



6-23-2020

Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability Before the Senate Committee on the Judiciary

Russell A. Miller

Washington and Lee University School of Law, millerra@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Dispute Resolution and Arbitration Commons](#), [Health Law and Policy Commons](#), [International Law Commons](#), [International Public Health Commons](#), and the [Legislation Commons](#)

Recommended Citation

Russell A. Miller, Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability Before the S. Comm. on the Judiciary, 116th Cong. (June 23, 2020).

This Speech is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.



WASHINGTON AND LEE
UNIVERSITY
SCHOOL OF LAW

Russell A. Miller
J.B. Stombock Professor of Law

Email: millerra@wlu.edu
Phone: +1 434 466 9923

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

U.S. Senate Committee on the Judiciary

Written Statement of Prof. Russell A. Miller

June 23, 2020

Chairman Graham, Ranking Member Feinstein, and distinguished Members of the Committee, thank you for giving me the opportunity to discuss China's potential international law responsibility for the harm caused by the coronavirus pandemic.

I am the J.B. Stombock Professor of Law at the Washington and Lee University School of Law. My research and teaching focus on public law subjects, including public international law. I have taught courses and led seminars on public international law for eighteen years at U.S. and European law schools. I am the author and editor of a number of books and articles in that field. I have worked on public international law matters in the context of an international institution. Among my publications on public international law is the book *Transboundary Harm in Public International Law: Lessons from the Trail Smelter Arbitration* (Cambridge University Press 2006) (co-edited with Rebecca Bratspies).¹ In a review published by the *American Journal of International Law* this book was praised as "powerfully conveyed and amply illustrated" and described as "a thought-provoking exploration of important conceptual terrain."² My expertise

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

² Jutta Brunée, *Review – Transboundary Harm in International Law*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 395 (2008).

on the canonical Trail Smelter Arbitration is an important foundation for my contribution to this hearing.

Sovereign states remain the central feature of the global order, of multilateral cooperation, and of public international law.³ States, and their sovereignty, are enshrined among the foundational principles of the United Nations Charter, which ensures the “sovereign equality” of all U.N. Members.⁴ It is accepted that the U.N. Charter codifies the customary principles of non-intervention and territorial integrity. The International Court of Justice, in the *Nicaragua* case, explained that “the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.”⁵

These essential commitments have been reinforced even as conditions have wound states into a thickening web of interrelation, interdependence, and integration. International law and international institutions have been a part of the process of globalization. But in many ways, they have merely responded to the social, economic, technological, and political forces that “flattened” the world.⁶ Much of life now is lived transnationally, including security, business, cultural, and even family affairs.

One mechanism international law has found for managing the tension between states’ interest in sovereignty and the reality of their deepening interrelationships and interactions is the doctrine addressing “transboundary harm.” This doctrine is concerned with the question: What are the consequences if one state, in exercising its territorial sovereignty, causes harm across a border in the sovereign territory of another state? It is a confounding question because, in these situations, both states can invoke their well-settled right to sovereignty. One state claims the right to use its territory as it wishes. Another state claims the right to be free from another state’s intrusions or interference.

³ In public international law the term “state” refers to the territorial and political entity we sometimes also call a “country.” Presently there are 193 member states of the United Nations. As used in this statement, for example, the term “state” applies to the United States of America and the People’s Republic of China. Interactions between states might be referred to as “interstate” or “international.” This use of the term “state” should not be confused with the American use of the term “state” to refer to the fifty separate sub-sovereign political units that form the Union.

⁴ U.N. Charter art 2, para. 1.

⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). The *Nicaragua* case involved allegations that the United States’ anti-communist campaign against the Sandinista government in the 1980s violated Nicaragua’s international law rights to non-intervention and territorial integrity. The United States did not participate in the proceedings on the merits of the allegations. The International Court of Justice ruled that the United States breached its obligations under customary international law not to use force against another state, not to intervene in another state’s affairs, not to violate another state’s sovereignty, and not to interrupt peaceful maritime commerce. This is a reminder that the international law claims I describe in this statement are universally applicable, including as standards for the conduct of the government of the United States. See Efthymios Papastavridis, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986, in *LATIN AMERICA AND THE INTERNATIONAL COURT OF JUSTICE* (Jean-Marc Sorel & Paula Wojcikiewicz Almeida eds., 2017); MAX HILAIRE, *INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* (1997).

⁶ THOMAS FRIEDMAN, *THE WORLD IS FLAT* (2005).

The transboundary harm problem found its most prominent answer in the decisions of the Trail Smelter Arbitration.⁷ The Trail Smelter case arose out of complaints from hard-scrabble farmers in the depression-era Rocky Mountains who suspected that crop damage and diminished timber harvests along the Canadian border in north-eastern Washington state had been caused by pollution drifting over the border from a massive zinc smelter in the town of Trail, British Columbia. When their attempts to obtain damages through civil lawsuits were obstructed by jurisdictional issues, the farmers turned to their Congressional delegation for help. The United States government took up the cause, asserting Canada's international law responsibility for the harm and demanding remedies. Canada stood in for the smelting company and agreed to have the dispute resolved through international arbitration. The arbitrators considered three factual and legal issues: (1) had the Trail Smelter caused harm in the United States; (2) if the Trail Smelter caused harm in the United States, then was that a violation of international law; and (3) if the harm caused by the Trail Smelter in the United States was a violation of international law, then what remedies were owed to the United States. It took the arbitrators years of fact-finding and legal analysis, and two judgments, to settle the matter. They found that the Trail Smelter (and Canada as the smelting company's proxy) was the proximate cause of harm to crops and timber in the United States. The arbitrators then announced the groundbreaking legal rule that has come to be known as the Trail Smelter Principle or the Transboundary Harm Principle:

*No state has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*⁸

Finally, the arbitrators held that Canada was responsible in international law, under the newly announced international law rule, for the harm done to American interests in the state of Washington. Canada was ordered to cease the harm and to ensure non-repetition. This was to be achieved through a jointly-monitored pollution abatement regime at the smelter. The aim of this regime was to allow the mill to continue operating while substantially reducing its harmful emissions. Canada also was ordered to make reparation for the harm the smelter had done in the United States by paying compensation to the American farmers. Both of these remedies required extensive fact-finding, including evidence from emissions and actuarial experts. As part of their judgment about Canadian reparations, the arbitrators considered evidence of the Americans' substandard farming techniques and practices. The final award was reduced to account for the Americans' contribution to the harm they suffered. To its credit, Canada complied with the arbitrators' judgment.

The Trail Smelter Arbitration is an old case involving a discrete dispute in a remote corner of North America. But the Transboundary Harm Principle the arbitrators announced has become settled doctrine in international law. Especially in the environmental law context, the Trail

⁷ See *Trail Smelter Arbitration Decision*, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW 182 (1939); *Trail Smelter Arbitration Decision*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 684 (1941).

⁸ See *Trail Smelter Arbitration Decision*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 684, 716 (1941).

Smelter Arbitration now is controlling precedent. The 1972 Stockholm Declaration on the Human Environment codified the Principle.⁹ The same is true for the Convention on Biological Diversity and the Framework Convention on Climate Change.¹⁰ The International Court of Justice enforced the Transboundary Harm Principle in the *Nuclear Weapons* case and the *Gabčíkovo-Nagymoros* case.¹¹ The Transboundary Harm Principle informed the International Law Commission's work developing the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.¹² The widespread embrace of the Transboundary Harm Principle suggests that it has emerged as a customary international law norm that is generally applicable to and binding on all states.¹³ That status is reinforced by the fact that the Transboundary Harm Principle so equitably navigates the clash of sovereignties implicated by transboundary disputes. The Transboundary Harm Principle accounts for the reality of states' ever-deeper interdependence, on the one hand, while reaffirming the state sovereignty upon which the entire state-based system hinges, on the other hand. One commentator explained that the rule announced by the Trail Smelter Arbitration replaces the traditional, absolute rule against non-intervention with a rule permitting *de minimis* interference as long as it does not cause injury of serious consequence. But, where there is actual, provable, substantial harm to a traditional sovereign interest, the Transboundary Harm Principle grants the harmed state relief.¹⁴

The relevance of the Transboundary Harm Principle for today's debate about accountability for the coronavirus pandemic should be obvious. The rule announced in the Trail Smelter Arbitration gives states around the world a basis for alleging the Chinese government's international law responsibility for *using or allowing the use of its territory – in relation to the coronavirus outbreak – in such a manner as to cause injury of serious consequence to the territory of other states or the properties or persons therein.*

⁹ Adopted June 16, 1972, at the United Nations Conference on the Human Environment, Stockholm, *Report of the U.N. Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 Rev. 1 at 3 (1973), U.N. Doc. A/CONF.48/14 at 2 and Corr.1 (1972).

¹⁰ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143; Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

¹¹ *Nuclear Weapons*, 1996 I.C.J. 226, at 241-42 para. 29 (July 1996); *Gabčíkovo-Nagymoros Project (Hun. v. Slov.)*, 1997 I.C.J. 7, at 41 para. 53 (Sept. 1997).

¹² Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001); Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 49, UN Doc. A/RES/56/82 (2001).

¹³ Two of the most important sources of public international law rules are treaties and customary international law. Treaties are mutual agreements among states by which the states signal their consent to be bound by law. States are obliged to fulfill the terms of these agreements. But the rules treaties create only bind the states that are party to the agreement. Customary international law establishes generally applicable, binding rules on the basis of states' general practice, if states engage in that practice because they believe they are required to do so by law. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993; HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* (2014).

¹⁴ Alfred P. Rubin, *Pollution by Analogy*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 46, 53 (Rebecca Bratspies & Russell Miller eds., 2006).

There are a number of theories about the Chinese government’s acts or omissions concerning the emergence and world-wide spread of the coronavirus that may be the proximate cause of actionable transboundary harm.

All of these theories start with the incontestable fact that the coronavirus outbreak originated in China.¹⁵

One theory is concerned with the conduct of the Chinese government *after* the health crisis emerged.¹⁶ This “ex post” theory alleges a broad range of acts and omissions that helped transform a local outbreak into a global pandemic. There is room for this theory under the Transboundary Harm Principle. But the “ex post” theory also might involve the Chinese government’s more specific international obligations established by global health law, human rights law, trade law, peace and security law, and the law of development finance.¹⁷

Another theory is concerned with the conduct of the Chinese government *before* the health crisis emerged.¹⁸ This “ex ante” theory alleges a broad range of acts and omissions that created the conditions for the emergence and world-wide spread of the novel coronavirus. The essence of this allegation is that the Chinese government has moved slowly to establish an effective food and drug regulatory regime.¹⁹ The food safety framework in China is only gradually catching up to the conditions in any of its modern, developed trading partners. Not surprisingly, China’s less effectively regulated food and drug market has produced one health crisis after the other. The risks in this arrangement – for China and the rest of the world – have been made clear again and again: with the 2002 SARS crisis; with the 2008 milk production scandal; and with the 2009 H1N1 crisis.²⁰ Now, it is thought that the unregulated sale of wildlife at open wet markets – like the Wuhan wet market – was the cause of the outbreak of the novel coronavirus in 2019. The journal *Scientific American* reports that independent researchers believe that wild pangolins sold for consumption at Wuhan’s wet market were the intermediate carrier of the coronavirus that

¹⁵ See Derrick Bryson Taylor, *How the Coronavirus Pandemic Unfolded: a Timeline*, N.Y. TIMES, June 9, 2020, available at <https://www.nytimes.com/article/coronavirus-timeline.html>.

¹⁶ See, e.g., Mona Charen, *China’s Lies, and Ours*, NATIONAL REVIEW, March 27, 2020, available at <https://www.nationalreview.com/2020/03/coronavirus-pandemic-china-lies-united-states-lies/>.

¹⁷ See, e.g., Armin von Bogdandy & Pedro Villarreal, *International Law on Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis*, MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW & INTERNATIONAL LAW (MPIL) RESEARCH PAPER NO. 2020-07, March 26, 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561650##.

¹⁸ See, e.g., Russell Miller & William Starshak, *China’s Responsibility for the Global Pandemic*, JUST SECURITY, March 31, 2020, available at <https://www.justsecurity.org/69398/chinas-responsibility-for-the-global-pandemic/>.

¹⁹ See, e.g., David J. Ettinger *et al.*, *China Publishes Long-Awaited Food Safety Law Implementation Regulation*, NATIONAL LAW REVIEW, Nov. 5, 2019, available at <https://www.natlawreview.com/article/breaking-news-china-publishes-long-awaited-food-safety-law-implementation-regulation>.

²⁰ See, e.g., Rebecca Onion, *We’ve Had a Lot of Pandemics Lately. Have We Learned Anything From Them?*, SLATE, Jan. 30, 2020, available at <https://slate.com/human-interest/2020/01/coronavirus-outbreak-sars-swine-flu-viral-history.html>; Yanzhong Huang, *The 2008 Milk Scandal Revisited*, FORBES, Jan. 16, 2014, available at <https://www.forbes.com/sites/yanzhonghuang/2014/07/16/the-2008-milk-scandal-revisited/#7a634dbf4105>.

most likely originates in the region’s bats.²¹ In a tacit admission that the unregulated market for wildlife meat was the avoidable cause of the crisis, in late February, 2020, the Chinese government “announced a permanent ban on wildlife consumption and trade.”²² The *Scientific American* report suggests that the Chinese government begrudgingly adopted the ban because it will “stamp out an industry worth \$76 billion” that involves approximately 14 million laborers.²³

There are several policy reasons for raising the “ex ante” theory in any effort to address the Chinese government’s potential international law responsibility for the transboundary harm caused by the global coronavirus pandemic.

First, the “ex ante” theory prioritizes the interests of the Chinese people, who are most at risk if China’s food and drug market remains less effectively regulated. As was the case in the current coronavirus outbreak, the Chinese people will be the first to suffer the health consequences of their government’s regulatory neglect. The Chinese people also will be subject to extreme mitigation and crisis-intervention measures as their government responds to inevitable health crises. Those measures risk violating the Chinese people’s core human rights.

Second, the “ex ante” theory accounts for important economic and trade concerns. As with other regulatory sectors – such as labor, environment, and intellectual property – China’s lower standards for health and safety in the food and drug market give it a significant competitive advantage among its more developed and more stringently regulated trading partners. China has used those competitive advantages, including its less effectively regulated food and drug market, to become a globalized economic power. That has secondary consequences. China’s products reach every corner of the globe; its citizens, as business-people and tourists, travel to every part of the planet; and its booming economy draws in a large number of foreigners for work and travel, many of whom will move on to new locales around the world after their time in China. All of this contact, all of this consumption, all of this comingling has churned up vast wealth for China. In a globalized regulatory race to the bottom, it also applies pressure on the rest of the world to compete on China’s terms and to live with the risks created by the Chinese government’s failure to make the country’s food and drug regulations more effective.²⁴ The Chinese government has preferred its globalized, economic advantage (and the economic growth that advantage produces) over the health and safety concerns of its people and the rest of the world.

There is strong bi-partisan commitment to both of these policy concerns.²⁵

²¹ Jane Qiu, *How China’s ‘Bat Woman’ Hunted Down Viruses from SARS to the New Coronavirus*, SCIENTIFIC AMERICAN, June 1, 2020, available at <https://www.scientificamerican.com/article/how-chinas-bat-woman-hunted-down-viruses-from-sars-to-the-new-coronavirus1/>.

²² *Id.*

²³ *Id.*

²⁴ DANI RODRIK, *THE GLOBALIZATION PARADOX* (2011).

²⁵ See, e.g., Haley Byrd, *Senate Approves Uyghur Human Rights Bill*, CNN, May 14, 2020, available at <https://www.cnn.com/2020/05/13/politics/uyghur-bill-senate-china/index.html>; Jeanne Whalen, *Commission that Advises Congress on China Warns of Prolonged Strategic Competition*, WASHINGTON POST, Nov. 14, 2019,

There also is a legal justification for raising the “ex ante” theory in any effort to address the Chinese government’s potential international law responsibility for the global coronavirus pandemic. The “ex ante” theory is a close analogy to the Trail Smelter Arbitration. The Trail Smelter dispute involved the allegation that Canada had failed to regulate the smelter’s environmental impact in a manner that would have prevented to occurrence of transboundary harm in the United States. The argument in the present case would be similar. The allegation is that the Chinese government’s failure to more effectively regulate its food and drug market – especially the failure to regulate the sale of wildlife at open wet markets – was a proximate cause of the global coronavirus pandemic and the immense harm around the world the pandemic has done to people’s life, health, and property, as well as the harm done to the economies of nearly every state in the world. The Trail Smelter Arbitration imposed international legal responsibility for domestic regulatory failure. This is exactly what the “ex ante” theory alleges as a way of asserting the Chinese government’s international law responsibility for the harm caused by global coronavirus pandemic.

Of course, asserting the Chinese government’s international law responsibility under the Transboundary Harm Principle is not the same thing as establishing a violation of the Principle. Several elements must be proven by clear and convincing evidence:

- the Chinese government’s acts or omissions (under either the “ex ante” or “ex post” theory) caused, facilitated, or exacerbated an injury;
- the injury, involving property or people, occurred in another state; and
- the injury is of serious consequence.

If the arbitrators were able to find a violation of the Transboundary Harm Principle in the Trail Smelter Arbitration on the basis of the pollution emanating from the smelter in British Columbia, then there is more than just a dubious basis for considering the Chinese government’s international law responsibility for the transboundary harm resulting from the emergence and spread of the coronavirus in 2019-2020.

But the outcome of that allegation should not be prejudged. There must be a thorough, independent assessment of the facts – including the facts relating to other states’ contribution to the harm they allege – followed by a just and equitable application of the legal standard to those facts. With this in mind, the Trail Smelter Arbitration also recommends itself as a model for the kind of procedure and statecraft that will be necessary in any effort to assert the Chinese government’s international responsibility for the transboundary harm resulting from the global coronavirus pandemic. The Trail Smelter Arbitration involved an independent, international arbitration convened by the United States and Canada for the resolution of their transboundary dispute. The arbitrators were charged with thoroughly investigating the facts – including the difficult task of monetarily quantifying the harm done – as well as fairly applying the relevant

available at <https://www.washingtonpost.com/business/2019/11/14/commission-that-advises-congress-china-warns-prolonged-strategic-competition/>.

law. The international commission proposed by the Justice for Victims of Coronavirus Act is a step in the direction of a comprehensive international investigation similar to the investigation that was conducted by the Trail Smelter arbitrators.²⁶

The Trail Smelter Arbitration highlights other strategic concerns. For example, it underscores the importance of Canada's willingness to participate in the arbitration. Without that essential gesture of good-faith and good-neighborliness, there would not have been a Trail Smelter Arbitration. Several factors should be considered in order to encourage the Chinese government to take a similar approach to any effort to determine its international law responsibility for the transboundary harm resulting from the emergence and world-wide spread of the coronavirus.

First, the Chinese government should be urged to consider how its participation will be beneficial.

China's participation in a transboundary harm process would have economic benefits. Canada consented to the Trail Smelter Arbitration because it wanted to maintain good relations with a powerful neighbor and important trading partner. In the end, the smelter was kept running under a strictly-monitored pollution abatement regime imposed by the arbitrators. That important economic institution was rejuvenated and modernized by the Trail Smelter Arbitration and it remains a thriving part of Canada's economy today. The Chinese government might be persuaded to view things in a similar light. There is significant evidence that the fallout of the pandemic, including an unprecedented collapse in global trade, is harming China's economy.²⁷ By participating in an transboundary harm process, and complying with any remedies ordered as a result of the process, China would help to revive a global economy that will resume its robust consumption of Chinese goods. Canada's participation in the Trail Smelter Arbitration also provided some unexpected economic benefits. The smelting company's efforts to comply with the arbitrators' judgment forced Canadian industry to become a technological leader in pollution abatement. The smelting company eventually repurposed and sold the byproducts of its pollution abatement program as a highly profitable fertilizer. Surely the Chinese government can see the potential economic windfall from becoming a world leader in pandemic prevention and treatment.

China's participation in a transboundary harm process also would have documentary benefits. 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. The world needs to understand how and why the coronavirus emerged and spread so that it can prepare for future crises. That is mostly work for the scientific community. But a legal process can make an important contribution. A legal process especially provides an opportunity to produce an accepted and accessible global narrative about the episode. This is

²⁶ Justice for Victims of Coronavirus Act, S. 3588, 116th Cong. (2020).

²⁷ See, e.g., Emily Feng & Amy Cheng, *With China's Economy Battered By Pandemic, Millions Return To The Land For Work*, NATIONAL PUBLIC RADIO, June 8, 2020, available at <https://www.npr.org/2020/06/08/868461563/with-chinas-economy-battered-by-pandemic-millions-return-to-the-land-for-work>.

international law’s expressive or “truth-telling” function.²⁸ Naturally, any narrative that emerges from a transboundary harm process will be shaped by the Chinese government’s right to tell its “side of the story.” It may be so effective in doing this that it would prevail over an allegation that its actions or omissions were the proximate cause of significant transboundary harm. But it also will involve, as was the case of the scrutiny applied to the American farmers in the Trail Smelter Arbitration, the presentation of evidence of the American government’s “contribution to its injury by willful or negligent action or omission.”²⁹

Second, the Chinese government might be persuaded that participation in an accountability process will help secure its status as a responsible, reputable, and respected world power.³⁰

Third, the *Trail Smelter Arbitration* demonstrates the importance of civil law remedies as part of an overall framework for holding a state accountable for the transboundary harm its conduct causes. The Washington farmers’ attempts to sue the Canadian smelting company, albeit unsuccessful, nevertheless helped spur the American government to action and served as an important, preliminary stage in the dispute at which evidence and expertise were developed. The lawsuits also helped frame the public and political perception of the dispute as a struggle between simple farmers and a Canadian corporate behemoth. This picture must have contributed to Canada’s willingness to participate in the arbitration. In other instances, such as the Libya-Lockerbie Bombing case, civil law liability ultimately secured a profound measure of private justice, in part by serving as leverage in interstate negotiations seeking to establish accountability and obtain damages in a settlement.³¹ All of this confirms two important points. On the one hand, the Transboundary Harm Principle is a public international law norm. There is no sovereign immunity against public international law claims. On the other hand, the proposals to deny the Chinese government the traditional privilege of foreign sovereign immunity in U.S. courts for civil lawsuits concerned with the global coronavirus pandemic might have strategic utility beyond their practical ability to secure damages for Americans.³²

In conclusion, I endorse Congressional and Executive Branch efforts to consider and seek to account for the Chinese government’s potential international law responsibility for the substantial transboundary harm its acts and omissions may have caused in connection with the global coronavirus pandemic. The Trail Smelter Arbitration announced the applicable customary international law rule. The Transboundary Harm Principle holds that no state may use or permit the use of its territory in such a manner as to cause significant injury in the territory of another

²⁸ See, e.g., Mark Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEORGE WASHINGTON LAW REVIEW 1165 (2006-2007).

²⁹ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 39, in Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001).

³⁰ See, e.g., JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015); *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* (Eyal Benvenisti & Moshe Hirsch eds., 2004).

³¹ See *Washington Settles American Suits against Libya*, L.A. TIMES, Aug. 15, 2008, available at <https://www.latimes.com/archives/la-xpm-2008-aug-15-fg-libya15-story.html>; Jerome L. Skinner, *An American Civil Law Response to International Terror*, 69 JOURNAL OF AIR LAW AND COMMERCE 545, 554 (2004).

³² Justice for Victims of Coronavirus Act, S. 3588, 116th Cong. (2020).

state. The Trail Smelter Arbitration also provides a model for a fair and equitable transboundary harm process through which the Chinese government’s alleged international law responsibility would have to be established. That process would include an independent, international institution before which all interested parties could participate to determine the facts and influence the interpretation and application of the law. There are many reasons why the Chinese government should consider participating in a transboundary harm process. In any case, the success of such a process would be enhanced by creating the possibility for civil law remedies against foreign sovereigns in relation to the global coronavirus pandemic, both as a means for securing individual justice and as a means for leveraging interstate negotiations concerned with establishing the Chinese government’s responsibility and settling on potential remedies.

I want to underscore that these claims are in no way born out of base a dislike for China. My position is not a crass form of China-bashing. Instead, I advance this position out of a deep commitment to the global order, including the public international law regime that makes it possible. State sovereignty is the heart of that global order. The Trail Smelter Arbitration provided a norm, and it provided an example of a process, for reinforcing state sovereignty in our globalized era. The international order and public international law need the lessons of the Trial Smelter Arbitration more now than ever before. For this reason, I would endorse the enforcement of the Transboundary Harm Principle if the circumstances of the global coronavirus pandemic were reversed. But they are not. The pandemic originated in China and there are profound policy and legal reasons for considering whether the Chinese government’s acts and omissions were the proximate cause of the pandemic’s immense transboundary harm. Besides, there is a final reason why my position must not be construed as an attack on China. The Trail Smelter Arbitration teaches us that the Transboundary Harm Principle can actually do the offending country a great deal of good. In this case it would advance the health and human rights interests of the Chinese people. It would prompt China to profit from its experience in pandemic prevention, mitigation, and treatment. It would signal the good-faith needed for a confident resumption of the well-functioning world trade regime from which China profits so much. And it would help secure China’s status as a responsible, reputable, and respected global power. That would be a welcome positive consequence of the devastating and deadly novel coronavirus pandemic.

Respectfully submitted,



Russell A. Miller
J.B. Stombock Professor of Law
W&L University School of Law