

THE BROOKINGS INSTITUTION  
DOLLAR & SENSE PODCAST  
Don't count on suing China for coronavirus compensation  
Monday, May 18, 2020

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**DOLLAR:** I'm David Dollar, host of the Brookings trade podcast. [Dollar & Sense](#). Today we're going to talk about the attempt to get China to pay compensation for the spread of the coronavirus, particularly through the use of U.S. courts. My guest is Robert Williams, executive director of the Paul Tsai China Center at Yale Law School and a nonresident senior fellow in our China Center here at Brookings. So welcome to the show, Robert.

**WILLIAMS:** Good to be with you, David. Thanks for having me.

**DOLLAR:** So there's a lot of talk from the administration and Congress about making China pay for the human and economic costs of the coronavirus. As I see it, the most popular idea is to let Americans sue China for compensation. President Trump has mentioned the figure of 10 million dollars per death, and since we're heading toward 100,000 deaths that's one trillion dollars in damages. So that's pretty serious money. So let's start with the basics. What are the obstacles right now to victims suing China in U.S. courts?

**WILLIAMS:** The main obstacle is a legal principle called sovereign immunity which basically says a national government or its agencies and instrumentalities cannot be sued in the courts of another nation. It's a pretty fundamental principle of international law and U.S. law based on the idea that equal sovereigns shouldn't use their courts to sit in judgment of each other.

In 1976, Congress passed a statute called the Foreign Sovereign Immunities Act, which says you can only sue a foreign government in American courts under exceptional circumstances. These include rare situations where the claim is based on commercial activity carried out by a foreign government that has a direct effect in the United States, or where there's a noncommercial tort that takes place in the U.S.

Now, based on the way courts have interpreted these exceptions, neither one of them really seems to apply here. The commercial activity exception is a narrow one. It's designed to cover situations such as state-owned enterprise that engages in market activity the way a private actor would in which case it can be held responsible for things like breach of contract. The complaint here is that China suppressed information, silenced whistleblowers, failed to notify international organizations in a timely manner, and failed to protect public health in other ways. So the thrust of the activity is basically governmental or regulatory acts and omissions, not commercial activity.

As for the noncommercial tort exception, that's really limited to the situation where both the conduct and the injury take place in the territory of the United States. An example would be a foreign official involved in a traffic accident in Manhattan. So that exception doesn't apply either, but all of this certainly hasn't stopped lawsuits from being filed in multiple states.

It's interesting, David, one of the other arguments some of the plaintiffs in these cases are making is that the Chinese Communist Party, as a defendant, in contrast to the Chinese government, is not a foreign state or instrumentality of a foreign state. But that, too, is an unpersuasive theory, particularly when it comes to China where we often speak of the Party-state because the Communist Party is the pervasive and ultimate source of state power. So all of these are just the obstacles to getting these cases heard by establishing a court's jurisdiction to say nothing of proving China's liability or extracting compensation.

**DOLLAR:** So could Congress pass a law that would change this? Without being a lawyer, my understanding is Congress did pass a law to allow victims of 9/11 to sue the Saudi Arabian government. Is that possibly a model for what might happen? Is that clear – the constitutionality of that?

**WILLIAMS:** There are a handful of bills being floated on Capitol Hill that very much follow the model of the legislation you just mentioned – the Justice Against Sponsors of Terrorism Act. Senator Hawley from Missouri has a bill that would lift immunity for any reckless act or omission that caused or substantially aggravated the pandemic in the U.S. Senator Cotton from Arkansas proposed a bill that would similarly strip immunity for any acts to deliberately conceal or distort the existence or nature of the virus.

If one of these bills were enacted, it's unlikely that courts would strike them down on constitutional grounds. You can imagine arguments being raised that such a law would violate separation of powers. For example, on the theory that it infringes the judiciary's Article 3 power by attempting to direct an outcome in a specific case. Courts have pretty roundly rejected these arguments, and the Supreme Court even said in a 2016 case that Congress has the prerogative to alter a foreign state's immunity and to render that alteration dispositive of judicial proceedings in progress. So, in short, I don't think the constitutional challenge would succeed because there's nothing in the Constitution that requires courts to recognize foreign sovereign immunity. And the political branches can strip it if they want, but that, of course, says nothing about whether lifting immunity is a good idea.

**DOLLAR:** Right. So let's turn to that issue. So even if it's potentially legal, is it a good idea to pursue China through our legal system? What would have to be established to create a credible case? And how do you think China is likely to respond? I know you have had a long experience in China and you know the Chinese legal system. How might the Chinese respond if the U.S. goes down this road?

**WILLIAMS:** Under existing law, as I mentioned, for these cases to proceed it would require that court embrace some novel interpretations of the commercial activity or noncommercial tort exceptions to the Foreign Sovereign Immunity Act. Just briefly, on the commercial activity theory, a plaintiff would have to show the Chinese government was acting not as a regulator but as a market player, and that it basically defrauded a U.S. counterpart. But it's one thing to say there are false or misleading statements by Chinese officials. That happens all the time in diplomacy. It's a far cry from the legal standard of fraudulent misrepresentation in a business deal. And I should add that misrepresentation and deceit are specifically excluded from the territorial tort exception to foreign sovereign immunity. So everything we're talking about here is either regulatory activity or diplomatic activity or failure thereof. Federal courts tend to be skeptical of artful attempts to plead into these exceptions, which is basically what we're seeing in the lawsuits filed today.

Now if a new law is passed it would depend on how it's framed. So one of the bills, for example, lifts immunity of any foreign state deemed to have intentionally or unintentionally discharged a biological agent. So there, it would depend on how the court interprets the concept of discharging a biological agent. Similar challenges arise if the relevant legal standard is deliberate concealment or reckless act or omission. On any standard you're going to have to present evidence of the wrongful act, which presents its own set of challenges, and you're going to have to prove proximate causation, which can be difficult when you have intervening factors contributing to the spread of the virus in the U.S., including most notably failures by the U.S. government to take appropriate measures to protect public health after it had information about the virus.

Even assuming you can get a favorable judgment after years of litigation, presumably, you know working its way through the courts, then you might well be confronted with an even more daunting challenge in enforcing that judgment by recovering compensation from Chinese state-owned assets in the U.S. The reason for that is not only that China would refuse to pay, but also because the immunity of sovereign property is actually broader than the jurisdictional immunity afforded to the sovereign. So, for example, if you can win your case under commercial activity exception, generally speaking you can only recover compensation from assets that are both located in the U.S. and connected with the commercial activity the defendant was engaged in.

So as I alluded to, China might very well not show up to defend itself in these cases. That's how they proceeded with the South China Sea arbitration brought by the Philippines, and they continue to reject that decision with impunity. But if they did show up, their lawyers would fight all these issues tooth and nail. So the net result you could conceivably wind up with is that Congress creates a new law giving U.S. citizens a right without a remedy.

The last thing we have to acknowledge is that all of this could be very self-defeating with potentially huge costs to U.S. interests given that the United States has unrivaled diplomatic, military, economic and scientific research activities around the world. So we stand to lose more from the weakening of the sovereign immunity principle than any other country. Again, sovereign immunity is about reciprocity. It's not a privilege we grant as a favor to other countries.

**DOLLAR:** I would point out there are various ironies here. If in the very unlikely case that China went along with this – suppose China agreed to a trillion dollars in damages. Well, the only way one nation can actually compensate another in real terms is by exporting. So basically, China would have to export an additional trillion dollars of products to the United States – goods and services. So that basically runs completely counter to the trade policy we're trying to develop with China. What are some of the ways where China might use its own legal system to respond to this?

**WILLIAMS:** There have already been some lawsuits filed in Chinese courts peddling the conspiracy theory that the U.S. military actually caused the virus and the U.S. government is responsible for covering it up. Other suits argue that China suffered reputational damage from President Trump calling COVID-19 the "Chinese virus." In theory, those could result in seizure of some U.S. assets in China. But realistically, those lawsuits aren't going anywhere. They're basically political theater.

Potentially more concerning are the various ways in which China might choose to retaliate through extra-judicial means. So we've already seen, for example, China suspending imports of Australian beef under pretext after Australia called for an independent inquiry into the origins of the virus. More generally, you can think back over the years to a number of retaliatory measures taken by China: restriction on rare earth exports to Japan during the 2010 Senkaku Diaoyu Islands standoff, the orchestrated boycotts against South Korea following installation of the THAAD missile defense system, and the ongoing detention of two Canadian citizens following the arrest of Huawei CFO in Canada. So you can imagine all sorts of ways China might choose to make life difficult for U.S. entities and interests in China. Without speculating about specific retaliatory measures, I think it's fair to say that whatever Beijing might choose to do would not be burdened by the pesky constraints of U.S.-style constitutional due process.

Just as an aside, there are Chinese citizens who've been trying to hold their own government accountable and they're being silenced and branded as tools of foreign forces. So, in any event, while our legal system is grinding away with these long shot lawsuits against China, Beijing isn't going to sit still. And I think recent history shows that when we get into a tit for tat race to the bottom, whether it's over journalist visas or anything else, China's bottom line tends to be lower than what the American system will allow.

**DOLLAR:** There are a number of reasons why this topic is relevant to international trade, which is the theme of our podcast. As I pointed out, in the unlikely event China went along with this, they would have to export enormously more to the United States. But as you were just discussing, it's much more likely that China would fight this tooth and nail, and that's going to end up throwing sand in the wheels of a lot of different trade and investment activities. It's hard to predict the specific path, but almost certainly this would be a re-acceleration of the U.S.-China trade war. So this is definitely something that firms need to worry about.

Some of the commentators following all this have pointed out that the administration is trying to distract attention from its own performance, which has not been particularly distinguished. I noticed that we had the same information as South Korea; South Korea has had 260 deaths from the coronavirus and we're up above 80,000. So basically, relative to the population, we have about 50 times more deaths than South Korea. So, I guess, a logical question for me is can people sue our federal government? If suing China doesn't look particularly promising, can victims sue the federal government for its poor performance?

**WILLIAMS:** Well, we're already seeing lawsuits against not only private actors but state governments for things like lost tuition money, room and board payments at state universities, things like that. There are some lawsuits being filed against the federal government for denying stimulus benefits to American citizens

whose spouses are non-citizens. But on the broad legal question I think you're asking on suing the U.S. federal government for COVID, the short answer is it would be very difficult and the reason, sure enough, is this concept of sovereign immunity. In the U.S. that immunity is not absolute. There's a statute called the Federal Tort Claims Act that allows you to sue the federal government for a whole bunch of things from a slip and fall at a post office to assault and battery by a federal law enforcement officer. But the exceptions to the federal government's sovereign immunity generally don't extend to discretionary functions and the type of general governmental policy failure that we're talking about with the coronavirus.

**DOLLAR:** Another possible way of making China pay for the coronavirus that's been discussed in the U.S. is not paying interest on the U.S. Treasury bonds that China holds – approximately one trillion dollars worth of reserves that Chinese has built up over time – either not paying interest, or in a more extreme case, defaulting on the principal. I would say not paying interest, by the way, is a kind of default and so from an economic point of view this is very questionable. It would essentially be a default on the part of the U.S. intent to raise interest rate that we pay in perpetuity out there into the future. But I wanted from a legal point of view, could Congress decide that we're not going to pay interest on bonds held by the Chinese or we're not going to redeem these bonds?

**WILLIAMS:** I guess what I'd say here is that there is a colorable legal argument for canceling or modifying U.S. debt held by China under a particular interpretation of customary international law. So the argument is basically that when a country violates its legal obligations and causes harm to another country, you can engage in a kind of self-help that would otherwise be unlawful. The technical term for this is countermeasures. They have to be proportionate in responding to the internationally wrongful act of another state and the idea behind it is that you're trying to induce the offending country to comply with its obligations. So there is a theory on which canceling U.S. Treasury bills would be lawful under international law as a response to China's failure to comply with its own treaty obligations, namely to provide timely and accurate information to the World Health Organization. I think there are some problems with this legal theory. I think there are limits to what law can accomplish here, but the more obvious issue, as you just pointed out and you know much better than I do, is that this is just not at all in the long-term interest of the United States given the role of the dollar as a reserve currency and the sanctity of the principle of full faith and credit of the U.S. government. We need the confidence of investors, arguably now more than ever when we're borrowing like crazy to finance deficit spending in an effort to mitigate the economic impact of the pandemic.

**DOLLAR:** I would add that the Congressional Research Service has just posted a really interesting study about the Chinese response to the coronavirus that seems quite objective. It's a long document, but the bottom line I took from a quick read is that China basically wasted two to three weeks. First the local officials wasted time in notifying the central officials even though under Chinese law they were actually supposed to notify the central Center for Disease Control within six hours of the discovery of the new coronavirus. So the local officials didn't follow Chinese regulations. And then, it's hard to tease out the exact separation, but central government clearly waited longer than it had to in order to inform the World Health Organization and other international authorities. So you've got basically about two to three weeks when China really didn't act and I think that that Congressional Research Service report is quite informative about all of this.

By the way, there's no evidence on some of the more extreme conspiracy theories that are floating around that maybe this came from virus lab in Wuhan – there's no evidence of that. But there is pretty strong evidence that two to three weeks was wasted. And I notice that the Wuhan airport has about two million passengers per week. That's in normal times, and this was actually their peak holiday season. So for three weeks, basically, you're talking at least six million people who traveled in or out of Wuhan – a lot of them internationally. So that's really the issue that people are angry about. What I'm taking from you, Robert, is that it's hard to respond to this via the U.S. court system.

**WILLIAMS:** That's right. And I'm not at all meaning to downplay all those problematic early responses on the Chinese side. The focus here, however, is on what does it all mean, what should we do, and where should we focus that energy.

**DOLLAR:** I guess the last question I'd like to ask you is about whether you have a sense of how some of our allies are responding, or are looking at how the U.S. is responding, not just to controlling the coronavirus but dealing with China. This talk about suing China, about renegeing on our interest obligations, on our treasury bonds – do you have a sense of how some of our allies are responding and how could we work with our allies to do things more effectively?

**WILLIAMS:** David, I think this really gets to the heart of the matter. It's pretty safe to say our allies aren't crazy about the idea that this should be resolved by a bunch of lawsuits filed by U.S. plaintiffs in U.S. courts. I thought our colleague Ryan Hass put it well in [a recent article](#) where he said I understand and I share the Trump administration's anger about China's deception and mismanagement of the crisis, but focusing that energy entirely on retribution is counterproductive. I basically agree with that.

This is a global crisis requiring global solutions and the reality is we need to be working closely with allies and through multilateral institutions like the WHO to improve that institution instead of defunding it and ceding further influence to China. It's certainly, I think, in everyone's interest for there to be an independent investigation into the origins and spread of the virus. That's something our allies are on board with. We can join together to push China to be more transparent and cooperative, to stop spreading disinformation, and drop this whole wolf-warrior diplomacy routine. But more broadly, we need to be focused the way we were with Ebola on building coalitions, on transnational efforts toward vaccine development and distribution, testing, treatment, regulatory harmonization can be part of that, information sharing and coordinating on economic stimulus, providing assistance to the developing world in particular. Frankly, many of these are areas where the U.S. government can and should be working with China too despite our differences.

The last thing I'll say on that, if there is a happy subplot here it's that a lot of that sort of cooperation is happening. It's primarily at the subnational level being driven largely by NGOs, companies, universities, and local governments. And my hope is that we'll start to see more of that leadership narrative emerge at the level of national governments. The upcoming WHO health ministers meeting is a possible forum for that. I've seen firsthand the people-to-people goodwill and cooperation – particularly between medical professionals and volunteers in the U.S. and China, but other countries, too. This really is an important part of the story that I think deserves much more attention than it's been getting.

**DOLLAR:** I think that's a really important distinction, Robert. We need to be working with other countries and international institutions. There's probably going to be a spread of the virus into the developing world. At the very least, the economic impact is going to be very devastating. That was the topic of [our last podcast](#): looking at what's going to happen in Africa. So we need to be working internationally including with China as difficult as that is. I think you're right that this focus on trying to penalize China, particularly through the U.S. court system, it is a kind of isolationism on the part of the U.S. It's basically trying to use our institutions in an extraterritorial way to penalize China. It's more or less the opposite of working internationally.

I'm David Dollar, and I've been talking to [Robert Williams](#) about some of these ideas to make China pay for the coronavirus. Pretty clear evidence that China delayed for two or three weeks and that's had a significant impact on the world, but the idea of trying to sue China in U.S. courts runs into legal and I would say political and economic obstacles. Talk about not paying interest on our debt, that's just shooting ourselves in the foot. So probably there's no recourse through these kind of methods. Alternatively, we're really going to have to work internationally with different allies and institutions to try to control this particular virus and prepare better for the future. So thanks for joining the show, Robert.

**WILLIAMS:** Yeah, thanks so much for having me, David.

**DOLLAR:** Thank you all for listening. We'll be releasing new episodes of [Dollar & Sense](#) every other week, so if you haven't already, make sure to subscribe on Apple Podcasts or wherever else you get your podcasts and stay tuned. Dollar & Sense is a part of the Brookings Podcast Network. It wouldn't be possible without the support of Shawn Dhar, Anna Newby, Fred Dews, Chris McKenna, Gaston Reboledo, Camilo Ramirez, Emily Horne, and many more.

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