Speech of Ms Teresa Cheng, SC
Secretary for Justice
2019 Colloquium on International Law
"Synergy and Security: The Keys to Sustainable Global Investment"
Session II: Dispute Resolution – The Global Dimension
15 August 2019 (Thursday)

Distinguished Guests, Ladies and Gentlemen,

1. As the Chairman of the Asian Academy of International Law (AAIL) said, this is the time when we, not just Hong Kong but also globally, are faced with contradictions. The Colloquium in pursuit of knowledge in synergy and security for the achievement of sustainable global development, is not only timely but actually pertinent for global peace in a newly developing international order that is evolving. Evolution NOT Revolution is the key. I thank the Chinese Society of International Law and the AAIL for putting together this event and of course all of you for coming to Hong Kong.

2. An effective dispute resolution mechanism is, without question, crucial in facilitating access to justice which is a fundamental component of the rule of law. The latest World Justice Project survey on access to justice

around the world gives Hong Kong's justice system high ratings on a number of important criteria.

3. The survey, released in June 2019, was designed to understand how ordinary people with everyday legal problems approach the matter. In Hong Kong, 90 per cent of respondents who experienced a legal problem in the past two years were confident they could achieve a fair outcome. Of this number, 93 per cent claimed that their problems were fully resolved, while 88 per cent said that the judicial process was fair, regardless of the outcome. Only two per cent said they faced financial hardship when facing legal problems.

4. While the survey may perhaps best reflect their satisfactory experience as regards access to justice in a domestic context, it also evidences Hong Kong's strong legal system and infrastructure, without which an effective international dispute resolution mechanism would not be possible.

5. This afternoon, I would like to share with you what Hong Kong has been doing recently to promote

resolution of international disputes.

6. But before that it would be unbecoming of me, as the Secretary for Justice, if I were not to address this distinguished international audience on the situation in Hong Kong.

7. Hong Kong has a strong and solid foundation for rule of law – the strong legal fraternity, the independent judiciary, the application of the common law and the protection of human rights guaranteed under the Basic Law.

8. Hong Kong has once been described as the "city of procession".

9. We are proud of it not just because we are an inclusive society respecting different views being harboured by different people, but also because Hong Kong is a city

that cherishes, respects and protects the freedom of speech and expression, the right to assemble and generally freedom not just in our acts but also our thoughts. Yet, as we all know, these rights are not absolute. Whilst enjoying the rights and freedoms that one is entitled to, one must also respect the rights of others.

10. We are also proud because the possessions and demonstrations have over the years generally been peaceful and orderly. People from all walks of life, young and old, conservative or progressive can all gather to express and exchange their views whilst respecting even the diametrically opposite views of others.

11. That is a free and civilised society we all aspire to.

12. Yet, when these rights and freedoms are abused or

misused, the free society will suffer. Where violence is resorted to, where disruptions affecting the rights and freedoms of others are inflicted, or where life and property are threatened or damaged, the general order of the society and the wellbeing of its people will be adversely affected.

13. Earlier this year, the Government of the Hong Kong Special Administrative Region (HKSARG) proposed amendments to the Fugitives Offenders Ordinance, which was based on the United Nations Model Treaty 1990. There were opposition from the general public about the amendments proposed. Initially, peaceful processions have taken place but later on some of these public events have turned violent and perhaps viral on social media.

14. When people have overstepped the limit of peaceful demonstration and resort to violence, this will not be

tolerated by the society nor permitted in law. The laws of Hong Kong, our independent prosecutorial and judicial systems are well equipped to deal with these violations of law. These infrastructures are part of our robust legal system that upholds the rule of law.

15. That however may not adequately address the cause of conflicts. As a result of digital communication, and how research engines are designed to operate, confirmation bias becomes a prevalent mode and source of marketing and association. Views therefore become entrenched and polarised and society divided sometimes without any rational basis and reasons. They sometimes are like ships passing at night, swords never crossed, issues never identified. The HKSARG will spare no less effort that it can provide in engaging the public and listening to their concerns, as well as adopting a new style of governance by building broad consensus when formulating and implementing

policies, adopting a PPP (public-private partnership) approach – to act with the people and for the people.

16. The current situation in Hong Kong will subside. Hong Kong is resilient and will further advance itself to another level through its strong legal system, solid financial infrastructure and by its citizens, and importantly also friends of Hong Kong like all of you here today.

17. Returning if I may, to our theme, "Dispute Resolution – the Global Dimension".

18. I would particularly talk about two recent developments in Hong Kong which enhance access to international or cross-border dispute resolution.

Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR

19. I would like to start with the ground-breaking Arrangement on mutual assistance in court-ordered interim measures in aid of arbitral proceedings signed by the HKSAR and Mainland China this April. Availability of interim measures is a crucial aspect of the rule of law as it provides parties with an avenue to have access to justice in a timely manner and to secure the fruits of dispute resolution.

20. One may start with Article 41 of the Statute of the International Court of Justice (ICJ) which empowers the Court to indicate any provisional measures which ought to be taken to preserve the respective rights of the party.

21. Article 41 speaks of preservation of the parties' rights. The ICJ has consistently construed it as meaning that "irreparable prejudice should not be caused to rights which are the subject of the dispute".

22. Irreparable prejudice is best illustrated by the famous or perhaps infamous case of *LaGrand*. In that case, Germany applied to the ICJ for a provisional order against the United States seeking to delay the execution of a German citizen just before the scheduled execution, on the ground of alleged violation of the Vienna Convention on Consular Relation. The order for provisional measure was duly granted by the ICJ.

23. In the judgment on the merits of the *LaGrand* case, the ICJ for the first time unequivocally decided that its provisional measures were binding. The order "was not a mere exhortation" but "created a legal obligation for the United States". The binding character was held to be in line with the object and purpose of Article 41 which was to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.

24. Unfortunately in that case, Mr LaGrand was executed in the United States in defiance of the provisional order

before the ICJ judgment came out.

25. In international arbitration and in contrast with the tersely-worded Article 41 of the ICJ Statute, Articles 17 to 17J of the 2006 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (**Model Law**), lay down a detailed regime for interim measures.

26. The fact that interim measures may provide a party to arbitration with timely and urgent access to justice is best reflected in the actual arbitral practice that applications for interim measures often involve the appointment of emergency arbitrators. It has become an increasingly common and useful practice.

27. For example, under the 2018 version of the Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules, a party requiring emergency relief may submit an application for appointing an emergency arbitrator to the HKIAC (a) before, (b) concurrent with, or (c) following the filing of a Notice of Arbitration, but prior to the

constitution of the arbitral tribunal.

28. The consideration of timely access to justice has to be balanced against other relevant rule of law considerations. Consistent with the ICJ jurisprudence on the requirement of *prima facie* jurisdiction, the same requirement is adopted by tribunals in arbitral practice for granting interim measures. This may help address the concern of non-consensual interference with a party's right, or in the case of investment arbitration, the sovereign power of the host State. The 2006 Model Law also provides for preliminary orders to be granted on an *ex parte* basis, and enforcement of interim measures etc.

29. Hong Kong is of course a Model Law jurisdiction adopting the latest 2006 version of the Model Law. Yet, the features of interim measures in Articles 17 to 17J of the Model Law are not yet universally embraced by all jurisdictions, particularly those that have not adopted the Model Law.

30. For instance, in Mainland China, the courts may grant

interim measures, including property preservation, evidence preservation and conduct preservation, in aid of arbitral proceedings administered by Mainland arbitral institutions. On the other hand, it had long been the case that a party to an arbitration seated outside the Mainland can neither seek the Mainland courts to enforce an interim measure issued by the arbitral tribunal nor apply to the Mainland courts for any interim measure in aid of its arbitral proceedings.

31. That was the position until the major breakthrough under the Arrangement signed between Hong Kong and the Mainland this April on court-ordered interim measures in aid of arbitral proceedings. The signing of the Arrangement showcases the strengths of the "One Country, Two Systems" principle.

32. Under this Arrangement, which has been described as a "game changer", Hong Kong becomes the first, and so far the only, jurisdiction outside the Mainland where parties to arbitral proceedings seated in Hong Kong and administered by designated arbitral institutions will be able to apply to the Mainland courts for interim

measures.

33. The benefits and significance of the Arrangement are manifold:

- At the contract negotiation stage, we believe that Hong Kong, together with the designated Hong Kong arbitration institutions, will stand out as an attractive forum.

- The Arrangement benefits parties from all over the world, irrespective of their nationality, domicile or place of business.

- The opening up of a new route for seeking interim measures from the Mainland courts is conducive to the effectiveness of dispute resolution in Hong Kong, thereby further enhancing parties' access to justice and the protection of their legal rights.

34. We believe the Arrangement will be a strong incentive for reputable international arbitral institutions to come to Hong Kong to set up dispute resolution centres or

permanent offices here and administer arbitration cases seated in Hong Kong. This will in turn draw in arbitration and dispute resolution practitioners and expertise.

35. Looking ahead, we anticipate more home-grown institutions and Hong Kong branch offices of world-renowned institutions to be set up in Hong Kong. Any international or intergovernmental organisations, such as AALCO (Asian-African Legal Consultative Organization), may enjoy the benefits of the Arrangement by establishing dispute resolution institutions or permanent offices in Hong Kong that satisfy the relevant criteria. We are hopeful that the Arrangement will enhance the competitiveness of Hong Kong's international arbitration services and further consolidate our position as a "go-to" seat of arbitration.

Investment mediation

36. The second area that I would like to talk about is concerned with another mode of ADR – mediation and,

in particular, investment mediation.

37. Over the past decades, arbitration has dominated the scene of investor-State dispute settlement (ISDS). As of end of 2018, the total number of known ISDS arbitration cases exceeded 900.

38. In recent years, the existing predominantly arbitration-based ISDS mechanism has, fairly or unfairly, attracted much criticism, including apparent inconsistencies in ISDS arbitral awards, high costs as well as perceived bias or conflict of interest on the part of arbitrators.

39. Against this background, UNCITRAL has embarked on a study of the possible reform of ISDS. The focus has so far has been on reform of investment arbitration as well as other systemic ISDS reform proposals such as the establishment of a standalone appellate body and multilateral investment court. Yet, I think one should not lose sight of investment mediation which may actually be a very important way forward for ISDS reform. In a recent position paper for Work Group III

of UNCITRAL on ISDS Reform, China expresses its support to the active exploration of the establishment of an effective investment mediation mechanism as one of the solutions for the ISDS reform.

40. If there is to be an effective investment mediation mechanism, it would be important for the investment treaty to provide for such mechanism which should refer to specified mediation rules. If one needs a concrete example, one may look at the arrangement between Hong Kong and Mainland China.

41. In accordance with the Investment Agreement under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA), a mediation mechanism has been implemented for the resolution of investment disputes.

42. The mediation mechanism facilitates and encourages the use of Hong Kong's mediation services by Mainland investors to resolve cross-border investment disputes arising out of the Investment Agreement. Hong Kong investors may likewise appoint designated

Mainland mediation institutions and mediators to assist in resolving similar disputes. Details of the mediation mechanism, including the list of mediation institutions and mediators mutually agreed by the two sides, were announced in December 2018. A set of mediation rules for adoption by Hong Kong mediation institutions and mediators was also published and the Department of Justice (DoJ) was involved in its drafting.

43. The adoption by the United Nations General Assembly of the United Nations Convention on International Settlement Agreements Resulting from Mediation (Mediation Convention) has provided much impetus for the further development of mediation as a dispute resolution mechanism for international disputes. The Mediation Convention was open for signature last week, on August 7. China was among the first 46 countries that signed this significant Convention.

44. Interestingly, unlike the New York Convention, the Mediation Convention does not provide for specified reservations relating to the reciprocity of enforcement

and recognition of mediated settlement agreements. State Parties to the Mediation Convention are thus not permitted to make any reciprocity reservation. It means mediated settlement agreements made in a non-State Party may still be enforced in a State Party of the Convention.

45. The Mediation Convention may apply to investment mediation, unless a contracting State has made make a reservation to exclude its application to mediated settlement agreements to which it is a party.

46. Indeed, one may argue that enforcement of mediated settlement agreements should in practice rarely be necessary as parties who voluntarily settle their disputes would most likely comply with their settlement agreements. Yet, the Convention will enhance the legitimacy of international mediation and no doubt encourage mediation to be more widely adopted by parties around the world.

47. Hong Kong aims to build up a team of sophisticated

investment mediators in Asia and develop Hong Kong into an international investment law and international investment dispute resolution skills training base.

48. Pioneering in Asia, the DoJ has, together with the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank Group and the AAIL, launched a training course on investment law and investor-state mediation skills in October 2018.

49. The first training course has attracted the participation of government officials, experienced mediators and academics from 18 jurisdictions. Further rounds of training are scheduled to be held around late October to early November this year.

Closing Remarks

50. To create synergy for sustainable global development, an innovative dispute avoidance and resolution system should be developed. We should all actively consider how to set up a body that is established through collaboration, based on creditability and sensitive to

cultural diversity, for resolving disputes in an innovative way so as to provide an inclusive and affordable mechanism that leads to a win-win solution for the parties involved. Mediation would be an indispensable aspect of that new dispute avoidance and resolution mechanism which best epitomises the theme of this Colloquium – "synergy" among the various jurisdictions.

51. Ladies and gentlemen, I have highlighted two of the new developments in the fast developing landscape of international dispute resolution in Hong Kong. Many more new initiatives are in the pipeline, most notably the development of LawTech and its application to international deal making and dispute resolution on an online platform called eBRAM. All these show the strong commitment of the HKSARG to our firm policy of developing Hong Kong into a centre for international law and international dispute resolution services in the Asia-Pacific region.

52. It cannot be denied that this is an unusually challenging

time for Hong Kong and indeed the world.

53. If we are true to the rule of law, if we only pass judgment after an apprehension of all the facts in context, if we, as Tony said, pursue knowledge based on verifiable facts, the goal of today's Colloquium will be achieved.