

Senate Judiciary Committee

“The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China’s Culpability”

Responses to Questions for the Record

Chimène Keitner

Submitted July 21, 2020

Contents

Responses to Questions from Senator Feinstein.....	2
Questions About the Foreign Sovereign Immunities Act (FSIA) (Q1(a)-(c)).....	2
Questions About Other Obstacles to Obtaining Damages from Civil Suits (Q2(a)-(f)).....	11
Questions About Civil Suits and the Transboundary Harm Principle (Q3(a)-(f)).....	17
Questions About Consequences of Domestic Suits Against Foreign States (Q4(a)-(d)).....	25
Questions About Alternative Methods for Pursuing Accountability (Q5(a)-(e))	30
Responses to Questions from Senator Leahy.....	35
Questions About Likely Effects of Civil Suits Against China (Q1(a)-(b))	35
Questions About U.S. Exposure to Litigation Risk (Q2(a)-(b)).....	36
Questions About Accountability and Global Public Health (Q3(a)-(b))	37
Responses to Questions from Senator Klobuchar.....	39
Responses to Questions from Senator Booker.....	42
Questions About Live Wildlife Markets and the International Wildlife Trade (Q1(a)-(c))	42
Question About Discovery of U.S. Government Records in Cases Against China (Q2).....	46
Questions About Harms to U.S. Interests from Amending the FSIA (Q3 & Q4)	47
Question About President Trump’s Praise of China’s COVID-19 Response (Q5).....	49

Responses to Questions from Senator Feinstein

Questions About the Foreign Sovereign Immunities Act (FSIA) (Q1(a)-(c))

Q1. There was some discussion at the hearing as to whether the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, currently permits civil suits against the Chinese government for harms arising from the coronavirus pandemic, including through China’s alleged concealment of information pertaining to the coronavirus at the outset of the pandemic and alleged hoarding of medical and personal protective equipment.

- a. Do you think it is likely that courts will hold that civil suits such as those filed by the States of Mississippi and Missouri against China for harms arising from the coronavirus pandemic can proceed under one or more of the exceptions to sovereign immunity delineated in the Act, such as the “commercial activity” or “territorial tort” exception? Why or why not? Please be specific with respect to the various categories of claims raised by the plaintiffs in these cases (e.g., claims based on China’s alleged hoarding of equipment).**

I have reviewed the claims in 16 civil suits filed against the Chinese government (listed in Table 1 on p. 11 of my written testimony). Although one can never predict judicial rulings with absolute certainty, a faithful interpretation and application of the FSIA consistent with binding Supreme Court precedent requires dismissing all of the claims, because they do not fall within an enumerated exception to foreign sovereign immunity.

I should note, at the outset, that it is not enough for a plaintiff’s allegations to fall within an enumerated exception to sovereign immunity in order to proceed. As with any other civil suit, the plaintiff must also state a claim upon which relief can be granted (*see* Fed. R. Civ. P. 12(b)(6)). In other words, the plaintiff must plausibly allege that the defendant violated a law or failed to perform an obligation that applies to that defendant. It is not clear to me that the allegations in these complaints meet that standard.

Most of the complaints attempt to fit their allegations within two statutory exceptions to sovereign immunity: (1) the commercial activity exception; and (2) the territorial tort exception. At least one complaint also invokes the exception for wrongful acts of foreign states in conjunction with acts of international terrorism on U.S. soil. This response addresses each in turn.

(1) *Commercial Activity Exception*, 28 U.S.C. § 1605(a)(2).

Certain plaintiffs allege that the defendants are not immune from the jurisdiction of U.S. courts because the action is “based upon ... an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”

Three core requirements must be met in order for this exception to apply: the “based upon” requirement; the “commercial activity” requirement; and the “direct effect” requirement.

The activities described in the complaints do not qualify as commercial activities within the meaning of the FSIA. As the Supreme Court made clear in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.” *Id.* at 614. That is because, under the “restrictive” theory of sovereign immunity codified in the FSIA, “a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*).” *Saudi Arabia v. Nelson*, 507 U.S. 349, 359–60 (1993).

Under this framework, “a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy boots or even bullets is a ‘commercial’ activity, because private companies can similarly use sales contracts to acquire goods.” *Weltover*, 504 U.S. at 614–15. Moreover, “the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce.’” *Id.* at 614 (emphasis in original).

As I testified at the Committee’s June 23 hearing, an allegation that a Chinese government-owned company sold defective personal protective equipment (PPE) under a contract with a U.S. buyer would be a commercial activity within the meaning of the statute. That is not the type of activity alleged, for example, in Missouri’s and Mississippi’s complaints.

Mississippi’s complaint cites the following reports about China’s actions with respect to the global market for PPE as the basis for its allegations:

- Keith Bradsher, et al., *The World Needs Masks. China Makes Them, but Has Been Hoarding Them*, N.Y. TIMES (Mar. 13, 2020), at: <https://www.nytimes.com/2020/03/13/business/masks-china-coronavirus.html> (reporting that China “has claimed mask factory output for itself” by refusing to authorize exports of masks manufactured in China).
- Talia Kaplan, *Peter Navarro: China ‘cornered’ the personal protective equipment market and ‘is profiteering’ during coronavirus outbreak*, FOX NEWS (April 19, 2020), at: <https://www.foxnews.com/media/peter-navarro> (reporting that White House Trade Adviser and National Defense Production Act policy coordinator Peter Navarro stated that China “is profiteering” and that while China was “hiding this virus from the world” it “went from a net exporter of personal protective equipment ... to a large net importer”).
- Juliet Eilperin, et al., *U.S. sent millions of face masks to China early this year, ignoring pandemic warning signs*, WASHINGTON POST (April 18, 2020), at:

https://www.washingtonpost.com/health/us-sent-millions-of-face-masks-to-china-early-this-year-ignoring-pandemic-warning-signs/2020/04/18/aaccf54a-7ff5-11ea-8013-1b6da0e4a2b7_story.html (reporting that “U.S. manufacturers shipped millions of dollars’ worth of face masks and other protective medical equipment to China in January and February with encouragement from the federal government” even though “by the end of January, briefings to the White House national security staff made clear that the danger of a major pandemic was real”).

- Kate O’Keeffe, *China’s Export Restrictions Strand Medical Goods U.S. Needs to Fight Coronavirus, State Department Says*, WALL STREET JOURNAL (April 16, 2020), at: <https://www.wsj.com/articles/chinas-export-restrictions-strand-medical-goods-u-s-needs-to-fight-coronavirus-state-department-says-11587031203> (reporting that “[n]ew Chinese export restrictions have left American companies’ U.S.-bound face masks, test kits and other medical equipment urgently needed to fight the coronavirus stranded” ... and that large quantities of PPE “are sitting in warehouses across China unable to receive necessary official clearances,” and further reporting that export restrictions described by China as intended “to ensure the quality of exported medical products given their importance” followed complaints from European countries about the quality of protective gear received from China).
- David Brunnstrom, et al., *U.S. asks China to revise export rules for coronavirus medical gear*, REUTERS (April 16, 2020), at: <https://www.reuters.com/article/healthcoronavirus-usa-china/us-asks-china-to-revise-export-rules-for-coronavirus-medical-gearidUSL1N2C502N> (reporting that the United States asked China “to revise new export quality control rules for protective equipment needed during the coronavirus pandemic so they are not an obstacle to timely supplies,” and describing the new rules as “a bid by China to balance the global demand for PPE ... while ensuring that manufacturers and sellers do not flood the market with uncertified or shoddy products”).
- Amber Athey, *Italy gave China PPE to help with coronavirus — then China made them buy it back*, THE SPECTATOR (April 4, 2020), at: <https://spectator.us/italychina-ppe-sold-coronavirus/> (citing “China taking advantage of Italy’s generosity” as “just the latest example of its disastrous diplomacy in the wake of the pandemic”).

These reports do not describe commercial activities within the meaning of the FSIA.

Imposing export restrictions and issuing (or declining to issue) official clearances required to export goods are not “the *type* of actions” by which a private party engages in commerce; to the contrary, as the Supreme Court noted in *Weltover*, the “authoritative control of commerce cannot be exercised by a private party.” *Weltover*, 504 U.S. at 614. As *Weltover* also makes clear, “whether the foreign government is acting with a profit motive” is not relevant to the analysis. *Id.*

Because the allegations do not satisfy the commercial activity requirement, there is no need to examine whether the defendants’ alleged acts caused a “direct effect” in the United States, as required by § 1605(a)(2). That said, the claims brought against China for

financial losses and other injuries suffered as a result of the continued spread of COVID-19 in the United States would also fail this prong of the commercial activity test.

A “direct effect” in this context, as noted in *Weltover*, “follows as an immediate consequence” of an act. An effect is not direct if it is a “remote or attenuated consequence of the act,” or if the effect “is caused by an intervening act.” RESTATEMENT (4TH) U.S. FOREIGN RELATIONS LAW § 454 cmt. e (2018). Although, as I indicated in my written testimony, China’s failure to contain the novel coronavirus might be what we call a “but for” cause of any given injury in the United States, the causal chain has dozens, if not hundreds, of additional links.

(2) *Territorial Tort Exception*, 28 U.S.C. § 1605(a)(5).

Plaintiffs’ complaints also do not contain allegations that fall within the “territorial tort” exception to foreign sovereign immunity. Some of the complaints argue that China’s alleged misconduct does not qualify as a “discretionary function” under § 1605(a)(5)(A), which excludes from jurisdiction “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.” This language describes an *exception* to the exception. Because the territorial tort exception does not apply in these circumstances, the question of whether China’s alleged misconduct constitutes a discretionary function does not arise.

The crux (or “gravamen”) of plaintiffs’ complaints is that COVID-19 originated in China, and that Chinese authorities failed to report and/or “covered up” the emergence and human-to-human spread of this virus until it was too late to contain. The timeline compiled by the Congressional Research Service “based on available public reporting to date” documents some of these delays. *See* Congressional Research Service, “Covid-19 and China: A Chronology of Events,” <https://crsreports.congress.gov/product/pdf/R/R46354> (updated May 13, 2020). However, even if the territorial tort exception did apply, claims arising out of “misrepresentation” or “deceit” are expressly excluded from its scope (*see* 28 U.S.C. § 1605(a)(5)(B)).

More fundamentally, U.S. courts have interpreted this exception to require a tortious act or omission of the foreign state *in the United States*. *See* REST. 4TH FOR. REL. § 457(1). This interpretation is consistent with the prevailing understanding of this exception in international law. *See id.* § 457(2). “Prototypical cases” under this exception involve “injuries resulting from an automobile accident involving an embassy vehicle and a ‘slip and fall’ in a foreign consulate.” David P. Stewart, Federal Judicial Center International Litigation Guide, *The Foreign Sovereign Immunities Act: A Guide for Judges* at 70 (2d ed. 2018).

I believe strongly in access to justice and in the important role played by civil litigation, including tort liability, in incentivizing powerful actors to act with due regard for the consequences of their conduct. I do not object in principle to “long shot” litigation, such as the ultimately successful cases filed against the tobacco industry. However, for the above reasons and those set forth in my written and oral testimony, I do not think any of the enumerated exceptions in § 1605 provide civil jurisdiction over plaintiffs’ claims against

China or Chinese government-owned or government-run entities for injuries caused in the United States by the spread of COVID-19.

Knowledgeable and experienced legal scholars and practitioners who have weighed in on this issue agree that courts will likely dismiss these claims for lack of jurisdiction because they do not fall within an exception to the FSIA. Relevant statements include the following (with affiliations for identification purposes only):

- Jonathan Turley, Professor of Law at George Washington University, wrote in *The Hill* that “some lawsuits have stretched the facts to suggest that the wet market or lab in Wuhan were commercial enterprises effectively run or directed by China. That argument is likely to be far too attenuated for the courts.” <https://thehill.com/opinion/judiciary/493467-why-china-will-likely-avoid-liability-in-spread-of-coronavirus-pandemic> (April 18, 2020)
- Lea Brilmayer, Professor of Law at Yale University, explained that “[a] sovereign is not supposed to sue a sovereign, and that’s what’s going on” with the Missouri lawsuit. <https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840550059/missouri-sues-china-communist-party-over-the-coronavirus-pandemic> (April 21, 2020)
- David Stewart, Professor of Law at Georgetown University and Reporter on Foreign Sovereign Immunity for the American Law Institute, stated that Missouri’s lawsuit, “is not likely to survive a motion to dismiss on jurisdictional grounds.” <https://thehill.com/regulation/494399-coronavirus-lawsuits-against-china-face-uphill-battle> (April 24, 2020)
- Tom Ginsburg, Professor of Law at University of Chicago, predicted that “these suits will be dismissed. They are addressed to Chinese government entities, and they are entitled to immunity.” <https://www.latimes.com/politics/story/2020-05-15/can-china-be-sued-in-the-u-s-and-forced-to-pay-for-coronavirus-losses-legal-experts-say-no> (May 5, 2015)
- J. Maria Glover, Professor of Law at Georgetown University, assessed that “these suits have almost zero chance of success in court” because of the FSIA. <https://www.latimes.com/politics/story/2020-05-15/can-china-be-sued-in-the-u-s-and-forced-to-pay-for-coronavirus-losses-legal-experts-say-no> (May 5, 2015)
- Ingrid Wuerth, Professor of Law at Vanderbilt University and Reporter on Foreign Sovereign Immunity for the American Law Institute, explained to the *Los Angeles Times* that the FSIA “aimed to take politics out of these disputes by telling judges they must dismiss lawsuits against foreign states.” <https://www.latimes.com/politics/story/2020-05-15/can-china-be-sued-in-the-u-s-and-forced-to-pay-for-coronavirus-losses-legal-experts-say-no> (May 5, 2015) Here, “[t]he fact that China may not have taken adequate precautions to prevent the spread of COVID-19, and then that wound up having an impact in the United States, is certainly not enough to bring it within the commercial activity

exemption.” <https://thehill.com/regulation/494399-coronavirus-lawsuits-against-china-face-uphill-battle> (April 24, 2020) As for the territorial tort exception, “[t]he tortiable activity has to be done in Missouri, not in Wuhan, China.”

<https://foreignpolicy.com/2020/04/24/missouri-opens-up-a-new-front-against-china-in-coronavirus-blame-game/> (April 24, 2020)

- Joel Trachtman, Professor of International Law at Tufts University, said that “[t]he argument for the commercial activity exception is specious,” and that he is “not sure how the Chinese government’s alleged governmental failure constitutes a commercial activity.” <https://foreignpolicy.com/2020/04/24/missouri-opens-up-a-new-front-against-china-in-coronavirus-blame-game/> (April 24, 2020)
- Jacques deLisle, Professor of Law at the University of Pennsylvania, wrote that “courts are unlikely to find the claims against China over COVID-19 to fall within” the FSIA’s exceptions to immunity. <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/> (May 12, 2020)
- Robert D. Williams, Executive Director of the Paul Tsai China Center at Yale Law School, stated in a Brookings interview that “based on the way courts have interpreted these exceptions [to foreign sovereign immunity], neither one of them really seems to apply here. ... [E]verything 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.” <https://www.brookings.edu/podcast-episode/dont-count-on-suing-china-for-coronavirus-compensation/> (May 18, 2020)
- Paul J. Larkin Jr., Senior Legal Research Fellow at The Heritage Foundation and former Assistant to the Solicitor General and Counsel to the Senate Judiciary Committee, analyzed exceptions to the FSIA in detail and concluded that “Missouri’s lawsuit does not look promising under current law.” <https://www.bu.edu/bulawreview/larkin/> (Summer 2020)

(3) *Terrorism Exception*, 28 U.S.C. § 1605B.

Buzz Photos v. People’s Republic of China, filed by Larry Klayman in the Northern District of Texas on March 17, 2020, seeks damages for “the creation and release, accidental or otherwise, of a variation of coronavirus known as COVID-19 by the People’s Republic of China and its agencies and officials as a biological weapon in violation of China’s agreements under international treaties.” (Complaint, p. 2). The only enumerated exception to jurisdictional immunity that could conceivably cover these claims is § 1605B, which codifies the Justice Against Sponsors of Terrorism Act (JASTA).

The definition of an “act of international terrorism” that serves as a predicate for invoking this exception requires activities that would violate U.S. criminal law and that appear to be intended “to intimidate or coerce a civilian population,” “to influence the policy of a government by intimidation or coercion,” or “to affect the conduct of a government by mass destruction, assassination, or kidnapping.” As I noted in the *JustSecurity* posts included in

my written testimony, there is no such thing as “accidental” terrorism. Moreover, § 1605B explicitly excludes “any act of war” from this definition.

In addition, § 1605B(d) provides that U.S. courts *do not* have civil jurisdiction over claims against a foreign state under this exception “on the basis of an omission or a tortious act or acts that constitute mere negligence.” The exception created by JASTA therefore would not cover the allegations in *Buzz Photos*, even if those allegations survived a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), which requires plaintiffs to include sufficient non-conclusory factual content in the complaint to allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

b. Do you think it is likely that courts will allow these lawsuits to proceed if they name the Chinese Communist Party as a defendant? Why or why not?

I do not think that U.S. courts will allow these claims to proceed against the Chinese Communist Party (CCP). As a threshold matter, I have not seen any indication that the CCP has been served with process in the pending suits. In order to obtain personal jurisdiction over a defendant in a U.S. court, the defendant must be properly served with process (or waive service), and the court’s exercise of jurisdiction over that defendant must be consistent with applicable due process guarantees. The Rule 12(b)(6) pleading standard would also apply to any claims against the CCP. The plaintiffs would have to identify concrete legal obligations that the CCP owed to them, and include sufficient non-conclusory factual allegations in the complaint to support a reasonable inference that the CCP violated those legal duties.

The FSIA is understood to confer both personal and subject-matter jurisdiction on a U.S. court if two conditions are met: (1) the defendant has been properly served with process, and (2) an enumerated exception to immunity applies. The procedures for serving a foreign state or political subdivision are set forth in 28 U.S.C. § 1608(a), and § 1608(b) specifies the procedures for serving an agency or instrumentality of a foreign state.

As I noted in the *JustSecurity* posts attached to my written testimony, Missouri has indicated that it plans to serve process on all defendants using FSIA procedures. The same appears to be the case for at least one of the class actions brought by private plaintiffs, according to status reports filed on 6/25 and 7/10 in *Reyes v. People’s Republic of China* in the Southern District of Florida, which was previously styled *Alters v. People’s Republic of China* (indicating expected delivery on July 13 of “the proper FSIA summonses for each defendant” to “the office in Beijing for receiving Hague Convention process”).

Professor Sophia Tang of Newcastle University and Professor Zhengxin Huo of the China University of Political Science and Law have noted that China could decline the attempted service of summons—whether it is issued to foreign state defendants or to the CCP—by invoking Article 13 of the Hague Service Convention, which permits a state party to refuse service “if it deems that compliance would infringe its sovereignty or security.” <http://conflictoflaws.net/2020/state-immunity-in-global-covid-19-pandemic/> (March 21, 2020)

It is difficult to reconcile using the FSIA to serve the CCP with claiming that the CCP's immunity is not governed by the FSIA. That said, if plaintiffs manage to serve the CCP with process, I anticipate that the CCP would raise several jurisdictional challenges that would prevent a court from reaching the merits of the underlying claims. First, the CCP could bring a due process challenge claiming a lack of sufficient "contacts" with the United States to establish personal jurisdiction outside the scope of the FSIA. Second, the CCP could claim immunity under the FSIA, either on the grounds that the CCP should be treated as a foreign state for immunity purposes, and/or that China, rather than the CCP, is the "real party in interest" in these suits.

If the CCP does not fall within the scope of the FSIA, it could also try to argue that it is entitled to jurisdictional immunity under the common law. *Cf. Samantar v. Yousuf*, 560 U.S. 305 (2010) (finding that the FSIA does not govern the immunity of foreign officials sued in their personal capacities). Finally, even if the CCP is not entitled to jurisdictional immunity, a court might dismiss the suit if a party that is entitled to immunity (such as the People's Republic of China, or one of its political subdivisions or agencies or instrumentalities) is a required party. *See id.* at 324–25, citing *Republic of Philippines v. Pimentel*, 533 U.S. 851, 867 (2008).

The few mentions of suits against foreign political parties in existing case law are not particularly instructive here, because China's political configuration as a "Party-State" means that the reasoning used to analyze other political systems—to the extent courts have done so—does not readily apply.

Other experts who have considered this question have concluded that suing the CCP is not a viable means of circumventing the FSIA. They include the following (with affiliations for identification purposes only):

- Donald C. Clarke, Professor of Law at George Washington University, observed that while there is "a lot less precedent on this than you might think," it "would be nuts to think that Congress intended to allow courts in Missouri or anywhere else to offend foreign entities that controlled a [U.N.] Security Council seat and had vast armies and nuclear weapons at their disposal merely on the grounds that those entities didn't meet some formal definition of 'state.'" <https://thechinacollection.org/can-get-around-foreign-sovereign-immunities-act-naming-communist-party-china-defendant/> (April 23, 2020)
- Jacques deLisle, Professor of Law at the University of Pennsylvania, wrote that "[t]he empirically well-founded claim that the CCP penetrates and can control Chinese government institutions and some major enterprises is not, however, a highly promising means for overcoming the barrier of sovereign immunity in U.S. lawsuits," in part because "[c]ourts can be quite skeptical of attempts at end runs around immunity law by nominally suing a non-governmental entity when the real target is the foreign state and its actions." <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/> (May 12, 2020)

- Robert D. Williams, Executive Director of the Paul Tsai China Center at Yale Law School, characterized the proposition that the CCP does not enjoy immunity as “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.” <https://www.brookings.edu/podcast-episode/dont-count-on-suing-china-for-coronavirus-compensation/> (May 18, 2020)
- Paul J. Larkin Jr., Senior Legal Research Fellow at The Heritage Foundation and former Assistant to the Solicitor General and Counsel to the Senate Judiciary Committee, observed that “Missouri’s *legal* argument that the CPC ‘is not protected by sovereign immunity’ lacks merit because it conflicts with the state’s *factual* assertion that the CPC is running the show.” <https://www.bu.edu/bulawreview/larkin/> (Summer 2020).

The above observations make sense, since it should not be possible to recover damages from China by naming the governing political party as defendant rather than the state itself.

c. Would interpreting the Act to permit lawsuits like those filed by the States of Mississippi and Missouri be consistent with customary international law? Why or why not?

Congress enacted the FSIA in part to codify the restrictive theory of foreign sovereign immunity under international law, and U.S. courts have used international law to interpret the FSIA. *See* REST. 4TH FOR. REL. § 451, rep. note 2 (2018). The restrictive theory distinguishes between claims against foreign states that arise out of governmental activities (which are generally exempt from jurisdiction), and claims that arise out of activities that private persons also engage in, including commercial activities (which are generally not exempt from jurisdiction). *See* REST. 4TH FOR. REL. § 451, cmt. *a* (2018).

The rules of international law that bind the United States can be found in treaties to which the United States is party, and in customary international law. Customary international law is understood to be formed by near-uniform state practice accompanied by a sense of legal obligation, rather than mere courtesy. Although there is no single authoritative interpreter of customary international law, pronouncements by the International Court of Justice (ICJ) on the content of customary international law often carry great weight.

In 2012, the ICJ held that Italy had violated Germany’s sovereign immunity by allowing civil suits to proceed against Germany in Italian courts for World War II-era atrocities committed by Germany (including on Italian soil), and by enforcing judgments against Germany that had been entered by Greek courts in similar cases. *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), 2012 I.C.J. Rep. 99 (Feb. 3).

At all stages of the proceedings, Germany admitted that its acts had been unlawful. However, as the ICJ emphasized, “the terms ‘*jure imperii*’ and ‘*jure gestionis*’ do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*)”

or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*)." *Id.* at para. 60. The ICJ held that customary international law required Italy to recognize Germany's sovereign immunity from the jurisdiction of Italian courts for Germany's acts *jure imperii*.

The *Charming Betsy* canon of statutory interpretation provides that a statute "ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). A U.S. court applying this canon to the FSIA would find that the claims brought in the complaints I have reviewed do not fall within any of the exceptions to sovereign immunity enumerated in the statute.

Questions About Other Obstacles to Obtaining Damages from Civil Suits (Q2(a)-(f))

Q2. Currently, there are several bills pending in the Senate that would amend the Foreign Sovereign Immunities Act to facilitate lawsuits against China for harms arising from the coronavirus, including S. 3592, the "Stop China-Originated Viral Infectious Diseases Act of 2020" or "Stop COVID Act of 2020"; S. 3662, the "Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020"; and S. 3674, the "Civil Justice for Victims of Coronavirus Act." In both your written submission and at the hearing, you testified that amending the Act to permit these suits likely would not result in plaintiffs obtaining compensation for injuries arising from the coronavirus pandemic.

a. Generally, what leads you to conclude that these lawsuits would fail to obtain compensation for victims of the coronavirus pandemic?

There are multiple obstacles to recovery for plaintiffs even if Congress removes the threshold barrier of jurisdictional immunity. It would take a much longer response to canvass them all, but I can articulate a number of core concerns here. First, there is the Rule 12(b)(6) requirement that plaintiffs state a legal claim upon which relief can be granted. Second, under current Supreme Court jurisprudence governing class certification under Rule 23, none of the proposed classes in the existing class action complaints would be certifiable, which means that the claims could not be adjudicated on a class-wide basis.

There are certainly procedural tools available to handle mass torts and aggregate actions, including adjudication that bifurcates liability and damages phases, and claims administration procedures that address some of the individualized assessments of injuries and damages at a later stage. However, those procedures are not designed to handle the exceptionally diffuse, complex, and multifactorial nature of the claims at issue here.

Most fundamentally, these procedures are not designed to handle disputes against foreign states. Cross-border discovery is challenging in the best of circumstances, even when the defendant is not a sovereign country. When the defendant is a foreign state, it remains unclear under current case law whether a U.S. court could issue monetary contempt sanctions for failure to comply with discovery orders. Even if a court ordered monetary sanctions, the order would likely not be enforceable. While there is some room for courts to

draw adverse inferences from non-compliance with discovery orders, 28 U.S.C. § 1608(e) makes clear that a U.S. court cannot issue a default judgment against a foreign state (or political subdivision or agency or instrumentality) “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” A case built mainly on adverse inferences would not ordinarily meet this bar.

Even if plaintiffs somehow established their claims with sufficient evidence and succeeded in obtaining a damages judgment, and even if they were able to join all required defendants and devise procedures for allocating damages among the millions of affected claimants, they would still not be able to enforce the judgment against assets located outside of the United States. That is because other countries generally will not recognize and enforce a judgment that contravenes prevailing understandings of the scope of sovereign immunity. This is illustrated, for example, by the March 2019 decision of the Luxembourg *Tribunal d’arrondissement* declining to enforce a default judgment against Iran issued by the Southern District of New York under the state sponsors of terrorism exception to the FSIA, which is unique to the United States and Canada.

The provisions in some of the proposed bills to allow the U.S. Attorney General to intervene in private suits and/or to halt litigation raise another fundamental problem with allowing these massive claims to proceed: namely, it would likely pit various groups of private claimants against each other, against U.S. governmental claimants (such as states and municipalities), and against the potentially countervailing foreign policy goals of the political branches over the years, if not decades, during which civil litigation would unfold.

Finally, the cost of furnishing the judicial apparatus for such extensive proceedings in the United States would be borne by U.S. taxpayers, as would the costs of establishing any eventual compensation fund using foreign state assets that would otherwise be (or have been) forfeited or paid to the U.S. Treasury, or that come from disputed sources.

b. If the lawsuits were allowed to proceed under the Act, what, if any, challenges would you expect plaintiffs to encounter in establishing that China was the cause of injuries arising from the pandemic?

The idea of “causation” has a particular meaning in a legal context. Generally speaking, a defendant is liable for the foreseeable *and direct* consequences of her wrongful actions. So, for example, even if my restaurant or other retail business has been impacted adversely by the pandemic, it could be difficult to establish that China’s actions or omissions in early January 2020 “caused” my business losses in a legal sense.

To illustrate just one aspect of the difficulties in establishing causation, consider a study published in the Center for Disease Control’s *Morbidity and Mortality Weekly Report* on July 17, 2020 entitled “Detection and Genetic Characterization of Community-Based SARS-CoV-2 Infections—New York City, March 2020.” This study found that the genetic sequences of most SARS-CoV-2-positive specimens collected in New York in March “resembled those circulating in Europe, suggesting probable introduction of SARS-CoV-2 from Europe, from other U.S. locations, and local introductions from within New York.” In addition, the origins of the outbreak on the West Coast remain poorly understood, with

theories ranging from direct introduction from Wuhan via a returning tourist from Washington State on January 15 to a possible separate introduction around February 13, either directly from China or via British Columbia, Canada, as reported in the *Seattle Times*. <https://www.seattletimes.com/seattle-news/health/genetic-analysis-raises-more-questions-about-the-history-of-washington-states-coronavirus-outbreak/> (May 26, 2020)

It will likely be difficult to reconstruct the virus's origin and path to different locations within the United States, let alone to answer more complex questions about the causal chain leading from China's alleged acts or omissions to the injuries suffered by specific plaintiffs. This is fundamentally different from more discrete, identifiable events and actions that cause personal injuries in the United States, such as concealing known pharmaceutical side effects, designing defective medical devices, marketing and selling cigarettes to consumers, or even hijacking four airplanes to kill civilians in the terrorist attacks of 9/11.

Even if a U.S. court could ascertain to a sufficient degree of certainty exactly where and how the novel coronavirus originated, there would still be multiple layers of scientific analysis required to determine its route to any particular individual (if the claimant was personally infected) or geographic area (for claimants seeking damages for collateral effects of the virus's spread). Others have noted these problems (with affiliations for identification purposes only), including:

- David P. Fidler, Adjunct Senior Fellow at the Council on Foreign Relations and Visiting Professor of Law at Washington University in St. Louis, observed that, under applicable international law rules, “whatever reparation China might owe ... likely does not encompass the trillions of dollars of damage associated with the outbreak,” and that “separating what damage is attributable to China’s delayed reporting and what harms arose because other governments botched their responses to COVID-19 would be difficult.” <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/> (March 27, 2020)
- Jacques deLisle, Professor of Law at the University of Pennsylvania, expressed the view that “many of plaintiffs’ substantive legal claims—mostly torts—would be at best expansive under established law and in some cases implausibly so. ... Chances that courts will find for plaintiffs on [Missouri’s] claims, and more conventional ones as well, are further diminished by their need to base liability on the complex, lengthy, and indirect causal chains that link the alleged failings of actors in China to harms in the United States, and arguments that those harms were reasonably foreseeable consequences of the defendants’ actions in China.” <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/> (May 12, 2020)

For these reasons, I assess that causation would be a significant hurdle for most U.S. plaintiffs seeking to recover damages from China for injuries arising from the spread of COVID-19.

Moreover, even if causation could be shown, colleagues who specialize in tort law emphasize that proximate cause would be an issue. Proximate cause bars liability if the connection between the (allegedly) tortious act and the result is too attenuated, too unforeseeable, involves superseding intervening causes, or there are policy reasons against liability. Any link to the injuries enumerated in the existing complaints would be very attenuated and remote.

In addition, litigating plaintiffs' theories of causation would occasion inquiry into, and discovery about, whether the actions of U.S. federal, state, and local authorities were appropriate based on available information, and whether they contributed to the existence or scope of plaintiffs' injuries (either as intervening acts that cut off the original wrongdoer's liability, or because applicable law might reduce or even negate the original wrongdoer's liability if there is contributory negligence). The same is true regarding private employers and other entities that might have played an intervening or contributory role in causing plaintiffs' injuries.

c. What, if any, challenges would you expect plaintiffs to encounter in conducting discovery in support of their claims against China?

The predominant challenge is that China will not comply with U.S. discovery orders, and U.S. courts do not have the tools to enforce such orders, as indicated above. (The same would be true if a foreign court ordered the U.S. government to produce analogous materials in response to litigation abroad.) Plaintiffs in U.S. cases against China could also encounter non-negligible difficulties obtaining U.S. government documents that could support claims without raising potentially countervailing national security concerns. *Cf.* Adam Klasfeld, *FBI Declassification Underway in 9/11 Saudi Suit*, <https://www.courthousenews.com/fbi-declassification-underway-in-9-11-saudi-suit/> (Oct. 12, 2018)

There are already significant legal barriers to obtaining discovery from some private Chinese defendants; the idea that the Chinese *government* will turn over documents to a U.S. court is unfathomable. To be sure, U.S. courts should not reward intransigence. However, there are legal, as well as practical and political, barriers to obtaining relevant documents from China.

China's Law on Guarding State Secrets "prohibits a company or individual from disclosing information considered to be a state secret," and "PRC authorities take an expansive view of information deemed state secrets and even information relating to the internal policies and procedures of a [State-Owned-Enterprise] may be considered state secrets under PRC law." Meg Utterback & Holly Blackwell, *China: Obtaining Discovery in China for Use in U.S. Litigation*, <https://www.mondaq.com/china/disclosure-electronic-discovery-privilege/162784/obtaining-discovery-in-china-for-use-in-us-litigation> (Jan. 31, 2012)

China does not permit attorneys to take depositions in China for use in foreign courts. The State Department cautions that participation in depositions not authorized by China's Central Authority under the Hague Evidence Convention "could result in the arrest,

detention, or deportation of the American attorneys and other participants.” See State Department, Bureau of Consular Affairs, Judicial Assistance Country Information: China, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html> (visited Jul. 15, 2020)

In ordinary lawsuits, conflicts of laws between China and the U.S. in matters of judicial assistance arise with some regularity, leading to what UC Davis visiting scholar Guiquiang Liu has called a “lose-lose situation.” Chinese entities that are ordered to produce documents risk civil and criminal penalties in China for disclosing sensitive information. Moreover, “the requesting parties seldom get the benefits of discovery due to the delay caused during the discovery procedure.” Guiquiang Liu, *A No-Win Situation: The Increasing China-U.S. Conflicts on Judicial Cooperation and Evidence Taking*, <https://www.chinajusticeobserver.com/a/a-no-win-situation-the-increasing-china-us-conflicts-on-judicial-cooperation-in-evidence-taking> (Oct. 11, 2019)

Mr. Liu has recommended that China and the United States “go back to the negotiating table for a more detailed bilateral agreement, especially in the field of combating terrorism, money laundering, tax evasion and intellectual property infringement where both countries share common interest[s].” *Id.* Professor Ray Campbell and attorney Ellen Campbell have likewise called for “a new negotiated solution that works better than the Hague Convention,” which can only be reached based on “a deep and nuanced understanding of the interests at stake on both sides.” Ray Worthy Campbell & Ellen Claar Campbell, *Clash of Systems: Discovery in U.S. Litigation Involving Chinese Defendants*, 4 PEKING U. TRANSNAT. L. REV. 129, 174 (2016). The absence of such an agreement will create problems for plaintiffs in obtaining discovery, especially on politically sensitive topics.

d. What, if any, challenges would you expect plaintiffs to encounter in executing on any judgments obtained from a successful civil suit against China?

Plaintiffs would have great difficulty enforcing any favorable judgments against Chinese assets located outside of the United States, because other countries have demonstrated strong reluctance to enforcing U.S. judgments rendered under novel exceptions to foreign sovereign immunity. Moreover, even within the United States, Chinese state assets are generally protected by immunity from execution under separate provisions of the FSIA. The Restatement (Fourth) of Foreign Relations notes that immunity from execution is broader than immunity from adjudication, “in recognition of the fact that execution of judgments against foreign-state property creates greater impositions on sovereign interests and potentially generates significantly greater friction, with the possibility of reciprocal action” REST. 4TH FOR. REL. § 464 cmt. *a.*

Max Planck Institute Research Fellow Martina Mantonavi has studied attempts to enforce default judgments rendered under the state sponsors of terrorism exception to the FSIA in European courts. She notes that two problems have arisen: first, whether the original judgment was rendered under an exception to “the public international law doctrine on State immunity” that is recognized in the courts of the enforcing state; and second, whether the rights of the foreign state defendant were given sufficient respect in the original

proceedings, especially in the case of default judgments. See Mantovani, *Follow-Up: Ongoing Attempts at Enforcing Havlish in Italy and in England*, Research Paper Ser. No. 1 (2020), https://www.mpi.lu/fileadmin/mp/medien/research/WPS/MPILux_WP_2020_1_US-Havlish_MM_VR_SL_ES.pdf (visited July 15, 2020).

These problems would also arise if plaintiffs asked a foreign court to enforce a U.S. judgment against China against Chinese assets located in the foreign country. Moreover, if other countries followed the proposed U.S. approach and allowed suits against China for COVID-19, foreign courts would likely prioritize using seized Chinese assets to compensate their own country's citizens, not to satisfy judgments rendered in the United States.

e. What, if any, other challenges would you expect plaintiffs to encounter in litigating or executing judgment on their claims?

The problems plaintiffs would encounter even absent sovereign immunity include meeting class certification requirements, obtaining discovery from both Chinese and U.S. sources, establishing a sufficiently direct link between China's acts and specific U.S. injuries, showing that intervening acts and omissions by other actors (including U.S. government actors) did not cause or contribute to the severity of injuries, attaching Chinese government assets in the U.S. or abroad, and allocating any Chinese assets among claimants with different cases pending in different jurisdictions based on different claims.

Although size, scope, and complexity alone are not reasons to shy away from pursuing remedies for wrongdoing, domestic judicial proceedings against China are not well-suited to obtain the sought-after results. If I were a government lawyer or an attorney in private practice, I would not hesitate to pursue redress for wrongdoing against a defendant if there were (1) a sufficiently direct link between the alleged wrongdoing and the injury, (2) a good-faith basis for asking a court to exercise jurisdiction, and (3) a genuine chance (even if uncertain) of actual recovery. None of these conditions are present here.

f. Are there any differences between the circumstances presented here and those that are actionable under the Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222 (2016), that would make it more or less likely that plaintiffs would recover damages in civil suits against China for harms arising from the coronavirus pandemic? If so, what are those differences, and how likely are they to affect the outcome of the lawsuits?

To my knowledge, plaintiffs have not recovered damages in civil suits brought under JASTA to date. As noted above, § 1605B requires a predicate act of international terrorism on U.S. soil; excludes acts of war; excludes claims based on omissions or acts that constitute "mere negligence"; and requires a tortious act of the foreign state or any agent of a foreign state while acting within the scope of her agency. The specific intent requirement of an act of "international terrorism" under JASTA (defined in 18 U.S.C. § 2331), and the requirement that such a predicate act occur "in the United States," limits the circumstances in which this provision will apply to those expressly contemplated by Congress.

Although obtaining discovery from foreign and U.S. sources on matters implicating governmental decision-making and national security is difficult in both contexts, I would not expect the myriad other problems enumerated in my response to question (e) to apply to well-pleaded claims under JASTA.

Questions About Civil Suits and the Transboundary Harm Principle (Q3(a)-(f))

Q3. Your colleague Professor Miller testified at the hearing that China may be liable for its behavior concerning the coronavirus pandemic under the international law principle of transboundary harm and that allowing civil suits to proceed against China might encourage a negotiated or arbitrated settlement between the U.S. and Chinese governments, citing as precedent the *Trail Smelter* case and the settlement of claims with the Libyan government arising from the Lockerbie bombing.

- a. How likely do you think it is that civil suits like those filed by the States of Mississippi and Missouri will encourage the Chinese government to negotiate a settlement with the United States or submit to international arbitration? Please explain the basis for your answer.**

I was somewhat perplexed by this claim, especially because Professor Miller's background and expertise does not include transnational litigation. See <https://wlu.app.box.com/s/10i5zouf9v70kbf6pd0ovwyir9pupewp> (listing areas of expertise as constitutional law, public international law, comparative law theory and method, and German law and legal culture). The claim is not well-founded.

Far from bringing China to the negotiating table, the civil suits filed to date have had the opposite effect. As reported by the *Los Angeles Times*, “[i]n Beijing, Chinese officials and state media have condemned the lawsuits as politically driven and legally unfeasible, and threatened that Chinese companies might in turn sue the U.S. government for incurring losses due to mishandling of the COVID-19 pandemic.” <https://www.latimes.com/politics/story/2020-05-15/can-china-be-sued-in-the-u-s-and-forced-to-pay-for-coronavirus-losses-legal-experts-say-no> (May 15, 2020)

As Professor Jacques deLisle has written, “Beijing has the capacity, and quite possibly the will (amid the escalating mutual recriminations over COVID-19), to adopt a much more confrontational stance, and to take much more consequential countermeasures, toward Washington than Riyadh plausibly could have contemplated” in response to JASTA. <https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/> (May 12, 2020)

Ryan Haas, the Michael H. Armacost Chair in the Foreign Policy program at Brookings, notes that the “current zeitgeist in Beijing” has produced an “aggressive new style [of diplomacy] known as ‘wolf warrior diplomacy.’” <https://www.brookings.edu/blog/order-from-chaos/2020/05/04/clouded-thinking-in-washington-and-beijing-on-covid-19-crisis/> (May 4, 2020) This style is “characterized by triumphalism—equal parts eagerness to assert the superiority of China’s approach to COVID-19 and enthusiasm for pointing out the

shortcomings of Western countries' responses." *Id.* As Mr. Haas has astutely observed, "[t]he cold reality is that America's [eye-for-an-eye] response is undermining the very objectives it purports to be pursuing." *Id.*

Jessica Chen Weiss, Associate Professor of Government at Cornell University, has written that "[t]he tit-for-tat rhetoric has already accelerated a race to the bottom in U.S.-Chinese relations and hindered cooperation in fighting the pandemic." <https://www.foreignaffairs.com/articles/china/2020-07-16/chinas-self-defeating-nationalism> (July 16, 2020) She cautions that "[f]or the United States, this more nationalistic Chinese approach will present even greater challenges going forward, hindering U.S. leverage and deterrence in ways that will constrain U.S. policy options."

Civil litigation can be an effective lever to encourage settlement, but only under conditions that are not present here. Most saliently, the defendant must have a genuine and pressing desire for "legal peace" and a clean slate that a settlement can help achieve. The optics of settlement must allow the defendant to "save face," which is sometimes accomplished by allowing a defendant to settle claims while refusing to admit any wrongdoing. If the defendant perceives the litigation process itself as humiliating and illegitimate, then saving face via settlement is not a viable option.

Any strategy that seeks to pressure China to "own up" to its role in the pandemic by applying U.S. law extraterritorially to Chinese governmental decision-making will backfire. As China analyst Iain Mills has emphasized, "[i]n general, most foreign governments, companies, and individuals fail to appreciate just how raw the post-colonial nerve still is in China." <https://www.worldpoliticsreview.com/insights/5559/reckoning-with-colonial-china-to-understand-the-countrys-future> (May 19, 2010)

This is fundamentally different from the tobacco litigation, which involved the conduct of private manufacturers clearly governed by domestic law, and even the litigation of Holocaust-era claims against banks and other entities, when Germany itself had long since acknowledged its inhumane and unlawful behavior. Suggestions that threatened or actual lawsuits in U.S. courts will somehow increase the chances of a negotiated financial settlement with China ignore China's history and its diplomatic posture and are not well-founded.

b. Is the *Trail Smelter* case a useful model for assessing the likelihood civil suits would force China to the negotiating table? Why or why not?

No, it is not. As I indicated in my written testimony, the underlying circumstances are fundamentally different. As Rebecca Bratspies, Professor of Law at the CUNY School of Law and co-editor, along with Professor Miller, of *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (2006), has explained, the 1930's arbitration "resolved a dispute between Canada and the United States over air pollution from a privately-owned Canadian smelter that caused harm on the U.S. side of the border." <https://www.justsecurity.org/71363/the-trail-smelter-arbitration-offers-little-guidance-for-the-covid-19-world-on-attempts-to-sue-china/> (July 14, 2020) The arbitration "did not decide

that Canada was responsible for the actions of its smelter,” and it “did not authorize private actors to bring a tort claim against a foreign sovereign in a domestic court.” *Id.*

This is not to deny the tremendous potential force of the “no harm” principle in international environmental law, which has come to be associated with the *Trail Smelter* arbitration. However, it would be a mistake to draw any inferences about China’s likely response to U.S. litigation in 2020 from Canada’s decision in 1935 to assume responsibility for damage caused by a private smelter to farmers in Washington state. In the latter case, the Canadian government responded to political pressure to act because Washington state’s long-arm statute could not reach the smelter, and because the farmers did not have standing to bring claims in Canadian court. In other words, there was no domestic jurisdiction over these civil claims in either Canada or the United States. Canada acted to *fill a void* in the available dispute resolution mechanisms between the farmers and the smelter, not to ward off the prospect of a damages judgment by a U.S. court. Political pressure from within Canada and from the United States, not judicial pressure from U.S. courts, produced this result.

Professor Bratspies further notes that “[e]ven if allegations that China’s actions in December 2019 and January 2020 breached this duty [under the WHO’s 2005 International Health Regulations] prove to be true, *Trail Smelter* and the Draft Articles [on State Responsibility] still would not offer support for tort actions in U.S. domestic courts.” *Id.* At the June 23 hearing, Professor Miller was unable to answer Senator Lee’s specific questions about what legal duty China allegedly breached and what remedies might be available for such a breach under the WHO framework. As Committee members might recall, Senator Graham declined my offer to provide the requested answers, which form the basis of the claim that China is liable for an alleged international law violation.

As for the question whether *Trail Smelter* offers guidance on the potential role of domestic litigation in the current circumstances, I concur in Professor Bratspies’s assessment that “*Trail Smelter* has nothing to say on this point,” and that “[t]he arbitration is emphatically not precedent for allowing private claims against a foreign government in U.S. domestic court.” *Id.* To the contrary, as Professor Bratspies notes, “once the dispute was elevated to a state-to-state level, both states explicitly rejected the possibility of opening their domestic courts to the claims at issue, opting instead for a *sui generis* process that had the parties meeting as equals in a neutral forum.” *Id.*

I am at a loss to explain Professor Miller’s and attorney William Starshak’s assertion in a *JustSecurity* blog post that *Trail Smelter* supports their hypothesis that “the threat of civil liability can be part of the mix of tools that bring a sovereign around to embrace its responsibility for transboundary harm in public international law,” and that “failed private lawsuits pushed Canada into inter-state arbitration” over the pollution caused by the private smelter. <https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/> (March 31, 2020) My understanding, supported by Professor Bratspies’s analysis and by observations made in several chapters of her co-edited volume (some of which I cited in my written testimony), is that there was *no* prospect for the U.S. farmers to impose civil liability on the private smelter through domestic judicial processes, and certainly no prospect of suing Canada itself.

Trail Smelter might even provide a cautionary tale for the U.S. claimants here. Professor Bratspies reminds us that “despite a relatively clear causal chain, the U.S. claims in *Trail Smelter* foundered on proof of injury.” <https://www.justsecurity.org/71363/the-trail-smelter-arbitration-offers-little-guidance-for-the-covid-19-world-on-attempts-to-sue-china/> (July 14, 2020) This was so, even though “[t]he *Trail Smelter* proximate cause question was relatively linear.” *Id.* By contrast, as she explains, “[i]t is hard to imagine a situation less analogous to the coronavirus pandemic, where the lines of causation are complex and intertwined, with numerous failures on multiple fronts combining to create the current situation.” *Id.* The model of the *Trail Smelter* arbitration is not pertinent or helpful here.

c. Is the Lockerbie bombing a good example of civil claims leading to broader interstate resolution? Why or why not?

The tragic details of the Lockerbie bombing in December 1988 remain seared in the minds of those of us who lived through it, even if we and our families were not affected directly. In 1998, the U.S. District Court for the Eastern District of New York denied Libya’s motions to dismiss civil claims for lack of personal and subject-matter jurisdiction under the FSIA exception for designated state sponsors of terrorism (which was enacted in 1996), while emphasizing that “the FSIA in no way alters the fact that plaintiffs have the burden of proving that Libya was responsible for the acts alleged.” *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 995 F. Supp. 325, 330 (1998).

The role played by civil claims in the series of interconnected steps that Libya ultimately took to normalize relations with the United States remains unclear. These steps included surrendering the two Lockerbie suspects for trial in The Hague in 1999, settling the Lockerbie case in August 2003, and agreeing to abandon the country’s Weapons of Mass Destruction (WMD) programs and allow international inspections.

Christopher Whytock, Professor of Law and Political Science at UC Irvine, and Bruce Jentleson, Professor of Public Policy and Political Science at Duke University, have observed that key factors in the ultimate success of coercive diplomacy towards Libya included “reciprocity in the nature and timing of the concessions made and benefits extended,” and the “growing conduciveness of Libyan domestic political and economic conditions to coercive diplomacy,” which included “need[ing] to get out from under the U.S. unilateral sanctions to obtain the technology and investment necessary to revitalize the Libyan oil and gas sector.” Jentleson & Whytock, *Who “Won” Libya? The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 INT’L SECURITY 47, 80 (2005) https://www.belfercenter.org/sites/default/files/files/publication/is3003_pp047-086.pdf

The factors that enabled Congress to play a more proactive role in these coercive diplomacy efforts towards Libya are not present when it comes to a country with China’s political, economic, and military resources, not to mention a veto on the U.N. Security Council.

The Global Policy Forum has examined Libya’s conduct in relation to the use of U.N. Security Council sanctions, including sanctions imposed by the U.N. in 1992 to pressure Libya to surrender the two bombing suspects for trial. The Security Council suspended, but

did not lift, these sanctions after Libya surrendered the suspects. In August 2003, Libya “accepted responsibility for the bombing and agreed to a \$2.7 billion settlement. In return, London and Washington immediately began to push the Security Council to lift all UN Sanctions against Tripoli.” <https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/libya.html> (visited July 17, 2020) This was accomplished in September 2003, after France had negotiated increased Libyan indemnity payments to French victims of a 1989 airliner bombing. In December 2003, Libya agreed to end efforts to produce nuclear weapons, and “began to offer contracts to big Western oil companies.” *Id.*

The role of private parties in settlement negotiations with Libya in 2002 created legal and policy complications for the United States and the United Kingdom. For example, as veteran State Department lawyer Jonathan Schwartz notes, it has been reported that “when the Libyan and family representatives reached agreement on a settlement structure in October 2002, the governments came in for a surprise. The proposed settlement was described by the parties as tying the families’ compensation to the lifting of sanctions against Libya.” Schwartz, *Dealing with a “Rogue State”: The Libya Precedent*, 101 AM. J. INT’L L. 553, 569 (2007). As Mr. Schwartz recounts, “[t]here was nothing inevitable about the particular tools chosen [in addressing Libya’s support for terrorism], nor their ultimate results. U.S. officials, both in the executive branch and in Congress, had to make difficult judgments, weighing the prospects for success of each option, its likely reception by international and American audiences, and its collateral effects on other U.S. foreign policy objectives.” *Id.* at 554.

The United States and Libya did not conclude a final Claims Settlement Agreement resolving claims by victims of the Lockerbie bombing and two other Libyan-sponsored terrorist attacks in the 1980’s until August 2008. A global settlement was important because, among other concerns, “[a]s long as there were pending claims or outstanding judgments against Libya under the terrorism exception to the FSIA, U.S. companies doing business with Libya may have been subject to litigation by judgment creditors who believed the U.S. company was in possession of Libyan property that is subject to execution on a terrorism judgment.”

https://www.everycrsreport.com/files/20090803_RL33142_783e1fb1062d70d7807ae92ced99d1d55e8175d4.pdf (Aug. 3, 2009) This settlement was made possible at least in part by the United States’ agreement that \$300 million in compensation would be paid for the Libyan victims of U.S. airstrikes ordered by President Ronald Reagan.

<https://www.theguardian.com/uk/2008/nov/21/lockerbie-libya> (Nov. 21, 2008)

Steve Emerson, an expert on Islamic extremist networks and international terrorism, considered whether the criminal prosecution of the Lockerbie bombers had “a deterrent effect on Gaddafi and his support for terrorism,” and concluded that “the real motivation for Gaddafi’s decision [to end his logistical support for international terrorism] still remains a matter of speculation.”

<https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1405&context=jil> (2004)

In sum, it is difficult to draw any inferences from the outcome of the Libya negotiations for the pursuit of civil damages from China.

d. 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?

It might be tempting to analogize the spread of a virus to cross-border pollution or other causes of transboundary harm, but the analogy is flawed for a number of reasons. As global health law expert David Fidler has emphasized, “[s]tates have not been keen to use customary law on state responsibility in the infectious disease context because of how political and epidemiological considerations align.”

<https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/> (March 27, 2020) This is because “[p]athogenic threats with the potential for cross-border spread can appear in any country. ... This reality creates a shared interest among states not to litigate disease notification issues.” *Id.*

U.S. practice can certainly shape the evolution of customary international law, particularly when it is accompanied by what international lawyers call *opinio juris*—a belief that acting, or refraining from acting, is legally required. Creating additional exceptions to the FSIA would not directly affect “the legitimacy of the doctrine of transboundary harm,” because jurisdictional immunity has nothing to do with substantive legal doctrines governing the attribution of conduct, imposition of liability, or calculation of damages. The question of immunity speaks solely to whether or not a domestic court can exercise jurisdiction over a sovereign defendant in a given dispute.

A forthcoming student note in the *Columbia Journal of Transnational Law* argues that U.S. courts should interpret the existing commercial activity exception in the FSIA to cross-border pollution by foreign state-owned-enterprises (SOEs) that cause harm within U.S. borders. This would go beyond what current case law permits. However, the proposal illustrates a relevant point, which is that treating the emission of pollution by SOEs as commercial activity, rather than sovereign conduct, could bring more claims for transboundary harm within the jurisdiction of U.S. courts.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3611401 (June 19, 2020)

Implementing such a proposal could contribute to shaping the parameters of the commercial activity exception under customary international law. Case law generated by claims against foreign SOEs could eventually also contribute to shaping the international law of liability for transboundary harm in the environmental law context, if that is Congress’s goal. As the note’s author explains, “[b]ecause the transboundary harm principle is a limitation on the right of a state to control its natural resources, it follows that a state *has no right* to exploit its resources in a manner that causes harm within the borders of another state.” *Id.* at 40 (emphasis in original).

In the environmental law context, as in the pandemic context, states’ decisions about what foreign conduct to treat as immune from domestic jurisdiction, and what foreign conduct to treat as unlawful, shape the international law rules that apply to them as well. We cannot

control whether foreign courts apply robust standards of pleading and proof. Consequently, broader exceptions to immunity, and broader standards of liability for transboundary harm, will lead to increased legal exposure for the United States. This could be a positive development, if it incentivizes decision-makers to regulate emissions more stringently, and to be more transparent about data relating to the spread of infectious disease. However, from a legal risk perspective, Congress should not broaden exceptions to immunity unless it is also prepared to take on this more ambitious regulatory agenda.

- e. What would be the implications of applying this principle, as interpreted by Professor Miller 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?**

Yes. This is why, in 1934, the State Department made clear to Canada that “its proposal [to set a maximum standard for emissions] was limited to the Trail smelter, that it did not contemplate the ‘establishment of any principles,’ and that it was neither desirable nor necessary to make the case into a precedent.” See Keitner Written Testimony (June 23, 2020), p. 6 fn. 24. Consent-based caps on carbon emissions can be (and have been) negotiated in the context of multilateral environmental law treaties.

A more fulsome application of the transboundary harm principle by domestic and international tribunals would produce a very different (and likely healthier) world than the one we currently inhabit. As Professor Rebecca Bratspies commented following the Committee's June 23 hearing, “[g]iven the United States' historic skepticism of this project [to codify principles of state responsibility], it was particularly encouraging to see Senators Lindsay Graham, Ted Cruz, and others taking positions that seem to embrace the core of these Draft Articles,” including with respect to state liability for transboundary harm. <https://www.justsecurity.org/71363/the-trail-smelter-arbitration-offers-little-guidance-for-the-covid-19-world-on-attem-is-unclearpts-to-sue-china/> (July 14, 2020) That said, Professor Bratspies also noted that “[it] is unclear how the Trump administration, which just purported to withdraw from the [World Health Organization], would be in a position to claim that China's purported breach of the [international health] regulations should be justiciable in its domestic courts.” *Id.*

Professor Bratspies, whose expertise lies specifically in international environmental law and environmental regulation, has emphasized that “[n]o doubt, many climate activists in the United States and around the world are carefully monitoring the possibility that the United States will set a precedent of waiving sovereign immunity for state actions that fail to prevent grave global public health concerns so that the precedent can be used to hold the U.S. government accountable.” *Id.* If Congress wants to take bold steps to protect the planet, then embracing state liability for transboundary harm and eliminating both domestic and foreign sovereign immunity for actions or omissions that harm global public health could help further this important goal.

f. 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 consistent with the principle of transboundary harm?

The Alien Tort Statute (ATS or ATCA) was enacted in 1789 as part of the Judiciary Act to establish federal subject-matter jurisdiction over civil claims brought by aliens for certain violations of international law. The scope of litigation permitted under this jurisdictional grant remains uncertain, as the Supreme Court recently granted review in two cases involving alleged U.S. corporate funding of child slavery overseas.

<https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/> As interpreted by the Supreme Court, the ATS provides federal jurisdiction (and a common-law cause of action) for violations of specific, universal, and obligatory rules of international law, if the claim “touch[es] and concern[s] the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application” of U.S. Statutes. See Chimène Keitner, *ATS, RIP?*, <https://www.lawfareblog.com/ats-rip> (April 25, 2018)

In U.S. courts, the Federal Tort Claims Act, rather than the ATS, presents the main obstacle to recovering damages from the U.S. government. The Congressional Research Service’s overview of the FTCA provides a useful guide to relevant issues.

<https://fas.org/sgp/crs/misc/R45732.pdf> (Nov. 20, 2019) As the CRS report explains, “the FTCA imposes significant substantive limitations on the types of tort lawsuits a plaintiff may permissibly pursue against the United States.” Of particular note, 28 U.S.C. § 2680(k) preserves the United States’ sovereign immunity in U.S. courts for “any claim arising in a foreign country.” The Supreme Court has interpreted this exception to “bar[] all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004)

As Professor Miller and Mr. Starshak note in a *JustSecurity* post, “[t]he most permissive interpretations of the Foreign Sovereign Immunity [*sic*] Act and the Alien Tort Statute do not seem to point the way toward liability for another country’s sovereign acts.”

<https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/> (March 31, 2020) The same is currently true for civil suits brought against the U.S. government.

The FTCA’s foreign country exception has been understood as intended to shield the United States from liability under foreign law, because choice of law principles would likely lead a U.S. court to apply foreign law to claims arising overseas. If Congress wanted to create opportunities for U.S. courts to develop and apply the doctrine of transboundary harm, Congress might consider narrowing this exception to the FTCA’s waiver of sovereign immunity for claims that involve violations of firmly established rules of international law.

The FTCA does not apply to claims brought against U.S. companies. Interestingly, the 2019 National Environmental Law Moot Court Competition involved a hypothetical claim brought by the “Organization of Disappearing Island Nations” and other plaintiffs against the fictitious multinational corporation HexonGlobal. The questions presented on appeal to the imagined Twelfth Circuit included whether the *Trail Smelter* principle is a recognized principle of international law for purposes of bringing suit under the Alien Tort Statute.

<https://law.pace.edu/sites/default/files/nelmcc/2018/nelmcc2019/2019%20NELMCC%20Prob%20lem.pdf>

The proliferation of climate change litigation in domestic and international fora suggests that this type of claim is more than just hypothetical. *See, e.g.*, Jaclyn Lopez, *The New Normal: Climate Change Victims in Post-Kiobel United States Federal Courts*, 8 CHARLESTON L. REV. 113, 132, 145 (2013) (presenting evidence in support of “an international norm against transboundary harm in the form of climate change impacts” and suggesting that “a climate change claim may succeed [under the ATS] where other environment claims have failed because climate change necessarily involves transboundary harm”); *but cf.* Bradford Mank, *Can Plaintiffs Use Multinational Environmental Treaties as Customary International Law to Sue Under the Alien Tort Statute?*, 2007 UTAH L. REV. 1086, 1147 (2007) (opining that “[i]nternational courts or arbitration panels are better equipped to address the vague principles concerning transboundary liability than are federal courts”).

Questions About Consequences of Domestic Suits Against Foreign States (Q4(a)-(d))

Q4. In your testimony, you indicated that the United States has “the most to lose” by amending the Foreign Sovereign Immunities Act to permit civil suits against China like those filed by the States of Mississippi and Missouri.

- a. What kinds of legal repercussions might we face from China if these lawsuits proceed? For example, might China permit or even encourage reciprocal lawsuits against the United States?**

Private claimants have already filed claims against the United States in Chinese courts for injuries relating to COVID-19. These include claims against the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Department of Defense (DOD) for allegedly “covering up” the emergence of the coronavirus.

<https://www.chinajusticeobserver.com/a/a-wuhan-lawyer-suing-the-us-government-over-covid-19> (March 25, 2020); <https://www.rfa.org/english/news/china/wuhan-lawsuit-03262020122653.html> (March 26, 2020) However, these suits cannot proceed under China’s absolute view of foreign sovereign immunity, which does not even include a commercial activity exception. The same is true of another lawsuit filed in China against the United States that seeks compensation for “reputational damage done by President Donald Trump’s use of the phrase ‘the Chinese virus’ to describe the coronavirus.” *Id.*

China conveyed its position in a June 2020 white paper that because “[t]he novel coronavirus is a previously unknown virus[, d]etermining its origin is a scientific issue that requires research by scientists and doctors.” In China’s view, “[i]t is both irresponsible and immoral to play the blame game in an attempt to cover up one’s own shortcomings. China will never accept any frivolous lawsuits or compensation claims.”

It seems less likely to me that we will see multiple direct reciprocal lawsuits in Chinese courts, and more likely that the negative impact on the United States will come from other potential Chinese retaliatory measures, and from the erosion of the norm of foreign

state immunity in international law and in other countries' legal systems. That said, China could decide to follow Iran's lead by allowing Chinese nationals to file claims against a foreign state when that state has purportedly violated China's immunity. In Iran, the adoption of this measure has led to significant judgments against the United States. International Court of Justice, *Certain Iranian Assets* (Iran v. United States), Preliminary Objections Submitted by the United States of America (May 1, 2017), at 38–39. There would likely be more opportunities for Chinese claimants to execute on judgments issued by Chinese courts against U.S. assets in China than there currently are for Iranian claimants to execute on judgments issued by Iranian courts against U.S. assets (of which there are few or none) in Iran.

It also appears that a special legislative committee of the National People's Congress (NPC) has been tasked with studying a proposal to "formulat[e] a foreign states immunities law" following what Ma Yide, a deputy to the NPC, called "malicious litigations raised in countries like the United States towards China over the COVID-19 response." China's official state-run news agency Xinhua has reported that "Ma suggested adopting a limited immunities principle, which is more commonly found in the United States, Canada, the United Kingdom and the European Union countries." http://www.xinhuanet.com/english/2020-05/27/c_139089872.htm?bsh_bid=5513736524 (March 27, 2020) The idea of a "limited immunities principle" presumably refers to the restrictive theory of foreign sovereign immunity, which the FSIA codified in U.S. law in 1976, and which is reflected in the U.N. Convention on Jurisdictional Immunities of States and Their Property (not yet in force). However, China could also contemplate codifying other exceptions to immunity.

It is also worth noting that China could claim that the United States is unlawfully violating its sovereign immunity by allowing suits to proceed, as Germany did when Italy allowed claims against Germany to proceed in Italian courts. There would not be a basis for the International Court of Justice to adjudicate such claims absent U.S. consent, but it is an additional legal response that China could choose to pursue if U.S. lawsuits proceed.

b. What kinds of non-legal (e.g., diplomatic) repercussions might we face from China if these lawsuits proceed?

Ironically, some of the strategies that the United States appears to be contemplating to extract compensation from China would actually harm the United States. These effects would also be felt if China decided to take similar actions unilaterally. For example, Donald Boudreaux, Professor of Economics at George Mason University, explained in a letter to the editor of the *Washington Post* that proposals to demand "billions in compensation" from China were "hilariously inconsisten[t]" with the Administration's other policy positions. <https://cafehayek.com/2020/05/more-trump-trade-inconsistency.html> (May 1, 2020) Professor Boudreaux noted that, in order to obtain the billions of dollars required to satisfy a compensation demand, China would either have to "hand over to us goods *for free*" or "liquidate their investments in America." *Id.* (emphasis in original). The first option would undermine the U.S. claim that the Chinese already sell goods to the United States "at prices allegedly too low." *Id.* The second option would require China to

“liquidate billions of dollars of their investments in dollar-denominated assets,” which “would, as a practical matter, further lower the value of stocks and other assets in America and drive up interest rates.” *Id.*

China can use the same diplomatic tools to pressure the United States that the United States uses to pressure China. If China deems that lawsuits in U.S. courts violate the customary international law of sovereign immunity, China would also have a non-frivolous legal argument that it is entitled to take countermeasures that would ordinarily be internationally unlawful, but that can be justified in certain circumstances to induce another state to come back into compliance with its international legal obligations.

There have already been tit-for-tat sanctions and visa bans between China and the United States on human rights matters. *See* AP, *China Sanctions Cruz, Rubio, Smith, Brownback for Criticism*, <https://www.kansascity.com/news/nation-world/article244183657.html> (July 13, 2020) (noting China’s view that sanctions relating to alleged human rights abuses against the predominantly Uighur population in the Xinjiang region interfere impermissibly in its internal affairs, and that U.S. sanctions seem in tension with former national security adviser John Bolton’s allegation that “Trump told Xi he was right to build detention camps in Xinjiang”).

There is also evidence that Missouri officials anticipated retaliation from China after Attorney General Eric Schmitt filed suit against China without the prior knowledge of Missouri Governor Mike Parson. *See* Jack Suntrup, *‘High Alert’: After Suing China Over Coronavirus, Missouri Braced for Retaliation, Records Show*, https://www.stltoday.com/news/local/govt-and-politics/high-alert-after-suing-china-over-coronavirus-missouri-braced-for-retaliation-records-show/article_09b2e4c3-3518-5b56-956a-2fb607e0474c.html (May 19, 2020). Concerns included that China might turn away Missouri exports, restrict or confiscate the business license and registration from the state’s China office, rescind all travel authorizations and visas for Missouri citizens and business executives, pull all Chinese students from Missouri, and/or hack Missouri state government websites and other critical IT infrastructure. *Id.*

It is also worth noting China’s passage of the new Hong Kong national security law, which carries a penalty of up to life in prison for “secession, subversion of state power, terrorism and collusion with foreign entities.” <https://www.npr.org/2020/07/01/885900989/5-takeaways-from-chinas-hong-kong-national-security-law> (July 1, 2020) Margaret Lewis, Professor of Law at Seton Hall Law School, has called the law “an efficient, official tool for silencing critics who step foot in Hong Kong.” *Id.* Unfortunately, it will be more difficult for the United States to object if China uses this law to penalize lawyers who work on controversial investigations and cases given the U.S. authorization of sanctions on International Criminal Court staff who conduct war crimes investigations that are deemed an affront to the United States. <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/> (June 11, 2020)

- c. If Congress were to amend the Act to permit these civil suits, might other countries use this precedent to permit private lawsuits against the**

**U.S. government for its own response to the coronavirus pandemic?
Please explain the basis for your answer.**

Yes, this result is certainly foreseeable. Although some countries currently have state immunity acts that would prohibit such actions (such as Canada, the United Kingdom, and Australia), others apply customary international law (such as New Zealand and Italy). Modifications to the FSIA would not immediately affect the content of customary international law on state immunities. However, it could have a cumulative effect over time, particularly if other countries decide to follow suit, as Canada did with the state sponsors of terrorism exception.

Any act or omission by a U.S. federal, state, or local authority that resulted in failure to prevent, or that exacerbated, the spread of the novel coronavirus would appear to be actionable under Professor Miller's theory of transboundary harm. Even if such suits did not ultimately prevail on the merits, they would require deploying significant resources to address, including responding to discovery requests, engaging local counsel, and defending against attempts at pre-judgment attachment of assets or other measures that are currently prohibited under prevailing understandings of foreign sovereign immunity.

Moreover, even if other countries have plausibility pleading standards akin to Rule 12(b)(6), these would not be difficult to satisfy under the proposed theories of liability and non-immunity. By way of example, reports from reputable news outlets in recent months have included the following:

- Descriptions of the U.S. pandemic response as “fragmented, chaotic, and plagued by contradictory messaging from political leaders.”
<https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response> (April 1, 2020)
- Claims by a Guatemalan health official that “[t]he U.S. has deported to Guatemala more than two dozen migrants who tested positive for the coronavirus after agreeing to establish health protocols to prevent the deportation of infected migrants.” <https://www.wsj.com/articles/u-s-fails-to-prevent-deportation-of-migrants-infected-with-covid-19-guatemalan-officials-say-11593023095> (June 24, 2020)
- “While most developed countries have managed to control the coronavirus crisis, the United States under Trump continues to spiral out of control, according to public health experts, with 3.3 million Americans infected and more than 133,000 dead.” https://www.washingtonpost.com/politics/trump-coronavirus-pandemic-no-plan/2020/07/15/7581bea4-c5df-11ea-a99f-3bbdff1af38_story.html (July 15, 2020)
- “Many FDA career scientists and doctors see the White House criticism of [Dr. Anthony] Fauci as an effort to bully him—to make it clear that no one should consider crossing the president in the months leading up to the election.”
<https://www.washingtonpost.com/politics/rancor-between-scientists-and-trump->

[allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdffb1af38_story.html](https://www.washingtonpost.com/news/energy-environment/wp/2020/07/17/allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdffb1af38_story.html) (July 17, 2020)

One does not need to draw a false equivalence between the United States and China to recognize the real legal risk to the United States of establishing a precedent for stripping foreign state immunity for governmental decisions relating to this, or any other, pandemic.

- d. What are the long-term implications for our national interests in eliminating sovereign immunity for China in this context? For example, might other countries rely on this precedent to permit private lawsuits against the United States in other contexts? Please explain the basis for your answer and, if possible, provide examples of what future claims might look like.**

There is no reason to think that the erosion of jurisdictional protections provided by foreign sovereign immunity would remain confined to the pandemic context. The United States has the “most to lose” in this context, because we have a massive extraterritorial footprint with our extensive trade, investment, development, diplomatic, military, intelligence, and other activities.

We have not seen huge numbers of suits against the United States in other countries precisely because of the principle of foreign state immunity. The Office of Foreign Litigation (OFL) in the Department of Justice protects U.S. interests in all litigation in foreign courts, including litigation against the United States, its officers, and employees. At any given time, foreign lawyers under OFL’s direct supervision represent the United States in approximately 1,000 lawsuits pending in the courts of over 100 countries. <https://www.justice.gov/civil/office-foreign-litigation> (visited July 17, 2020)

In an early “brainstorming” effort to imagine what tort-based climate change litigation against the United States in international fora could look like, Andrew Strauss, Dean and Professor of Law at the University of Dayton, posited that the United States would be “the most logical first country target of a global warming lawsuit in an international forum” as “the single largest emitter” of greenhouse gases. <https://www.ourenergypolicy.org/wp-content/uploads/2013/06/SSRN-id1102661.pdf> (2003) In his essay, Professor Strauss did not even contemplate the possibility of suits against the United States (as opposed to U.S. corporations) in foreign courts, because such suits are precluded by foreign sovereign immunity.

Cases in foreign courts have considered questions of U.S. foreign and national security policy within the limits imposed by the United States’ entitlement to foreign state immunity. For example, two lawsuits in Germany asserted “that Germany bears legal responsibility for the consequences of U.S.-led drone strikes in Yemen and Somalia that were conducted from the U.S. Air Force’s Ramstein base, located in southwestern Germany.” <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes> (April 4, 2019) In March 2019, the Higher Administrative Court in Münster ruled that the German government “must take action to ensure that the US respects international law in its use of Ramstein Air Base.”

<https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/> (visited July 17, 2020)

In 2009, an Italian court convicted a CIA base chief and 22 other Americans *in absentia* for kidnapping a Muslim cleric known as Abu Omar from the streets of Milan in 2003. <https://www.nytimes.com/2009/11/05/world/europe/05italy.html> (Nov. 4, 2009) A separate lawsuit sought \$14 million in damages from the defendants. *Id.* Absent the doctrine of foreign state immunity, one can imagine a stream of lawsuits in foreign courts against the United States and its agencies for all manner of adverse impacts (perceived or actual) of U.S. policy worldwide.

Others have also noted this problem, both with respect to suits for injuries from COVID-19 and other types of suits:

- David Stewart, Professor of Law at Georgetown University and Reporter on Foreign Sovereign Immunity for the American Law Institute, observed that “[t]here’s hardly anybody who’s handled this [pandemic] correctly. All those folks looking at China ought to be looking over their shoulder saying, ‘Wait a minute, can we be sued?’” <https://thehill.com/regulation/494399-coronavirus-lawsuits-against-china-face-uphill-battle> (April 24, 2020)
- Joel Trachtman, Professor of International Law at Tufts University, warned that COVID-19 lawsuits against China could open a Pandora’s box: “If the Chinese Communist Party or the Chinese government can be sued for this, I am not sure why the United States couldn’t be sued for the war in Iraq, global warming, etc.” <https://foreignpolicy.com/2020/04/24/missouri-opens-up-a-new-front-against-china-in-coronavirus-blame-game/> (April 24, 2020)

As indicated above, the reciprocity implications of the state sponsors of terrorism exception, and even of JASTA, are more limited, both because their scope of application is much narrower, and because the United States has more diplomatic leverage over the defendant countries to begin with.

Questions About Alternative Methods for Pursuing Accountability (Q5(a)-(e))

Q5. In your testimony, you indicated that there are other, more effective ways to hold China accountable for its behavior with respect to the coronavirus pandemic.

- a. Should there be an independent international investigation of China’s behavior with respect to the coronavirus pandemic? If so, what role should the United States play in that investigation?**

Yes. I agree with Professor Miller’s comments in his written testimony that a “thorough and fair international investigation into the coronavirus outbreak would help develop and systematically collect immensely valuable information about the science and policy

involved in viral outbreaks,” and that “[t]he world needs to understand how and why the coronavirus emerged and spread so that it can prepare for future crises.”

China’s retaliatory response to Australia’s proposal for an international investigation into the origins of the pandemic illustrates the difficult balance between securing cooperation from the host state and ensuring a transparent and effective investigation.

https://www.washingtonpost.com/world/asia_pacific/bristling-at-calls-for-coronavirus-inquiry-china-fires-trade-salvo-at-australia/2020/05/12/29c53058-93fe-11ea-87a3-22d324235636_story.html?arc404=true (May 12, 2020) As calls for an international inquiry were mounting, Australian officials expressed concern that “Washington’s attack on China [was giving] Beijing room to argue that Australia’s request for an independent inquiry [was] part of a U.S.-led agenda to blame it for the coronavirus outbreak,” and that “the American approach of ‘let’s get China’” was undermining Australia’s efforts “to cast the review as open-minded and global.” <https://www.reuters.com/article/us-health-coronavirus-australia-china/australia-annoyed-as-us-pushes-wuhan-lab-covid-19-theory-idUSKBN22K118> (May 8, 2020)

Despite this initial resistance, China has agreed to an independent review of the global coronavirus response, which has been launched under the auspices of the World Health Organization (WHO). <https://www.statnews.com/2020/07/09/who-review-covid19-pandemic-response/> (July 9, 2020) The review will be led by former Liberian President Ellen Johnson Sirleaf, a Nobel Peace Prize winner, and Helen Clark, former prime minister of New Zealand. *Id.* Countries can propose potential members of the review panel, which is expected to deliver an interim report in November and a “substantive” report to the World Health Assembly (the WHO’s governing body) at its 2021 meeting next May.

The United States’ suspension of funding to the World Health Organization, which relies on contributions from member states, and its notice of withdrawal from the WHO’s founding treaty effective July 2021, will deprive the United States of any meaningful role in this international response.

Meanwhile, China has taken advantage of the absence of U.S. leadership and support for the WHO’s efforts by increasing its funding to the organization, leading to a vicious cycle whereby U.S. concerns that the WHO is being influenced disproportionately by China may become a self-fulfilling prophesy.

https://www.washingtonpost.com/world/asia_pacific/china-pledges-additional-30-million-funding-for-world-health-organization/2020/04/23/24f9b680-8539-11ea-81a3-9690c9881111_story.html (April 23, 2020)

The best course of action would be to: (1) support the WHO (while working from within the organization to promote needed reforms), (2) rescind our notice of withdrawal, (3) ensure the appointment of respected experts to the review panel, and (4) use our behind-the-scenes leverage to pressure China to cooperate fully with the investigation, without experiencing cooperation as capitulation or humiliation. The United States must also lead by example with transparency about our own ongoing COVID-19 response at all levels of government, including by making relevant data publicly available to journalists and

researchers to the maximum extent possible, and by identifying and following “best practices” in the detection of harmful viruses and prevention of their spread.

b. Would it be possible to hold China accountable for its behavior using international fora such as the International Court of Justice? If so, how would that work?

The immediate priority (in addition to stopping the continued global spread of the virus) should be securing Chinese cooperation and access to evidence that will provide scientists with a better understanding of exactly where the novel coronavirus first appeared and how it spread. That said, there will also need to be an accounting of what Chinese (and other countries’) authorities could and should have done differently to avoid the worst outcomes. The International Court of Justice (ICJ) can adjudicate bilateral disputes between states, and it can also issue advisory opinions at the request of a competent U.N. organ or specialized agency (such as the General Assembly or the WHO). Some have suggested that the ICJ would be an appropriate forum in which to address legal responsibility for climate change. Some of the same considerations would apply in both contexts. *See, e.g., Daniel Bodansky, The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L. J. 679, 708 (2017) (recommending international adjudication as “a complement rather than as a substitute for” climate change negotiations).

There is a non-frivolous argument that the ICJ would have jurisdiction over a claim against China under Art. 75 of the WHO Constitution, which provides for the Court’s jurisdiction over “any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly...” A central question would be whether an alleged violation of the reporting requirement in the 2005 International Health Regulations promulgated by the World Health Assembly falls within the scope of this treaty provision. International lawyer Peter Tzeng has offered a preliminary analysis of these jurisdictional questions. <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/> (April 2, 2020) However, the United States would lack standing to bring such a claim if it is no longer party to the WHO Constitution.

c. Would the imposition of new tariffs against China be an effective way to hold China accountable? Why or why not?

My view on tariffs is informed by experts in economics, who have established definitively that tariffs on foreign goods are ultimately paid by American consumers. As Veronique de Rugy, Senior Research Fellow at the Mercatus Center at George Mason University and Senior Fellow at the American Institute for Economic Research, has noted, several academic studies have shown that tariffs imposed on imports from China and other U.S. trading partners starting in March 2018 “have actually been shouldered largely by Americans rather than by foreign companies.” <https://www.aier.org/article/should-china-pay-reparations/> (May 7, 2020) As Dr. de Rugy indicates, “[a]ny COVID-19 retaliation tariffs would be no different, and would not be paid for chiefly by the Chinese but, rather, by Americans in the form of higher prices.”

It is important to emphasize that any talk of cancelling U.S. sovereign debt held by China is even more reckless, and should be abandoned immediately. Senior economists and investment analysts agree that cancelling Chinese debt “would throw the entire U.S. financial system into disarray.” <https://www.nbcnews.com/business/economy/should-u-s-refuse-pay-back-its-1-trillion-debt-n1227351> (June 11, 2020) Even raising the *possibility* of taking this action “could prompt investors to reevaluate Treasuries as the world’s benchmark safe haven.” *Id.* Moreover, “China is a principal buyer of Treasuries, so if the country significantly scaled back its purchases, or sold a material amount of its existing holdings, the associated slump in demand could drive up America’s borrowing costs.” *Id.*

d. Would sanctions against Chinese government officials and entities be an effective way to hold China accountable? If so, what kinds of sanctions would be effective, and what can Congress do to facilitate them?

As a general matter, I would favor targeted sanctions over tariffs as a foreign policy tool because there is less risk that the actual costs will be borne by American consumers. However, the complex landscape of U.S. sanctions on China and Chinese officials means that it could be difficult to differentiate a new round of sanctions from existing measures related to other abuses by the Chinese government.

Professors Jentleson’s and Whytock’s study of the use of coercive diplomacy towards Libya found that “economic sanctions can be an effective component of a coercive diplomacy strategy when imposed multilaterally and sustained over time.” https://www.belfercenter.org/sites/default/files/files/publication/is3003_pp047-086.pdf

In my view, the most important thing Congress can do to equip the United States to coordinate an effective multilateral sanctions strategy is to continue using its Article I authority to prevent further dismantling of the State Department, and to bring credibility and expertise back into our handling of foreign affairs.

e. What else could the U.S. government—and Congress, in particular—do to hold China accountable for its behavior without harming our own national interests?

A recent Heritage Foundation issue brief by senior policy analyst Olivia Enos emphasizes the importance of multilateralism in attempts to hold the Chinese Communist Party accountable for its response to COVID-19, and calls on the United States to “lead the way.” <http://report.heritage.org/ib5074> (May 12, 2020) The report, which predates the World Health Assembly’s resolution establishing an international review panel, recommends that the U.S. “press the international community to coalesce around pursuing an international investigation into the CCP’s mishandling of the COVID-19 outbreak,” and advises that “in partnership with like-minded countries, the U.S. should press the CCP to respect civil society and individual liberties that can help prevent future catastrophes.” *Id.*

Whether we like it or not, we are currently engaged in an international credibility contest with China. In my opinion, the most important thing that Congress can do is to *ensure that the United States leads by example in our domestic response to the ongoing health crisis*. The more the current Administration ignores and even denigrates scientific expertise and seeks to cast doubt on, or even conceal, statistics about infections, hospitalizations, and deaths, the less seriously we can expect other countries to take us when we criticize China's conduct in December 2019 and January 2020.

In order to hold another veto-wielding member of the U.N. Security Council "accountable" for its actions, the United States requires the ability to mobilize allies and partners in support of a coordinated response. By squandering our international goodwill and emulating some of the behavior more often associated with authoritarian regimes, the U.S. government is exacerbating the dire domestic impact of COVID-19 and ceding ground to China in our ongoing geopolitical rivalry.

I concur in the assessment offered by Kurt Campbell, Chair and CEO of the Asia Group and former Assistant Secretary of State for East Asian and Pacific Affairs, and Rush Doshi, Director of the Brookings Institution's China Strategy Initiative, that "Beijing understands that if it is seen as leading, and Washington is seen as unstable or unwilling to do so, this perception could fundamentally alter the United States' position in global politics and the contest for leadership in the twenty-first century."
<https://www.foreignaffairs.com/articles/china/2020-03-18/coronavirus-could-reshape-global-order> (March 18, 2020)

Dr. Campbell and Dr. Doshi paint a bleak picture: "During the 2014–15 Ebola crisis, the United States assembled and led a coalition of dozens of countries to counter the spread of the disease. The Trump administration has so far shunned a similar leadership effort to respond to the coronavirus. Even coordination with allies has been lacking. ... China, by contrast, has undertaken a robust diplomatic campaign to convene dozens of countries and hundreds of officials, generally by videoconference, to share information about the pandemic and lessons from China's own experience battling the disease." *Id.* In their view, the United States has little to gain by "put[ting] China at the center of its coronavirus messaging," and would do better by sending "a public message that stresses the seriousness of a shared global challenge and possible paths forward." *Id.*

A group of foreign policy experts from the Center for American Progress have reached a similar conclusion and have proposed concrete steps the U.S. should take to lead the global response to the coronavirus crisis. As these experts point out, "the inept U.S. response to the coronavirus crisis domestically has hampered its ability to respond internationally."
<https://www.americanprogress.org/issues/security/news/2020/03/26/482274/us-leading-global-response-coronavirus-crisis/> (March 26, 2020)

Congress can best contribute to restoring U.S. leadership by supporting science-based approaches to testing, tracing, and treatment, and by using its oversight powers to hold domestic governmental actors to account.

Chinese cooperation in finding a cure for COVID-19 could be much more valuable in the long run than forcing China to liquidate U.S. Treasuries to pay civil damages awards. Accountability in a broad sense will come in the form of global public opinion, and the reaffirmation of the United States' leading role as a model of democratic governance in a world increasingly menaced by opportunistic authoritarians.

Responses to Questions from Senator Leahy

Questions About Likely Effects of Civil Suits Against China (Q1(a)-(b))

Q1. You have expressed skepticism about whether amending the Foreign Sovereign Immunities Act to allow private litigation against China for its response to Covid-19 would actually force China to negotiate or change its behavior.

a. Why are you skeptical about whether private civil suits would actually pressure China to change its behavior?

The leverage a civil suit might provide in shaping a private actor's conduct is simply not present when we are talking about a permanent member of the U.N. Security Council. I have elaborated on the basis for my deep skepticism in my responses to questions 3(a), 3(b) and 3(c) from Senator Feinstein, which I would incorporate by reference here.

I would also echo the criticism of the Trump Administration's current approach levied by Jude Blanchette, Freeman Chair in China Studies at the Center for Strategic and International Studies. As Mr. Blanchette notes, the Administration's recent decision to "take on" the nearly 92 million members of the CCP, the vast majority of whom "have no meaningful connection to policy decisions," allows President Xi "to paint a dire picture of a political system under siege by hostile foreign powers."
<https://www.csis.org/analysis/united-states-has-gotten-tough-china-when-will-it-get-strategic> (July 17, 2020)

I agree with Mr. Blanchette that by "prioritiz[ing] tough-appearing tactics over patient, strategic thinking," the Administration's actions "detract from the serious work the United States is doing to lean into strategic competition," and they leave "the United States ill-prepared to face the very real threats emanating from the Xi administration—challenges that will persist for years, if not decades." *Id.*

b. If Congress were to amend the Foreign Sovereign Immunities Act to allow private litigation against the Chinese government for its handling of the ongoing pandemic, do you think American citizens would be able to collect any damages awarded?

For the reasons elaborated above, I do not think private litigation will ultimately put Chinese money in the pockets of American claimants. I would incorporate by reference my responses to questions 1(a)-(c) and 2(a)-(f) from Senator Feinstein.

It is possible that, if the U.S. government somehow expanded the jurisdiction of the Foreign Claims Settlement Commission, ensured the presence of adequate funds, and devised criteria governing the admissibility and payment of claims, there could be some sort of financial compensation for some Americans. This could be done by the political branches without the need for private litigation.

Questions About U.S. Exposure to Litigation Risk (Q2(a)-(b))

Q2. During the hearing before the Senate Judiciary Committee last week, you expressed concern that the United States has the most to lose from weakened immunity rules. Furthermore, given that the United States only makes up 4% of the world's population but comprises 25% of the world's confirmed COVID-19 cases, we should be careful about other countries responding in kind and trying to hold the United States responsible for its handling of the pandemic.

- a. If Congress were to amend the Foreign Sovereign Immunities Act to allow private litigation against the Chinese government for its handling of the ongoing pandemic, what impact would you expect on foreign private suits against the United States? Specifically, could you please explain how you expect the United States would face weakened immunity rules abroad?**

I would not necessarily expect a flood of retaliatory suits in China, since China has other forms of leverage it can use in its diplomatic relations with the United States. That said, there have been several suits filed in China already. More significantly, the accumulation of civil suits against China in U.S. courts has prompted a re-examination of China's adherence to an absolute theory of immunity that does not contain exceptions even for commercial activities.

I am more concerned about potential suits against the United States in other countries' courts for the transboundary effects of our inadequate domestic response to COVID-19, as well as the longer-term legal exposure we would face from further erosion of the international legal principle of foreign state immunity. I am also concerned that other countries could invoke the U.S. example and resort to abrogation of sovereign immunity as a way of escalating foreign policy disputes, which could (1) introduce a dangerous element of uncertainty into diplomatic relations, foreign direct investment, trade, and other types of cross-border contacts and transactions, and (2) deprive governments of the ability to devise and execute nuanced approaches to complex foreign policy problems by giving particular groups of private claimants a disproportionate role in driving diplomatic outcomes. It is also worth emphasizing that, of course, claims against the United States in any context are actually claims against the U.S. Treasury.

For further consideration of the issues raised by this question, I would incorporate by reference my response to question 4(a), 4(c), and 4(d) from Senator Feinstein.

b. With the passage of such an amendment to the Foreign Sovereign Immunities Act, could the United States open itself up to private litigation for its handling of the ongoing COVID-19 pandemic?

Domestic sovereign immunity doctrines govern the possibility of private litigation against the U.S. government and U.S. officials in U.S. courts for their response (or lack thereof) to the ongoing COVID-19 pandemic. The Federal Tort Claims Act (FTCA) currently prohibits suits against the U.S. government in U.S. courts for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty,” as well as for “any claim arising in a foreign country.” *See generally* CRS, *The Federal Tort Claims Act (FTCA): A Legal Overview* (Nov. 20, 2019), <https://fas.org/sgp/crs/misc/R45732.pdf>

The stark contrast between abrogating China’s sovereign immunity while invoking the United States’ sovereign immunity from suit, including by the same potential claimants, would not be lost on observers within or outside the United States.

When it comes to litigation risk in foreign courts, it is worth noting that the United States is not a party to the U.N. Convention on Jurisdictional Immunities of States and Their Property (not yet in force). We therefore rely on other countries’ unilateral guarantees of foreign state immunity to protect U.S. interests in foreign courts, and on customary international law. If the issue ever arose before an international tribunal, it is difficult to imagine a tribunal allowing us to avail ourselves of a protection (foreign state immunity) that we deny to other countries. As a doctrinal matter, this could either be because the tribunal would view our conduct as taking the position that international law does not require a forum state to provide such immunity (thereby negating our claim), or based on the application of equitable principles.

Questions About Accountability and Global Public Health (Q3(a)-(b))

Q3. During the hearing you also noted the need for American leadership during this international crisis. You stated that the United States has abdicated its international leadership role.

a. In lieu of amending the Foreign Sovereign Immunities Act, what should the United States do to hold China accountable for its Covid-19 failures?

I would incorporate by reference my responses to questions 5(a)-(e) from Senator Feinstein. I would also re-emphasize the importance of multilateral approaches to determining when and how the novel coronavirus emerged and began to spread, and containing and remedying the devastating harms it continues to cause.

I am very concerned that a politically-driven blame game is preventing us from engaging strategically with China and the WHO on issues including the supply and distribution of Personal Protective Equipment (PPE) and the development and production of a safe and effective vaccine.

The U.S-China relationship is shaping up to be one of the world's most, if not the most, consequential bilateral relationship of this century. Any responsible strategy for pursuing "accountability" must bear that reality firmly in mind.

b. Would the United States' withdrawal from the World Health Organization (WHO) diminish its ability to lead on international health crises like the current pandemic?

Yes, it would, and it already has, even though our announced withdrawal will not take effect until July 2021. I would (re)incorporate by reference my response to question 5(e) from Senator Feinstein here. I am also very concerned that we seem to have little desire to engage constructively with partners and allies in our mutual self-interest across a wide range of critical policy areas. It is no exaggeration to say, as others have observed, that the current Administration is presiding over the precipitous and preventable global decline of the United States.

I am genuinely fearful, not only of the catastrophic short-term consequences of our largely self-imposed predicament, but also of its long-term implications if we do not course-correct soon.

Observers have attributed our disastrous (non)response to COVID-19, and many of this Administration's harmful policies, to a lethal combination of incompetence and malevolence. *See, e.g.,* Quinta Jurecic & Benjamin Wittes, *Incompetence Exacerbated by Malevolence*, <https://www.theatlantic.com/ideas/archive/2020/03/incompetence-exacerbated-by-malevolence/607696/> (discussing the Administration's coronavirus response) (March 10, 2020); Michael Dorf, *Trump's Toxic Mix of Incompetence and Malevolence*, <https://www.newsweek.com/michael-dorf-trumps-toxic-mix-incompetence-malevolence-550549> (Jan. 31, 2017); Greg Sargent, *Trump's Incompetence Will Not Save Us from His Malevolence*, <https://www.washingtonpost.com/blogs/plum-line/wp/2017/10/17/trumps-incompetence-will-not-save-us-from-his-malevolence/> (Oct. 17, 2017); Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas*, <https://www.lawfareblog.com/malevolence-tempered-incompetence-trumps-horrifying-executive-order-refugees-and-visas> (Jan. 28, 2017).

We need to press the "reset" button and rebuild U.S. credibility and leadership at home and abroad. As Jude Blanchette, Freeman Chair in China Studies at the Center for Strategic and International Studies, has written: "most importantly, the United States needs to articulate a vision—a grand strategy—that looks *beyond* the narrower (albeit important) issue of China to depict the type of global order the United States aims to help realize and protect. ... Imagine if the United States took leadership over the litany of challenges—some existential—that now face the planet: climate change, inequality, racial injustice, poverty, and global pandemics. Few expect, or want, Beijing to lead on any of these. Many are hoping the United States eventually will." <https://www.csis.org/analysis/united-states-has-gotten-tough-china-when-will-it-get-strategic> (July 17, 2020)

Responses to Questions from Senator Klobuchar

In your written testimony, you discuss whether civil lawsuits against China are likely to result in payments to Americans who have contracted coronavirus.

Q1. Do you believe that lawsuits against China would provide any meaningful recovery for Americans who have contracted coronavirus? Why or why not?

I would incorporate by reference my responses to questions 2(a)-(e) from Senator Feinstein and questions 1(a)-(b) from Senator Leahy. I also note that many of the suits filed to date are on behalf of plaintiffs (individuals and entities) who have suffered secondary economic and financial effects from the spread of the pandemic in the United States and the ongoing failure to contain it, rather than direct harm as the result of an infection.

Virtually every single person in the United States could seek some sort of recovery from China under plaintiffs' theory of the case. This underscores how unrealistic these suits are in promising meaningful relief for claimants.

Q2. In your opinion, what should be done to encourage foreign nations to manage disease outbreaks within their borders effectively?

This is perhaps the most important question to ask, even though it was not the focus of the Committee's hearing. I'm unlikely to be able to do it justice in a QFR response, but I'm glad to offer some preliminary thoughts.

In 2014, the United States and international partners launched the Global Health Security Agenda (GHSA), <https://ghsagenda.org/>. Brookings Nonresident Senior Fellow and former Ambassador Bonnie Jenkins notes that, in 2013, "[w]e realized that most countries (possibly as high as 70%) were not compliant with the WHO's 2005 International Health Regulations." Jenkins, *Now Is the Time to Revisit the Global Health Security Agenda*, <https://www.brookings.edu/blog/order-from-chaos/2020/03/27/now-is-the-time-to-revisit-the-global-health-security-agenda/> (March 27, 2020) I agree with her assessment that "[t]he GHSA countries must maintain high-level political attention and commitment to the initiative," and that "the GHSA and national preparedness efforts need sustained funding and an even larger corps of member countries." *Id.*

Despite the overarching principle of state sovereignty, countries have a legitimate interest in each other's disease management protocols for at least two reasons. First, every human being is entitled to basic human rights. The WHO Constitution, which Congress authorized the President to join in 1948, affirms the principle that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being *without distinction of race, religion, political belief, economic or social condition.*" Freedom from preventable disease is a basic precondition for human flourishing.

Second, like excessive greenhouse gas emission, ineffective disease management can have significant harmful effects on the welfare of other countries' populations. That is why countries created the WHO in 1946 as a specialized agency of the United Nations "for the

purpose of co-operation among themselves and with others to promote and protect the health of all peoples.” It might sound trite, but this is a classic example of the type of situation in which no country can or should “go it alone.”

Lucie Gadenne, Assistant Professor of Economics at Warwick University, and Maitreesh Ghatak, Professor of Economics at the London School of Economics, have suggested that the WHO should narrow its focus to emphasize Global Response to Infectious Diseases (GRID). While I do not have a position on that broader recommendation, I fully endorse the other two prongs of their recommended reforms:

- Giving the WHO capacity – beyond that granted by the International Health Regulations – to sanction countries that do not follow its rules. The lack of “teeth” in the IHR was a deliberate design choice by members of the World Health Assembly, but the COVID-19 pandemic might provide the impetus required for states to consent to more robust monitoring and enforcement procedures. Notably, however, “GRID cannot sanction countries based on outcomes but on the steps taken to abide by its recommendations.”
- Ensuring that the WHO has a budget adequate to the task. Currently, WHO’s annual budget of roughly \$2 billion “is not much higher than the budget of the main hospital in its host city, Geneva.” Professors Gadenne and Ghatak propose establishing independent funding sources for GRID that “free it from relying on voluntary contributions by individual countries and shield it from the undue political influence of powerful countries.”

<https://voxeu.org/article/world-health-organization-grid-reform> (May 30, 2020); see also Yanzhong Huang, Council on Foreign Relations, *How to Reform the Ailing World Health Organization*, <https://www.cfr.org/expert-brief/how-reform-ailing-world-health-organization> (May 3, 2016); Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations> (June 5, 2020).

Kelley Lee, Professor and Research Chair in Global Health Governance at Simon Fraser University, has also emphasized the problems endemic to any organization where the funding “is so skewed toward voluntary contributions” rather than assessed contributions. <https://www.vox.com/2020/4/19/21224305/world-health-organization-trump-reform-q-a> (May 29, 2020) I agree with Professor Lee’s concern “that we don’t destroy what little we already have. Instead, go the other way, let’s see what we can do to build up WHO and make it the organization we need it to be.” *Id.*

Finally, I must emphatically reemphasize the point that the United States needs to lead by example. We cannot expect, let alone compel, other countries to manage disease outbreaks with candor, transparency, effective coordination, and whole-of-society mobilization unless we do so ourselves.

In addition to renewing our commitment to the Global Health Security Agenda, we should adopt a version of the 69-page Playbook for Early Response to High-Consequence Infectious Disease Threats and Biological Incidents developed by the Obama National Security Council as official policy, and share our knowledge and “lessons learned” with other countries. <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285> (March 25, 2020)

I would also urge Congress to review and consider implementing other existing recommendations such as those in the National Science and Technology Council’s Pandemic Prediction and Forecasting Science and Technology Working Group’s report *Towards Epidemic Prediction: Federal Efforts and Opportunities in Outbreak Modeling*. https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/NSTC/towards_epidemic_prediction-federal_efforts_and_opportunities.pdf (December 2016)

As the NSTC Working Group report makes clear, cooperating with global partners to collect and share the relevant data, both historical and real-time, will better prepare all countries to manage the next outbreak when (not if) it happens:

As the boundaries between humans and animals decrease, the risk of zoonotic disease emergency will continue to increase. ...

Discovery of potential zoonotic pathogens is not sufficient, however, to understand the risk they may pose to humans. There have been too few spatio-temporal surveys to understand transmission dynamics, particularly across multiple interacting species (for example, wildlife, nearby domestic animals, and humans); and investigations of transmission dynamics between humans and animals to which exposure may be especially high, such as companion animals and animals used for food. Little also is known about how to predict whether a novel agent in a non-human reservoir possesses (or could acquire) the capability to infect humans, cause disease, and be transmitted among humans; or about the interplay of biological, ecological, environmental, and social-behavioral factors in driving disease emergence.

To advance public health towards the vision of pandemic protection, the Federal government should strengthen support for modeling R&D, especially in animals and at the human-animal-environment interfaces. Specifically, the [Working Group] recommends that the Federal government, to the extent possible within existing authorities and resources, ... *[d]evelop a “One Health” national strategy for predictive modeling of potential infectious disease threats globally, encompassing human, animal, plant, and environmental health priorities, science, and communities.*

Responses to Questions from Senator Booker

Questions About Live Wildlife Markets and the International Wildlife Trade (Q1(a)-(c))

Q1. At the hearing, we discussed a bipartisan letter that I led along with Chairman Graham and many of our colleagues in April calling for an immediate global ban on “live wildlife markets” as well as the international trade of wildlife not for conservation purposes. As the letter explained:

Scientists studying zoonotic diseases—diseases that jump between animals and humans—have pointed to the close proximity of shoppers, vendors, and both live and dead animals at wildlife markets in countries around the world as prime transmission locations for these pathogens. The stress of transport and holding wild animals in these crowded markets where they are also sometimes slaughtered creates an unnatural environment where viruses from different species are able to come in contact, mutate, and spread from one species to another. The viruses can subsequently spread or “spill over” into humans through handling and consumption of wildlife, potentially starting highly contagious outbreaks of new and deadly diseases for which we have no natural immunity—as we are currently seeing with COVID-19 and have seen with SARS, Ebola, monkeypox and Lassa fever in the recent past.*

In light of the limited time afforded by the live-questioning format, I would like to give you the opportunity to elaborate on this issue.

- a. What legislative tools can Congress use to try to push for a global ban on live wildlife markets and the international wildlife trade?**

I commend Congress for this bipartisan initiative, which will hopefully catalyze important conversations at the national and international levels.

First, as I emphasized in my response to question 5(e) from Senator Feinstein, pursuing any of these goals will require rebuilding an effective State Department, and restoring dignity, respect, and credibility to our conduct of foreign policy. Congress can help achieve these goals through its crucial role in appropriations, appointments, and oversight. This includes protecting and empowering agency inspectors general, and limiting the ability of the Executive Branch to circumvent the Senate’s advice-and-consent function by over-reliance on acting officials.

Second, Congress could establish a congressional advisory commission on global zoonotic disease prevention to develop concrete recommendations and a plan of action for

* Letter from Senators Cory A. Booker, Lindsey O. Graham, et al. to Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., et al. 1 (Apr. 8, 2020), [https://www.booker.senate.gov/imo/media/doc/04.08.20_Booker_Graham_Live%20Market%20Letter_%20\(002\)%20\(001\)\[1\].pdf](https://www.booker.senate.gov/imo/media/doc/04.08.20_Booker_Graham_Live%20Market%20Letter_%20(002)%20(001)[1].pdf)

designing, implementing, and enforcing the proposed global ban. The commission will require scientific and technical experts to formulate definitions of safe and unsafe activities, as well as experts on trade and development who can offer input on how to develop alternative sources of income for those whose livelihoods currently depend on unsafe activities. The commission's initial mandate could focus on live wildlife markets and aspects of the international wildlife trade, while supplemental mandates could address other core drivers of animal-borne infectious diseases, such as global forest loss and fragmentation.

Third, although it appears unlikely that Congress could compel the President to rescind his notice of withdrawal from the World Health Organization, Congress could likely appropriate funds for the WHO to be paid as voluntary contributions to the organization, and/or appropriate funds for other organizations that could be charged with coordinating global efforts to prevent zoonotic disease transmission, such as the World Organization for Animal Health (OIE), to which we belong.

Fourth, Congress could study the potential benefits of joining international environmental treaties so that the United States can play a more significant role in supporting and coordinating the work done by environmental treaty bodies. The 1992 Convention on Biological Diversity (CBD), which the United States has signed but not ratified, could provide a framework for pursuing negotiations about how best to eliminate conditions that permit the transmission of zoonotic pathogens from animals to humans. China will host the next CBD Conference of the Parties, which is currently scheduled for May 2021 in Kunming. <https://www.cbd.int/cop/> The United States has been an active observer in that forum and could use the opportunity to raise these issues.

Fifth, Congress could encourage and support international efforts under the auspices of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, to which the United States is party. Congress could also focus attention on and support ongoing collaboration between the World Trade Organization (WTO) and the World Organization for Animal Health (OIE) on facilitating countries' efforts to eliminate conditions conducive to the transmission of zoonotic pathogens.

Sixth, Congress could help foster partnerships with private philanthropic organizations to convene international conferences to further refine and adapt the advisory commission's recommendations. This will be especially important for developing strategies to implement the commission's recommendations in countries where zoonotic diseases are most likely to arise, but who may lack sufficient capacity to identify and contain outbreaks at a sufficiently early stage.

Seventh, Congress could examine and decide whether to support the recommendations presented to the WHO in April by over 200 organizations endorsing a permanent ban on live wildlife markets and the use of wildlife in traditional medicine:

- Recommend to governments worldwide that they institute a permanent ban on live wildlife markets, drawing an unequivocal link between these markets and their proven threats to human health.

- Recommend to governments that they address the potential risks to human health from the trade in wildlife – including collection from the wild, ranching, farming, transport, and trade through physical or online markets for any purpose – and act to close down or limit such trade in order to mitigate those risks.
- Unequivocally exclude the use of wildlife, including from captive-bred specimens, in WHO's definition and endorsement of Traditional Medicine and revise WHO's 2014-2023 Traditional Medicine Strategy accordingly to reflect this change.
- Assist governments and lead a coordinated response among the World Trade Organization, World Organization for Animal Health (OIE) and other multilateral organizations worldwide in awareness-raising activities to clearly inform of the risks of wildlife trade to public health, social cohesion, economic stability, law and order, and individual health.
- Support and encourage initiatives that deliver alternative sources of protein to subsistence consumers of wild animals, in order to further reduce the risk to human health.

<https://www.prnewswire.com/news-releases/world-animal-protection-calls-on-who-for-global-ban-of-wildlife-markets-to-save-human-lives-301036814.html> (April 7, 2020)

- b. Earlier this year China announced that it was banning the trade and consumption of wild animals. But a number of analyses show that China's ban has significant loopholes, including an exception for trading wildlife for medicinal purposes.† What tools can Congress use to push China and other countries to impose strong and serious bans on live wildlife markets and related trading?**

The available diplomatic strategies for changing China's behavior on any given issue are different than they are for many other countries whose relationships with the United States involve different background assumptions, trade-offs, and goals.

Generally speaking, in my view, the United States can have the most influence if we lead by example by joining and abiding by international agreements, and by adopting and enforcing robust domestic regulations. This is especially true when it comes to issues such as wildlife conservation and management, where perceived short-term economic benefits can obscure more important, longer-term systemic costs. We should also be prepared to provide development assistance to support communities as they transition to more sustainable models of consumption and production.

Congress could also study proposals for reducing the demand that drives the unsafe exploitation of wild animals and their habitats. Li Zhang, Ning Hua, and Shan Sun have explained that “[t]hroughout Chinese history, wild animals have been viewed as an

† See, e.g., James Gorman, *China's Ban on Wildlife Trade a Big Step, but Has Loopholes, Conservationists Say*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/science/coronavirus-pangolin-wildlife-ban-china.html>.

important source of food and income. From a traditional Chinese perspective, as [in] many other countries, wild animals are a resource to be exploited, not something to be protected for their intrinsic value.” Moreover, “with the development of a consumer economy, people’s demand for wild animal products has grown substantially.” See Zhang, Hua & Sun, *Wildlife Trade, Consumption and Conservation Awareness in Southwest China*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7088108/> (March 21, 2008)

Members of Congress could make clear in their public statements and interactions with Chinese counterparts that China’s failure to regulate environmentally destructive and dangerous practices within its borders will prevent China from becoming a respected international leader and partner with the United States. Congress could also engage in more direct cooperation and information-sharing with Chinese counterparts, for example by engaging with the Biodiversity Working Group of the China Council for International Cooperation on Environment and Development (BWG/CCICED).

c. During the SARS outbreak in 2003, China implemented a narrower ban on wildlife trading. But it was only temporary—China later rolled it back.‡ How can we persuade other countries that bans on wildlife markets and trading need to be permanent?

I share the hope of conservation experts that, “[i]n the long run ... the spike in outrage over the link between commercial wildlife exploitation and COVID-19 will lead to lasting change across the wildlife industry in China, as well as elsewhere in the region.” <https://news.mongabay.com/2020/04/as-calls-to-shutter-wildlife-markets-grow-china-struggles-with-an-industry-worth-billions/> (April 27, 2020)

In the near term, the United States should work with other countries to help design and provide alternative sources of livelihood for those engaged in the wildlife trade. *Id.* The United States should also work to find ways to counter the influence of the Traditional Chinese Medicine (TCM) lobby, which has been linked to “catastrophic levels of poaching” across the world as a result of the adoption of TCM practices by millions of consumers. *Id.* That being said, David Olson, director of conservation at the World Wildlife Fund in Hong Kong, wisely cautions that “the international calls for action [can be] counterproductive because of the nationalism and politics involved.” *Id.* If calls to halt wildlife consumption and the wildlife trade can attract support in domestic public opinion, they are more likely to be effective and permanent.

A core challenge, as emphasized by Aili Kang, executive director of the Wildlife Conservation Society (WCS)’s Asia Program, will be to keep public support active over the longer term, once people begin to recover from the pandemic and risk “forget[ting] what happened.” *Id.* Funding for ongoing education and public service announcements that remind people of the catastrophic consequences of their consumption choices might prove a powerful strategy for entrenching lasting change.

‡ See, e.g., Steven Lee Myers, *China Vowed To Keep Wildlife Off the Menu, a Tough Promise To Keep*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/world/asia/china-coronavirus-wildlife-ban.html>.

In this context, it is also worth bearing in mind observations offered by Grace Ge Gabriel, Asia Regional Director for the International Fund for Animal Welfare:

Demand reduction efforts by non-governmental organizations can help eliminate ignorance, but cannot deter wildlife crimes driven by greed. Combating wildlife crime needs policy support. Only by combining clear and unambiguous laws, vigorous enforcement and meaningful penalties for violators can we change the high-profit, low-risk nature of wildlife crime. Making wildlife crime high-risk not only prevents illegal wildlife trade, but also stigmatizes it in the eyes of consumers.

<https://www.un.org/en/chronicle/article/will-china-say-no-wildlife-trade> (visited July 18, 2020)

As with most issues, while there is no silver bullet, Congress could support and encourage governmental and civil society actors to pursue some of these proposed steps.

Question About Discovery of U.S. Government Records in Cases Against China (Q2)

Q2. In your written testimony, you discussed some of the unintended consequences of legislative proposals to amend the Foreign Sovereign Immunities Act (FSIA) to enable COVID-related civil lawsuits to proceed against foreign nations. In particular, you explained:

Amending the FSIA to allow civil suits to go forward would not result in obtaining compensation, and would likely make that goal more difficult to achieve. The last thing this country needs are protracted court battles and reciprocal discovery about which country's or state's bungled response caused more direct and avoidable harm to U.S. claimants. If these claims were actually litigated, it would provide attorneys for China with a captive audience to catalogue the shortcomings in U.S. local, state, and federal responses to a threat that was reportedly highlighted by the intelligence community in the President's Daily Brief as early as mid-January.

What kinds of materials generated by the Trump Administration might be subject to discovery in such litigation?

In any civil lawsuit, a party can subpoena discoverable materials, including electronic records, from a third party. Discoverable material is nonprivileged material that is related to any party's claim or defense and is proportional to the needs of the case. Thus, any nonprivileged materials generated by the Trump Administration (or by any state or local government and its officials) that are relevant and proportional might be subject to discovery, as long as the parties seeking discovery take reasonable steps to avoid imposing undue burden or expense on the nonparty. A third-party subpoena could also reach materials held by U.S. companies involved in responding to the COVID-19 emergency.

Giving China the opportunity to avail itself of U.S. courts' subpoena power should give Congress pause. One could also envision attempts to implead U.S. governmental actors as parties via counter-claims and cross-claims, and/or allegations of contributory negligence or comparative fault.

There are additional ways for defendants and others to obtain relevant information. The Freedom of Information Act (FOIA) entitles citizens to compel production of certain government documents even outside a litigation context, and denials of FOIA requests or allegedly excessive redaction can be challenged in court. In addition, there is ample information already in the public record that China could use, either in a court of law or in the court of public opinion, to deflect the spotlight from its own failures and shine it on the failures of some U.S. officials to respond appropriately to a known public health threat.

If the core defense or allegation is that U.S. authorities failed to take steps that they should have taken to protect the public's health and to minimize the scale, scope, and duration of the disruption to the U.S. economy, then one could expect a defendant to seek materials including internal government correspondence about: why officials apparently ignored the extensive pandemic preparation guidance left by the prior administration; who made decisions about the U.S. pandemic response at various junctures, and what credentials or experience qualified them to make those decisions; what basis government officials have invoked for disregarding the scientific consensus about crucial public health measures such as mask-wearing; and how many deaths could have been avoided by properly equipping and staffing hospitals and other care centers.

To be sure, in a litigation context, some of these requests could ultimately be denied on the grounds of insufficient relevance to the particular plaintiff's claims, undue burden, and other possible objections. However, the fact that these defenses would almost certainly be raised at both the liability and damages phases of any trial should disabuse proponents of these suits of the notion that China alone would occupy the "hot seat" in any proceedings.

Questions About Harms to U.S. Interests from Amending the FSIA (Q3 & Q4)

Q3. As you noted, many legal analysts, including George W. Bush's State Department Legal Adviser, John Bellinger, have raised concerns that if the United States were to allow China to be sued in cases like these, China could retaliate. China could make the United States or U.S. officials subject to being sued there, or potentially take other measures against U.S. interests. What are some of the specific kinds of retaliatory measures that Congress should be most concerned about in this context?

I would incorporate by reference my responses to questions 4(a)-(b) from Senator Feinstein. Although China could take retaliatory measures, my bigger concerns are that amending the FSIA to allow these suits would (1) add fuel to President Xi's ability to paint himself as the defender of Chinese sovereignty from foreign interference, (2) increase the domestic political costs to President Xi of cooperating with the United States and other countries to provide information that could help identify the specific origins of the virus and boost efforts to combat and treat it, and (3) throw another wrench into already fraught

U.S.-Chinese relations across a range of issues including travel, telecommunications, trade, and human rights, while (4) ceding a large measure of control to a vast and potentially unlimited number of private plaintiffs and attorneys who will (understandably) pursue their own interests on separate and potentially colliding tracks.

Q4. You made another striking observation in your written testimony about one of the pending proposals, S. 3674: “There is no better recipe for a mass exodus of foreign investment from the United States, and a reciprocal run on U.S. assets worldwide.” The provisions you were talking about would remove immunity from attachment and execution, and would also allow injunctions before a judgment relating to the “transfer of disposable assets.” While the legal mechanisms here are somewhat technical, can you explain why provisions like these would be so troubling for American economic interests?

The United States is the world’s largest beneficiary of foreign direct investment (FDI), and it “routinely ranks among the most favorable destinations for foreign direct investors.” <https://www.cfr.org/background/foreign-investment-and-us-national-security> (Aug. 28, 2018) Constraints on FDI should flow from considered U.S. policy decisions about the relative costs and benefits of foreign investment in different economic sectors, not from a perception among investors that the United States is erratic or capricious in its treatment of foreign assets within its jurisdiction. I would also incorporate by reference my response to question 5(c) from Senator Feinstein.

Tampering with the FSIA’s framework governing measures of constraint against foreign sovereign assets would jeopardize the stability and predictability that investors require. As a matter of existing law, as summarized by the Restatement (Fourth) of Foreign Relations, the FSIA “eliminates all forms of prejudgment attachment (except upon waiver and in certain maritime and terrorism cases), but in specified situations permits attachment and execution following entry of judgment.” REST. 4TH FOR. REL. § 464 cmt. *b*. This is in part because “experience has shown that diplomatic friction may arise if property is restrained before a claim against a foreign state has been established.” *Id*.

The distinction between sovereign and commercial activities that underpins the restrictive theory of sovereign immunity also plays a role in the rules governing attachment and execution. *See id.* cmt. *c*. Under the FSIA, prejudgment attachment for purposes of security is precluded, although this immunity may be waived when the property is used for commercial activity, and in certain maritime and terrorism cases. *Id.* cmt. *d*. Under 28 U.S.C. § 1611, certain categories of property are immune from attachment and execution, including property of a foreign central bank held for its own account. In addition, certain categories of foreign-government property (such as embassies, consulates, or their bank accounts) are protected by other provisions of U.S. and international law. *See id.* cmt. *e*.

Dismantling these protections—or suggesting that they could be dismantled if they become politically disfavored—erodes the confidence required for cross-border investment and diplomacy.

It might be tempting to paint particular FSIA provisions solely as obstacles to civil recovery that are unconnected to broader U.S. interests, or as “outdated” laws that require updating in light of changed realities. When it comes to provisions that form the backbone of Congress’s codification of the restrictive theory of foreign sovereign immunity, that characterization is not accurate.

Question About President Trump’s Praise of China’s COVID-19 Response (Q5)

Q5. For much of the early part of this year, President Trump repeatedly praised China’s response to the COVID-19 outbreak.[§] As you explained in your written testimony, “The President speaks on behalf of the United States, and his remarks can and will be cited in U.S. courts in China’s defense.” Assuming the kinds of lawsuits at issue here were allowed to proceed, how might President Trump’s comments praising China’s response be deployed by the defense?

The lack of a coordinated message from the Administration about various aspects of U.S. policy in general, and the federal government’s response to COVID-19 in particular, is distressing and embarrassing. It also detracts from the ability to pursue claims against China for its COVID-19 response. For example, CNN identified “at least 37 separate instances where Trump praised China” from January 22, 2020 through April 1, 2020. <https://www.cnn.com/2020/04/21/politics/trump-china-praise-coronavirus-timeline/index.html> (May 19, 2020) These statements will complicate plaintiffs’ efforts to argue that China violated its international legal duties and engaged in wrongdoing that requires a legal remedy in U.S. courts.

Examples of the President’s statements include:

- January 22: “[W]e have it totally under control. It’s one person coming in from China, and we have it under control.” Asked whether he trusts “that we’re going to know everything we need to know from China,” the President responded, “I do. I do. I have a great relationship with President Xi.”
- January 24: “China has been working very hard to contain the Coronavirus. The United States greatly appreciates their efforts and transparency.”
- February 2: “Well, we pretty much shut [coronavirus] down coming in from China. We have a tremendous relationship with China, which is a very positive thing.”
- February 7: Asked whether he was concerned that China is covering up the full extent of coronavirus, the President answered: “No. China is working very hard. ... They’re working really hard, and I think they are doing a very professional job. They’re in touch with World – the World – World Organization. CDC also. We’re working together. But World Health is working with them. CDC is working with

[§] See, e.g., Myah Ward, *15 Times Trump Praised China as Coronavirus Was Spreading Across the Globe*, POLITICO (Apr. 15, 2020), <https://www.politico.com/news/2020/04/15/trump-china-coronavirus-188736>.

them. I had a great conversation last night with President Xi. It's a tough situation. I think they're doing a very good job."

- March 20: "I have great respect for President Xi. I consider him to be a friend of mine. It's unfortunate that this got out of control. It came from China. It got out of control. Some people are upset. I know – I know President Xi. He loves China. He respects the United States. And I have to say, I respect China greatly and I respect President Xi."
- March 27: The President stated that President Xi has "developed some incredible theories and all of that information is coming over here. It's – a lot of it's already come. The data – we call it 'data.' And we're going to learn a lot from what the Chinese went through."
- March 30: Asked about a report in the *Washington Post* that Russia, China, and Iran are engaging in a sophisticated disinformation campaign that blames the United States for our COVID-19 response and for causing the virus, the President responded, "Number one, ... when you read it in 'The Washington Post,' you don't believe it. I don't. I believe very little what I see."
- April 1: "We really don't know. I mean, yeah – look, how do we know whether if they underreported or reported however they report?" "As to whether or not their numbers are accurate, I'm not an accountant from China."

* * *

Thank you for the opportunity to answer these additional questions. I hope that the Committee finds my responses useful to its work.