

Speech by SJ at UNCITRAL Working Group III on ISDS Reform - Forum for Further Preparatory Work on Investment Mediation (English only)

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the UNCITRAL (United Nations Commission On International Trade Law) Working Group III on ISDS Reform - Forum for Further Preparatory Work on Investment Mediation today (May 5):

1. Good morning, good afternoon, and good evening, ladies and gentlemen. I would like to thank again the Central People's Government, UNCITRAL and the Asian Academy of International Law (AAIL) for supporting the organisation of today's Working Group III Forum for Further Preparatory Work on Investment Mediation in the Hong Kong Special Administrative Region.
2. Investment mediation remains a promising ISDS reform option that has attracted much interest as shown by the fact that today's Forum as held in hybrid mode has brought together a total of around 500 registered participants from 68 jurisdictions around the world.
3. Today's Preparatory Forum has again proven that there is no limit to creativity when it comes to the work of ISDS reform as the Forum is the first of its kinds in the process of UNCITRAL Working Group III. The Forum is particularly timely as it allows us to, on the one hand, look back and further develop the ideas discussed in the 2019 ISDS Reform Conference - Mapping the Way Forward, the Pre-Intersessional Meeting for the Working Group in 2020 as well as the Inter-Sessional Meeting in Hong Kong in 2021, and, on the other hand, to look ahead to the future as Working Group III plans to have its first reading of the text on investment mediation, in particular the draft model clauses and guidelines, in the second half of 2022. In a way, today's Forum echoes the theme of "Mediate First: Harmony from Now to Beyond" of Hong Kong's Mediation Week 2022 held just this week.

International Mediation

4. International mediation, with its emerging potential not only in respect of State-to-State disputes, but also investor-State disputes, has been a dispute resolution mechanism that Hong Kong has been promoting for some time. I also share the views made by Dr Sun Jin (Deputy Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs of the People's Republic of China) in his opening remarks regarding international mediation and observe that mediation is the best form of conflict resolution between States, focusing on common interests whilst preserving relationships, in line with the international principles of peaceful co-existence and peaceful settlement of disputes as set out in the key international documents such as the United Nations Charter.

5. The greater use of international mediation in the context of ISDS disputes is particularly timely in rejuvenating the economy as well as the international trade and investments in the post-pandemic world by providing a flexible and voluntary dispute resolution mechanism that allows foreign investors and host jurisdictions to resolve ISDS disputes through creative and forward-looking settlement arrangements and preserve their long-term relationships. The many benefits of investment mediation have already been mentioned before in the working papers and discussion of the UNCTRAL Working Group III as well as the recent UNCITRAL's documents such as the UNCITRAL Notes on Mediation (2021) and the UN General Assembly Resolution (A/76/471) in respect of the newly adopted UNCITRAL Mediation Rules (2021).

Mediation Clauses and Rules

6. We appreciate very much UNCITRAL Secretariat's efforts in making use of the present Forum to collect feedbacks and comments in refining the

draft model clauses and guidelines on investment mediation. Such model clauses and guidelines are crucial in providing the basic legal framework and roadmap for government officials and foreign investors to utilise investment mediation, when such framework is lacking at the treaty level.

7. Professor Franck (Professor Susan Franck of Law of Washington College of Law, American University) in her presentation has given us a walkthrough of the key considerations in the design of treaty clauses and rules on investment mediation. Given the inherent nature of mediation as a flexible mechanism and the high degree of autonomy of the disputing parties in the process design, the consideration on the design of treaty clauses and rules on investment mediation would need to take into account the various existing models in order to identify what are the features that make these models on investment mediation work.

8. One of the reference models mentioned in today's discussion is the mediation clauses and the detailed investment mediation rules under the Investment Agreement of the Mainland - Hong Kong Closer Economic Partnership Arrangement, which we refer to as the CEPA Investment Mediation Rules. We are pleased to note that the Secretariat considers such Rules to be useful to be referred to in the draft note on model treaty clauses. Where there are currently only very few detailed investment mediation rules in the international arena, the comprehensive yet flexible CEPA Investment Mediation Rules is unique with its three-mediator commission mode which has taken inspiration from the party appointment model in investment arbitration scenario. The detailed sets of code of conducts and qualifications requirements on mediators also are there to ensure the legitimacy of the process.

Mandatory Mediation

9. With respect to the specific design of model clauses for investment mediation, a feature that has attracted much discussion is the idea of mandatory mediation, as discussed by Huawei (Partner of Zhong Lun Law Firm Ms Sun Huawei) in her presentation. At a time when much work remains to be done to get users of ISDS familiarised with investment mediation, mandatory mediation, which echoes the idea of "Mediate First, Arbitration Next", is a tool that should be positively considered.

10. In fact, according to a survey on investors' perceptions on ISDS conducted by the Queen Mary University of London in 2020, approximately 63 per cent of the respondents supported the introduction of a mandatory requirement to go through mediation before commencing arbitration proceedings. As an example, the Hong Kong - UAE Investment Promotion and Protection Agreement also contains a mandatory mediation provision.

11. Previously, some concerns have been expressed as to whether mandatory mediation would be contrary to the voluntary nature of investment mediation and causes undue delay and extra cost. In this regard, it is pertinent to note that there are different models of mandatory mediation, such as mandating only the parties to consider or attempt to mediate at least once and allowing the parties to withdraw at any time from the process if it is considered that such process is futile. The notion of mandatory mediation need not be seen as being equivalent to compelling the disputing parties to go through the whole process of mediation.

12. From the discussions just now, we seem to focus on mandatory mediation probably in three areas: one that of the effectiveness of it, secondly the timing, and third whether it will create an additional layer of friction in the dispute resolution mechanism.

13. If I may share with you my own experience of mandatory mediation. I vividly remember that pursuant to a mandatory mediation clause, I was

appointed as the mediator and the parties were calling me directly and saying they do not want to have any joint meeting and they do not want to meet with the other side. The parties however told me that because of the mandatory mediation clause, they have to "go through the process". That was exactly what they thought they were doing at the beginning. But ultimately, with a lot of shuttling and discussions, the parties were actually able to settle and met at a joint meeting in which they signed the settlement agreement, and both went away happily. Had that particular dispute be not settled through mediation, it would have resulted in a very time-consuming and costly litigation. A number of my mediation experiences do come from what one might call "mandatory mediation clauses" under which the disputing parties must attempt mediation before they proceed to the next stage of either adjudication or arbitration.

14. The second point about the timing of the mandatory mediation clause is also interesting. Whilst it may be useful to put it into the cooling off period as a "Mediate First, Arbitration Next" mechanism, one must also have a mindset that mediation, unlike arbitration, is not a "one-stop and then stop" situation. Mediation can be attempted at various stages, but starting with mediation and the cooling off period, as some of the speakers have identified, is really a useful mechanism to consider. And we may then want to consider whether or not that would be something to proceed.

15. The third question that was raised is whether it will create an additional layer of friction. I think Susan (Professor Susan Franck of Law of Washington College of Law, American University) has very aptly pointed out that it depends on the mindset of the relevant parties involved. And I think if the mindset is to bear in mind that there are not just one dispute resolution mechanism, that of arbitration, the frictional layer would not even exist. And the fact that mediation is being remembered will continue to be something that will be extremely useful to resolve the disputes among the parties.

Confidentiality and Transparency in Investment Mediation

16. Another aspect of the model clauses that has aroused interest is concerned with how to strike a balance between confidentiality and transparency in investment mediation. The distinctive nature of ISDS disputes, which usually involve public policy and interests, may call for greater transparency on the part of governments to ensure public accountability, which may come into tension into the need to preserve confidentiality to ensure the integrity of the process and encourages the parties to communicate with candour.

17. In addressing this delicate balance, Xiongfeng (Deputy Secretary General and Board Secretary of the South China International Arbitration Center (Hong Kong), Mr Li Xiongfeng) in his presentation has taken us through different models and an example that he discussed is the model in the CEPA Investment Mediation Rules which seeks to address the issue by providing that unless otherwise agreed by the disputing parties in writing, the confidentiality obligation shall not extend to the fact that the disputing parties have agreed to mediate or a settlement has been reached from the mediation.

Institutional Mediation for ISDS Disputes

18. As discussed before, having a set of well-designed model treaty clauses on investment mediation alone is not sufficient to promote the greater usage of investment mediation of ISDS disputes. For such model treaty clauses to be effectively used, it is crucial for there to be international institutions to administer mediation of ISDS disputes in an impartial, efficient and cost-effectiveness manner. And also, such institution may well need to bear the responsibility to disseminate knowledge, experience and best-practices on the use of investment

mediation. Institutional mediation or administered mediation for ISDS disputes remains to be an emerging area with much potential.

19. As highlighted by Professor Qi (Professor Qi Tong of the School of Law, Wuhan University) in his presentations, further thoughts may be given to how the institutional setting for investment mediation can be improved and even as to whether new institutions should be established to improve access to mediation. One would tend to think that such institutions could be established through international collaboration, based on credibility and sensitive to cultural diversity and provide inclusive and affordable investment mediation services.

Capacity Building for Investment Mediation

20. Speaking of capacity building on investment mediation, which was discussed in Tony's (Chairman of the AAIL, Dr Anthony Neoh, SC) presentation, such training is particularly crucial in overcoming the psychological barriers over the use of investment mediation and increasing the pool of mediators equipped with the necessary skills and knowledge for resolving ISDS disputes.

21. On this front, since 2018, the Department of Justice (DoJ) has partnered up with leading international institutions such as ICSID (International Centre for Settlement of Investment Disputes) and International Energy Charter and the AAIL to offer its flagship Investment Law and Investor-State Mediator Training Courses. So far, three rounds of courses were held and attended by over 200 participants from over 38 jurisdictions around the world from a wide diversity of background, including government officials as well as legal and mediation practitioners. The DoJ plans to continue to offer such training in future to further

promote the culture of mediation, especially for government officials, in the realm of ISDS in Asia and beyond.

Online Dispute Resolution and Investment Mediation

22. In respect of the development of investment mediation as an ISDS reform option, an innovative mindset can be adopted to leverage on the latest development of technology and the changing circumstances of the world to unlock the synergy of investment mediation with other reform options such as online dispute resolution (ODR) in the eco-system of ISDS. Let me mention and emphasise that ODR does not merely mean ADR (alternative dispute resolution) services online.

23. In the Secretariat's Note on digital economy for the 54th session of UNCITRAL Commission in 2021 (Note), it was reported that online mediation has resulted in a similar and, in some cases, a higher settlement rate than that conducted offline. As discussed by Pui-Ki from eBRAM (Chief Executive Officer of the eBRAM International Online Dispute Resolution Centre, Ms Emmanuelle Ta), the application of ODR to mediation of ISDS disputes needs to take into account the distinct characteristics of international investment disputes, such as the involvement of substantial public interests, transparency requirements as well as confidential and sensitive information. These matters from the States and investors will warrant greater security measures in place, as compared with international commercial disputes. It would appear that some guidelines or rules on the use of ODR for ISDS disputes would be helpful.

24. In respect of ODR, the DoJ Project Office for Collaboration with UNCITRAL was established to work on the Inclusive Global Legal Innovation Platform on Online Dispute Resolution, an initiative which was endorsed at the 54th annual session of the UNCITRAL Commission in 2021, and its work on a possible legal instrument on "Access to Justice and the Role of ODR"

received general support during the UNCITRAL Colloquium on Possible Future Work on Dispute Settlement in March 2022.

25. You may all remember that often when we talk about how to persuade someone to change their mind, one has to win their mind as well as their heart. Insofar as winning their mind is concerned, I think today we have Judith (Legal Officer of the UNCITRAL, Ms Judith Knieper) who has given us a very good framework and overall picture of the protocol, the guidelines and the rules that are under discussion in order to ensure the procedural and legitimacy of the investment mediation is going to be well protected. And therefore the mind, in my humble view, has been won.

26. As to the heart, I must thank Susan for her passion and insights in ensuring that investment mediation is going to be a feasible and viable option for investor-State disputes. By sharing from her experience of 20 years in investment arbitration as well as her insights as to how clauses are to be put in and how investment mediations are to be done, and delivered to us so passionately, it clearly has persuaded my heart to support her very ideas.

Conclusion

27. Ladies and gentlemen, to wrap-up, we thank again the distinguished panel of speakers in sharing with us their insights on the various topic issues on investment mediation. We hope that the seminar portion of the Preparatory Forum has provided that some useful ideas and suggestions for the Working Group to further consider in respect of the design of the model clauses and guidelines on investment mediation in the roundtable session of the Forum.

28. The roundtable discussion this evening will be conducted in line with the UNCITRAL deliberation process, which emphasises inclusiveness, constructiveness and transparency and seeks to benefit from the widest

possible breadth of available expertise from all stakeholders. I would encourage the delegations from Working Group III and participating experts from Hong Kong to make suggestions and share experience in the roundtable session to facilitate the UNCITRAL Secretariat in revising the draft model clauses and guidelines on investment mediation.

29. Hopefully, with the world recovering from the pandemic, we will be able to meet with the delegations from Working Group III in person here in Hong Kong very soon, so as to further develop the work on the reform option of investment mediation. Thank you very much.

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