

Speech by Secretary for Justice at conference "Investor-State Arbitration - Lessons for Asia"

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Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the conference "Investor-State Arbitration - Lessons for Asia" today (December 7):

Introduction

It gives me great pleasure to welcome you to Hong Kong and to this Conference. We are delighted to have among us legal practitioners and expert academics in this field from around the world.

"Investor-State Arbitration" may not be a very familiar concept to this part of the world but it is certainly gaining importance as we see the recent rise in the number of such cases and, as Michael mentioned, the China factor.

The majority of these cases were brought on the basis of the Convention on the Settlement of Investment Disputes between States and Nationals of other State (the "ICSID Convention" or the "Washington Convention") which was concluded back in 1966. The International Centre for Settlement of Investment Disputes (the "ICSID") was established under the Convention and the ICSID caseload has increased significantly in the last decade. Up to June 2007, it has registered a total of 236 investor-State disputes, many of which were registered during the past ten years.

Investor-State Arbitration in Asia

Only a handful of these cases are disputes taken against countries in Asia, despite the phenomenal growth of many Asian economies in recent years. Huge amounts of direct foreign investment have poured into the economies in the region in one form or another, such as joint ventures or setting up of regional offices or subsidiaries. These investments, especially those that were ploughed into infrastructure projects, may give rise to conflicts with governments.

The small number of such disputes in Asia may in part be attributed to the pragmatic approach of countries across the region and the success of their economic policies. Perhaps as we take our lessons on investor-State Arbitration, we may also learn from participants how best to minimise disputes and to solve them effectively.

Investor-State Arbitration and Hong Kong

Hong Kong is an interesting choice of venue for this conference. I say this because Hong Kong, whilst not being a State, has a unique status in investor-State arbitration. Thanks to our

new constitutional order which gives Hong Kong a high degree of autonomy, investor-State arbitration is as relevant to Hong Kong as it is to many States.

Under the "One Country, Two Systems" principle enshrined in the Basic Law, Hong Kong is able to establish its own network of bilateral investment treaties ("BITs"), otherwise known as investment promotion and protection agreements ("IPPs"). Like many other BITs, each of our agreements has provided for a mechanism whereby an investor may take a dispute with a signatory of the Agreement to arbitration.

#### The ICSID Convention

The ICSID Convention has been applied to Hong Kong for over forty years but Hong Kong has not been involved in the cases handled by ICSID.

#### Hong Kong as an International Centre for Arbitration

Whilst the Hong Kong SAR Government is not yet an active participant in investor-State arbitration, Hong Kong itself is an important centre for international arbitration.

The Hong Kong International Arbitration Centre ("HKIAC"), organiser of this conference, is Hong Kong's flagship in international arbitration. In 2006, the HKIAC alone handled 394 international arbitration cases. In terms of the number of cases handled, it is the fourth leading arbitration institutions in the world. It is well-equipped and has the capacity to handle all kinds of arbitrations, including investor-State arbitrations.

The HKSAR Government is determined to maintain and further enhance Hong Kong's status as the region's premier financial services centre and to facilitate the flow of capital and investment. We are acutely aware of the need to attract and retain investment by fostering a fair, transparent and effective legal and regulatory framework. Such a framework must be supported by an effective dispute resolution system through which an aggrieved party, whether local or foreign, may seek redress.

#### Actions to Promote Hong Kong as International Arbitration Centre

In his Policy Address in October, the Chief Executive of the HKSAR Government has reiterated the importance of a sound judicial system and comprehensive legal services for dispute resolution to an international financial centre like Hong Kong.

My department, the Department of Justice, works closely with the legal professions and the HKIAC in maintaining Hong Kong as a centre for resolving international civil and commercial disputes.

Hong Kong, as you know, is absolutely unique as a mature common law jurisdiction, with a separate legal system from that of

the Mainland, and yet being in close proximity with the Mainland geographically, economically and culturally. And with the on-going economic integration with the Mainland under the Closer Economic Partnership Arrangement ("CEPA") concluded back in 2003, and the well-developed arbitration infrastructure in Hong Kong, we enjoy a distinct advantage in the provision of arbitration services to disputes involving Mainland parties. As you know, China has been riding on the rapid globalisation of the world economy with foreign investment in China experiencing truly phenomenal growth. My Department will spare no effort in strengthening collaboration between Hong Kong and Mainland with regard to arbitration matters.

My Department has also been in touch with international arbitration bodies to explore ways in which they can establish a presence in Hong Kong in expanding their business into Asia.

To further strengthen our appeal as a prime jurisdiction for arbitration, we will continue to review and update our legal infrastructure for arbitration. My department will soon be publishing a consultation paper on a draft Arbitration Bill to replace the existing arbitration law. The draft Bill is intended to bring domestic arbitrations in line with international arbitrations by adopting the UNCITRAL Model Law as the basis for conducting arbitral proceedings in Hong Kong. This will make our law even more user-friendly, especially to foreign investors who may be more familiar with the UNCITRAL Model Law.

#### Mediation

Apart from arbitration, I should mention that we are also keen to develop and promote mediation. Last week we had a most useful two-day conference held at the HKIAC where we exchanged views with overseas experts as to the best way to promote greater use of mediation in resolving commercial and community disputes in Hong Kong.

As many of you will agree, there is no reason why mediation cannot be employed to deal with investor-State disputes.

In fact, the ICSID Convention has made provisions for conciliation of investor-State disputes. Since 1996, the Multilateral Investment Guarantee Agency ("MIGA"), another international organisation supported by the World Bank, began to offer mediation service to help governments and foreign investors find creative solutions to their disputes relating to contracts guaranteed by MIGA. The service is based on the belief that investment disputes will act as disincentive to investors, and that it is in the interest of investors as well as States to resolve disputes amicably. As far as I know, the mediation service provided by MIGA has proved to be highly successful with all cases but three reaching an amicable solution. The work of MIGA has

clearly demonstrated that mediation is also a useful tool in settling investor-State disputes.

#### Concluding Remarks

Finally, ladies and gentlemen, I would like to thank the Hong Kong International Arbitration Centre and other sponsoring organisations for organising a conference on such an interesting and important subject. I am sure it will enhance participants' appreciation of the legal framework and key issues concerning investor-State arbitration and will facilitate exchange of insights and experience in perfecting the current regime.

May I take this opportunity to wish the conference every success and that all of you have an enjoyable and memorable stay in Hong Kong.

Ends/Friday, December 7, 2007