Current and Potential Legal and Legislative Remedies Against the Chinese Government for Its Handling of the Novel Coronavirus

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Abstract

The COVID-19 pandemic has come to define a significant portion of life in 2020. Many in the United States put the blame for this global pandemic on the Chinese government and aim to seek justice against it through litigation. American legislators have also drafted bills to explicitly allow for such lawsuits. This paper examines the doctrine of Foreign Sovereign Immunity relating to these lawsuits and explores whether this litigation is possible within the current framework of sovereign immunity. This paper also explores proposed legislation to amend this framework and its likelihood of success. Based upon this research, current law grants very little possibility of a successful suit against the Chinese government for its handling of COVID-19. Furthermore, proposed legislative remedies are also unlikely to pass in Congress.

Introduction

COVID-19's contagiousness and unpredictability have forced the world into lockdown and have taken more than 500,000 lives. In this age of uncertainty, individuals search for answers and accountability. Many examined the early responses to the novel coronavirus to map why the world came to where it did; their search led them to explore the Chinese government's response to the virus soon after it was discovered in China.

Axios, using reporting from *The Wall Street Journal* and *The Washington Post*, created a timeline detailing the early coronavirus outbreak in China. It reports that one of the earliest suspected cases of coronavirus arose on December 10, 2019 in the province of Wuhan. By December 27, lab executives briefed Wuhan health officials about a newly discovered coronavirus with an 87% similarity to the SARS virus.[1]

Some key moments after this point include Chinese authorities' reprimanding of doctors and researchers who attempted to spread information about COVID-19, and reporting from the World Health Organization on January 14, 2020 that Chinese authorities have found "no clear evidence of human-to-human transmission of the novel coronavirus" - an assertion later proven false.[1,2]

There are a plethora of actions taken by the Chinese government with regard to COVID-19 from the moment it discovered the virus up until the coronavirus was considered a pandemic. Many consider this handling of the virus inadequate; A study from the University of Southampton shows that if Chinese authorities had acted only three weeks earlier than they did, global cases could have been reduced by 95%.[3]

One of the widely discussed punitive measures against the Chinese government includes litigation in United States courts. Cases have already been filed in California, Nevada, Pennsylvania, Texas, Missouri, Mississippi, and Florida. Given that these cases litigate against a foreign sovereign, Courts deciding them will consider the question of Foreign Sovereign Immunity. Foreign Sovereign Immunity precludes litigation against a foreign state, unless the state's actions fall within one of the exceptions to immunity.[4] This paper will examine various aspects of the Chinese government's handling of the coronavirus, and explore whether any parts of it fall under any of the exceptions to Foreign Sovereign Immunity.

There is also legislation seeking to expand the exceptions of Foreign Sovereign Immunity to explicitly allow for suits against the Chinese government for its handling of COVID-19. This paper will also examine how this legislation would modify current US law to permit these suits.

Current Exceptions to Foreign Sovereign Immunity

Notable exceptions to Foreign Sovereign Immunity are as follows: waiver, commercial activity, expropriations, noncommercial torts, enforcement of arbitral agreements and awards, and state-sponsored terrorism.[4]

I. Waiver

There are two kinds of waivers: express and implied.

a) Express Waiver

An express waiver is an explicit waiver of immunity, typically found in contracts or by statements made by a government representative. Courts typically construe this waiver narrowly in favor of the sovereign.[4] Due to this narrow construction, plaintiffs seeking relief will likely find none in the express waiver exception, given the apparent lack of express waivers provided by the Chinese government in matters such as its handling of the COVID-19 pandemic.

b) Implied Waiver

An implied waiver, on the other hand, is traditionally found in cases where

(1) a foreign state agrees to arbitration in the United States

(2) a foreign state agrees that a contract is governed by U.S. law or

(3) a foreign state files a responsive pleading in a case in U.S. courts without raising the defense of sovereign immunity.[4]

A Chinese Foreign Ministry spokesperson stated on the record that this issue is not under the jurisdiction of US courts; this seemingly hostile statement makes it unlikely that the Chinese government will agree to arbitration in the US or agree that any contracts related to this handling, if they exist, are governed by U.S. law.[24] This likely takes out the first two means of achieving an

implied waiver of immunity. The third pathway is only available once litigation progresses further. Since litigation recently commenced, it is unknown whether this pathway to achieve implied waiver can be used.

Conclusion

Given these factors, it is unlikely that the waiver exception will prevail. Whether or not this exception can be invoked in later stages of litigation depends on whether the Chinese government raises the defense of sovereign immunity in its responsive pleadings (the third pathway of achieving an implied waiver exception).

II. Commercial Activity

This exception to immunity exists when a claim

> 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 United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;[32]

Plaintiffs must consider this definition of commercial activity and its various applications in each jurisdictional pathway.

a) Definition of Commercial Activity

Commercial activity is "either a regular course of commercial conduct or a particular commercial transaction or act." The commercial nature of an activity is determined by the *nature* of the conduct, rather than the *purpose*. This means that a foreign government must act, "not as

regulator of a market," but "in the manner of a private player within it" (*Republic of Argentina v. Weltover*).[4] Some examples of commercial activity between a private party and a foreign government include contracts and illegal acts performed during the course of business or trade. On the other hand, regulatory powers, charitable donations, human rights violations, and state-sponsored terrorism are some examples of noncommercial activity.[4]

There are three jurisdictional pathways that use this definition for different types of suits. The potential to have prevailing claims with commercial activities and associated acts using each pathway will be discussed in the following section.

b) Jurisdiction

After establishing a commercial activity between the Chinese government and a private party in the United States, as per the definition stated above, plaintiffs must have a valid legal claim based upon this commercial activity or an act associated with it. This means that plaintiffs suing the Chinese government for its handling of COVID-19 must, based on the jurisdictional pathways they choose to use, either establish this handling as the Chinese government's commercial activity, or an act associated with this activity.

Legal actions must be based upon:

1. A commercial activity carried on in the United States by the foreign state
2. An act performed in the United States in connection with a commercial activity of the foreign state elsewhere
3. An act outside the United States that was taken in connection with the commercial activity of the foreign state outside of the U.S. and that caused a direct effect in the United States[4]

The first kind of jurisdictional pathway only considers a commercial activity in the US without considering an associated act, meaning that plaintiffs seeking to use this pathway need to define the Chinese government's handling of COVID-19 as a commercial activity. This may prove a nearly impossible task, given that the Chinese government's handling of COVID-19 is not an action a "private player" in the market would be able to perform. Even if plaintiffs succeed in describing the handling as a commercial activity, proving that this handling was carried out in the United States might prove insurmountable, since many of the agents responsible for the handling of the novel coronavirus are located in China.

The second kind of jurisdictional pathway exists when a claim is based upon an associated act in the United States that relates to commercial acts conducted abroad by a foreign state. Plaintiffs using this exception need to characterize the Chinese government's handling of COVID-19 as either a commercial activity abroad or an associated act in the United States. Given that the handling probably can not be characterized as a "commercial act" and occurred outside of the United States, neither of these descriptions of the handling will likely stand in the court of law. Even assuming that plaintiffs succeed in establishing the handling of COVID-19 as one of these, proving that the other exists will prove challenging, due to the seeming lack of these in relation to the Chinese government's handling of COVID-19.

The last kind of jurisdictional pathway provides the most leeway, allowing for the commercial activity and any associated act, which any legal claim would be based upon, to occur abroad, but requires that they must have a direct effect in the United States. The Supreme Court, in *Republic of Argentina v. Weltover*, stated that this "direct effect" must follow "as an immediate consequence" of the foreign state's activity.[4] This means that plaintiffs suing the Chinese government for its handling of COVID-19 must prove that this handling (whether

classified as the commercial activity or the associated act) directly caused them harm. This in itself may prove a challenging task, due to the domestic policies of the US and other countries - which may have also contributed to plaintiffs' harm from the virus. For example, one study by researchers in New York claims that most of New York's coronavirus cases came from Europe and other parts of the United States, which potentially implicates the domestic policies of European countries and the United States government, at the state and federal level, along with those of the Chinese government.[25] Since this study introduces new actors and actions between the Chinese government's handling of the virus and the harm plaintiffs faced, it is unclear whether a "direct effect" from the former to the latter even exists.

Despite this, cases against the Chinese government filed in Missouri, Nevada, California, and Florida cite this specific argument in their complaint.[7,8,9,10] Putting aside the question of whether a "direct effect" exists, plaintiffs may have some ground with this jurisdictional pathway if the following theory is proven true: the Chinese government purposefully downplayed the threat of COVID-19 and hoarded personal protective equipment (PPE) to sell at a profit once the world was in need of it.[12] If these two activities are true and directly related, plaintiffs could argue that the Chinese government's handling of COVID-19 was the foreign act, connected to the commercial activity of selling PPE at a profit, with the direct effect being the exponential growth of coronavirus in the United States. However, proving these two activities true and directly related might be a challenge due to the various acting intermediaries within the Chinese bureaucracy. But even if this is proven to be true, demonstrating a direct effect in the United States will likely be challenging, for the reasons cited above.

Conclusion

The commercial activity exception will likely not serve as a remedial pathway for lawsuits against the Chinese government. Although the third jurisdiction might be the most promising pathway, claims using it could face difficulty in finding a commercial activity directly connected with the Chinese government's handling of COVID-19. Even if this is done, demonstrating that the handling had a "direct effect" in the United States will prove another challenge, due to the variety of actors and actions involved.

III. Expropriations

Foreign Sovereign Immunity can be waived in situations "in which rights in property taken in violation of international law are in issue." The seized property must either:

1) be in the United States, in connection with a commercial activity carried out by a foreign state in the US, or
2) be owned or operated by an agency or instrumentality of the foreign state, engaging in commercial activity in the United States.[4]

To invoke this exception, the claim in question must fulfill the three prongs set up in this definition: it must involve property, which is taken in violation of international law, that is connected to the commercial activity of either a foreign state or its agent.

a) <u>Property</u>

Until a little more than a decade ago, courts generally ruled that property must be tangible for it to be considered "taken." However, the D.C. Circuit rendered a verdict stating that the property clause gives them "no reason to distinguish between tangible and intangible property."[4]

Given that the Chinese government's handling of COVID-19 likely has little to do with any property a US court would have jurisdiction over, this first prong may not be met.

b) Taken in Violation of International Law

In this clause, the "taking" must be performed by a sovereign government. The US District Court for the District of Columbia in *De Csepel v. Republic of Hungary* held that a taking violates international law if "(1) it was not for a public purpose; (2) it was discriminatory; or (3) no just compensation was provided for the property taken." In the context of the Chinese government's handling of COVID-19, even if there is property that meets the requirements of the first prong, there is, at the time of writing this paper, no evidence that such property was illegally seized, as per this framework, by the Chinese government.

c) Connection to Commercial Activity

If the defendant in suits invoking this exception is a foreign state, the seized property must be present in the United States and be connected with a commercial activity carried out by that state in the United States.[4] Even if plaintiffs somehow meet the first two prongs when suing the Chinese government, this third prong will likely not be met, since any property in the US that could have been allegedly seized during the Chinese government's handling of COVID-19 might not be directly connected to any of the Chinese government's commercial activity in the US. Plaintiffs could avoid this requirement by suing an agent or instrumentality of the Chinese government, thereby having the ability to waive its immunity in a suit involving allegedly seized property outside the US. But, plaintiffs can not then use this as a means for waiving the Chinese government's immunity as well.[4] This, coupled with the fact that the Chinese government, as a legal entity, performed a majority of COVID-19's handling in China, means that plaintiffs would likely find little relief in suing a separate agent/instrumentality of the Chinese government.

Conclusion

Given these elements, a suit against the Chinese government for its handling of COVID-19 is unlikely to prevail on this exception. This is because there is seemingly no property connected to any of the Chinese government's commercial activity in the US, alleged to have been illegally seized over the course of this handling by it or its agents/instrumentalities.

IV. Noncommercial Torts

This exception to Foreign Sovereign Immunity occurs in cases:

> in which money damages are sought for personal injury or death, or for 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 or her office or employment[4]

It may appear that this exception could be a perfect fit for lawsuit against the Chinese government for its handling of COVID-19; after all, this exception covers civil suits for death (from COVID-19, in this case), caused by omissions (the Chinese government's silencing of information regarding COVID-19 during the early days of the outbreak). Suits in Nevada, California, and Florida cite this exception in their lawsuits.[7,8,9] There are two considerations that all plaintiffs who use this exception must evaluate: the limitations to this exception and extraterritoriality.[4]

a) <u>Limitations to this Exception</u>

There are two categories of claims that can not invoke the noncommercial tort exception. These are cases:

1. based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused
2. arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[4]

The first limitation prevents the use of this exception in claims involving discretionary functions. A discretionary function, as defined by *Thornton v. City of St. Helens*, is "an action that involves room for policy judgment or the responsibility for deciding the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."[13] In other words, discretionary functions are subjective actions of a government that are up to the rationale of the individuals exercising them. The California, Nevada, and Florida lawsuits argue that their suits do not pertain to discretionary acts since the Defendants have acted against the principles of "humanity" and "transparency" and/or have acted contrary to the "internal laws of the PRC and its provincial and municipal governments."[7,8,9] Time will tell whether this argument is successful.

The second limitation bars the use of this exception to immunity in claims relating to "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." The California, Nevada, and Florida suits do not allege these claims.[7,8,9]

b) Extraterritoriality

The question of extraterritoriality is concerned with *where* the tort or omission occurs. The Supreme Court, in *Argentine Republic v. Amerada Hess Shipping Corp*, concluded that this exception does not "apply to torts occurring abroad, even if the tort is said to have been partially

performed (or to have had an "effect") in the United States." Under this precedent, other courts have held that "both the injury and the tortious act or omission must occur in the United States."[4] Given this, even if plaintiffs somehow manage to argue successfully that the limitation for "discretionary functions" does not apply, they might have trouble with the question of extraterritoriality since the alleged omissions and tortious actions likely occurred in China.

Conclusion

In totality, plaintiffs suing the Chinese government for its handling of the coronavirus must show that there was harm caused by an omission, that the discretionary functions limitation does not apply, and that extraterritoriality is in their favor. Due to the difficulty in establishing extraterritoriality, plaintiffs might not succeed in using this exception.

V. Arbitration

This exception was created to exempt a foreign state's immunity to:

> "enforce an arbitration agreement made by the foreign state (with or for the benefit of a private party) or to confirm an arbitration award pursuant to such an agreement if the underlying dispute is capable of settlement by arbitration under the laws of the United States."[4]

If a claim meets this definition, it must then meet any of these four conditions:

a. the arbitration takes place, or is intended to take place, in the United States,
b. the agreement or award is (or may be) governed by a treaty or international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards, or

c. the underlying claim could have been brought in a U.S. court but for the agreement to arbitrate or

d. if the foreign state has waived its immunity[4]

a) The Definition

Plaintiffs' suit must center around either of the two kinds of arbitration scenarios. Plaintiffs must either prove that there exists an arbitration agreement between a foreign state and a private party to be enforced, or that an arbitration dispute resulted in an arbitration award to be confirmed in US courts.[4]

Proving the former would require such an agreement to exist, whereas the latter requires that arbitration had already concluded with an award to be paid, assuming that such a dispute is capable of settlement by arbitration in the United States. Due to the seeming lack of either of these in the Chinese government's handling of COVID-19, plaintiffs will have a difficult time proving that sufficient conditions exist to fit the definition.

b) The Four Conditions

This section revolves around whether any of the four conditions would apply in a coronavirus suit against the Chinese government.

Condition (A)

This condition can not be met unless the Chinese government agrees to arbitrate these suits in the United States, which is unlikely given the government's antagonistic stance to these suits.

Condition (B)

In order for this condition to be met, there must be an "agreement or [arbitral] award" that "is (or may be) governed by a treaty or international agreement." Since there is likely no arbitration agreement or arbitral award between a United States private party and the Chinese government related to the Chinese government's handling of COVID-19, this condition will likely not be met.

If there exist such arbitration agreements or arbitral awards, and they may be governed by a treaty or international agreement, then international agreements signed by the US and China will provide the framework for enacting these agreements and awards. The most likely to be used treaties would be the U.N. Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention") and the Inter-American Convention on International Commercial Arbitration ("Panama Convention").[4]

Condition (C)

This condition is met if the underlying claim could be brought in a U.S. court but for the agreement to arbitrate. In other words, the claim, which is the subject of the arbitration, has to be litigable in the United States. This means that it will more than likely need to fit under another exception to Foreign Sovereign Immunity.[17] Therefore, the only way to determine if this condition is met in suits against the Chinese government is if a court deems that the original issue of the suit (the handling of COVID-19) provides an exception to immunity.

Condition (D)

If the foreign state has waived its immunity, then Condition D is satisfied. This can only be achieved through express and implied waivers, as discussed earlier.[17] So, as per the earlier discussion on waivers, this condition is also unlikely to be met, unless the Chinese government waives immunity during the course of litigation.

Conclusion

This exception can only be incurred in circumstances regarding potential arbitration or arbitral awards where the underlying dispute can be litigated in the US. This would require that both the US and China have an existing arbitration agreement or an arbitral award pending, which is very unlikely to be the case. Furthermore, there are four conditions, any of which must suffice to warrant the use of this exception. Condition (C) and (D) could suffice, assuming that the legal dispute falls into another Foreign Sovereign Immunity exception, or is one in which the Chinese government waives its immunity.

VI. State-Sponsored Terrorism

There are two state-sponsored terrorism exceptions. The first utilizes 28 U.S. Code § 1605A and the second utilizes 28 U.S. Code § 1605B.

28 U.S. Code § 1605A

This exception to Foreign Sovereign Immunity applies in cases:

> "in which money damages are sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[4]

This exception only applies if three conditions are met:

1. the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question;

2. the claimant or victim was a U.S. national, a member of the armed forces, or an employee or contractor of the United States government acting within the scope of employment; and
3. (when the acts in question occurred in the designated foreign state), that state was given a "reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration[4]

This means that there are two thresholds that must be met for this exception to apply: the facts of the case must meet the definition of this exception, and the three requirements must be met.

a) The Definition

The first test is satisfied when an individual in a foreign state's government (official, employee, or agent) acts in the scope of his or her government capacity (office, employment, or agency) and provides material support to terrorist acts (acts of torture, extrajudicial killing, aircraft sabotage, or hostage-taking) or assists in the supporting of these acts. To prevail on this claim against the Chinese government for its handling of COVID-19, plaintiffs must be able to connect the handling to a terrorist act or the supporting of one, which may prove challenging.

b) The Second Test - The Conditions

Of the three conditions in 28 U.S. Code § 1605A, the second is likely the easiest to meet, given that some victims of COVID-19 were US nationals. Given the early stages of this litigation, it is unknown whether the third condition can be met or not. The first condition, however, will likely be the end of any lawsuit against the Chinese government seeking to utilize 28 U.S. Code § 1605A as its basis for exception to immunity, since China was not designated a state-sponsor of terrorism during the time of the acts in question.[18]

28 U.S. Code § 1605B

This section was added in 2016 under the Justice Against Sponsors of Terrorism Act. It dictates that a foreign state shall lose its immunity:

> "in any case in which money damages are sought… for physical injury to person or property or death occurring in the United States and caused by
>
> (1) an act of international terrorism in the United States; and
>
> (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless [of] where the tortious act or acts of the foreign state occurred."[4]

Plaintiffs seeking to use this exception to sue the Chinese government for its handling of COVID-19 must successfully establish the handling as "an act of international terrorism in the United States" or "a tortious act or acts of the foreign state," since both elements are required to invoke this exception. A lawsuit filed in Texas against the Chinese government argues the former. The suit describes the Chinese government's handling of COVID-19 as the release of a "biological weapon."[11]

An act of international terrorism is defined as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended-

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;[19]

Plaintiffs in the Texas suit attempt to meet prong (A) by arguing that the Chinese government's handling of the coronavirus is the release of a "biological weapon," an act "outlawed since at least 1925." Plaintiffs further argue that this "biological weapons" is akin to "terrorist-related weapons of mass destruction of population centers," a characterization that could potentially meet prong (B), if plaintiffs can prove that the Chinese government appeared to intentionally create such "weapons" to "intimidate or coerce," or "affect the conduct of a government by mass destruction."[11] This characterization might be difficult to prove, since there is little evidence that the Chinese government manufactured this virus for terrorism; in fact, CUNY health policy professor Bruce Lee states that the structure and behavior of COVID-19 are different from what human-made weaponized diseases would be.[30] Lastly, the fact that this handling was outside the United States might meet prong (C); however, this very same fact would then prevent plaintiffs from using this exception to immunity, since the exception requires the terrorist act to occur in the United States.

Even if plaintiffs prove an act of international terrorism in the United States, plaintiffs must prove that there was also a tortious act(s) by the foreign state or its agents, "regardless [of] where [they] occurred."[4] Tortious acts include negligence, defined as "a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances." Negligence can consist of an omission, when there is "some duty to act."[31] If plaintiffs succeed in establishing a duty to act that applies to agents of the Chinese government, they may be able to use the Chinese government's omissions to hold them liable for a tortious act. Since this provision does not consider the location of the tortious act, plaintiffs would likely not run into the same issues that they would in invoking the noncommercial tort exception. On the other hand, plaintiffs must then prove that a separate act of international terrorism also occurred in the United States, which might be difficult to prove since there is little evidence of such an act occurring.

Even if plaintiffs prove the existence of a terrorist act and tortious act, they must prove causation between the acts and the resulting "physical injury or death or damage to property in the United States." The bar for causation is not high; plaintiffs must only prove a "reasonable connection" between the events in question.[4] Given this threshold, plaintiffs suing the Chinese government for its handling of COVID-19 might prevail in connecting the handling to US COVID-19 deaths.

Conclusion

Both pathways for lawsuits invoking the state-sponsored terrorism exception might not prove fruitful. Plaintiffs using the first path, 28 U.S. Code § 1605A, might have difficulty establishing the Chinese government's handling of COVID-19 as a terrorist act or in support of one; furthermore, China was not designated a state-sponsor of terrorism during the events in

question. The second pathway for such a lawsuit, 28 U.S. Code § 1605B, also bears challenges. Plaintiffs must somehow characterize the Chinese government's handling of COVID-19 as an act of international terrorism or a tortious act. Proving the latter might be easier, but then finding a related terrorist act might be difficult. After proving the existence of a terrorist act and tortious act, plaintiffs need to demonstrate that these acts directly caused the death of thousands in the United States, which might be easier to do than proving the existence of both these acts.

Key Takeaways

Under current Foreign Sovereign Immunity laws, most of the common exceptions will most likely not allow for a lawsuit against the Chinese government for its handling of COVID-19. The commercial activity exception may seem promising, but plaintiffs utilizing it will likely face challenges in establishing the impact of COVID-19 in the United States as a "direct effect" of the Chinese government's handling of the virus. Likewise, the second state-sponsored terrorism exception (28 U.S. Code § 1605B) may, at first, seem encouraging for these suits, but plaintiffs will likely struggle with establishing this handling as the release of a biological weapon with the aim of "intimidating or coercing" or "affect[ing] the conduct of a government by mass destruction." Even if plaintiffs decide to characterize the handling as a tortious act, finding a related terrorist act in the United States will likely prove difficult. Therefore, it seems unlikely that any of these exceptions will provide any relief for coronavirus victims seeking justice against the Chinese government.

Legislation

This section of the paper will examine three proposed legislative acts seeking to amend the United States Code to explicitly allow for lawsuits against the Chinese government for its handling of COVID-19.

I. Civil Justice for Victims of Coronavirus Act

This bill, introduced in the Senate by Senator Joshua Hawley (R-MO), seeks to amend the United States Code to include the following:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical or economic injury to person, property, or business occurring in the United States following any reckless action or omission (including a conscious disregard of the need to report information promptly or deliberately hiding relevant information) of a foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, that caused or substantially aggravated the COVID–19 global pandemic in the United States, regardless of where the action or omission occurred"[20]

This bill would impose liability upon any foreign state for damages caused by "any reckless action or omission" that "caused or substantially aggravated" the COVID-19 pandemic, "regardless of where the action or omission occurred." The "omission" could be conscious or deliberate, but does not appear to be limited to them, meaning that plaintiffs might not need to prove scienter to win a case against the Chinese government using this exception.

The "caused or substantially aggravated" clause may indicate that the Chinese government can avoid losing immunity as long as it successfully argues that it did not cause, nor "substantially" aggravate the COVID-19 pandemic. The process of discovery in a lawsuit may reveal how easy or difficult making this argument may be.

II. Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020

This legislative act, introduced by House Representative Dan Crenshaw (R-TX) in the House and by Senator Tom Cotton (R-AR) in the Senate, outlines its amendment to the United States code as follows:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury or death, or injury to property or economic interests, occurring in the United States and caused by—
> (1) the spread of COVID–19; and
> (2) a tortious act or acts, including acts intended to deliberately conceal or distort the existence or nature of COVID–19, of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office employment, or agency, regardless where the tortious act or acts of the foreign state occurred."[23]

Similar to Senator Hawley's bill, this bill gives no regard to the location of the foreign state's acts. It also limits the scope of lawsuits by only providing an immunity exception to those regarding the COVID-19 pandemic. However, this bill differs in that it requires the tortious acts or omissions to be "deliberate." This standard is more difficult to prove than the one in Senator Hawley's bill, which suggests that actionable claims might not require a conscious act.

III. Stop China-Originated Viral Infectious Diseases Act of 2020

Senators Marsha Blackburn (R-TN), Martha McSally (R-AZ), and Steve Daines (R-MT) introduced this bill to the Senate to amend the United States Code to read:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case where such foreign state is alleged, whether intentionally or unintentionally, to have discharged a biological agent, as defined in section 178 of title 18, and such discharge results in the bodily injury, death, or damage to property of a national of the United States"[21]

Unlike Senator Hawley's and Senator Cotton and Representative Crenshaw's bills, this one creates an exception to Foreign Sovereign Immunity in any case where a foreign state allegedly discharges any "biological agent," as opposed to just COVID-19, irrespective of the scale of damage. For reference, "biological agent" is defined as:

> "any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa), or infectious substance, or any naturally occurring, bioengineered or synthesized component of any such microorganism or infectious substance, capable of causing—
>
> (A) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;
> (B) deterioration of food, water, equipment, supplies, or material of any kind; or
> (C) deleterious alteration of the environment"[22]

Key Takeaways

Each of these bills would explicitly allow for lawsuits against the Chinese government for its handling of the novel coronavirus. However, they are all unlikely to provide relief for American victims of COVID-19. Skopos Labs is an organization

that uses various characteristics of a bill, including the subject of it, its author, number of related bills, the committee it is assigned to, etc. to determine its likelihood of passing. It analyzed the Civil Justice for Victims of Coronavirus Act, Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020, and Stop China-Originated Viral Infectious Diseases Act of 2020 using these factors, and gave them a 1%, 2%, and 3% chance of passing, respectively.[26,27,28]

Furthermore, China's already hostile stance towards this litigation in the United States might further prevent legislators from taking a stronger stance against China. This could be due to fear of Chinese retaliation; the *Global Times*, a Chinese Communist Party newspaper, reported the Chinese government's hostile stance towards these bills. They quoted a research fellow at the Chinese Academy of Social Sciences, who said that China "should impose countermeasures that could make [these politicians] feel the pain."[29]

Conclusion

Plaintiffs suing the Chinese government for its handling of COVID-19 using current exceptions to Foreign Sovereign Immunity are likely to face great challenges. Although legislation currently in the works to amend Foreign Sovereign Immunity would solve this issue, the likelihood of these bills passing is quite low. Therefore, any legal or legislative relief against the Chinese government for its handling of COVID-19 in the United States is likely going to lead to a dead end.

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