

CHINA'S INTERNATIONAL LAW RESPONSE TO THE SPREAD OF THE NEW CORONAVIRUS

Written by Zhihong Dai

2nd Year LLM Student, Guangdong University of Foreign Study

ABSTRACT

The new coronavirus epidemic is still raging around the world today, and as of today, the United States has the largest number of confirmed cases. And China's outbreak has been under strong and strict control, making it gradually achieved zero confirmed cases. In an effort to distract American citizens' attention from Trump's administration's failure of handling this pandemic without taking effective measures in the early stages of the outbreak, they made a series of harsh accusations against China and even threatened to stop funding the World Health Organization. Many western countries also accused China of violating its obligations of international law and requested compensation from China. This paper tries to analyze U.S.'s allegations against China from a legal point of view.

Keywords: Coronavirus Outbreak, State Sovereign, Immunity Right, Commercial Acts

BACKGROUND

On March 12, 2020, a U.S. law firm called The Berman Law Group, on behalf of several Florida residents and merchants, filed a lawsuit against the People's Republic of China, the National Health and Health Commission of the People's Republic of China, the Ministry of Emergency Management of the People's Republic of China, the Ministry of Civil Affairs of the People's Republic of China, the Hubei Provincial Government of the People's Republic of China and the Wuhan Municipal Government of the People's Republic of China. China's response to the coronavirus outbreak was negligent, resulting in personal injury, mental and property damage suffered by the U.S. plaintiffsⁱ, and thus, requesting damages from China in the indictment.

It was followed by several western countries who jumped out to question China's data on the outbreak and accuse it of hiding cases in the early stages of the outbreak, leading to an outbreak in their countries. According toⁱⁱan internationally renowned news media report, a member of a British Conservative think-tank said in a report that China was in violation of international law which fail to disclose public health information in a timely manner, resulting in the loss of more than 320 million pounds to the United Kingdom. Germany's largest newspaper, Blid, also claimed that China needed to pay Germany 149 billion euros. Australia and India had also filed similar claims against China.

ANALYSIS

Let's first look at the case against China in Florida, the last case in the U.S. against the Chinese government is the Prince v. Gov.s Republic of China, 2019 U.S. Dist. As the U.S. courts have no jurisdiction over the Chinese government (i.e. sovereign immunity) it was dismissed.

Definition of State Sovereign Immunity Right

The state sovereign immunity right, also known as the immunity of State jurisdiction, i.e. the State and its property may not be subject to the jurisdiction of another State, including before and after the action of a court of another State and the enforcement measures before and after the judgement against the property of that State. It was originally a principle of customary international law, but later the written law of various countries and international conventions gradually formed, this concept has been clearly interpreted and stipulated. With regard to the immunity of States of state, the "absolute immunity doctrine" implies that the conduct and property of a State, irrespective of its nature or purpose, are not subject to the jurisdiction of that State unless that State voluntarily waives immunity.

State immunity under U.S. law

The Foreign Sovereign Immunity Act (the Foreign Sovereign Immunity Act 1976)ⁱⁱⁱ was passed by the United States Congress in 1976 (hereinafter referred to as the "Act"). Under the Act, foreign countries may enjoy sovereign immunity in the United States, unless the exceptions of the Act are met, and the doctrine of restrictive immunity applied by the United States has since been established. The Act provides that the United States courts are the subjects of the jurisdiction to adjudicate the sovereign immunity of foreign countries in the United States, and the laws that courts need to follow in dealing with and adjudicating sovereign immunity matters.

The Foreign Sovereign Immunity Act sets out the question of whether a sovereign state can be sued in a federal or state court in the United States, and how to serve the instruments and enforce the judgment. Although the United States also has the Alien tort Law, but once the subject involved is a sovereign state, the exemption law is the subject can be prosecuted in the United States jurisdiction. If the conditions set out in this act are not met, the United States courts will not accept a request for jurisdiction in such cases.

First in the Case of *The Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812), the U.S. Supreme Court did not support citizens or private groups suing foreign governments. Even if there is a business practice between the parties, i.e. a Government doing business with an individual from

another country, that individual cannot sue a Government in the United States. Later, the related theory developed continuously, the theory of restrictive immunity appeared, and finally gradually formed a conditional system of sovereign immunity jurisdiction.

In the Immunity Act, a number of situations are listed where foreign governments can be prosecuted in the United States, and the "epidemic-related class action" applies two points in the Act: 1. Government-involved business practices; These cases are summarized in U.S. common law cases as commercial and non-commercial, and similar acts can be prosecuted prior to the enactment of the Waiver Act.

In this lawsuit arising from the new crown virus lawsuit, the United States side invoked only the "commercial activities" and "infringement" of the "commercial activities" and "infringement" of the "commercial activities" and "infringement" of the Act, claiming that the Chinese Government in this case should not enjoy sovereign immunity and should be subject to United States jurisdiction. However, if we study the relevant provisions of the Act, we will find that the American law firm's claims do not stand up to scrutiny.

What is a commercial act?

The definition of a business conduct is article 1603 (d). A common business act or a specific business transaction or conduct. The commercial nature of an activity should be determined by the course of its conduct or the nature of a particular transaction and conduct, not by its purpose. It is difficult to see the meaning from the law, since the United States is a case law country, the specific interpretation of the definition needs to be found in the jurisprudence.

According to the relevant U.S. court precedents, *South Carolina v. United States*, 199 U.S. 437, 461-463, 50 L. Ed. 261, 26 S. Ct. 110 (1905), *New York v. United States*, 326 U.S. 522, 579, 90 L. Ed. 326, 66 S. Ct. 3109 The overturned view is that when a foreign government participates in a transaction not as a market manipulator but as an equal private entity, that is, the government exercises business conduct, even if the motive behind the business is in the national interest, but as long as the business is similar to private transactions, it is included in the scope of the prosecution. For example, the Chinese government controls foreign exchange transactions belonging to the economic regulation of sovereign countries, is not a civil subject

trading behavior, therefore, cannot be prosecuted for such acts. But if the Chinese government contracts the U.S. to buy civilian aircraft, the act could fall within the jurisdiction of the Act. From this point of view, the Chinese government's control of the virus is unlikely to be done by private individuals, and this is not a private transaction.

How to judge the direct impact of business conduct:

The second element of the composition is that this business act should constitute a direct impact. With regard to "direct impact", there is currently no clear definition, and it can be seen from the jurisprudence that the United States judge has adopted a conservative approach to "direct impact" and does not expand the interpretation to avoid the United States becoming a refuge in the world of disputes. It should be noted that the United States is a case law country and that jurisprudence has a reference effect before it is overturned. Through the collection, the author found a case about the direct impact, the general content is: if the final act of accepting money in a contract dispute will occur in the United States, then this business behavior has a direct impact on the United States.

Reasons for the Court to dismiss the prosecution

One is that the Chinese government's response to the outbreak is not a business activity. Section 1605(a)(2) of the Act provides that sovereign immunity shall not be applied to proceedings arising in connection with commercial activities conducted by a foreign country in the United States, or for conduct in connection with commercial activities in the United States, or for conduct in a foreign country that, although occurring outside the United States, has a direct impact on the United States. "Commercial activity" means^{iv} a common business act or a particular business transaction or action, whether the act is a business activity should take into account the nature of the conduct itself. After the outbreak of the new coronavirus broke out in China, the Chinese government's response was neither any business practice, nor a business transaction with any party, but a necessary act of response to a public health emergency and measures to protect the lives and health of citizens and safeguard the public interest and social order. It is therefore more difficult to conclude that the Chinese Government's conduct can fall into the exception of section 1605 (a)(2) of the Act and thus cannot invoke immunity and accept United States jurisdiction.

Second, because the Chinese government's anti-epidemic operations are not carried out in the United States. Section 1605(a)(5) of the Act provides that a claim for compensation for an infringement of non-commercial personal injury or property in the United States by a foreign state shall not be subject to sovereign immunity. Combined^v with jurisprudence, torts that may be applied outside of these regulations also make it clearer that the act itself and its outcome must occur in the United States. If the conduct takes place outside the United States, i.e. if the Chinese government's conduct, as in this case, takes place in China, then the United States courts will not be able to invoke section 1605(a)(5) of the Act to bring jurisdiction over the subject state of the act.

The class action is likely to turn into a "farce" in legal terms, as it is harder for U.S. courts to include the Chinese government's jurisdiction over the case for defendants from the perspective of national sovereign ion immunity. However, it is likely that the legal relationship of the case itself is not the focus, and that "public opinion positions" may be the most important purpose for U.S. law firms to prosecute the case, especially as the new coronavirus outbreak in the United States becomes more serious.

RESPONSE TO WESTERN COUNTRIES' OBLIGATIONS UNDER INTERNATIONAL LAW AND CLAIMS AGAINST CHINA

Other countries may argue that China has violated Articles 5, 6 and 7 of the International Health Regulations in its handling of the new crown outbreak. In this outbreak, some agencies claim that as early as November 17, 2019, Wuhan, the first confirmed case, by January 1, 2020, the number of confirmed cases has reached 266. On December 27th, Dr. Zhang Jixian reported it to the relevant authorities, indicating the existence of a new virus. Later, Dr. Li Wenliang also informed his peers to alert everyone to the possibility of a new virus. The Chinese government informed the WHO on December 31st, after which Xinhua said the virus would not spread from person to person. But on the surface, there had been cases of human-to-human transmission: a patient who had died on January 9th had passed the virus to his wife; On January 14th WHO officials declared the virus "very limited" because the Chinese had been concealing the fact that the human-to-human transmission had been made. Four days later,

Wuhan city held a "million people banquet." In addition, after China announced on January 23rd that Wuhan had closed the city, 5 million Wuhan residents had left the city overnight to "escape" to various places. Therefore, other countries may, on the basis of the IHR claim: (1) China's violation of its monitoring obligations. Article 5 of the IHR states: "Each State Party shall, in accordance with the specific provisions of Annex 1 to this Regulation, develop, strengthen and sustain capacity-building for the discovery, assessment, notification and reporting of incidents as soon as possible, but not later than five years after the entry into force of this Regulation." "Annex 1A 1.4(2) requires States parties to provide priority information such as: "clinical description, laboratory results, sources and types of risks, human cases and deaths, conditions affecting the spread of the disease and health measures taken". In this outbreak, the Chinese side has not been able to find, assess and inform the above-mentioned key information in a timely manner. (2) The Chinese side has violated its notification obligations. Article 6, paragraph 1, of IHR states: "Each State Party shall, in the most effective form of communication available, notify WHO of all public health emergencies that have occurred in its territory and which, in accordance with the decision-making documents, may constitute an emergency of international concern, and any health measures taken to respond to such events, through the National Counterparty of the International Health Regulations, within 24 hours of assessing public health information." Paragraph 2 requires States Parties to continue to report to WHO in a timely manner, after notification, the exact and full detail of public health information it has received about the reported incidents, including, where possible, the definition of cases, laboratory test results, sources and types of risks, the number and number of cases and deaths, the circumstances affecting the spread of the disease and the health measures taken. "If china can inform the WHO of the outbreak as soon as possible and its human-to-human risk, countries around the world can take more effective measures to prevent the spread of the virus in a timely manner." It is because of the Chinese side's concealment, resulting in the outbreak in the world out of control, and caused a lot of damage. (3) The Chinese side violates its obligation to share information. Article 7 of the IHR states: "States Parties shall provide WHO with all relevant public health information if there is evidence of an unexpected or unusual public health emergency in its territory that may constitute a public health emergency of international concern, regardless of its origin or origin."

For this, China can:

First, the jurisdictional defense. Although Article 56 of the IHR provides a dispute resolution mechanism, the application of the mechanism requires the consent of the Chinese side. China only needs to refuse to accept the jurisdiction of the IHR dispute resolution mechanism.

Second, the source of information is illegal and untrue. References to the above-mentioned claims show that the source of most of the information is very suspicious, not only unofficial reports, unconfirmed, but also some of the information from media and websites with a certain political orientation. In addition, recently, the Beijing News, by combing the timeline, made a strong response to the "underreporting challenge": on December 30, Wuhan Municipal Health and Planning Commission issued an emergency notice on strengthening unexplained pneumonia; The director of the China Center for Disease Control and Prevention and the director of the U.S. Centers for Disease Control and Prevention made a video phone call to inform China of unexplained pneumonia and communicate how to prevent and control the virus, and on January 9, China isolated the virus, confirmed that the new coronavirus is the main pathogen, the same day to the World Health Organization, and to the relevant countries of the international community to share. As Professor Wu Zunyou, chief epidemiologist at the China Center for Disease Control and Prevention, summed it up: China first informed the WORLD Health Organization of the outbreak, shared the coronavirus gene sequence with the rest of the world, and strengthened international cooperation for the first time.

REFERENCES

ⁱ <https://www.bermanlawgroup.com/practice-area/class-action/coronavirus-class-action>

ⁱⁱ <https://www.cnbc.com/2020/04/24/lawsuits-outrage-over-chinas-handling-of-the-coronavirus-pandemic.html>

ⁱⁱⁱ <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg2891.pdf>

<https://www.law.cornell.edu/uscode/text/28/part-IV/chapter-97>

^{iv} 28 U.S. Code § 1603. Definitions (d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

^v Gregory Allen PERSINGER, et al., Appellants v. ISLAMIC REPUBLIC OF IRAN, et al. 234 U.S. App. D.C. 349, 729 F.2d 835 (D.C. CIR.1984)