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To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities

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Letter to the *Journal*

To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities

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I. Introduction

1. The devastation wrought by the spread of the novel coronavirus has touched virtually every country and will affect countless lives and livelihoods for years to come. In the midst of the ongoing pandemic, individuals in some countries have sought legal redress through their own domestic courts. This phenomenon seems most prevalent in the United States, where at least twenty civil lawsuits had been filed as of June 2020—eighteen by private litigants, and two by state attorneys general.[1] This symposium contribution considers the legal theories underlying these lawsuits and their prospects of success. It

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1 Readers can find the author's written testimony on this issue before the U.S. Senate Judiciary Committee, as well as oral testimony presented on June 23, 2020 and answers to Questions for the Record submitted on July 21, 2020, at https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability.

also considers legislative proposals that would create a new exception to foreign sovereign immunity for claims arising from a pandemic.

2. In certain circumstances, civil litigation can perform an important expressive function in shaping normative expectations for conduct, even if it is ultimately unsuccessful in obtaining compensation for the plaintiffs. However, especially in the transnational context, these potential benefits must be weighed against other possibly more significant costs. Unlike in the anti-terrorism context, Congressional immunity-stripping proposals for pandemics do not currently appear to enjoy bipartisan support.

3. My analysis proceeds as follows. Part II details some of the claims brought against China in U.S. courts. Part III describes the actions filed by state attorneys general. Part IV discusses proposed amendments to the Foreign Sovereign Immunities Act, which governs foreign state immunity from civil suit in U.S. courts. Part V briefly considers the relevance of China's international legal responsibility to domestic suits and concludes.

II. Civil Lawsuits Brought by Private Plaintiffs

4. The first civil suit filed against China for COVID-19 appears to have been filed by a Florida-based plaintiffs' firm in mid-March 2020. Like many of the privately initiated suits, *Alters et al. v. People's Republic of China* (S.D. Fla.) is styled as a class action, meaning that the named plaintiffs seek to represent a class (or classes) of similarly situated plaintiffs. There is little chance any court would certify the proposed classes under Federal Rule of Civil Procedure 23. The proposed class definitions include "[a]ll persons and legal entities in the United States who have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus." It seems there are few persons, natural or legal, who would *not* belong to one of the proposed classes.

5. The Florida complaint names various Chinese governmental entities as defendants, in addition to the People's Republic of China (PRC) itself. These include the National Health Commission of the PRC, the Ministry of Emergency Management of the PRC, the Ministry of Civil Affairs of the PRC, the People's Government of Hubei Province, and the People's Government of the City of Wuhan. The suit filed in April by the Attorney General of Missouri (*State of Missouri v. People's Republic of China*, E.D. Mo.) also names the Chinese Communist Party and adds the Wuhan Institute of Virology and the Chinese Academy of Sciences. Some of the plaintiffs are now filing amended complaints to add new defendants and claims.

6. The U.S. Foreign Sovereign Immunities Act, which was passed by Congress in 1976, codifies the restrictive theory of foreign sovereign immunity. It contains a relatively expansive definition of the term "foreign state" to include political subdivisions and agencies or instrumentalities of foreign states, as well as entities that are organs of a foreign state or that are majority-owned by a foreign state. 28 U.S.C. § 1603. The statute provides both personal and subject-matter jurisdiction over civil actions against foreign states that fall within certain enumerated exceptions to foreign sovereign immunity. It appears that many plaintiffs seeking redress against China for damages caused by COVID-19 are attempting to serve all named defendants via the service provisions in the FSIA. 28 U.S.C. § 1608. Once a defendant is served, it has sixty days to respond to the suit by filing an answer or—more often—a motion to dismiss. If a named defendant does not respond to the suit, the FSIA authorizes a U.S. state or federal court to enter a default judgment only if "the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

7. These suits raise multiple complex questions of transnational civil procedure, including extraterritorial application of U.S. law, choice of forum and abstention doctrines, due process rights of foreign litigants, cross-border discovery of foreign government documents, and the availability of contempt sanctions against foreign states, to name a few. They also raise substantive legal issues including causation, contributory negligence, and the plaintiff's duty to mitigate damages. Before reaching those questions, however, a court must "satisfy itself that one of the exceptions [to immunity] applies"—not by adjudicating the merits (which would defeat the purpose of jurisdictional immunity), but by "apply[ing] the detailed federal law standards set forth in the Act." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461, U.S. 480, 493–94 (1983).

8. The two most salient enumerated exceptions to foreign state immunity for potential claims against China are the commercial activity exception and the territorial tort exception. 28 U.S.C. § 1605. Yet the allegations in the complaints do not appear to fall within these exceptions. The complaint in *Alters*, which is representative of the actions by private plaintiffs, alleges that "[t]he PRC and the other Defendants knew that COVID-19 was dangerous and capable of causing a pandemic, yet slowly acted, proverbially put their head in the sand, and/or covered it up for their own economic self-interest."[2]

2 Complaint, *Alters v. People's Republic of China*, Case No. 1:20-cv-21108-UU (S.D. Fla., Mar. 13, 2020), at https://images.law.com/contrib/content/uploads/documents/392/85094/Coronavirus-China-class-action.pdf.

These are damning allegations, some of which are consistent with a timeline compiled by the nonpartisan Congressional Research Service "based on available public reporting to date". *See* Congressional Research Service, "Covid-19 and China: A Chronology of Events," https://crsreports.congress.gov/product/pdf/R/R46354 (updated May 13, 2020). However, they do not fall within an enumerated exception to the FSIA.

9. In order to fall within the commercial activity exception, the plaintiff's claims must be "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." 28 U.S.C. § 1605(a)(2). Alternatively, the complaint must seek money damages against a foreign state "for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment". 28 U.S.C. § 1605(a)(5). Although the latter exception might seem to fit the circumstances here, courts have interpreted it definitively as requiring a tortious act or omission of the foreign state *in the United States*. *See* RESTATEMENT (4th) U.S. FOREIGN RELATIONS LAW § 457(1) (2018). This interpretation is consistent with the prevailing understanding of this exception in international law. *See id.* § 457(2).

10. It is important to emphasize that jurisdictional immunity does not equal lack of legal responsibility under either domestic or international law. The question is how best to allocate adjudicatory authority horizontally among states and promote accountability for wrongdoing, while facilitating cooperation among political and territorial communities to secure the well-being of their populations.[3]

III. Enforcement Actions by State Attorneys General

11. The civil suits filed by the attorneys general of Missouri and Mississippi, respectively, must fall within an enumerated exception to the FSIA in order to proceed. They do not. Both attorneys general intend to serve all defendants using the service provisions of the FSIA, thus seemingly conceding that they all fall within the FSIA's definition of a foreign state or its agency or

3 For an additional perspective from the author, see Chimène I. Keitner, Germany v. Italy *and the Limits of Horizontal Enforcement: Some Reflections from a United States Perspective*, 11 J. INT'L CRIM. JUST. 167 (2013), at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2095&context=faculty_scholarship.

instrumentality.[4] The crux of the lawsuits, as framed by the complaint in the Missouri case, is as follows:

> 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. [Complaint, at 2.]

12. Among other causes of action, Missouri's complaint includes a claim for the tort of public nuisance under Missouri law on the grounds that defendants' conduct was "knowing, willful, and in reckless disregard of the rights of the State and its residents", and that economic and non-economic damages in the "billions—and possibly tens of billions—of dollars" are the "proximate result" of defendants' conduct. It also alleges a breach of duty by "restrict[ing] exports" of Personal Protective Equipment (PPE) and "allow[ing] the export of ineffective PPE", both of which the complaint characterizes as commercial activities. However, the act of regulating markets is a quintessentially sovereign activity. The U.S. Supreme Court has indicated that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, [then] the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). The allegations in these complaints do not describe activities akin to those of "private player[s]" within a market. Moreover, as the Court has made clear, "the issue [in defining commercial activities under the FSIA] is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* (emphasis in original).[5]

4 *But cf.* Complaint, *Missouri v. People's Republic of China*, Case No. 1:20-cv-00099 (E.D. Mo., Apr. 21, 2020), at https://ago.mo.gov/docs/default-source/press-releases/2019/prc-complaint.pdf?sfvrsn=86ae7ab_2 (stating that "the Communist Party is not a foreign state or an agency or instrumentality of a foreign state, and is not entitled to any form of sovereign immunity").

5 Of potential relevance, U.S. courts have recognized a foreign sovereign compulsion *defense* against application of the U.S. antitrust laws in limited circumstances "when a foreign sovereign compels the very conduct that the U.S. antitrust law would prohibit." *See* U.S. Dep't of Justice & Federal Trade Comm'n, "Antitrust Guidelines

13. Mississippi's claims for violations of state antitrust and consumer protection law resulting from alleged PPE "hoarding" rely on a similarly flawed understanding of the commercial activity exception.[6] If a state-owned company negligently designs or manufactures PPE abroad, and the product is sold in the United States and causes personal injury in the United States, then the direct-effect requirement of the commercial activity exception would be satisfied. *See* REST. 4th FOR. REL. § 454, reporters' note 8. That does not appear to be the thrust of the allegations here.

14. As a general matter, political subdivisions play an increasingly salient role in international law and international relations. Missouri and Mississippi's lawsuits (and any others that state attorneys general decide to file) will work their way through the normal judicial process, as district court judges determine whether or not the claims fall within an enumerated exception to foreign sovereign immunity under the FSIA. Denials of jurisdictional immunity have been deemed immediately appealable under the collateral order doctrine. 28 U.S.C. § 1291. If any of the claims were to proceed to trial, the plaintiff states would be subject to reciprocal discovery on matters including any alleged failure to mitigate damages by taking reasonable steps to prevent the further spread of the virus.[7]

IV. Proposed Amendments to the Foreign Sovereign Immunities Act

15. Opening a country's domestic courts to lawsuits against a foreign government may be particularly tempting when other potential responses seem inadequate or ineffective in the face of catastrophic injury. The U.S. Congress has done this before in response to acts of international terrorism. *See* 28 U.S.C. §

for International Enforcement and Cooperation" (Jan. 13, 2017) at 32, at https://www.courtlistener.com/docket/17160343/1/state-of-mississippi-v-peoples-republic-of-china/.

6 Complaint, *State of Mississippi v. People's Republic of China*, Case No. 1:20-cv-00168-LG-RHW (S.D. Miss., May 12, 2020), at https://www.courtlistener.com/docket/17160343/1/state-of-mississippi-v-peoples-republic-of-china/.

7 Actions taken, or not taken, by the plaintiff states could also be relevant to determining whether a foreign country's act outside the United States had a "direct effect" within the United States, as required by the relevant prong of the commercial activity exception. A "direct effect" in this context "follows as an immediate consequence of an act." An effect is not direct if it is a "remote or attenuated consequence of the act," or if the effect "is caused by an intervening act." REST. 4TH FOR. REL. § 454 cmt. e.

1605A (exception for certain claims against designated state sponsors of terrorism); 28 U.S.C. § 1605B (exception for tortious acts of a foreign state, excluding mere negligence, that cause injury resulting from an act of international terrorism in the United States that is not an act of war).

16. Even absent foreign sovereign immunity, civil lawsuits against China for most injuries in the United States caused by the spread of COVID-19 would not result in massive recoveries for plaintiffs. Different sections of the FSIA govern a foreign state's immunity from attachment and execution. 28 U.S.C. §§ 1609–1611. These provisions have been left largely intact by previous amendments, although the bill introduced by Missouri Senator Josh Hawley would also curtail this immunity.[8]

17. Some members of Congress have become inured to warnings about the potential foreign relations consequences of immunity-stripping legislation, which they feel have not been borne out. Others have suggested that an excessive emphasis on reciprocity concerns gives foreign states too loud a voice in deliberations on domestic legislative provisions. This narrow understanding of reciprocity as involving tit-for-tat lawsuits misses the bigger picture of the foreseeable consequences for the United States of weakened immunity protections from the jurisdiction of other states. In 2019, the United States produced nearly 15% of world GDP ($87.2 trillion), with only around 4.3% of the world's population.[9] This figure gives some sense of the United States' potential exposure to legal claims in other countries, whether meritorious or not, which dwarfs that of virtually every other country in the world.

18. Precisely because of the United States' relative economic and military power on the world stage, the United States does not need to deploy the "threat" of lawsuits in U.S. courts to influence other countries' behavior. Lawmakers are understandably frustrated when other tactics and tools of persuasion appear to fall short, but that is not a reason to jettison established principles of foreign state immunity that protect the United States.

8 "Justice for Victims of Coronavirus Act" (Apr. 14, 2020), available at https://www.hawley.senate.gov/sites/default/files/2020-04/Justice-for-Victims-of-Coronavirus-Act.pdf.

9 Mark J. Perry, "Putting America's Enormous $21.5T Economy Into Perspective" (Feb. 5, 2020), at https://www.aei.org/carpe-diem/putting-americas-huge-21-5t-economy-into-perspective-by-comparing-us-state-gdps-to-entire-countries/.

V. The Connection Between Domestic Suits and International Legal Responsibility

19. There is perhaps no less appropriate context for discarding principles of foreign state immunity than a global pandemic. As Professor David Fidler has written, "[p]athogenic threats with the potential for cross-border spread can appear in any country."[10] Moreover, "[u]nder the principles of state responsibility, separating what damage is attributable to China's delayed reporting and what harms arose because other governments botched their responses to COVID-19 would be difficult." This is true as both a practical and a conceptual matter.

20. It is highly doubtful that an alleged violation of the International Health Regulations (2005) could provide a cause of action in U.S. courts under prevailing case law. International dispute resolution bodies perform an essential function in channeling legal claims against countries away from domestic courts and into consent-based fora. International commissions have played important fact-finding roles in the past, and can do so again in assessing countries' responses to the initial, and later, phases of the COVID-19 outbreak. In addition, insulating the institutions charged with protecting global public health—especially, but not solely, the World Health Organization—from undue pressure by member states remains a high priority. Instead, we seem to be witnessing an opposite trend.

21. Civil litigation in domestic courts can perform the important social functions of condemning harmful behavior, deterring future wrongdoing, and securing compensation for injured parties using the coercive power of the state. It is not well suited to perform these functions with respect to a foreign state's acts or omissions relating to the initial or continued spread of a deadly virus.

10 David Fidler, "COVID-19 and International Law: Must China Compensate Countries for the Damage?" (Mar. 27, 2020), at https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/.