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Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability

U.S. Senate Committee on the Judiciary

Written Questions for the Record – Prof. Russell A. Miller

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Chairman Graham, Ranking Member Feinstein, and distinguished Members of the Committee, in this memo I provide my answers to the written questions submitted to me by Ranking Member Feinstein, Senator Leahy, and Senator Klobuchar.

I am the J.B. Stombock Professor of Law at the Washington and Lee University School of Law. My research and teaching focus on public law subjects, including public international law. I have taught courses and led seminars on public international law for eighteen years at U.S. and European law schools. I am the author and editor of a number of books and articles in that field. I have worked on public international law matters in the context of an international institution. Among my publications on public international law is the book *Transboundary Harm in Public International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) (co-edited with Rebecca Bratspies).[1] My expertise regarding the canonical Trail Smelter Arbitration is an important foundation for my contributions to this hearing.

[1] TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca Bratspies & Russell Miller eds., 2006).

Questions from Ranking Member Feinstein

1. You testified at the hearing that China may be liable for its behavior concerning the coronavirus pandemic under the international law principle of transboundary harm, citing the Trail Smelter case as an example of this principle.

    a) If Congress were to amend the Foreign Sovereign Immunities Act to permit private lawsuits against China for harms arising from the coronavirus, do you think that would further affirm the legitimacy of the doctrine of transboundary harm under customary international law? Why or why not?

The legitimacy and force of the Transboundary Harm Principle do not depend on an amendment to the Foreign Sovereign Immunities Act (FSIA). The Principle is rooted in public international law, which largely operates independently of the domestic law norms, institutions, and remedies that are implicated by suits brought pursuant to the FSIA. Still, in a nominal sense, a domestic legal development (such as an amendment to the FSIA) that explicitly endorses or accommodates the Transboundary Harm Principle might count as evidence of general practice and *opinion juris* in an assessment of the Principle's status as a rule of customary international law.[2] It is more important to note that states do not enjoy sovereign immunity from violations of public international law norms, such as the Transboundary Harm Principle. Assertion of rights under the Transboundary Harm Principle are not directly dependent on or related to the FSIA. Instead, I see the Transboundary Harm Principle (operating on the public international law level) and an amended Foreign Sovereign Immunities Act (operating on the domestic law level) as complementary tools in a broader strategy for holding the Chinese government accountable for the coronavirus pandemic. The threat of domestic civil suits, perhaps involving orders attaching or enforcing execution against the Chinese government's assets in the United States, could provide valuable leverage in American efforts to prompt China to negotiate on a bilateral or multilateral basis for remedies resulting from its role in the emergence and worldwide spread of the novel coronavirus.[3] The suits facilitated by amendments to the FSIA also might contribute to efforts to develop evidence and expertise related to the causes and consequences of the outbreak. Finally, the suits facilitated by amendments to the FSIA also might perform the important documentary and "truth-telling" function that is a valuable part of any legal process. These final two considerations would be useful for bilateral or multilateral interstate responses to the Chinese government's responsibility for the pandemic.

[2] Statute of the International Court of Justice, June 26, 1945, Art. 38(1)[b], 59 Stat. 1055, 33 U.N.T.S. 933.
[3] *See, e.g.,* 28 U.S.C. 1610(g)(1).

b) What would be the implications of applying this principle, as you have interpreted it as applying to China's behavior concerning the coronavirus pandemic, in the context of environmental harms caused by nation-states? For example, under the principle of transboundary harm, would a government's refusal to take responsible actions to lower its carbon emissions potentially expose it to liability for any environmental harms arising from that practice, such as climate change?

The Transboundary Harm Principle is a cornerstone of international environmental law. This extends to international law responses to the climate change crisis. For example, the Principle was incorporated into the preamble of the United Nations Framework Convention on Climate Change (UNFCCC).[4] But the Transboundary Harm Principle, as invoked in that and other contexts, should not be understood as a blunt instrument that exclusively functions to impose liability for causing transboundary environmental harm. Instead, the Principle seeks to strike a balance between limiting transboundary harm while also reinforcing each state's sovereign right, as the UNFCCC puts it, "to exploit its own natural resources pursuant to its own environmental and developmental policies."[5] This is what I have described as the "clash of sovereignties" at the heart of the Trail Smelter Arbitration. The Transboundary Harm Principle does several things to strike a delicate balance between minimizing transboundary harm and reaffirming sovereignty. First, the Principle is limited to transboundary injuries of "serious consequence." Second, the Principle does not apply unless the injury – including its causes and consequences – are established by "clear and convincing evidence." Third, the Trail Smelter arbitrators applied the Principle in that case with a mandate for seeking a "fair and equitable" outcome. The arbitrators interpreted the last element to require them to give weight to the smelter's economic significance to Canada. These elements make the Transboundary Harm Principle a proportionate and sustainable response to the problem of transboundary harm. Any application of the Transboundary Harm Principle to the climate crisis would have to account for these elements. The "seriousness" of the harm involved in global warming should be easy to establish. But, under the Principle's high standard of proof, it might be harder to attribute the causes and consequences of that historic, diffuse and immense harm to any single state. For these reasons, in my book *Transboundary Harm in International Law* I concluded that "*Trail Smelter* probably has very little influence on the substantive norms forming the global climate change regime."[6]

[4] United Nations Framework Convention on Climate Change, preamble, May 9, 1992 1771 U.N.T.S. 107, 165 ("Recalling also that States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").
[5] *Id*.
[6] Russell A. Miller, *Surprising Parallels between Trail Smelter and the Global Climate Change Regime*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION, *supra* note 1, at 167, 168.

c) Consistent with your understanding of the principle of transboundary harm, does the Alien Tort Claims Act, 28 U.S.C. § 1350, permit private lawsuits against the United States for its transboundary harms? If not, should the Act be amended to permit such lawsuits?

The Alien Tort Claims Act (ATCA) gives the U.S. federal courts jurisdiction over civil suits filed by foreign nationals "for torts committed in violation of international law."[7] A tort is a civil wrong that causes an individual to suffer loss or harm.[8] The international law torts envisioned by the ATCA are concerned with harm done to private, individual claimants. This is evident from the nature of the injuries that have served as the basis for ATCA cases in the federal courts: torture; cruel, inhuman or degrading treatment; summary execution; and prolonged arbitrary detention.[9] There is no link between the ATCA and the Transboundary Harm Principle because the Principle is not a tort offering a remedy to individuals in international law. The party harmed by a violation of the Transboundary Harm Principle is the affected sovereign state and not an individual claimant. In the Trail Smelter Arbitration, for example, the original (allegedly tortious) claims of the harmed American farmers were transposed into an interstate claim pursuant to which the U.S. government alleged that the Canadian government was responsible for a violation of the international law norms guaranteeing American territorial sovereignty. In this interstate, international law context a state suffering an actionable transboundary harm does not need the benefit of the ATCA to advance its interests. State victims of an internationally wrongful act have an adequate public international law framework for holding the violating state accountable. That framework consists of the law and doctrine of international state responsibility and the norms governing remedies in international law.

Questions from Senator Leahy

1. Sovereign immunity is an important aspect of the relationships between countries, and one that is largely based on reciprocity.

a) Would you agree that creating new exceptions under the Foreign Sovereign Immunities Act would likely encourage other countries to weaken the United States' immunity from litigation in their courts?

It is possible that creating additional exceptions to foreign sovereign immunity could jeopardize the reciprocal system of foreign sovereign immunity, prompting a civil-suit arms race among states. That, however, is not the necessary or inevitable outcome of the amendments to the Foreign Sovereign Immunities Act (FSIA) that are proposed in bills submitted by members of this Committee.

[7] 28 U.S.C. § 1350.
[8] *See, e.g.,* LEGAL INFORMATION INSTITUTE'S WEX LEGAL DICTIONARY, *available at* https://www.law.cornell.edu/wex/tort.
[9] *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 201-232 (2nd ed., 2015).

There are reasons to doubt that a race-to-the bottom will occur. There also are reasons to believe that the United States could successfully navigate an inter-state system in which the commitment to foreign sovereign immunity had been loosened.

First, as an empirical matter, it should be determined how states reacted to previous FSIA amendments (for example AEDPA and JASTA). If states largely shrugged off those American efforts to loosen sovereign immunity, despite vehement and vocal objections at the time Congress was considering them, then it would be useful to study why that was the case. One fruitful issue for study would be to evaluate whether the precision and narrowness of the new exceptions introduced by previous amendments reassured others that the United States had not opened the floodgates on sovereign immunity but instead was eliminating sovereign immunity only for an extremely limited range of circumstances that also posed considerable risk of harm to the international order. It would be interesting to discover that states may have welcomed the American efforts to loosen sovereign immunity in a targeted manner as a new tool for America (and other responsible states) to exercise leadership in supporting and enforcing the international order. After all, many states around the world benefit from American efforts to hinder pariah states' illegal sponsorship of terrorist networks. Similarly, many states around the world will benefit from American efforts – using a number of tools – to hinder the emergence and worldwide spread of pandemics.

Second, as a theoretical matter, the central role of reciprocity in the international law doctrine of sovereign immunity should reassure us that amendments to the FSIA will not trigger a downward spiral and an eventual, sweeping abandonment of the principle. In keeping with the principle of reciprocity, if states react at all to American efforts to carve out a limited exception to sovereign immunity, then we should expect them to do so only by loosening their commitment to sovereign immunity in the same, narrowly defined circumstances as those covered by the new American exception. The United States has not been the source of repeated pandemic outbreaks and it has little to fear from an exception to sovereign immunity covering that issue.[10] Reciprocity is the celebrated backstop to the general immunity granted to foreign sovereigns. But reciprocity also will be the principle that guides states' reconsideration and reformulation of the doctrine of sovereign immunity in reaction to the proposed amendments to the FSIA.

Third, as a practical matter, the United States has much less to fear than other states from a generally lowered standard for sovereign immunity. America's considerable power leaves the United States with options and advantages in a new landscape characterized by reduced respect for sovereign immunity. The United States' ethical, political, economic, and diplomatic strength will enable it to head-off, avoid, or mitigate the consequences of civil liability claims. Consider the following points:

- Foreign citizens already are authorized by the Foreign Claims Act to seek compensation from the United States for damages caused by U.S. military personnel who are not

[10] *See, e.g.*, Damir Huremović, *Brief History of Pandemics (Pandemics Throughout History)*, *in* PSYCHIATRY OF PANDEMICS 7-35 (Damir Huremović ed., 2019).

involved in combat operations.[11] The U.S. military has expanded this concept. During the long-running Afghanistan conflict, for example, the Department of Defense paid culturally appropriate "condolence payments" for harm done to civilians during American combat operations.[12] Humanitarian organizations welcomed this policy.[13]

- The United States' strength should allow it to negotiate bespoke, bilateral sovereign immunity agreements with states where our presence or activities increase the risk of American civil liability. Our practice of securing some measure of individual (civil and criminal) immunity from local legal processes for American service members in Status of Forces Agreements might be a model for this approach.[14]
- The size, significance and openness of the U.S. economy also create practical disparities in the risks posed by a loosened sovereign immunity regime. A significant peril posed by civil suits is the risk that domestic courts will attach or enforce execution against foreign sovereigns' assets as a means to securing payment for any damages eventually awarded. America's exposure in this regard is small when compared to the value of foreign sovereign assets maintained in the American market. For example, enactment of JASTA in 2016 prompted the Kingdom of Saudi Arabia to threaten to sell-off $750 billion of its assets in the United States.[15]
- The United States' strength also positions the country to confront its liability, when necessary and appropriate, and to negotiate favorable settlements to resolve related civil liability claims that advance to a more serious stage. In fact, the U.S. government already does this on a domestic basis in the framework of the Federal Tort Claims Act (FTCA).[16] That regime provides a limited waiver of the United States' immunity, allowing claims for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[17] The Director of the Department of Justice's FTCA Litigation Section is authorized to act on settlements by federal agencies of up to $1,000,000.[18] The FTCA also anticipates exceptions to the United States' foreign sovereign immunity in certain cases of torts committed by an employee of the

[11] 10 U.S.C. § 2734.
[12] *See* Cora Currier, *How the U.S. Paid for Death and Damage in Afghanistan*, THE INTERCEPT, Feb. 27, 2015, *available at* https://theintercept.com/2015/02/27/payments-civilians-afghanistan/.
[13] *Id.*
[14] *See* U.S. DEPARTMENT OF STATE INTERNATIONAL SECURITY ADVISORY BOARD, REPORT ON STATUS OF FORCES AGREEMENTS (Jan. 16, 2015), *available at* https://2009-2017.state.gov/documents/organization/236456.pdf; Gunter Filippucci, *Alternative Approaches to Certain Deployments – Agreements Conferring Status Similar to the Status of Administrative and Technical Staff of Embassies (A&T Agreements), in* THE HANDBOOK OF THE LAW OF VISITING FORCES 713 (Dieter Fleck ed., 2nd ed. 2018) (Discussing America's development of a "Global Sofa Template.").
[15] *See* Tim Worstall, *Saudi Arabia's Threat To Sell Off $750 Billion Of US Assets Over 9/11 Bill Is Pretty Empty Really*, FORBES, April 17, 2016, *available at* https://www.forbes.com/sites/timworstall/2016/04/17/saudi-arabias-threat-to-sell-off-750-billion-of-us-assets-over-911-bill-is-pretty-empty-really/#3ccbcc9c43fd.
[16] 28 U.S.C. § 1346b.
[17] *Id.*
[18] *See* DEPARTMENT OF JUSTICE, JUSTICE MANUAL § 4-5.230 (2018).

U.S. The Act authorizes the Secretary of State to exercise his or her discretion to settle tort claims that arise outside the U.S. territory in connection with Department of State operations.[19] These legal provisions and the practice of federal authorities under them demonstrate the American government's capacity to reach effective and favorable settlements to resolve civil claims. More profoundly, the FTCA's domestic and foreign provisions demonstrate the United States' ethical and democratic willingness to account for the liability it incurs as a consequence of its acts and omissions. Indeed, there is something unsettling about insisting that the United States should be permitted to hind behind a rigorous doctrine of foreign sovereign immunity to avoid liability for the harm the government might do.

b) How would the U.S. be impacted by weakened immunity in foreign domestic courts?

I believe I have answered this question with my answer to question 1(a) above. The United States will be able to effectively manage an international order characterized by a looser commitment to foreign sovereign immunity. In fact, the United States' reputation in international affairs might be bolstered. On one hand, civil causes of action in American courts might make a significant contribution to reinforcing the international order. On the other hand, the limited risk of exposure to civil claims the United States might face will give the country the opportunity to fairly and justly account for its conduct abroad in a way that burnishes its credibility as a leader and partner in world affairs.

c) Even if American citizens or states are able to prevail in domestic civil lawsuits against China, do you believe they will succeed in actually collecting damages?

Plaintiffs have had difficulty collecting their FSIA judgments against foreign sovereigns. For example, the the billions of dollars already awarded pursuant to FSIA's "state-sponsored terrorism" exception to sovereign immunity have largely gone unpaid.[20] There are legal and practical reasons for this. As a legal matter, FSIA generally grants foreign sovereigns immunity from pre-judgment attachment and post-judgment execution. The exceptions to this immunity are more limited than the jurisdictional and substantive exceptions they are meant supplement. As a practical matter, the state defendants in the FSIA terrorism suits often are hostile to the United States and maintain few assets in the United States.[21] These factors make it even harder to execute the FSIA judgments.

The proposed amendments to the FSIA covering the Chinese government's potential liability for the coronavirus pandemic could resolve the legal barrier to recovery by including a broader and

[19] 28 U.S.C. § 2672; 22 U.S.C. 2669f.
[20] *See* DAVID P. STEWART, FEDERAL JUDICIAL CENTER – THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 110 (2013), *available at* https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf. *See also* Laurel Pyke Malson *et al.*, *The Foreign Sovereign Immunities Act: 2014 Year in Review*, 22 LAW AND BUSINESS REVIEW OF THE AMERICAS 141 (2016).
[21] STEWART, *supra* note 20.

more effective exception to immunity from attachment of and execution against China's property in the United States. In any case, China has a diplomatic and economic relationship with the United States that is fundamentally different to the relationship between the United States and the states that have been subject to FSIA terrorism suits, including Iran, Cuba, North Korea, or Sudan.[22] In the last 15 years China has accumulated nearly $200 billion in assets in the United States.[23] This figure includes public and private investment. Admittedly, the complex integration of the state and enterprises in the Chinese system makes it difficult to accurately identify which of these might be regarded as sovereign or truly private assets. But China's asset exposure in the United States is far greater than Iran's or Sudan's. In any case, even if the United States and China view themselves as "strategic competitors," the countries have immense incentives – including the seemingly indissoluble integration of their economies – to cooperate and negotiate with respect to potential FSIA civil suits.[24]

2. International law has evolved significantly in the many decades since the Trail Smelter arbitration. Today, the relationships between countries are governed by a complex web of treaties, agreements, international customs, and domestic laws.

   a) What legal or diplomatic mechanisms do you believe will be most effective, and most likely to succeed, at holding China accountable for its role in the COVID-19 pandemic?

I believe an international settlement is the most effective and desirable mechanism for holding the Chinese government accountable for its role in the emergence and worldwide spread of the coronavirus. Focusing on what I described in my written statement for the hearing as the "ex-ante" theory of China's responsibility for the pandemic, this settlement should include three components: (i) reassurances of immediate cessation and non-repetition, especially through the enactment of a robust, modern food safety regulatory regime that also covers the sale and consumption of wildlife at wet markets; (ii) reparations in the form of compensation for the worldwide harm done by the pandemic; and (iii) just satisfaction taking the form of an acknowledgement of responsibility and an expression of regret. Achieving this outcome, however, will require the United States to avail itself of a wide range of tools. Some tools would have an international dimension. Others would have a domestic dimension.

On the international plane, the U.S. should work within established multi-lateral institutions to apply pressure on China, perhaps through censure or sanctions. The United States also should work with allies and partners to try to involve China in an *ad hoc*, consensual dispute resolution process similar to the *Trail Smelter Arbitration*. A key to both of these international efforts will

[22] *ID.* at 81.
[23] *See* DEREK SCISSORS, CHINA'S GLOBAL INVESTMENT IN 2019: GOING OUT GOES SMALL (AMERICAN ENTERPRISE INSTITUTE) (2020), *available at* https://www.aei.org/research-products/report/chinas-global-investment-in-2019-going-out-goes-small/.
[24] *See* Ashley J. Tellis, *The Return of U.S.-China Strategic Competition*, *in* STRATEGIC ASIA 2020: U.S.-CHINA COMPETITION FOR GLOBAL INFLUENCE 3 (Ashley J. Tellis et al. eds., 2020), *available at* https://carnegieendowment.org/files/SA_20_Tellis.pdf.

be fact-finding and evidentiary initiatives that neutrally and objectively document the causes and consequences of the emergence and spread of the novel coronavirus.

On the domestic plane, I endorse the proposals to amend the Foreign Sovereign Immunities Act to permit civil suits in American courts so that plaintiffs can try to establish and obtain damages for China's civil liability for the pandemic. I chiefly see this domestic mechanism as a valuable tool for creating leverage for the United States' international efforts to secure a settlement. But I do not dismiss other possible benefits. If properly constructed the amendment to the FSIA might create a tangible possibility for securing justice for claimants. Civil suits also would contribute to the development of evidence and expertise related to the causes and consequences of the outbreak. Finally, civil suits would serve a documentary and "truth-telling" function.

b) In what forums or tribunals has the transboundary harm principle been most frequently and successfully applied? Please explain.

The Transboundary Harm Principle is so well-settled and prevalent as a customary international law norm that its most significant influence and impact now must be measured by the large number of subsidiary, subsequent, and specific international law regimes that contain its DNA. After all, the Principle essentially is a rule about limiting sovereignty out of respect for states' increasing interconnectedness. It would be fair to say that the Principle is everywhere we see international law limiting state sovereignty. Perhaps the most profound examples of the foundational echo of the *Trail Smelter Arbitration* in public international law are the explicit and implicit uses of the Transboundary Harm Principle by the International Law Commission in its draft articles on State Responsibility and on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law.[25] In my written statement for the hearing I referred to other discrete invocations of the Principle in various treaties.

Still, the Transboundary Harm Principle serves as an independent, substantive and procedural rule of international law for settling disputes between states.

This is especially true for transboundary environmental harm. It has been said that "every discussion of the general international law relating to pollution starts, and must end, with a mention of the *Trail Smelter Arbitration*."[26] An important recent example of the Principle's application to alleged environmental harm is the *Pulp Mills on the River Uruguay Case (Argentina v. Uruguay)* decided by the International Court of Justice (ICJ) in 2010.[27] In that case Argentina charged Uruguay with failing to consult over plans to build pulp mills on the Uruguay River, which is shared by the two countries. Argentina believed that the proposed mills would

[25] International Law Commission, Report on the Work of Its Fifty-second Session, UN GAOR, 55th Sess., Supp. No. 10, at 124, UNDoc. A/55/10 (2000) [ILC Draft Articles on State Responsibility]; *id*. at 273 [ILC Draft Articles on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law].
[26] John Read, *The Trail Smelter Dispute [Abridged]*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION, *supra* note 1, at 27, 45.
[27] Pulp Mills on the River Uruguay (Arg v. Uru.), 2010 I.C.J. 14 (Apr. 20).

be a source of transboundary pollution. The International Court of Justice invoked the Transboundary Harm Principle as the applicable substantive customary international law rule. Among other sources the Court mentioned as a basis for the Principle's status as a binding norm, it referred to the Principle's incorporation into and codification by the International Law Commission's Draft Articles.

The essence of the Transboundary Harm Principle has played a role in other international transboundary environmental harm cases. The Principle informed the ICJ's work in the *Nuclear Tests Case (Australia & New Zealand v. France)* (1974).[28] In that case the Court granted provisional measures ordering France to suspend nuclear tests in the South Pacific while the case was under consideration. In keeping with the Principle, the provisional measures were intended to prevent France from causing radioactive fall-out on Australian or New Zealand territory. In the *Lake Lanoux Arbitration* (1957) the arbitrators concluded that French plans to develop and divert the water flowing from Lake Lanoux, to which Spain had a partial claim, had adequately accounted for Spain's sovereign, territorial interests.[29] The arbitrators judged the case on the basis of historical agreements between France and Spain, but the spirit of the ruling clearly advances the concerns of the Transboundary Harm Principle.

The Transboundary Harm Principle now also informs domestic courts' interpretation of national law when they are confronted with disputes involving international transboundary environmental harm. This should not be surprising because the Principle has its origins in U.S. Supreme Court jurisprudence concerned with the settlement of transboundary disputes between states of America's federal union.[30] The *Pakootas v. Teck Cominco* case is an example of the Transboundary Harm Principle's role domestic environmental law.[31] *Pakootas* again involved the smelter at Trail, British Columbia, which was accused in this century of dumping slag and effluent into the Columbia River. The riparian pollution was carried downstream and into the United States where it was registered at unsafe levels in the tribal waters of the Colville Native American community based in northeastern Washington state. The Tribe eventually sued in U.S. federal court alleging that the smelter's operator had not fulfilled its obligations under American environmental law (particularly the Comprehensive Environmental Response, Compensation, and Liability Act) to mitigate and cleanup the environmental harm it had done in the U.S. A key

[28] Nuclear Tests (Aust. & N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).
[29] Lake Lanoux Arbitration (Fr. v. Spain), Tribunal Arbitral, 12 R.I.A.A. 281 (Nov. 16, 1957).
[30] The arbitrators explained: "There are, however, as regards, both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States." *Trail Smelter Arbitral Decision*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW 684, 714 (1941) (citing State of Missouri v. the State of Illinois, 200 U. S. 496 [1906]; Georgia v. Tennessee Copper Co., 237 U.S. 474 [1915]; Georgia v. Tennessee Copper Co., 237 U.S. 678 [1915]; State of New York against the State of New Jersey, 256 U.S. 296 [1921]; New Jersey v. City of New York, 283 U.S. 473 [1931]).
[31] Pakootas v. Teck Cominco Metals, Ltd., 452 F. 3d 1066 (9th Cir. 2006); Pakootas v. Teck Cominco Metals, Ltd., No. 16-35742 (9th Cir. 2018).

question in the case was whether the Canadian industrial firm should be accountable under the U.S. environmental law regime. Implicitly enforcing the Transboundary Harm Principle, the Ninth Circuit Court of Appeals held that U.S. law applied to the smelter operator's conduct that had effects across the border in the United States. After surveying other jurisdictions for similar applications of the Transboundary Harm Principle in domestic environmental proceedings, one commentator concluded: "It is more likely [today that] a Trail Smelter type dispute would be resolved at the level of a private dispute [in a national court]."[32]

The Transboundary Harm Principle is most frequently invoked in environmental cases. But the core of the rule has been applied in a number of other contexts. Most famously, the Principle was determinative in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)* (1949).[33] In that case the ICJ ruled that Albania was responsible under international law for the harm done to British navy vessels by mines located in the portion of the Corfu Channel controlled by Albania. The British navy was entitled under the law of the sea to pass through those waters, which connect the Adriatic Sea and the Mediterranean Sea. The Court concluded that Albania's exclusive control of the territory (including the territorial waters) within its frontiers created the prospect of international responsibility for harm occurring within or emanating from its territory. The Transboundary Harm Principle also colors our understanding of a state's international law responsibility for cross-border armed activities. The applicable *jus cogens* rule, anchored in the U.N. Charter, is referred to as the "principle of non-use of force in international relations and the principle of non-intervention." In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (1986), the ICJ applied a standard concerning states' threat or use of force that accounted for states' responsibility for harm caused across national frontiers by forces operating from or organizing in their territory.[34] This use of the Transboundary Harm Principle was central to the ICJ's more recent judgement in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005).[35] In that case the Court reinforced the essence of the Transboundary Harm Principle by recognizing Uganda's international law responsibility to exercise vigilance in preventing rebel groups from using its territory as a base for conducting operations on the other side of the border in the Democratic Republic of Congo.

The extensive use – the omnipresence – of the Transboundary Harm Principle in international law is an acknowledgment of the wisdom with which it resolves a "clash of sovereignties." Those clashes will increase with the increasing interdependence of the world's countries. The Principle seeks to reaffirm a state's sovereign authority over its territory while insisting that those rights be exercised in a way that does not casue clearly proven, significant harm in the territory of another state. The harm caused around the world by the novel coronavirus is

[32] Martijn van de Kerkhof, *The Trail Smelter Case Re-examined: Examining the Development of National Procedural Mechanisms to Resolve a Trail Smelter Type Dispute*, 27 MERKOURIOS - INTERNATIONAL AND EUROPEAN ENVIRONMENTAL LAW 68, 82 (2011).
[33] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).
[34] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26).
[35] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19).

significant. In fact, it is immense and devastating. It now is common to see comparisons between its effects around the globe and World War II's nearly incalculable consequences for the world. It might be possible to convincingly establish that the emergence and worldwide spread of the coronavirus was caused by the Chinese government's "ex ante" or "ex post" acts and omissions. The Transboundary Harm Principle provides a well-established international law rule that would hold China accountable should its responsibility be proven.

c) Do you believe our withdrawal from the World Health Organization puts the U.S. in a better or worse position to ensure that China is held accountable and prevent similar failures from reoccurring in the future? Please explain.

America's withdrawal from the World Health Organization (WHO) puts the U.S. in a worse position relative to efforts to hold the Chinese government accountable for the pandemic. For example, the WHO brokered International Health Regulation (IHR) imposes duties on participating states (including the United States and China) to collect and share information about potential health crises. As one set of commentators put it, allegations of China's delay in reacting to and reporting the emergence of the novel coronavirus "is not just a misfortune, but a legal issue."[36] America's withdrawal from the WHO will undermine its ability to raise claims in the WHO-IHR context relative to parts of what I described in my written statement as the "ex post" theory of the Chinese government's responsibility for the pandemic.

Withdrawing from the WHO also puts the U.S. in a worse position relative to future efforts to prevent and mitigate similar crises. The World Health Organization, whatever its flaws, provides an invaluable framework for coordinating states' cooperation around global health concerns. Perhaps the most relevant example of the value the WHO adds to states' efforts to prevent and mitigate crises such as the worldwide coronavirus outbreak is the work of its Health Emergencies Programme. The Programme is home to and can access valuable expertise in respect to health science and policy. It also can help public and private partners assess risks and develop containment and contingency plans to prevent the emergence and spread of health crises. Once a crisis is unfolding, the Programme can work with public and private partners to: monitor the event; facilitate the collection, interpretation and dissemination of essential information; and recommend action. The United States should not rely exclusively on the WHO to advance its global health crisis agenda. But neither should the United States neglect or undermine the possible value the WHO can add to America's efforts.

Questions from Senator Klobuchar

1. In your written testimony, you discuss China's unwillingness to allow international experts to review China's official actions in handling the coronavirus pandemic.

[36] Armin von Bogdandy & Pedro Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW & INTERNATIONAL LAW (MPIL) RESEARCH PAPER NO. 2020-07 (March 26, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650&download=yes.

a) In your opinion, how could potential Chinese objections to allowing an international review of its actions be addressed?

With all due respect, my written statement for the hearing did not discuss China's willingness to tolerate a role for international experts in reviewing its actions in handling the coronavirus pandemic.

Still, international law provides several mechanisms for responding to the Chinese government's potential intransigence.

Should the Chinese government's responsibility be met with a multilateral response, then that regime could contain means for encouraging China's cooperation as well as punishing its obstinacy. For example, the international community incentivized Iraqi compliance with demilitarization requirements after the Gulf War with a mix of sanctions and market access for its commodities in the oil-for-food program.[37] At the same time, progress towards dismantling Iraq's weapons of mass destruction was facilitated and verified by a U.N. monitoring and inspection regime.[38] As another example, Iran's compliance with internationally negotiated limits on its nuclear programs was fostered by the Joint Comprehensive Plan of Action, which lifted sanctions that had been imposed on the Islamic Republic.[39]

Should the United States choose to bilaterally prosecute its rights relative the Chinese government's potential international law responsibility for the pandemic, then international law would permit it to take unilateral "self-help" measures as a means for reacting to Chinese obstinacy. The Restatement (Third) of the Foreign Relations Law of the United States explains that a "state victim of a violation of an international obligation by another state may resort to countermeasures."[40] Accepted countermeasures include the termination or suspension of treaty obligations and the attachment of the offending state's assets.

Respectfully submitted,

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[37] *See* S.C. Res. 986, U.N. Doc. S/RES/986 (April 14, 1995).
[38] *See* S.C. Res. 687, U.N. Doc. S/RES/687 (April 3, 1991); S.C. Res. 1284, U.N. Doc. S/RES/1284 (Dec. 17, 1999).
[39] Joint Comprehensive Plan of Action, U.S. Department of State (July 14, 2015), available at http://www.state.gov/documents/organization/245317.pdf.
[40] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987).