

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

### THE PRESUMPTION AGAINST EXTRATERRITORIALITY IN TWO STEPS

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For the past twenty-five years, the presumption against extraterritoriality has been the Supreme Court's principal tool for determining the geographic scope of federal statutes.<sup>1</sup> In 2010, *Morrison v. National Australia Bank*<sup>2</sup> used the presumption to decide the scope of Section 10(b) of the Securities Exchange Act, which prohibits securities fraud. *Morrison* approached the question in two steps. First, it looked for a "clear indication of extraterritoriality" to rebut the presumption and found none.<sup>3</sup> Second, it looked to see if application of the statute would be domestic or extraterritorial by examining the "focus" of the provision. Plaintiffs argued that applying Section 10(b) would be domestic because the alleged fraud occurred in the United States, although they had bought their shares in Australia. The Court disagreed, holding that application of Section 10(b) would be extraterritorial because "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States,"<sup>4</sup> and in this case the transaction occurred abroad.

The Supreme Court's decision in *RJR Nabisco, Inc. v. European Community* formalizes *Morrison's* approach, unanimously adopting "a two-step framework for analyzing extraterritoriality issues."<sup>5</sup> Because U.S. courts are likely to use this two-step framework going forward, it is worth looking at what the Supreme Court said and did in *RJR* to see how the analysis should be applied.

*RJR* described its two-step framework this way. "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."<sup>6</sup> If the answer at the first step is no,

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<sup>1</sup> *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), revived the presumption as a canon of statutory interpretation in 1991. Apart from a brief mention in 1989, see *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989), the Supreme Court had not applied the presumption to determine the geographic scope of a federal statute since 1949. See *Foley Bros. v. Filardo*, 336 U.S. 281 (1949).

<sup>2</sup> *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

<sup>3</sup> *Id.* at 255-65.

<sup>4</sup> *Id.* at 266.

<sup>5</sup> *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101, slip op. at 9 (2016). Part II of the opinion was joined by all seven participating Justices. Justice Scalia passed away before oral argument. Justice Sotomayor was recused because she heard an earlier incarnation of the case as a judge on the Second Circuit. See *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2005) (Sotomayor, J.), *cert. denied*, 546 U.S. 1092 (2006).

<sup>6</sup> *RJR*, 136 S. Ct. at 2101, slip op. at 9. The Court also said: "We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction." *Id.* The Court was trying, in a shorthand way, to describe its application of the presumption to the implied cause of action under the jurisdictional Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). For explanation why the presumption against extraterritoriality does not apply to jurisdictional statutes, even after

then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.<sup>7</sup>

If, on the other hand, the answer at the first step is yes, then "[t]he scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign applications, and not on the statute's 'focus.'"<sup>8</sup>

The questions of statutory interpretation before the Supreme Court in *RJR* were the geographic scope of RICO's substantive prohibitions and the geographic scope of RICO's civil damages action. RICO is the acronym for the Racketeer Influenced and Corrupt Organizations Act,<sup>9</sup> which makes it illegal to use a pattern of racketeering activity in particular ways relating to an enterprise. Racketeering activity consists of certain federal and state offenses known as predicates. RICO also creates a civil cause of action for treble damages for "[a]ny person injured in his business or property by reason of a RICO violation."<sup>10</sup> The European Community and twenty-six of its member states brought suit against *RJR Nabisco*, alleging that *RJR* had engaged in a scheme to launder drug-trafficking money through cigarette purchases, resulting in competitive harm to state-owned cigarette businesses and other injuries.

The Supreme Court held unanimously that two of RICO's substantive provisions apply extraterritorially to the same extent as its predicates. Since the federal money laundering statute applies to offenses "outside the United States" if the defendant is a U.S. person,<sup>11</sup> these substantive provisions of RICO also apply extraterritorially if the defendant is a U.S. person. But the Court also held, by a vote of 4-3, that RICO's private cause of action requires "a domestic injury to business or property and does not allow recovery for foreign injuries."<sup>12</sup> Because plaintiffs waived any claims for domestic injuries, the Court concluded that their suit had to be dismissed.

We are interested not just in what the Supreme Court held but also in why, and particularly in how it applied the two-step framework described above. The Court began with RICO's substantive prohibitions. At the first step of its analysis, the Court found "a clear, affirmative indication" that RICO's prohibitions apply extraterritorially in Congress's decision to include in the list of predicate acts some offenses that plainly apply to foreign conduct, including the federal money laundering statute.<sup>13</sup> But the Court cautioned that RICO's prohibitions apply extraterritorially "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially."<sup>14</sup> That RICO itself did not specify its geographic scope was not dispositive. "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of

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

<sup>7</sup> *RJR*, 136 S. Ct. at 2101, slip op. at 9.

<sup>8</sup> *Id.*

<sup>9</sup> 18 U.S.C. §§ 1961-1968.

<sup>10</sup> *Id.* § 1964(c).

<sup>11</sup> *Id.* § 1957(d)(2).

<sup>12</sup> *RJR*, 136 S. Ct. at 2111, slip op. at 27.

<sup>13</sup> *Id.* at 2101-02, slip op. at 9-11.

<sup>14</sup> *Id.* at 2102, slip op. at 11.

extraterritoriality is not essential.”<sup>15</sup> As the Court said previously in *Morrison*, the presumption is not a “clear statement rule.”<sup>16</sup> In past cases, the Court has consulted “all available evidence,”<sup>17</sup> including legislative history.<sup>18</sup>

This clear indication of extraterritoriality was enough to convince the Supreme Court that at least two of RICO’s substantive provisions apply abroad: (1) Section 1962(b), which prohibits acquiring or maintaining control of an enterprise through a pattern of racketeering activity; and (2) Section 1962(c), which prohibits conducting an enterprise’s affairs through a pattern of racketeering activity.<sup>19</sup> The Court rejected RJR’s argument that because “the ‘focus’ of RICO is the enterprise being corrupted” these provisions should be limited to domestic enterprises.<sup>20</sup> Because “there is a clear indication at step one that RICO applies extraterritorially,” the Court would “not proceed to the ‘focus’ step.”<sup>21</sup> More specifically, the Court reasoned that it did “not need to determine which transnational (or wholly foreign) patterns of racketeering [RICO] applies to; it applies to all of them, regardless of whether they are connected to a ‘foreign’ or ‘domestic’ enterprise.”<sup>22</sup> The Court added that a domestic-enterprise requirement would lead to “counterintuitive results” by excluding from RICO foreign crime rings and other enterprises operating in the United States.<sup>23</sup> It would also require a “satisfactory way of determining whether an enterprise is foreign or domestic.”<sup>24</sup> The Court avoided these difficulties by stopping its analysis at step one and refusing to consider the “focus” of the statute once the presumption had been rebutted.

RJR’s approach seems quite clear until one considers the Supreme Court’s refusal to extend the same treatment to Section 1962(a), which prohibits investing income from a pattern of racketeering activity in an enterprise. The Court hesitated because it thought that “arguably § 1962(a) extends only to domestic uses of the income,” though it did not decide that question.<sup>25</sup> But if the character of an enterprise as domestic or foreign is irrelevant to the geographic scope of Sections 1962(b) and (c), why might it be relevant to the geographic scope of Section 1962(a)? Perhaps it makes sense to think that Congress wanted to bring foreign crime rings within the scope of Section 1962(c). Perhaps it also makes sense to think that Congress was not particularly concerned about Section 1962(a) covering the investment of racketeering proceeds in enterprises outside the United States.<sup>26</sup> One can only reach such determinations, however, by examining “the ‘focus’ of congressional concern.”<sup>27</sup> Maybe that is, in fact, what the Court was doing in *RJR* when it pointed to the “counterintuitive results” of excluding foreign crime rings from Section 1962(c).<sup>28</sup> But distinguishing Section 1962(a) suggests at a minimum that the two steps in *RJR*’s analysis are not quite as separate as the Court thinks.

The Supreme Court also declined to decide the geographic scope of Section 1962(d), which prohibits conspiring to violate (a), (b), or (c). It simply assumed “that § 1962(d)’s extraterritoriality tracks that of the

<sup>15</sup> *Id.*

<sup>16</sup> *Morrison*, 561 U.S. at 265.

<sup>17</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993).

<sup>18</sup> *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

<sup>19</sup> *RJR*, 136 S. Ct. at 2103, slip op. at 13.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2104, slip op. at 14.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2103, slip op. at 13.

<sup>26</sup> It seems harder to justify a distinction between Section 1962(a) and (b). If Congress was not concerned about investment in foreign enterprises, why should it be considered about control of foreign enterprises?

<sup>27</sup> *RJR*, 136 S. Ct. at 2100, slip op. at 8 (quoting *Morrison*, 561 U.S. at 266).

<sup>28</sup> *Id.* at 2104, slip op. at 15.

provisions underlying the alleged conspiracy.”<sup>29</sup> Lower courts have routinely held that ancillary criminal provisions on conspiracy, aiding and abetting, attempt, and the like have the same geographic scope as the underlying offense.<sup>30</sup> *RJR* indirectly supports this line of cases by holding that one statutory provision may take its geographic scope from another. If this is true for RICO, it is likely true for conspiracy and other ancillary offenses as well.

While the Supreme Court was unanimous in applying the two-step framework to RICO’s substantive provisions, the Court split 4-3 on the geographic scope of RICO’s private cause of action. Section 1964(c) authorizes “[a]ny person injured in his business or property by reason of a violation of section 1962” to bring suit for treble damages. Relying on *Kiobel*, the Court reasoned that it should “separately apply the presumption against extraterritoriality to RICO’s cause of action despite our conclusion that the presumption has been overcome with respect to RICO’s substantive prohibitions.”<sup>31</sup> This provision-by-provision approach is generally consistent with what the Supreme Court has done in past cases.<sup>32</sup>

At step one, the Court found no “clear indication that Congress intended to create a private right of action for injuries suffered outside the United States.”<sup>33</sup> Indeed, by referring only to injuries to “business or property”—excluding personal injuries, for example—Congress “signaled that the civil remedy is not coextensive with § 1962’s substantive prohibitions.”<sup>34</sup> Plaintiffs’ strongest argument at step one was that RICO’s private right of action, including its “business or property” language was modeled on the Clayton Act, which the Court had interpreted to permit recovery for antitrust injuries suffered abroad. But the Court reasoned that interpretations of one statute did not automatically transfer to the other and pointed out that Congress had more recently limited the application of U.S. antitrust laws by excluding recovery for foreign injuries that are independent of domestic injuries.<sup>35</sup>

At step two, the Supreme Court held that “Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.”<sup>36</sup> The Court’s analysis was notably brief and strangely did not mention the word “focus.” Perhaps this was because the answer to the focus question was so obvious. Since the text of the provision authorizes claims by “[a]ny person injured in his business or property,” it would be hard to argue that the focus of the provision is anything other than injuries to business or property. If whatever is the focus of the provision must occur in the United States for its application to be domestic, then clearly application of the private right of action to foreign injuries would not be domestic.

Justice Ginsburg (joined by Justices Breyer and Kagan) dissented from the Court’s interpretation of RICO’s private right of action. She would not have distinguished “between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct.”<sup>37</sup> It is not clear if her point extends to private causes of action generally or only to RICO’s private cause of action. She did emphasize the particular history of RICO’s cause of action, arguing that since it was modeled on the Clayton Act it should be interpreted the

<sup>29</sup> *Id.* at 2103, slip op. at 14.

<sup>30</sup> See, e.g., *United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013) (“Generally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute.”).

<sup>31</sup> *RJR*, 136 S. Ct. at 2106, slip op. at 19.

<sup>32</sup> See, e.g., *Morrison*, 561 U.S. at 265; *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007).

<sup>33</sup> *RJR*, 136 S. Ct. at 2108, slip op. at 22.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2109-10, slip op. at 25-26.

<sup>36</sup> *Id.* at 2110, slip op. at 27.

<sup>37</sup> *Id.* at 2113, slip op. at 4 (Ginsburg, J., concurring in part and dissenting in part).

same way.<sup>38</sup> But apart from this history, she did not argue that Section 1964(c) provided a clear indication of extraterritoriality to rebut the presumption at step one or that the focus of the provision was anything other than injury to business or property at step two.

By formalizing the presumption against extraterritoriality into a two-step framework and by applying that framework both to RICO's substantive provisions and to its private right of action, the Supreme Court has given significant guidance to lower courts. But important questions remain. One is whether the presumption requires at least some conduct to have occurred in the United States irrespective of the focus of the statute. Recall that the Court used the following language to describe its application of the presumption at step two:

If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.<sup>39</sup>

Does this mean that there must be some conduct in the United States for application of a statute to be considered domestic, even if the focus of the provision is something other than conduct?

There are good reasons to think that the answer is no. First, *RJR* itself made no mention of conduct in the United States at the second step of its analysis with respect to RICO's private right of action. The court held that Section 1964(c) "requires a civil RICO plaintiff to allege and provide a domestic injury to business and property"<sup>40</sup>—not that it requires a plaintiff to allege domestic injury *and* domestic conduct. Earlier in the opinion, the Court said explicitly that violations of RICO's substantive provisions could be based on predicate acts occurring abroad "whether or not any domestic predicates are also alleged."<sup>41</sup> If neither RICO's substantive provisions nor its cause of action require conduct in the United States, it is hard to see where such a requirement could come from. Imagine that the plaintiffs in *RJR* had cigarette businesses in the United States, so that the defendant's foreign money laundering—a concededly extraterritorial predicate—had caused domestic injury. It seems doubtful that the Court would have dismissed their claims for lack of conduct in the United States.

Second, *Morrison*—the decision on which *RJR*'s two-step framework is based—expressly found the location of conduct irrelevant in applying the presumption against extraterritoriality. Despite alleged fraudulent conduct in the United States, *Morrison* concluded that applying Section 10(b) would be extraterritorial because "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."<sup>42</sup> One might try to reconcile *RJR*'s conduct language with *Morrison* by arguing that the "conduct relevant to the statute's focus" in *Morrison* was the sales rather than the fraud. But the defendants in *Morrison* had no part in the sales, which involved publicly traded securities. Alternatively, one might argue that the "conduct relevant to the statute's focus" in *Morrison* was the corporate defendant's decision where to list its securities—in Australia rather than in the United States. But *Morrison*'s transactional test also applies to unlisted securities, and lower courts applying the test to such securities have expressly rejected the argument that defendants must have "engaged in at least some conduct in the United States."<sup>43</sup> *Morrison* held that the focus of Section 10(b) was the transaction—period. Trying to read *Morrison* as adopting some sort of conduct requirement distorts that decision.

<sup>38</sup> *Id.* at 2113-14, slip op. at 5-6 (Ginsburg, J., concurring in part and dissenting in part).

<sup>39</sup> *Id.* at 2101, slip op. at 9.

<sup>40</sup> *Id.* at 2110, slip op. at 27.

<sup>41</sup> *Id.* at 2102, slip op. 11.

<sup>42</sup> *Morrison*, 561 U.S. at 266.

<sup>43</sup> *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012).

Finally, adding a conduct requirement would only thwart Congress's purpose when the focus of a provision is something other than conduct. For example, the Supreme Court has repeatedly made clear that the focus of U.S. antitrust law is "to redress *domestic* antitrust injury."<sup>44</sup> Some anticompetitive activity, like the boycott alleged in *Hartford Fire*,<sup>45</sup> may involve no domestic conduct but still cause domestic injury. Were the Court to impose a requirement that "conduct relevant to the statute's focus occurred in the United States"<sup>46</sup> on antitrust law, it would frustrate Congress's clear aim. One could, of course, take the position that antitrust law is an exception to the presumption against extraterritoriality.<sup>47</sup> But that is in some tension with the Court's recent assertions that the presumption applies "across the board"<sup>48</sup> and "in all cases."<sup>49</sup> It is simpler, more coherent, and indeed more consistent with what the Court did in both *Morrison* and *RJR* to conclude that the presumption against extraterritoriality contains no separate conduct requirement. If whatever is the focus of the provision occurs in the United States—be it conduct, or injury, or a transaction—that is sufficient to make application of the provision domestic at step two of the *RJR* framework.

<sup>44</sup> *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 165 (2004); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

<sup>45</sup> *Hartford Fire*, 509 U.S. at 770-77 (describing alleged boycott).

<sup>46</sup> *RJR*, 136 S. Ct. at 2101, slip op. at 9.

<sup>47</sup> In fact, the Court did not apply the presumption in either *Empagran* or *Hartford Fire*.

<sup>48</sup> *RJR*, 136 S. Ct. at 2100, slip op. at 8.

<sup>49</sup> *Morrison*, 561 U.S. at 261.