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The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability, Part IV: Questions for the Record—Federal Government Response to Coronavirus and U.S. Public Health Leadership Role

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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 IV in a series of works by Professor Keitner that the *Harvard National Security Journal* has published over the past year. Part I memorialized Professor Keitner’s prepared written testimony.² This Part is the third and final installment containing 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 In 2020, 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.⁶

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

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, the final in this series, includes Professor Keitner's responses to Senators' questions related to the third point: that the federal government's response to the COVID-19 pandemic in its early stages was inadequate, and that a stronger U.S. leadership role in the global public health community is part of the solution.

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. Certain answers have been supplemented to account for recent developments.

I. SENATOR FEINSTEIN

A. *Transboundary Harm*

Q: 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.”⁷ 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.”

U.S. practice can certainly shape the evolution of customary international law, particularly when it is accompanied by what international lawyers call *opinio juris*—a belief that acting, or refraining from acting, is legally required. Creating additional exceptions to the FSIA would not directly affect “the legitimacy of the doctrine of transboundary harm,” because

⁷ David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SECURITY (Mar. 27, 2020), <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations>.

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 recent 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 apply to cross-border pollution by foreign state-owned-enterprises (SOEs) that causes harm within U.S. borders.⁸ 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.

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."⁹

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.

B. Alternative Methods for Pursuing Accountability

1. Independent International Investigation

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

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

⁸ Daniel Loud, Note, *Emitting Injustice? Foreign State-Owned Enterprises That Cause Transboundary Pollution and the Foreign Sovereign Immunities Act of 1976*, 58 COLUM. J. TRANSNAT'L LAW 170 (2021).

⁹ *Id.* at 40 (emphasis in original).

A: Yes. I agree with Professor Miller's comments in his written testimony [submitted for this hearing] that a "thorough and fair international investigation into the coronavirus outbreak would help develop and systematically collect immensely valuable information about the science and policy involved in viral outbreaks," and that "[t]he world needs to understand how and why the coronavirus emerged and spread so that it can prepare for future crises."¹⁰

China's retaliatory response to Australia's proposal for an international investigation into the origins of the pandemic illustrates the difficult balance between securing cooperation from the host state and ensuring a transparent and effective investigation.¹¹ As calls for an international inquiry were mounting, Australian officials expressed concern that "Washington's attack on China [was giving] Beijing room to argue that Australia's request for an independent inquiry [was] part of a U.S.-led agenda to blame it for the coronavirus outbreak," and that "the American approach of 'let's get China'" was undermining Australia's efforts "to cast the review as open-minded and global."¹²

Despite this initial resistance, China has agreed to an independent review of the global coronavirus response, which has been launched under the auspices of the World Health Organization (WHO).¹³ The review will be led by former Liberian President Ellen Johnson Sirleaf, a Nobel Peace Prize winner, and Helen Clark, former prime minister of New Zealand.¹⁴ Countries can propose potential members of the review panel, which is expected to deliver an interim report in November and a "substantive" report to the World Health Assembly (the WHO's governing body) at its 2021 meeting next May.¹⁵

The United States' suspension of funding to the World Health Organization, which relies on contributions from member states, and its notice of withdrawal from the WHO's founding treaty effective July 2021, will deprive the United States of any meaningful role in this international response.¹⁶

¹⁰ *Written Statement of Professor Russell A. Miller: Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability Before the S. Comm. on the Judiciary* (June 23, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony1.pdf>

¹¹ Gerry Shih, *Bristling at Calls for Coronavirus Inquiry, China Cuts Australian Beef Imports*, WASHINGTON POST (May 12, 2020), https://www.washingtonpost.com/world/asia_pacific/bristling-at-calls-for-coronavirus-inquiry-china-fires-trade-salvo-at-australia/2020/05/12/29c53058-93fe-11ea-87a3-22d324235636_story.html

¹² Kirsty Needham & Colin Packham, *Australia Annoyed as U.S. Pushes Wuhan Lab COVID-19 Theory*, REUTERS (May 8, 2020), https://www.reuters.com/article/us-health-coronavirus-australia-china/australia-annoyed-as-us-pushes-wuhan-lab-covid-19-theory_idUSKBN22K118 [<https://perma.cc/FG7R-3ZE7>]

¹³ Helen Branswell, *WHO Launches Independent Review of the International Response to the COVID-19 Pandemic*, STAT NEWS (July 9, 2020), <https://www.statnews.com/2020/07/09/who-review-covid19-pandemic-response> [<https://perma.cc/MM5B-N2NA>]

¹⁴ *Id.*

¹⁵ *See* COVID-19: MAKE IT THE LAST PANDEMIC, (Independent Panel for Pandemic Preparedness & Response, 2021), https://theindependentpanel.org/wp-content/uploads/2021/05/COVID-19-Make-it-the-Last-Pandemic_final.pdf [<https://perma.cc/67UU-X4LU>]. The panel's former co-chairs also produced a progress report in November 2021 emphasizing the need for more urgent, coordinated global action. *See* LOSING TIME: END THIS PANDEMIC AND SECURE THE FUTURE (Independent Panel for Pandemic Preparedness and Response, 2021), https://live-the-independent-panel.pantheonsite.io/wp-content/uploads/2021/11/COVID-19-Losing-Time_Final.pdf [<https://perma.cc/G58K-QY8A>].

¹⁶ On January 20, 2021, President Biden notified the UN Secretary-General that the United States was retracting its notice of withdrawal, which had not yet taken effect. *See* Letter from Joseph R. Biden, President of the United

Meanwhile, China has taken advantage of the absence of U.S. leadership and support for the WHO's efforts by increasing its funding to the organization, leading to a vicious cycle whereby U.S. concerns that the WHO is being influenced disproportionately by China may become a self-fulfilling prophesy.¹⁷

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

2. Availability of Existing International Fora

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

A: The immediate priority (in addition to stopping the continued global spread of the virus) should be securing Chinese cooperation and access to evidence that will provide scientists with a better understanding of exactly where the novel coronavirus first appeared and how it spread. That said, there will also need to be an accounting of what Chinese (and other countries') authorities could and should have done differently to avoid the worst outcomes. The International Court of Justice (ICJ) can adjudicate bilateral disputes between states, and it can also issue advisory opinions at the request of a competent U.N. organ or specialized agency (such as the General Assembly or the WHO). Some have suggested that the ICJ would be an appropriate forum in which to address legal responsibility for climate change. Some of the same considerations would apply in both contexts.¹⁸

There is a non-frivolous argument that the ICJ would have jurisdiction over a claim against China under Art. 75 of the WHO Constitution, which provides for the Court's jurisdiction over "any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly..." A central question would be whether an alleged violation of the reporting requirement in the 2005 International Health Regulations promulgated by the World Health Assembly falls within the scope of this

States, to His Excellency António Guterres, Secretary-General of the United Nations (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/letter-his-excellency-antonio-guterres/> [https://perma.cc/CS7J-YYJT].

¹⁷ Gerry Shih, *China Pledges Additional \$30 Million Funding for World Health Organization*, WASHINGTON POST (Apr. 23, 2020), https://www.washingtonpost.com/world/asia_pacific/china-pledges-additional-30-million-funding-for-world-health-organization/2020/04/23/24f9b680-8539-11ea-81a3-9690c9881111_story.html [https://perma.cc/WZC5-3TRL].

¹⁸ See, e.g., Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L. J. 679, 708 (2017) (recommending international adjudication as "a complement rather than as a substitute for" climate change negotiations).

treaty provision. International lawyer Peter Tzeng has offered a preliminary analysis of these jurisdictional questions.¹⁹ However, the United States would lack standing to bring such a claim if it is no longer party to the WHO Constitution.

3. Efficacy of Tariffs or Sanctions Against China

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

A: My view on tariffs is informed by experts in economics, who have established definitively that tariffs on foreign goods are ultimately paid by American consumers. As Veronique de Rugy, Senior Research Fellow at the Mercatus Center at George Mason University and Senior Fellow at the American Institute for Economic Research, has noted, several academic studies have shown that tariffs imposed on imports from China and other U.S. trading partners starting in March 2018 “have actually been shouldered largely by Americans rather than by foreign companies.”²⁰ As Dr. de Rugy indicates, “[a]ny COVID-19 retaliation tariffs would be no different, and would not be paid for chiefly by the Chinese but, rather, by Americans in the form of higher prices.”²¹

It is important to emphasize that any talk of cancelling U.S. sovereign debt held by China is even more reckless, and should be abandoned immediately. Senior economists and investment analysts agree that cancelling Chinese debt “would throw the entire U.S. financial system into disarray.”²² Even raising the *possibility* of taking this action “could prompt investors to reevaluate Treasuries as the world’s benchmark safe haven.”²³ Moreover, “China is a principal buyer of Treasuries, so if the country significantly scaled back its purchases, or sold a material amount of its existing holdings, the associated slump in demand could drive up America’s borrowing costs.”²⁴

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

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

¹⁹ Peter Tzeng, *Taking China to the International Court of Justice Over COVID-19*, EURO. J. INT’L LAW: TALK! (Apr. 2, 2020), <https://www.ejiltalk.org/taking-china-to-the-international-court-of-justice-over-covid-19/> [https://perma.cc/4NPH-TJYN].

²⁰ Veronique de Rugy, *Should China Pay Reparations?*, AMERICAN INSTITUTE FOR ECONOMIC RESEARCH (May 7, 2020), <https://www.aier.org/article/should-china-pay-reparations/> [https://perma.cc/R7UW-X999].

²¹ *Id.*

²² Martha C. White, *Should the U.S. Refuse to Pay Back its \$1 Trillion Debt to China?*, NBC NEWS (Jun. 11, 2020), <https://www.nbcnews.com/business/economy/should-u-s-refuse-pay-back-its-1-trillion-debt-n1227351> [https://perma.cc/7VTB-JM4H].

²³ *Id.*

²⁴ *Id.*

by the Chinese government. Professors Jentleson's and Whytock's study of the use of coercive diplomacy towards Libya found that "economic sanctions can be an effective component of a coercive diplomacy strategy when imposed multilaterally and sustained over time."²⁵

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

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

A: A recent Heritage Foundation issue brief by senior policy analyst Olivia Enos emphasizes the importance of multilateralism in attempts to hold the Chinese Communist Party accountable for its response to COVID-19, and calls on the United States to "lead the way."²⁶ The report, which predates the World Health Assembly's resolution establishing an international review panel, recommends that the U.S. "press the international community to coalesce around pursuing an international investigation into the CCP's mishandling of the COVID-19 outbreak," and advises that "in partnership with like-minded countries, the U.S. should press the CCP to respect civil society and individual liberties that can help prevent future catastrophes."²⁷

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

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

I concur in the assessment offered by Kurt Campbell, Chair and CEO of the Asia Group and former Assistant Secretary of State for East Asian and Pacific Affairs, and Rush Doshi, Director of the Brookings Institution's China Strategy Initiative, that "Beijing understands that if it is seen as leading, and Washington is seen as unstable or unwilling to do so, this perception

²⁵ Bruce W. Jentleson & Christopher A. Whytock, *Who Won Libya? The Force-Diplomacy Debate and Its Implications for Theory and Policy*, 30 QUARTERLY JOURNAL: INTERNATIONAL SECURITY (ISSUE 3), 47, 82 (2006), https://www.belfercenter.org/sites/default/files/files/publication/is3003_pp047-086.pdf [https://perma.cc/Z4X3-PZBV].

²⁶ Olivia Enos, *Holding the Chinese Communist Party Accountable for Its Response to the COVID-19 Outbreak*, HERITAGE FOUNDATION (May 12, 2020) <http://report.heritage.org/ib5074> [https://perma.cc/D3UH-7ZKW].

²⁷ *Id.*

could fundamentally alter the United States' position in global politics and the contest for leadership in the twenty-first century."²⁸

Dr. Campbell and Dr. Doshi paint a bleak picture: "During the 2014–15 Ebola crisis, the United States assembled and led a coalition of dozens of countries to counter the spread of the disease. The Trump administration has so far shunned a similar leadership effort to respond to the coronavirus. Even coordination with allies has been lacking. ... China, by contrast, has undertaken a robust diplomatic campaign to convene dozens of countries and hundreds of officials, generally by videoconference, to share information about the pandemic and lessons from China's own experience battling the disease."²⁹ In their view, the United States has little to gain by "put[ting] China at the center of its coronavirus messaging," and would do better by sending "a public message that stresses the seriousness of a shared global challenge and possible paths forward."³⁰

A group of foreign policy experts from the Center for American Progress have reached a similar conclusion and have proposed concrete steps the U.S. should take to lead the global response to the coronavirus crisis. As these experts point out, "the inept U.S. response to the coronavirus crisis domestically has hampered its ability to respond internationally."³¹

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

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

II. SENATOR LEAHY

A. *Accountability and Global Public Health*

1. The U.S. Role in Holding China Accountable

²⁸ Kurt M. Campbell & Rush Doshi, *The Coronavirus Could Reshape Global Order*, FOREIGN AFFAIRS (Mar. 18, 2020), <https://www.foreignaffairs.com/articles/china/2020-03-18/coronavirus-could-reshape-global-order> [https://perma.cc/2BS4-B9R7].

²⁹ *Id.*

³⁰ *Id.*

³¹ Max Bergmann et. al., *The U.S. Should Be Leading the Global Response to the Coronavirus Crisis*, CENTER FOR AMERICAN PROGRESS (Mar. 26, 2020), <https://www.americanprogress.org/issues/security/news/2020/03/26/482274/us-leading-global-response-coronavirus-crisis/> [https://perma.cc/697W-7V3P].

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

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

A: I would incorporate by reference my responses to [related] questions from Senator Feinstein. I would also re-emphasize the importance of multilateral approaches to determining when and how the novel coronavirus emerged and began to spread, and containing and remedying the devastating harms it continues to cause. I am very concerned that a politically-driven blame game is preventing us from engaging strategically with China and the WHO on issues including the supply and distribution of Personal Protective Equipment (PPE) and the development and production of a safe and effective vaccine. The U.S-China relationship is shaping up to be one of the world's most, if not the most, consequential bilateral relationship of this century. Any responsible strategy for pursuing "accountability" must bear that reality firmly in mind.

B. Impact of the U.S. Withdrawal from the WHO

Q: Would the United States' withdrawal from the WHO diminish its ability to lead on international health crises like the current pandemic?

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

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

Observers have attributed our disastrous (non)response to COVID-19, and many of this Administration's other harmful policies, to a lethal combination of incompetence and malevolence.³² We need to press the "reset" button and rebuild U.S. credibility and leadership at

³² See, e.g., Quinta Jurecic & Benjamin Wittes, *Incompetence Exacerbated by Malevolence*, THE ATLANTIC (Mar. 10, 2020) <https://www.theatlantic.com/ideas/archive/2020/03/incompetence-exacerbated-by-malevolence/607696/> [https://perma.cc/B6QP-FWGY] (discussing the Administration's coronavirus response); Michael Dorf, *Trump's Toxic Mix of Incompetence and Malevolence*, NEWSWEEK (Jan. 31, 2017), <https://www.newsweek.com/michael-dorf-trumps-toxic-mix-incompetence-malevolence-550549> [https://perma.cc/M7K3-K6Z5]; Greg Sargent, *Trump's Incompetence Will Not Save Us from His Malevolence*, WASHINGTON POST (Oct. 17, 2017) <https://www.washingtonpost.com/blogs/plum-line/wp/2017/10/17/trumps-incompetence-will-not-save-us-from-his-malevolence/> [https://perma.cc/CSL5-7KXT]; Benjamin Wittes, *Malevolence Tempered by Incompetence: Trump's*

home and abroad. As Jude Blanchette, Freeman Chair in China Studies at the Center for Strategic and International Studies, has written: “most importantly, the United States needs to articulate a vision—a grand strategy—that looks *beyond* the narrower (albeit important) issue of China to depict the type of global order the United States aims to help realize and protect. . . . Imagine if the United States took leadership over the litany of challenges—some existential—that now face the planet: climate change, inequality, racial injustice, poverty, and global pandemics. Few expect, or want, Beijing to lead on any of these. Many are hoping the United States eventually will.”³³

C. Steps to Encourage Outbreak Management Among Foreign Nations

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

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

In 2014, the United States and international partners launched the Global Health Security Agenda (GHSa).³⁴ Brookings Nonresident Senior Fellow and former Ambassador Bonnie Jenkins notes that, in 2013, “[w]e realized that most countries (possibly as high as 70%) were not compliant with the WHO’s 2005 International Health Regulations.”³⁵ I agree with her assessment that “[t]he GHSa countries must maintain high-level political attention and commitment to the initiative,” and that “the GHSa and national preparedness efforts need sustained funding and an even larger corps of member countries.”³⁶

Despite the overarching principle of state sovereignty, countries have a legitimate interest in each other’s disease management protocols for at least two reasons. First, every human being is entitled to basic human rights. The WHO Constitution, which Congress authorized the President to join in 1948, affirms the principle that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being *without distinction of race, religion, political belief, economic or social condition*.”³⁷ Freedom from preventable disease is a basic precondition for human flourishing.

Horrible Executive Order on Refugees and Visas, LAWFARE (Jan. 28, 2017),

<https://www.lawfareblog.com/malevolence-tempered-incompetence-trumps-horrible-executive-order-refugees-and-visas> [https://perma.cc/94WA-5RMT].

³³ Jude Blanchette, *The United States Has Gotten Tough on China. When Will It Get Strategic?*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Jul. 17, 2020), <https://www.csis.org/analysis/united-states-has-gotten-tough-china-when-will-it-get-strategic> [https://perma.cc/3RPC-RAMV].

³⁴ The GHSa website can be accessed at <https://ghsagenda.org> [https://perma.cc/LW4H-QMGP].

³⁵ Jenkins, *Now Is the Time to Revisit the Global Health Security Agenda*, BROOKINGS INSTITUTE (Mar. 27, 2020) <https://www.brookings.edu/blog/order-from-chaos/2020/03/27/now-is-the-time-to-revisit-the-global-health-security-agenda/> [https://perma.cc/U9AF-QC3M].

³⁶ *Id.*

³⁷ Constitution of the World Health Organization preamble, July 22, 1946, 62 Stat. 2670.

Second, like excessive greenhouse gas emission, ineffective disease management can have significant harmful effects on the welfare of other countries' populations. That is why countries created the WHO in 1946 as a specialized agency of the United Nations "for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples."³⁸ It might sound trite, but this is a classic example of the type of situation in which no country can or should "go it alone."

Lucie Gadenne, Assistant Professor of Economics at Warwick University, and Maitreesh Ghatak, Professor of Economics at the London School of Economics, have suggested that the WHO should narrow its focus to emphasize Global Response to Infectious Diseases (GRID).³⁹ While I do not have a position on that broader recommendation, I fully endorse the other two prongs of their recommended reforms:

- Giving the WHO capacity – beyond that granted by the International Health Regulations – to sanction countries that do not follow its rules. The lack of "teeth" in the IHR was a deliberate design choice by members of the World Health Assembly, but the COVID-19 pandemic might provide the impetus required for states to consent to more robust monitoring and enforcement procedures. Notably, however, "GRID cannot sanction countries based on outcomes but on the steps taken to abide by its recommendations."⁴⁰
- Ensuring that the WHO has a budget adequate to the task. Currently, WHO's annual budget of roughly \$2 billion "is not much higher than the budget of the main hospital in its host city, Geneva." Professors Gadenne and Ghatak propose establishing independent funding sources for GRID that "free it from relying on voluntary contributions by individual countries and shield it from the undue political influence of powerful countries."⁴¹

Kelley Lee, Professor and Research Chair in Global Health Governance at Simon Fraser University, has also emphasized the problems endemic to any organization where the funding "is so skewed toward voluntary contributions" rather than assessed contributions.⁴² I agree with Professor Lee's concern "that we don't destroy what little we already have. Instead, go the other way, let's see what we can do to build up WHO and make it the organization we need it to be."⁴³

³⁸ *Id.*

³⁹ Lucia Gadenne & Maitreesh Ghatak, *The World Health Organization: A GRID For Reform*, VOX EU (May 30, 2020), <https://voxeu.org/article/world-health-organization-grid-reform> [https://perma.cc/FBW9-6KJ3]. For similar arguments by other scholars, see Yanzhong Huang, *How to Reform the Ailing World Health Organization*, COUNCIL ON FOREIGN RELATIONS (May 3, 2016), <https://www.cfr.org/expert-brief/how-reform-ailing-world-health-organization> [https://perma.cc/XZ8A-93V9]; Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, 24 AMERICAN SOCIETY OF INTERNATIONAL LAW (ISSUE 15) (Jun.5, 2020), <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations> [https://perma.cc/95S8-V69D].

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Jen Kirby, *How to Fix the WHO, According to an Expert*, VOX NEWS (May 29, 2020), <https://www.vox.com/2020/4/19/21224305/world-health-organization-trump-reform-q-a>

⁴³ *Id.*

Finally, I must emphatically reemphasize the point that the United States needs to lead by example. We cannot expect, let alone compel, other countries to manage disease outbreaks with candor, transparency, effective coordination, and whole-of-society mobilization unless we do so ourselves. In addition to renewing our commitment to the Global Health Security Agenda, we should adopt a version of the 69-page Playbook for Early Response to High-Consequence Infectious Disease Threats and Biological Incidents developed by the Obama National Security Council as official policy, and share our knowledge and “lessons learned” with other countries.⁴⁴

I would also urge Congress to review and consider implementing other existing recommendations such as those in the National Science and Technology Council’s Pandemic Prediction and Forecasting Science and Technology Working Group’s report *Towards Epidemic Prediction: Federal Efforts and Opportunities in Outbreak Modeling*.⁴⁵ As the report makes clear, cooperating with global partners to collect and share the relevant data, both historical and real-time, will better prepare all countries to manage the next outbreak when (not if) it happens:

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

To advance public health towards the vision of pandemic protection, the Federal government should strengthen support for modeling R&D, especially in animals and at the human-animal-environment interfaces. Specifically, the [Working Group] recommends that the Federal government, to the extent possible within existing authorities and resources, ... [d]evelop a “One Health” national strategy for predictive modeling of potential infectious disease threats globally, encompassing human, animal, plant, and environmental health priorities, science, and communities.⁴⁶

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⁴⁴ See Dan Diamond & Nahal Toosi, *Trump Team Failed to Follow NSC’s Pandemic Playbook*, Politico (Mar. 25, 2020), <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285> [https://perma.cc/MNQ7-HJP4].

⁴⁵ National Science and Technology Council (December, 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/NSTC/towards_epidemic_prediction_federal_efforts_and_opportunities.pdf [https://perma.cc/B6RL-NGDL].

⁴⁶ *Id.*

A. Live Wildlife Markets and the International Wildlife Trade

1. Legislative Tools to Encourage a Global Ban on Live Wildlife Markets and the International Wildlife Trade

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

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

In light of the limited time afforded by the live-questioning format, I would like to give you the opportunity to elaborate on this issue. What legislative tools can Congress use to try to push for a global ban on live wildlife markets and the international wildlife trade?

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

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

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

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

Fourth, Congress could study the potential benefits of joining international environmental treaties so that the United States can play a more significant role in supporting and coordinating the work done by environmental treaty bodies. The 1992 Convention on Biological Diversity (CBD), which the United States has signed but not ratified, could provide a framework for pursuing negotiations about how best to eliminate conditions that permit the transmission of zoonotic pathogens from animals to humans. China will host the next CBD Conference of the Parties, which is currently scheduled for May 2021 in Kunming.⁴⁷ The United States has been an active observer in that forum and could use the opportunity to raise these issues.

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

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

Seventh, Congress could examine and decide whether to support the recommendations presented to the WHO in April by over 200 organizations endorsing a permanent ban on live wildlife markets and the use of wildlife in traditional medicine⁴⁸:

- Recommend to governments worldwide that they institute a permanent ban on live wildlife markets, drawing an unequivocal link between these markets and their proven threats to human health.
- Recommend to governments that they address the potential risks to human health from the trade in wildlife – including collection from the wild, ranching, farming, transport,

⁴⁷ For more information about the CBD Conference of Parties, see CONFERENCE OF THE PARTIES (COP), <https://www.cbd.int/cop/> [https://perma.cc/4JRR-XQQY]. Ultimately, the meeting was divided into two phases. Phase I took place online from October 11-15, 2021. Phase II is scheduled to take place in person from April 25-May 8, 2022.

⁴⁸ *World Animal Protection Calls on WHO for Global Ban of Wildlife Markets to Save Human Lives*, CISION PR NEWSWIRE (Apr. 7, 2020), <https://www.prnewswire.com/news-releases/world-animal-protection-calls-on-who-for-global-ban-of-wildlife-markets-to-save-human-lives-301036814.html> [https://perma.cc/6ZZ5-LCEJ].

and trade through physical or online markets for any purpose – and act to close down or limit such trade in order to mitigate those risks.

- Unequivocally exclude the use of wildlife, including from captive-bred specimens, in WHO’s definition and endorsement of Traditional Medicine and revise WHO’s 2014-2023 Traditional Medicine Strategy accordingly to reflect this change.
- Assist governments and lead a coordinated response among the World Trade Organization, World Organization for Animal Health (OIE) and other multilateral organizations worldwide in awareness-raising activities to clearly inform of the risks of wildlife trade to public health, social cohesion, economic stability, law and order, and individual health.
- Support and encourage initiatives that deliver alternative sources of protein to subsistence consumers of wild animals, in order to further reduce the risk to human health.

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

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

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

Congress could also study proposals for reducing the demand that drives the unsafe exploitation of wild animals and their habitats. Li Zhang, Ning Hua, and Shan Sun have explained that “[t]hroughout Chinese history, wild animals have been viewed as an important source of food and income. From a traditional Chinese perspective, as [in] many other countries, wild animals are a resource to be exploited, not something to be protected for their intrinsic value.”⁴⁹ Moreover, “with the development of a consumer economy, people’s demand for wild animal products has grown substantially.”⁵⁰

⁴⁹ nLi Zhang, Ning Hua, & Shan Sun, *Wildlife Trade, Consumption and Conservation Awareness in Southwest China*, 17 BIODIVERSITY & CONSERVATION, 1493, 1494 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7088108> [https://perma.cc/VV6K-K652].

⁵⁰ *Id.*

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

Q: During the SARS outbreak in 2003, China implemented a narrower ban on wildlife trading. But it was only temporary—China later rolled it back.⁵¹ How can we persuade other countries that bans on wildlife markets and trading need to be permanent?

A: I share the hope of conservation experts that, “[i]n the long run ... the spike in outrage over the link between commercial wildlife exploitation and COVID-19 will lead to lasting change across the wildlife industry in China, as well as elsewhere in the region.”⁵²

In the near term, the United States should work with other countries to help design and provide alternative sources of livelihood for those engaged in the wildlife trade.⁵³ The United States should also work to find ways to counter the influence of the Traditional Chinese Medicine (TCM) lobby, which has been linked to “catastrophic levels of poaching” across the world as a result of the adoption of TCM practices by millions of consumers.⁵⁴ That being said, David Olson, director of conservation at the World Wildlife Fund in Hong Kong, wisely cautions that “the international calls for action [can be] counterproductive because of the nationalism and politics involved.”⁵⁵ If calls to halt wildlife consumption and the wildlife trade can attract support in domestic public opinion, they are more likely to be effective and permanent.

A core challenge, as emphasized by Aili Kang, executive director of the Wildlife Conservation Society (WCS)'s Asia Program, will be to keep public support active over the longer term, once people begin to recover from the pandemic and risk “forget[ting] what happened.”⁵⁶ Funding for ongoing education and public service announcements that remind people of the catastrophic consequences of their consumption choices might prove a powerful strategy for entrenching lasting change.

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

⁵¹ ‡ See, e.g., Steven Lee Myers, *China Vowed To Keep Wildlife Off the Menu, a Tough Promise To Keep*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/world/asia/china-coronavirus-wildlife-ban.html> [https://perma.cc/HD4G-WJCB].

⁵² Ashoka Mukpo, *As Calls to Shutter Wildlife Markets Grow, China Struggles With an Industry Worth Billions*, MONGABAY (Apr. 27, 2020) <https://news.mongabay.com/2020/04/as-calls-to-shutter-wildlife-markets-grow-china-struggles-with-an-industry-worth-billions> [https://perma.cc/Y5TZ-C2QL].

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Demand reduction efforts by non-governmental organizations can help eliminate ignorance, but cannot deter wildlife crimes driven by greed. Combating wildlife crime needs policy support. Only by combining clear and unambiguous laws, vigorous [sic] enforcement and meaningful penalties for violators can we change the high-profit, low-risk nature of wildlife crime. Making wildlife crime high-risk not only prevents illegal wildlife trade, but also stigmatizes it in the eyes of consumers.⁵⁷

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

⁵⁷ Grace Ge Gabriel, *Will China Say No to Wildlife Trade?*, UN CHRONICLE, <https://www.un.org/en/chronicle/article/will-china-say-no-wildlife-trade> [https://perma.cc/4ZX8-RXDG].