

**Speech by SJ at 2021 Colloquium on International Law
“Development of International Trade Law in the [Post-]
Pandemic Era” (English only) (with photo)**

Chief Executive, Commissioner Liu, Ms Joubin-Bret,
Dr Neoh, Professor Huang, distinguished guests, ladies and
gentlemen,

1. 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.
2. 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.

3. 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 2021¹.

4. 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

¹ See https://www.wto.org/english/news_e/pres21_e/pr889_e.htm. According to the WTO’s news release on 4 October 2021, global merchandise trade volume is predicted to grow by about 10.8 per cent in 2021, followed by a rise of 4.7 per cent in 2022. Trade volume growth is predicted to be accompanied by GDP growth of 5.3 per cent in 2021 and 4.1 per cent in 2022.

development of international trade laws.

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

5. 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”².

² Opening address by the Secretary of the UNCITRAL, Ms Anna Joubin-Bret, at the 4th UNCITRAL Asia Pacific Judicial Summit: Sustainably Adapting to a New Normal - Judicial Roundtable in Hong Kong Legal Week 2021 on 2 November 2021.

6. CISG entered in force for China as of 1 January 1988. CISG will soon be applicable to HKSAR. The legislation has been passed and pending the procedural aspects in accordance with Article 153 of the Basic Law and for 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 HKSAR, CISG will come into force in HKSAR next year.

(i) Reservation under Article 95 of the CISG

7. 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.

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

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

(ii) Mainland – HKSAR Arrangement

10. Being an international convention governing international sale of goods, CISG does not apply to transactions within China, namely between businesses in Mainland and 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

11. 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.³ 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.⁴

12. In December 2020, as a measure to guarantee the supply of a COVID-19 medication Remdesivir⁵ in Russia, the Russian Government, in accordance with its national law and in line with the compulsory licensing regime under

³ See article “COVID-19: will State measures give rise to a new set of investment claims?”, 2 April 2020 published by Hogan Lovells: <https://www.engage.hoganlovells.com/knowledgeservices/news/covid-19-will-state-measures-give-rise-to-a-new-set-of-investment-claims>, and article “COVID-19 and Investment Treaties: Balancing the Protection of Public Health and Economic Interests”, May 2020 published by Jones Day:

<https://www.jonesday.com/en/insights/2020/05/covid19-and-investment-treaties>.

⁴ See “Investor–State Dispute Settlement Cases Pass The 1,000 Mark: Cases And Outcomes In 2019”, IIA Issues Note, July 2020, Issue 2, published by UNCTAD: <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf>.

⁵ Pronunciation: /rem'desivɪər/ rem-DESS-i-veer

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.

13. 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 authorization, subject to the payment

of adequate compensation and usually after unsuccessful efforts to obtain authorization 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.

14. 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.⁶

15. 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-19.⁷ The proposal has since gained the support from a significant number of countries, including China, Russia and the US. China

⁶ Case no. AKPI21-303. For a note on this case, see “The Russian Supreme Court upholds the Order of the Russian Government on the compulsory licensing of Gilead’s Covid-19 patents”, Alisa Pestryakova De Berti Jacchia Franchini Forlani Studio Legaleat, 2 July 2021: <https://www.lexology.com/library/detail.aspx?g=d8a550f1-3415-4aed-aa91-6ddddd6a103b5>.

⁷ See the news article “TRIPS Council agrees to continue discussions on IP response to COVID-19”, 20 July 2021 on WTO’s website: https://www.wto.org/english/news_e/news21_e/trip_20jul21_e.htm.

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.⁸

16. The TRIPS Council is scheduled to have a meeting this week to discuss the proposal⁹, and the world eagerly awaits its decision.

Dispute Resolution under the New Normal: Online Dispute Resolution (“ODR”)

⁸ See the news articles at http://www.gov.cn/xinwen/2021-05/17/content_5607537.htm and <https://www.mfa.gov.cn/ce/cenz/chn/wjbfyrth/t1876601.htm>.

⁹ See the news article “Members pursue convergence for an IP COVID-19 response”, 14 October 2021 on WTO’s website: https://www.wto.org/english/news_e/news21_e/trip_14oct21_e.htm.

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

18. 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

region¹⁰.

19. 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 ¹¹ . The leaders' express support for the EAASR provided a very solid basis for furthering APEC's ODR work under it.

20. The APEC ODR Framework, developed by the APEC Economic Committee, is part of an exemplary initiative undertaken by APEC to help businesses, especially

¹⁰ See https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Structural-Reform/2021_structural

¹¹ See <https://www.apec.org/meeting-papers/leaders-declarations/2021/2021-leaders-declaration>.

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 HKSAR, in line with the APEC ODR Framework.

21. Meanwhile, ODR has also been accorded with high-

priority in the ASEAN agenda¹², and a workshop on ODR was organized in our Hong Kong Legal Week 2021. Prominent speakers emphasized 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.”¹³

22. To keep track of the ODR landscape and develop legal tools to address potential issues, the Inclusive Global

¹² The ASEAN Economic Community Blueprint 2025 (para 52-53) highlights the development of a regional legal framework for ODR for facilitating e-commerce transactions in ASEAN. The ASEAN Strategic Action Plan for Consumer Protection 2025 also sets the goal to enhance consumer confidence and cross-border commercial transactions through addressing cross-border complaints through ODR in its Strategic Goal 3 (<https://aseanconsumer.org/cterm- regional-cooperation-in-asean/asean-strategic-action-plan-on-consumer-protection-asapcp-2016-2025>). Similar references were also made at SJ’s speech at the ASEAN Workshop on ODR on 3 November 2021 (https://www.doj.gov.hk/en/community_engagement/speeches/20211103_sj1.html).

¹³ See <https://www.youtube.com/watch?v=ucVdXKuKeIE&feature=youtu.be> (at 72:24).

Legal Innovation Platform on ODR (“iGLIP on ODR”) was recently set up with the support of the 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 utilize 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.

23. Ladies and gentlemen, it is now almost two years into

the pandemic. No one can say for sure when we would 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 reorient to the New Normal.

24. 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.”¹⁴ Global solidarity and

¹⁴ See WHO Director General’s remarks at the G20 Extraordinary Leaders’ Summit on COVID-19 (26 March 2020), available at <https://www.who.int/dg/speeches/detail/who-director-general-s-remarks-at-the-g20-extraordinary-leaders-summit-on-covid-19---26-march-2020>.

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.

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