

Speech by SJ in New York

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, entitled "What Americans Should Know About Hong Kong" at a luncheon hosted by the Hong Kong Association of New York, the New York Bar Association and the American Foreign Lawyers Association today (September 15, New York time):

Ladies and gentlemen,

Introduction

It must be rare for anyone to start a speech with an apology. But I must apologize for the title of my speech, especially after having dinner with Professor Jerome Cohen yesterday evening.

First, it sounds so arrogant as if you ladies and gentlemen do not know or know enough about Hong Kong. Second, it is so misleadingly wide when I can offer, in my capacity as the Secretary for Justice, will inevitably be matters related to the law. However, if you do want to know where you can find good eating and shopping places in Hong Kong, I and the ETO officers will be more than happy to assist after the speech.

But more seriously, may I suggest there are reasons why it is worth your spending a few moments on Hong Kong. Contrary to the dire predictions of "the fall of Hong Kong", we are going strong nine years after the Reunification with the Mainland.

Under the innovative principle of "One Country, Two Systems", Hong Kong is the only territory in the world and in world history, as far as I know, where a capitalist economy operated on the common law exists as an inseparable part of a socialist country with an entirely different legal system. Secondly, not only is Hong Kong unique, it is also uniquely successful.

Just last week on 7 September, in the Economic Freedom of the World: 2006 Annual Report published by the Cato Institute of the United States in conjunction with the Fraser Institute of Canada and over 60 other research institutes around the world, Hong Kong is again ranked the world's freest economy. Apart from the top

overall ranking, Hong Kong also ranks first in “freedom to trade internationally”. We did not fare as well according to the latest World Bank’s study report on doing business in 2007, published also last week, we came only 5th in the world. However, we are still the world’s top ranked economies in categories including ease of trading across borders, getting credit and protecting investors.

If you are in the finance world, it would not have escaped your attention about the announcement yesterday that the retail portion of the IPO of China Merchant Bank was oversubscribed in Hong Kong by 265 times, locking up \$250 billion in individual investors’ money. This followed the listings of a number of mega banks in Hong Kong, breaking all records in terms of the amount of capital raised.

I. The Rule of Law in Hong Kong

The first matter I would like you to know about Hong Kong is that it is not just our economy that survived the Asian Finance Crisis and SARS; our legal system in Hong Kong is also going strong despite the inevitable challenges coming from the interface with the Mainland political and legal system.

Hong Kong’s legal system, developed on the English model, is similar to the system you have here. Its continuing independence from the Mainland’s legal system is a litmus test for the faithful implementation of our Basic Law. And its strengths are the cornerstones of our economic success, and of attraction to overseas businessmen and investors.

No doubt the three interpretations of the Basic Law by the National People’s Congress in the past 9 years have raised people’s concern for the integrity of our judicial independence. However, it would be unfair to overlook or play down the efforts and achievements we have made in strengthening the rule of law in Hong Kong in the past 9 years.

First, the Basic Law is not only defensive in terms of continuing the common law, it is also progressive in extending legal protection which Hong Kong has not enjoyed. In particular, the Basic Law has conferred on the people of Hong Kong the most extensive protection on human rights and freedoms in our history. Chapter III of the Basic Law contains a whole range of rights including freedom of expression, freedom of assembly, etc., and Article 39 in particular provides for the application of ICCPR and other international covenants to Hong Kong.

Second, we have a competent and independent judiciary to help enforce the rights guaranteed under Basic Law. Those of you familiar with Hong Kong will know that we have the top legal brains, both local and overseas, sitting in our Court of Final Appeal.

Hong Kong has been getting a favourable grading year after year in the survey on “Confidence in Asian Judicial Systems” conducted by the Political and Economic Risk Consultancy Ltd. As reported in its 19 July 2006 Report, Hong Kong’s grade is 1.55 in a 10 grade range with zero being the best grade possible and 10 worst. That is the best grade obtained among the Asian Judicial Systems, with Singapore being the next (scoring 1.87). For comparison, Hong Kong’s grade of 1.55 is only second to that of Australia which is 1.35, but better than that of US which is 1.83.

One of the noticeable phenomena in the past nine years is the rapid development of public law litigation. First, the unprecedented new constitutional order provides fertile grounds for different interpretations and debates. Secondly, the guarantees in the Basic Law, particularly those relating to human rights, have been the source of much litigation. The growth of human rights jurisprudence in Hong Kong has been exponential. Its development is also interesting because of the breadth of case law references. Relevant authorities from almost the entire common law world have been cited in our courts.

The courts have interpreted and enforced those guarantees most judiciously. For example, they have made rulings on the constitutionality of provisions on right of abode in the Immigration Ordinance, on restrictions on the right of assembly under the Public Order Ordinance, the law prohibiting the desecration of national and regional flags, reduction in civil service salaries, and police operations of interception of communication and covert surveillance, etc. The decisions in these cases, some in favour of the government and some against, demonstrate that the Basic Law is not a piece of window-dressing.

Of course, under the newly implemented constitutional order, challenges will come again. However, I believe trust between Hong Kong and the Central Authorities with an open mind is crucial in the successful implementation of One Country, Two Systems. Trust can only come with frank communication and understanding. There is clearly a common goal, i.e. to enable Hong Kong to prosper.

I believe it is important to continue to encourage the Mainland to appreciate the common law traditions which we so very much cherish. To this end, Hong Kong's role is unique but we are not the only one doing it. In my visit to the UK in June and in my visit here thus far, it is clear to me there are many dedicated people contributing in this cause.

II. Legal Services in Hong Kong

The second matter I believe you may want to know more about is the legal services and opportunities in Hong Kong.

Many of you have worked in Hong Kong or with Hong Kong lawyers. Hong Kong has a wide spectrum of lawyers, both local and foreign. Currently, there are in Hong Kong about 5,500 practising solicitors, about 950 practising barristers, and over 800 foreign lawyers.

The 800 foreign lawyers come from 25 different jurisdictions. Those from the US top the list in terms of number (over 300). The statutory criteria for the registration and regulation of such lawyers were first enacted in 1994. The registration systems are very easy to comply with. As a result, Hong Kong has become a magnet to law firms and lawyers from all over the world.

These lawyers cannot practise Hong Kong law or enter into partnerships with Hong Kong solicitors. However, a registered foreign law firm may enter into an association with a local law firm provided that the number of foreign lawyers to local lawyers in the association does not exceed the ratio of 1:1 (this requirement may be waived by the Law Society under exceptional circumstances), and that certain other conditions are met. Further, foreign lawyers can get qualified locally by passing the requisite examinations run by the professional bodies.

The Mainland Market

Many of you here may have already established your strongholds in China by establishing representative offices in the Mainland. If so, please bear with me with what I am about to say, which is aimed at those in the audience who might not have embarked on that direction.

The Mainland itself has just about 120,000 lawyers. Some are extremely

sophisticated in their practice, have a good command of English and IT, and have up-to-date information on legal developments elsewhere in the world. However, only about 5,000 to 6,000 have the language proficiency and experience to handle international legal practice. So there is considerable scope for Hong Kong-based law firms – local and international – to fill this gap.

Foreign lawyers have been able to provide services on the Mainland since Interim Provisions (on the establishment of offices within the Territory of China by Foreign Law firms) were promulgated in 1992. Originally, a foreign law firm could only establish one representative office in the whole of Mainland China, and that could only be in one of 19 specified cities.

But when China joined the WTO in December, 2001, new and more relaxed regulations were enacted. Since the implementation of those regulations on January 1, 2002, representative offices of foreign law firms are no longer required to register centrally. They are only required to register with the provincial judicial administrations. The previous restriction on having only one office in one of 19 designated cities has also been abolished.

At present, representative offices of foreign law firms can engage in the provision of advice on laws of their jurisdictions, international treaties, international commercial laws and practices. But they are not allowed to engage in legal services relating to Mainland law. These law firms cannot employ Mainland lawyers, and foreign lawyers are not allowed to obtain Mainland legal qualifications. There are currently about 140 representative offices of foreign law firms in the Mainland, of which about 56 represent US law firms.

Hong Kong lawyers and CEPA

Originally, Hong Kong lawyers who wished to practise on the Mainland were regulated in the same way as foreign lawyers. But that changed on January 1, 2004, when the Closer Economic Partnership Arrangement (CEPA) between Hong Kong and the Mainland came into effect. CEPA is a type of free trade pact between Hong Kong and the Mainland – made possible because we are both separate members of the WTO. If ever you were looking for a good example of how "One Country, Two Systems" works, CEPA is it.

The advantages offered to Hong Kong law firms under CEPA include the

following:

* Hong Kong law firms with representative offices on the Mainland are allowed to operate in association with Mainland law firms. Currently 67 Hong Kong law firms have representative offices in the Mainland.

* Mainland law firms are allowed to employ Hong Kong lawyers and barristers as consultants on Hong Kong law;

* Hong Kong permanent residents with Chinese citizenship are allowed to sit the Mainland legal qualifying examination and, if they become qualified on the Mainland, are allowed to engage in non-litigation legal work in Mainland law firms, as well as litigation in family and succession matters related to Hong Kong.

I should add that some law firms in Hong Kong that originally began life as foreign law firms have, after their members qualified as Hong Kong solicitors, switched to become Hong Kong law firms. As a result, they can not only offer advice on Hong Kong law, but their representative offices on the Mainland can enjoy the benefits of CEPA.

Attracting Mainland-related legal business in Hong Kong

So far, I have talked about legal services in Hong Kong and those in Mainland. Hong Kong's constitutional status and its geographical location also provide a unique opportunity to provide dispute resolution services for Mainland-related contracts. Hong Kong's legal system offers a reassuring setting for litigation, arbitration, mediation and other forms of alternative dispute resolution.

Arbitration

Awards made by the Hong Kong International Arbitration Centre are enforceable on the Mainland, and in all contracting states of the New York Convention. That centre currently handles about 300 cases per year, but this is likely to increase further as ADR becomes more popular. Hong Kong offers world-class arbitral facilities at the Hong Kong International Arbitration Centre. Our arbitral law is also modern, and provides that international arbitrations are to be governed by the UNCITRAL Model Law.

It is not just international corporations that find comfort in the depth and breadth of experience we have in our legal sector. Mainland parties also find there are benefits in using Hong Kong as a dispute resolution centre. We share the same language and culture, and we are extremely familiar with the way the Mainland market operates.

Hong Kong and the Mainland are, of course, part of one country, and so the New York Convention does not make Hong Kong arbitral awards enforceable in the Mainland or vice versa. However, in June 1999, a Memorandum of Understanding concerning the Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong SAR was signed by the Deputy President of the Supreme People's Court and Hong Kong's Secretary for Justice, my predecessor, Ms Elsie Leung. This Memorandum of Understanding reflected the spirit of the 1958 New York Convention, and provided for mutual enforcement of awards on a similar basis to that in the Convention.

Mainland awards enforceable in Hong Kong under this Arrangement are those made by recognised Mainland arbitration authorities. At present, there are over 100 such recognised authorities.

As the awards made in Hong Kong can also be enforced in the Mainland, the Arrangement no doubt serves to encourage Mainland enterprises, as well as foreign investors in the Mainland, to employ arbitration services in Hong Kong and thereby strengthen Hong Kong's role as a regional disputes resolution centre.

Court Judgments

As regards court judgments, at present, local judgments are not enforceable in the Mainland, and vice versa. Since we wish to strengthen Hong Kong's role as a centre for dispute resolution, it would clearly be beneficial if Hong Kong judgments could be enforced in the Mainland.

In that respect, I am pleased to say that I have recently signed an Arrangement with Mainland authorities which paves the way for a limited form of reciprocal enforcements of judgments. When implemented, Hong Kong judgments at District Court level or higher will be enforceable in the Mainland if the following criteria are, among other things, satisfied: Firstly, the judgment is a money judgment arising from a commercial contract. Secondly, the parties to the contract have expressly provided

for a Mainland Court or a HKSAR court to have exclusive jurisdiction over disputes. Under the Arrangement, judgments given by certain Mainland courts will be enforceable in Hong Kong if similar criteria are satisfied. The courts in question are those at the Intermediate People's Court level or higher, plus a small number of Basic Level People's Courts that are designated to handle foreign-related commercial cases.

III. International Cooperation

So much in updating you as to the legal services. Thirdly, I believe it is important to mention the international ties Hong Kong maintains. Hong Kong's success lies in our capacity as part of China on the one hand and as the "World City of Asia" on the other.

Since 1997, Hong Kong has negotiated and concluded some 140 bilateral agreements with foreign governments. Over 200 multilateral treaties continue to apply to Hong Kong and almost 80 of these multilateral agreements do not apply to the Mainland of China. These bilateral and multilateral agreements cover a wide range of subjects such as air services, merchant shipping, investment promotion and protection, mutual legal assistance in criminal matters, surrender of fugitive offenders, transfer of sentenced persons, trafficking in narcotic drugs, and so on. Subjects like human rights protection, intellectual property rights and private international law are covered as well.

Hong Kong has also been authorized to participate in international organizations and international conferences either on our own or as members of the Chinese delegation. At APEC meetings, our Chief Executive sits at the same table as the President of China and the President of the United States of America and they all wear the same outfit for the group photo.

And you might also have read about Hong Kong hosting the 6th Ministerial Conference of the WTO last year. As in Seattle and other places who hosted the events, we had to face protests of a scale Hong Kong has never experienced before. The police estimated there were about 4,000 overseas and 2,500 local protestors who took part in various demonstrations and processions. As the host government, we had an obligation to ensure that the conference would be safely and smoothly held. At the same time, we were committed to act strictly in accordance with the law, respecting and upholding the constitutional rights of protestors to free speech and peaceful assembly. I am pleased to say, as most people agreed, we have

struck the right balance and the Hong Kong police force had done a very good job.

Actively participating in international cooperation against crime

In connection with rule of law matters, Hong Kong is authorized to make appropriate arrangements with foreign jurisdictions for reciprocal juridical assistance. Such arrangements include agreements for the extradition of fugitive offenders, for mutual legal assistance in criminal matters, and the transfer of sentenced persons.

Today, particularly when we are still sadly commemorating 9-11, you should be pleased to know that although we do not see ourselves as a major terrorist target, following the attacks in New York in 2001, we have also stepped up significantly our anti-terrorism measures. These include the enactment of local legislation, principally to give effect to the UN Security Council Resolution 1373 and the Financial Action Task Force's Special Recommendations on Terrorist Financing. Our legislation, amongst other things would empower our Secretary for Security to "freeze" terrorist properties, prohibit the supply of weapons to terrorists, and require the reporting of suspicious financial transactions. It would also enable our law enforcement agencies to provide relevant intelligence to overseas agencies.

As a major international financial centre, Hong Kong is also joining hands with the international community in maintaining an effective anti-money laundering regime. In fact, during 2001 and 2002, Hong Kong took up presidency of FATF and it was during this time that much work was done on the revision of the Task Forces' 40 Recommendations Against Money Laundering subsequently adopted in 2003, and which have become the benchmark for international anti-money laundering standards.

IV. Protection of Intellectual Property Rights

Fourthly, I want to say a few words about Hong Kong's efforts in protecting intellectual property rights, which is a subject of some concern to US businessmen.

Let me assure you that the HKSAR Government is committed to maintaining a robust intellectual property protection regime, providing a favourable environment for investment, creativity and innovations to be rewarded. We have established an effective legal framework for the protection of intellectual property rights (IPRs) which fully meets our obligations under the WTO Agreement on Trade-Related

Aspects of Intellectual Property Rights (TRIPS). We also keep our legislation under constant review to make it in line with international developments. For example, we are now seeking to amend our Copyright Ordinance to reflect the latest social and technological developments.

Our legal framework is backed up by an efficient and user-friendly IPR registration system, which provides not only traditional paper-based services, but also easy-to-use electronic services. Businesses can now register their trade marks, patents and design articles through electronic means. They can also renew their registrations and change the registrant's name online instantly. These facilities enable companies to manage their intellectual assets in a highly efficient way.

For an effective IPR protection system, enforcement plays an indispensable part. Over the years, Hong Kong Customs has been taking sustained actions to combat IPR offences. Their efforts are well recognized internationally. Intelligence-led investigations are mounted against organized activities, and repeated raids are conducted at different levels, including import and export, manufacture, distribution and retail. As a result, large-scale production of pirated optical discs has been driven out of Hong Kong, and trading of pirated and counterfeit goods is fully under control. Hong Kong Customs has also made dedicated efforts to combat infringing activities on the Internet. Last year, we convicted someone who distributed infringing copies of movies by using the Bit Torrent software. This successful case demonstrates our determination to combat such unlawful activities. Our strenuous enforcement efforts, coupled with the civil actions taken by owners of intellectual property, have sent a strong signal to the community that piracy on the Internet can be tracked down.

We are also developing in the community a culture of respect for IPRs. To this end, our Intellectual Property Department has an annual budget of around HK\$7 million to organize an on-going IPR public education programme.

Globalization and the rapid development of the Internet call for international cooperation in the fight against piracy and counterfeit problem. Accordingly, the HKSAR Government has been working closely with our trading partners, including the US, on the IPR front. We will continue to strive for closer international cooperation and exchanges to meet the challenges ahead.

Conclusion

Next year will be the tenth anniversary of Reunification. When we take stock of the experience so far, I believe that the implementation of “One Country, Two Systems” will be considered to have been a great success. Looking to the future, the business opportunities in the Mainland are likely to continue to expand, and Hong Kong will continue to play its significant part, both due to its proximity as a gateway to China, and also due to its uniqueness as an example of a society subject to the rule of law.

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