

**Speech by SJ at the UNCITRAL Working Group III
Inter-sessional Meeting - Use of Mediation in ISDS
(Opening Remarks for
the Roundtable Discussion Session of Day 2 - October 29,
2021) (English only)**

1. Good morning, good afternoon and good evening, welcome back to Day 2 of the Inter-sessional Meeting. With the support of the Central People's Government, it is a great pleasure for the Department of Justice to co-organize with UNCITRAL and the Asian Academy of International Law this roundtable discussion session for the delegations of Working Group III.
2. Today's roundtable discussion will follow the UNCITRAL deliberation process which emphasizes inclusiveness, constructiveness and transparency. The purpose of this discussion session is for us to build upon the foundation established in our Pre-Intersessional Meeting last year and the ideas we have gathered in yesterday's sessions and this morning's practical workshop in order to gain a sense of the

elements that are to be included in the reform option of mediation. In essence, it is a scoping exercise for the Working Group on mediation-related work.

3. As is the tradition of UNCITRAL Working Group III, no decision of the Working Group will be made in this roundtable session.

Agenda of the Roundtable Discussion Session

4. Today, it is our pleasure to have Jae, the representative from the UNCITRAL Secretariat, Natalie, the Rapporteur of the Working Group to moderate the roundtable discussion, and Shane, the Chair of the Working Group to wrap up the discussion. Thank you to all of you.
5. In today's agenda, we have quite a number of topics to cover, namely, the two draft notes prepared by the UNCITRAL Secretariat on model treaty provisions and

guidelines on the use of mediation in ISDS disputes, the relevance of and coherence with UNCITRAL texts on international mediation and the linkages of mediation with other ISDS reform options.

6. Before I hand the floor to the moderators, I would like to first suggest that there are some overarching principles to bear in mind in considering the questions at hand.

Mediation as a Rule of Law-Based ISDS Reform Option

7. First, mediation as an ISDS reform option emphasizes peaceful and mutually beneficial settlement of disputes and its use in ISDS disputes will support Goal 16 of the United Nations Sustainable Development Goals in the promotion of just, peaceful and inclusive societies.
8. Secondly, apart from ensuring mediation as a rule of law-based ISDS reform option, it is equally important for the

reform option to preserve the characteristics of mediation as an efficient, voluntary and flexible dispute resolution procedure aiming at preserving the long-term relationship between foreign investors and the host States and also fundamentally avoiding intensification of conflicts.

9. Having highlighted these overall considerations, I now turn to the specific agenda items.

Agenda Items: UNCITRAL's Draft Notes on Mediation – Model Clauses and Guidelines

10. In yesterday's roundtable session, we have preliminarily looked at the issue of mediation model clauses. Various models such as the mediation clauses and rules under the CEPA Investment Agreement have been discussed. Today, we will look closer at the topic and go through clause-by-clause the draft model in the note prepared by the UNCITRAL Secretariat. Hopefully, the comments received

in this roundtable session will facilitate the Secretariat to further refine the notes on model clauses for deliberation by the Working Group next year.

11. An item closely related to model mediation clauses is the guidelines on mediation. This is the subject of the second note by the UNCITRAL Secretariat, which will be further discussed in today's roundtable. The UNCITRAL draft guidelines itself is a product of international cooperation as it is prepared with ICSID's support. The draft guidelines can also be seen as a companion to the model mediation clauses as it can familiarise the potential users with the basic concepts of the process of investment mediation.

12. The guidelines also serve as a tool for awareness raising and knowledge dissemination for policy-makers as it touches upon measures for encouraging the use of investment mediation at policy, structural and organizational dimensions, such as getting the frameworks right at international and domestic levels and overcoming barriers

to mediation through capacity building and education. Ideas from the delegations will no doubt further enrich the draft guidelines.

Agenda Item: UNCITRAL Mediation Rules

13. The need for a clear set of mediation rules was reiterated by a number of speakers in the earlier sessions. Indeed, various international organizations, mediation institutions and governments have developed mediation rules, some specifically for investment disputes.

14. UNCITRAL is certainly to be congratulated for having its new UNCITRAL Mediation Rules adopted in the Commission Session earlier this year. As noted by the Secretariat, the UNCITRAL Mediation Rules are for generic use for international commercial disputes, but can also be used in mediating international investment disputes. This roundtable may be an opportune moment for the

Working Group to consider the relevance of the UNCITRAL text in the context of ISDS disputes.

15. The CEPA Investment Mediation Rules for resolving investment disputes between Mainland investors and Hong Kong may also be one of the reference models the Working Group may wish to consider.

Agenda Item: Linkages with other ISDS reform options

16. Exploring the potential synergy of mediation with other reform options in the eco-system of ISDS, for example, arbitration, dispute avoidance, third party funding and an advisory centre on international investment law have been suggested.

17. The suggestion by eBRAM earlier this morning to look into how online dispute resolution can complement the use of mediation as part of the reform option makes a lot of sense

in the light of the pandemic and the new normal that we all will have to adapt to.

18. Hong Kong has been active in exploring the potential of LawTech and the Department of Justice Project Office for Collaboration with UNCITRAL has launched a project on the Inclusive Global Innovation Platform on ODR (iGLIP on ODR).

19. Given the inherent nature of mediation as a flexible dispute resolution procedure that allows the disputing parties and the mediators to creatively design the process, there are no limit as to the types of ISDS reform options that can synergize with mediation. Your creativity will be much appreciated.

Working Method for Developing Mediation-Related ISDS

Reform Option

20. Having collected these views, an important practical issue is how to ride on the momentum and synthesise all these ideas into a comprehensive and deliverable package of reform option on mediation.

21. Last year in the Virtual Pre-Intersessional Meeting of Working Group III, I have ventured to suggest the use of drafting groups as a tool for the Working Group to draw on the practices, experience and knowledge of the delegations to expedite the work of mediation such as developing model texts and guidelines.

22. I am indeed very pleased to see that this work approach has found its way into the Revised Work Plan of the Working Group as annexed to the report of its 40th session. If it is considered useful, the Hong Kong Special Administrative Region is, as always, willing and more than happy to offer its assistance in facilitating such mediation-related work for the Working Group.

23. Without further ado, may I now hand the floor to our moderators today to kick off the roundtable discussion.

Thank you.