Just Security

Don't Bother Suing China for Coronavirus

By Chimène Keitner
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There is plenty of blame to go around for the dire personal, social, and economic costs occasioned by the spread of the novel coronavirus, which currently afflicts most countries in the world. As David Fidler wrote in *Just Security* last week, the World Health Organization updated the International Health Regulations in 2005 in an attempt to prevent the worst harms from precisely this sort of outbreak. U.S. domestic authorities also prepared plans, including the 2006 *National Strategy for Pandemic Influenza* promulgated by President George W. Bush and the 2016 *Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats* developed under President Barack Obama. It seems clear that Chinese authorities failed to adequately report and to contain the spread of this new disease, and that the U.S. Executive Branch botched its response, with highly predictable and deadly results. Private actors may also bear legal responsibility for exacerbating the harms caused by unsafe working conditions, equipment shortages, termination of employment and other contracts, and other problems, which will, in turn, lead to litigation with insurers and reinsurers for the foreseeable future. In addition to protecting their own families and communities, lawyers are understandably thinking about how best to protect, and to seek redress for, their clients. Unfortunately, some attorneys appear to have chosen the one path that is virtually guaranteed not to provide any meaningful recovery: suing China. This article explains why claims against China will be dismissed on sovereign immunity grounds, among other likely bases for dismissal.

Core Allegations

The two complaints that have attracted publicity so far—one filed in Florida on March 12 and another filed in Nevada on March 23—follow the same template. Each names as defendants the People's Republic of China, the National Health Commission of the Republic of China, the Ministry of Emergency Management of the People's Republic of China, the Ministry of Community (or Civil) Affairs of the People's Republic of China, the People's Government of Hubei Province, and the People's Government of the City of Wuhan, China. Both are seeking class certification on behalf of a nationwide class, the first comprising "all persons and legal entities in the United States who have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus" plus "all persons and legal entities in the United States whose businesses have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus," and the second comprising "all small businesses in the United States … which have sustained, among other things, financial/monetary damages and/or losses related to the outbreak of the COVID-19 virus." The language in both complaints is virtually identical, including a bizarre claim for strict liability for

"ultrahazardous activity" associated with allegedly operating "bio-weapons laboratories" near the Wuhan animal market. The Florida complaint identifies named plaintiffs but does not indicate what specific harms they have already suffered or expect to suffer; the Nevada complaint indicates that the named small businesses are currently experiencing "a substantial reduction in income and profits because of the coronavirus." It is inconceivable in light of applicable class certification standards that any of the proposed classes would be certified.

Both complaints seek unspecified monetary damages. The Florida complaint seeks to certify an injunctive relief class but does not specify the injunctive relief sought; the Nevada complaint omits injunctive relief but includes a claim for punitive damages.

Sovereign Immunity

In the rush to be the first to file, the attorneys who drafted the (virtually identical) jurisdiction and venue sections of these complaints seem to have fundamentally misunderstood the Foreign Sovereign Immunities Act of 1976, which governs these actions. Clearly, all of the named defendants qualify as a "foreign state" under § 1603(a) of the act, which indicates that a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." The FSIA specifies the procedure for serving a foreign state or its agency or instrumentality, and it contains other relevant limitations, including the express exclusion of punitive damages from the scope of available relief. Most fundamentally, the FSIA provides that foreign states enjoy immunity from the civil jurisdiction of U.S. courts, subject to certain enumerated exceptions. Unequivocal Supreme Court precedent makes clear that the FSIA provides the "sole basis" for obtaining civil jurisdiction over a foreign state in U.S. courts, and that it provides "a comprehensive set of legal standards governing claims of immunity" from civil suit. The suggestion in the complaints that the respective federal courts also "ha[ve] subject matter jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005 (CAFA) and 28 U.S.C. § 1332(d)" is incorrect.

The FSIA is an unusual statute in that it provides federal courts with both personal and subject-matter jurisdiction over a foreign state if—and only if—an applicable exception applies. (This 2018 Federal Judicial Center guide to the FSIA, written by David Stewart, remains a valuable resource.) The complaints here allege that two exceptions apply: § 1605(a)(2) for a commercial activity with a sufficient U.S. nexus, and § 1605(a)(5) for a territorial tort. Yet, the complaints utterly fail to specify what relevant commercial activity any of the Chinese defendants engaged in, let alone how that activity has a sufficient U.S. nexus. The only thing they say is that there is no "exception to jurisdiction under the FSIA for 'discretionary acts' because the Defendants have acted clearly contrary to the precepts of humanity, transparency, and/or their conduct is prohibited by the internal laws of the PRC and its provincial and municipal governments." They indicate that "the PRC admitted that the Wuhan police acted improperly" and that the defendants used a coerced false statement from Dr. Li Wenliang "to mislead the international community." These acts might be appalling, and perhaps they even violate some unspecified Chinese law—but they are indisputably sovereign acts. Moreover, even if the defendants' conduct amount to a tortious act, the exception in § 1605(a)(5) expressly **excludes** "any claim arising out of …

misrepresentation [or] deceit," as well as any claim based on the exercise, or failure to exercise, a discretionary function. The provision has also been uniformly interpreted to require that the defendant's actions or omissions occurred within the United States. (For those interested, the Restatement (Fourth) of Foreign Relations § 457 provides an up-to-date examination of this exception.)

Simply put, any scholar or practitioner with working knowledge of the law of foreign sovereign immunity would have taken one look at the headlines about these lawsuits (as I did) and assess immediately that there is no basis for jurisdiction in a U.S. court. (There would also likely be grounds to dismiss for failure to state a claim, *forum non conveniens*, and other defects in service or pleadings.)

More Harm than Good

This makes one wonder: do the attorneys involved simply not know the relevant law, or is there something else going on here? The law firm that filed the Nevada suit (using virtually identical language to the Florida suit filed 10 days earlier) claims that it has done so "in part, to shed light on how the coronavirus was allowed to turn into a pandemic, and to make those responsible implement practices that would prevent a pandemic of this magnitude from occurring again." If that is true, this is not the way to accomplish those goals. There is an understandable human impulse to assign blame, but—especially in the United States—the contributory negligence evident in many aspects of the Executive Branch's response makes focusing on China counter-productive at this point. Indeed, a Chinese lawyer recently sued the United States and various U.S. government departments for their alleged "cover-up" of the pandemic; another Chinese suit seeks compensation for "reputational damage done by President Donald Trump's use of the phrase 'the Chinese virus' to describe the coronavirus." Casting blame exclusively on China has also fueled xenophobia and racism against individuals of Asian descent.

Although government officials in China and the United States are unlikely to face civil accountability in a court of law, they are subject to the court of public opinion. Journalists, researchers, and activists should continue to shine a light on foreign governments that fail to act with truthfulness and transparency, and that do not enforce environmental and other regulations to protect the public. We must also insist on no less from the government of the United States.

Addendum: After this initial article was filed, two more class actions came to light. The first, filed in the Central District of California on March 27, essentially mirrors the Nevada and Florida suits, although it adds the Wuhan Institute of Virology as a named defendant. The second, filed in the Northern District of Texas on March 17, names the People's Republic of China, the People's Liberation Army, the Wuhan Institute of Virology, the Director of the Wuhan Institute of Virology (Shi Zhengli), and PLA Major General Chen Wei. The second complaint rests entirely on the theory that coronavirus was created as part of the development of a prohibited biological weapon by China, and that it was released by China "accidentally or otherwise." Two observations are relevant here: First, this might be one of the rare complaints against foreign officials in which the foreign state is the "real party in interest," meaning that the Foreign Sovereign Immunity Act governs both state

and official immunity in this case under the Supreme Court's reasoning in Samantar v. Yousuf. Although the individual defendants are named as alleged joint tortfeasors, it is unlikely that the plaintiffs are seeking $20 trillion damages from the individual defendants' pockets. Second, and more fundamentally, there is no such thing as "accidental" terrorism. Even though the deaths from COVID19 attributable to the spread of the coronavirus and US failure to take appropriate steps to prevent and mitigate damage already dwarf those suffered on 9/11, the exception to jurisdictional immunity in 28 USC 1605B does not cover these circumstances. This section, which codifies the immunity provisions of the Justice Against Terrorism Act (JASTA), explicitly precludes a suit against a foreign state for an act of war. Instead, it requires "an act of international terrorism in the United States" and a tortious act by a foreign state that cannot be an omission and that does not constitute "mere negligence." As with the other lawsuits, the statutory predicates for civil jurisdiction over China or Chinese officials related to the spread of coronavirus simply are not present here.

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Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity

By Chimène Keitner
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Earlier this month, I wrote a piece for *Just Security* titled "Don't Bother Suing China for Coronavirus." I explained why U.S. courts do not have jurisdiction over private class action lawsuits brought against Chinese government defendants for their alleged misconduct in allowing the coronavirus to spread. On Tuesday, Missouri's attorney general filed a suit seeking damages for harm to Missouri and its inhabitants. The suit was praised by Donald Trump Jr. as "a very appropriate move." Meanwhile, National Security Adviser Robert O'Brien incautiously remarked that "the Chinese have a lot of assets around the world" and "we'll see what happens" with these lawsuits. Although the analysis in my prior post also applies to this complaint, there are a few nuances worth addressing.

To the Missouri AG staff's credit, this complaint is much better written than the others filed to date. In addition to blaming China for allowing the virus to spread by concealing the extent of its transmission (including from the World Health Organization), Missouri's complaint includes allegations of personal protective equipment (PPE) "hoarding," as well as social media censorship (which opens up a whole other can of worms). It remains unclear that China owes any legal duty to the state of Missouri that could form the basis of a tort claim, let alone (as alleged) a duty under Missouri law. Even if there was a breach of such a duty, however, Missouri's claims cannot be adjudicated in a U.S. court for the same reasons that equivalent tort claims against the United States could not be adjudicated in foreign courts. Missouri was one of the last U.S. states to issue a stay-at-home order, which would also be taken into account in any calculation of damages. In one observer's assessment, however, "anything less than a total victory is an epochal loss for China." Missouri has certainly raised the stakes by jumping on the "sue China" bandwagon.

Circumventing the FSIA by Naming Different Defendants

The Missouri AG attempts to avoid the Foreign Sovereign Immunities Act (FSIA) by arguing that the Communist Party of China (CCP) is not covered by the FSIA, and that the CCP "exercised direction and control" over all the other named defendants. Courts generally do not view attempts to "plead around" the FSIA favorably. The complaint cites an unpublished opinion by a federal district court in Michigan finding that the CCP does not fall under the FSIA, but that determination was inconsequential, because the plaintiff's claims had other fatal defects. However, in a different unpublished opinion, a federal district court in New York found in a decision, upheld on appeal, that China Central Television is an instrumentality of China because it is the "mouthpiece of the Chinese Communist Party." Similarly, a federal district court in Florida found that the Communist Party of Cuba is an agency or instrumentality of Cuba, a designated state sponsor of terrorism under the FSIA. On the other hand, a New York district court issued a default

judgment against ZANU-PF, whose First Secretary was Zimbabwean President Robert Mugabe (the judgment was overturned for improper service).

At least two of the private class action complaints name the CCP as a defendant, but only Missouri makes the argument that the CCP does not fall within the FSIA's scope. Yet, political parties in China are not the same as political parties in other countries. As a practical matter, there *are* no other political parties, leading China to be dubbed a "Party-State." The bipartisan U.S.-China Economic and Security Review Commission recommended in its 2019 report that the United States stop referring to Xi Jinping by the "unearned title of President" and instead refer to him as "General Secretary" of the CCP, since that is the position that provides him with governmental authority. As a decision issued shortly after the FSIA was enacted noted, the FSIA's definition of agency or instrumentality "seems designed to establish the degree of the foreign state's identification with the entity under consideration [and] is ill-suited to concepts which exist in socialist states." In China, the CCP arguably *is* the state.

The Missouri complaint also names the government-run Chinese Academy of Sciences, which allegedly administers the Wuhan Institute of Virology. Even if these entities end up falling outside the FSIA's definition of a foreign State or an agency or instrumentality of a foreign State (which is unlikely), the Supreme Court indicated in *Samantar v. Yousuf* (2010) that the FSIA would apply when the State is the "real party in interest." This observation provides a basis for treating the suit as if it were filed against China, if the plaintiffs seek assets from China. In addition, *the Republic of Philippines v. Pimentel* (2008) holds that a suit may not go forward if a sovereign foreign State is an indispensable party, which China would very likely be here. Finally, if a defendant falls outside the scope of the FSIA, that defendant must be properly served with process, and there must be a basis for asserting personal jurisdiction over that defendant (in addition to subject-matter jurisdiction over the claim). The Supreme Court has virtually eliminated general personal jurisdiction over entities unless they are either headquartered or incorporated in the forum State, and it has also limited the exercise of specific personal jurisdiction over non-resident defendants. Any of these defects would be grounds for dismissing the claims at the pleading stage.

Misconstruing the Commercial Activity and Territorial Tort Exceptions

Perhaps anticipating these obstacles, Missouri attempts to fit the entire complaint within the commercial activity exception to sovereign immunity, as well as the exception for territorial torts. However, just because one or more of the named defendants engages in commercial activity, does not mean that this exception applies. The crux of Missouri's complaint is summarized in its opening paragraph:

> During the critical weeks of the initial outbreak, Chinese authorities deceived the public, suppressed crucial information, arrested whistleblowers, denied human-to-human transmission in the face of mounting evidence, destroyed critical medical research, permitted millions of people to be exposed to the virus, and even hoarded personal protective equipment—thus causing a global pandemic that was unnecessary and preventable.

All of the defendants' alleged acts occurred outside of the United States. The relevant commercial activity exception provides jurisdiction over a civil action "based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." As the Restatement (Fourth) of Foreign Relations indicates, this exception "requires a substantive connection or a causal link between the act and commercial activity" (§ 454, rep. note 7). In addition, the "direct effect" requirement does not include effects that are "remote or attenuated" consequences of the act, or effects that are caused by an intervening act (§ 454, rep. note 8). The complaint recites these statutory requirements, but it does not appear to satisfy them. Similarly, although the complaint further alleges that "each of the counts" are "torts occurring in the United States" for purposes of the non-commercial tort exception, the Restatement (Fourth) makes clear that this exception applies to injuries in the United States "caused by the tortious act or omission of the foreign state *in the United States*" (§ 457(1), emphasis added). It also excludes claims "based upon an exercise of or failure to exercise a discretionary function," as well as claims for misrepresentation or deceit. As Comment (a) to this section indicates:

> In the United States and other jurisdictions, limitations on sovereign immunity were initially developed in the context of commercial activities of foreign states, but today a foreign state may also be held responsible for damages on a basis comparable to a private person or corporation when that state's tortious conduct in the forum state causes death or injury to private persons or damage to property in the forum state. For instance, the driver of an official vehicle on official business may be engaged in a governmental function, but if the driver injures a pedestrian, the state may be subject to suit for damages based on the injury.

In sum, although it is possible that the intricacies of the commercial activity exception might tempt a district court to allow very limited jurisdictional discovery, the "gravamen" of the complaint is that the Chinese government, acting outside the United States, breached its international obligations, with disastrous consequences for the rest of the world. The FSIA does not provide jurisdiction over these claims.

Another JASTA?

Another Missouri official, Republican Senator Josh Hawley, appears to have recognized that suits against China for damages caused by coronavirus cannot be brought in U.S. courts. He has proposed changing U.S. law to allow these claims (a move that would have disastrous foreign relations consequences). Another proposal by Republican Senators Marsha Blackburn and Martha McSally (the "Stop China-Originated Viral Infectious Diseases Act of 2020" or the "Stop COVID Act of 2020"), would create an exception to sovereign immunity where a foreign State is alleged "whether intentionally or unintentionally, to have discharged a biological weapon." The text of a third proposed amendment to the FSIA introduced by Rep. Dan Crenshaw (R-Texas) and Senator Tom Cotton (R-Ark.) targets foreign States, but it unironically condemns those

> responsible for, or complicit in ordering, controlling, or otherwise directing acts intended to deliberately conceal or distort the existence or nature of COVID-19, if such acts are found to have likely contributed to the global COVID-19 pandemic.

Congress cannot create an exception to foreign sovereign immunity every time the United States is adversely affected—even catastrophically—by another country's actions. Not only would this likely violate international law, but it would virtually guarantee reciprocal lawsuits in other countries' courts. Instead of crafting legislation that will ultimately harm U.S. interests, Congress should prioritize finding out what the U.S. government knew or should have known about the virus, and why it failed to act sooner.

It is entirely appropriate–indeed, essential–for the international community to find out what caused the outbreak of this virus and where China's response fell short, and to take effective measures to prevent a similar outbreak from happening again. Hawley's proposal that the State Department "lead an international effort to secure compensation from the Chinese government" does not require a new statute to move forward, although it seems in tension with the Trump administration's hostility toward compulsory international adjudication. Meanwhile, lawsuits against China in U.S. courts should not detract from the continued responsibility of U.S. federal and state governments to prevent the further spread of the virus.

[On Wednesday, April 22, Mississippi Attorney General Lynn Fitch announced her intention to sue China, and urged Mississippi's Congressional delegation to support creating a new exception to the FSIA. The complaint was filed on May 12.]

[Update: As Ted Folkman pointed out at Letters Blogatory, Missouri has notified the district court that it plans to use the FSIA to serve process on all defendants. Missouri cannot use the FSIA to serve entities that do not come within the FSIA's scope. In other words, it cannot simultaneously argue that the CCP is not a foreign state for immunity purposes, but that it is a foreign state for service purposes. Meanwhile, the Florida lawyers amended their complaint on May 4 to include the CCP. It's not clear how the various private class action lawyers who have named the CCP as a defendant are handling service, or how they plan to establish personal jurisdiction over the CCP outside the FSIA. The FSIA provides that defendants have 60 days to respond once they are served. A court cannot issue a default judgment unless "the claimaint establishes his claim or right to relief by evidence satisfactory to the court."]