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INTERNATIONAL DISPUTE RESOLUTION CONFERENCE 2019

New Era of Global Collaboration

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Reform of Investor-Party and Party-to-Party Dispute Settlement Mechanisms – a Hong Kong Perspective

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Reform of Investor-Party and Party-to-Party Dispute Settlement Mechanisms – a Hong Kong Perspective

- **Overview on the recent developments in the reform of investor-Party and Party-to-Party dispute settlement mechanisms**
- **The perspective of Hong Kong on the reform**
- **Investment mediation under the CEPA Investment Agreement between Mainland China and Hong Kong**

A Short History on Party-to-Party Dispute Settlement

- **Creation of the Permanent Court of Arbitration in the 1899 Peace Conference**
- **Establishment of the Permanent Court of International Justice**
- **The International Court of Justice and different international tribunals in different areas of international law**

Reform of the WTO Dispute Settlement Mechanism and the Appellate Body Crisis

- The “Crown Jewel” of the WTO – Transform the power-based system of GATT to today’s rule-based system
- Recent dissatisfaction with the WTO dispute settlement system and the impasse over the appointment of Appellate Body members
- Reform to save the WTO dispute settlement system?

Legitimacy Crisis of the Investor-Party Dispute Settlement Mechanism

- A new paradigm in international dispute settlement mechanisms
- Backlash against ISDS and the legitimacy crisis of the WTO
- Return to the age of investment contracts?
- Reform initiatives in international forums – UNCITRAL Working Group III on ISDS Reform and ICSID

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Which directions are we heading for the reform of Investor-Party and Party-to-Party dispute settlement mechanism?

Unique Perspective of the Hong Kong Special Administrative Region under “One Country, Two Systems”

Hong Kong's Participation in the WTO Dispute Settlement Mechanism

- **Article 116 of the Basic Law**

- The Hong Kong Special Administrative Region shall be a separate customs territory.
- The Hong Kong Special Administrative Region may, using the name “Hong Kong, China”, participate in relevant international organizations and international trade agreements (including preferential trade arrangements), such as the General Agreement on Tariffs and Trade and arrangements regarding international trade in textiles.

- **One WTO case as a complainant and 22 WTO cases as a third party**

Hong Kong's Free Trade Agreement Regime

- **Concluded 6 FTAs with foreign economies**
- **Examples of new features in the Dispute Settlement Chapter (“DS Chapter”) of the Hong Kong – Australia FTA**
 - **Clarification on the rules related to preliminary ruling by the Panel** (*see Rules 1 and 2 of Annex 18-A of DS Chapter*)
 - **Guidance on the interpretation of an obligation under the FTA that is identical or substantially identical to an obligation under the WTO Agreement** (*see Article 18.3 of DS Chapter*)
 - **Express rule on submissions, communications and other documents in electronic format** (*see Rule 10 of Annex 18-A of DS Chapter*)

Hong Kong's Investment Promotion and Protection Agreement Regime

- **Concluded 20 investment promotion and protection agreements with foreign economies**
- **Investor-Party dispute settlement mechanism is included in all of Hong Kong's investment promotion and protection agreements**
- **Participation as members of the Chinese delegation in UNCITRAL Working Group III on ISDS reform**

Investment Mediation – A New Look and New Life for Investor-Party Dispute Settlement Mechanism?

- Provides the host governments and the foreign investors with a high degree of autonomy, flexibility and consensual resolution options in resolving investment disputes
- Commonly found in international dispute resolution mechanisms
 - ❑ Article 33 of the Charter of the United Nations
 - ❑ Compulsory conciliation procedure under the United Nations Convention on the Law of the Sea
 - ❑ Article 5 of the WTO Dispute Settlement Understanding
 - ❑ ICSID conciliation rules and recently proposed mediation rules

Investment Mediation – A New Look and New Life for Investor Party Dispute Settlement Mechanism?

- **Initiatives of the Department of Justice**

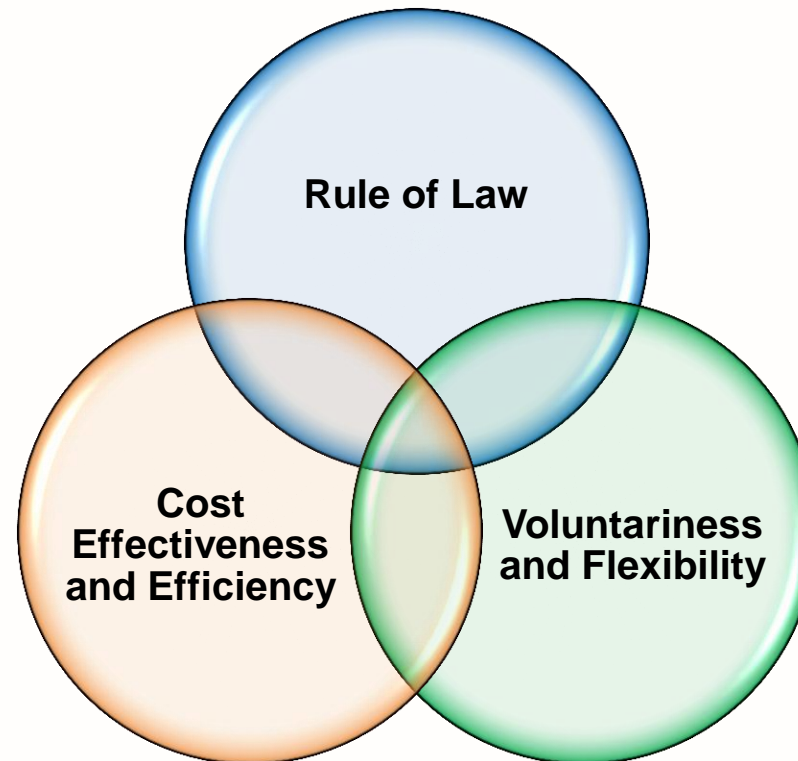
- ISDS reform conference in February 2019,
- Training in investment law and investment mediation co-organized with international organizations such as ICSID.

- **Mediation and conciliation as dispute resolution options during the “cooling-off” period in the Hong Kong – Chile Investment Agreement and the Hong Kong – Australia Investment Agreement**

CEPA Investment Agreement

- **Concluded between Mainland China and the Hong Kong Special Administrative Region under the Closer Economic Partnership Arrangement in 2017**
- **Contain provisions similar to those in international investment agreements**
- **Investment mediation as an option for resolving investment disputes arising under the CEPA Investment Agreement**
- **For disputes involving Mainland investors under the CEPA Investment Agreement, apart from the provisions in the mediation mechanism, a set of CEPA investment mediation rules have been devised for administration by designated mediation institutions in Hong Kong**

Three Key Principles of the Investment Mediation Procedure under the CEPA Investment Agreement



Rule of Law

- **Detailed provisions to ensure the independence and impartiality of mediators as well as to avoid situations of potential conflicts of interest**
 - See Article 7 of the CEPA investment mediation rules
- **Express requirement on the mediators to mediate the disputes in a manner that is transparent, objective, equitable, fair and reasonable**
 - See Article 7(1) of the CEPA investment mediation rules
- **An appropriate balance between the need for confidentiality of the mediation and transparency consideration**
 - See Article 11(4) of the CEPA investment mediation rules

Cost Effectiveness and Efficiency

- **Mediation management conference**
 - See Article 9 of the CEPA investment mediation rules
- **Requirement on mediators to take into account the overall goal of a cost-efficient and timely settlement of disputes in conducting the mediation and in deciding procedural matters**
 - See Article 8(8) of the CEPA investment mediation rules

Voluntariness and Flexibility

- **The disputing parties may, in accordance with the principle of voluntary participation, choose whether to participate in or to withdraw from mediation**
 - See Article 3(1) of the CEPA investment mediation rules
- **Sufficient room for modifications and customization of the mediation rules to fit with the circumstances of individual cases and the preferences of the disputing parties**
 - See Article 1(2) of the CEPA investment mediation rules

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Thank you!