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

Carlos M. Vázquez and Ingrid Wuerth†*

AJIL Unbound is pleased to publish this Agora on the U.S. Supreme Court's June 2016 decision in *RJR Nabisco v. European Community*[1] concerning the extraterritorial applicability of the Racketeer Influenced and Corrupts Organizations Act (RICO).[2] The suit, which was brought by the European Community and twenty-six of its Member States, alleged that RJR Nabisco participated in a global money-laundering scheme in violation of RICO. The defendant argued that RICO does not apply extraterritorially and that the courts lacked subject matter jurisdiction because the European Community is not a "foreign state" for diversity purposes. Only the first issue was before the Supreme Court.

The Supreme Court held that the substantive provision of RICO on which the plaintiffs relied does apply extraterritorially because the provision incorporates as "predicate acts" other laws that themselves have extraterritorial application. The Court went on to hold, however, that the provision conferring the plaintiffs' private right of action, 18 U.S.C. Section 1964 (c), must separately overcome the presumption against extraterritoriality. Finding insufficient evidence that Congress intended to authorize recovery for foreign injuries, the Court concluded that RICO authorizes treble damages only for injuries suffered in the United States even if the plaintiff alleges RICO predicate offenses that do apply extraterritorially, such as assassinating government officials. The opinion was authored by Justice Alito, whose concurring opinion in *Kiobel v. Royal Dutch Petroleum* had taken a very narrow approach to the extraterritorial application of the Alien Tort Statute.[3] The holding regarding the extraterritorial effect of the substantive RICO provisions was unanimous, but the holding regarding RICO's private cause of action generated a 4-3 split.

Our distinguished panel of seven authors for this symposium is, on the whole, rather critical of the Court's work in the *RJR* case. Paul B. Stephan and William S. Dodge offer perhaps the most favorable appraisals. In *Private Litigation as a Foreign Relations Problem*, Stephan describes *RJR* as an "exclamation point" to a long-term trend in which the Supreme Court seeks to avoid the potential foreign policy problems threatened by litigation involving foreign transactions and actors, even if a foreign state is the plaintiff, as in *RJR* itself.[4] With *RJR*, the Supreme Court has made clear that private litigants face "serious territorial constraints on the wrongs they can right," while U.S. public authorities may "range widely" because they are politically accountable and may weigh the foreign policy costs in determining whether to pursue litigation.[5] In his contribution entitled *The Presumption*

* *Professor of Law, Georgetown University Law Center.*

† *Helen Strong Curry Chair of International Law at Vanderbilt Law School.*

Originally published online 09 August 2016.

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

[2] 18 U.S.C. §§ 1961-1968.

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

[4] Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AJIL UNBOUND 40 (2016).

[5] *Id.* at 42.

Against Extraterritoriality in Two Steps, Dodge notes that the Court in *RJR* "formaliz[ed] the presumption against extraterritoriality" into a two-step framework and, in applying it to RICO, gave "significant guidance to lower courts."[6] He goes on the discuss whether the second step requires plaintiffs to allege conduct in the United States, even if the focus of the statute is something other than conduct, like the injury.

The other contributions are more critical. Anthony J. Colangelo and Pamela K. Bookman argue that the Court's approach will not actually minimize foreign policy costs. In *Frankenstein's Monster of Extraterritoriality Law*, Colangelo argues that because "the plaintiff was comprised of precisely those nations into whose territories U.S. law would have extended," there will be no resentment if U.S. law is applied in their territories.[7] Indeed, *refusing* to provide foreign governments the same access to justice as the U.S. government, "smacks of unequal treatment and itself risks foreign resentment and international friction."[8] In *Doubling Down on Litigation Isolationism*, Bookman considers the question of foreign policy costs in terms of the evidence presented to support them.[9] The majority cited the U.S. government's poorly substantiated amicus brief, and also the amicus briefs that foreign-government plaintiffs in *RJR* had filed in *other* cases in which they had opposed the extraterritorial application of U.S. law. Bookman notes that this "'gotcha' style of argument is not a model of diplomacy" and may be unprecedented.[10] She also argues that the position of the foreign governments is not inconsistent because in *RJR* (but not the earlier cases) the defendants are U.S. corporations.

Hannah L. Buxbaum and Carlos M. Vázquez both question the Court's heavy reliance on territory in its description and application of the presumption. In *The Scope and Limitations of the Presumption Against Extraterritoriality*, Buxbaum argues that the Court relies increasingly on "categorical, territory-based rules" which are ill-suited, too "messy and often unpredictable patterns of transnational economic activity."[11] In the *RJR* context, by applying the presumption separately to the statutory section creating the private cause of action, the Court risks the underenforcement of statutes for which Congress intended a private remedy to be available. Other difficulties, she points out, will arise when courts attempt to apply the "domestic injury" requirement of *RJR*. In *Out-Beale-ing Beale*, Vázquez, also raises concerns about the "rigidly territorialist" approach to choice of law adopted in *RJR*.[12] He notes that the Court's focus on the place of *injury*, as opposed to the place where other elements of the cause of action occurred, is both novel and unexplained. He observes that the Court's focus on injury harkens back to the *lex loci delicti* rule of Joseph Beale's First Restatement of Conflict of Laws, but would actually narrow the scope of federal statutes much further than that approach would. Under the *lex loci delicti* rule, when the legislature has not addressed the issue of geographic scope, a statute would apply whenever the injury was suffered within the state; under *RJR*, private recovery under such statutes would be limited to cases in which *both* the injury *and* the substantive focus of congressional concern took place on U.S. soil.

Finally, Stephanie Francq offers a European perspective on *RJR*.[13] Francq considers why the European initiated proceedings in the U.S. courts under RICO rather than pursuing sanctions within the EU system or that of its Member States. As she explains, the relevant EU regulatory framework was in its infancy and not up for the task at the time the *RJR* litigation began. (Indeed, the EU did not even exist then; it was the European

[6] William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 49 (2016).

[7] Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AJIL UNBOUND 51, 55 (2016).

[8] *Id.*

[9] Pamela K. Bookman, *Doublin Down on Litigation Isolationism*, 110 AJIL UNBOUND 57 (2016).

[10] *Id.* at 60.

[11] Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62 (2016).

[12] Carlos M. Vázquez, *Out-Beale-ing Beale*, 110 AJIL UNBOUND 68 (2016).

[13] Stephanie Francq, *A European Story*, 110 AJIL UNBOUND 74 (2016).

Community at the time.) Francq further explains how the EU system has evolved since that time and examines how U.S. plaintiffs would fare were they to pursue claims against European corporations in the EU today.

https://doi.org/10.1017/S2398772300002361 Published online by Cambridge University Press