

**Speech by SJ at the UNCITRAL Working Group III Inter-session Meeting - Use of Mediation in ISDS (Closing Remarks for Day 1 - October 28, 2021) (English only)**

1. Good morning, good afternoon and good evening, ladies and gentlemen. This is described as a wrap up, I'd like to think it is actually half-time, because tomorrow morning we're going to have another session as well. It is very heartening to see the Inter-session Meeting finally taking place in the Hong Kong Special Administrative Region, which has previously been delayed as a result of the pandemic. This particular meeting on mediation is of great significance to the Hong Kong Special Administrative Region not only because it is the very first time for an inter-session meeting of an UNCITRAL Working Group to formally take place in our city, but also it is a prelude to the third annual Hong Kong Legal Week next week.

2. With the advancement in technology, I am pleased to share with you that this meeting brings together a total of over 640 registered participants from 94 jurisdictions around the world.
  
3. We are very grateful to the UNCITRAL Secretariat for the useful presentation on the two draft notes on mediation model clauses and guidelines, the sharing by the distinguished speakers from various international organizations, and the roundtable session.
  
4. These fruitful discussions echo three main directions derived from the Virtual Pre-Intersessional Meeting of the Working Group III held in Hong Kong last year. And to recap, these

three main directions are: “getting the frameworks right”; “overcoming psychological barriers through education”; and “unlocking mediation’s synergy with other ISDS reform options”.

### “Getting the Frameworks Right”

5. First, “getting the frameworks right”, both at the international and domestic levels, is crucial for empowering, incentivising, regulating and facilitating the use of mediation in investment disputes. During the panel session, we have heard the experience of ICSID in devising the new mediation rules and the International Energy Charter on its model instrument on management of investment disputes, which touches upon establishing domestic institutional framework for

use of mediation. The presentation by the representative from UNCTAD also echoes the importance of domestic framework in the successful implementation of mediation.

6. At the international level, the absence of express reference to mediation in treaty provisions and rules on the mediation procedure has been identified as matters that have to be addressed for the greater use of mediation in ISDS.
  
7. The roundtable session as moderated by the Chair of Working Group III has provided the opportunity for us to look at various broader questions on the use of mediation in ISDS.

8. One particular issue of interest is on the draft model mediation clauses prepared by the UNCITRAL Secretariat, which can be incorporated into international investment agreements, thereby getting a framework at the international level.
  
9. Mediation provisions in international investment agreements generally follow a two-tier structure, with the first tier being mediation clauses providing for the overall architecture of the mediation process, from the availability of mediation, the procedural steps and requirements for initiating the process, whether mediation is mandatory, timing, confidentiality and transparency requirements, and to the eventual mediated settlement agreements. The second tier provides for the detailed investment

mediation rules setting out operational details such as appointment of mediators and code of conducts.

10. An example has been mentioned just now, and if I may share a little bit more on Investment Agreement under the Closer Economic Partnership Arrangement between Hong Kong and the Mainland, which we call the CEPA Investment Agreement. The CEPA Investment Agreement has generally followed a two-tier structure by expressly making mediation an option for resolving investment disputes in its clauses and setting out the details in its mediation rules. As expected, there can be variations across different models, with each providing for different features.

11. In terms of its features, the CEPA Investment Mediation Rules provides, as the Chair of Working Group III mentioned just now, for a unique three-mediator commission model with mediation administered by designated institutions, and the use of mediation management conference. The Rules have also struck a balance between confidentiality and transparency. On one hand, it expressly provides for the survival of the confidentiality requirements following the termination of mediation, and on the other hand, allows disclosure of the fact that the disputing parties have agreed to mediate or have reached a settlement from the mediation.

“Overcoming Psychological Barriers through Education”

12. Whilst a set of well-drafted mediation clauses and mediation rules lays the foundation for the greater use of mediation in investment disputes, officials of host States and investors need to be convinced of the usefulness of mediation and put their trust in professionally trained mediators to assist them in resolving disputes, which have both monetary and policy significance. So the key question would be how we can achieve this.

13. There is a consensus in today's sessions on the importance of capacity building on investment mediation. Since 2018, I am happy to say Hong Kong has been at the forefront in Asia with DoJ partnering with ICSID, the International Energy Charter, and AAIL in offering investment law and investor-State mediation training courses for



government officials as well as legal and mediation practitioners around the world.

14. Over 200 participants from more than 33 jurisdictions have attended the training and I understand that the Investor-State Mediation Module of the 3<sup>rd</sup> edition will soon be held in Hong Kong physically in March next year.

15. From the perception of government officials, psychological barriers over the use of mediation are inevitable. Focused and specialised capacity building may well be the much needed catalysts. I hope this will be a topic that will be further explored in tomorrow's Practical Workshop on the Use of Mediation in ISDS.

“Unlocking Mediation’s Synergy with other ISDS Reform Options”

16. A holistic mindset also needs to be adopted in considering the reform of ISDS, and naturally mediation cannot be considered in isolation from other reform options in the eco-system of ISDS. That’s where we get into the direction of “unlocking mediation’s synergy with other ISDS reform options”.

17. Much room for creativity can be observed in this area. A treaty can expressly provide for both arbitration and mediation for investment disputes by a tiered dispute resolution clause providing for “mediation first and arbitration next”. Furthermore, as illustrated by the World Bank representative in

the panel session, prevention of escalation of the dispute can be an area for the Working Group to look into.

18. In tomorrow's Workshop, we hope we will be able to have another opportunity to look further into the relationship between procedures preventing escalation of differences into disputes and mediation clauses if disputes do materialise.

19. In Working Group III, the reform option of third party funding in arbitration has also been extensively discussed. As recognized by the UNCITRAL's draft note on model clauses and the roundtable discussion, the use of third party funding in mediation may also be a relevant area to consider.

20. Various international organizations such as ICSID and a number of jurisdictions have experience in relation to the use of third party funding in ADRs. In Hong Kong, as mentioned also just now, legislative amendments have been made in 2017 to clarify that third party funding for arbitration and mediation is not prohibited by any common law doctrines of maintenance and champerty. We will be happy to share our experience with the Working Group on this issue when opportunities arise.

21. With this, I will now conclude the wrap up of the first half of our Inter-sessional Meeting, and I look forward to seeing you all tomorrow. Thank you.