Foreword

FOREWORD TO THE SPECIAL ISSUE ON "COVID-19 AND INTERNATIONAL DISPUTE SETTLEMENT"

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The Coronavirus disease (hereinafter "COVID-19") pandemic is the challenge of our time. Millions are infected, and hundred of thousands of lives are lost. In response, national borders are closed, cities are on lockdown, quarantine orders are imposed, and export and import control measures are implemented. There seems to be no facets of our lives that are not deeply impacted by it. International dispute settlement is certainly no exception. International arbitration sees the immediate effects of the COVID-19, while the flexibility and resilience of the international dispute settlement community is working hard to meet the challenges with online hearings or cyber alternatives. Medium and Long term impacts of the global pandemic is also expected, as more disputes are occurring when parties to contracts caught by the pandemic found themselves not able to perform their contractual commitments, and the States around the world rush to respond to the crisis with regulatory measures that inevitably have negative impact on the business big or small. When the progress of globalization comes to a halt, governments are finding their commitment to free trade no longer the first priority. Disputes in the field of international health law are also emerging. Accordingly, we have decided to publish a special issue on "COVID-19 and International Dispute Settlement". This special issue will address these challenges of our time, and our contributors all ponder the question posed by the pandemic, and strive to find how the international dispute settlement

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would develop to overcome the challenges of the COVID-19 and would work in a way that support the fight against the disease. The current volume includes eleven peer-reviewed articles to address these issues, exploring the impact of the COVID-19 on the international dispute settlement, and the challenges and responses of the various dispute settlement mechanisms. This special issue aims to provide a broad look into how the unprecedented pandemic has uncovered new needs in international dispute settlement, has accelerated the trends that have been existing for international dispute resolutions, and has created various policy responses that will soon be challenged in various forums.

In this special issue, we have collected three groups of papers, including papers addressing the implications of COVID-19 for international commercial arbitration, those for international investment disputes, and those for public international law disputes. These papers are arranged in the order of these groups. We begin with a paper by Dr. Stephan Wilske that comprehensively reviews the impact of the global pandemic on international arbitration and its responses to those challenges. In his paper "The Impact of COVID-19 on International Arbitration—Hiccup or Turning Point?", Dr. Wilske observes that COVID-19 has an immediate and significant impact on the practice of international arbitration. Dr. Wilske provides comprehensive analyses regarding short-term (including the closure of premises of arbitral institutions and the use of virtual hearings) and mid-term solutions (including amended arbitration rules and guidelines and potential phenomenon of new arbitration cases) that have been adopted or developed by the international arbitration community. Dr. Wilske then identifies elements of international arbitration that could easily take place in virtual reality and for which elements physical presence is and remains desirable or maybe even indispensable. Dr. Wilske points out that, while facing many challenges, international arbitration is a more flexible dispute resolution mechanism. Dr. Wilske concludes that COVID-19 will most probably speed up processes aimed at more efficiency that had already commenced prior to the outbreak of the global pandemic, but will not change the core elements of international arbitration.

Thereafter, we have three papers in succession discussing the challenges, concerns, and rules brought about by the speeded up process of virtualization of the international arbitration. First, Prof. Hong-Lin Yu analyses the impact of the swift response of the arbitration community to adopt e-platforms, electronically filings and videoconferencing in her paper ""Business as usual" During an Unprecedented Time—The Issues of Data Protection and Cybersecurity in International Arbitration". Prof. Yu firstly highlights the "business as usual" approach adopted in international arbitration. Prof. Yu then focuses on the confidentiality, data protection and cybersecurity concerns that may arise with the trend of virtualization. She provides an in-

depth discussion regarding the Seoul Protocol on Video Conferencing in International Arbitration, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration 2020, and the consultation draft of the ICCA/IBA Joint Task Force's Roadmap on Data Protection in International Arbitration. Prof. Yu emphasizes the importance of the arbitral participants' understanding of their dual roles in both arbitration and data protection/cybersecurity as well as their mutual impact in order to ensure the delivery of cybersecurity across borders in international arbitration.

Second, Prof. Mark L. Shope surveys how arbitral institutions respond to the challenges brought by the global pandemic with intensified use of virtual interactions in his paper "The International Arbitral Institution Response to COVID-19 and Opportunities for Online Dispute Resolution". Prof. Shope firstly examines the reactions of individual arbitral institutions in light of the COVID-19 shut downs and quarantines. He then reviews the relevant individual arbitral rules relating to virtual interactions, as well as the online dispute resolution protocols, standards, principles and guidelines developed or adopted in the arbitration community. Prof. Shope concludes with his reflection in which he evaluates the importance of the institutional responses with virtual interactions and stresses the issues the relevant rules, technical notes, protocols, and best practice policies need to address and further explore.

Third, Alex Lo turns to specific considerations, both practical as well as legal and due process ones, in his paper "Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations". Mr. Lo points out that there is a natural inclination for parties to arbitral proceedings to try to resolve the dispute as quickly as possible. However, Mr. Lo argues that before the tribunal adopts alternative hearing formats in response to travel and other restrictions due to COVID-19, there are some issues that should be carefully considered. Mr. Lo then analyzes specific considerations related to the choice of the alternative hearing formats, including virtual hearings or documents only proceedings, as well as bifurcated proceedings resulting from restrictions imposed due to Covid-19. Mr. Lo cautions that while in certain situations, these proceedings may be the second best option, for other situations, considering potential issues with respect to costs, efficiency, and due process arising from the proceedings, it may be better to simply postpone the hearing or suspend the proceedings until the restrictions are lifted.

Thereafter, we turn our focus to international investment arbitrations with five articles in succession that discuss the national response to the unprecedented challenges and the potential for investor claims against them. First, Prof. Julien Chaisse establishes a conceptual framework for an international investment tribunal to review a claim brought by a foreign investor against national COVID-19 responses through a comprehensive

survey of state measures across 50 jurisdictions in his paper "Both Possible and Improbable—Could COVID-19 Measures Give Rise to Investor-State Disputes?". Prof. Chaisse firstly provides a conceptual framework to analyze the legal consequences of the COVID-19 pandemic in light of general international law rules, investment treaties, and international health rules. He then systematically examines and analyzes the state measures in light of international investment law. Prof. Chaisse argues that many of these measures may harm foreign investors and could constitute breaches of international norms, but most of the investor claims will probably not be successful as the various justifications or exceptions will be applicable.

The next four articles address specific exceptions that may be invoked to justify potential violations of the obligations for host states under international investment treaties. Prof. Jaemin Lee examines the potential invocation of security exception contained in recent investment agreements with regard to the governmental COVID-19 responses in his paper "The Coronavirus Pandemic and International Investment Arbitration—Application of "Security Exceptions" Clauses in Investment Agreements". Prof. Lee first notes that the inclusion of security exceptions clauses in international investment agreements is a relatively recent phenomenon, and identifies two types of such clauses. Prof. Lee then analyzes the recent *Russia — Traffic in Transit* WTO panel report, the first WTO panel that issues a decision on security exception clause under Article XXI of the GATT 1994. Noting the differences between trade agreements and international investment agreements, Prof. Lee argues that the Panel Report offers a good starting point for the discussion in the investment context. Prof. Lee concludes that at least a *bona fide* measure to counter COVID-19 may constitute an instance to invoke security exceptions in international investment agreements, which may then cure violation of substantive provisions. Prof. Lee further points out that the security exception clause under international investment agreements need to be revisited in the future so that it does not become a source of conflict or a carte blanche for treaty violations.

We next turn to the police powers doctrine in the other two articles. In the first article, "COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?", Prof. Prabhash Ranjan first argues that, facing a claim of indirect expropriation, public health related regulatory measures qualify as State police powers. Prof. Ranjan then examines the boundaries under which the State police powers need to operate for them not to constitute indirect expropriation. Prof. Ranjan further specifically reviews the texts of various Indian bilateral investment treaties and analyzes the potential application of the police powers doctrine. Prof. Ranjan argues that while India may rely on the police powers doctrine, the actual outcome for

such cases will rely on arbitral discretion, and India should ensure that exercise of its regulatory measure is not excessive or disproportionate.

In the second article, "Note on COVID-19 and the Police Powers Doctrine: Assessing the Allowable Scope of Regulatory Measures During a Pandemic", Janice Lee first identifies two main types of regulatory measures to counter the effect of the global pandemic, i.e., preventive control measures to curtail the spread of the virus, as well as rehabilitative measures aimed at protecting the economy. After reviewing potential claims that could be raised against States under investment treaties, Ms. Lee discusses the definition and conditions for the invocation of the police powers doctrine, and analyzes the application of the doctrine in the relevant arbitral cases in the context of regulatory measures enacted to address public health. Ms. Lee then assesses the potential challenges with respect to COVID-19 regulatory measures under the police powers doctrine, and identifies specific uncertainties in its application. Ms. Lee argues that in light of the uncertainties, States have to carefully consider the measures to be implemented to avoid possible liability from investment treaty claims by foreign investors.

Mao-wei Lo in the next paper "Legitimate Expectations in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses Under International Investment Agreements" focuses on whether the regulatory measures and regulatory changes in the time of pandemic would constitute a violation of fair and equitable treatment. Mr. Lo first focuses on the scope of legitimate expectations of the affected foreign investors. He then examines potential public health defenses under international investment agreements, as well as explores the role of International Health Regulations (2005) (hereinafter "IHR (2005)"). Mr. Lo argues that regulatory changes amid the COVID-19 crisis enacted by the host states with a view to protect public health should be treated with deference unless the host state's actions are in bad faith or arbitrary.

Thereafter, we turn to the impact of the global pandemic with regard to international disputes in the area of international public law and international trade law. Prof. Ching-Fu Lin explores the possible reform of the dispute settlement mechanism under the IHR (2005) in his paper "COVID-19 and the Institutional Resilience of the IHR (2005): Time for a Dispute Settlement Redesign?", Prof. Lin first identifies potential disputes between State Parties as well as disputes between State Parties and The World Health Organization (hereinafter "WHO") due to the alleged failure of some State Parties and The WHO Director-General to act in compliance with the IHR (2005). After examining the existing dispute settlement mechanism under the IHR (2005), Prof. Lin argues that its institutional design contains critical flaws. Therefore, Prof. Lin calls for the establishment of a Compliance and Accountability Committee, a quasi-adjudicative branch, via a revision of the IHR (2005) to actively monitor, evaluate, and issue Specific Comments on

the practices of the State Parties and the WHO in terms of their conformity with the treaty.

In our next paper, Dr. Hsien Wu discusses the role of the World Trade Organization (hereinafter "WTO") dispute settlement mechanism for resolving disputes due to the new challenges posed by the COVID-19 epidemic in his paper "WTO Dispute Settlement in the Wake of Coronavirus Disease 2019 (COVID-19): Exploring the Possible Benefits and Limits of Contemporary Mechanisms". Dr. Wu first identifies measures adopted by governments that may be subject to disputes in terms of their adverse effects on international trade. He then analyzes both positive and negative factors that may affect the decision whether to utilize the WTO dispute settlement system in response to these measures. Dr. Wu aims to provide guidance to WTO members on whether to present a dispute to the WTO in light of the factors discussed here.

This special issue focuses on the immediate and long-term impact of COVID-19 on the international dispute settlement. The papers presented here seem to echo that the crisis brought by the global pandemic is unprecedented, the changes to the international dispute settlement profound and inevitable, while sharing the confidence in the resilience of the international dispute settlement mechanisms that would hopefully contribute to the recovery and balance of the society. It is hoped this special issue would lead to more analysis, dialogue, and debate of the future of the international dispute settlement during and after the crisis.