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## ONLINE ARTICLE

The Foreign Sovereign Immunities Act, Coronavirus, and Addressing  
China's Culpability, Part II: Questions for the Record—Benefits to the  
United States from Foreign Sovereign Immunity

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Chimène Keitner\*

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\* Alfred & Hanna Fromm Professor of International and Comparative Law, UC Hastings Law, San Francisco.

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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.”<sup>1</sup> 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 II 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.<sup>2</sup> This Part, along with the subsequent installments 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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 hearing.<sup>6</sup>

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

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<sup>1</sup> *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].

<sup>2</sup> 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://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].

<sup>3</sup> 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”).

<sup>4</sup> See *id.*

<sup>5</sup> See 28 U.S.C. § 1604 (2018); 28 U.S.C. § 1605A (2018).

<sup>6</sup> 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 first point: that creating an exception to foreign sovereign immunity for the COVID-19 pandemic would disproportionately harm the United States.

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. *Transboundary Harm and Trail Smelter*

#### 1. The Doctrine of Transboundary Harm under Customary International Law

**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.**

**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?**

A: 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.”<sup>7</sup> 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.”<sup>8</sup>

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<sup>7</sup> David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SEC. (Mar. 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/3TWD-ARL6].

<sup>8</sup> *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, as framed in this question, 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.<sup>9</sup>

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."<sup>10</sup>

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.

## 2. Applying the Doctrine of Transboundary Harm to Environmental Harms Caused by Nation-States

**Q: 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**

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<sup>9</sup> See Daniel Loud, *Emitting Injustice? Foreign State-Owned Enterprises That Cause Transboundary Pollution and the Foreign Sovereign Immunities Act of 1976*, COL. J. TRANSNAT'L L. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3611401](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3611401) [https://perma.cc/T6HK-2U8W].

<sup>10</sup> *Id.* at 40.

**carbon emissions potentially expose it to liability for any environmental harms arising from that practice, such as climate change?**

A: 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.”<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup>

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.”<sup>14</sup> 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.

3. The Alien Tort Claims Act and Private Lawsuits Against the United States

**Q: 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?**

A: 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

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<sup>11</sup> John Knox, *The Flawed Trail Smelter Procedure: The Wrong Tribunal, the Wrong Parties, and the Wrong Law*, in *TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* (Rebecca Bratspies & Russell Miller eds., 2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=665682](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=665682) [https://perma.cc/Q5N5-WAP7].

<sup>12</sup> Rebecca Bratspies, *Trail Smelter Arbitration Offers Little Guidance for COVID-19 Suits against China*, JUST SEC. (Jul. 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/8YY8-R9JU].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

U.S. corporate funding of child slavery overseas.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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.”<sup>18</sup> 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.”<sup>19</sup> 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.”<sup>20</sup>

As Professor Miller and Mr. Starshak note in a *Just Security* 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.”<sup>21</sup> 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.<sup>22</sup>

<sup>15</sup> See *Nestlé USA, Inc. v. Doe I*, No. 19-416 (filed Aug. 31, 2020), <https://www.scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/> [https://perma.cc/H8J3-MZPH].

<sup>16</sup> Chimène Keitner, *ATS, RIP?*, *LAWFARE* (Apr. 25, 2018), <https://www.lawfareblog.com/ats-rip> [https://perma.cc/TG55-B4GC].

<sup>17</sup> See KEVIN M. LEWIS, CONG. RSCH. SERV., R4532, *THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW* (2019), <https://fas.org/sgp/crs/misc/R45732.pdf> [https://perma.cc/7BVZ-8CT2].

<sup>18</sup> *Id.*

<sup>19</sup> 28 U.S.C. § 2680(k).

<sup>20</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

<sup>21</sup> Russell Miller and William Starshak, *China’s Responsibility for the Global Pandemic*, *JUST SEC.* (Mar. 31, 2020), <https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/> [https://perma.cc/DY2B-U2KH].

<sup>22</sup> See *Organization of Disappearing Island Nations v. HexonGlobal Corporation*, 2019 NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION (2019), <https://law.pace.edu/sites/default/files/nelmcc/2018/nelmcc2019/2019%20NELMCC%20Problem.pdf> [https://perma.cc/BLP3-9ESW].

The proliferation of climate change litigation in domestic and international fora suggests that this type of claim is more than just hypothetical.<sup>23</sup> Scholars have noted evidence in support of “an international norm against transboundary harm in the form of climate change impacts.” suggesting that “a climate change claim may succeed [under the ATS] where other environment claims have failed because climate change necessarily involves transboundary harm.”<sup>24</sup>

## B. *Consequences of Domestic Suits Against Foreign States*

### 1. Reciprocal Lawsuits Against the United States in Chinese Courts

**Q: 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.**

**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?**

A: 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.<sup>25</sup> 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.”<sup>26</sup>

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

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<sup>23</sup> For examples of cases in the United States and around the world, see *Climate Change Litigation Databases*, SABIN CTR. FOR CLIMATE CHANGE L. (2021), <http://climatecasechart.com/> [https://perma.cc/WR4D-6M85].

<sup>24</sup> Jaclyn Lopez, *The New Normal: Climate Change Victims in Post-Kiobel United States Federal Courts*, 8 CHARLESTON L. REV. 113, 132, 145 (2013), [https://www.biologicaldiversity.org/publications/papers/Lopez\\_TheNewNormal\\_2013.pdf](https://www.biologicaldiversity.org/publications/papers/Lopez_TheNewNormal_2013.pdf) [https://perma.cc/2682-QCSM]; but see 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), [https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1142&context=fac\\_pubs](https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1142&context=fac_pubs) [https://perma.cc/8GCJ-7MYC] (opining that “[i]nternational courts or arbitration panels are better equipped to address the vague principles concerning transboundary liability than are federal courts”).

<sup>25</sup> Guodong Du and Meng Yu, *A Wuhan Lawyer Suing the U.S. Government Over COVID-19? In China, Legal Impediments May Surface*, CHINA JUST. OBSERVER (Mar. 25, 2020), <https://www.chinajusticeobserver.com/a/wuhan-lawyer-suing-the-us-government-over-covid-19> [https://perma.cc/SK9C-4F7D]; see also *Chinese Lawyers Sue U.S. Over ‘Coronavirus Cover-up’*, RADIO FREE ASIA (Mar. 26, 2020), <https://www.rfa.org/english/news/china/wuhan-lawsuit-03262020122653.html> [https://perma.cc/JV8S-6WZX].

<sup>26</sup> *Id.*

the blame game in an attempt to cover up one's own shortcomings. China will never accept any frivolous lawsuits or compensation claims."<sup>27</sup>

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.<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup> 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).<sup>31</sup> 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.<sup>32</sup> 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.

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<sup>27</sup> STATE COUNCIL INFO. OFF. OF THE P.R.C., FIGHTING COVID-19: CHINA IN ACTION (June 7, 2020), [http://en.nhc.gov.cn/2020-06/08/c\\_80724.htm](http://en.nhc.gov.cn/2020-06/08/c_80724.htm) [https://perma.cc/5WPF-D2TN].

<sup>28</sup> See Certain Iranian Assets (Iran v. U.S.), Preliminary Objections Submitted by the United States of America (May 1, 2017), at 38-39, <https://www.icj-cij.org/public/files/case-related/164/164-20170501-WRI-01-00-EN.pdf> [https://perma.cc/5T9Z-KMTW].

<sup>29</sup> Chinese lawmakers propose foreign states immunities law, XINHUA (May 26, 2020), [http://www.xinhuanet.com/english/2020-05/26/c\\_139089551.htm](http://www.xinhuanet.com/english/2020-05/26/c_139089551.htm) [https://perma.cc/XT2R-8F8M].

<sup>30</sup> *Id.*

<sup>31</sup> Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, 3 U.N.T.C. 13, [https://legal.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf) [https://perma.cc/E2KB-T742]; see generally David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194 (2005).

<sup>32</sup> See Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3), <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> [https://perma.cc/243M-D8XU]; see also Chimène I. Keitner, *Germany v. Italy: The International Court of Justice Affirms Principles of State Immunity*, 16 ASIL INSIGHTS (Feb. 14, 2012), <https://www.asil.org/insights/volume/16/issue/5/germany-v-italy-international-court-justice-affirms-principles-state> [https://perma.cc/VAS9-FLKR].

## 2. Non-legal Repercussions from China

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

A: 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.<sup>33</sup> 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.”<sup>34</sup> The first option would undermine the U.S. claim that the Chinese already sell goods to the United States “at prices allegedly too low.”<sup>35</sup> 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.”<sup>36</sup>

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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup>

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<sup>33</sup> Don Boudreaux, *More Trump Trade Inconsistency*, CAFÉ HAYEK (May 1, 2020), <https://cafehayek.com/2020/05/more-trump-trade-inconsistency.html> [https://perma.cc/AG4E-6XSU].

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *China Sanctions Cruz, Rubio, Smith, Brownback for Criticism*, ASSOCIATED PRESS (July 13, 2020), <https://apnews.com/article/7b689e7a51bee2a7e6e1a7699257239c> [https://perma.cc/MGB7-7RKX].

<sup>38</sup> See Jack Suntrup, *‘High Alert’: After Suing China Over Coronavirus, Missouri Braced for Retaliation, Records Show*, ST. LOUIS TODAY (May 19, 2020), [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](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) [https://perma.cc/76QK-HYHY].

<sup>39</sup> See *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."<sup>40</sup> 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."<sup>41</sup> 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.<sup>42</sup>

### 3. Private Lawsuits Against the United States for Its Own Pandemic Response

**Q: 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.**

A: 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:

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<sup>40</sup> Emily Feng, *5 Takeaways From China's Hong Kong National Security Law*, NAT'L PUB. RADIO (July 1, 2020), <https://www.npr.org/2020/07/01/885900989/5-takeaways-from-chinas-hong-kong-national-security-law> [https://perma.cc/LCN3-JSST].

<sup>41</sup> *Id.*

<sup>42</sup> See *Blocking Property of Certain Persons Associated With the International Criminal Court*, Exec. Order No. 13,928, 85 Fed. Reg. 36139 (June 11, 2020), <https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court> [https://perma.cc/N4YL-MA37].

- Descriptions of the U.S. pandemic response as “fragmented, chaotic, and plagued by contradictory messaging from political leaders.”<sup>43</sup>
- 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.”<sup>44</sup>
- “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.”<sup>45</sup>
- “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.”<sup>46</sup>
- 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.

#### 4. Long-Term Implications for American National Interests

**Q: 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.**

A: 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.

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<sup>43</sup> *The United States leads in coronavirus cases, but not pandemic response*, SCIENCE MAG. (Apr. 1, 2020), <https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response> [https://perma.cc/Y9J4-S5ZF].

<sup>44</sup> Juan Montes, *U.S. Fails to Prevent Deportation of Migrants Infected With Covid-19, Guatemalan Officials Say*, WALL ST. J. (June 24, 2020), <https://www.wsj.com/articles/u-s-fails-to-prevent-deportation-of-migrants-infected-with-covid-19-guatemalan-officials-say-11593023095> [https://perma.cc/GT72-KA2W].

<sup>45</sup> Philip Rucker, Yasmeeen Abutaleb and Ashley Parker, *As the coronavirus crisis spins out of control, Trump issues directives — but still no clear plan*, WASH. POST (July 15, 2020), [https://www.washingtonpost.com/politics/trump-coronavirus-pandemic-no-plan/2020/07/15/7581bea4-c5df-11ea-a99f-3bbdff1af38\\_story.html](https://www.washingtonpost.com/politics/trump-coronavirus-pandemic-no-plan/2020/07/15/7581bea4-c5df-11ea-a99f-3bbdff1af38_story.html) [https://perma.cc/GU6P-49LT].

<sup>46</sup> Philip Rucker, Laurie McGinley, Josh Dawsey and Yasmeeen Abutaleb, *Rancor between scientists and Trump allies threatens pandemic response as cases surge*, WASH. POST (Jul. 17, 2020), [https://www.washingtonpost.com/politics/rancor-between-scientists-and-trump-allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdff1af38\\_story.html](https://www.washingtonpost.com/politics/rancor-between-scientists-and-trump-allies-threatens-pandemic-response-as-cases-surge/2020/07/17/d950e9b6-c777-11ea-a99f-3bbdff1af38_story.html) [https://perma.cc/ZQ6T-KN2D].

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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

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."<sup>50</sup> 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."<sup>51</sup>

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.<sup>52</sup> Separate lawsuit sought \$14 million in damages from the defendants.<sup>53</sup> 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:

<sup>47</sup> See DEP'T JUST., OFFICE OF FOREIGN LITIGATION, <https://www.justice.gov/civil/office-foreign-litigation> [https://perma.cc/S9D2-9N3J].

<sup>48</sup> Andrew Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, Env't L. Rep. (2003), <https://www.ourenergypolicy.org/wp-content/uploads/2013/06/SSRN-id1102661.pdf> [https://perma.cc/ZT4X-QXYF].

<sup>49</sup> See *id.*

<sup>50</sup> Emma DiNapoli, German Courts Weigh Legal Responsibility for U.S. Drone Strikes, LAWFARE (Apr. 4, 2019), <https://www.lawfareblog.com/german-courts-weigh-legal-responsibility-us-drone-strikes> [https://perma.cc/JB6W-9PNE].

<sup>51</sup> Faisal bin Ali Jaber and others v. the Federal Republic of Germany, Oberverwaltungsgericht für das Land Nordrhein-Westfalen [OVG NRW] [Higher Administrative Court for the State of North Rhine-Westphalia] Mar. 19, 2019, [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/OVG\\_Muenster\\_oral\\_declaration\\_of\\_judgment\\_19\\_March\\_2019\\_EN.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf) [https://perma.cc/R3RP-9GJS].

<sup>52</sup> See Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 4, 2009), <https://www.nytimes.com/2009/11/05/world/europe/05italy.html> [https://perma.cc/HU43-QKL8].

<sup>53</sup> See *id.*

- 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?’”<sup>54</sup>
- 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.”<sup>55</sup>

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.

## II. SENATOR LEAHY

### A. *U.S. Exposure to Litigation Risk*

#### 1. Foreign Private Suits Against the United States

**Q: 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.**

**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?**

A: 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.

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<sup>54</sup> 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/C2DH-5YPM].

<sup>55</sup> Keith Johnson, *Missouri Opens Up a New Front Against China in Coronavirus Blame Game*, FOREIGN POL. (Apr. 24, 2020), <https://foreignpolicy.com/2020/04/24/missouri-opens-up-a-new-front-against-china-in-coronavirus-blame-game/> [https://perma.cc/PFT8-TVCE].

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.<sup>56</sup>

## 2. Private Litigation Against the United States for Its Pandemic Response

**Q: 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?**

A: 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.”<sup>57</sup>

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).<sup>58</sup> 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.

### III. SENATOR BOOKER

#### A. *Discovery of U.S. Government Records in Cases Against China*

**Q: In your written testimony, you discussed some of the unintended consequences of**

<sup>56</sup> For further consideration of the issues raised by this question, see *supra* Sections I.B.1, 3, 4.

<sup>57</sup> LEWIS, *supra* note 17.

<sup>58</sup> See Convention on Jurisdictional Immunities of States and Their Property, *supra* note 31.

**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?**

A: 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.

*B. Potential Chinese Retaliation Against the United States*

**Q: 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?**

A: I would incorporate by reference my responses to questions I.B.1 and 2 from Senator Feinstein above. 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.

*C. Harm to U.S. Economic Interests*

**Q: 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?**

A: 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."<sup>59</sup> 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.

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<sup>59</sup> Jonathan Masters and James McBride, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN RELATIONS (Aug. 28, 2018), <https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security> [https://perma.cc/7HMJ-84EZ].

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."<sup>60</sup> 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."<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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.

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<sup>60</sup> Restatement (Fourth) of Foreign Relations § 464 cmt. b.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*, cmt. c.

<sup>63</sup> *See id.*, cmt. d.

<sup>64</sup> *See id.*, cmt. e.