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Applying Morrison v. National Australia Bank, the Supreme Court Rejects Extra-territorial Application of the Alien Tort Statute

By George T. Conway III

Editors Note: The author, a partner at Wachtell, Lipton, Rosen & Katz argued the Morrison case for the defendants in the Supreme Court.

Just as it extinguished class-action litigation tourism under the Securities Exchange Act three years ago in *Morrison* v. *National Australia Bank*, the U.S. Supreme Court, invoking *Morrison*, today abruptly ended the burgeoning use of the Alien Tort Statute to litigate extraterritorial torts. *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Apr. 17, 2013).

Enacted in 1789, the ATS provides that federal district courts have "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The law lay largely dormant for nearly two hundred years. By the 1980s, however, human-rights lawyers had begun invoking the ATS to bring claims against foreign officials. And by the turn of this century, they were using the ATS to bring multibillion-dollar class actions against multinational corporations alleged to have aided and abetted extraterritorial abuses by foreign governments.

Defendants in these cases typically did not dispute that the ATS applied to overseas torts, and lower courts had simply assumed, without analysis, that a statute involving "aliens" and "the law of nations" was meant to apply abroad. Instead defendants argued the merits of the claims: for example, that their conduct did not violate international law, or did not constitute "aiding and abetting." But that changed after *Morrison,* which vigorously applied the presumption against extraterritoriality, a canon of construction governing all statutes. Defendants began full-throatedly urging that the ATS could not be applied to extraterritorial torts. In *Kiobel*, Shell made the argument for the first time in the Supreme Court, and was joined by *amici curiae* who were defendants in similar cases. As our previous memo

reported, this prompted the Court to order reargument on the extraterritoriality question, even though the question had never been raised below.

In today's decision, the Court squarely held that the ATS could not be applied extraterritorially. Citing and quoting *Morrison* repeatedly, Chief Justice Roberts's majority opinion held that the statute failed "to evince a 'clear indication of extraterritoriality.'" The law's mentions of aliens and the law of nations did not imply extraterritorial reach, the Court explained, because "such violations affecting aliens can occur either within or outside the United States." And the Court held that "the historical background against which the ATS was enacted" likewise did not "overcome the presumption" under *Morrison*: the Court noted, among other things, that the "[t]wo notorious episodes" of international-law violations that preceded the ATS's enactment had both "involved conduct within the Union." Accordingly, the Court held that the claims against Shell had to be dismissed because "all of the relevant conduct took place outside the United States." The Court added, again citing *Morrison*, that "even where … claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."