Speech of Ms. Teresa Cheng, SC
Secretary for Justice

Award Ceremony of the Second CIETAC Cup for Investment Arbitration (Frankfurt Investment Arbitration Moot Court China National Round)

4 February 2021 (Thursday)

Mr Wang Chengjie [Vice Chairman and Secretary-General of the China International Economic and Trade Arbitration Commission ("CIETAC")], Distinguished Guests, Ladies and Gentlemen,

1. It gives me great pleasure to speak at this award ceremony of the second CIETAC Cup for Investment Arbitration. Not only will this award recognise the ability of the teams here in this China National Round, but, as I understand it, the top six teams will be afforded a unique opportunity to take part in the Frankfurt Investment Arbitration Moot. It is really laudable that CIETAC is proactively encouraging and

promoting the development of young talents in investment arbitration. I recall thanking CIETAC some years ago when it was sponsoring and supporting the investment arbitration moot organised by the Tsinghua University International Arbitration and Dispute Settlement Program. To see CIETAC taking a concrete step forward to further this object is most heart-warming.

2. I also recall sitting at the finals of the Frankfurt Investment Arbitration Moot some years back and witnessing some most talented students arguing their cases before us. Time flies as this is now the 13th edition of the moot and we must all thank Dr Sabine Konrad for championing the idea and taking it forward unselfishly and with such dedication.

3. COVID-19 has changed the world, bringing about a lot of uncertainties and with it opportunities, compelling us to adapt to the new normal. In the world of dispute resolution, be it commercial or

investment arbitration or mediation, technology is the tool that we have all turned to when physical meetings and hearings are out of the question. In Hong Kong, eBRAM, an online dispute resolution ("ODR") platform, has taken shape and has been assigned to provide an ODR service for COVID-19 related disputes at hardly any cost to the parties [1]. Institutions around the world are all adapting to the pandemic, and CIETAC is no different. It released the "Guidelines on Proceeding with Arbitration Actively and Properly during the COVID-19 Pandemic" on 28 April 2020, which promotes non-contact measures for the submission of applications, documents and evidence, and conducts oral hearings via its platform. It also explicitly notes that these guidelines *"shall cease to have effect when the pandemic is over"*[2].

4. In fighting the pandemic, States have had to resort to emergency measures so as to address public health

[1] See https://www.ebram.org/covid_19_odr.html for more details on the COVID-19 Online Dispute Resolution Scheme.

[2] See http://www.cietac.org/index.php?m=Article&a=show&id=16919&l=en.

issues. These measures range from mandatory quarantine for visitors or returning nationals, compulsory requisition of premises for medical or quarantine purposes, closure of scheduled premises such as restaurants, nationalisation of private hospitals, export bans on foods or medical products, prohibition on group gatherings, travel restrictions, lockdowns and the list goes on. Some States have taken measures to impose restrictions on exports of medical products including vaccines contrary to the strong urges and recommendations from the World Health Organization to do otherwise[3]. It is always a fine balance to strike amongst factors such as public health needs, economic stability and the social needs of the people. History tells us that crisis always generates disputes and inevitably contentious proceedings, often involving States or State owned enterprises. Sadly, I suspect that it will not be different this time.

5. The impact of the pandemic on the world supply chain will inescapably affect the performance of

[3] See, e.g., https://news.un.org/en/story/2021/01/1083342.

commercial contracts. There will be an upsurge on the sale of goods and shipping disputes, where *force majeure* will be one of, if not the only, core issues. Yet the major disputes may be the investment claims levied against States contending that their measures have breached substantive protections as contained in bilateral investment treaties. The requisition of premises for use as temporary quarantine centres or hospitals and export bans on medical products for domestic use may be framed as expropriation claims. Foreign investors may also contend a violation of the fair and equitable treatment provision or that full protection and security was not provided, causing a loss to investment in the host State.

6. Bearing in mind that the measures were introduced in good faith for the benefit of the population, it is fair that States would rely on necessity as a defence. If established, this customary international law doctrine of necessity, imprecise though it may be, will allow a state to justify a breach of an international obligation in situations of grave and imminent peril for the

essential interests of the state. This principle of necessity has been recognised by the International Court of Justice in cases such as the *Gabcikovo-Nagymaros Project* case[4] and the *Israel Security Wall Case*[5], as well as codified in Article 25 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles")[6].

7. While the defence of necessity has been invoked far more often than any other defences enumerated in the ILC Articles, it should be pointed out that since the conditions to be met in order to successfully raise this

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[4] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, International Court of Justice, Judgment of 25 September 1997, at paragraph 51: *"The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation"*.

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, Advisory Opinion of 9 July 2004 at paragraph 140.

[6] Article 25 of the ILC Articles reads:

"1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity."

defence are most stringent, and arbitral tribunals may be inconsistent in their application of such conditions, successful invocation of the defence of necessity has been rare.

8. As I have previously noted, the doctrine of necessity is, at best, imprecise as there are at least two distinct lines of cases that have come to contradictory conclusions on exactly the same set of basic facts as evidenced in the International Centre for Settlement of Investment Disputes ("ICSID") cases involving Argentina[7]. One of the elements of the defence is that the threat has to be sufficiently serious to constitute a grave and imminent peril, which meant that the threat must be actual and not merely a possibility[8]. In the Argentine cases, the tribunal in the *CMS* decision found that the Argentina financial crisis situation was not serious enough to qualify as a "grave and imminent peril", noting that *"the*

[7] See, for example, the ICSID cases of *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8 ("*CMS*") and *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1 (*"LG&E"*).

[8] ILC Articles Article 25(1)(a).

Argentine crisis was severe but did not result in total economic and social collapse"[9]. In contrast, the *LG&E* tribunal, when considering the same Argentine financial crisis, found that the *"essential interests of the Argentine state were threatened in December 2001. It faced an extremely serious threat to its existence, its political and economic survival…"*[10].

9. Similarly, in considering whether the invocation of necessity by Argentina may be barred for the reason that it has contributed to the situation of necessity as provided under Article 25(2)(b) of the ILC Articles, the tribunals in both *CMS* and *LG&E* differed when considering a similar set of facts. The *CMS* tribunal found that the *"government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the [Argentine Government] from its responsibility in the matter"*[11]. The *LG&E* tribunal, on the other hand,

[9] *CMS*, Award dated 12 May 2005, at paragraph 355.

[10] *LG&E*, Decision on Liability dated 3 October 2006, at paragraph 257.

[11] *CMS*, Award dated 12 May 2005, at paragraph 329.

concluded that there was *"no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity"*[12].

10. Having said that, the position on COVID-19 may be different from the economic crisis of Argentina in 2001 or Belgium in 2008. It is a pandemic and has affected the whole world with no States spared. It has gone unchecked for over a year and indeed the virus has mutated, with new waves of confirmed cases repeatedly hitting a community thereby continuously creating new challenges for States. I only hope that whilst the interests of investors must be protected in accordance with law, the good sense and sympathetic understanding of investors will contain the magnitude and scope of the disputes, so that the world does not go straight into another fight once out of the pandemic, bringing about further polarisation and contentious sentiments.

[12] *LG&E*, Decision on Liability dated 3 October 2006, at paragraph 257.

11. Recent bilateral and multilateral treaties, such as the India-Brazil Investment Cooperation and Facilitation Treaty concluded in January last year, and the multilateral Regional Comprehensive Economic Partnership ("RCEP") between the members of ASEAN and China, Australia, Japan, New Zealand and South Korea signed in November last year, do not contain a mechanism for investor-state dispute settlement ("ISDS"), suggesting a trend for States to reject traditional international arbitration in favour of new models of dispute resolution to complement investment arbitration or, for some radical views, to replace it completely.

12. Discussions on ISDS reform are not new. The work of the United Nations Commission on International Trade Law ("UNCITRAL"), in particular its Working Group III, has been proceeding to identify areas of reform for ISDS, in particular whether other alternative dispute resolution mechanisms such as mediation could pave the way for a more efficient and effective ISDS mechanism.

13. The Department of Justice co-organised with UNCITRAL and the Asian Academy of International Law a hybrid pre-intersessional meeting of UNCITRAL Working Group III, the first of its kind, last year[13]. We hope that at the meeting this year, we can discuss further on the use of investment mediation in ISDS reform.

14. Before I conclude, I wish to make a brief point about something that should be increasingly addressed in the international legal community, and that is the need for inclusiveness or, as it has more often been called, diversity. Diversity, in the context of international dispute resolution, must refer not only just to gender diversity, but also race, culture, and age. While ICSID reported last year that only 14% of appointed arbitrators, conciliators and *ad hoc* committee members were women[14], a steep drop from the 24%

[13] See https://aail.org/past-event-2020-uncitral-wgiii/ for presentations, papers and video of the event.

[14] See Chart 11: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules in FY2020 – Distribution of Appointments by Gender, ICSID Fiscal Year 2020 Caseload Statistics at

reported in 2019[15], individuals of 44 nationalities were represented for the 2020 financial year, the highest number in a single year at ICSID[16].

15. The need for diversity can be seen worldwide, with last year marking the 10th anniversary of the European Platform of Diversity Charters, which offers a place for existing European Diversity Charters to exchange and share experience and good practices. European Union ("EU") Diversity Charters encourage organisations to develop and implement diversity and inclusion policies, and currently 26 such Charters are in existence[17].

16. The United Nations ("UN") Sustainable Development Goals also promote diversity, with Goal 5 being to

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https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf.

[15] See Chart 11: Arbitrators, Conciliators and *ad hoc* Committee Members Appointed in Cases Registered under the ICSID Convention and Additional Facility Rules in FY19 – Distribution of Appointments by Gender, ICSID Fiscal Year 2019 Caseload Statistics at https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282019-2%20Edition%29%20ENG.pdf.

[16] https://icsid.worldbank.org/news-and-events/news-releases/2020-year-review.

[17] See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/tackling-discrimination/diversity-management/diversity-charters-eu-country_en for a list of diversity charters by EU country.

achieve gender equality, and Goal 10 being to reduce inequality within and amongst countries.

17. The Department of Justice launched the "Vision 2030 for Rule of Law" initiative against the backdrop of Goal 16 of the Sustainable Development Goals, which is to *"promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"*. The 17 Sustainable Development Goals are interconnected, and we will also keep in mind the other goals, including those relating to diversity, in our aim to promote the rule of law.

18. May I boldly use this opportunity to suggest that we, in this part of the world, should learn from the EU Diversity Charters and the UN Sustainable Development Goals and consider how we can join hands to actively promote diversity by drawing up a Charter of our own, the Asian Inclusive Charter.

19. To conclude, I would like to congratulate all participating teams that have participated in the moot competition. I hope that you have enjoyed the experience of mooting, the thrill of being questioned and importantly the camaraderie of the mooting community. Needless to say special congratulations to the top teams that will proceed to the Frankfurt finals. Although the Frankfurt moots will be held online this year, I am sure that you will nonetheless benefit from the exchange and interflow of ideas, learning from competitors around the world, and obtaining excellent feedback from distinguished judges. Last but not least, congratulations to CIETAC for the successful organisation of this wonderful competition. Thank you very much.