AAIL ASIAN ACADEMY OF INTERNATIONAL LAW

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Panel 1 Speech by Teresa Cheng SC

International investment law as a subject may have a long history but when one reviews the time it is put into practice, it can be said to be a relatively new area of law. At first, practitioners, like myself, were hoping that, through *jurisprudence constance,* a new body of case law will be developed, cases will converge and a new set of rules that will provide consistent, coherent, predictable and foreseeable results will be developed. Unfortunately, this ideal legal order has not materialized.

As set out in a Note of UNCITRAL, 28 August 2018, entitled “possible reform of investor-state dispute settlement (ISDS): Consistency and related matters”, the Secretariat summarized a number of concerns of the states and illustrated the divergence and inconsistencies in the IIA awards. Lack of consistency and coherence in holdings of law, and hence lack of predictability are very valid concerns of the states. States and investors alike desire for correct decisions and awards, but also importantly, the concerns if unaddressed could exacerbate leading to two lines of cases and this will result in doubts being raised as to the

integrity of the process and indeed the legitimacy of the process. This may mean that some may start to move away from international investment arbitration ("IIA") back to the national courts as the venue for resolving investment disputes. These concerns need to be addressed and that is "*Draft statute of a standing mechanism for the resolution of international investment disputes*" aims to do.

In considering the matter it is important to bear in mind the fundamental reasons for it, is it merely just addressing the grievance of the parties that have been given an award that is erroneous in law or is it merely something to be done to ensure that IIA process continues to be a legitimate process for resolving ISD. The measures to be taken could be different.

IIA has the implication of binding sovereign states. Furthermore, IIA awards somehow are publicly available and could be referred to by other tribunals as a reference. In light of the various choice of dispute resolution methods for the parties and indeed even the choice to move away from IIA, measures for the avoidance or minimization of divergent results or divergent interpretation of the same legal principles would have to be devised. In addition to that, from the perspective of

ensuring the upholding of the rule of law in the context of predictability and foreseeability, such discussions are apt.

The scope of the matters that can be appealed have been identified in the paper. The test by which the appeal is to be determined, the remedy the appellate body ("AB") can make, and finally, the enforceability of the award of the appellate body are some of the main matters that have to be considered.

In developing this appellate mechanism, one must realise that there are implications in that some of the fundamental features of arbitration will be usurped. The key is to strike a balance. For instance, when designing the structure, the desirability of finality in an arbitration will have to be balanced against the importance of getting the law right and getting a fair result. Another important fundamental aspect of IIA is its enforceability. The IIA award under the ICSID regime will be enforceable under article 54 of the Washington Convention, and those under UNCITRAL being enforced under NYC. What of the product of the appellate body? This will have to be addressed, not unsurmountable but must be considered. In short, the design of the appellate system should try to ensure that the advantages of arbitration remain unaffected.

I would like to focus on two matters. First, the Draft Statute seems to have assumed an automatic right of appeal. If that is so, it may create opportunities for abuse and undermine the important quality of arbitration, namely finality. It may therefore be useful to look at how some domestic courts deal with appeal of arbitration awards.

Many common law jurisdictions would allow the parties to appeal an award when certain criteria are satisfied. In gist, if it is related to an area of law that is of general importance, and the arbitral tribunal was obviously wrong or so wrong that he could not be right, such that the balance would tip against finality, then permission will be given for an appeal to be heard. This may be a useful way by which one can balance finality against an incorrect award thereby ensuring proper justice is dispensed with by applying the correct principles in law. Therefore, it is worth considering the appeal to be one subject to a screening system so that only worthy cases could be brought to the appeal.

Secondly, to effectively address the concerns of lack of consistence, coherence and predictability, the decisions of the AB must have some sort of effect beyond just correcting the errors of law of the original

arbitral tribunal. If it merely corrects the original award, it would only address the rights and obligations of the two parties.

International law does not have a precedential effect, and decisions in IIA awards do not bind subsequent tribunals or other non-disputant parties. Once the original award has been corrected by the AB, that AB award would only bind the two parties involved and very little effect on other tribunals. The AB awards can be quoted as reference again and there is no custom or practice to "follow" that AB award. In other words, without some sort of mechanism, such AB award is just another award.

Here, I would like to share with you what China has done domestically in terms of its judgements. China is a civil law jurisdiction, yet the SPC has abstracted the advantages of common law and has developed three sets of databases. One is the general database where all cases are to be found and as a result will contain divergent decisions each not persuasive let alone binding on the other. Hence, apart from allowing the public to be aware of the decisions and reasons of these judgments, they have little impact on the development of law. Secondly, there is a People's Court Cases Database. This database contains cases that have been selected by the Supreme People's Court ("SPC") as representative

cases of for the reasoning in interpreting and applying the law. They have a persuasive effect in that the courts are asked to consider them when dealing with their own case. The third type is Guiding Cases, these cases are chosen each year by the SPC and they have much stronger persuasive effect so much so that People's Court will have to follow them when applying the law to the facts of the case. In a way these judicial developments abstracted the beauty of the case law precedent effect in the common law system into the civil law system.

Returning to IIA, there is a large database of IIA awards and it will continue to grow. But if the AB decisions can become like the Guiding Cases database, then arbitral tribunals will have to follow them as they are categorized as highly persuasive. Whilst such AB decisions will not the have the effect of binding the subsequent tribunals in IIA, one will expect that such decisions to be followed unless for good reasons otherwise. In other words, the decisions of the AB awards will have a much broader effect. This will then truly address the original concerns of states of lack of consistency coherence and predictability and will bring hope to this idea legal order of *jurisprudence constance*. One may think that if the design and adoption of such "persuasive/presidential effect" is established and recognized, then the decisions of the AB will

really benefit the investors and the states, and also a good way of ensuring that the rule of law is upheld.

I thank you for your attention