

Speech by SJ at 2021 Colloquium on International Law (English only) (with photo)

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the 2021 Colloquium on International Law "Development of International Trade Law in the [Post-] Pandemic Era" today (November 19):

Chief Executive (Chief Executive, Mrs Carrie Lam), Commissioner Liu (Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region (HKSAR), Mr Liu Guangyuan), Ms Joubin-Bret (Secretary of the United Nations Commission on International Trade Law (UNCITRAL), Ms Anna Joubin-Bret), Dr Neoh (Chairman of the Asian Academy of International Law (AAIL), Dr Anthony Neoh), Professor Huang (President of the Chinese Society of International Law, Professor Huang Jin), distinguished guests, ladies and gentlemen,

May I first express my gratitude to the AAIL and the Chinese Society of International Law for putting together this Colloquium and for inviting me to speak here.

The uniqueness of the theme of today's colloquium is the use of square brackets for the phrase [Post-] Pandemic Era. It reflects that in some jurisdictions they adopt a "zero-COVID" approach whilst others a "live-with-COVID" strategy. Yet irrespective of the different approaches, the world has to adapt and must adapt quickly. Trade continues, and trade law-related disputes are unavoidable.

Despite a fall in world trade in 2020 due to the pandemic, recent figures have shown a resurgence of global economic activity and projected a rebound in world trade in 2021.

As cross-border trade will continue to be an engine of growth in the [post-] pandemic recovery, an important topic which warrants our discussion today is the development of international trade laws.

Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to the HKSAR

The Secretary of the United Nations Commission on International Trade Law (UNCITRAL), Ms Anna Joubin-Bret, commented at the 4th UNCITRAL Asia Pacific Judicial Summit in Hong Kong Legal Week 2021, "[t]he CISG, which celebrated its 40th anniversary last year, is the most successful substantive uniform commercial law treaty".

CISG entered in force for China as of January 1, 1988. CISG will soon be applicable to the HKSAR. The legislation has been passed and pending the procedural aspects in accordance with Article 153 of the Basic Law and for the Central People's Government to formally notify the Secretary-General of the United Nations (as depository for the CISG) of the requisite declaration for its application to the HKSAR, CISG will come into force in the HKSAR next year.

(i) Reservation under Article 95 of the CISG

China has made a reservation under Article 95 of the CISG, declaring that it is not bound by Article 1(1)(b). This means that CISG rules only apply to international sales contracts between parties whose places of business are in different CISG Contracting States (as required by Article 1(1)(a)) in Mainland China.

In response to the Consultation submissions in the HKSAR, the CISG will apply to the HKSAR in full, that is without China's Article 95 reservation.

This distinction evidences China's determination to fully implement and respect "one country, two systems" and in particular to facilitate the HKSAR to continue to develop its common law legal system.

(ii) Mainland - HKSAR arrangement

Being an international convention governing international sale of goods, CISG does not apply to transactions within China, namely between businesses in Mainland and the HKSAR. We will discuss with the Central People's Government to arrive at an arrangement to ensure the effective implementation of the principles enshrined in CISG under "one country, two systems".

Balancing trade and public health: solidarity is key

Ever since the outbreak of the pandemic, lawyers practising international trade law have repeatedly warned of the risk that COVID-19 response measures adopted by governments, which unavoidably interfere in some way with the business operations of private enterprises, might be challenged in courts or investor-state dispute settlement proceedings. Indeed, the United Nations Conference on Trade and Development (UNCTAD) published an Issues Note in 2020 warning that there could be a surge of investor-state cases with respect to COVID-related measures.

In December 2020, as a measure to guarantee the supply of a COVID-19 medication Remdesivir in Russia, the Russian Government, in accordance with its national law and in line with the compulsory licensing regime under Article 31 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), issued an order to grant a compulsory license to a Russian company for the use of certain patents without the consent of the patent holder, Gilead Sciences, Inc., a US-based pharmaceutical company. The order allowed the Russian company to produce the COVID-19 medication in Russia on a non-exclusive basis until the end of 2021, upon paying to Gilead adequate compensation.

Article 31 of the TRIPS Agreement permits WTO members to grant compulsory licences under their own national laws, so as to allow the use of a patent without the patent holder's authorisation, subject to the payment of adequate compensation and usually after unsuccessful efforts to obtain authorisation from the patent holder. This

latter requirement for prior negotiations with the patent holder may also be waived in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.

In the Russian case, Gilead later filed a lawsuit at the Supreme Court of the Russian Federation, challenging the government order and arguing that it undermined Gilead's rights as the patent owner in choosing its licensees and in setting the amount of consideration for the licence. In May 2021, the Supreme Court rejected Gilead's claims, and the Russian Government's order was upheld.

Apart from Article 31, the international community has explored other measures to combat the pandemic under the TRIPS Agreement. Back in October 2020, India and South Africa initiated a proposal for a temporary waiver of certain provisions of the TRIPS Agreement, suspending the patent rights in relation to COVID-19 medications, so as to aid the prevention, containment and treatment of COVID-19. The proposal has since gained support from a significant number of countries, including China, Russia and the US. China has expressed support of the developing countries' demand for the TRIPS waiver and will do all things that are conducive to the equitable distribution of COVID-19 medications and their fight against the pandemic.

The TRIPS Council is scheduled to have a meeting this week to discuss the proposal, and the world eagerly awaits its decision.

Dispute resolution under the new normal: online dispute resolution (ODR)

Another area which will be key in driving our [post-] pandemic recovery is technology. Technological developments and innovation have revamped the dispute resolution scene.

At the Asia-Pacific Economic Cooperation (APEC) Ministerial Meeting on Structural Reform convened in June this year, ministers of the member economies issued a joint statement, endorsing the Enhanced APEC Agenda for Structural Reform (EAASR) and recognising the importance of the Collaborative Framework on ODR (APEC ODR Framework) as a tool to advance structural reforms to support post-pandemic economic recovery and to build strong, sustainable and inclusive economic growth in the region.

Last week, the Economic Leaders of APEC issued the Leaders' Declaration after their meeting, welcoming the EAASR, as providing for collaboration on growth-focused reforms designed to be inclusive, resilient, sustainable and innovation-friendly. The leaders' express support for the EAASR provided a very solid basis for furthering APEC's ODR work under it.

The APEC ODR Framework, developed by the APEC Economic Committee, is part of an exemplary initiative undertaken by APEC to help businesses, especially micro, small and medium-sized enterprises (MSMEs), to resolve cross-border commercial disputes through the use of ODR. The APEC ODR Framework provides a one-stop-shop

for e-negotiation, e-mediation and e-arbitration, ensuring fast and affordable access to justice for MSMEs. Hong Kong, China, being a staunch supporter of APEC's work, was one of the early economies to have opted-into the APEC ODR Framework and, with the support of eBRAM Centre, we have launched a series of initiatives to develop and promote the use of ODR in the HKSAR, in line with the APEC ODR Framework.

Meanwhile, ODR has also been accorded high priority in the ASEAN agenda, and a workshop on ODR was organised in our Hong Kong Legal Week 2021. Prominent speakers emphasised the value of ODR under the new normal throughout the Legal Week, and as Mr Michael Dennis said, for MSMEs which often face financial constraints and cannot afford lengthy legal proceedings, "ODR is not just an alternative, it is the only practical redress option."

To keep track of the ODR landscape and develop legal tools to address potential issues, the Inclusive Global Legal Innovation Platform on ODR (iGLIP on ODR) was recently set up with the support of the Department of Justice (DoJ) Project Office for Collaboration with UNCITRAL (DoJ Project Office). At its 54th Session in July, UNCITRAL has just endorsed the suggestion of its Secretariat to continue to collaborate with the DoJ Project Office and to take part in iGLIP on ODR, so as to utilise the experience, resources and connections available to co-operate in promoting, raising awareness and capacity building on ODR. The second meeting of the iGLIP on ODR will be held next week, where we will discuss, amongst other things, ODR as a means of access to justice, access to technology and minimum standards.

Ladies and gentlemen, it is now almost two years into the pandemic. No one can say for sure when we will eventually come to the much-longed-for truly post-pandemic era (that is, without the square brackets). Whether the pandemic remains or subsides, we must rethink our modus operandi in the status quo and re-orient to the new normal.

To echo the words of the WHO Director-General on the pandemic, "No country can solve this crisis alone... That means a paradigm shift in global solidarity - in sharing experiences, expertise and resources, and in working together to keep supply lines open, and supporting nations who need our support". Global solidarity and multilateralism are essential to overcome the setbacks of the pandemic, and for us to emerge from these challenges to a more resilient, inclusive and sustainable future.

On this note, I look forward to the engaging and insightful discussions to follow and wish you all a fruitful Colloquium!

Ends/Friday, November 19, 2021