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

PRIVATE LITIGATION AS A FOREIGN RELATIONS PROBLEM

*Paul B. Stephan**

In *RJR Nabisco v. European Community*, the Court added an exclamation point to a long term trend in its jurisprudence.[1] It believes, this trend indicates, that private civil suits pose specific foreign relations issues, at least when the targets are foreign transactions and actors, to which the Court will respond by erecting barriers. To this general point the case adds an unsurprising, but still important codicil: These problems don't go away when foreign states take advantage of the U.S. civil litigation system by acting as plaintiffs.

The Court recognizes that the modern world poses problems that require transnational solutions. When the Executive Branch makes the first move by enforcing its rules against foreign actors and transactions, the Court puts up few if any obstacles. It seems to believe that responsible officials understand the game that gets played out between sovereigns with common jurisdiction and different interests.[2] When private actors seek to insert themselves into this game through civil litigation, however, the Court demurs in the form of the presumption against extraterritoriality. It assumes that Congress does not wish to authorize such disruptive suits, unless and until Congress says otherwise.

The presumption reemerged in *EEOC v. Arabian American Oil Co.*, a 1991 decision dealing with a regulatory framework—employment discrimination—that relied mostly on private litigation.[3] Chief Justice Rehnquist, writing for the majority, argued that Congress could not be understood as wanting to set the terms of labor markets outsides the United States. He did not put it quite this way, but labor markets lack the international mobility that characterize, for example, the market for capital. Rather, local conditions have the greatest influence on the terms of employment contracts. He thus assumed that the scope of the statute matched the principal problem confronted, which was conditions in the domestic labor market.

* *John C. Jeffries, Jr., Distinguished Professor of Law, John V. Ray Research Professor of Law, Director, Graduate Studies Program, University of Virginia School of Law.*

Originally published online 09 August 2016.

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

[2] The recent lower court decision *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, (2d Cir. 2016) does not fit within this framework. It applied the presumption against territoriality in a way that limits purely public enforcement authority, namely the scope of search warrants authorized by the Stored Communications Act. The case deserves more careful analysis than I have room for here. Suffice it to note that the Second Circuit and the Supreme Court do not seem to be on the same page with respect to the presumption, as shown by the Court's reversal, either in reasoning or in judgment, of Second Circuit decisions in *Morrison*, *Kiobel*, and *RJR*.

[3] EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). The presumption was a feature of U.S. jurisprudence for many years, but seemed to pass into desuetude after Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949), the last case to incorporate it into its holding until *Aramco*.

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Congress then amended the law to allow some extraterritorial effect, but in a context where territorial limits on labor probably matter least. It extended employment discrimination law to overseas employment with U.S. multinationals, but only if nondiscrimination did not conflict with local law.[4] If one assumes plausibly that cross-border labor mobility is most likely to occur within an integrated firm, this exception makes sense. The deference to local law also avoids direct regulatory contradictions that might put U.S. employers at a disadvantage in foreign markets.

A decade later, a unanimous Court in *F. Hoffman-LaRoche v. Empagran* interpreted the legislative mare's nest that is the 1982 Foreign Trade Antitrust Improvements Act as limiting civil suits for antitrust injuries to harm that occurs in the United States.[5] The Court did not invoke the presumption against extraterritoriality as such, but the *RJR* majority found its analysis helpful in explaining why RICO's private right of action should apply only to domestic injury. Interestingly, the United States argued for this result, as did a number of foreign states through amicus briefs. The outcome did not limit the Antitrust Division's power to go after anticompetitive behavior that harmed the U.S. market, including global conspiracies that range far beyond the United States. Instead it kept out of U.S. courts the non-U.S. victims of global conspiracies. What the United States wanted, and what the Court gave them, was a regulatory regime that concentrated U.S. regulatory forces, including private litigation, to injuries with a clear U.S. nexus.

This upset many commentators for many reasons, but one was that the Court had ignored an important distinction between labor markets and commodity markets. Perhaps, even in our new era of globalization, labor markets are primarily local—what happens in Riyadh stays in Riyadh—but commodity markets tend to be robustly international, with changes in supply and demand in one part of the world having a significant impact on prices elsewhere. Thus, some argued, anticompetitive behavior in one market necessarily would injure the United States. Justice Breyer acknowledged the point, but expressed the belief that courts could sort this out.[6]

The next decision, *Morrison v. National Australia Bank*, was a blockbuster.[7] It dealt with securities regulation, and particularly whether U.S. law applied to all sales of securities, or only sales occurring within U.S. territory. Securities markets are even more globalized than commodities markets, so one validly can argue that worldwide jurisdiction is necessary fully to protect U.S. interests. A fraud anywhere in the world can harm U.S. investors, and injuries to U.S. investors can damage U.S. markets even when the investors shop abroad. The problem, of course, is that this argument proves too much, as U.S. courts had recognized since the 1970s.[8] The solution of the lower courts was to sort things out case-by-case, limiting U.S. jurisdiction to transactions with a sufficient, but not necessarily great, U.S. nexus.

Justice Scalia, writing for a majority, demanded a more categorical approach. The securities laws regulate the issuance and sales of securities, not fraud as such. Accordingly, for U.S. regulation to apply the sales either had to take place in the United States or involve stock listed on U.S. exchanges. Given the Securities and Exchange Commission's primary focus on U.S. issuers and U.S. exchanges, this did not significantly constrain public regulation, but it did restrict private litigation involving foreign sales of foreign stock that fraud in the United

[4] Civil Rights Act of 1991, § 109 (amending §§ 701 and 702 of Civil Rights Act of 1964).

[5] F. Hoffman-LaRoche v. Empagran, 542 U.S. 155 (2004). Justices Scalia and Thomas concurred in the judgment. Justice Breyer's opinion for the Court indicated that a different outcome will ensue if the foreign injury was not independent of the domestic injury produced by the same course of conduct. *Id*. at 175.

[6] Specifically, his opinion left open the possibility that the plaintiffs could prove that the conspiracy's "domestic effects were linked to the foreign harm." *Id*. What counts as a link, however, remains extremely murky. For a debate on this issue, compare Ralf Michaels, Empagran*'s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 533 (David L. Sloss et al. eds., 2011), with Paul B. Stephan, Response Essay, Empagran*: Empire Building or Judicial Modesty?*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 553 (David L. Sloss et al. eds., 2011).

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

[8] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975).

States had influenced. Congress responded almost immediately by trying to extend the regulatory authority of the Justice Department and the SEC to all cases with a U.S. nexus. Significantly, however, it left the rules for private litigation where *Morrison* had determined them.[9]

Empagran and *Morrison* are significant, because antitrust and securities laws historically were the two most important fields for private attorney generals to supplement public regulation with private litigation. These cases, when framed by the congressional response, have left us in a world where U.S. public regulators may range widely, but private attorney generals face serious territorial constraints on what wrongs they can right.

RJR is the first case explicitly to embrace this division of labor.[10] The Court's majority could do so because of the structure of the Racketeering Influenced and Corrupt Organizations Act (RICO), the statute at issue. RICO is essentially a sanctions statute that imposes both enhanced criminal penalties and supercompensatory civil liability for certain offenses created by other bodies of law that occur in a context that the statute defines as racketeering. Because the remedies are separate, it was possible for the Court majority to distinguish their territorial scope. The enhanced criminal sanctions could apply to offenses that, based on context and other evidence, indicates a congressional intent to regulate conduct outside the United States. But the privately enforced civil sanction was distinct. This conceptual separation made it possible to find that Congress had not indicated anything about private enforcement, as opposed to criminal punishment, applying overseas, and that private access to civil litigation therefore requires a domestic injury.

Whether this distinction makes senses depends on how one thinks of this system, as well as regulatory law generally. If one conceives of law as defining bad things and authorizing sanctions, then it may seem odd to allow conduct to be bad for some purposes but not for private enforcement. If, however, one thinks of public enforcement and private litigation as distinct legal systems, each with its own culture, context and political economy, then treating them differently may seem reasonable.

At least in the United States, public enforcement of federal law involves public prosecutors (both in the Department of Justice and in the administrative agencies that have this power) who must coordinate their activities with other components of the government, including those answerable for the foreign relations of the United States. Indeed, the Justice Department has its own Office of International Affairs to manage the international implications of its actions. To some degree, the prosecutors must internalize the effect of their decisions on other countries and their governments. They must, in other words, balance the dynamic foreign policy consequences of their actions when deciding whether to prosecute or otherwise impose regulatory sanctions.

Private litigants face no such constraints. Plaintiffs and their lawyers may have multiple interests—getting paid, of course, but perhaps also changing the conversation about certain behavior and advancing various expressive interests—but none normally takes into account the foreign relations goals of the United States. The glory of private litigation is that it operates outside democratic accountability, as a means of righting wrongs to which the majority may be indifferent. But this feature is also a bug: It means private litigants (and in the case of class actions, we really are talking about the attorneys) can undertake suits that may benefit themselves personally but produce public harm. We may tolerate paying this price when it comes to our domestic political economy, but foreign relations costs may fall into a different category.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b) (2010) (amending the Securities Exchange Act to provide extraterritorial jurisdiction in suits by the government involving significant conduct or substantial effects in the United States). There is some question whether this enactment achieved its object. SEC v. Chicago Convention Center, LLC, 961 F. Supp. 2d 905, 909-917 (N.D. Ill. 2013).

[10] Three of the seven members of the Court, of course, rejected the distinction.

This argument illuminates the other recent presumption-against-extraterritoriality case, *Kiobel v. Royal Dutch Petroleum Co.*[11] This decision, which came soon after *Morrison*, applied the presumption to the federal-common-law cause of action for international torts that an earlier decision, *Sosa v. Alvarez-Machain*, had inferred was implied by a 1789 jurisdictional statute giving the federal courts jurisdiction to hear such cases.[12] The *Kiobel* Court's majority, in an opinion of remarkable opacity, ruled that this privately enforced regulatory regime extended only to torts with a significant connection to the United States, without specifying what counted as a connection.

At first blush, *Kiobel* might seem schizophrenic: Why should a statute dealing with international law violations injuring aliens imply a desire to regulate only U.S. conduct? The opinion starts to make sense, however, if one buys into the same vision that we see reflected in *RJR*.

Private litigation, this vision posits, is not only about vindicating rights, but also about bringing problematic claims that expand the boundaries of liability to the enrichment of those who bring those claims. The current rules of civil litigation, a majority of the Court seems to believe, do a reasonably acceptable job of limiting the costs of such ambitious litigation when the burdens fall on domestic actors, but not when foreign nations bear them. This is doubly so if foreign states have some ability to retaliate for regulatory actions that they disfavor. Private litigants get to make arguments that the government does not endorse and may oppose. This creativity and resistance to the status quo makes sense within a liberal democracy such as ours, but not when the issue is characterization of the acts and policies of foreign actors of significance to foreign states. When we do law as foreign policy, the Court seems to be saying, we want it done by political actors who must face political accountability for their choices, not by litigants and judges who have no such responsibility.

This is, of course, not the only way of seeing these issues. One might believe that some values, reflecting norms of transcendent and imperative morality, are too important to be left to the mere politics of international relations. We need, the argument might go, a sacerdotal community that will advance and defend these values, and at least in the United States the civil litigation system comes as close as we are likely to get to that epitome. My point here is not to reject that perspective, but only to observe that it is not the Court's. For what it's worth, I don't think it is likely ever to be the view of any plausible future Supreme Court, but that discussion is for another day.

This leaves us with a secondary but intriguing aspect of *RJR*. The party pushing for extraterritorial regulation by U.S. private litigation was an official foreign actor, namely a supranational organization representing (at the moment) twenty-eight sovereigns, as well as twenty-six of those states suing on their own behalf. If a foreign sovereign embraces U.S. regulation, why does it fall to the Supreme Court to deny it?[13]

On one level, the Court had a perfectly sound answer to this question:

> [O]ur interpretation of § 1964(c)'s injury requirement will necessarily govern suits by non-governmental plaintiffs that are not so sensitive to foreign sovereigns' dignity. We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign.[14]

The Court in effect maintained that the principles of interpretive economy and judicial modesty requires a binary choice. That being so, excluding private suits based on foreign injury on the whole reflects the better

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

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

[13] For more on this argument, see Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism"*, 73 WASH. & LEE L. REV. 653 (2016).

[14] RJR, 136 S. Ct. at 2108, slip op. at 22.

balance between the benefits of rights vindication and the costs of regulatory conflict, compared to a rule of unlimited (or more precisely, politically unaccountable) intrusion into shared international regulatory responsibilities.

To get to this outcome, the Court had to repudiate a decision from a somewhat earlier era, *Pfizer Inc. v. Government of India*.[15] While distinguishing that Burger-Court precedent on technical grounds, the *RJR* majority also noted that it has since rejected the argument, endorsed in *Pfizer*, that Congress must have intended to extend antitrust protect to foreign consumers because the antitrust laws extend to trade with foreign nations, not just domestic interstate commerce. The majority then referred to the distinction between "extending substantive antitrust law to foreign conduct and extending a private right of action to foreign injuries, two separate issues that, as we have explained, raise distinct extraterritoriality problems."[16] In a nutshell, private rights of action that permit private litigation raise foreign relations problems that public regulation through government officials does not. This is true even where a foreign state embraces the role of private plaintiff.

One might imagine a different system, where private persons face barriers to litigation that trenched on foreign prerogatives but foreign sovereigns do not. Problems would still exist, if the United States did not want its courts to serve as forums for disputes among foreign states, but perhaps one could limit jurisdiction further to cases against U.S. defendants. It was not crazy, however, for the Court to leave such fine tuning to Congress, especially since it seems implausible that Congress might embrace suits against U.S. actors under circumstances where otherwise identical foreign actors enjoy immunity from litigation.

What bears repeating is that *RJR*'s majority decision may not be to everyone's taste (including, of course, the three dissenters), but that it does reflect a coherent position of broader significance for issues of prescriptive jurisdiction. It focuses the debate on private civil litigation, rather than on regulation generally. Those seeking to broaden or rein in extraterritorial jurisdiction now must take account of the specific features of private lawsuits, and explain why they either do or do not matter. At least for the foreseeable future, the Court will want to know.

[15] Pfizer Inc. v. Government of India, 434 U.S. 308 (1978).

[16] RJR, 136 S. Ct. at 2110, slip op. at 26.