HARVARD LAW SCHOOL
NATIONAL SECURITY JOURNAL

ONLINE ARTICLE

# The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability, Part III: Questions for the Record—Private Litigation Will Likely Fail to Secure Relief for U.S. Victims

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**Recommended Citation**

Chimène Keitner, *Testimony on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability, Part III*, HARV. NAT'L SEC. J. ONLINE (Oct. 20, 2021), https://harvardnsj.org/wp-content/uploads/sites/13/2021/10/Keitner-The-Foreign-Sovereign-Immunities-Act-Coronavirus-and-Addressing-Chinas-Culpability_Part-III.pdf.

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## INTRODUCTION

On June 23, 2020, the Senate Judiciary Committee held a hearing on "The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability."[1] Professor Chimène Keitner submitted written testimony, answered questions at the hearing, and provided written responses to follow-up Questions for the Record from committee members. This is Part III in a series of works by Professor Keitner that the *Harvard National Security Journal* will publish this year. Part I memorialized Professor Keitner's prepared written testimony.[2] This Part, along with one prior and one subsequent installment in this series, contains Professor Keitner's detailed responses to 39 Questions for the Record (QFRs).

The basic question at issue in the hearing was whether Congress should amend the Foreign Sovereign Immunities Act to permit civil suits against foreign states for injuries arising from a pandemic. U.S. courts generally refrain from adjudicating claims arising from the sovereign or governmental acts of other countries, both as a matter of comity and because foreign sovereign immunity is a binding rule of international law. Nation-states are not immune, however, from the jurisdiction of foreign courts for claims arising from their commercial activities.[3] Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976 to codify this distinction and to provide a jurisdictional basis for civil claims against foreign states and their agencies and instrumentalities.[4] Under the FSIA, foreign states and their agencies and instrumentalities are immune from civil suit in U.S. courts unless a claim falls within an enumerated exception to immunity under the Act.[5] Last year, several Republican members of Congress proposed amending the FSIA to create an exception to foreign sovereign immunity for countries whose acts or omissions contributed to the COVID-19 pandemic in the United States. These proposals formed the subject of the June 23, 2020 hearing.[6]

Professor Keitner's opening statement on June 23 focused on three main points:

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[1] *The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability Before the S. Jud. Comm.*, 116th Cong. (2020), https://www.judiciary.senate.gov/meetings/the-foreign-sovereign-immunities-act-coronavirus-and-addressing-chinas-culpability [https://perma.cc/22TH-ZXRL].

[2] *See* Chimène Keitner, *Testimony on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability*, HARV. NAT'L SEC. J. ONLINE (Feb. 23, 2021), https://harvardnsj.org/wp-content/uploads/sites/13/2021/02/Keitner_The-Foreign-Sovereign-Immunities-Act-Coronavirus-and-Addressing-Chinas-Culpability-Part-I.pdf [https://perma.cc/RZ88-8GV6].

[3] *See* 28 U.S.C. § 1602 (2018) (indicating that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned").

[4] *See id.*

[5] *See* 28 U.S.C. § 1604 (2018); 28 U.S.C. § 1605A (2018).

[6] On July 20, Senator Martha McSally (R-AZ) and seven Republican co-sponsors introduced a consolidated bill entitled the "Civil Justice for Victims of COVID Act" that combines features of the other bills. S. 4212, 116th Cong. (2020), https://www.congress.gov/116/bills/s4212/BILLS-116s4212is.pdf [https://perma.cc/MJ26-2T7J]. On July 30, the Republican members of the Senate Judiciary Committee, joined by Senator Dick Durbin (D-IL), voted to report the bill to the Senate. Senator Graham reported the bill without amendment and without a written report. *See* Actions Overview, S.4212—116th Congress (2019-2020), Congress.gov, https://www.congress.gov/bill/116th-congress/senate-bill/4212/actions [https://perma.cc/758L-SGD5].

First, the United States has more to lose than any other country by removing the shield of foreign sovereign immunity for a pandemic;

Second, private litigation will not bring China to the negotiating table, and it will not produce answers or compensation for U.S. victims;

Third, Congress should focus instead on the inadequate federal response to COVID-19, and on restoring U.S. leadership in global public health.

This Part includes Professor Keitner's responses to Senators' questions related to the second point: that private litigation will likely fail to secure relief for U.S. victims.

The responses to the Questions for the Record below have been edited and organized for clarity and readability. They identify the Senator who asked each question and the text of each question in bold, followed by Professor Keitner's responses.

## I. SENATOR FEINSTEIN

### *A. The Foreign Sovereign Immunities Act (FSIA)*

**Q: 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.**

1. The Commercial Act, Territorial Tort, and Terrorism Exceptions

**Q: 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).**

A: 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.[7] In other words, the plaintiff

[7] *See* FED. R. CIV. P. 12(b)(6).

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.

i. *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*,[8] "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."[9] 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*)."[10]

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."[11] 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.'"[12]

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, however, in the complaints raising the commercial activity exception.

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[8] 504 U.S. 607 (1992).
[9] *Id.* at 614.
[10] Saudi Arabia v. Nelson, 507 U.S. 349, 359–60 (1993).
[11] *Weltover*, 504 U.S. at 614–15.
[12] *Id.* at 614 (emphasis in original).

For example, 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, writing for The New York Times, reported that China "has claimed mask factory output for itself" by refusing to authorize exports of masks manufactured in China.[13]

• Talia Kaplan, of *Fox News*, reported 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".[14]

• Juliet Eilperin, writing for *The Washington Post*, reported 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".[15]

• Kate O'Keeffe, of *The Wall Street Journal*, reported 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.[16]

• David Brunnstrom, in an article for *Reuters*, reported 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".[17]

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[13] Keith Bradsher, et al., *The World Needs Masks. China Makes Them, but Has Been Hoarding Them*, N.Y. TIMES (Mar. 13, 2020), https://www.nytimes.com/2020/03/13/business/masks-china-coronavirus.html. [https://perma.cc/3GF6-SKES].

[14] Talia Kaplan, *Peter Navarro: China 'cornered' the personal protective equipment market and 'is profiteering' during coronavirus outbreak*, FOX NEWS (Apr. 19, 2020), https://www.foxnews.com/media/peter-navarro [https://perma.cc/Q5ND-82BB].

[15] Juliet Eilperin, et al., *U.S. sent millions of face masks to China early this year, ignoring pandemic warning signs*, WASH. POST (Apr. 18, 2020), 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 [https://perma.cc/E5E4-LD7Z].

[16] Kate O'Keeffe, Liza Lin, & Eva Xiao, *China's Export Restrictions Strand Medical Goods U.S. Needs to Fight Coronavirus, State Department Says*, WALL ST. J. (Apr. 16, 2020), https://www.wsj.com/articles/chinas-export-restrictions-strand-medical-goods-u-s needs-to-fight-coronavirus-state-department-says-11587031203 [https://perma.cc/AWZ6-UG6A].

[17] David Brunnstrom, et al., *U.S. asks China to revise export rules for coronavirus medical gear*, REUTERS (Apr. 16, 2020), https://www.reuters.com/article/heathcoronavirus-usa-china/us-asks-china-to-revise export-rules-for-coronavirus-medical-gearidUSL1N2C502N [https://perma.cc/E64N-Q8SA].

• Amber Athey, from *The Spectator*, cited "China taking advantage of Italy's generosity" as "just the latest example of its disastrous diplomacy in the wake of the pandemic".[18]

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."[19] As *Weltover* also makes clear, "whether the foreign government is acting with a profit motive" is not relevant to the analysis.[20]

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."[21] 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.

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

The 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 the 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

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[18] Amber Athey, *Italy gave China PPE to help with coronavirus — then China made them buy it back*, SPECTATOR AUST. (Apr. 5, 2020), https://www.spectator.com.au/2020/04/italy-gave-china-ppe-to-help-with-coronavirus-then-china-made-them-buy-it-back/ [https://perma.cc/7EHZ-MU8U].
[19] *Weltover*, 504 U.S. at 614.
[20] *Id.*
[21] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS L. OF THE U.S. § 454 cmt. e (AM. L. INST. 2018).

these delays.[22] However, even if the territorial tort exception did apply, claims arising out of "misrepresentation" or "deceit" are expressly excluded from its scope.[23]

More fundamentally, U.S. courts have interpreted this exception to require a tortious act or omission of the foreign state *in the United States*.[24] This interpretation is consistent with the prevailing understanding of this exception in international law.[25] "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."[26]

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."[27]

• 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.[28]

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[22] *See* SUSAN V. LAWRENCE, CONG. RSCH. SERV., R46354, COVID-19 AND CHINA: A CHRONOLOGY OF EVENTS (updated May 13, 2020), https://crsreports.congress.gov/product/pdf/R/R46354 [https://perma.cc/VH4L-6HRT].
[23] *See* 28 U.S.C. § 1605(a)(5)(B).
[24] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS L. OF THE U.S. § 457(1) (AM. L. INST. 2018).
[25] *See id.* § 457(2).
[26] David P. Stewart, Federal Judicial Center International Litigation Guide, *The Foreign Sovereign Immunities Act: A Guide for Judges* at 70 (2d ed. 2018).
[27] Jonathan Turley, *Why China will likely avoid liability in spread of coronavirus* pandemic, THE HILL (Apr. 18, 2020), https://thehill.com/opinion/judiciary/493467-why-china-will-likely-avoid-liability-in-spread-of-coronavirus-pandemic [https://perma.cc/4EJ8-74PP].
[28] Frank Morris, *Missouri Sues China, Communist Party Over the Coronavirus Pandemic*, NPR (Apr. 21, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/21/840550059/missouri-sues-china-communist-party-over-the-coronavirus-pandemic [https://perma.cc/5QQG-VRB3].

• 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."[29]

• 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."[30]

• 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.[31]

• 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."[32] 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."[33] As for the territorial tort exception, "[t]he tortiable activity has to be done in Missouri, not in Wuhan, China."[34]

• 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."[35]

• 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.[36]

• 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

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[29] Harper Neidig, *Coronavirus lawsuits against China face uphill battle*, THE HILL (Apr. 24, 2020), https://thehill.com/regulation/494399-coronavirus-lawsuits-against china-face-uphill-battle [https://perma.cc/M5T6-WD7M].
[30] David G. Savage & Alice Su, *Can China be sued in the U.S. and forced to pay for coronavirus losses? Legal experts say no*, L.A. TIMES (May 15, 2020), 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 [https://perma.cc/6HDY-XRFY].
[31] *Id.*
[32] *Id.*
[33] Neidig, *supra* note 29.
[34] Keith Johnson, *Missouri opens up a new front against China in Coronavirus blame game*, FOREIGN POL'Y (Apr. 24, 2020), https://foreignpolicy.com/2020/04/24/missouri-opens-up-a-new-front-against-china in-coronavirus-blame-game/ [https://perma.cc/PHU6-53L2].
[35] *Id.*
[36] Jacques deLisle, *Pursuing politics through legal means: U.S. efforts to hold China responsible for COVID-19*, FOREIGN POL'Y RSCH. INST. (May 12, 2020), https://www.fpri.org/article/2020/05/pursuing-politics-through-legal-means-u-s-efforts-to-hold-china-responsible-for-covid-19/ [https://perma.cc/AG2M-J6TK].

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."[37]

• 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."[38]

iii. *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."[39] 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 *Just Security* 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."[40]

2. Naming the Chinese Communist Party as a Defendant

**Q: 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?**

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[37] Robert D. Williams & David Dollar, *Don't count on suing China for coronavirus compensation*, BROOKINGS (May 18, 2020), https://www.brookings.edu/podcast episode/dont-count-on-suing-china-for-coronavirus-compensation/ [https://perma.cc/CL24-6EWY].

[38] Paul J. Larkin, Jr., *Suing China over COVID-19*, 100 B.U. L. REV. ONLINE 91 (2020), https://www.bu.edu/bulawreview/larkin/ [https://perma.cc/2AYZ-EE5Z].

[39] Complaint, Buzz Photos v. People's Republic of China, 2020 WL 1283705 *2 (N.D. Tex., filed Mar. 17, 2020).

[40] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A: 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 *Just Security* posts attached to my written testimony,[41] 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."[42]

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,

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[41] Chimène Keitner, *Don't Bother Suing China for Coronavirus*, JUST SECURITY (Mar. 31, 2020, Addendum added Apr. 8, 2020), https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus/ [https://perma.cc/S888-SAZL]; Chimène Keitner, *Missouri's Lawsuit Doesn't Abrogate China's Sovereign Immunity*, JUST SECURITY (Apr. 22, 2020), https://www.justsecurity.org/69817/missouris-lawsuit-doesnt-abrogate-chinas-sovereign-immunity/ [https://perma.cc/KH3C-2WSB].

[42] Zheng Sophia Tang & Zhengxin Huo, *State immunity in global COVID-19 pandemic*, CONFLICTOFLAWS.NET (Mar. 21, 2020), http://conflictoflaws.net/2020/state-immunity-in-global-covid-19-pandemic/ [https://perma.cc/LM5Y-YT5S].

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.[43] 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.[44]

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 tha[n] 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.'"[45]

• 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."[46]

• 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."[47]

• 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

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[43] *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).
[44] *See id.* at 324–25 (*citing* Republic of Philippines v. Pimentel, 533 U.S. 851, 867 (2008)).
[45] Donald Clarke, *Can you get around the Foreign Sovereign Immunities Act by naming the Communist Party of China as a defendant?*, CHINA COLLECTION (Apr. 23, 2020), https://thechinacollection.org/can-get-around-foreign-sovereign-immunities-act-naming-communist-party-china-defendant/ [https://perma.cc/6VM9-HMUN].
[46] deLisle, *supra* note 36.
[47] Williams & Dollar, *supra* note 37.

"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."[48]

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.

3. Consistency with Customary International Law

**Q: 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?**

A: 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.[49] 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).[50]

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.[51]

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*)."[52] 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."[53] A U.S.

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[48] Larkin, *supra* note 38.
[49] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS L. OF THE U.S. § 451, rep. note 2 (AM. L. INST. 2018).
[50] *Id. at* § 451, cmt. *a*.
[51] Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening), 2012 I.C.J. Rep. 99 (Feb. 3).
[52] *Id.* ¶60.
[53] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

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.

*B. Other Obstacles to Obtaining Damages from Civil Suits*

**Q: 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.**

1. Why, in General Terms, the Lawsuits in Question Would Fail to Obtain Compensation for Victims of the Coronavirus Pandemic

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

A: 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.[54] Second, under current Supreme Court jurisprudence governing class certification under Rule 23,[55] 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.[56] 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

[54] Fed. R. Civ. P. 12(b)(6).
[55] Fed. R. Civ. P. 23.
[56] *See, e.g.*, Fed. R. Civ. P. 42(b) (bifurcation); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (describing aggregate settlements of non-class-action, large-scale multiparty litigation).

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.[57]

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.

2. Challenges with Showing Causation

**Q: 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?**

A: 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.

[57] Jugement civil 2019TALCH01 / 00116, Numéro 177266 du rôle (Mar. 27, 2019), available (in French) at https://justice.public.lu/dam-assets/fr/actualites/2019/Jgt20190327-exequatur-anonyme.pdf [https://perma.cc/4PMR-MXAP].

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*.[58]

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, who 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."[59]

• Jacques deLisle, Professor of Law at the University of Pennsylvania, who 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."[60]

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.

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[58] Sandi Doughton, *New analysis may rewrite the history of Washington state's coronavirus outbreak*, SEATTLE TIMES (May 26, 2020, Updated May 27, 2020), https://www.seattletimes.com/seattle-news/health/genetic-analysis-raises-more-questions-about-the-history-of-washington-states-coronavirus-outbreak/ [https://perma.cc/D2GA-64JQ].
[59] David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SECURITY (March 27, 2020), https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/ [https://perma.cc/D22K-3Z3M].
[60] deLisle, *supra* note 36.

Moreover, even if causation could be shown, colleagues who specialize in tort law emphasize that proximate cause would be an issue.[61] 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.

3. Challenges with Discovery

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

A: 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.[62]

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."[63]

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

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[61] *See generally* AM. JUR. TORTS § 27 (proximate cause), § 28 (intervening act and superseding cause).
[62] *Cf.* Adam Klasfeld, *FBI Declassification Underway in 9/11 Saudi Suit*, COURTHOUSE NEWS SERV. (Oct. 12, 2018), https://www.courthousenews.com/fbi-declassification-underway-in-9-11-saudi-suit/ [https://perma.cc/44YY-SG8H].
[63] Meg Utterback & Holly Blackwell, *China: Obtaining Discovery in China for Use in U.S. Litigation*, MONDAQ (Jan. 31, 2012), https://www.mondaq.com/china/disclosure-electronic-discoveryprivilege/162784/obtaining-discovery-in-china-for-use-in-us-litigation [https://perma.cc/J4FD-JTJ6].

Authority under the Hague Evidence Convention "could result in the arrest, detention or deportation of the American attorneys and other participants."[64]

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."[65]

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]."[66] 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."[67] The absence of such an agreement will create problems for plaintiffs in obtaining discovery, especially on politically sensitive topics.

4. Challenges with Executing Judgments

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

A: 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."[68]

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

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[64] State Department, Bureau of Consular Affairs, Judicial Assistance Country Information: China (visited Jul. 15, 2020), https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html [https://perma.cc/AXQ5-HNBH].

[65] Guiqiang Liu, *A No-Win Situation: The Increasing China-U.S. Conflicts on Judicial Cooperation and Evidence Taking*, CHINA JUSTICE OBSERVER (Oct. 11, 2019), https://www.chinajusticeobserver.com/a/a-no-win-situation-the-increasing-china-us-conflicts-on-judicial-cooperation-in-evidence-taking [https://perma.cc/RVV3-LUVX].

[66] *Id.*

[67] 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)

[68] REST. 4TH FOR. REL. § 464 cmt. a.

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.[69]

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.

5. Other Challenges

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

A: 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.

6. Comparison/Contrast with Justice Against Sponsors of Terrorism Act

**Q: 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?**

A: 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;

[69] See Mantovani, *Follow-Up: Ongoing Attempts at Enforcing Havlish in Italy and in England*, MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW, Research Paper Ser. No. 1, at 28 (2020) (visited July 15, 2020), https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux_WP_2020_1__US-Havlish_MM_VR_SL_ES.pdf [https://perma.cc/H7PE-XVMQ].

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.

### *C. Civil Suits and the Transboundary Harm Principle*

**Q: 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.**

#### 1. The Likelihood of Encouraging China to Negotiate a Settlement or Submit to International Arbitration

**Q: 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.**

A: 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."[70]

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.[71]

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]

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[70] Savage & Su, *supra* note 30.
[71] deLisle, *supra* note 36.

known as 'wolf warrior diplomacy.'" 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." 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."[72]

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."

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."[73]

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."[74]

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.

2. The *Trail Smelter* Case as a Potential Model

**Q: 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?**

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[72] Ryan Hass, *Clouded thinking in Washington and Beijing on COVID-19 crisis*, BROOKINGS, Order from Chaos (May 4, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/05/04/clouded-thinking-in-washington-and-beijing-on-covid-19-crisis/ [https://perma.cc/B7Z7-AKRP].

[73] Jessica Chen Weiss, *China's Self-Defeating Nationalism: Brazen Diplomacy and Rhetorical Bluster Undercut Beijing's Influence*, FOREIGN AFFAIRS (July 16, 2020), https://www.foreignaffairs.com/articles/china/2020-07-16/chinas-self-defeating-nationalism [https://perma.cc/9LYR-Y5VV].

[74] Iain Mills, *China's Colonial Past Key to Understanding its Future*, WORLD POL. REV. (May 19, 2010), https://www.worldpoliticsreview.com/insights/5559/reckoning-with-colonial-china-to-understand-the-countrys-future [https://perma.cc/8U56-372P].

A: 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."[75] 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."[76]

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."[77] 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 of 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."[78] To the contrary, as Professor Bratspies notes, "once the dispute was elevated to a state-to-state level,

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[75] Rebecca Bratspies, *Trail Smelter Arbitration Offers Little Guidance for Covid-19 Suits against China*, JUST SECURITY (July 14, 2020), https://www.justsecurity.org/71363/the-trail-smelter-arbitration-offers-little-guidance-for the-covid-19-world-on-attempts-to-sue-china/ [https://perma.cc/2K68-T2ZA].
[76] *Id.*
[77] *Id.*
[78] *Id.*

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."[79]

I am at a loss to explain Professor Miller's and attorney William Starshak's assertion in a *Just Security* 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.[80] 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."[81] This was so, even though "[t]he *Trail Smelter* proximate cause question was relatively linear."[82] 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."[83] The model of the *Trail Smelter* arbitration is not pertinent or helpful here.

3. The Lockerbie Bombing Settlement as a Potential Model

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

A: 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."[84]

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

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[79] *Id.*
[80] Russell Miller & William Starshak, *China's Responsibility for the Global Pandemic*, JUST SECURITY (March 31, 2020), https://www.justsecurity.org/69398/chinas-responsibility-for-the-global pandemic/ [https://perma.cc/GK3K-Q8CX].
[81] Bratspies, *supra* note 75.
[82] *Id.*
[83] *Id.*
[84] Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 330 (1998).

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."[85]

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."[86] 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."[87]

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."[88] 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."[89]

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[85] Bruce Jentleson & Christopher Whytock, *Who "Won" Libya? The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 INT'L SEC. 47, 80 (2005), https://www.belfercenter.org/sites/default/files/files/publication/is3003_pp047-086.pdf [https://perma.cc/YGF8-6BFV].

[86] *Index of Countries on the Security Council Agenda: Libya*, GLOB. POL'Y F. (visited July 17, 2020) https://archive.globalpolicy.org/security/sanction/libya/indxirlb.htm [https://perma.cc/3HFP-5D4U].

[87] *Id.*

[88] Jonathan Schwartz, *Dealing with a "Rogue State": The Libya Precedent*, 101 AM. J. INT'L L. 553, 569 (2007).

[89] *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."[90] 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.[91]

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."[92]

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

## II. SENATOR LEAHY

### *A. The Likely Effects of Civil Suits Against China*

**Q: 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.**

#### 1. Skepticism of the Ability of Private Civil Suits to Change the Chinese Government's Behavior

**Q: Why are you skeptical about whether private civil suits would actually pressure China to change its behavior?**

A: 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

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[90] CHRISTOPHER M. BLANCHARD, CONG. RSCH. SERV, RL33142, LIBYA: BACKGROUND AND U.S. RELATIONS 36, (Aug. 3, 2009), available at https://www.everycrsreport.com/files/20090803_RL33142_783e1fb1062d70d7807ae92ced99d1d55e8175d4.pdf [https://perma.cc/XKG5-G276].

[91] Matthew Weaver and agencies, *Families of Lockerbie bombing victims receive compensation from Libya*, THE GUARDIAN (Nov. 21, 2008), https://www.theguardian.com/uk/2008/nov/21/lockerbie-libya [https://perma.cc/CDY5-NZAS].

[92] Steve Emerson, *The Lockerbie Terrorist Attack and Libya: A Retrospective Analysis*, 36 CASE W. RES. J. INT'L L. 487 (2004), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1405&context=jil [https://perma.cc/FKS4-U66V].

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."[93]

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."[94]

2. The Ability of Private Litigants to Collect Damages

**Q: 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?**

A: 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.

## III. SENATOR KLOBUCHAR

### *A. Whether Lawsuits Against China Would Provide Any Meaningful Recovery for Americans*

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

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[93] Jude Blanchette, *The United States Has Gotten Tough on China. When Will It Get Strategic?*, CSIS (July 17, 2020), https://www.csis.org/analysis/united-states-has-gotten-tough-china-when-will-it-get-strategic [https://perma.cc/RLD3-HZDZ].
[94] *Id.*

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

A: 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 the plaintiffs' theory of the case. This underscores how unrealistic these suits are in promising meaningful relief for claimants.

## IV. SENATOR BOOKER

### *A. President Trump's Praise of China's COVID-19 Response*

**Q: For much of the early part of this year, President Trump repeatedly praised China's response to the COVID-19 outbreak.[95] 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?**

A: 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.[96] 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."

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[95] *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 [https://perma.cc/VF87-HDLY].

[96] Jennifer Hansler, Curt Merrill and Isaac Yee, *The many times Trump has praised China's handling of the coronavirus pandemic*, CNN (May 19, 2020), https://www.cnn.com/2020/04/21/politics/trump-china-praise-coronavirus-timeline/index.html [https://perma.cc/396P-ZX73].

- 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 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."

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