application of U.S. securities fraud laws at the behest of plaintiffs who are not citizens or residents of the U.S., *against defendants who are not citizens or residents of the U.S.*, for frauds perpetrated on exchanges that are not within the territory of the U.S." (emphasis added)); Brief of the Governments of Germany, et al., F. Hoffman-La Roche Ltd. v. Empagran, No. 03-724, Feb. 3, 2004, at 25 (objecting to U.S. regulation of "the conduct of foreign businesses in foreign countries").

[31] *See* RJR Nabisco, Inc. v. European Community, No. 15-138, Brief for Respondents at 46-52 (Feb. 4, 2016), for additional reasons to distinguish those cases.

of the European Commission in *Sosa v. Alvarez-Machain*.[32] There, the Commission endorsed a cause of action based on international law under the Alien Tort Statute *so long as* jurisdiction to prescribe is based on the internationally recognized concepts of "territory, nationality, or protection."[33] Nevertheless declining to respect these foreign sovereign plaintiffs' traditional right to sue—under a statute that Congress has demonstrated applies to foreign conduct—seems to infringe on comity rather than further it.

This decision seems like it would benefit U.S. defendants acting abroad, like RJR here. But while the decision will certainly mitigate RJR's immediate problems with this lawsuit, it likely will not make all of its troubles disappear, and may have unintended negative consequences for U.S. business operating abroad. With respect to the *RJR* litigation itself, if the lower courts decide on remand that the Supreme Court's decision precludes this litigation from going forward, as is likely, I would think that the plaintiffs will continue to try to find a way to hold RJR accountable for the alleged offenses.[34] Eventually this may result in more EU regulations that reach U.S. companies' conduct in the United States and elsewhere.[35]

This "strife" is not inherently bad. It may be part of the pull and tug inherent in the private international law debates.[36] This result may serve some comity goals, limiting the United States' regulatory influence and making way for others to move in (or not). But it may not serve Congress's goals. As litigation isolationism solidifies, in increasing numbers of future cases where U.S. law had been the predominant regulating force, U.S. and foreign plaintiffs will seek out foreign law and foreign courts to pursue similar cases. Scholars predicted this trend after *Morrison*—and indeed global securities litigation has found other homes, most notably the recent securities litigation against Volkswagen in German courts.[37]

It is hard to know Congress's "opinion" about these developments, and congressional reactions to extraterritoriality restrictions on statutory interpretation have varied.[38] But it is also hard to argue that the presumption tracks congressional intent when it keeps raising the hurdle that Congress must clear in order to rebut it. For example, if I am right that Congress's response to *Aramco*, in which it tried to establish the extraterritorial application of Title VII, would fail to overcome today's *RJR* version of the presumption against extraterritoriality, then Congress is in a bind.

A big problem with *RJR* and its ilk is the disconnect between what they seek to achieve—here, accordance with Congress's expressed intent and with international comity—and their actual effects. But there is another problem. In *RJR*, the Court also not only empowers, but arguably *requires* lower courts to push away transnational litigation involving conduct that Congress intended to regulate through a host of statutes. In those cases, instead of the United States, foreign countries—these very plaintiffs—will be calling the shots even in cases with "the United States written all over it."[39]

[32] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[33] Brief of Amicus Curiae the European Commission in Support of Neither Party, Sosa v. Alvarez-Machain, No. 03-339, Jan. 23, 2004, at 13.

[34] RJR is the only major tobacco company not to have entered into an antifraud agreement with the European Union and its Member States. *See Tobacco Smuggling*, OLAF EUROPEAN ANTI-FRAUD OFFICE (July 1, 2016).

[35] *See* Joanne Scott, *The New EU "Extraterritoriality"*, 51 COMMON MARKET L. REV. 1343 (2014).

[36] *See* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 Notre Dame L. Rev. (forthcoming 2016).

[37] *See, e.g.*, Alanna Petroff, *New Bombshell Lawsuit Against Volkswagen*, CNN MONEY (May 16, 2016, 8:30 AM).

[38] Congress revised Title VII to have it apply extraterritorially under certain circumstances after *Aramco*, see *supra* note 19; it was silent following *Kiobel*; and it reacted to *Morrison* the day after the Supreme Court released its opinion, in a move that came too quickly to call it a *reaction* to the decision, *see* Marco Ventoruzzo, *Like Moths to A Flame? International Securities Litigation After* Morrison*: Correcting the Supreme Court's "Transactional Test"*, 52 VA. J. INT'L L. 405, 439 (2012).

[39] RJR, 136 S.Ct. at 2115, slip op. at 7 (Ginsburg, J., dissenting).