



ISSN : 1875-4120
Issue : Vol. 18, Issue 3
Published : April 2021

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2021
TDM Cover v9.0

Transnational Dispute Management

www.transnational-dispute-management.com

The Façade of COVID-19 Class Action Litigation Against China Under the Foreign Sovereign Immunities Act

by M. Diaz, Jr., M. Colomar-Garcia, B.C. Hadaway, G.E. Davidson, X.J. Zhao, J. Coronado, and Z. Pan

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

The Façade of COVID-19 Class Action Litigation Against China Under the Foreign Sovereign Immunities Act

Michael Diaz, Jr., Marta Colomar-Garcia, Brant C. Hadaway, Gary E. Davidson, Xingjian “Jeff” Zhao, Javier Coronado, Zhen Pan. Diaz, Reus & Targ, LLP¹

“I cannot tell, the world is grown so bad, that wrens make prey where eagles dare not perch.”

William Shakespeare, RICHARD III, act 1, sc. 3.

I. Introduction and Summary of Pending Class Action Cases

In recent weeks, at least seven class action lawsuits have been filed in federal district courts throughout the United States against the government of the People’s Republic of China (the “P.R.C.” or “China”), all relating to China’s alleged liability for damages and injuries sustained in the ongoing COVID-19 pandemic. Although plaintiffs in these lawsuits make broadly different claims, they all face the same highly formidable legal roadblock: a need to find exceptions that can pierce the presumptive immunity afforded to China and other sovereign nations under the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602, *et seq.*, which would otherwise preclude their claims at the outset for lack of jurisdiction.

The first action, *Logan Alters, et al. v. People’s Republic of China, et al.*, Case No. 1:20-cv-21108-UU (the “Florida action”), filed in the Southern District of Florida, asserts claims for negligence, negligent (and in the alternative, intentional) infliction of emotional distress, strict liability for ultra-hazardous activity, and public nuisance against the Chinese government, as well as the country’s National Health Commission, Ministry of Emergency Management, and Ministry of Civil Affairs. Two Chinese political subdivisions, the People’s Government of Hubei Province and that of the provincial capital Wuhan, where cases of the virus were first reported, are also named as defendants. The plaintiffs assert subject matter jurisdiction under the “tort” and “commercial activity” exceptions of the FSIA and identify the putative class as consisting of all persons and legal entities, in Florida and the U.S., who have allegedly suffered injury, damage and loss related to the COVID-19 outbreak. A similar action, *Bella Vista LLC, et al. v. People’s Republic of China, et al.*, Case No. 2:20-cv-00574, filed in the District of Nevada, largely mirrors the claims and class certification requests found in *Logan*, but is limited to damages allegedly sustained in Nevada.

Two other class action cases, *Buzz Photos, et al. v. People’s Republic of China, et al.*, Case No. 3:20-cv-00656-K, filed in the Northern District of Texas, and *Borque CPAs and Advisors, Inc., et al. v. People’s Republic of China, et al.*, Case No. 8:20-cv-00597, filed in the Central District of California, also include as defendants China’s military, the People’s Liberation Army, and the Wuhan Institute of Virology, a biological laboratory. Otherwise, despite striking a somewhat more forceful narrative than *Logan* and *Bella Vista*, the claims and class certification requests in these two latter actions largely reflect those found in the former. Notably, the

¹ Michael Diaz, Jr. is the firm’s Global Managing Partner. Marta Colomar-Garcia is the Administrative Managing Partner. Brant C. Hadaway and Gary E. Davidson are Partners, both based in Miami. Xingjian “Jeff” Zhao is a Partner based in Shanghai and heads the firm’s China practice. Javier Coronado is an associate attorney at the firm’s Bogotá, Colombia office. Zhen Pan is an associate attorney in Miami. The authors would like to thank Prince-Alex Iwu, a law clerk at the firm’s Miami office, for his contributions to this article.

plaintiffs in *Buzz Photos*, a case spearheaded by Freedom Watch, Inc.² (an advocacy group which, along with its founder, is also a plaintiff), further seek to pierce immunity based on an FSIA exception carved out by the Justice Against Sponsors of Terrorism Act (“JASTA”), claiming a whopping USD \$20 trillion in damages from China and its subordinate co-defendants (excluding attorneys’ fees and costs).

The three most recently filed cases all rest upon allegations largely mirroring their predecessors, with some unique twists. In another Southern District of Florida action, *Aharon, et al. v. People’s Republic of China, et al.*, Case No. 9:20-cv-80604, filed on behalf of a group of medical workers (two of whom have tested positive for COVID-19), allege that China has unlawfully stockpiled personal protective equipment, resulting in severe U.S. supply shortages and price inflation. Plaintiffs in another Central District of California case, *Cardiff Prestige Property Inc., et al. v. People’s Republic of China, et al.*, Case No. 8:20-cv-00683, claim, on behalf of an estimated 32 million American small businesses, that the Chinese government caused the pandemic and economic recession by engaging in misinformation, and intimidating those who tried to alert the public during COVID-19’s early stages. Echoing these allegations are plaintiffs in *Azelea Woods of Ouachita, et al. v. People’s Republic of China, et al.*, filed in the Western District of Louisiana on behalf of Louisiana businesses.

As detailed below, neither of the two exceptions to FSIA immunity being invoked by these class plaintiffs³ – the commercial activity exception and tort exception – would provide a sound basis for U.S. courts to exercise jurisdiction over China’s alleged mishandling of the coronavirus outbreak. All named defendants in the seven lawsuits almost certainly fall within the definition of a “foreign state” (or a political subdivision, agency, or instrumentality thereof) under the FSIA, and are thus presumptively entitled to sovereign immunity. The Chinese government’s handling of the outbreak hardly constitutes a “commercial activity” for purposes of piercing sovereign immunity under the statute.⁴ As to the tort exception, the FSIA specifically bars any claim based upon a sovereign’s alleged “failure to exercise or perform a discretionary function regardless of whether the discretion be abused.”⁵ Nor does it permit claims arising out of a foreign nation’s alleged misrepresentation or deceit.⁶

Moreover, each of the class actions at issue appears to rely on accusations of tortious acts or omissions occurring exclusively in China (or in any event, outside of the U.S.). As a result, the thematic allegation in these complaints, that China behaved irresponsibly by failing to take early, preemptive action to control the virus when it first emerged in the Wuhan area, would not likely satisfy the FSIA’s basic threshold requirements for asserting jurisdiction over a foreign sovereign. And, the terrorism exception under JASTA will likely not work, because there is no international consensus – scientific or otherwise – as to the true origin of the novel

² Most recently, Freedom Watch, Inc. also submitted a criminal complaint to the International Criminal Court in The Hague, Netherlands. Expanding the case to also include the Chinese President and members of China’s Politburo, the criminal complaint parrots nearly identical allegations as those found in *Buzz Photos*, and calls “for the opening of an inquiry by the Prosecutor at the International Criminal Court under Article 15 of the Rome Treaty” against the P.R.C. government and other named defendants over their alleged culpability in the COVID-19 outbreak.

³ Unless otherwise stated or where context clearly dictates to the contrary (such as when analyzing the Justice Against Sponsors of Terrorism Act), this article will base its analysis on the Florida action, *Logan Alters, et al. v. People’s Republic of China, et al.*, Case No. 1:20-cv-21108-UU, because of the overlapping allegations and causes of action being asserted in all four cases.

⁴ See 28 U.S.C. § 1605(a)(2).

⁵ See 28 U.S.C. § 1605(a)(5).

⁶ See *id.*

coronavirus, a key factual question that is likely to remain unresolved into the foreseeable future. Since the FSIA provides the exclusive basis for obtaining jurisdiction over a foreign state,⁷ other legal theories propounded, such as the Class Action Fairness Act of 2005 and 28 U.S.C. § 1332(d), are unlikely to vest U.S. courts with jurisdiction.

With respect to personal jurisdiction under the FSIA, the lion's share of lawsuits filed against the P.R.C. government and its subordinate bodies in U.S. courts will likely begin and end with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (the "Hague Convention" or "Hague Service Convention"). As further explained below, the plaintiffs in the COVID-19 class action lawsuits will find it challenging, if not practically impossible to serve the Chinese government and its various co-defendants, as required under the FSIA, either "in accordance with an applicable international convention on service of judicial documents[,]"⁸ or through the ministerial, consular, and diplomatic channels under the statute.⁹

As such, U.S. courts will not likely have the requisite jurisdiction under the FSIA to even certify a class, let alone grant or enforce a judgment against China, even if the Chinese government (or a subordinate defendant) is somehow deemed served in these lawsuits but fails to enter an appearance.¹⁰ However, given the current global political environment, China would be well advised not to take the risk of failing to appear. Although obtaining and executing upon a default would not be easy for the class plaintiffs, their chances are not zero. And, U.S. federal district courts retain wide discretion to grant extraordinary relief permitting service by alternative means, in instances where a recalcitrant defendant is evading service. Finally, there is pending new legislation in Congress, the *Justice for Victims of COVID-19 Act*, which, if enacted into law, will completely remove China's ability to assert sovereign immunity under the FSIA for private claims relating to the COVID-19 pandemic in the United States.

II. The Foreign Sovereign Immunities Act: A Brief Overview

Before Congress passed the Foreign Sovereign Immunities Act, U.S. courts generally deferred to decisions made by the political branches on whether to exercise jurisdiction over lawsuits filed against foreign sovereigns. The U.S. State Department, in response, adopted flexible standards for determining whether sovereign immunity should attach. Since such working theories within an executive branch agency were not enacted into law, their application proved to be highly problematic. Foreign nations often took advantage of the discretion afforded to the State Department by exerting various forms of diplomatic pressure in order to seek a determination that they were immune, which resulted in inconsistent decisions on the sovereign immunity issue. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). This inconsistency in application was one of the primary catalysts for Congress to enact the FSIA in 1976. The statute largely freed the executive branch from yielding to diplomatic pressures and established workable governing standards, with the force of federal law, for

⁷ *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

⁸ 28 U.S.C. §1608(a)(2).

⁹ *See* 28 U.S.C. §§ 1608(a)(3)-(4).

¹⁰ *See Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 287 (2d Cir. 2011) (quoting *Verlinden B.V.*, 461 U.S. at 493 n. 20); *see also Chen v. China Cent. Television*, 06CIV414PAC, 2007 WL 2298360, at *3 (S.D.N.Y. Aug. 9, 2007) ("The fact that CCTV has not appeared in this matter is therefore irrelevant; the Court must dismiss Plaintiffs' claims *sua sponte* unless they fall within one of the statutory exceptions to immunity set forth in 28 U.S.C. §§ 1605-1607."); *Kurd v. Republic of Turkey*, CV 18-1117 (CKK), 2020 WL 587982, at *10 (D.D.C. Feb. 6, 2020) ("But, even on a motion for default judgment, the court must still assure itself of its jurisdiction under the FSIA.").

determining both personal and subject matter jurisdiction over foreign governments. *See id.*; *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011).

The FSIA presumes a foreign state’s immunity from the jurisdiction of U.S. courts. *See id.* at 799; *see also Colvin v. Syrian Arab Republic*, 363 F. Supp. 3d 141, 152-53 (D.D.C. 2019). The term “foreign state,” as defined in the Act, not only refers to the foreign country itself, but also includes any political subdivisions, agents, or instrumentalities of that country.¹¹ Under the statute, courts have subject matter jurisdiction over a case against a foreign state only when the sovereign’s conduct falls within one of the statute’s enumerated exceptions. Otherwise, a court would not have jurisdiction over, and plaintiffs would not have a case against, the foreign state. *See Shoham v. Islamic Republic of Iran*, 12-CV-508 (RCL), 2017 WL 2399454, at *10 (D.D.C. Jun. 1, 2017).

The two main exceptions to FSIA immunity being invoked by the class plaintiffs in the actions – further analyzed below – are the commercial activity exception and the tort exception, generally the two most common exceptions sought by plaintiffs. Under the commercial activity exception, a foreign state is not entitled to sovereign immunity under the FSIA if its alleged misconduct relates to a commercial activity that caused a direct effect in the U.S., whether or not the conduct itself had taken place in U.S. territory.¹² The tort exception can trigger jurisdiction for certain torts causing personal injury, death, or property damage “occurring in the United States” that are committed by a foreign state, or (if acting within the scope of their employment) by any official or employee of that foreign state.¹³ Neither exception can be easily established.

The U.S. Supreme Court has made it clear that federal district courts must assure themselves of requisite jurisdiction under the FSIA “in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden*, 461 U.S. at 493-94. In other words, regardless of what FSIA exception has been invoked and whether or not the foreign sovereign has even appeared in the case, the court has an affirmative obligation to determine whether an exception to immunity applies.¹⁴

III. Ongoing U.S. Efforts to Pierce China’s Sovereign Immunity

In a very recent development, U.S. Senator Josh Hawley of Missouri has announced his intention to introduce the *Justice for Victims of COVID-19 Act*,¹⁵ a piece of legislation aimed squarely at removing China’s sovereign immunity in civil litigation relating to COVID-19. According to Senator Hawley, the proposed bill would “strip China of its sovereign immunity [under the FSIA] and create a private right of action against the [Communist Party of China] for reckless actions like silencing whistleblowers and withholding critical information about COVID-19.” *Id.* Although no official draft of the proposed bill has been released to date,

¹¹ 28 U.S.C. § 1603(a).

¹² *See* 28 U.S.C. § 1605(a)(2).

¹³ *See* 28 U.S.C. § 1605(a)(5).

¹⁴ *See Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1290 (11th Cir. 1999) (observing that “the district court correctly determined that it was required to address the issue of PNB’s immunity, despite the fact that Ecuador did not raise the issue”).

¹⁵ *See* Office of U.S. Senator Josh Hawley, “Senator Hawley Announces Bill to Hold Chinese Communist Party Responsible for COVID-19 Pandemic” (Apr. 14, 2020), available at <https://www.hawley.senate.gov/senator-hawley-announces-bill-hold-chinese-communist-party-responsible-covid-19-pandemic>.

Senator Hawley’s office has announced that the *Justice for Victims of COVID-19 Act* will “[m]ake the Chinese government liable for civil claims in U.S. courts by[:.]”

- Creating a private right of action against the Chinese government for any reckless action it took that caused the COVID-19 pandemic in the United States, such as its decisions to withhold information and to gag doctors;
- Stripping the Chinese government of sovereign immunity for these actions so that plaintiffs can sue; and
- Allowing courts to freeze Chinese government assets so victims can enforce their claims[.]

Id. In addition, the proposed bill will “[e]stablish the Justice for Victims of COVID-19 Task Force at the State Department” to, among other things, “[l]ead an international investigation to determine how Beijing’s decisions to distort and conceal information about the COVID-19 outbreak [] caused this global pandemic; and [l]ead an international effort to secure compensation from the Chinese government, including by preparing options to compel Beijing to provide restitution” *Id.*

Although the bill has just been announced, and has yet to make its way through the legislative process, it signals an intent by certain members of Congress (members who have not traditionally been closely aligned with the nation’s trial lawyers) to unleash a tidal wave of virus-related litigation against China.

Further, Senator Hawley’s home state of Missouri has recently filed a civil lawsuit against China, its political subdivisions, agents, and instrumentalities, with the notable inclusion of the Communist Party of China (“CCP”), on behalf of that state and its residents, tracking claims earlier asserted in the seven class actions cases. *See State of Missouri, ex rel. Eric S. Schmitt, in his official capacity as Missouri Attorney General v. the People’s Republic of China, et al.*, Case No. 1:20-cv-00099 (E.D. Mo. Apr. 21, 2020). U.S. courts have never opined on the question of whether the ruling CCP shares responsibility for Chinese government conduct, much less on whether the CCP can invoke sovereign immunity as a defense in civil actions. However, none of the allegations in Missouri’s complaint are specific to the CCP, making it unclear as to how Missouri is seeking to hold the Party responsible as an independent actor that is separate from the Chinese government.

IV. The State of Pandemic-Related Litigation Against Foreign Sovereigns

COVID-19 is not the first pandemic or virus to have triggered litigation against a foreign government in U.S. courts under the FSIA. For example, in *Opati v. Republic of Sudan*, the victims of the U.S. embassy bombings in Tanzania and Kenya sued the Republic of Sudan and the Islamic Republic of Iran alleging that these governments provided material support for the attacks; one of the plaintiffs was successful in proving that he was infected with HIV as a result of the cuts and scratches that he suffered at the site of the bombing. 60 F. Supp. 3d 68, 78-79 (D.D.C. 2014). There, the plaintiff successfully obtained an award of damages against Sudan and Iran, both of which were designated as state sponsors of terrorism at all times pertinent to the lawsuit, under the FSIA’s terrorism exception. *Id.* at 79; *see also Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 149 (D.D.C. 2011); 28 U.S.C. § 1605A(a)(1).

Similarly, in *Jerez v. Republic of Cuba*, the plaintiff sued the Republic of Cuba and the Cuban armed forces for allegedly “injecting him with the hepatitis C virus and subject[ing] him to

other conditions also causing hepatitis C,” and for “failing to warn him of the virus,” while he was being incarcerated in Cuba. 775 F.3d 419, 421-22 (D.C. Cir. 2014). Unlike in *Opati*, the plaintiff in *Jerez* did not succeed in obtaining any judgment or award against the sovereign defendant, because the court determined that the alleged torts committed involving the virus all occurred in Cuba, and furthermore, the FSIA’s terrorism exception could not be used against Cuba under the circumstances of that case. *See Jerez*, 775 F.3d at 424-25. “Cuba was not designated a state sponsor of terrorism until 1982, and the defendants subjected Jerez to torture in 1970 and 1971. Further, Cuba was designated a state sponsor not because of the torture inflicted on Jerez, but because of support for acts of international terrorism” *Id.* at 425 (internal quotation mark omitted).

Nonetheless, COVID-19 is the first virus to trigger class-action lawsuits of such magnitude against a foreign government. And there is no prior U.S.-based litigation against China with any meaningful factual overlap with the above cases, and no prior ruling by any U.S. court concerning a foreign government’s liability for harms associated with mishandling a virus (let alone one that led to a global pandemic).

V. Prior Litigation Against China in U.S. Courts

Since the FSIA was enacted in 1976, China and its subordinate entities have been named as defendants in U.S. federal courts scores of times under one or more of the FSIA’s exceptions to sovereign immunity. The Chinese government has not adopted a “one-size-fits all” approach to defending FSIA cases and in some of these matters, China has formally challenged the court’s jurisdiction at the inception.¹⁶ In fact, China has a successful track record of defending against sovereign litigation on grounds that its actions have not had enough of a U.S. nexus to trigger the commercial activity exception to the FSIA. *See Pons*, 666 F. Supp. 2d at 412-13; *Morris*, 478 F. Supp. 2d at 568-69.¹⁷ But there have also been instances where China did not appear to defend cases at all, only to formally appear – upon a default judgment having already been entered and with the fairly imminent threat of asset attachment – to retroactively challenge subject matter jurisdiction under the FSIA. *See, e.g., Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986) (affirming dismissal for lack of subject matter jurisdiction after China, which had been defaulted, made an appearance to vacate the district court’s judgment and dismiss the case under the FSIA); *Walters v. People’s Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) (granting, in an action to collect on a \$10 million default judgment entered against the P.R.C. government, certain state-owned banks’ motions to vacate restraining notices and quash subpoenas).

VI. The FSIA’s Commercial Activity Exception Will Not Likely Apply

The commercial activity exception applies only to cases where (i) the foreign state engaged in commercial activity; (ii) the plaintiff’s lawsuit is “based upon” the foreign state’s commercial activity (or upon “an act in connection with” the foreign state’s commercial activity); and (iii) the foreign state’s commercial activity that forms the basis for the plaintiff’s lawsuit has a

¹⁶ *See, e.g., Pons v. People’s Republic of China*, 666 F. Supp. 2d 406 (S.D.N.Y. 2009); *Morris v. People’s Republic of China*, 478 F. Supp. 2d 561, 570 (S.D.N.Y. 2007); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir.1998); *CYBERSitter, LLC v. People’s Republic of China*, 805 F. Supp. 2d 958 (C.D. Cal. 2011); *Gleissner v. Air China Airlines Ltd.*, 15 CIV. 9162 (ER), 2019 WL 1369456, at *2 (S.D.N.Y. Mar. 26, 2019).

¹⁷ The Republic of China (Taiwan) has also been successful in defending cases brought under the FSIA’s tort exception, by asserting that the alleged tort did not occur entirely within the United States. *See Lin v. United States*, 177 F. Supp. 3d 242, 259 (D.D.C. 2016), *aff’d*, 690 Fed. Appx. 7 (D.C. Cir. 2017).

sufficient nexus with the United States. *See* 28 U.S.C. § 1605(a)(2). The pending class action complaints against China based on the horrific effects of the COVID-19 outbreak in the U.S. do not appear to meet these requirements.

First, it is unlikely that a U.S. court will find that the plaintiffs' claims relate to a "regular course of commercial conduct," or a "particular commercial transaction or act" of China and/or its instrumentalities. *See* 28 U.S.C. § 1603(d). Under the FSIA, courts must determine whether a particular activity qualifies as "commercial" based on the *nature* of the activity rather than its purpose. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Critically, for the commercial activity exception to apply, courts must determine whether the conduct at issue is the *type* of conduct private parties engage in for "trade and traffic or commerce." *Id.* If the conduct or transaction in question is "peculiar to sovereigns" and of a type in which private citizens cannot engage, the commercial activity exception does not apply. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993).

The plaintiffs have the burden of substantiating their jurisdictional claims against China. *See Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 140 (D.D.C. 2008). However, most of the complaints that have been filed against China do not disclose the nature or form of commercial activity allegedly conducted by China's government or its instrumentalities in connection with the COVID-19 outbreak. A U.S. court is unlikely to see China's alleged failure to prevent and contain the outbreak in Wuhan as an act that can be performed by a private citizen; rather, the court will far more likely view it as an act associated with a power peculiar to sovereigns. *See Nelson*, 507 U.S. at 359-60. The same goes for China's alleged failure to report the outbreak to the world. *See id.* at 363 (concluding that allegations seeking to trigger the commercial activity exception that center on a sovereign state's alleged "fail[ure] to warn" was "merely a semantic ploy . . . a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn[.]").

While certain plaintiffs may have better odds in having alleged that China produced the COVID-19 in lab tests – an enterprise that private parties can conceivably engage in – China has reportedly denied these accusations.¹⁸ Moreover, private parties can operate laboratories and conduct lab tests, but that does not make laboratories or lab tests a commercial enterprise. Even if China produced COVID-19 in "furtherance of lab tests," China would not by that fact alone have engaged in commercial activity, considering that there are many non-commercial uses of laboratories and lab tests, such as for military purposes. In addition, "[t]he fact that the plaintiffs characterize the nature of these activities as tortious, further indicates that the commercial activities exception does not appropriately apply." *Jin*, 557 F. Supp. 2d at 141-42.

Second, even if a court finds that China has engaged in commercial activity, that does not necessarily bring the exceptions of 28 U.S.C. § 1605(a)(2) into play because such exceptions can apply only if the plaintiffs' claims are "based upon" those activities. *Id.* Specifically, China's alleged commercial activity, or act in connection with a commercial activity, if proved, must entitle Plaintiffs to relief under Plaintiffs' theory of the case. *See Nelson*, 507 U.S. at 357. China's commercial activity must do more than simply lead to the conduct that formed the

¹⁸ *See, e.g.*, "China denies lab link to coronavirus as questions over origin mount," WASHINGTON TIMES; <https://www.washingtontimes.com/news/2020/feb/5/china-denies-lab-link-to-coronavirus-as-questions-/> (Feb. 5, 2020); SOUTH CHINA MORNING POST, "Chinese research lab denies rumors of links to first coronavirus patient," <https://www.scmp.com/news/china/society/article/3050872/chinese-research-lab-denies-rumours-links-first-coronavirus> (Feb. 16, 2020).

basis of each suit. *See Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009), cert. denied, 561 U.S. 1024 (2010).

None of the substantive claims being raised by plaintiffs in the four class actions are commercial in nature (for example, there is no allegation against China of any breach of contract, fraud, or unjust enrichment). Accordingly, a U.S. court will only entertain Plaintiffs' claims (such as for negligence, intentional infliction of emotional distress, and creation of a public nuisance) against China and its subordinate entities under the FSIA's commercial activity exception if "on the core of the suit" they are due to China's commercial transactions or acts. *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1222 (11th Cir. 2018). Meeting this high standard will prove difficult. Plaintiffs allege an excessively large number of alternative theories as to China's involvement in the spread of COVID-19, but do so without reference to much of any factual predicate, making it almost impossible to identify the "core of the suit" (and exposing plaintiffs' allegations to the possibility of being stricken *sua sponte* by the court as unpermitted "shotgun pleadings"). Critically, "[i]f a transaction is partially commercial and partially sovereign in nature and the cause of action is based on sovereign activities involved in the transaction, the commercial activity exception to FSIA does not apply and the sovereign is immune from suit." *Jin*, 557 F. Supp. 2d at 139.

Lastly, the existence of the requisite U.S. nexus is also unclear in these already filed cases against China. China's actions outside the U.S. in connection with China's extraterritorial commercial activities that cause an effect in the U.S. can certainly confer jurisdiction on a U.S. court under the FSIA. *See* 28 U.S.C. § 1605(a)(2). However, the effect of China's actions must follow as an "immediate consequence" of China's commercial activity. *See Weltover*, 504 U.S. at 618 (emphasis added). "Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995). Accordingly, "the fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the [commercial activity] exception." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36-37 (2d Cir. 1993).

It will be far from easy for any of the plaintiffs in the COVID-19 class action lawsuits against China to show that the personal injuries they allegedly sustained stemmed directly from China's purported commercial activity, and not from an "intervening act, or an extended causal chain." *Morris*, 478 F. Supp. 2d at 568-69. Courts presiding over FSIA cases will apply "[t]he common sense interpretation of a 'direct effect'[,], one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978).

VII. The FSIA's Tort Exception Will Not Likely Apply

The tort exception allows a plaintiff to obtain money damages against a foreign state for personal injury or death, "occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment." *Amerada Hess*, 488 U.S. at 439 (quoting 28 U.S.C. § 1605(a)(5)). For the tort exception to apply, the "entire tort" complained of must occur in the United States. *Doe v. Federal Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017). This "entire tort" threshold might prove difficult to surmount, considering that the

tortious acts or omissions alleged in these class action complaints occurred mostly, if not entirely, within China.

Assuming a court took the view that the “entire tort” threshold had been met, plaintiffs may still be required to establish that the alleged acts or omissions comprising the torts are not a discretionary function of Chinese officials. The discretionary function exception acts as a backstop to the tort exception by allowing a foreign state to assert immunity when tort claims being asserted against it arise from the exercise (or failure to exercise) a discretionary function. *See* 28 U.S.C. § 1605(a)(5)(A). Like its analogue in the Federal Tort Claims Act (FTCA), under the FSIA’s discretionary function exception, a court will consider whether the alleged governmental actions in question involved policy considerations, with a stated deference to foreign sovereigns, in order to avoid “second-guessing” policy decisions through the medium of tort actions. *Cf. United States v. S.A. Empresa de Viacao Aerea*, 467 U.S. 797, 819 (1984); *O’Byryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009).

In fact, courts scrutinize claims made under the FSIA’s tort exception to an even greater degree than claims against the U.S. federal government under the FTCA, due to the often-intricate political dynamics involved and the diplomatic ramifications of any eventual decision or judgment against a foreign sovereign. *See Rodriguez v. Republic of Costa Rica*, 139 F. Supp. 2d 173 (D.P.R. 2001), *aff’d*, 297 F.3d 1 (1st Cir. 2002). Here, the issue of whether China would be able to frame the litany of acts or omissions being attributed to it as discretionary functions is highly fact dependent.

VIII. The FSIA’s Terrorism Exception Will Not Likely Apply

The FSIA provides another major exception to sovereign immunity, where the claims against the foreign sovereign arise from acts of terrorism. The terrorism exception is based on two separate statutory provisions. Under 28 U.S.C. § 1605A(a)(1), the terrorism exception would apply only if the foreign sovereign was designated as a state sponsor of terrorism at the time the cause of action arose. *See Republic of Iraq v. Beatty*, 556 U.S. 848, 863 (2009). Because China has not been designated a state sponsor of terrorism, claims against China cannot be asserted under this particular statute. Even if, hypothetically, China was designated as a state sponsor of terrorism sometime in the future, such an extraordinary development would be in the hands of the U.S. government’s political branches and will likely be of limited utility to the current plaintiffs. *See Jerez*, 775 F.3d at 424-25 (rejecting retroactive application of the terrorism exception against Cuba).

Accordingly, plaintiffs in the class action lawsuits against China must look at the second exception to the FSIA, the Justice Against Sponsors of Terrorism Act (“JASTA”) codified under 28 U.S.C. § 1605B. JASTA came into force in September 2016. It provides that any U.S. citizen or national may bring a claim against a foreign state for money damages, for physical injury to a person or property, or for death, occurring in the United States and caused by *either* an act of international terrorism in the United States, *or* by the tortious acts of a foreign state or its agents wherever they occur. Critically, JASTA’s application does not depend on a foreign state’s designation as a state sponsor of terrorism. *Contra* 28 U.S.C. § 1605A(a)(1). *See In re Terrorist Attacks on September 11, 2001*, 298 F. Supp. 3d 631, 639 (S.D.N.Y. 2018). JASTA’s definition of international terrorism covers, among other things, “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State[.]” 18 U.S.C. § 2331(1); *see also* 18 U.S.C. § 2333(a); *Lelchook v. Islamic Republic of Iran*, 393

F. Supp. 3d 261, 265 (E.D.N.Y. 2019). The underlying conduct does not need to have taken place within the United States. *See* 18 U.S.C. § 2331(1)(C).

Unsurprisingly, the plaintiffs in *Buzz Photos* allege that China violated JASTA. However, for JASTA’s international terrorism exception to apply, China’s conduct must constitute a violation of the “criminal laws of the United States or any state.” 18 U.S.C. § 2331(1). In seeking to meet this requirement, the class action complaint in *Buzz Photos* alleges that China violated the “Anti-Terrorism Act” (“ATA”). The ATA imposes criminal penalties against (1) those who kill a U.S. national where such killing constitutes homicide (*i.e.*, murder, and voluntary or involuntary manslaughter), while such national is outside of the U.S., (2) and whoever outside the U.S., who attempts to kill or engages in a conspiracy to kill, a U.S. national where such killing constitutes murder. *See* 18 U.S.C. §§ 2332(a), (b). But plaintiffs will also need to prove that (i) China created COVID-19; and (ii) China did so with the intent of intimidating or coercing a civilian population, influencing the policy of a government by intimidation or coercion, or affecting the conduct of a government by mass destruction, assassination, or kidnapping. 18 U.S.C. § 2331(B)(i)-(iii). It seems improbable that plaintiffs currently have sufficient evidence to support this particular legal claim.

IX. The Challenges of Completing Service of Process in Lawsuits Against China

Pursuant to the FSIA, a foreign state is immune from the jurisdiction of any court in the U.S. unless one of several enumerated exceptions to immunity applies. *See* 28 U.S.C. §§ 1604, 1605-1607. If an action falls within one of these exceptions, the FSIA provides subject matter jurisdiction in federal district courts. *See id.* at § 1330(a). The statute also provides for personal jurisdiction “where service has been made under section 1608.” *Id.* at §1330(b).

Specifically, section 1608(a) of the FSIA governs service of process on “a foreign state or political subdivision of a foreign state.” *Id.* at § 1608(a); FED. R. CIV. P. 4(j)(1). In particular, the statute sets out in hierarchical order the following four methods by which “[s]ervice . . . shall be made.” 28 U. S. C. § 1608(a) (emphasis added). The first is by delivery of a copy of the summons and complaint “in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision.” *Id.* § 1608(a)(1). This is inapplicable to the class plaintiffs’ pending litigation against the P.R.C., because “no [such] special arrangement exists.” *Id.* For almost all cases filed against the P.R.C., therefore, service must be made pursuant to the second method – the delivery of a copy of the summons and complaint “in accordance with an applicable international convention on service of judicial documents.” *Id.* at §1608(a)(2).

Both the U.S. and China are signatories to the Hague Service Convention, which has the force of federal law in all U.S. proceedings. *See Water Splash Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017) (“The Hague Service Convention specifies certain approved methods of service and ‘pre-empts inconsistent methods of service’ wherever it applies.”); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (“compliance with the Convention is mandatory in all cases to which it applies.”). The Hague Convention applies where, as here, both the origination and destination states of the documents at issue are contracting states to the Convention. Service is permitted under The Hague Convention only by the following means: via a central authority (Articles 2-7), on diplomatic and consular agents (Articles 8-9), by mail or through a judicial official of the State of destination if the destination State does not object (Article 10), through methods allowed by other applicable international agreement

(Article 11), and other means as allowed by the internal laws of the destination state (Article 19). *See Water Splash Inc.*, 137 S. Ct. at 1508 (reviewing permitted service methods).

“The legal sufficiency of a formal delivery of documents must be measured against some standard. The Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state.” *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 700. Articles 11 and 19 are inapplicable here because the U.S. and China have entered into no other service treaty, and China’s internal laws do not provide any other means for foreign litigants to serve the country’s central government or political subdivisions. Article 19 also provides no recourse to the class plaintiffs because China’s internal laws generally prohibit serving international process through any channel other than the official organs of the P.R.C. Ministry of Justice, even upon non-sovereign, private party defendants. *See Arts. 87 & 92, Civil Procedural Law of the People’s Republic of China (2017 Am.)*.¹⁹

China formally objects to all methods of service otherwise permitted under Article 10, precluding U.S. plaintiffs from serving those within P.R.C. territory via either ordinary or electronic postal channels.²⁰ Article 10 gives rise to a procedural “loophole” that has enabled U.S.-based plaintiffs to effectuate service by e-mail upon defendants domiciled in the Convention’s signatory countries with relative ease. In fact, until 2019, plaintiffs in U.S. federal court litigation, particularly in so-called “trademark protection” cases brought under the Lanham Act, have regularly flouted China’s reservation under Article 10. Plaintiffs routinely “delivered” summonses and other materials to defendants clearly located in China via e-mail with the click of a mouse, resulting in default judgments being entered against tens of thousands of China-based parties. *See Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Schedule “A” (“Luxottica”)*, 391 F. Supp. 3d 816, 820 (N.D. Ill. 2019) (detailing the volume of such default judgements entered in the Chicago-centered federal district prior to the tide-shifting opinion being rendered).

In the *Luxottica* case, the Northern District of Illinois sided with the defense in concluding that “[the] court is persuaded by the cases [cited by defense counsel] treating [China’s] [Article] 10(a) objections as precluding service by e-mail. Because e-mail would bypass the methods of service that the Hague Convention authorizes, the Convention preempts it as inconsistent[.] China’s Article 10 objection embraces all forms of service the Article allows.” *Id.* at 827 (emphasis added).²¹ Since China categorically opposes all methods of service contemplated under Article 10 of The Hague Convention, and Article 10’s operation is contingent upon the forum state’s non-objection, the Court, referring to key cases cited by defendants’ counsel,²²

¹⁹ 《中华人民共和国民事诉讼法》（1991年4月9日第七届全国人民代表大会第四次会议通过）（根据2017年6月27日第十二届全国人民代表大会常务委员会第二十八次会议《关于修改〈中华人民共和国民事诉讼法〉和〈中华人民共和国行政诉讼法〉的决定》第三次修正）。National People’s Congress of the People’s Republic of China, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm.

²⁰ *See* The Hague Conference on Private International Law, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn> (publishing China’s formal opposition to “the service of documents in the territory of the People’s Republic of China by the methods provided by Article 10 of the Convention.”).

²¹ Diaz, Reus & Targ, LLP’s intellectual property disputes team from Miami and Shanghai successfully litigated the *Luxottica* case on behalf of several China-based business defendants.

²² *See, e.g., Mapping Your Future, Inc. v. Mapping Your Future Services, Ltd.*, 226 F.R.D. 305, 308 (D.S.D. 2009) (“[T]he court finds that sending a copy of a summons and complaint by [electronic] mail to a defendant in a foreign country is not a method of service of process permitted by the Hague Convention.”); *DeJames v.*

held that “China’s objections are substantially in the form of objections which courts have determined prevent service by e-mail. These include objections communicated by Switzerland, Germany, and Mexico. *China’s objections likewise preclude e-mail service.*” *Id.* (emphasis added). In the wake of the court’s opinion in *Luxottica*, the defendants in that case eventually obtained a full dismissal of all claims, with prejudice.²³

This watershed decision strengthening The Hague Convention’s service requirements upon Chinese defendants has already influenced the landscape of transnational procedural law throughout the U.S., with other federal district courts reaching the same conclusions after approvingly citing to and adopting principles that *Luxottica* first articulated. *See, e.g., Anova Applied Elecs., Inc. v. Hong King Group, Ltd.*, No. CV-17-12291-FDS, 2020 WL 419518, at *1 (D. Mass. Jan. 24, 2020) (holding that “e-mail service on defendants [based in China] is prohibited by the Hague Convention.”). For all intents and purposes, FSIA plaintiffs purporting to sue the P.R.C. government and/or its political subdivisions are now required, in the post-*Luxottica* world, to travel under The Hague Convention’s provisions relating to service via a central authority (Articles 2-7), and service via diplomatic and consular agents (Articles 8-9). *Water Splash Inc.*, 137 S. Ct. at 1508.

Under the FSIA, if service upon the sovereign defendant is not possible under either a special arrangement or an applicable international convention (primarily the Hague Convention), a third method may be utilized by “sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). Further, if service cannot be made within 30 days under § 1608(a)(3), the plaintiff’s last resort is to send the service packet “by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia,” for transmittal after payment of a fee “through diplomatic channels to the foreign state.” *Id.* at § 1608(a)(4).

These methods of service, as well as the remaining avenues for service under the Hague Convention (through a central authority or through diplomatic and consular agents), all necessarily hinge upon the sovereign defendant, in this case China, *consenting to be served through its own ministerial organs* (*i.e.*, the P.R.C. Ministry of Justice, the designated central authority for service under Articles 2-7 of the Hague Convention, or the P.R.C. Ministry of Foreign Affairs, for service via diplomatic or consular channels). Service of process by plaintiffs under the FSIA necessarily hinges, therefore, on whether China decides to accept it.

X. Despite Obstacles, China Should Not Risk a Default

China should not elect to run the significant risk of a federal district court “bucking the trend” post-*Luxottica* (particularly district courts outside of the First and Seventh Circuits). “28

Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir. 1981) (validating China’s objections), *cert. den.*, 454 U.S. 1085; *Rockefeller Tech. Inv. (Asia) VII v. Changzhou Sinotype Tech. Co., Ltd.*, 233 Cal. Rptr. 3d 814, 826 (Ct. App. 2018).

²³ A full copy of the published opinion in *Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Schedule “A”*, 391 F. Supp. 3d 816 (N.D. Ill. 2019), together with the dismissal documents, may be accessed here: <https://diazreus.com/wp-content/uploads/2020/03/Luxottica-Group-SpA-v-Partnerships-Westlaw-with-Attachments.pdf>. The matter was heard before the Honorable Joan B. Gottschall, United States District Court for the Northern District of Illinois, Case No. 1:18-cv-02188.

U.S.C.A. § 1608(e) does not relieve the sovereign from the duty to defend cases and to obey court orders.” *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994). Federal district courts retain wide discretion to grant relief in instances where a recalcitrant defendant is allegedly evading service, including but not limited to granting a motion under FED. R. CIV. P. 4, which would enable the class plaintiffs to pursue service by alternative means, such as by e-mail or even by publication (and thereby “buckling the trend” post-*Luxottica*). After all, the FSIA provides that once deemed served, a foreign state or political subdivision has 60 days to file a responsive pleading. *See* 28 U.S.C. § 1608(d). If the sovereign defendant fails to do so, it will run the risk of incurring a default judgment, as discussed above. *Id.* at § 1608(e). Although executing on such a default would not be easy for the class plaintiffs, it is nonetheless possible.

Even though the P.R.C. government itself may not fear the plaintiffs’ collection upon any eventual default judgment in the U.S., plaintiffs may have recourse to collect against Chinese state-owned companies doing business in the U.S., or even against private companies in which there is a state-owned component. For example, the U.S.-based assets of a state-owned company can be subject to enforcement upon a sovereign’s default, if such entity is determined to be the government’s alter ego. *See First Nat. City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611 (1983). Generally, a foreign state-owned company – including national banks, petroleum conglomerates, among others – can be treated as the alter ego of the sovereign when the company “is so extensively controlled by its owner that a relationship of principal and agent is created.” *Id.* at 629. Although endeavoring to collect upon a sovereign’s default is difficult, it is possible under current law. *See Walters v. Industrial and Commercial Bank of China Ltd.*, 651 F.3d 280, 298 (2d Cir. 2011) (quoting *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 477 (2d Cir. 2007)); *Jerez v. Republic of Cuba*, 775 F.3d 419, 421-22 (D.C. Cir. 2014); *Transamerica Leasing Inc. v. La Republica de Venezuela*, 200 F.3d 843, 849-50 (D.C. Cir. 2000).

Therefore, as discussed in depth above, China should confront these cases, and (assuming no intervening changes in U.S. federal law) it will likely enjoy sovereign immunity in each of them after accepting service and making formal appearances. The class plaintiffs, on their part, will face a herculean task – not to mention discovery and other evidentiary barriers – when they seek to establish the necessary facts to support each discrete element for piercing immunity under the FSIA’s narrow enumerated exceptions. Finally, China cannot disregard the possibility that its liability exposure may exponentially increase in light of recently announced, targeted legislation now pending in Congress. If enacted into law, the *Justice for Victims of COVID-19 Act* would – among other things – create a private right of action against the Chinese government for civil claims relating to COVID-19, and would be very likely to prevent China from asserting sovereign immunity under the FSIA with respect to those claims.²⁴

²⁴ *See supra* at sec. III & fn. 15.