

## Second Circuit Exercises “Hypothetical Jurisdiction” To Dismiss Claim Rather than Address Subject Matter Jurisdiction Over Corporation in Alien Tort Statute Claim

January 27, 2012 by [Louis M. Solomon](#)

[\*Liu Bo Shan v. China Construction Bank Corp.\*](#), No. 10-2992-cv (2d Cir. 2011)(summary order), reviewed on appeal claims alleging torture against China Construction Bank in alleged violation of the Torture Victim Protection Act, 28 U.S.C. Sec. 1350 note, as well as claims of torture, cruel, inhuman, and degrading treatment and arbitrary detention in China in alleged violation of the Alien Tort Statute, 28 U.S.C. Sec. 1350. The bank asserted that subject matter jurisdiction did not lie based on the Second Circuit’s prior decision in *Kiobel v. Royal Dutch Petroleum Co.*, 620 F.3d 111 (2d Cir. 2010), which held that the district court lacked subject matter jurisdiction to hear an ATS claim against a corporate defendant for violations of customary international law. The Panel refused to reconsider whether *Kiobel* was rightly or wrongly decided, reiterating the principle that “[i]t is axiomatic that a panel of this court is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court”. *E.g.*, *NML Capital v. Republic of Argentina*, 621 F.3d 230 (2d Cir. 2010) (which we posted on [here](#)).

Instead, the Court of Appeals stated that, “even if jurisdiction exists, the amended complaint was correctly dismissed for failure to state a claim”. The Court believed it had authority to exercise “hypothetical jurisdiction” where the jurisdiction it was exercising hypothetically was “statutory, not constitutional”. The Court applied that rule as well to a Foreign Sovereign Immunities Defense asserted by the bank.

Analyzing the ATS claim, the Court found that the plaintiff needed to plead either direct or indirect liability. For direct liability, the pleading must have alleged that the Bank “participated, physically or otherwise directly, in the material elements of a crime” under international law. For indirect liability, or “accessorial liability” as characterized by the Court, the pleading attempted to allege aiding and abetting and conspiracy.

For both direct and indirect claims, the Court of Appeals found the allegations deficient. It therefore affirmed dismissal of the claims.

Tagged [Sovereign Immunity](#), [Subject-Matter Jurisdiction](#) |