China-ASEAN Justice Forum – Judicial Reform and Improvement of the Investment Environment

1 The end of the Second World War triggered a chain effect of decolonisation and the emergence of a large number of newly independent states. These nascent states often possessed rich natural resources, but were also characterised by weak institutions, political instability and substantial barriers to entry. In the aftermath of the demise of the golden age of capitalism in the early 1970s, which had seen unprecedented internal growth in the major capitalist economies of the United States, Japan and continental Europe[1], the deregulation of markets began in earnest and controls over the movement of capital were slowly dismantled. But even as foreign direct investment ("FDI") outflows multiplied in the 1980s, a large proportion of FDI was initially concentrated in Western Europe and North America.[2] The suspicion between investors from developed countries and developing host states went both ways. Developing countries jealously guarded their sovereignty and tended to view FDI as a form of neo-colonialism[3], while investors from developed countries were wary of the level of political and legal commitment to the preservation of a stable investment environment.

2 A dense network of bilateral investment treaties ("BITs") was the result of an imbalance between the economic goal of attracting foreign investment on the one hand and the inability of developing countries to give investors a reliable assurance

[1] See Andrew Glyn, Alan Hughes, Alain Lipietz and Ajit Singh, "The Rise and Fall of the Golden Age" in Stephen Marglin and Juliet Schor, *The Golden Age of Capitalism* (Clarendon Press, 2000) in ch 2 at p 48.
[2] UNCTAD, *World Investment Report 2011*.
[3] Kenneth J. Vandevelde, "A Brief History of International Investment Agreements" (2005) 12 University of California Davis Law Journal 157 at 166.

of investment security by binding themselves to a consistent set of agreed rules on the other hand. BITs were therefore developed as a means of providing foreign investors with a minimum body of enforceable legal protections that the host state would offer over and above its domestic laws.[4] It is not a coincidence that the modern wave of BITs traces its roots to the 1990s when developing countries turned increasingly towards the liberalisation of trade and capital flows.[5] Many developing countries simply did not possess the internal infrastructure to promote an environment that would be conducive to foreign investment, and BITs presented a rough and ready substitute. Countries that embraced this – and Singapore was fortunate to be one of them – were able to exploit their first mover advantage and utilise investment as a sustained engine of growth.

3 From the 1970s to the 1980s, Singapore's economic development accelerated rapidly, with consistent annual GDP growth rates in excess of 6%. The economy underwent a structural transformation from dependence on entrepot trade and the British military base to an outward looking model based on foreign investment and export-led growth in the manufacturing and financial sectors. In the absence of a hinterland, the success of this model depended almost solely on the attractiveness of Singapore to foreign investment. A confluence of factors has contributed to a subsequent growth trajectory that defied all expectations; but I would venture to suggest that our legal institutions have played a critical role in this. A country with little to offer apart from geography had to adhere to the rule of law as the fundamental organising principle of governance in order to offer investors

[4] See Andrew T Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1997) 38 Virginia Journal of International Law 639 at 657–666.
[5] Srividya Jandhyala, Witold J. Henisz and Edward D. Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 Journal of Conflict Resolution 1046, 1051-1056.

stability, predictability and the effective protection of their rights. I do not propose here to rehearse a rarefied debate on the meaning of the rule of law and will only touch on two relatively uncontested aspects – the need for certainty and transparency in the application of laws and control over the powers and authority exercised by institutions.

4 Singapore received English common law and equity as the foundation of her legal heritage[6], and with that, inherited established principles of commercial law that are familiar to international businessmen and corporations. In practice, laws are applied equally and fairly to all; the protection of property rights and commitments is not dependent on the wishes or views of the government of the day. Legitimate expectations are created by the law and respected by the law. We are also committed to the basic principle of the rule of law that all powers have legal limits.[7] The social costs of endemic corruption were recognised during the earliest days of self-government, and the government took resolute steps to stamp out any forms of corruption or abuse of official power. The Corruption Practices Investigation Bureau was formed as an independent body in 1952 and reports directly to the Prime Minister, receiving oversight from the highest level of government and allowing corrupt behaviour in any government ministry or organisation to be investigated without any constraints.[8] While the initial political commitment towards preserving the integrity of the government may have sprung from the immediate need for economic survival[9], the notion of incorruptibility is now firmly ingrained in our society and the

[6] The Second Charter of Justice 1826 (Letters Patent dated 27 November 1826)
[7] See the famous affirmation of this principle in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
[8] Koh Teck Hin, "Corruption Control in Singapore", delivered at the 13th International Training Course on the Criminal Justice Response to Corruption.
[9] Andrew Phang Boon Leong, *The Development of Singapore Law* (Butterworths, 1990) at p 241.

commercial sector has over time developed trust and confidence in the accountability of public institutions.

5 A strong substantive legal framework with rules that protect property and contractual rights and preserve a stable regulatory environment requires the support of a mature judiciary that provides accessible and timely processes for the administration and enforcement of laws. The system and structure of courts that had been constructed in an *ad hoc* and pragmatic manner to support a colonial outpost had to be reorganised and modernised following our independence. Legislation was only passed in 1969 and 1970 to provide a proper basis for the administration of justice in our courts, creating the Supreme Court and the Subordinate Courts[10] that dealt respectively with cases of varying monetary values.[11] Our courts were therefore fairly youthful institutions that did not have the benefit of a long historical tradition; but this also meant that reform efforts were not impeded by institutional conservatism or inertia.

6 By the late 1980s, it started to become apparent that the court machinery was creaking under the weight of the expanding caseload and increasing complexity of disputes. Although the government had placed considerable emphasis on the *quality* of justice and the rule of law, it was perhaps not equally appreciated that – to borrow the words of the then Prime Minister Mr Lee Kuan Yew – we had to have lawyers

[10] This has recently been renamed in the State Courts in a move to emphasise the critical role that the lower courts play in achieving justice for the public.

[11] The Supreme Court of Judicature Act 1969 (Act 24 of 1969) and the Subordinate Courts Act 1970 (Act 19 and 1970); see generally, Mavis Chionh, 'The Development of the Court System' in Kelvin L.Y. Tan (ed), *Essays in Singapore Legal History* (Marshall Cavendish, 2005) at ch 5.

and courts to match.[12] The now infamous investment treaty claim brought by White Industries against India demonstrates the problems that can be caused by a pervasive backlog.[13] The investor in that case filed a claim against India, alleging that a nine-year delay in the resolution of legal proceedings in the Indian courts constituted a delay that breached India's obligation to guarantee effective means of enforcing rights with respect to investments. The investor succeeded and India was required to pay damages. From the tribunal's perspective, a legal right or obligation that cannot be enforced in a timely manner can amount to non-enforcement in all but name.

7 In October 1990, the then newly appointed Chief Justice Yong Pung How stated that there were 1,963 suits and 108 admiralty suits that were still awaiting hearing dates in the High Court, with some cases having been set down for hearing as early as 1982.[14] The waiting period for trial dates often exceeded three years and there were more than 10,000 inactive cases languishing in the system.[15] This was the effect of a *laissez faire* mindset that looked upon the administration of justice as an idealistic endeavour and not as the function of an institution that had to *work* in order to serve practical needs. The judiciary responded by initiating a series of reforms that were designed to reduce the accumulating backlog, and more fundamentally, to effect a change in the attitudes of the legal fraternity. These reforms were mostly informal and incremental and did not require any substantial

[12] Lee Kuan Yew, "Proceedings at the Opening of the Singapore Academy of Law: Address by The Honourable The Prime Minister, Mr Lee Kuan Yew" [1990] 2 SAcLJ 155.
[13] *White Industries Australia Limited v The Republic of India*, UNCITRAL, Final Award (30 November 2011)
[14] Yong Pung How, Speech Delivered at the Chief Justice's Welcome Reference (8 October 1990) in *Speeches and Judgments of Chief Justice Yong Pung How* (FT Asia, 1996) at p 26.
[15] Chan Sek Keong, Speech Delivered at the 12th Conference of Chief Justices of Asia and the Pacific.

overhaul of the civil procedure framework in Singapore, but the creeping backlog that had persisted since the 1980s was eradicated within the span of two short years.[16]

8 The first step was an obvious one – addressing the shortage of judges and the low levels of judicial productivity. The Supreme Court bench was enlarged by the appointment of new judges and Judicial Commissioners, who exercise the powers of High Court judges but are appointed for fixed terms. Under the Judicial Commissioner scheme, senior lawyers from the Bar, Legal Service or academia may serve in a judicial capacity and return to their previous careers thereafter, allowing the judiciary to draw on the experience and knowledge of eminent members of the profession to alleviate any temporary surges in caseloads whilst ensuring that the quality of justice is not compromised. Eight judges and four Judicial Commissioners were appointed in or after 1990, doubling the size of the bench.[17] After the backlog was cleared, a permanent Court of Appeal was constituted in 1993 with the creation of a new class of Judges, the Justices of Appeals, who were designated to sit specifically on appellate cases. This marked the completion of the architecture of our court system.

9 Case management was introduced as an integral part of the court process, with a shift in responsibility towards the judiciary in dictating the pace of litigation. The common law tradition of litigation is an adversarial one, "the assumption being that each will be regardful of his own interest"[18], and the progress of a case through the judicial system is dependent on the initiative and industry of the parties and their

[16] Yong Pung How, Speech Delivered at the Opening of the Legal Year 1993 (9 January 1993) in *Speeches and Judgments of Chief Justice Yong Pung How* (FT Asia, 1996) at p 72.
[17] *Supreme Court Singapore: The Re-organisation of the 1990s* (Supreme Court Singapore, 1994) at p 56.
[18] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 *per* Lord Diplock.

lawyers. It was, however, patently clear by the late 1980s that a passive approach could not sufficiently incentivise lawyers, and the Singapore courts introduced a robust system of case management to keep a tight rein throughout the life cycle of each case. Extensive use was made of pre-trial conferences (or "PTCs"), convened by the court at regular intervals, for directions to be issued to the parties on timelines and to monitor compliance.[19] PTCs also served the additional function of providing a forum for parties to identify crucial disputed issues and to delineate the scope of evidence to be adduced, thus facilitating the expeditious conduct of the subsequent trial.

10 An interventionist judiciary-led approach to case management is not a novel development, but what distinguished Singapore's experience was the uncompromising approach towards compliance. Lawyers were expected to accommodate the court's hearing schedules; once hearing dates were allocated, adjournments would not be entertained in the absence of good reasons.[20] The Rules of Court were also amended to include a provision for the automatic discontinuance of cases that remained dormant for over a year.[21] Valuable judicial resources and time would not be expended on litigants who chose to conduct cases in a dilatory fashion.

[19] Case management was formalised in 1996 by O 34A r 1(1) of the Rules of Court, which vests the court with a broad discretion to "direct any party or parties to those proceedings to appear before it, in order that the Court may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter".

[20] See *Chan Kern Miang v Kea Resources* [1998] 2 SLR(R) 85, where the Court of Appeal held at [13] that "[s]trong compelling grounds must exist before the court will consider the exercise of its discretion".

[21] See O 21 r 2(6) of the Rules of Court, which states that "if no party to an action or a cause or matter has, for more than one year … taken any step or proceeding … the action, cause or matter is deemed to have been discontinued"; Lim Hui Min, "Automatic Discontinuance under Order 21 Rule 21 – First Dormant, then Dead" (2001) 13 SAcLJ 150.

11 Crucially, the court was empowered to impose sanctions in the form of "unless orders" if lawyers flagrantly breached timelines or procedural directions. The consequences of default extended to the dismissal of actions or the striking out of defences, and an extension of time for complying with an unless order would not be granted unless the failure to obey was non-intentional and attributable to extraneous circumstances.[22] With the perspective of hindsight, some might say that the then prevailing judicial philosophy of intolerance towards procedural default might have been rather harsh. But this was an extraordinary set of measures taken to address a real problem of dilatoriness and a consequently large backlog of unfinished cases. These changes enabled us to address these issues and in the process also changed the mindset and attitudes of our lawyers. With this achievement, our courts have developed a more accommodating stance. We recently emphasised the principle of proportionality in deciding whether the draconian sanction of summarily dismissing a case on the basis of a procedural breach is warranted.[23] Nevertheless, the early widespread use of "unless orders" as a vital part of the case management toolkit was instrumental in fostering a culture of compliance on the ground. After an initial teething period, lawyers understood that such orders meant what they said – they would be readily enforced as the norm and compliance was not optional.[24] A transformation in the litigation culture was achieved by adopting a blunt and decisive approach that could gradually be relaxed once change had taken root.

[22] *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [13]; also see *Manilal and Sons (Pte) Ltd v Bhupendra K J Shan (trading as JB International)* [1989] 2 SLR(R) 603 for an early example of the use of an "unless order".
[23] See *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [35]–[41].
[24] Lionel Leo, "Case Management: Drawing from the Singapore Experience" (2011) 30 CJQ 143 at 158.

12 I now move from the individualised management of discrete cases to measures directed at ensuring the overall efficacy of the judicial function. Chief Justice Yong had a strong managerial background in the financial sector and understood the need for performance benchmarking and evaluation.[25] The Singapore courts now monitor three main key performance indicators or KPIs: the clearance rate, the lifespan of cases and the waiting period.[26] The clearance rate represents the number of pending matters disposed of as a percentage of new matters filed within each year. A high percentage means that only a small number of cases are rolled over and that any backlog is kept to a minimum; and in 2011 and 2012, our clearance rates for civil suits were 97% and 90% respectively. The lifespan of cases traces the period of time it takes for a case to be fully disposed of. We have set a target of 18 months from the date of filing to the date of conclusion, which has consistently been met in at least 90% of all cases. The last indicator is the waiting period, which gauges the court's ability to meet certain timelines for allocating hearing dates. Taken collectively, these KPIs give a quick snapshot of the overall efficiency of the court in disposing of cases and assist both the court and lawyers to manage the progress of cases by providing reliable indicators as to when parties can expect cases to move forward. The KPIs are also released to the public annually and signal our commitment towards improving our standards of service to the public.

13 I do not, of course, suggest that numbers and statistics are capable of measuring the most important qualitative aspects at the heart of the judiciary's work, and these indicators should not lead to a distortion of the true performance of the

[25] See Waileed Haider Malik, Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons (The World Bank, 2007).
[26] Justice Judith Prakash, "Making the Civil Litigation System more efficient", Speech delivered at the Asia Pacific Judicial Reform Forum Round Table Meeting in Singapore (21 January 2009)

judicial system in favour of achieving quantifiable proxy targets. Nevertheless, the success of any reform is measured by whether the results were a blip or whether they have had a more enduring legacy, and the rigorous system of performance monitoring has provided clear benchmark standards by which our courts run and are expected to continue to run. In the Global Competitiveness Report for 2013-2014, Singapore was ranked first for the efficiency of its legal framework in settling disputes.

14 As the foundations for an efficient system of courts are being firmly entrenched, we have also shifted our focus towards enhancing the quality of our jurisprudence and the active establishment of a legal environment that is conducive to internationalised modes of dispute resolution.

15 The present Supreme Court bench comprises members with diverse experiences and legal backgrounds, from leading academics to litigation and corporate lawyers, public lawyers and those who have worked their way up through the ranks of the lower judiciary. While the Singapore courts do not presently have the critical volume of cases to establish specialised courts nor an experienced bar that is clearly divided along lines of specialisation, we have gradually moved to a selective docketing system of channelling cases. Cases are assigned to categories organised by subject matter – such as construction, finance, shipping, arbitration, and intellectual property – and then to judges who have experience and expertise in dealing with such cases. This permits some degree of judicial specialisation, and judges are assigned to complex cases at an early stage so that the judge is actively involved in directing the expeditious conduct of the trial and is familiar with the facts

and procedural background by the time the matter is set down for trial. At the appellate level, cases of jurisprudential and commercial significance are identified and closely managed so that important legal issues are clearly distilled and the court has the benefit of high quality submissions.

16 It is also important to recognise that while the courts must, first and foremost, provide access to justice for its citizens, a judicial system can no longer remain insular or parochial in a landscape where jurisdictional boundaries are quickly being eroded and dispute resolution is increasingly conducted on a transnational scale. We are continuing to build on our reputation and advantages as an arbitration-friendly jurisdiction and are currently in the midst of establishing the framework for a specialist commercial court, the Singapore International Commercial Court ("SICC"), which will hear disputes that arise from international commercial transactions.[27] Singapore is well-placed to do so in the light of our increasingly sophisticated commercial jurisprudence and growing prominence in the parallel field of arbitration. Decisions of the SICC will be enforceable as judgments of the High Court of Singapore and this neutral court-based mode of adjudication presents a viable alternative option for those who are suspicious of the impartiality of party-appointed arbitrators. Quite apart from the economic benefits of promoting Singapore as a key centre for the convergence of legal services in Asia, the establishment of a commercial court signals our continuing commitment towards maintaining a clear, fair and stable domestic legal regime that is receptive to the pragmatic needs of global business and commerce.

[27] See the Report of the Singapore International Commercial Court Committee (November 2013).

17 I wish to conclude by returning to the picture that I began with – the need to put in place a legal and judicial architecture that will act as a magnet for global capital flows. Although some might yet question whether there is in fact a causative (or even correlative) connection between judicial reform and development, I do not think many would disagree that reform to achieve a stable, fair and efficient judicial system is a laudable end in itself. But it is also possible to look at the relationship from the other end, where international investment creates opportunities and provides the support and political will for judicial reform. Unlike the European Union trade bloc, there is considerable heterogeneity in the legal systems of each of the Asian states[28]; and while the harmonisation of substantive commercial law is unlikely to materialise in the foreseeable future, an impetus for the convergence of legal and judicial norms may come from the economic realities of the investment environment. Market actors will inevitably look to lower their transaction and compliance costs across boundaries and will seek uniformity in the protection of investments. Future judicial reform may have to take place on a broader plane in order to enhance international confidence in the region. I hope that our dialogue today will contribute not only to the sharing of our learning and experience in instituting domestic judicial reforms, but will also open avenues for judicial collaboration and integration on a wider level.

[28] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence [2013] SJLS 231 at 244–245.