

Sovereign Immunity & Covid-19: China's Immunity Under the Fsia from Federal Covid-19 Lawsuits

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Many states have filed lawsuits against the People's Republic of China in U.S. Federal Courts for allowing coronavirus to spread and for the ensuing consequences. At present, international law and the American Sovereign Immunity statute bar such lawsuits against China. Only an amendment to the federal statute that creates an exception for recovery against China for COVID-19 related harm can pierce the sovereign immunity enjoyed by China.

I. The Pandemic and Legal Recourse

The COVID-19 pandemic caused unprecedented and egregious damage to lives, healthcare delivery systems, and societies around the world. Battling a ubiquitous invisible enemy has left many pessimistic about the future. Individuals and leaders dealing with the pandemic have been under severe emotional and mental stress.

Because the virus originated in and spread from China, some groups have vocally advocated that there should be legal liability through lawsuits for the harm and damage caused. Such claims undoubtedly require a fair and thorough investigation. [Some scholars have endorsed remedies under international law and diplomatic channels for China's recalcitrant conduct.](#)

The truthfulness or ability to prove China's role in the virus's spread is not relevant to the legal discussion of sovereign immunity. The fundamental question before us is whether the People's Republic of China is immune from federal lawsuits in the United States relating to the spread of the COVID-19 pandemic.

II. Foreign Sovereign Immunity in the United States

[According to Vattel](#), every nation that governs itself by its authority and laws, without dependence on any foreign power is a sovereign state. [Sovereign states are co-equal territorial, cultural, and economic formations that can independently establish the rule of law, freely and effectively.](#)

The legal concept of foreign sovereign immunity stems from the idea that a sovereign should not be subjected to domestic legal proceedings in

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another country. Under international law, the concept of foreign immunity has is closely related to the principle of sovereign equality and is best captured by the legal maxim “[par in parem non habet imperium](#)” (equals have no sovereignty over each other).

In the United States, as a matter of grace and comity, [sovereigns enjoyed absolute immunity](#) based on reciprocal self-interest and respect for power and dignity. Until 1952, when [the Tate Letter](#) was issued, sovereigns enjoyed immunity extended to all actions against friendly foreign sovereigns. [In the Tate Letter](#), the State Department announced adopting the “restrictive” theory of foreign sovereign immunity, confining immunity to suits involving “public” and not “commercial” acts. [The restrictive theory was “troublesome” because it gave overwhelming importance to the executive to support the grant of immunity based on diplomatic pressure and political considerations, resulting in precedential inconsistencies and lack of uniformity.](#)

In 1976, the U.S. Congress passed the Foreign Sovereign Immunities Act (FSIA) to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to “[assur\[e\] litigants that . . . decisions are made on purely legal grounds and under procedures that ensure due process.](#)” FSIA is the sole basis for obtaining jurisdiction over a foreign state in US courts and [unless a specified exception to foreign sovereign immunity applies, there is no jurisdiction.](#) Two exceptions are relevant to the present inquiry: [commercial acts and non-commercial tort exception.](#)

III. Missouri’s Federal Lawsuit

In the United States, in addition to class actions in several states, Attorneys General, such as the one in Missouri, [have instituted lawsuits against the People’s Republic of China.](#) Defendants include the Communist Party of China, the National Health Commission, the Central Ministries, the City of Wuhan, Hubei Province, Wuhan Institute, and the Chinese Academy of Sciences.

The State of Missouri seeks “[recovery for the enormous loss of life, human suffering, and economic turmoil experienced. . .from the COVID-19 pandemic \[because of an\]. . .appalling campaign of deceit, concealment, misfeasance, and inaction by Chinese authorities unleashed this pandemic.](#)”

The complaint [invokes the jurisdiction of the federal court under the FSIA and relies on the commercial acts and non-commercial tort exceptions to the grant of immunity.](#) After meticulously tracing the origins of COVID-19 to China, [the complaint alleges how the virus was allowed to spread, followed by an elaborate cover-up by Chinese authorities.](#) These actions caused huge suffering in the United States while China was allegedly hoarding Personal Protective Equipment (PPE) to profit from increased worldwide demand during the viral outbreak. [The claims against the defendants include public nuisance, abnormally dangerous activities, and breach of duty by allowing transmission of COVID-19 and hoarding PPE.](#)

IV. Commercial Activities Exception

The assertion that China's conduct surrounding the entire spread of the coronavirus is a "commercial activity" is unlikely to be accepted. [The FSIA's "commercial activity" exception waives immunity](#) where the action is "based upon" a commercial activity carried on in the United States by the foreign state; or upon "an act performed in" the United States in connection with a commercial activity of the foreign state elsewhere; or upon "an act outside" the territory of the foreign state elsewhere, and that act causes a "direct effect" in the United States.

[Missouri asserts that China's "commercial activities" include:](#) (1) operation of the healthcare system in Wuhan and throughout China; (2) commercial research on viruses by the Wuhan Institute and Chinese Academy of Sciences; (3) the operation of traditional and social media platforms for commercial gain; and (4) production, purchasing, and import and export of medical equipment, such as PPE, used in COVID-19 efforts.

As the commercial character is to be determined by its "nature" rather than its "purpose," [the question is not whether the foreign government is acting with a profit motive or instead to fulfill uniquely sovereign objectives.](#) ["Rather, the issue is whether the government's particular actions \(whatever the motive behind them\) are the type of actions by which a private party engages in commerce."](#) To determine whether the commercial activity exception applies, [the court asks three questions:](#) "(1) 'whether the particular conduct giving rise to the claim in question constitutes or is in connection with commercial activity;' (2) whether the relevant activity is sovereign or commercial; and (3) whether the commercial activity has the requisite jurisdictional nexus with the United States."

Afghanistan providing a safe haven for terrorists and terrorist organizations in exchange for compensation [did not constitute "commercial activity,"](#) since such conduct was not typically performed by a private party engaging in commerce. Additionally, [the "failure to warn" about design defects](#) in an airline causing death is not an "act" or "activity" performed in the United States in connection with commercial activity elsewhere sufficient to meet the exception to sovereign immunity. The "commercial activity" exception does not encompass the ["administrat\[ion\] of a government program to provide for the health and welfare of \[a sovereign's\] citizens and residents."](#) Provision of such healthcare benefits—including the provision of medical treatment—are ["uniquely sovereign in nature."](#)

[Controlling public health crises is a quintessential government function.](#) Applying the lucidly enunciated legal standard, [the acts and omissions alleged against China do not fulfill the commercial or jurisdictional nexus](#) (conducted in or cause a "direct effect" in the United States) threshold to pierce immunity. [The misdeeds at issue in the coronavirus suits are overwhelmingly regulatory](#)—lax safety practices at state laboratory facilities that unsubstantiated accounts to identify as the origin of the virus, failure to take proper steps to contain or inform the world about the outbreak, a government embargo on exporting PPE, and so on.

V. Noncommercial Tort Exception & Discretionary Functions

It will be onerous for Missouri to establish that China's conduct falls within the ambit of the noncommercial tort exception to foreign sovereign immunity. [The FSIA provides](#) that a foreign state shall not be immune in cases where monetary damages are sought for personal injury or death, or damage to or loss of property occurring in the United States and caused by the tortious conduct of that foreign state. [These exceptions were primarily directed at problems like the traffic accidents of foreign diplomats.](#)

Two rules are relevant and important for discussion. First, [the "entire-tort" rule stipulates that the exception to immunity is applicable only when the "entire tort" occurs within the territorial jurisdiction of the United States.](#) It is inapplicable when a foreign sovereign commits a tort abroad, even if that tort results in ["direct effects" in the United States.](#) Second, the discretionary function rule [bars any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused.](#)

[The Missouri lawsuit alleges](#) that certain torts "are torts occurring in the United States," which attracts the noncommercial tort exception to sovereign immunity otherwise enjoyed by China. However, [China's actions fall within the zone of immunity that extends to the performance of "discretionary functions"](#)—that is, policy judgments, even reckless or willful ones, that are abuses of the state's powers.

Discretionary functions include acts or decisions made at the policy-making or planning level of government that are ["fundamentally governmental nature."](#) Saudi Arabia's official acts of deciding what disbursements should be made to Islamic charitable organizations were decisions grounded in social, economic, and political policy, and thus were covered by the "discretionary function" rule, and hence, [were immune from claims made by victims of the terrorist attacks of September 11, 2001.](#) China's failure to properly oversee and investigate unidentified thugs hired to injure and intimidate practitioners of Falun Gong in the United States was [within its sovereign discretionary function.](#) Failure to provide safety to child victims of sexual abuse by the Roman Catholic archbishops fell within the discretionary function, and thus [Holy See was not liable for negligently hiring known or suspected child sexual abusers.](#)

Prima facie, it appears that China's handling of the virus, even if arguably questionable, is well within its discretionary function. Moreover, it will be difficult to show that the alleged torts occurred "entirely" within the United States.

VI. The Road Ahead: Amend, Not Defend

The COVID-19 lawsuits against China filed in federal courts primarily rely on the "commercial activities" and "noncommercial torts" exceptions to sovereign immunity. An examination of the law shows that these claims are unlikely to pass muster in courts. [There might be several other issues like immunity to the various other defendants as being organs or subsidiaries of China, identifying a class of plaintiffs, standing, and of course, the merits of](#)

[each of the tortious claims.](#)

Such lawsuits are, at best, meretricious political statements to castigate China. They are likely to be dismissed at a preliminary stage for lack of jurisdiction because China enjoys foreign sovereign immunity. [The only solution for making these lawsuits legally sustainable in U.S. federal courts is a novel and licentious amendment to the FSIA](#), specifically piercing sovereign immunity from lawsuits for the spread of infectious diseases. [Such an amendment would be akin to the Antiterrorism and Effective Death Penalty Act of 1996 \(AEDPA\)](#), where Congress amended the FSIA to eliminate jurisdictional immunity for claims against designated state sponsors of terrorism. Some legislative proposals have been introduced by members of the 116th Congress. [The Justice for Victims of Coronavirus Act seeks to waive state sovereign immunity](#) for “*any reckless action or omission including a conscious disregard of the need to report information promptly or deliberately hiding relevant information . . . that caused or substantially aggravated the COVID–19 global pandemic in the United States, regardless of where the action or omission occurred.*”

While the analysis presented in this paper is purely legal, it is important to recognize that the damage caused by the COVID-19 virus is unprecedented in modern times. According to the World Health Organization (WHO), as of February 1, 2021, [COVID-19 has infected over 100 million people and claimed over 2.2 million lives globally](#). While the scope of this paper is limited to exploring sovereign immunity extended to China against COVID-19 related lawsuits in the United States, it is important to note that individuals from a particular region or background or country should in no way be held morally, socially, ethically, or legally responsible for the spread of the virus.