



Foreign Sovereign Immunity and COVID-19 Lawsuits Against China

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Putative classes of plaintiffs have launched at least [five class action lawsuits](#) against the government of the People’s Republic of China (PRC or China) for losses in the United States associated with the COVID-19 pandemic. Two states—[Missouri](#) and [Mississippi](#)—have also lodged claims in federal court against China and Chinese entities for COVID-19 associated losses in those states. The lawsuits essentially allege that the PRC government’s early failure to accurately inform the World Health Organization and the world community about the contagiousness and scope of outbreak of the disease in China, along with other actions to conceal vital information, prevented containment of the coronavirus and directly led to its reaching global pandemic proportions. Each of these lawsuits faces a common initial hurdle: jurisdiction under the [Foreign Sovereign Immunities Act \(FSIA\)](#). This Legal Sidebar analyzes two possible exceptions under the FSIA that these lawsuits have asserted as a jurisdictional basis and describes some legislative efforts to overcome foreign sovereign immunity. Because the complaints are similar but the Missouri complaint seems to be the most detailed in its foreign sovereign immunity claims, this Legal Sidebar focuses on the lawsuit by the State of Missouri.

Foreign Sovereign Immunity

As is the case in most countries and in accordance with [international law](#), foreign sovereign governments are [generally immune](#) from lawsuits in the United States. As the Supreme Court [explained](#), Congress enacted the FSIA in 1976 in part to relieve the executive branch of the burden and diplomatic pressure of providing official statements known as “suggestions of immunity” on whether foreign sovereign immunity barred U.S. courts from exercising jurisdiction over a foreign government in a particular suit. The FSIA provides a [comprehensive set of standards](#) to guide courts with respect to foreign sovereign immunity. The Supreme Court has held that the [sole basis](#) by which U.S. courts (federal and state) may obtain jurisdiction over a foreign state, including its [agencies and instrumentalities](#), is through an [exception](#) under the FSIA. When one of the exceptions applies, the [foreign state](#) “shall be liable in the same manner and to the same extent as a private individual under like circumstances,” except that punitive damages are available only against an agency or instrumentality of a foreign state.

The essence of the allegations against China, as set forth in [Missouri’s complaint](#), is that

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[d]uring 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.

Missouri asserts the court has jurisdiction over its claim for damages based on two exceptions to the FSIA: the [commercial activity](#) exception or, alternatively, the [territorial tort](#) exception. While courts have yet to rule on whether the exceptions are available in this case, [many observers doubt](#) that these exceptions will prove viable.

The Commercial Activity Exception

The [commercial activity exception](#) is the [most commonly asserted](#) exception under the FSIA. It removes foreign sovereign immunity from suit and provides jurisdiction in any case

in which 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 United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Whether an activity is commercial [depends](#) on its nature rather than its purpose. The Supreme Court has [explained](#) that “the issue 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.’” Consequently, activities considered uniquely sovereign functions, such as regulating foreign currency exchanges, are not commercial in nature.

Availability of the exception [relies](#) on the answers to three questions:

1. Does the activity of the state or government in question qualify as a “commercial activity”?
2. Is the plaintiff’s specific claim “based upon” that activity (or upon an act in connection with that activity)?
3. Does the activity in question have a sufficient jurisdictional nexus to the United States?

The State of Missouri argues that Chinese government entities and the Chinese Communist Party (which Missouri alleges is not a foreign state and thus not entitled to immunity, a position some [observers dispute](#)) engages in the [following commercial activity](#):

- operation of the healthcare system in Wuhan and throughout China;
- commercial research on viruses by the Wuhan Institute and Chinese Academy of Sciences;
- the operation of traditional and social media platforms for commercial gain; and
- production, purchasing, and import and export of medical equipment, such as personal protective equipment (“PPE”), used in COVID-19 efforts.

The actions at the heart of the complaint, however, arguably are not based directly on any of these activities. The Supreme Court has [held](#) that “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” Here, the lawsuit appears to be based primarily upon Chinese authorities’ alleged concealment of information rather than on the alleged commercial activity.

The FSIA [requires](#) the commercial activity to have a “direct effect” in the United States. The Supreme Court has [explained](#) that, in the case of commercial activity by a foreign state outside the United States, the required “direct effect” in the United States must follow “as an immediate consequence” of the

defendant's activity. Some [argue that](#) the injuries suffered in Missouri and elsewhere are too [attenuated](#) from the asserted activities to permit jurisdiction under the commercial exception activity to the FSIA.

The Territorial Tort Exception

The [tort exception](#) to the FSIA removes sovereign immunity from suit for non-commercial activities

in which 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.

There are several important [caveats](#) to the tort exception. First, any claim based on the performance or failure to perform a *discretionary function* does not fall within the tort exception and is still protected by sovereign immunity. The FSIA does not define *discretionary function*, but the Supreme Court has [concluded](#) that the analogous exclusion under the [Federal Tort Claims Act](#) for discretionary functions covers administrative decisions grounded in social, economic, and political policy. Second, the FSIA provides that “any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights” does not fall within the tort exception. Finally, most courts have [held](#) that the entire tort, not just the injury, must occur within the United States in order for this exception to apply.

These limitations may preclude use of the tort exception to sue China for the activities alleged. The Chinese government's reporting or failure to report health data arguably is a discretionary governmental function based on policy, as perhaps is its alleged ordering of destruction of viral samples. Actions involving misrepresentation and deceit, possibly including denying evidence of person-to-person transmission of the virus, may likewise be excluded from the exception and remain protected by sovereign immunity. And all of these actions allegedly occurred in China, suggesting that the claims may not satisfy the “entire tort” rule.

Legislative Proposals

Given the strictures of the FSIA and the limited scope of its exceptions, the COVID-19 lawsuits against China face many potential barriers. Members of the 116th Congress have introduced several bills that reduce the FSIA's obstacles.

The Stop China-Originated Viral Infectious Diseases Act of 2020 (H.R. 6444) would add a new exception to the FSIA for cases in which a “foreign state is found, whether intentionally or unintentionally, to have discharged a biological weapon, as defined in section [2280\(d\)\(3\)](#) of title 18, United States Code, in the United States or such discharge results in the bodily injury of a United States citizen.” A similar [bill](#), S. 3592, would exempt from immunity foreign states that discharge, intentionally or not, a “biological agent” (as defined in [Title 18, Section 178, of the United States Code](#)). This bill would also create a cause of action by incorporating [Title 18, Section 2333](#), of the *U.S. Code* the civil cause of action for international terrorism, which would entitle successful plaintiffs (who are U.S. nationals) to treble damages. Neither bill defines *discharge*.

Another [bill](#), S. 3588, would exempt from immunity foreign states that commit “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.” The bill would provide a cause of action in such cases that would permit plaintiffs to obtain treble damages. Judges in such an action would be permitted to issue pre-judgment injunctions related to transfer or disposal of assets. The bill would also amend [Title 28, Section 1610, of the U.S. Code](#) to remove immunity from any defendant-owned property

in the United States, permitting its seizure to pay judgments. The Attorney General, however, would be permitted to intervene in such an action to seek a renewable 180-day stay if the Secretary of State certifies that the United States is engaged in good faith discussions with the defendant foreign state to resolve relevant claims. In the event the United States reached a claims settlement agreement with the foreign state, the Attorney General could seek dismissal of the lawsuit with prejudice, regardless of whether plaintiffs agreed to the settlement.

The Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020 (H.R. 6519) would also create a new exception to the FSIA for lawsuits seeking “money damages ... 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. ...” This bill would also permit the Attorney General to seek successive stays if the United States is engaged in good faith settlement discussions with the defendant, which, if successful, could result in the dismissal of the lawsuit.

H.R. 6524, the Compensation for the Victims of State Misrepresentations to the World Health Organization Act of 2020, would amend the noncommercial tort exception to the FSIA by specifically including claims for “personal injury or death, or damage to or loss of property, occurring in the United States as a result of a willful or grossly negligent misrepresentation of information to the World Health Organization of the nature, seriousness, or communicability of an infectious disease.” The bill would not expressly remove the exclusions for discretionary actions or misrepresentations nor expressly address the “entire tort” rule.

While those suffering from physical or economic injuries due to the COVID-19 pandemic might support these proposals, some [legal analysts](#) have [expressed](#) concern that efforts to abrogate PRC state immunity might have unintended consequences. There are [qualms](#) that China (or any other country sued under a new exception to sovereign immunity) could retaliate by making the United States subject to suit in a foreign country or through some other means, which could result in further economic hardship and place U.S. assets abroad at risk. Some have [noted](#) that problems could be compounded if plaintiffs win sizable judgments and seek to satisfy their judgments by seizing foreign state assets. Ultimately, some [argue](#), there may be better ways to hold China accountable for any role it played in exacerbating the pandemic.

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