AG'S KEYNOTE SPEECH

PACIFIC RIM ADVISORY COUNCIL CONFERENCE

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"PUBLIC INTERNATIONAL LAW – A REQUIREMENT FOR EVERY PRIVATE LAWYER"

Distinguished delegates to the Pacific Rim Advisory Council Conference, ladies and gentlemen, it gives me great pleasure to be able to welcome you to Singapore and to address you this morning. My friend, Mr S Sivanesan of Rodyk & Davidson who invited me to address you today, left it entirely to me to choose my topic and having regard to the international composition of this distinguished audience, I thought I would speak to you about public international law and its growing relevance to the private sphere.

2 Commercial lawyers generally tend to think that public international law has little to do with their work. The pre-conception appears to be that public international law is a body of law that governs solely the relationships between sovereign states. Because of this, commercial lawyers do not generally regard public international law as a vital tool in their armoury. Having spent most of my career as a commercial litigator, I too held this view. And it is not hard to see why. Public international law has traditionally been about resolving disputes between sovereign states, a realm where private non-state actors traditionally had no standing and hence little, if any,

interest. Public international law, so it is often thought, operates on the international plane; municipal law operates on the domestic plane, and never the twain shall meet.

3 But the more I have thought about it, the more it has become apparent to me that this is a misconception borne out of our collective failure to appreciate the extent to which the nature and scope of public international law has undergone tremendous change in the last few decades. In many ways, public international law has been privatised over the last 20 years or so in the sense that it has penetrated the domestic realm, so that today, to an ever-increasing extent, it affects the state's relationship with its own nationals as well as non-nationals within its jurisdiction. For this morning's discussion, to illustrate my hypothesis, I have chosen to focus on just three key areas where a commercial lawyer may come into contact with public international law. They are:

- First, investment treaties and investor-state arbitration;
- Second, international trade law;
- And third, international human rights law.

4 I will explore each area briefly but my real purpose is simply to demonstrate to you that to be an effective and relevant commercial lawyer today, you need to have a grasp of public international law. The time has come where public international law can no longer be ignored by commercial law practitioners.

Investor-state arbitration

5 There is perhaps no clearer illustration of how public international law directly impacts your work as a commercial lawyer than in the area of investment treaties, under which your client investors may have directly enforceable rights against the host State. Investment treaties allow investors to decide when and how to threaten, initiate or settle claims for an alleged violation of treaty obligations under international law. By investment treaties, I am broadly referring to the international network of bilateral investment treaties (or BITs for short), regional free-trade agreements and multilateral agreements, such as the Energy Charter Treaty, all of which contain provisions for foreign investors to hold host States liable for breaches of treaty obligations committed through government action. From a commercial lawyer's point of view, these investment treaties provide an additional weapon in the arsenal of remedies available to protect a client's commercial interests from being adversely affected by government action. Take the example of the recent case where Philip Morris (Asia) Limited has indicated its intention to leverage on the Hong Kong-Australia BIT to pursue legal action against the Australian government over plans to mandate plain packaging for tobacco products in Australia, on the grounds that this would allegedly have costly implications for their business.

6 Today, there are some 3000 international investment treaties in existence, including BITs and investment chapters in free-trade agreements. This has resulted in an increased level of protection for foreign investors when dealing with host States.

This has in turn incentivised growth in international trade and commerce. But unsurprisingly, there has also been a corresponding proliferation of investor-state arbitrations, with more than 350 known investor-state claims either pending or concluded. Some commentators have noted that the driving force of international investment law is not only the proliferation of investment treaties, but also the growing body of arbitral awards. The market for legal services has much expanded due to this proliferation of investor-state arbitrations. What this in effect represents is a rapidly expanding growth area of work opportunities for commercial lawyers.

7 But it necessarily follows from this that for today's commercial lawyer, an understanding just of commercial law would not suffice. It is true to say that by consenting to investor-state arbitration, States accept a process that bears much superficial resemblance to international commercial arbitration. They are cast as respondents in claims brought by investors. Moreover, investor-state arbitration employs procedural rules that are either directly made for commercial arbitration or tailored after the model of commercial arbitration.

8 Yet, one cannot overlook the fact that investor-state arbitration is fundamentally a different creature from international commercial arbitration. At the heart of it, investor-state arbitration involves the control of the legality of a state's conduct under the applicable investment treaty. Thomas Wilde summed it up nicely when he observed in his Separate Opinion in ***International Thunderbird Gaming v***

Mexico (a case brought under Chapter XI of the NAFTA under the UNCITRAL Arbitration Rules):

> "Investment arbitration therefore does not set up a system of resolving disputes between presumed equals as in commercial arbitration, but a system of protection of foreign investors that are by exposure to political risk, lack of familiarity with and integration into, an alien political, social, cultural, commercial, institutional and legal system, at a disadvantage. Legal principles for and methodological approaches to examining the factual situation, habits, natural instincts and styles from commercial arbitration are therefore no suitable guideposts for investment arbitration."

9 Investor-state arbitration is also fundamentally different from commercial arbitration in another respect. Investor-state arbitration involves obligations that originate from an international treaty that would have been negotiated between the host State and the home State of the investor. In contrast, commercial arbitration involves obligations that originate from a freely negotiated contract between two private entities. This fundamental difference affects the vital issue of the law governing the dispute: while a contractual dispute may be governed by, for example, English or New York or Singapore law, an investor-state dispute will necessarily be governed by public international law, since the obligations in question originate from an international treaty. A good grasp of public international law is therefore critical in investor-state arbitration. A starting point has to be a proper working knowledge of the Vienna Convention on the Law of Treaties, in particular, Articles 31 to 33 relating to the principles of treaty interpretation. It is also important to have sound knowledge of the issue of state immunity. The well-established position has been that a waiver of

state immunity from jurisdiction does not amount to an automatic waiver of immunity from enforcement of the resulting award. Consequently, state immunity can pose an obstacle to the enforcement of arbitral awards rendered against sovereign States. This was precisely the problem in the recent case of ***FG Hemisphere Associates LLC v. Democratic Republic of Congo***, where Congo successfully resisted an attempt to enforce arbitral awards against it in Hong Kong, by relying on the doctrine of state immunity.

10 I mention these issues in support of my basic thesis that today's commercial practitioner needs a healthy blend of expertise: including knowledge of international law, expertise in dealing with aspects of international relations as well as an understanding of international business transactions and business practices.

11 Before leaving this subject, I should briefly highlight a potential concern that I have observed in this area from a public international law perspective. The proliferation of investor-state disputes has come at a significant cost in that the development of international investment law has been placed in the hands of a select few drawn from quite narrow specialities within international law, with little or no accountability to state actors. The arbitral jurisprudence in investor-state disputes that has developed over time has been described as resembling "a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in

particular"[1]. The stark alienation of treaty parties from the interpretive process has heightened the prospect of a disconnect between the expectations of the States that enter into these investment treaties and the tribunals that interpret them. Inevitably, this has added fuel to the growing call for the accountability of arbitral tribunals. How this will affect the growth and direction of investor-state arbitration remains to be seen. But I think it is inevitable that state actors will push back against the ossification of the current practice where norms of international law with a significant impact on a State's actions are being generated by a small largely self-selected group with little, if any, international accountability.

International trade law

12 I now move onto the next point of contact a commercial lawyer can have with public international law – that is in the area of international trade law. Governments increasingly recognise the need for engagement on the international plane to unify standards and practices to facilitate trade in goods and services across borders by entering into treaties. The result of this engagement has been a vast and overlapping network of multilateral, regional and bilateral free-trade agreements that sit alongside the WTO regime, to regulate trade relations between States.

[1] Anthea Roberts, '*Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*', A.J.I.L. Vol. 104 (April 2010) 179.

13 These norms agreed to at the international level are effectuated through measures taken by governments at the domestic level to regulate private conduct. In essence, this means that domestic regulatory measures are the implementation of a State's international obligations. In net terms, decisions of domestic policy regulators are increasingly constrained by substantive and procedural norms established at the global level.

14 So what does this really mean for you as commercial lawyers? Quite simply, private actors such as your client corporations can secure rights from this system of obligations and rights that operate on the international plane for governments, albeit *indirectly*. This is unlike investor-state arbitration where investors have the option of bringing claims directly against a State which is thought to be acting inconsistently with its treaty obligations under the applicable investment treaty. While such direct action may not avail here, corporations should not be seen as powerless in the face of WTO-inconsistent or FTA-inconsistent regulations at home or in foreign countries.

15 Besides relying on administrative law remedies under domestic law, with a proper understanding of international trade law, commercial lawyers would be in a position to assist clients in strategically determining whether the domestic regulations in question (that are presumably adversely affecting business) are consistent with WTO or FTA obligations; and if they are inconsistent, there are at least two avenues for seeking redress:

- First, to make representations to the relevant authorities to challenge certain regulations on the basis of non-compliance with WTO or FTA obligations. The relevant authorities may well be receptive to the challenge and amend their regulations to be compliant with their international obligations pursuant to such a challenge; and
- Second, to lobby the home State to take action against an "errant" foreign State under the WTO dispute settlement mechanism. This is of course a more drastic move where the relevant authorities of the offending State have not paid heed to your representations.

16 On this second point, I should highlight that although the WTO dispute settlement mechanism considers only disputes between States, the reality is that many WTO disputes are actually reflective of the corporate rivalry that subsists between private actors. Take for example the ***'Case of Japan – Measures Affecting Consumer Photographic Film and Paper'***, which was brought before the WTO dispute settlement panel because of the lobbying efforts of rivals, Kodak and Fuji. Another case in point is the ***'Case concerning European Communities – Measures Affecting Trade in Large Civil Aircraft'***, which was brought to the WTO due to lobbying efforts of rivals, Boeing and Airbus. In fact, the ability and willingness of a number of states to bring claims in the WTO depend very much on support from private entities, which are prepared to bankroll the substantial legal costs involved in bringing a case to the WTO because of the vital strategic interests at stake.

17 This brings me to one of the key challenges being faced by the WTO dispute settlement bodies today, namely, that of distinguishing measures that fulfil legitimate environmental or health and safety objectives from those that constitute disguised restrictions on trade. This challenge has arisen due to the growing number of disputes involving environmental and health and safety issues being brought before the WTO. There have been some criticisms that the WTO panels, which are composed generally of trade and legal experts, lack the expertise necessary to decide whether there is sufficient scientific evidence to justify environmental, health and safety regulations. Others criticise the dispute resolution process for prioritising trade objectives over environmental and health and safety objectives. It would certainly be useful to keep abreast of the latest developments in this area of the WTO jurisprudence to assess how valid such criticisms are. It would also be interesting to see the extent to which the WTO dispute settlement bodies succeed in reconciling the objectives of a multilateral trade regime with the objectives of environmental and health and safety protection.

International Human Rights Law

18 I turn to the final point of contact between a commercial lawyer and public international law that I wish to highlight this morning and that is in the area of international human rights law.

19 Over the last fifty years, public international law has penetrated the once exclusive zone of domestic affairs to regulate the relationships between governments

and their own citizens through the growing body of international human rights law. Through ratification of international and regional human rights treaties, governments are bound to respect, protect and fulfil human rights. These international obligations are implemented in the form of domestic measures and legislation to ensure compliance with treaty obligations. Where within the domestic setting there are failures to address human rights violations, there are mechanisms and procedures in place for individual complaints and communications at the international and regional level.

20 International human rights standards have traditionally focused on the responsibility of States to respect and promote human rights. However, with globalisation, the growing reach and impact of business enterprises has given rise to a debate about the roles and responsibilities of such non-State actors with regard to human rights. Over the last decade alone, there has been a shift from the almost exclusive attention on abuses perpetrated by governments, to greater scrutiny of the activities of business enterprises, particularly multinational corporations. One clear signpost of this scrutiny is found in the corporate cases of human rights violations that have been litigated under the Alien Tort Claims Act, which basically gives US federal courts jurisdiction to hear claims of aliens for violations of human rights. Shell, for instance, faced multiple law suits under the Alien Tort Claims Act relating to its alleged complicity in human rights violations arising from business activities in Nigeria.

21 Over the last decade, the issue of articulating what these responsibilities are has found its way onto the agenda of the United Nations. Through the United Nations human rights machinery such as the establishment of a Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, human rights standards of corporate responsibility and accountability for transnational corporations and other business enterprises have been identified and clarified. This has culminated in the development of the ***"Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"***, recently endorsed by the UN Human Rights Council on 16 June 2011. Although these Guiding Principles cannot be seen as creating new international law obligations for corporations, they do set out for the first time global standards outlining how States and businesses should implement the UN "Protect, Respect and Remedy" Framework in order to better manage business and human rights challenges. Under this framework, corporations have the responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts flowing from their activities.

22 The key question that remains is whether such "soft norms" will eventually develop into hard obligations in a world where companies are no longer simply encouraged, but are required by international law to respect human rights. I would suggest to you that a fuller integration of private business enterprises into the fold of the international legal system of accountability is perhaps closer than we imagine.

Although the mandate of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises has come to an end, the UN Human Rights Council has established follow-up mechanisms, such as the creation of a new expert Working Group and an annual multi-stakeholder forum. Much will depend on the decisions that will be taken by the expert Working Group on priority areas of work that will shape the next steps ahead.

23 It should also be noted that other UN human rights mechanisms, such as treaty monitoring bodies of the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights have begun their own initiatives to develop General Comments on private sector-related issues.

24 This brief survey has, I hope, shown you that in the legal landscape in which we now function as commercial lawyers, we need to have a proper understanding of public international law, including even human rights standards that are today being framed in terms of corporate responsibility and accountability. This knowledge is vital if you are to protect your clients not just from expensive and protracted law suits in the court of law, but perhaps even more importantly from reputational damage in the court of public opinion.

25 The practice of law has become more dynamic, more challenging, more complex, more international and ultimately more exciting than at any previous time in history. Commercial law can no longer be seen as the preserve of the black letter

lawyer. As globalisation continues apace, so too will the globalisation of the law and we as its practitioners, need to be up to the task. I wish you an enjoyable conference and once again, welcome to Singapore.