Can China be sued because of Covid-19?

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By: Pearl Eliadis

On April 20, a group of Floridians – individuals and a business – launched a novel class action lawsuit against China, blaming it for the scale and spread of the Covid-19 pandemic. The pandemic is widely agreed to have begun in Wuhan City, in China's Hubei province. The plaintiffs claim that the ensuing economic and human damage was exacerbated by delays and cover-ups by the Chinese government, its health commission, internal ministries, and local governments.

A novel claim?

The plaintiffs are individual residents of Florida and the Pitching Lab LLC D/B/A/TBT Training, a baseball training camp located in southern Florida.

They claim that the United States District Court, Southern District of Florida, has jurisdiction over the case, claiming damages in excess of the statutory threshold of $5 million. They assert that there are potentially millions of other similar class members.

Class action suits are not novel, but the same cannot be said for the international context of this lawsuit that is occurring during a global pandemic. This is especially true given that national leaders are pointing fingers at each other and encouraging nationalistic and ideological positions that have not assisted with rational responses. All of this raises the question of the likely success of this lawsuit to circumvent, if not demolish, the established barrier of state immunity from foreign lawsuits.

The lawsuit is part of a much broader trade, political, and ethical debate about China and its growing influence, and while it may be tempting to add legal liability to the list, it is far from clear that the general principle of international sovereign immunity will cede before this or other similar lawsuits.

Such cases are normally barred when the defendant is a foreign sovereign state. In the US, the 1976 *Foreign Sovereign Immunities Act*, the FSIA, codifies the principle of foreign state immunity, and creates a broad defence to such actions against foreign states. Foreign states are defined in the FSIA to include not only nations themselves, but also political subdivisions like provinces, states or municipalities, as well as their "agents and instrumentalities" (28 U.S. Code §?1603).

Since the FSIA was enacted in the mid-1970s, the courts have been given responsibility to decide on foreign immunity lawsuits (prior to the FSIA, the State Department had that responsibility). The policy decision to turn to the courts for adjudication was based on the assumption that the courts would be less likely to be influenced by political factors than the government. However, a US study has suggested that judicial decisions on whether to grant sovereign immunity do in fact depend on the politics at play and that US courts appear to be systematically influenced by political factors, even more so than the State Department had been prior to the FSIA.

The result is that although US experts are taking a dim view of the Florida class action, the politicisation of the issue in general, and of the US courts in the context of foreign immunity cases in particular, raise important questions. First, it raises the question of whether a coronavirus class action may have some chance of success given the overheated debate surrounding China's economic and political role in the current pandemic. Second is the legal question of the significant hurdles that the plaintiffs will have to overcome if they are to be successful in their suit.

Class action allegations

The tortious conduct alleged by the plaintiff is that the "PRC and other Defendants, acting from their own economic self-interest and looking to protect their place as a superpower, failed to report the outbreak as quickly as they could have; underreported cases; and failed to contain the outbreak despite knowing the seriousness of the situation" (para 30). The lawsuit claims that the Chinese government censored medical professionals who had sounded the alarm and then downplayed the dangers of the virus.

The plaintiffs make a range of claims regarding the alleged tortious conduct of China, its agents and instrumentalities, including allegations that their conduct was: negligent and/or reckless; “clearly contrary to the precepts of humanity”; in violation of Chinese law, and, in a nod to theories currently in circulation among the US federal administration, whether the PRC’s “bio weapons labs are ultra-hazardous activities, and caused the release of the virus” (para 44). (All further references to paragraphs are to the statement of claim hyperlinked in the opening paragraph).

The plaintiffs claim that China was negligent because it knew about the dangers and the deadly nature of the virus, and that they failed to contain it properly or admit their knowledge, and failed to warn about the dangers when they knew or reasonably should have known about them (paras 53-56). As a result, the plaintiffs allege, the Chinese government is responsible for negligent infliction of emotional distress, and that it should incur strict liability for the operation of its laboratories, notably the National Biosafety Laboratory at the Wuhan Institute of Virology.

The plaintiffs claim that the laboratories in question are located near the “wild animal” or wet marketplaces where the virus is alleged to have originated, and repeat stories circulating in the media that Chinese researchers are known to sell laboratory animals to street vendors for sale as food instead of cremating them as required by law (paras 71-78).

Exceptions to the principle of foreign state immunity?

The plaintiffs assert that the Court’s jurisdiction derives from an exception to the principle of sovereign immunity. Section 1605 (a)(2) of the FSIA provides that despite the general rule of state immunity, foreign states are not immune from the jurisdiction of courts of the United States where:

“§ 1605 (a)(2) … 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;”

This lawsuit cannot reasonably construed as a case where China or its agents are undertaking a “commercial activity carried on the United States” and so the claim would likely rely more heavily on the second section, namely that the commercial activity of the foreign state created or exacerbated the pandemic.

The difficulties with this approach start with the fact that the live animal marketplace in China is not a commercial activity of the state. It is possible that the unlawful sale of laboratory animals, if proven, might satisfy the second section, but this would in turn require the plaintiffs to prove on the balance of probabilities that the unlawful sale (a) occurred and (b) is the likely cause of the pandemic or at least a contributing factor. Mainstream media reports indicate long-standing concerns with bio laboratories in Wuhan, but do not mention its connection with live animal markets. Some smaller right wing publications, on the other hand, do make that connection. None of it has been proven.

The plaintiffs also make a claim under § 1605(a)(5) with respect to monetary damages for personal injury and death, damage or loss to property caused by the tortious acts or omissions of the defendants, their officials or employees. That section provides:

"§ 1605(a)(5): … not otherwise encompassed in paragraph (2) above, 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;"

However, the section immediately following this one expressly prohibits acts that are "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." Mere negligence, therefore, would be unlikely to trigger the application of this exception although, again, there is a possibility that the knowing sale of laboratory animals to wet markets could underpin a claim. However, the obstacles to establishing both these acts and their connection to the outbreak are formidable.

Dismantling sovereign immunity?

Sovereign immunity has a long history, and has stubbornly resisted most attempts to dismantle it. The 1648 Peace of Westphalia, the peace treaties that ended the Thirty Years War, is generally credited as the source of the concept of state sovereignty. Whether it is correct to ascribe this role to the treaties or not, state sovereignty is a fundamental principle of international relations and international public law, so central that it has been characterized as a "fixation" – at least during the nineteenth and twentieth centuries – by scholar Andreas Oslander.

In the United States, foreign states enjoyed full immunity until 1976 when the FSIA was passed by Jimmy Carter, the essence of the principle is that states should absorb the economic and other costs of other states' actions rather than destabilizing international relations and risking escalating retaliation. As a result, the consequences for the type of recklessness or delay that China is accused of are more likely to lie in the political realm.

That, at least, has been the calculus that we have lived with for centuries, but it is also true that the pandemic has created widespread economic and social damage with a global reach that arguably has not been seen since the Second World War.

A legal response that is equally exceptional would not be surprising either, even if it too is unprecedented.

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