

State immunity in global COVID-19 pandemic:

State immunity in global COVID-19 pandemic: Alters, et. al. v People's Republic of China, et. al.

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1. Background

Four American citizens and a company filed the class-action against Chinese government for damages suffered as the result of the COVID-19 pandemic. None of the named plaintiffs were infected by the COVID-19 but they suffered financial loss due to the outbreak. The defendants include the People's Republic of China, National Health Commission of PRC, Ministry of Emergency Management of PRC, Ministry of Civil Affairs of PRC, Government of Hubei Province and Government of the City of Wuhan. The plaintiff argued that Chinese government knew COVID-19 was dangerous and capable of causing a pandemic yet covered it up for their economic self-interest and caused injury and incalculable harm to the plaintiffs. ([here](#))

2. State Immunity and US Courts' Jurisdiction

The Defendant is a sovereign state and enjoys immunity from jurisdiction of other countries. Most countries, like the U.S., adopt the restrictive immunity approach, and apply exception to the immunity of a state when the disputed state's act, for example, relates to commercial activities or commercial assets, or constitutes tort. The Foreign Sovereign Immunities Act (FSIA) of 1976 provides the sole basis for obtaining jurisdiction on an action against a foreign state. (*Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428) Plaintiffs relied on the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§1602 et seq. §1605 states: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

...

(5) ...money damages are sought 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; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;”

This is not the first time for China to be sued in the US court under §1605(a)(5) of the FSIA (for example, see *Youming Jin et al., v Ministry of State Security et al.*, 475 F.Supp. 2d 54 (2007); *Jin v Ministry of State Security*, 557 F.Supp. 2d 131 (2008); *Walters v Industrial and Commercial Bank of China*, 651 F.2d 280 (2011)), but given the impact of COVID-19 this case probably is the most influential one. The purpose of this provision is to provide the victim the right to claim damages against a foreign state for tortious activities that may be legalised by the foreign law. The U.S. court thus will apply the local law to interpret this provision. Some crucial concepts, such as “tortious act” and “discretionary function”, are interpreted by the relevant US law. (*Doe v Federal Democratic Republic of Ethiopia*, 189 F.Supp. 3d 6 (2016)) However, since the FSIA is a unilateral domestic statute with clear impact in the foreign sovereign and international comity, it is inappropriate to apply the U.S. law, as the national law of a state of equal status, to determine if the foreign state has committed tort. This approach impliedly grants the U.S. and U.S. law the superior position over foreign states and foreign law. If the FSIA aims to protect humanity and basic rights of individuals that are universally recognised and protected, an international law standard instead of U.S. one should be more appropriate.

Anyway, although the U.S. has adopted the restrictive immunity approach and the U.S. standard to protect the tort victim against foreign government, this exception is applied with a high threshold, making the jurisdiction hurdle difficult to cross. Firstly, the alleged tort or omission must occur in the U.S. The Supreme Court in *Argentine Republic v Amerasia Shipping*, 488 US 428 (1989) articulated the “entire tort” rule, holding that the non-commercial tort exception “covers only torts occurring within the territorial jurisdiction of the United States” (*Argentine v Amerasia*, 441) “Entire tort” means only when both tort action and damage occur in the US, jurisdiction may be asserted. (*Cabiri v Government of Ghana*, 165 F.3d 193 (2d Cir. 1999) Even if the damage caused by

COVID-19 occurred in the U.S., the alleged tort conduct of Chinese government were conducted exclusively out of the territory of the U.S. Arguably, the Supreme Court did not consider the situation where tort actions abroad may causing damages in the US in its 1989 judgment. However, there is no authority support extension of jurisdiction to cross-border tort.

Secondly, pursuant to the common law on tort, the plaintiffs should prove the defendants had a duty of care, breached this duty, and the breach caused the foreseeable harm. Chinese government undoubtedly owes the duty of care to Chinese citizens and residents. Does Chinese government owe any duty to non-residents? Such a duty cannot be found in Chinese domestic law. Relevant duties may be found in international conventions. Art 12 of the International Covenant on Economic, Social and Cultural Rights states a state member should recognise the right of everyone to enjoy the highest standard of health and should take steps necessary for “(t)he prevention, treatment and control of epidemic, endemic, occupational and other diseases”. (Art 12(2)(c)) This duty applies to nationals and non-nationals alike. (Art 2(2)) However, none of the named plaintiffs in this suit were infected by COVID-19. The damage is sought for the damage to their commercial and business activities instead of physical or mental health. Furthermore, the International Health Regulation 2005 provides the state parties international obligations to prevent spreading of disease, such as the duty to notify WHO of all events which may constitute a public health emergency of international concern within its territory within 24 hours of assessment of public health information (Art 6(1)) and sharing information (Art 8), but these obligations are not directly owed to individuals and cannot be directly enforced by individuals in ordinary courts. It is thus hard to argue Chinese government owes the plaintiff a duty of care.

Even if the plaintiffs seek damages for personal injury. It is difficult to prove China has breached the duty and the breach “caused” the COVID-19 outbreak in the US or other part of the world. Since COVID-19 is a new virus with many details remaining unknown, it takes time to truly understand the virus and be able to contain the spread of the disease. Therefore, when the first case of “a mysterious pneumonia” was discovered in Wuhan in December 2019, there was no enough knowledge and information to piece together an accurate picture of a yet-to-be-identified new virus, let alone to predict its risk of quick spreading and the later global pandemic. After the first case was identified on 31 December

2019, Wuhan airport started to screen passengers from 3 Jan 2020, WHO issued travel restriction instruction on 5 Jan, and COVID-19 was only identified on 7 Jan. On 8 Jan, the first suspected case was reported in Thailand. It shows that the Chinese government responded quickly and the virus spread out of China before enough information was collected to understand it. After the seriousness of COVID-19 was confirmed, China has adopted the most restrictive measures, including lockdown the City of Wuhan and put the whole country under full or partial quarantine to contain the disease, which was a critical move to slow the spread of the virus to the rest of the world by two or three weeks. It is hard to argue that Chinese government has breached the duty. It is even harder to claim that the conduct of Chinese government caused the outbreak in the US. US confirmed the first case on 21 Jan, evacuated citizens out of Wuhan on 26 Jan and started visa travel ban on Chinese travellers on 8 Feb. Only 10 cases were confirmed in the US by 10 Feb. It suggests that the later outbreak in the US was not caused by the Chinese government. As of now, China is the only country in the whole world which has brought the COVID-19 pandemic back under control.

Finally, a foreign state does no loss immunity under §1605(a)(5) of the FSIA for discretionary conducts. The discretion shield aims to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The exception ... protects only governmental actions and decisions based on considerations of public policy.” (Berkovitz v US, 486 U.S. 531, 546-37) Discretion is assessed by a two-limb test. Firstly, if the defendant followed any statute, regulation, or policy specifically prescribing a course of action, the conduct was non-discretionary. Secondly, if, in the absence of regulatory guide, the defendant’s decision was grounded in social, economic, or political goals, such an action is deemed the exercise of discretion. (Berkovitz, 531) An exercise of power contrary to regulatory guidance is not shielded by the discretion exemption. (Doe v Ethiopia, 26) Measures adopted to prevent epidemic are largely discretion-based, which closely related to the local economy and culture.

3. Likely Response from China

As mentioned above, it is not the first case that China was sued before an American court; therefore, the likely response from China can be predicted. A general judgment is that the Chinese government will reiterate its position in case of need that it will accept no suit against it at a domestic American court, and

China will not enter into appearance before the American court.

Unlike the U.S., China is one of the few countries that insist on absolute immunity approach. This has been clearly affirmed by the continuous assertion of absolute immunity by its central government in various occasions. (Russell Jackson et al. v People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Memorandum sent by the Chinese Embassy in Washington, DC, in Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007). It is worth mentioning that on 14 September 2005, the then Chinese Foreign Minister signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force), which is understood by some observers to be a signal that China is switching to endorse the restrictive approach in relation to the application of the principle of state immunity. Nonetheless, it is still too early to conclude that China has abandoned the absolute doctrine, and has chosen to embrace the restrictive doctrine, insofar as the Standing Committee of the NPC has not ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property so far, and there is no signal to suggest the NPC should do so in the foreseeable future.

In this light, it can be predicted that China will argue that it enjoys immunity from jurisdiction of domestic American court. To be more specific, if the U.S. District Court for the District of Southern Florida authorized the summons directed to the Defendant, China's possible response may be analysed as follows, depending on specific means of the service of process.

Firstly, if counsel to the Plaintiffs submitted the summons to the Chinese government by mail, a common practice of American lawyers, the Chinese government may choose to ignore it. Service in United States federal and state courts on foreign sovereigns and their agencies and instrumentalities is governed primarily by the FSIA. Since there is no special agreement for service of process between China and the U.S., pursuant to the FSIA, the Hague Service Convention to which both countries are party is the applicable instrument in this case. It is worth noticing that upon accession and ratification of the Hague Service Convention, China notified the Hague Conference on Private International Law of its objection, in accordance with Article 10, sub-paragraph (a) of the Convention, to service of process via postal channels; therefore, service by counsel to the Plaintiffs of a summons on the Defendant via mail will not be effective. Hence, ignoring the request advanced by counsel to the Plaintiffs is the most reasonable

option for China.

Second, if the summons is served on the Chinese government through diplomatic channels, China will choose to turn it down by resorting to the Hague Service Convention. Pursuant to Article 13 of the Hague Service Convention, where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. As China insists on absolute immunity approach, it is logic that China will refuse the request advanced by counsel to the Plaintiffs and returned the documents by Article 13 of the Hague Service Convention.

Last, but not least, as the present development suggests that the U.S. government is blaming China for the spread of the COVID-19, accusing China of delaying America's response, China would probably deem the lawsuit as a part of the American smear campaign to blame it. The possibility that China responds to this case via legal measures is further reduced. Therefore, we submit that there is a big chance that China may not enter into appearance before the court in Florida and would raise diplomatic protest.