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Note

Rebutting the Presumption: A Proposed Amendment to Regulate International Business Conduct Through § 1964(c)

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I. Introduction

A. The Problem of International Money Laundering

In an increasingly global marketplace, the effects of money laundering[1] have been as significant as they are widespread. Money laundering has been tied to terrorist financing and to drug cartels, and risks the integrity of individual countries' financial stability as well as the integrity of the international financial system as a whole.[2] A 2011 United Nations report estimated that "money flows" from transnational organized criminal activity accounted for roughly 1.5% of global GDP, or $1.6 trillion, in 2009.[3] Of that amount, the report found that 70 percent "would have been available for laundering through the financial system."[4]

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1. For a background on how money laundering works, see Michael Anderson, Note, *International Money Laundering: The Need for ICC Investigative and Adjudicative Jurisdiction*, 53 VA. J. INT'L L. 763, 766–68 (2013).

2. *E.g.*, INT'L MONETARY FUND, IMF AND THE FIGHT AGAINST MONEY LAUNDERING AND THE FINANCING OF TERRORISM 1 (2018), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism [https://perma.cc/2N6T-S6GG].

3. UNITED NATIONS OFFICE ON DRUGS & CRIME, ESTIMATING ILLICIT FINANCIAL FLOWS RESULTING FROM DRUG TRAFFICKING AND OTHER TRANSNATIONAL ORGANIZED CRIMES 5 (2011), http://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf [https://perma.cc/EAW7-A5Y8].

4. *Id.*

Drug cartels and terrorist organizations have frequently called on the assistance of large, multinational firms in cleaning funds brought in from illicit activities: in a particularly egregious example, a subsidiary of the Honk Kong and Shanghai Banking Corporation (HSBC) was used to launder Al-Qaeda heroin profits that were ultimately used to purchase tickets for the planes used in the September 11 attacks.[5] HSBC, which operates through a network that covers 66 countries and territories and serves more than 39 million customers worldwide,[6] was ultimately accused of practices that allowed substantial amounts of illicit funds to flow through its foreign branches. A U.S. Senate investigation found that HSBC's anti-money laundering (AML) procedures were severely deficient—even though HSBC "operates in many jurisdictions with weak AML controls, high risk clients, and high risk financial activities."[7] Problems identified with HSBC's AML program included a "backlog of over 17,000 alerts identifying possible suspicious activity that had yet to be reviewed," a "3-year failure" to "conduct any AML monitoring of $15 billion in bulk cash transactions," and inadequate AML staffing, resources, and leadership.[8] HSBC not only allegedly facilitated the laundering of Al-Qaeda funds, but also repeatedly violated sanctions, and Mexican cartels used HSBC branches to launder enormous amounts of cash.[9] One cartel member was recorded via wiretap proclaiming that HSBC was "*the* place for money laundering."[10]

Following Senate and Department of Justice investigations into HSBC's AML compliance, HSBC agreed to pay $1.92 billion in fines to U.S. authorities.[11] Although the Senate investigators felt that HSBC's conduct rose to a level greater than mere negligence,[12] no individual executives were prosecuted, and the record fines levied against the bank accounted for

5. Anderson, *supra* note 1, at 764.

6. *Who We Are*, HSBC, http://www.hsbc.com/about-hsbc [https://perma.cc/CG7G-W5HC] [hereinafter HSBC].

7. U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY 2–3 (July 17, 2012), https://www.hsgac.senate.gov/imo/media/doc/PSI%20REPORT-HSBC%20CASE%20HISTORY%20(9.6)2.pdf [https://perma.cc/3R5B-893V].

8. *Id.* at 3.

9. Aruna Viswanatha & Brett Wolf, *HSBC to Pay $1.9 Billion U.S. Fine in Money-Laundering Case*, REUTERS (Dec. 10, 2012), https://www.reuters.com/article/us-hsbc-probe/hsbc-to-pay-1-9-billion-u-s-fine-in-money-laundering-case-idUSBRE8BA05M20121211 [https://perma.cc/7WBL-U28Q].

10. Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/5HT4-UUVX].

11. Viswanatha, *supra* note 9.

12. Keefe, *supra* note 10 ("Senator Carl Levin, who headed the investigation, declared, 'This is something that people knew was going on at that bank.'").

roughly one month's profits.[13] And fines or apologies[14] notwithstanding, that one of the world's largest banks fell so short in implementing standard AML procedures suggests that the current enforcement regime is wanting, or, at least, could be strengthened significantly.

B. Transnational Agreement on the Need for Regulation

Although the current anti-money laundering enforcement regime may be lacking in terms of deterrence, the requisite international agreement[15] that money laundering should be criminalized and punished has been expounded and reiterated in numerous treaties and conventions to which the US and much of the United Nations are parties. What these agreements demonstrate ultimately—and especially for purposes of this Note—is that severe penalties could be imposed against domestic and foreign entities that facilitate money laundering without hindering the competitiveness of the enforcing state's businesses, and without the harm to international comity that courts often fret over when faced with domestic laws' extraterritorial application.[16]

There is at present no international convention focusing "exclusively on money-laundering."[17] Numerous international drug conventions, however, stipulate member states' obligation to police the means by which criminal organizations hide their proceeds.[18] For example, the 1988 Vienna

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13. *Id.*

14. *See* Dominic Rushe, *HSBC 'Sorry' for Aiding Mexican Drug Lords, Rogue States and Terrorists*, GUARDIAN (July 17, 2012), https://www.theguardian.com/business/2012/jul/17/hsbc-executive-resigns-senate [https://perma.cc/9A27-8VB2] (HSBC's head of compliance stated, "[d]espite the best efforts and intentions of many dedicated professionals, HSBC has fallen short of . . . the expectations of our regulators.").

15. *See infra* Parts II.A, IV.A.2 (discussing how transnational agreements can provide the political context necessary for strong extraterritorial enforcement of individual states' business regulations).

16. *See infra* Part III.B (discussing the presumption against extraterritoriality and recent Supreme Court jurisprudence on the issue).

17. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 3, at 121.

18. *See, e.g.*, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 3, Dec. 20, 1988, S. TREATY DOC. No. 101-4 (1989) [hereinafter The Vienna Convention] (stipulating that "[e]ach Party shall . . . establish as criminal offences under its domestic law, . . . [t]he conversion or transfer of property, knowing that such property is derived from any [drug-related offenses] . . . for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence"); FATF, THE FORTY RECOMMENDATIONS OF THE FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING 1 (1990), http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf [https://perma.cc/4XDA-ZYHN] ("An effective money laundering enforcement program should include increased multilateral cooperation and mutual legal assistance in money laundering investigations and prosecutions and extradition in money laundering cases, where possible."); United Nations Convention Against Transnational Organized Crime, art. 7, Nov. 15, 2000, S. TREATY DOC. No. 108-16 (2004) ("Each State Party. . . [s]hall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions . . . in order to deter and detect all forms of money-laundering . . . , emphasiz[ing] requirements for record-keeping and the reporting of suspicious transactions."); United Nations Convention Against Corruption, art. 14, October 31, 2003, S. TREATY DOC. No.

Convention, which is almost universally adhered to, made money laundering an extraditable offense and obliges parties to make drug-related money-laundering activities a criminal offense.[19] And the Financial Action Task Force (FATF) on Money Laundering has promulgated a set of 40 recommendations, now adopted by 36 states,[20] intended to stem the tide of international money laundering.[21] The recommendations included extending the Vienna Convention's criminalization of drug-related money laundering to all money-laundering activities,[22] requiring states to cooperate with investigations even when that conflicts with privacy protections,[23] and requiring financial institutions to maintain records for at least five years and to develop appropriate AML programs.[24]

The FATF and the various convention stipulations regarding money-laundering regulation, according to the UN Office on Drugs and Crime, reflect an international understanding that illicit financial flows are "highly detrimental for society at large" and "can result [in] large-scale corruption, disturbances of competition, violence and economic equilibria and can contribute towards a weakening of the state, thus jeopardizing the rule of law."[25] Moreover, and for the purposes of this Note, it demonstrates a basic commitment amongst many states—and the recommendation of international institutions—to criminalize and effectively deter international money laundering via each state's own domestic laws. This type of collective

109-6 (2003) ("Each State Party shall . . . institute a comprehensive regulatory and supervisory regime . . . emphasiz[ing] requirements for customer, and, where appropriate, beneficial owner identification, record-keeping, and the reporting of suspicious transactions."); UNITED NATIONS OFFICE ON DRUGS & CRIME, POLITICAL DECLARATION AND PLAN OF ACTION ON INTERNATIONAL COOPERATION TOWARDS AN INTEGRATED AND BALANCED STRATEGY TO COUNTER THE WORLD DRUG PROBLEM 49 (Mar. 11–12, 2009), https://www.unodc.org/documents/ungass2016/V0984963-English.pdf [https://perma.cc/8LRA-FXDY] (committing member states to "[w]idening the scope of predicate crimes for money-laundering to include all serious crimes" and "[m]aking money-laundering an extraditable offence"); U.N. Congress on Crime Prevention and Criminal Justice, *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World*, art. 23, U.N. Doc. A/CONF.213/18, chap. I, resolution 1 (Apr. 19, 2010) (recognizing the need for member states to "adopt effective mechanisms for the seizure, restraint and confiscation of proceeds of crime and to strengthen international cooperation to ensure effective and prompt asset recovery").

19. The Vienna Convention, *supra* note 18.

20. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 3, at 123 (noting that "membership in the FATF more than doubled . . . to the current 36").

21. *See generally* FATF, *supra* note 18.

22. *Id.* at 1 (recommending that countries "consider" "criminaliz[ing] money laundering based on all serious offenses").

23. *Id.* at 5 (recommending that countries "make efforts to improve a spontaneous or 'upon request' international information exchange relating to suspicious transactions," with "safeguards . . . to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection").

24. *Id.* at 2 (Financial institutions should "maintain, for at least five years, all necessary records . . . to enable them to comply swiftly with information requests," and "[f]inancial institutions should pay special attention to all complex, unusual large transactions.").

25. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 3, at 122.

agreement on the need to regulate harmful international business conduct has, in the past, effectively laid the political groundwork for rigorous international enforcement by individual states via their domestic laws—and without offending international comity or undermining the competitive posture of member states' industries.[26]

II. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA) prohibits publicly and privately held corporations from bribing any foreign public official[27] for the purposes of influencing government decision-making or obtaining or retaining the government's business.[28] It may be raised as an affirmative defense under the Act that the otherwise-prohibited conduct was "lawful under the written laws and regulations of the foreign official's . . . country."[29] Although the Act does not directly create a private cause of action,[30] FCPA violations are being used more frequently in the civil context as a part of or predicate for damages claims.[31] In several recent cases, undisclosed potential FCPA violations have served as predicates for securities fraud claims.[32] FCPA violations have also been used as the basis for suits alleging breach of

26. *See infra* note 36 and accompanying text (discussing the ways in which the OECD Anti-Bribery Convention made strong extraterritorial enforcement of the Foreign Corrupt Practices Act politically acceptable).

27. *See* 15 U.S.C. § 78dd-1(f)(1)(A) (1998) (defining "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization").

28. *Id.* § 78dd-1(a)(1) (prohibiting registered securities issuers from bribing foreign public officials); *see also id.* § 78dd-2(a)(1) (prohibiting the same conduct for non-issuer "domestic concerns").

29. *Id.* § 78dd-1(c)(1).

30. *See, e.g.*, Republic of Iraq v. ABB AG, 768 F.3d 145, 169 (2d Cir. 2014) ("The Republic contends that the district court should have recognized an implied private right of action [under the FCPA]."); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1030 (6th Cir. 1990) ("[S]ince none of the . . . [factors for determining a private right of action from a federal statute] support[] the plaintiffs' private right of action theory, we AFFIRM the district court's dismissal of the FCPA claim.").

31. Aryeh S. Portnoy & John L. Murino, *Private Actions Under the Foreign Corrupt Practices Act: An Imminent Front?*, INT'L LITIG. NEWS (Int'l Bar Ass'n Legal Prac. Division, London), Apr. 2009, at 31–32, https://www.crowell.com/documents/private-actions-under-the-US-FCPA.pdf [https://perma.cc/2M8B-NJVP].

32. *See, e.g.*, *In re* Faro Techs. Sec. Litig., 534 F. Supp. 2d 1248, 1257–58 (M.D. Fla. 2007) (denying motion to dismiss on claim that defendant "overstat[ed] the amount of sales by including sales achieved through unlawful conduct in Asia in violation of the [FCPA]"); *In re* Nature's Sunshine Prods. Sec. Litig., 486 F. Supp. 2d 1301, 1308 (D. Utah 2007) (holding that misstatements regarding a "payment that purportedly violated the FCPA" were material, even though the plaintiffs did not allege "anything regarding the amount of money involved"); *In re* Immucor Inc. Sec. Litig., No. 1:05-CV-2276-WSD, 2006 WL 3000133, *1 (N.D. Ga. Oct. 4, 2006) (denying motion to dismiss on § 10(b) claim for "understat[ing] the scope and gravity of potential [FCPA] violations by [the defendant's] Italian subsidiary").

fiduciary duties[33] and—although generally unsuccessfully—as a predicate act under the Racketeer Influenced Corrupt Organizations Act.[34]

This Note argues that the advent of the FCPA as a means for shareholders to recover damages for executives' and subsidiaries' illegal conduct is traceable to an international agreement to criminalize corporate bribery of foreign public officials. That is, where the international agreement made possible a strong extraterritorial law enforcement regime, that enforcement made possible an additional means of regulation and deterrence that may prove even stronger—one in which corporations must concern themselves not only with regulatory compliance, but also with their own legal and monetary responsibility for the harm caused to stakeholders by their illegal acts.[35]

A. The FCPA Model

Much like international money laundering, corporate bribery of foreign public officials is an issue on which many states have found common ground in the need for regulation. The FCPA has become a rare example of both U.S. enforcement of domestic laws against actors whose conduct takes place in foreign jurisdictions and of international cooperation in combatting a global problem. The FCPA has undergone a transformation in recent years, with the once under-enforced domestic law that was seen as a hindrance to U.S. companies' vigorous competition in the global marketplace, now a rigorous extraterritorial enforcement mechanism that is applied (and whose application is supported) almost universally.[36]

In the first two decades following its inception, the Act was largely dormant.[37] In prohibiting the bribery of foreign government officials for the purpose of securing business, the FCPA was politically risky. The prevailing fear amongst politicians and businesspeople was that the Act would put

33. *See, e.g.*, *In re* Syncor ERISA Litig., 516 F.3d 1095, 1098 (9th Cir. 2008) (reversing summary judgment on ERISA-breach of fiduciary duty claim alleging a "foreign bribery scheme" in violation of the FCPA by the defendant's Taiwanese subsidiary).

34. *See, e.g.*, Karim v. AWB Limited, 347 Fed. App'x 714, 715–16 (S.D.N.Y. 2008) (granting motion to dismiss on RICO claim alleging, in part, FCPA violations); Castellanos v. Pfizer, Inc., No. 07-60646-CIV, 2008 WL 2323876, at *2 (S.D. Fla. May 29, 2008) (dismissing FCPA-predicated RICO claim); *see also* 18 U.S.C. § 1964(c) (2016) (RICO's private action provision); *infra* Part III (discussing § 1964(c)).

35. *See* Portnoy & Murino, *supra* note 31, at 33 (noting that even as companies are "reviewing and enhancing" or "building . . . from the ground up" FCPA compliance programs in response to the "vigilant global anti-corruption regime, driven in large part by US authorities," "private litigants . . . are part of a developing trend that has the potential to raise the risk levels for non-compliance to new heights," and cautioning that "[w]ith private parties now joining the fight against corruption, companies more than ever must be prepared."); *infra* Part IV.A (discussing the advantages of regulatory enforcement through private civil litigation).

36. *See generally* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017).

37. *Id.* at 1621 ("The FCPA was effectively dormant for its first twenty years.").

American businesses at a severe disadvantage in international business, as other countries continued to turn a blind eye to—and in some cases even directly subsidize[38]—domestic companies' bribery of foreign public officials.[39] That perception has been linked to the early non-enforcement of the Act, as no single year between 1977 and 2001 saw more than five FCPA enforcement actions.[40]

The early 2000s saw a relative deluge of FCPA enforcement actions, however, and one that Professor Rachel Brewster has argued is directly traceable to the OECD Anti-Bribery Convention.[41] There, member states agreed to criminalize corporate bribery of foreign officials and to each rigorously enforce their own laws.[42]

The promises of the OECD Convention went largely unfulfilled. Although the member states did go on to criminalize bribery, the resulting enforcement was lacking.[43] Brewster has argued that the significant impact of the Convention, however, was in the mere agreement regarding the need to regulate international corporate bribery. Following the Convention, the political risks of applying the FCPA were effectively mitigated—whether or not other countries enforced their laws as rigorously, each had agreed to criminalize the relevant conduct, and so American corporations could be less concerned about the competitive disadvantage of its enforcement. That is, as the extraterritorial application of the FCPA had become acceptable internationally, American corporations were less concerned about complying with its directives, and so the Justice Department and the SEC were provided the political context necessary to bring more enforcement actions carrying higher penalties.[44]

Since the Convention, FCPA enforcement has exploded, with 2010 seeing fifty-six prosecutions.[45] And perhaps more significantly, the largest and the majority of the penalties rendered under the FCPA have come against

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38. *Id.* at 1616 ("When the FCPA was enacted, other major developed countries (such as Germany and the United Kingdom) did not prohibit foreign bribery and even subsidized it by making bribes tax-deductible.").

39. *Id.*

40. *Id.* at 1649–50.

41. *See id.* at 1655 ("This Article argues that the international acceptance of anti-bribery principles made the U.S. government capable of strengthening its enforcement of the statute without imposing a competitive loss on American businesses.").

42. *Id.* at 1642 (noting that the 1997 OECD Convention "was both binding and contained strongly worded obligations for nations to prohibit foreign bribery by their nationals (natural and legal)").

43. *Id.* at 1643 ("The vast majority of OECD states have limited to no enforcement of their anti-bribery laws.").

44. *Id.* at 1677 (stating that the treaty "allowed the U.S. government to turn around its FCPA enforcement policies without putting American firms at a competitive disadvantage" and thereby "permitted the United States to expand its enforcement regime to all of the world's major exporters").

45. *Id.* at 1648, 1648 n.162.

actors in foreign jurisdictions.[46] Moreover, as the Convention created more extensive criminal liability—i.e., as fewer nations' laws provided cover via a "foreign sovereign legality" defense[47]—there was a concomitant extension of corporations' civil liability. That is, the widening scope of criminal liability was necessarily attendant to a widening field of predicate acts on the basis of which stakeholders injured by corrupt international business conduct could be provided a remedy. And whatever one's opinion on the merits of those claims, that additional liability provides an additional incentive for corporations to aim beyond mere minimal compliance and towards true harm avoidance. Authors for whom those corporations potentially subject to such liability are the target audience have pointed out that the addition of private litigants to the already "vigilant global anti-corruption regime" may "raise the risk levels for non-compliance to new heights," and cautioned that "[w]ith private parties now joining the fight against corruption, companies more than ever must be prepared."[48]

What the FCPA Model demonstrates is that transnational agreements to individually regulate harmful international business conduct, whether or not universally fulfilled, provide the political context necessary for a rigorous extraterritorial enforcement regime. And where that extraterritorial enforcement regime exists, so too does the possibility of civil liability that provides both redress for injured parties and damages exposure sufficient to shift corporate incentives towards a genuine effort at compliance and control over subsidiary activities.

III. The Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO)[49] was passed in 1970 with the aim of aiding the prosecution of organized crime leaders who had previously escaped liability by having subordinates carry out their organizations' criminal acts.[50] The Act set out as its purpose the strengthening and expansion of the means of prosecuting organized crime.[51] RICO set out more than mere criminal liability, however, as Congress made clear at the outset with its direction that RICO "shall be liberally construed to effectuate its remedial purposes."[52]

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46. *Id.* at 1651 & n.173 (Seven of the ten highest FPCA penalties have rendered against foreign firms; prior to the OECD Convention, all ten of the highest penalties had been against domestic firms.).

47. *See* 15 U.S.C. § 78dd-1(c)(1) (2016); *see also supra* note 27 and accompanying text (providing foreign sovereign legality as an affirmative defense).

48. Portnoy & Murino, *supra* note 31, at 33.

49. 18 U.S.C. §§ 1961–68.

50. *See* Daniel R. Peacock, Note, *RICO's Extraterritorial Application: From* Morrison *to* RJR, Nabisco, Inc., 65 DRAKE L. REV. 555, 560–62 (2017) (providing an overview of RICO).

51. *Id.* at 560.

52. *Id.* at 561; Organized Crime Control Act Pub. L. 91-450, § 904(a), 84 Stat. 922, 947 (1970).

RICO sets out a broad list of "prohibited activities," for which both criminal and civil liability may be imposed, under the heading of "racketeering activity."[53] Racketeering activity covers a range of predicate offenses, including various felony offenses chargeable under state law[54] and "any act which is indictable under" a litany of federal statutes, including those covering bribery, counterfeiting, mail fraud, forgery, and money laundering.[55] A single violation of a predicate offense will not trigger RICO liability, which requires instead a "pattern of racketeering activity" involving at least two related "acts of racketeering activity."[56]

RICO requires moreover the involvement of an "enterprise," which "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[57] Enterprises, which courts generally define liberally under the statute,[58] are targeted by RICO provisions prohibiting "any person" from either participating in an enterprise's racketeering activity[59] or acquiring or maintaining an interest in an enterprise through racketeering activity.[60] RICO's text contemplates and in fact directs its extraterritorial application, with those sections creating criminal liability targeting explicitly "any enterprise which is engaged in, or the activities of which affect . . . foreign commerce."[61] And most importantly for this Note, RICO creates in § 1964(c) civil liability for those who violate its substantive provisions. Specifically, the section provides that "any person injured in his business or property by reason of a violation of section 1962" may sue in any appropriate U.S. district court, and "shall recover" treble damages and costs of suit.[62] Other than barring its use for "conduct that would have been actionable as fraud in the purchase or sale of securities"[63] and prescribing that defendants who plead guilty or are convicted in criminal RICO proceedings be collaterally estopped from defending the essential allegations of the offense in a subsequent civil suit by the Government,[64] RICO's text contains no additional qualifications on its private action provision.

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53. 18 U.S.C. § 1962.

54. *Id.* § 1961(1)(A).

55. *Id.* § 1961(1)(B).

56. *Id.* § 1961(5).

57. *Id.* § 1961(4).

58. *See infra* note 70 (discussing the types of associations that have qualified as RICO enterprises).

59. 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity.").

60. *Id.* § 1962(b) ("It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise . . . .").

61. *Id.* §§ 1962(b), (c).

62. *Id.* § 1964(c).

63. *Id.*

64. *Id.* § 1964(d).

A. Private RICO Litigation and Money Laundering

At least prior to the Supreme Court's recent strengthening of its presumption against extraterritoriality doctrine in *Morrison v. National Australia Bank Ltd.*[65] and *RJR Nabisco, Inc. v. European Community*,[66] RICO had been used extraterritorially to seek damages arising from international money laundering violations.

An illustrative example of the requirements (at least at the pleading stage) for a successful RICO-money laundering claim is provided by *Republic of Colombia v. Diageo North American, Inc.*,[67] in which the Republic of Colombia alleged that the defendant liquor manufacturers and distributors—Diageo North America, Seagrams, and related entities—were members of an "enterprise" of drug traffickers that organized around the purpose of laundering proceeds from illicit narcotics sales and smuggling liquor into Colombia.[68] Although the defendants were mostly competitors in the liquor manufacturing and distribution market, RICO's prescribed liberal construction[69] helped the Colombian Government to sufficiently demonstrate their status as an "enterprise"[70] to survive a 12(b) motion.[71] And the plaintiffs managed to sufficiently plead—if perhaps by a narrow margin—injury "by reason" of a RICO violation. Although the language of RICO itself might suggest a proximate causation requirement that would generally pose a high bar for money-laundering claims (and the Supreme Court has in fact couched

65. 561 U.S. 247 (2010).

66. 136 S. Ct. 2090 (2016); *see infra* Parts III.B., III.B.2 (discussing the cases and the presumption).

67. 531 F. Supp. 2d 365 (E.D.N.Y. 2007).

68. *Id.* at 375.

69. *See* Organized Crime Control Act Pub. L. 91-450, § 904(a), 84 Stat. 922, 947 (1970); *see also supra* note 52 and accompanying text.

70. The Supreme Court has held "association-in-fact" enterprises under RICO to require only "three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Boyle v. United States, 556 U.S. 938, 946 (2009). Courts have generally construed RICO's definition of "enterprise" liberally and held an array of alleged associations (both entity and association-in-fact) to fall within it. *See*, *e.g.*, *id.* at 941 (holding that a "loosely and informally organized" group of bank thieves that did not have "a leader or hierarchy" or "any long-term master plan or agreement" was an association-in-fact enterprise within the meaning of RICO); Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir. 2007) (determining Microsoft and Best Buy, through an allegedly fraudulent joint marketing and information sharing scheme, constituted a RICO association-in-fact enterprise); Handeen v. Lemaire, 112 F.3d 1339, 1351–53 (8th Cir. 1997) (holding that a bankruptcy estate, as pleaded, constituted an entity enterprise); Allstate Ins. Co. v. Benhamou, 190 F. Supp. 3d 631, 656–57 (S.D. Tex. 2016) (noting that insurers sufficiently alleged that the group of medical doctors and clinics operated an entity or association-in-fact RICO enterprise).

71. *See Republic of Colombia*, 531 F. Supp. 2d at 425 (Although the defendants argued that Colombia had not sufficiently alleged "an enterprise separate from the course of conduct" made the predicate of the suit, "many—if not all—of the members of the alleged enterprise formed a liquor-distribution chain," of which narcotics traffickers were also members in that they "convert[ed] Colombian Pesos into United States Dollars, a conversion that is required to make this distribution chain function.").

the "by reason of" requirement in terms of proximate cause[72]), "the proximate cause element has a different meaning in the RICO context than it does in the common law context."[73] A "compensable injury flowing from" substantive RICO violations, as the Supreme Court explained in *Anza v. Ideal Steel Corp.*,[74] "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise."[75] While the precise RICO-proximate cause standard remains murky,[76] the Eastern District of New York held that Colombia had met it at the pleading stage in *Republic of Colombia*. Although the court found it to be a "close call," Colombia narrowly overcame the defendants' objection that causation was indirect and speculative by alleging that the defendants' laundering of narcotics proceeds enabled them to "sell their liquor at lower prices," which "caused Plaintiffs to lose profits and revenue"—and that allegation, moreover, enabled Colombia to avoid the bar of the revenue rule.[77] Colombia's allegations that the defendants "actively managed" the enterprise, additionally, overcame objections that intervening acts had broken the requisite chain of causation.[78] The district court found it significant also in its proximate causation analysis that, because no person had been "injured more directly than Plaintiffs," "if Plaintiffs are not permitted to bring the instant claim, it would appear that Defendants' money-laundering enterprise would not give rise to an actionable civil RICO claim."[79]

Money laundering-predicated RICO claims based upon foreign injury, prior cases have shown, are at least practicable. Money laundering is specifically incorporated into RICO as a predicate offense; as in most RICO cases, the "enterprise" requirement is generally a low bar, and proximate causation is—if it is different at all—more easily met than in the context of common law causes of action. Recent extensions of the "presumption against extraterritoriality" doctrine, however, have operated to limit § 1964(c)'s scope.

B. RICO and the Presumption Against Extraterritoriality

When a statute does not clearly indicate its extraterritorial application, Justice Scalia explained for the Court in *Morrison v. National Australian*

72. Holmes v. Sec. Inv'r Protection Corp., 503 U.S. 258, 265–68 (1992).

73. *Republic of Colombia*, 531 F. Supp. 2d at 431.

74. 547 U.S. 451 (2006).

75. *Id.* a 457 (citing Sedima, S.P.R.L. v. Imrex Co., 437 U.S. 479, 497 (1985)).

76. *See id.* at 457–61 (discussing RICO-proximate cause precedent generally and in terms of "whether the alleged violation led directly to the plaintiff's injuries").

77. *Republic of Colombia*, 531 F. Supp. 2d at 432.

78. *Id.* at 437–38.

79. *Id.* at 433.

Bank, Ltd., "it has none."[80] The presumption against extraterritoriality is in essence a rule of statutory interpretation,[81] setting out as a default rule that Congress shall be presumed not to have intended a law to apply extraterritorially.[82] The presumption "applies regardless of whether there is a risk of conflict between the American statute and a foreign law."[83] The presumption, which first arose in the landmark *American Banana* case,[84] has been considered so long settled that the Court "assume[s] that Congress legislates against the backdrop" of it.[85] Prior to the *Morrison* decision in 2010, lower courts had developed several tests for determining the extraterritorial application of RICO—which addresses specifically enterprises that are "engaged in" or "the activities of which affect" foreign commerce,[86] and incorporates by reference statutes that apply extraterritorially,[87] yet makes no individual reference to its extraterritorial application or lack thereof in its civil action provision.[88]

The majority of courts prior to *Morrison* had held that RICO could be applied extraterritorially, typically applying either (or some combination) of the "conduct" and "effects" tests (developed first by the Second Circuit in the context of securities fraud[89]) for extraterritoriality.[90] The two leading cases at

80. 561 U.S. 247, 248 (2010).

81. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1990) ("[W]hether Congress has in fact exercised its authority" to direct that a law be applied extraterritorially "is a matter of statutory construction.").

82. *See Morrison*, 561 U.S. at 255 (The presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.") (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

83. *Id.* (citing Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 173–74 (1993)).

84. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (Traditional notions of territorial sovereignty "would lead in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial." (internal quotations omitted)).

85. *Arabian Am. Oil Co.*, 499 U.S. at 248.

86. *See* 18 U.S.C. §§ 1962(b), (c) (2016); *see also supra* note 58 and accompanying text.

87. *See id.* § 1961(1)(B) ("'[R]acketeering activity' means . . . any act which is indictable under . . . title 18 . . . section 1956."); *see also, e.g.*, *id.* § 1956(b)(2) (Prescribing that, in money laundering prosecutions, "the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country" if service of process complies with the Federal Rules of Civil Procedure or the laws of the foreign jurisdiction in which the person is found, and the foreign person's illegal transactions "occur . . . in part in the United States," involve "property in which the United States has an ownership interest," or "the foreign person is a financial institution that maintains a bank account at a financial institution in the United States."); United States v. All Assets Held at Bank Julius, 251 F. Supp. 3d 82, 92 (D.D.C. 2017) ("Section 1956 . . . explicitly provide[s] for extraterritorial application, with certain limitations on [its] reach.").

88. *See* 18 U.S.C. § 1964(c).

89. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) (the conduct test), *abrograted by* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010); Schoenbaum v. Firstbrook, 405 F.2d 200, 208–09 (2d Cir. 1968) (the effects test), *abrogated by* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010).

90. *See* Peacock, *supra* note 50, at 562; *see also, e.g.*, Liquidation Comm'n of Banco Intercont'l, S.A. v. Renta, 530 F.3d 1339, 1351–52 (11th Cir. 2008) ("The . . . widely accepted view

the time, *Alfadda v. Fenn*[91] and *Poulos v. Caesars World, Inc.*,[92] held, respectively, that RICO applied extraterritorially where conduct material to the pattern of racketeering activity occurred in the United States; and where material conduct in the United States directly caused foreign injury or racketeering activity abroad caused significant effects within the United States.[93]

Because the tests for determining RICO's extraterritorial application had developed out of lower courts' securities jurisprudence, *Morrison*'s holding that § 10(b) of the Securities Exchange Act did not apply extraterritorially, and its concomitant rejection of the conduct and effects tests, returned international RICO jurisprudence to a place of uncertainty.[94] *Morrison*'s two-pronged test for determining extraterritoriality in the securities context—directing that courts (1) look for a clear statement of the law's extraterritoriality in its plain text, and absent such a finding, in the statute's overall context; and then (2) if the presumption has not been rebutted, determine whether the claim involves a domestic application of the statute[95]—led the Second Circuit to develop a new rule for RICO's extraterritorial application in *European Community v. RJR Nabisco, Inc.*[96]

1. European Community v. RJR Nabisco*: The Second Circuit's "Predicate Acts" Test.—RJR Nabisco* involved a claim brought by the European Community and twenty-six member states against R.J. Reynolds Nabisco under § 1964(c)'s private action provision, with predicate violations including money laundering and material aid to terrorist organizations.[97] The Community asserted that an "extensive investigation" by European governmental officials had uncovered "serious misconduct" by RJR Nabisco.[98] That investigation, which began in the 1990s and was led by the European Anti-Fraud Office in cooperation with U.S. and other authorities, had also targeted several other large tobacco companies that were

. . . we adopt today[] is that RICO may apply extraterritorially if conduct material to the . . . racketeering occurs" or "significant effects of the racketeering are felt" in the United States); Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004) (applying the conduct and effects tests to RICO, at least in "cases such as this one, where comity concerns . . . are too peripheral to impact our threshold jurisdictional inquiry"); Alfadda v. Fenn, 935 F.2d 475, 479 (2d Cir. 1991) ("The mere fact that the corporate defendants are foreign entities does not immunize them from the reach of RICO."), *overruled by* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010).

91. 935 F.2d 475 (2d Cir. 1991).

92. 379 F.3d 654 (9th Cir. 2004).

93. *Alfadda*, 935 F.2d at 479; *Poulos*, 379 F.3d at 663.

94. *See Morrison*, 561 U.S. at 261 (criticizing the tests as "judicial-speculation-made-law").

95. *Id.* at 265–67.

96. 764 F.3d 129 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090 (2016).

97. *See generally id.*

98. Brief for Respondents at 1, RJR Nabisco v. European Cmty., 136 S. Ct. 2090 (2016) (No.15-138), 2016 WL 447643.

competitors of RJR Nabisco.[99] The investigation led not only to (relatively small) criminal penalties against RJR Nabisco affiliates in the U.S. and Canada,[100] but also to settlements—all of which were reached in 2010 or prior—involving compliance-program agreements and payments ranging from $200 million to over $1 billion with Philip Morris International, Japan Tobacco International, British American Tobacco, and Imperial Tobacco Limited.[101] No settlement was reached with RJR Nabisco, however, and the European Community claimed that "alone among the major tobacco companies," in 2016 RJR Nabisco "continue[d] to engage in unlawful business practices and refuse[d] to adopt reforms to eliminate illegal cigarette trafficking and money laundering."[102]

As part of its money-laundering scheme, the European Community alleged, RJR Nabisco sold cigarettes to organized criminal organizations, from which it received "secret payments," and then laundered the proceeds "in the United States or offshore venues known for bank secrecy."[103] According to the European Community's complaint, RJR Nabisco laundered the proceeds of "Italian, Russian, and Colombian organized crime through financial institutions in New York City, including The Bank of New York, Citibank N.A., and Chase Manhattan Bank," and violated sanctions by doing business in Iraq that "financed both Saddam Hussein's regime and terrorist groups."[104]

The alleged RICO scheme had significant domestic ties—RJR Nabisco had "directed money-laundering and other criminal activities" and "dispatched U.S. citizen-employees to travel abroad to deal directly with criminal elements" from their U.S. headquarters,[105] after determining "at the highest corporate level" to "sell cigarettes to and through criminal organizations and to accept criminal proceeds in payment."[106] The European Community alleged that RJR Nabisco had facilitated these activities by restructuring its corporate structure, "for example, by establishing subsidiaries in locations known for bank secrecy to direct and implement

99. *Id.* at 6.

100. *Id.* at 7 & n.1 (citing Agreed Statement of Facts Containing Admissions Made Pursuant to s.655 of the Criminal Code, *Her Majesty the Queen in Right of Canada v. Northern Brands Int'l, Inc.* (Ontario Ct. of Justice, filed Apr. 13, 2010) (involving a $75 million settlement agreement between Canada and an RJR Nabisco affiliate); Reynolds American Inc., SEC Form 8-K, Exhs. 10.2 & 99.1 (Apr. 13, 2010); U.S. Dep't of Justice, Press Release, *R.J. Reynolds Affiliate Pleads Guilty, Pays $15 Million in Criminal Fines and Forfeitures as Part of Cigarette Smuggling Operation* (Dec. 22, 1998), http://www.justice.gov/archive/opa/pr/1998/December/605usa.htm [https://perma.cc/8E7E-WZ2D]).

101. Brief for Respondents, *supra* note 98, at 7–8 & n.2–5.

102. *Id.* at 8.

103. Second Amended Complaint at 1, European Cmty. v. RJR Nabisco, Inc., 814 F. Supp. 2d 189 (E.D.N.Y. 2011) (No.1: 02-cv-5771-NGG-VVP), 2011 WL 1841796.

104. *Id.*

105. Brief for Respondents, *supra* note 98, at 1.

106. Second Amended Complaint, *supra* note 103, at 1.

their money-laundering schemes and to avoid detection by U.S. and European law enforcement."[107] It was clear, the European Community alleged, that RJR Nabisco was "well aware" that it was laundering criminal proceeds—among other reasons, because of the company's "monthly routine" of sending U.S. employees to Colombia (by way of bribing officials at the Venezuelan border) to collect "enormous amounts of Colombian cocaine money" in "bulk cash."[108]

In addition to damages under RICO and various common law causes of action, the European Community sought injunctive relief to prevent RJR Nabisco from "engaging in money laundering and organized crime" and to compel them "to adopt necessary programs and procedures to prevent such conduct in the future."[109] The European Community asserted further that, if it could not obtain relief, "there [would] be an increased risk to national security, continued injury to Plaintiffs' business and property, and damage to the vital interests of the United States and Plaintiffs."[110]

After the Eastern District of New York dismissed the RICO claims, holding that in light of *Morrison*, RICO's "silence" on the issue of extraterritoriality "prohibits any extraterritorial application of RICO,"[111] the European Community appealed to the Second Circuit. The Second Circuit held that the District Court had misread *Norex Petroleum Ltd. v. Access Industries, Inc.*[112] as holding that RICO "can never have extraterritorial reach in *any* of its applications," when it in fact held merely that RICO does not apply extraterritorially "*in all of its applications*."[113] The court went on to set out a new test for RICO's extraterritoriality via a focus on the statutes on which RICO liability is predicated—specifically, holding that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[114] That holding was justified, in part, on the grounds that at least some of the statutes incorporated into RICO as predicate acts "unambiguously and necessarily involve extraterritorial conduct."[115] A presumption against extraterritoriality doctrine too strong for § 1964(c) to rebut in any circumstance would be especially problematic in cases like this, the court said, where its extraterritoriality is "explicitly permitted under the money laundering statute,"[116] which "expressly states"

107. *Id.* at 2.

108. *Id.* at 29–30, 37–38.

109. *Id.* at 2.

110. *Id.* at 2–3.

111. European Cmty. v. RJR Nabisco, Inc., No. 01-CV-5771 (NGG)(VVP), 2011 WL 843956, at *4 (E.D.N.Y. March 8, 2011) (mem. op.).

112. 631 F.3d 29 (2d Cir. 2010).

113. European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014).

114. *Id.*

115. *Id.*

116. *Id.* at 137.

that there will be "extraterritorial jurisdiction over the conduct prohibited by this section."[117]

The Supreme Court reversed.

2. RJR Nabisco v. European Community*: The Supreme Court Addresses RICO's Extraterritorial Application.* —The Supreme Court's decision in *RJR Nabisco, Inc. v. European Community*[118] established what some have described as a new and even higher bar to overcome the presumption against extraterritoriality.[119]

Basing its holding primarily on the method of statutory interpretation for extraterritoriality laid out in *Morrison v. National Australia Bank Ltd.,* Justice Alito's opinion for the Court held that Congress had not overcome the presumption against extraterritoriality with § 1964(c).[120] That result was surprising for several reasons—not the least of which was that RICO's text seemed plainly to indicate its intended extraterritorial application (and the Court in fact conceded that point[121]), and § 1964(c) individually did nothing more than provide a cause of action for "any person injured" by reason of its violation.[122] Another was that the case seemed to extend the presumption, as some Justices in *Morrison* had feared was forthcoming, so far as to make what was once a mere rebuttable presumption into a "clear statement rule,"[123] and now one that Congress must explicate in each individual section of an act.[124] The upshot for RICO litigation of *RJR Nabisco* was the creation of a distinction between the extraterritorial application of RICO in civil and in law enforcement contexts—which was surprising because the presumption arose in the first place in the context of private civil actions,[125] and especially

117. *Id.* at 139 (citing 18 U.S.C. § 1956(f)).

118. 136 S. Ct. 2090 (2016).

119. *See, e.g.*, Maggie Gardner, Essay, RJR Nabisco *and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 141 ("[T]he *RJR Nabisco* majority made it harder for Congress to efficiently rebut the presumption against extraterritoriality.").

120. *RJR Nabisco*, 136 S. Ct. at 2111 ("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.").

121. *Id.* at 2103 ("[I]t is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.").

122. 18 U.S.C. § 1964(c) (2016).

123. *C.f. Morrison*, 561 U.S. at 278 (Stevens, J., concurring in the judgment) ("[T]he Court seeks to transform the presumption from a flexible rule of thumb into something more like a clear statement rule.").

124. Gardner, *supra* note 119, at 141 (The case "introduced a new requirement that Congress reiterate its extraterritorial intent in every provision of a statute, whether jurisdictional, substantive, or remedial.") (citing *RJR Nabisco*, 136 S. Ct. at 2108–09).

125. *See* S. Nathan Williams, *The Sometimes "Craven Watchdog": The Disparate Criminal-Civil Application of the Presumption Against Extraterritoriality*, 63 DUKE L.J. 1381, 1390–93 (2014) (explaining that the presumption's "modern heritage" arose in the civil context and has been parallel to but distinct from its application in criminal cases). For additional background by way of the Court's first explication of the presumption against extraterritoriality, see Am. Banana Co. v.

because "the very nature of [RICO] is to create a private cause of action for racketeering activity based on predicate acts that are criminal offenses and do not otherwise provide for private causes of action."[126]

RJR Nabisco's holding seemed to be—and perhaps to a greater extent than the majority opinion might have indicated—largely based on the concern that allowing plaintiffs to, via § 1964(c), bring claims predicated on foreign conduct in U.S. courts would create "international friction."[127] Although the majority opinion acknowledged that the facts of this case raised no particular comity concerns (in fact, surely the twenty-six sovereigns bringing the suit would not have objected to the Court's permitting them to put on their case), it rejected that objection by asserting that the Court would decline to create a "double standard" that would treat more favorably suits involving foreign conduct when they are brought by foreign states and against domestic companies.[128]

C. Criticism of the RJR Nabisco *Decision*

Vigorous dissents to *RJR Nabisco*, authored by Justices Ginsburg and Breyer, argued that the majority had extended the scope of the presumption against extraterritoriality too far, accepted too blindly the contentions of *amici* that holding otherwise would harm international comity, and trusted too little the ability of other doctrines—such as *forum non conveniens*—to dismiss or transfer claims inappropriate for United States courts. Academics discussing the impact of the decision went so far as to say that the majority had overruled Congress.[129]

Justice Ginsburg's dissent argued that, under *Morrison*, Congress had done enough to signal its "affirmative intent" that RICO apply extraterritorially, and had "deliberately included within RICO's compass predicate federal offenses that manifestly reach conduct occurring abroad."[130] Justice Ginsburg went on to note the unusual results under the majority opinion of allowing RICO to reach "injury abroad only where the

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United Fruit Co., 213 U.S. 347, 357 (1909) (discussing traditional notions of the "territorial limits over" lawmaking power).

126. Victoria L. Safran, *RICO's Extraterritorial Reach: The Impact of* European Community v. RJR Nabisco, 4 STAN. J. COMPLEX LITIG. 47, 72 (2016) (discussing the Second Circuit's decision in the case).

127. *RJR Nabisco*, 136 S. Ct. at 2107 ("Allowing recovery for foreign injuries in a civil RICO action" would present a "danger of international friction."); *see also Racketeer Influenced and Corrupt Organizations Act—Extraterritoriality*—RJR Nabisco, Inc. v. European Community, 130 HARV. L. REV. 487, 493 (2016) (RJR Nabisco "confirmed, too, the Court's overriding preoccupation with potential international friction."); Gardner, *supra* note 119, at 144 ("[T]he *RJR Nabisco* majority seemed to suggest that the presumption should be applied more rigorously when there is a danger of international friction.") (quotations omitted).

128. *RJR Nabisco*, 136 S. Ct. at 2108.

129. Garner, *supra* note 119, at 140.

130. *RJR Nabisco*, 136 S. Ct. at 2112 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment).

Government is the suitor" but not where private plaintiffs are involved and of "separating[] prohibited activities and authorized remedies" in a remedy-authorizing statute that specifically incorporates other, unequivocally extraterritorial statutes.[131] Under longstanding Supreme Court precedent, Ginsburg noted, "incorporating one statute . . . into another . . . serves to bring into the latter all that is fairly covered by the reference."[132] The majority's "domestic injury" requirement, moreover, was not only "[u]nsupported by RICO's text, inconsistent with its purposes, and unnecessary to protect the comity interests the Court emphasizes" but also replaced "Congress' prescription with one of the Court's own invention."[133] And not only was the rule announced in *RJR Nabisco* inconsistent with Congressional intent, but Ginsburg argued it also seemed to unnecessarily duplicate existing doctrines aimed at preserving international comity. *Forum non conveniens* and general due process constraints, Ginsburg pointed out, enable U.S. courts to refuse jurisdiction where an alternative available forum is preferable and prevent the exercise of general jurisdiction over defendants not "at home" in the forum.[134] Comity protections, moreover, were built into RICO already—RICO's "definitional provisions exclude entirely foreign activity," and so "no suit under RICO would lie" for entirely foreign injuries predicated on entirely foreign conduct.[135] Perhaps most damningly, "[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests."[136] For that proposition, Justice Ginsburg referenced *Pfizer, Inc. v. Government of India*,[137] which explained the rule "long recognized" by the Court that "a foreign nation is generally entitled to prosecute any civil claim" in U.S. courts on the same basis as a domestic corporation or individual—"[t]o deny him this privilege would manifest a want of comity."[138] Moreover, *Pfizer* stated that, while allowing a foreign sovereign to sue in U.S. courts for treble damages is merely "a specific application of a long-settled general rule," excluding foreign nations from that opportunity would create a "conspicuous exception" to that rule, which "could not be justified in the absence of clear legislative intent."[139]

Justice Breyer's partial dissent, like Justice Ginsburg's, took particular issue with the majority's contention that civil RICO recovery for foreign

131. *Id.* at 2113.

132. *Id.* (citing Panama R. Co. v. Johnson, 264 U.S. 375, 392 (1924)).

133. *Id.* at 2112.

134. *Id.* at 2115.

135. *Id.* (citing European Cmty. v. RJR Nabisco, Inc., 783 F.3d 123, 143 (2d Cir. 2015) (Lynch, J., dissenting from the denial of rehearing en banc)) (quotation marks omitted).

136. *Id.*

137. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 318–19 (1978).

138. *Id.*

139. *Id.* at 319.

injuries risked international friction. As Breyer noted, the case certainly did not involve "purely foreign facts."[140] The majority's reliance on alleged comity concerns, moreover, was misplaced considering that the Government (as *amicus curiae*) had not provided examples of the "danger of international friction" it asserted would be associated with "recovery for foreign injuries in a civil RICO action,"[141] nor had it "consulted with foreign governments on the matter."[142]

Irrespective of the merits of the Court's statutory interpretation methods, this Note argues the greatest significance of *RJR Nabisco* lies in what the Court gave up—the possibility of a rigorous international enforcement regime to regulate conduct that poses serious risks the world over, driven by the aid of private parties whose injuries it would directly redress, and capable of properly incentivizing multinational firms otherwise too big to comply.

IV. Regulating International Money Laundering Through § 1964(c)

This Note argues in favor of extraterritorial civil RICO suits predicated on international money laundering—suits that, while they have been litigated successfully in the past, were recently prohibited by the Supreme Court. Part I explains why the problem of international money laundering is significant globally and the current state of international agreements on the need to regulate it. Part II sets out the history of Foreign Corrupt Practices Act as a model for international business regulation through similar applications. Part III discusses the mechanics of civil RICO claims predicated on international money laundering and analyzes the history and current state of precedent on RICO's extraterritorial application. Part IV.A argues that civil, extraterritorial, international money laundering-predicated RICO suits would be advantageous in terms of incentivizing compliance with existing regulations and would not risk harm to international comity, and therefore should be permitted. Part IV.B proposes a legislative amendment to effectuate that result.

A. The Advantages of Civil Litigation as Enforcement

International money laundering, as it exists today, not only poses significant risks for the rule of law worldwide and in individual countries, but also undermines fairness in international business competition. That large and typically multinational firms have continued to profit from direct and intentional involvement with—and material aid to—drug cartels and terrorist

140. *RJR Nabisco*, 136 S. Ct. at 2116 (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment); *see also* Brief for Respondents, *supra* note 98, at 1; Second Amended Complaint, *supra* note 103, at 1–2; *supra* notes 101–05 and accompanying text.

141. *RJR Nabisco*, 136 S. Ct. at 2107 (majority opinion).

142. *Id.* at 2116.

operations, moreover, demonstrates that the existing enforcement regime has not been sufficient to incentivize regulatory compliance.

This Note argues that the current state of international agreement on international money-laundering regulation fits the "FCPA model,"[143] in that it provides for a political context in which U.S. statutes regulating the proscribed conduct could be applied extraterritorially, against firms both foreign and domestic, without harming international comity or the competitive posture of U.S. businesses, respectively. And for the same reasons, the FCPA model shows that an extraterritorial law enforcement regime can lay the groundwork for civil suits that provide both direct redress to injured parties and strong incentives for firms to ensure regulatory compliance.

This section argues that civil suits predicated on international money laundering, via an extraterritorial application of RICO's private action provision, would serve as an effective enforcement and deterrence mechanism. Specifically, these suits should be heard in U.S. courts because (1) stronger deterrence is needed for more effective regulation; (2) the existing international agreements, even more so than did the OECD Convention for FCPA enforcement, make them politically palatable; (3) private litigation would shift corporate incentives; and (4) comity concerns associated with RICO's extraterritorial application have been overstated and are effectively mitigated by other existing doctrines.

1. Effective Regulation Requires Stronger Deterrence Mechanisms.— The modern trend in organized criminal activity has been towards increasing cooperation with large, multinational firms—without the assistance of which, presumably, drug cartels and terrorist groups would be less capable of effectively hiding the source of, and utilizing, the proceeds of illicit activities. That corporate-criminal connection has proven not to be isolated, insignificant, or due to mere negligence. Several examples, discussed throughout this Note, demonstrate both the need for effective regulation and that the existing enforcement regime has thus far been wanting in terms of deterrence.

HSBC's AML shortcomings, as discussed in Part I.A, exemplify the harm that can result from the direct involvement of multinational banks with drug cartels and terrorist groups.[144] One of the largest banks in the world,[145] HSBC's global reach placed numerous branches worldwide in direct contact

143. *See supra* Part II.A (discussing increased international Foreign Corrupt Practices Act enforcement as flowing from international agreement to regulate corporate bribery, and responsible for civil suits that disincentivize corruption by further increasing the risks of non-compliance).

144. *See supra* Part I.A.

145. HSBC, *supra* note 6.

with clients considered a "high risk" for money laundering.[146] And the illegally obtained cash funneled through HSBC's various branches was tied to drug cartels, terrorist organizations, and even directly to Al Qaeda heroin profits used to purchase plane tickets for the September 11 attacks.[147] U.S. Senate investigations uncovered AML protocols so lacking as to indicate genuinely willful violations—HSBC had failed to review over 17,000 alerts identifying suspicious activities, and for three years conducted no AML monitoring whatsoever of $15 billion in "bulk cash transactions."[148] Internal documents from U.S. Attorneys' offices, moreover, contended that HSBC's AML procedures constituted a "systemically flawed sham paper-product designed solely to make it appear that the Bank has complied," that HSBC management in some instances "intentionally decided" not to review suspicious-activity alerts, and that it had allowed hundreds of billions of dollars to move unchecked each year.[149] HSBC's allegedly willful aid of criminal organizations and noncompliance with banking regulations, combined with a U.S. penalty that was both a record-setting fine and insignificant in terms of bank profits,[150] demonstrate the continuing need for stronger enforcement mechanisms.

Similar noncompliance has been uncovered with non-banking international entities as well—consider, for example, the *Republic of Colombia* case, which involved allegations by a foreign sovereign that American liquor distribution and manufacturing corporations like Seagrams had participated in a criminal enterprise responsible for laundering narcotics proceeds and illegally smuggling liquor into Colombia.[151] And a European Anti-Fraud Office investigation into several of the world's largest tobacco companies revealed serious misconduct by companies like Phillip Morris International and British American Tobacco—and, of course, by RJR Nabisco, which had allegedly directed employees from its U.S. headquarters to illegally travel to Colombia for face-to-face meetings in which they would collect "enormous amounts of Colombian cocaine money" in "bulk cash."[152]

The ineffectiveness of existing enforcement mechanisms—and the ways in which they could be bolstered by § 1964(c)'s extraterritorial

146. *See* U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 7, at 2–3 and accompanying text (HSBC "operates in many jurisdictions with . . . high risk clients.").

147. *See* discussion *supra* notes 5–10 and accompanying text.

148. U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, *supra* note 7, at 3.

149. Carrick Mollenkamp, Brett Wolf & Brian Grow, *Special Report: Documents allege HSBC Money-Laundering Lapses*, REUTERS BUS. NEWS (May 3, 2012), https://www.reuters.com/article/us-hsbcusa-probes/special-report-documents-allege-hsbc-money-laundering-lapses-idUSBRE8420FX20120503 [https://perma.cc/CG4Q-9HD2].

150. Keefe, *supra* note 10.

151. *See supra* notes 66–78 and accompanying text.

152. *See supra* notes 95–99, 102–05 and accompanying text.

application[153]—was explained well at oral argument in front of the Supreme Court in *RJR Nabisco*. Counsel for the European Community (the predecessor to the EU), when asked why his clients had chosen to sue in a U.S. court, explained that they were dealing with a situation in which "an American company is operating through largely illegal cutouts and middlemen and organized criminal operators."[154] Because RJR Nabisco had no subsidiaries there, it had "no assets to attach in Europe"—and understanding that they would "eventually . . . have to come to the United States to enforce [a] judgment," the European nations had determined that bringing suit in RJR Nabisco's home country would be the "simplest thing to do."[155] "[F]rom the perspective of litigation efficiency," he explained, "coming into the home forum of the defendant and saying, we believe you are violating U.S. law and we seek redress for that . . . is perfectly appropriate."[156] As the European Community's brief on the merits in *RJR Nabisco* explained, the company had refused to settle, and as late as 2016 was "continu[ing] to engage in unlawful business practices and refus[ing] to adopt reforms to eliminate illegal cigarette trafficking and money laundering."[157] Assistance from Canadian and U.S. law enforcement organizations, moreover, had successfully targeted only RJR Nabisco's affiliates and subsidiaries, but not the parent company itself—and even then, the settlements reached with those entities ($75 million Canadian and $15 million U.S., respectively) paled in comparison to settlement agreements reached between the European Community and RJR Nabisco's major competitors, which ranged from $200 million to over $1 billion and included compliance-program agreements.[158] Considering RJR Nabisco's refusal to settle, its continuing noncompliance, and the European Community's inability to attach the assets of an American company with no European subsidiaries, the European Community might plausibly have argued that bringing suit in the U.S. was not just the "simplest," but perhaps even the *only* way in which their injuries could be redressed. As some courts had held prior to *Morrison*,[159] it should have militated in favor of hearing the European Community's case that RJR Nabisco's "money-laundering enterprise would

153. *See supra* Parts III.A, III.B (discussing 18 U.S.C. § 1964(c) and its extraterritorial application).

154. Transcript of Oral Argument at 38–39, RJR Nabisco v. European Cmty., 136 S. Ct. 2090 (2016) (No. 15-138).

155. *Id.* at 39. Counsel for the European Community, when asked whether RICO's treble damages were a factor in the decision to sue in the U.S., also explained that he had been authorized by his clients to stipulate that they would not accept treble damages. *Id.* at 38.

156. *Id.* at 39–40.

157. Brief for Respondents, *supra* note 98, at *8.

158. *See supra* notes 97–99 and accompanying text.

159. *See supra* notes 89–93 and accompanying text (discussing *Morrison* and its impact on lower courts' RICO-extraterritoriality jurisprudence).

not give rise to an actionable civil RICO claim" if the parties most directly injured by it were not permitted to bring suit.[160]

From the ongoing involvement of large, multinational firms in laundering the proceeds of organized crime, and from those firms' ability to alter their corporate structure such that it is out of reach of law enforcement jurisdiction,[161] it is apparent both that stronger enforcement mechanisms are needed in international money laundering, and that civil RICO actions could provide an effective alternative. In keeping with the FCPA model, moreover, the litany of international agreements regarding money-laundering regulation indicates that a broad extraterritorial application of RICO's private action provision is practicable without injury to international comity or business competition.

2. The FCPA Model Supports an Extraterritorial Anti-Money Laundering Enforcement Regime.—The OECD Anti-Bribery Convention, as Professor Rachel Brewster has argued, laid the foundation necessary for a political context in which the Foreign Corrupt Practices Act's extraterritorial reach could be extended to "all of the world's major exporters," and permitted the U.S. to "turn around its FCPA enforcement policies without putting American firms at a competitive disadvantage."[162] The OECD Convention—today ratified by all OECD states and 43 states in total[163]—was binding on its signatories and contained "strongly worded obligations for nations to prohibit foreign bribery by their nationals (natural and legal)."[164] The Convention, even though it did not result in strong enforcement of most signatories' anti-bribery laws,[165] ameliorated the U.S. government's concerns that its enforcement would disadvantage U.S. firms—and what's more, laid the foundation for a post-Convention explosion of extraterritorial FCPA application. Because the Convention required signatories to criminalize the bribery of foreign public officials in international business transactions, far less corrupt business conduct globally was subject to the FCPA's "foreign sovereign legality" defense.[166] And accordingly, the Convention teed up what became a rigorous enforcement regime, facilitated almost entirely by the

160. Republic of Columbia v. Diageo North America, Inc., 531 F. Supp. 2d 365, 433 (E.D.N.Y. 2007).

161. *E.g.*, Second Amended Complaint, *supra* note 103, at 2 (alleging that RJR Nabisco's corporate restructuring had involved, in part, "establishing subsidiaries in locations known for bank secrecy . . . . to avoid detection by U.S. and European law enforcement").

162. Brewster, *supra* note 36, at 1677.

163. OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUB. OFFICIALS IN INT'L BUS. TRANSACTIONS: RATIFICATION STATUS AS OF MAY 2017 (2017), http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf [https://perma.cc/DW57-2366].

164. Brewster, *supra* note 36, at 1642.

165. *Id.* at 1643.

166. *See* 15 U.S.C. § 78dd-1(c)(1) (2016) (providing as an affirmative defense that bribery was "lawful under the written laws and regulations of the foreign official's . . . country").

FCPA, in which the largest penalties have been rendered against foreign firms.[167] Although courts have not read a private cause of action into the Act,[168] its violation has been used in a variety of contexts as a predicate for civil damages claims.[169] The post-international agreement increase in FCPA enforcement, this Note argues, was attendant to an increase in civil liability for those violating its substantive provisions.[170] That civil liability, even more so than direct FCPA enforcement, has "raise[d] the risk levels for non-compliance" with the FCPA "to new heights"—and has led some authors to caution that, "[w]ith private parties now joining the fight against corruption, companies more than ever must be prepared."[171]

What I have here termed the FCPA model—the path from international agreement to increased extraterritorial enforcement and increased civil liability—fits well as a means of analyzing the problem of international money-laundering regulation.

A multitude of international conventions and treaties have stipulated member states' obligations to criminalize, deter, and monitor for money-laundering activities.[172] Perhaps the most significant of these agreements is the 1988 Vienna Convention,[173] which is adhered to by 184 states[174] and obliges parties to make drug-related money laundering a criminal offense.[175] Another is a set of 40 recommendations promulgated by the Financial Action Task Force on Money Laundering, which has been adopted by 36 states, criminalizes all money-laundering activity, and sets out AML compliance procedures and methods of international cooperation in investigations.[176] What these agreements demonstrate is that, in keeping with the FCPA model, a strong extraterritorial anti-money laundering enforcement regime is practicable without risk to the competitiveness of U.S. businesses—and that there ought to be nothing standing in the way of an extraterritorial civil action. This would make non-compliance with AML regulations a genuine "risk" for firms worldwide, being made available to private parties in U.S. courts.

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167. Brewster, *supra* note 36, at 1651 tbl.1 & 1648 fig.1.

168. *See, e.g.*, Republic of Iraq v. ABB AG, 768 F.3d 145, 169–70 (2d Cir. 2014) (the court was "unpersuaded" that a private action should be read into the FCPA); Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1027–30 (6th Cir. 1990).

169. *See supra* notes 32–34 and accompanying text (listing cases in which the FCPA has been used as a part of civil suits for securities fraud, breach of fiduciary duty, and as a predicate act under RICO).

170. *See supra* Part II.

171. Portnoy & Murino, *supra* note 31, at 33.

172. *See supra* note 18 (listing the agreements).

173. *See supra* notes 18–19 and accompanying text.

174. UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 3, at 122.

175. The Vienna Convention, *supra* note 18, at art. 3.

176. FATF, *supra* note 18; *see also supra* notes 20–24 (discussing the FATF's recommendations).

3. Private Litigation Shifts Incentives.—Permitting extraterritorial private RICO actions for injuries arising from international money laundering would have the potential to significantly increase firms' liability for noncompliance with AML procedures and willful participation in laundering criminal proceeds. As discussed in Part IV.A.1, governmental enforcement of AML-targeted statutes has largely been wanting in terms of deterrence. And as with the FCPA and the private actions arising from it,[177] damages awards from money laundering-caused injury could far exceed the fines and penalties otherwise associated with non-compliance.

There is good reason to believe that the availability of extraterritorial private RICO actions for money laundering would incentivize firms to avoid harmful conduct, rather than alter their corporate structure to avoid liability or merely accept the risk of occasional and relatively inconsequential criminal penalties. In particular, RICO damages would likely be much higher than existing criminal penalties because RICO provides for treble damages.[178] Cases involving extraterritorial money laundering-predicated RICO claims—although there have been relatively few—have demonstrated well the striking significance of trebled damages under the statute. In *BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil*,[179] for example, BCCI's court-appointed liquidator brought a RICO claim against Khalil, a Saudi resident and citizen and "perhaps the largest depositor" in the failed bank.[180] The suit alleged that, among other predicate acts, BCCI had been injured by reason of Khalil's companies' violation of the money laundering statute.[181] BCCI prevailed in the case and proved total damages of over $388 million—roughly $43 million of which was attributable to Khalil's money laundering.[182] Pursuant to § 1964(c), the court trebled those damages for a total of approximately $1.2 billion. Another case brought on behalf of an insolvent bank, *Liquidation Commission of Banco Intercontinental, S.A. v. Renta*[183] affirmed trebled RICO damages predicated in part on money

177. *See supra* Part IV.A.1 (discussing the deterrent effect of private FCPA actions).

178. *See* 18 U.S.C. § 1964(c) (2016) (providing a person "injured in his business or property by reason of a violation of section 1962" "shall recover threefold the damages he sustains").

179. BCCI Holdings (Luxembourg) Societe Anonyme v. Khalil, 56 F. Supp. 2d 14 (D.D.C. 1999), *rev'd in part on other grounds*; BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168 (D.C. Cir. 2000).

180. *BCCI Holdings (Luxembourg) Societe Anonyme*, 56 F. Supp. 2d at 21. The suit had also named another individual and two companies, all three of which defaulted. *Id.*

181. *Id.* at 54; *see also* 18 U.S.C. § 1956 (the money laundering statute); RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (extraterritorial application is "explicitly permitted by" § 1956); European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 139 (2d Cir. 2014), *rev'd on other grounds*; *supra* notes 53–56 (discussing RICO's incorporation of § 1956 and the mechanics of a RICO claim).

182. *BCCI Holdings*, 56 F. Supp. 2d at 68–69. The judgment for BCCI was affirmed on appeal, save for $62 million that had been attributed to the bank's "copper and silver trading losses." *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d at 174.

183. *Liquidation Com'n of Banco Intercontinental, S.A.*, 530 F.3d 1339 (11th Cir. 2008).

laundering violations. After holding that § 1964(c) applied extraterritorially,[184] the Eleventh Circuit affirmed a judgment rendered against a Florida businessman and in favor of a Dominican bank for damages trebled to $177 million.[185]

In addition to trebled damages for injury arising from offenses "indictable" under the money laundering statute, RICO provides, via its collateral estoppel provision, for other forms over civil restitution. That is, defendants who plead to or are convicted of criminal RICO charges are collaterally estopped from defending the essential allegations of the offense in a subsequent civil suit by the Government.[186] And even if the defendant is ordered to pay restitution in criminal proceedings, that will not preclude a suit by injured parties—in fact, those defendants will generally be entitled to a set-off only *after* damages have been trebled in the civil suit.[187]

In short, the extraterritorial application of § 1964(c) for money laundering-predicated damages claims would undoubtedly expand firms' liability for money laundering violations. The possibility of civil liability generally can have a deterrent effect on illegal conduct—as has been noted in other contexts, the involvement of private parties in an enforcement regime has the potential to "raise the risk of non-compliance to new heights."[188] And considering the availability of treble damages under § 1964, that risk could become especially significant; its collateral estoppel provision, similarly, may multiply violators' liability. This Note argues that, from the company perspective, such civil liability would likely be attendant to a shift in incentives: That is, one from minimal regulatory compliance, or even jurisdiction avoidance, to harm—i.e., potential civil damages—avoidance.

4. Comity Concerns Have Been Overstated.—Having argued that international money laundering is in need of additional means of regulation, that the international community generally supports such regulation, and that civil RICO actions would be an effective means of doing so, this section addresses the argument that § 1964(c)'s extraterritorial application would risk harm to international comity.

The particular facts of *RJR Nabisco*,[189] of course, did not pose any apparent risk to international comity—and the Court in fact conceded as

184. *Id.* at 1352 ("We have no doubt that under these circumstances, Congress would have intended [the plaintiff] to have recourse to American courts and remedies."); *see also id.* ("The alleged predicate acts [included] . . . money laundering.").

185. *Id.* at 1339.

186. 18 U.S.C. § 1964(d).

187. *See, e.g.*, City of New York v. Venkataram, No. 06 Civ. 6578 (NRB), 2009 WL 1938984 *2, *7 (S.D.N.Y. July 7, 2009) (collecting cases) (granting summary judgment on § 1964(c) claim against defendants who had pleaded guilty to, *inter alia*, multiple counts of money laundering, and holding that deducting a restitution set-off after trebling damages is "the proper course").

188. Portnoy & Murino, *supra* note 31, at 33.

189. *See supra* Parts III.B.2 and III.C (discussing the case and criticism of it).

much. The majority's response, however—that it would not "create a double standard"[190] treating suits by foreign sovereigns differently—seemed to disregard the possibility that § 1964(c) could apply extraterritorially, and comity could be preserved, without doing so. As Justice Ginsburg noted in dissent, other doctrines such as *forum non conveniens* and due process restrictions on general jurisdiction could be trusted to ensure that claims truly inappropriate for U.S. courts are dismissed or transferred elsewhere.[191] Territorial restrictions in RICO and in the substantive offenses it incorporates (including the money laundering statute, § 1956), too, limit the ability of U.S. courts to adjudicate claims with minimal domestic connections.[192]

Widely adhered-to international agreements to criminalize, cooperate in investigations of, and otherwise regulate money laundering, moreover, indicate that international money laundering is regarded differently than are other sorts of illegal business conduct. First, by reference to the FCPA model, even a single international agreement may make the extraterritorial application of law enforcement statutes politically acceptable—and even when that involves enormous fines rendered by the U.S. government against foreign businesses. And perhaps more significantly, the fact that international money laundering is—generally, if not always—tied to drug cartel and terrorist operations makes the desire to regulate it particularly universal. As the UN Office on Drugs and Crime has noted, the current state of international agreement reflects a shared understanding that money laundering is "highly detrimental for society at large" and "can result in large-scale corruption, disturbances of competition, violence and economic equilibria and can contribute towards a weakening of the state, thus jeopardizing the rule of law."[193] When foreign firms' international money laundering violations involve willful, direct assistance to and collaboration with violent drug cartels, dictatorial regimes under sanctions, and terrorist groups like Al Qaeda, it seems arguable that other countries might find American discovery rules[194] or treble damages more palatable than in other contexts.

Because private RICO actions provide an appropriate vehicle for regulating, deterring, and remedying the harm caused by international money laundering, this Note argues that Congress should amend § 1964(c) to permit its extraterritorial application in certain circumstances.

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190. RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2095 (2016).

191. *See supra* notes 132–37 (discussing Justice Ginsburg's dissent and precedent indicating that "international friction" concerns would militate in favor of adjudicating the claim).

192. *Id.*

193. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 3, at 121–22.

194. *C.f.* FATF, *supra* note 18, at 5 (recommending that countries improve "spontaneous" information exchanges with regard to specific transactions, with "safeguards to ensure that this exchange of information is consistent with privacy and data protection[s]"); *see also* UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 3, at 126 ("36 states" have adopted the FATF recommendations.).

B. Rebutting the Presumption: A Proposed Amendment to § 1964(c).

In consideration of Congress' prescription that RICO "shall be liberally construed to effectuate its *remedial purposes*,"[195] and because criminal RICO liability is provided only by reference to existing criminal statutes, it is arguable that prior circuit court precedent permitting § 1964(c)'s extraterritorial application[196] had properly construed Congress' intent. But in light of the Supreme Court's recent holding to the contrary, this Note argues that § 1964(c) in at least some cases *should* be applied extraterritorially; and, in this Part, that *RJR Nabisco* laid out the means by which Congress might amend RICO to direct that result. In short, all the Court appears to have required of Congress is a reiteration in § 1964(c) of RICO's extraterritoriality.[197] This Part proposes a legislative amendment to direct § 1964(c)'s extraterritorial application while preserving international comity.

1. RJR Nabisco*'s Clarification of the Requirements to Overcome the Presumption.—RJR Nabisco*'s holding regarding RICO's extraterritorial application was limited to § 1964(c), RICO's private action provision. With regard to RICO as a whole, the *RJR* majority noted, it is "hard to imagine how Congress could more clearly have indicated that it intended RICO to have (some) extraterritorial effect."[198] Although *Morrison* may have strengthened the presumption, it did not preclude courts from looking at context to find Congress' extraterritorial intent[199]—and as to § 1962 (violations of which provide a basis for § 1964(c) claims), *RJR* held, "context is dispositive."[200] Section 1962 necessarily overcame the presumption because, by way of penalizing "racketeering activity" defined to include predicate statutes that "expressly apply extraterritorially,"[201] Congress evinced its "affirmative intention"[202] that § 1962 reach conduct occurring abroad. As an example providing the "most obvious textual clue" that § 1962 must cover some extraterritorial conduct, the majority noted that RICO incorporates statutes like 18 U.S.C. § 1957, which prohibits transactions in

195. Organized Crime Control Act Pub. L. 91-450, § 904(a), 84 Stat. 922, 947 (1970). (emphasis added); *see supra* note 52 and accompanying text.

196. *See supra* notes 89–90 and accompanying text.

197. *See* Garner, *supra* note 116, at 141 (describing RJR Nabisco's requirement that "Congress reiterate its extraterritorial intent in every provision of a statute").

198. RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2103 (2016).

199. Morrison v. Nat'l Australian Bank Ltd., 561 U.S. 247, 265 (2010).

200. *RJR Nabisco*, 136 S. Ct. at 2102.

201. *Id.*

202. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1990).

criminally derived property and expressly applies to offenses "taking place outside the United States."[203]

The lack of a reference to extraterritoriality in § 1964(c), however, led the Court to conclude that "a *civil* RICO plaintiff must allege and prove a domestic injury."[204] Thus, in the words of Justice Ginsburg's dissent, the majority opinion limited RICO's scope such that it now reaches "injury abroad only where the government is the suitor."[205] More specifically, the majority held that the Second Circuit—although its analysis had been correct as to other portions of RICO—had erred in viewing the presumption as concerned primarily with the conduct § 1964(c) covers.[206] Because it does not "directly regulate conduct" (and even though the Court concluded that RICO's substantive provisions overcame the presumption), a remedial provision like § 1964(c) requires courts to "separately apply the presumption."[207] The Court justified that holding in part on the grounds that statutes providing private remedies present a greater risk of harm to international comity than does "merely applying U.S. substantive law to . . . foreign conduct," because private actions do not carry the "check imposed by prosecutorial discretion."[208] To direct the extraterritorial application of a statute's remedial provisions, in addition to its substantive prohibitions, the Court therefore requires Congress to provide even greater clarity.

2. Amending § 1964(c) to Meet the RJR *Standard.—RJR Nabisco* requires that Congress reiterate its extraterritorial intent in remedial provisions of otherwise extraterritorial statutes.[209] This Part suggests an amendment to RICO that both directs § 1964(c)'s extraterritorial application

203. *RJR Nabisco*, 136 S. Ct. at 2101; *see also* 18 U.S.C § 1957(a), (d)(2) (2012) (proscribing knowingly "engag[ing] in a monetary transaction" in property "of a value greater than $10,000" that is "derived from specified criminal activity" where the offense is by a United States person and "takes place outside the United States").

204. *RJR Nabisco*, 136 S. Ct. at 2111 (emphasis added).

205. *Id.* at 2113 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment).

206. *Id.* at 2106.

207. *Id.*

208. *Id.* (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117–18 (2013)).

209. *See supra* Part IV.B.1. The Court's recent presumption jurisprudence, taken together, in fact requires a reiteration of extraterritoriality in *every* provision of a statute, "whether jurisdictional, substantive, or remedial." Gardner, *supra* note 119 at 141; *see also* Kiobel, 569 U.S. at 116 (applying the presumption to the Alien Torts Statute, which is "strictly jurisdictional"); *RJR Nabisco*, 136 S. Ct. at 2105 ("RICO's extraterritorial effect is pegged to" Congress' judgments providing when predicate statutes "apply to foreign conduct."); *id.* at 2106 (The reasoning employed in *Kiobel* dictates that the presumption be "separately appl[ied] . . . to RICO's cause of action.").

in a manner consistent with *RJR Nabisco* and provides additional protections to preserve international comity.

To effectuate the "remedial purposes"[210] of RICO, the "very nature" of which is to create a private cause of action for criminal acts otherwise without one,[211] this Note argues that Congress should formally direct in § 1964(c) the reading that the Second Circuit adopted, and the Supreme Court held appropriate as to RICO's substantive provisions, in the *RJR Nabisco* cases.[212] That is, "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate."[213] Congress could codify that direction in § 1964(c) by adding a subsection directing that "There is extraterritorial jurisdiction over claims brought under this section if the predicate acts alleged prescribe liability or guilt for conduct taking place outside the United States." That amendment would impose territorial limitations on § 1964(c) claims by dictating that recovery be permitted for foreign injury only when it arises from conduct that Congress has prohibited extraterritorially, and not from any other predicate RICO acts that are alleged as part of a "racketeering pattern" and do not apply extraterritorially. In application, if an extraterritorial § 1964(c) claim alleged three predicate acts, only two of which were predicated on extraterritorial statutes, then a third act predicated on a statute prohibiting only domestic conduct could not "piggyback" on the first two to increase damages.

In addition to providing that § 1964(c) will reach conduct occurring abroad only insofar as the predicate acts alleged provide for that result, Congress could amend § 1964(c) to incorporate the language it used in the money-laundering statute, 18 U.S.C. § 1956, which has been held sufficient to rebut the presumption against extraterritoriality.[214] Section 1956(f) provides as follows:

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210. Organized Crime Control Act Pub. L. 91-450, § 904(a), 84 Stat. 922, 947 (1970).

211. Safran, *supra* note 126, at 72.

212. European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014), *rev'd*, 136 S. Ct. 2090; *RJR Nabisco*, 136 S. Ct. at 2102 (agreeing with the Second Circuit's holding as to RICO's substantive provisions).

213. *European Cmty.*, 764 F.3d at 136

214. *See, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2103 ("[a] violation of § 1962 may be based on a pattern of racketeering activity that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial."); *id.* at 2112 ("Congress deliberately included within RICO's compass predicate federal offenses that manifestly reach conduct occurring abroad.") (citing 18 U.S.C. § 1956) (Ginsburg, J., concurring in part and dissenting in part); United States v. All Assets Held at Bank Julius, 251 F. Supp. 3d 82, 92 (D.D.C. 2017) ("Section[] 1956 . . . explicitly provide[s] for extraterritorial application, with certain limitations on [its] reach."); *supra* notes 200–04 and accompanying text. The money laundering statutes provide for additional grants of, and qualifications on, their "extraterritoriality" in that they define foreign persons over whom courts shall have jurisdiction and the types of conduct carrying a sufficient domestic connection. 18 U.S.C. §§ 1956(b)(2), 1957(d) (2016). The language used in § 1956(f) is appropriate for RICO in particular because its territorial restrictions are sufficiently broad for application to a range of predicate offenses.

> There is extraterritorial jurisdiction over the conduct prohibited by this section if–
>
> (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
>
> (2) the transaction or a series of related transactions involves funds or monetary instruments of a value exceeding $10,000.[215]

To mitigate the potential for international friction that concerned the Court in *RJR Nabisco*, Congress could alter the language of § 1956(f)(2) so as to cover only transactions "of a value exceeding $10,000,000." That would limit private RICO actions' reach to the most substantial money laundering violations—conduct that most countries have already agreed to collectively regulate.[216] To further that objective, § 1964(c) could follow the example of the FCPA and incorporate a "foreign sovereign legality" defense.[217] Providing as an affirmative defense that the conduct alleged was legal under the laws of the country in which the conduct occurred would not substantially limit the reach of money-laundering claims,[218] but would avoid conflict between foreign laws and other RICO predicates.

To facilitate private regulation of corrupt international business conduct, while also strictly cabining § 1964(c)'s reach to conduct that is (a) especially harmful, (b) material to United States interests and (c) prohibited by the country in which the conduct occurs, this Note proposes the following legislative amendment:

18 U.S.C. § 1964(c)(1) Extraterritorial Jurisdiction.—

There is extraterritorial jurisdiction over claims brought under this section if:

(A) the predicate acts alleged prescribe liability or guilt for conduct taking place outside the United States;

(B) the conduct alleged is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States;[219]

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215. 18 U.S.C. § 1956(f). Section 1956(f)'s requirement that foreign persons' conduct "occurs in part" in the United States is not as strict as it might appear on its face—§ 1956(b)(2) provides for jurisdiction over foreign persons where, for example, the "person" is a financial institution with an account at a U.S. bank or where a violation *involves a transaction* that "occurs in whole or in part" in the United States. *Id.* §§ 1956(b)(2), (f).

216. *See supra* Parts I.B, IV.A.2.

217. *See supra* note 29 and accompanying text.

218. *See supra* Part I.B (discussing the nearly universal adoption of anti-money laundering regulations).

219. This requirement would operate to impose an additional limitation on the exercise of jurisdiction over claims predicated on statutes whose extraterritorial reach is potentially much broader than that provided by the money laundering statutes—see *infra* note 221.

(C) for claims alleging violations of title 18 section 1956 or title 18 section 1957, the transaction or series of transactions involve funds or monetary instruments of a value exceeding $10,000,000; and

(D) for claims predicated on other extraterritorial statutes listed in title 18 section 1961, the amount in controversy exceeds $10,000,000.[220]

(2) It may be raised as an affirmative defense to a claim brought under this section that the conduct alleged was legal under the written laws of the country in which the conduct took place.

This Note argues that an amendment providing for extraterritorial private RICO claims would aid the transnational regulation of illegal business conduct like money laundering, and that such claims would be practicable without harm to international comity or to business competition. The legislative proposal laid out in this Note aims to effectuate extraterritorial private RICO actions while also cabining their reach to truly harmful conduct that carries a domestic connection. Although an amendment providing for but restricting § 1964(c)'s extraterritorial reach surely could not constitute the equivalent of "the check imposed by prosecutorial discretion,"[221] this proposal's domestic-connection and substantial injury requirements would impose an even higher bar for predicate statutes the extraterritoriality of which Congress has already directed. In combination with the broad comity protections afford by doctrines like *forum non conveniens* and due process restrictions on general jurisdiction (as well as territorial restrictions built into various RICO predicates), the amendment would balance well the competing needs to effectively deter harmful corrupt business conduct internationally and to preserve international comity and business competition while doing so.

V. Conclusion

International money laundering presents a global issue that poses significant risks to financial, law enforcement, and national security interests worldwide. The involvement of large, multinational firms in money laundering has facilitated criminal and terrorist organizations' use of the proceeds of their illegal activities. Those firms' involvement in money

220. It is debatable, and a discussion appropriate for a different paper, which of the other RICO predicates might apply extraterritorially. One likely candidate is the "material support of terrorism" statute, which provides for extraterritorial jurisdiction, for example, where "an offender is brought into or found in the United States, even if the conduct . . . occurs outside the United States" or where the "offense occurs in or affects . . . foreign commerce," and separately reiterates that "[t]here is extraterritorial Federal jurisdiction over an offense under this section." 18 U.S.C. §§ 2339B(d)(1)(C), (d)(1)(E), (d)(2) (2016); *see also* 18 U.S.C. § 1961(1) (defining as RICO predicates acts "indictable under . . . section 2332b(g)(5)(B)"); 18. U.S.C. § 2332b(g)(5)(B)(i) (referencing the material support statute). Those extraterritorial provisions apply explicitly to financial institutions, in addition to other actors. *Id.* § 2339B(a)(2). For evidence of Congress' intent to provide private causes of action for terrorist activities, see 28 U.S.C. § 1605A (2008); 22 U.S.C. § 8772 (2012); *Bank Markazi, AKA Central Bank of Iran v. Peterson*, 136 S. Ct. 1310 (2016).

221. RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2106 (2016).

laundering has not been isolated—well-known banks, tobacco companies, and liquor manufacturers and distributors have worked directly with drug cartels and terrorist groups. Although there has been substantial transnational agreement on the need to regulate this harmful conduct and to cooperate in international enforcement of anti-money laundering laws, various firms' allegedly willful, and in some cases potentially continuing, misconduct has demonstrated that existing enforcement mechanisms are insufficient in terms of deterrence.

This Note argues that violators ought to be subjected to civil, in addition to criminal, liability for the harm caused by international money laundering and that RICO's private action provision provides a method of doing so. In particular, RICO's private action provision should be applied extraterritorially such that, for example, U.S. firms whose money laundering causes foreign injury would be made to defend RICO claims in U.S. courts. But the Supreme Court's recent extension of its presumption against extraterritoriality doctrine—and its recent holding that the presumption precludes extraterritorial application of RICO's private action provision—has undercut RICO's effectiveness as a method for international deterrence of illegal business conduct. Because the presumption against extraterritoriality has been frequently tied to "international comity" concerns, this Note argues that notions of comity ought not preclude RICO's extraterritorial application. In particular, the significant increase of international FCPA enforcement (stemming from an international agreement similar to those regarding money laundering) demonstrates that extraterritorial civil suits predicated on money laundering should be practicable without offense to international comity. Moreover, an amendment providing for RICO's extraterritorial application could include additional comity protections. This Note argues further that money laundering-predicated civil RICO suits, especially because they would involve treble damages and collateral estoppel based on criminal pleas and convictions, would serve as a highly effective deterrence mechanism.

Because the Supreme Court has rejected the extraterritorial application of private RICO actions, as the Act is currently written, this Note proposes an amendment to § 1964(c) to provide for its extraterritoriality, with built-in protections to preserve international comity. This Note argues that the amendment, in conjunction with the existing protections of *forum non conveniens* and general-jurisdiction restrictions, would balance well the competing needs to preserve international comity and to effectively regulate harmful international business conduct.