

IN THIS EXCLUSIVE INTERVIEW WITH *ASIA BUSINESS LAW JOURNAL*, MIGUEL DE SERPA SOARES, UNDER-SECRETARY-GENERAL FOR LEGAL AFFAIRS AND UNITED NATIONS LEGAL COUNSEL, TALKS TO **JOHN CHURCH** ABOUT HIS LEGAL TEAM AND THE CRUCIAL WORK BEING DONE IN ASIA AND FURTHER AFIELD TO PROMOTE HUMAN RIGHTS, FREE TRADE AND ECONOMIC DEVELOPMENT

THE BIG PICTURE

As far as legal jobs go, they don't come any bigger or more significant. Miguel de Serpa Soares, under-secretary-general for legal affairs and United Nations legal counsel, is the man António Guterres turns to before sending in the peacekeepers, constructing a complex multilateral treaty or negotiating any international issue that requires legal gravitas.

Born in Angola and raised and educated in Portugal, the UN's top lawyer prior to this prestigious appointment was director general of the Department of Legal Affairs in the Ministry of Foreign Affairs of Portugal, from 2008 to 2013.

An affable man with a concise and direct point of view, a recent law lecture he delivered in Beijing to keynote the Asian Infrastructure Investment Bank's (AIIB) inaugural Legal Week drew the admiration of invited GCs of some of the biggest international Financial Institution (IFIs) in the region and further afield, as well as academics and keen law students who had come to hear his views on "The Necessity of Co-operation between International Organizations".

"It's enormous but it's very interesting," he says of his work with a wry smile, in an exclusive interview with *Asia Business Law Journal*. "I do believe I have one of the best legal jobs in the world."

Serpa Soares introduces the structure of his legal team and how it works very simply, with six divisions and the division of labour by subject.

"We have the Office of the Legal Counsel which is in my immediate vicinity, and this covers the more political issues: peace and security; issues related to the interpretation of the [UN] Charter; peacekeeping operations – usually the stuff that makes headlines, that will land on my office desk," he says. "Then I have a large internal division,

the General Legal Division, which deals mostly with management and administrative issues, which is very important in the organization, and is very involved in the management reform process, etc.

"I have a Division for Ocean Affairs and the Law of the Sea, which is a specialized division dealing with the UN Convention on the Law of the Sea (UNCLOS), but also with all the different processes that exist in the General Assembly for sea and ocean matters.

"I have a highly specialized division in Vienna covering international trade law, and this is the secretariat of UNCITRAL (the United Nations Commission on International Trade Law), a small team but highly specialized in international trade law matters.

“Then I have a Treaty Section, because the secretary-general (António Guterres) is usually the depositary of the multilateral treaties that are concluded under the auspice of the UN, and this is more than 560, a huge amount of legal documents to manage. These are live documents, mostly multilateral treaties but also involving registration of bilateral treaties.

“Finally I have a Codification Division, a strange name but they do exactly that, assisting the international bodies that try to codify international law, i.e. the International Law Commission, where a big part of international treaties has been drafted and negotiated, and also it serves as the secretariat to the Sixth Committee of the General Assembly, which is the committee of international law.”

These divisions account for about 200 people, and he says they represent a good mix of competences. “But I’m very proud of the geographical diversity because I think it’s very important, and I’m happy that my staff reflects the diversity of the UN, so 60 nationalities into 200 is very good, and gender balance is also important, and we have a very balanced department in terms of gender.”

Four years into the job and he observes his time at the UN has shored up some personal beliefs. “More and more these four years have reinforced the conviction that we need to live in an international order that is based on norms and rules, and not on sheer power,” he says. “The Office of Legal Affairs was established in 1946, and when you think of it, it’s curious why in 1946 member states felt

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the need to have a legal office immediately on the origin of the UN. I think that answers the wish of having an organization based on norms and rules.

“For instance, it is important also to note how relevant the work of international courts and tribunals, in particular the International Court of Justice, is for the promotion of this international order based on norms and rules. Sometimes, it may be unnoticed how many conflicts have been avoided by the work of international tribunals, for instance by means of the peaceful settlement of disputes. So, it’s not only about a wider appreciation of international law, but also about peace, which is a prerequisite for sustainable development and economic growth.”

We live in uncertain times, with tectonic shifts in geopolitical norms, but Serpa Soares is unperturbed by the legal challenges these changes may throw up for the UN.

“If you look back, since 1946, we have had other challenges before,” he says. “We went through the Cold War, the fall of the Berlin wall, there were so many things that happened in the 1960s, 1970s and 1980s and in the past 70 years. But still this idea that we need to create an international order based on rules and norms has not changed. The main challenge is that Member States keep believing that international law is fundamental for the type of international order they are aiming for.

“Generally, this idea is accepted and not seriously challenged by anyone, because you will notice that no state will say ‘I’m doing

something illegal' or 'I don't care about international law', even if they don't, but they always try to come up with a legal justification of their actions, and that's already a very good sign. You have global challenges for all of us in the international order, and not specifically legal. I don't know how in the next 20 years we are going to deal with issues like climate change and issues of non-proliferation [of nuclear weapons], these are a matter of big concern.

"But how this translates to the legal sphere, I don't see any immediate challenge other than states starting to disrespect international law. We do see with some concern in the past three or four years, some systematic disrespect for international humanitarian law, in the way hostilities are conducted, the way civilians have suffered, I can give you many examples. That is a bit worrying, and also a certain erosion of human rights law."

The AIIB's inaugural Legal Week for GCs of multilateral financial institutions in Asia and further afield was a must see for Serpa Soares, a firm believer in informal platforms of co-operation. "I myself chair three different informal networks of legal advisers," he says. "There's a network of legal advisers with all the specialized agencies that meets once a year, also an annual meeting of the legal advisers of the UN Offices, Funds and Programmes, and also an annual meeting of the Field Legal Advisers in the peacekeeping and special political missions.

"We usually have two days of meetings with a set agenda but very informal discussion, focusing on the specific problems that we think are common to the different institutions. It's basically an exchange of knowledge and experience and it's very useful for all because inevitably you will come upon a problem that someone else has had, and you can suggest solutions and see how it's been dealt with, it's very useful.

"I'm a big supporter of these informal forums. People can speak freely, there's no outcome no formal document to adopt, it's really

a peer conversation and I find it very helpful."

A related question is how such conferences can ultimately benefit countries, both developed and developing, in Asia, and how the UN can help move this forward in terms of working closely with these international organizations and their legal representatives.

"What these things are mostly is an exchange of knowledge," says Serpa Soares. "In this region you have some countries with less knowledge of international law and less practice in multilateral diplomacy, and this translates into legal work, so these meetings

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can bring people to a more advanced stage of learning how to deal with certain problems.

"In my office, for instance, we have a programme which serves a similar aim, called the Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. We organize annual regional courses, one for

Asia-Pacific, one for Africa and one for Latin America and the Caribbean, on current topics of international law.

"I do this in co-operation with professors, judges and academics who do this for free, it's our way to contribute to this process, which is knowledge. We can bring our experience, because after all we are the largest international bureaucracy and we've been in business for 70 years, a respectable life for any international institution. And this we're willing to share and co-operate with other international organizations, to share solutions and suggestions. It's how we contribute."

The fact that Serpa Soares, based in New York, was in Beijing is worthy of attention, attending as he was the function of the AIIB, a new and very substantial infrastructure development bank. In a week where China's National People's Congress was in full swing and President Xi Jinping was laying out his roadmap for the future with his own ideologies being enshrined in the constitution, the UN top legal representative's visit would not have gone unnoticed.

As the US appears to be pivoting inward under a new administration, China's ambitions have rolled outward with the enormous Belt and Road initiative, leaving no mistake as to where the nation intends to focus its considerable resources.

The Belt and Road may well be the largest initiative of its kind in the coming century, so how important is it for the UN to take a lead in developing workable legal solutions in areas like commercial conciliation and enforcing settlement agreements in jurisdictions along the Belt and Road?

"A well developed modern and harmonized commercial law regime throughout the Belt and Road countries addresses most of the risks and concerns that several stakeholders have been identifying, namely: improving market competitiveness, with flow-on effects for consumers; predictability in the outcomes of disputes; transactional effectiveness, efficiency and accuracy; and

resolution of cross-border disputes,” says Serpa Soares. “In that context, it also reduces cross-border transactions and litigation risks; regulatory distortions in international trade and commerce; and the risks associated with enforcing awards, including prohibitive costs associated with the vindication of rights.

“And here we are summoned to recognize the importance of the New York Convention. The convention, by ensuring the enforceability of foreign arbitral awards, has played the key role in shifting attitudes towards alternative dispute resolution in commercial transactions. Approved by a United Nations Diplomatic Conference, it has been adopted by 157 state parties, including, amongst the usual players like China, the US and UK, countries like Bangladesh, Congo, Kyrgyzstan, Uganda and Uzbekistan. This has con-

attractive and harmonized regulatory regime for international business. Governments appear to be particularly committed to ensure they are seen as regional economies ‘open for business’. In 2012, when the UNCITRAL Regional Centre was established, only 15 out of 56 states in the region had arbitration legislation based on the UNCITRAL Model Law. Today, we have 24, a 60% increase in less than five years.”

Serpa Soares says that as China consolidates its position as one of the most important trade players in the international market, arbitration has become an attractive alternative to litigation in commercial disputes between Chinese companies and their foreign trade partners.

“Against that background, I believe that the promotion and enactment of the UN-

alternate dispute resolution in Asia, but Serpa Soares believes states in the region have been very active in promoting legal reforms related to conciliation and mediation. “Such drive for reform is also being reflected in the work that UNCITRAL Working Group II on Dispute Settlement is undertaking since 2015,” he says.

“States have been negotiating an international standard to deal with the enforcement of international commercial settlement agreements resulting from conciliation. During the last Working Group meeting, states reached compromise regarding five key aspects, relating to: (1) the legal effect of settlement agreements; (2) the treatment of settlement agreements concluded in the course of judicial or arbitral proceedings; (3) possible opt-in declaration by the parties; (4) the im-

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tributed to globalize a culture favourable to commercial arbitration.

“Clearly, the New York Convention is one of the most widely adopted and most successful international instruments to come out of the UN. Since the establishment of the UNCITRAL Regional Centre [for Asia-Pacific], we had four new ratifications of the convention in the region, doubling the pace of ratifications of the previous five years.

“It is important to note that the region has been progressively reforming its international arbitration system, to ensure it has an

CITRAL Model Law on International Commercial Arbitration, including in China, is paramount to ensure that a speedy and predictable dispute settlement mechanism is in place throughout the Belt and Road countries,” he says. “To illustrate this in figures, currently 70% of the states within the BRI [Belt and Road initiative] have enacted the Model Law.”

The lack of legislative frameworks on international commercial conciliation, and the enforceability of mediated settlements, have been identified as key challenges for

the conciliation process, and of the conduct of conciliators, on the enforcement procedure; and (5) the form of the instrument to be prepared, namely through both a Model Law and a convention, mirroring the New York Convention.

“Hopefully this will bring certainty and additional options for businesses across borders to settle their disputes and enforce their legal rights.”

The role of UNCITRAL’s RCAP (regional centre for Asia-Pacific) cannot be ignored in the region and Serpa Soares says the project’s

success can be measured by its achievements since its inception in 2012. Among RCAP's achievements is its partnership with the Hong Kong SAR government, which is a key donor and partner.

The partnership is structured around: support with in-kind contributions and human resources for the operation of RCAP and programme delivery; and co-ordination on matters related to regional judicial collaboration in international trade law (co-hosting the UNCITRAL Asia-Pacific Judicial Summit) and activities in the framework of the APEC Economic Committee.

The second such summit was held in Hong Kong the week before the NPC and AIB Legal Week in Beijing, and also attended by Serpa Soares. It is part of an ongoing effort to establish partnerships with regional judiciaries and judicial training institutions to facilitate further integration of capacity-building activities, wider inclusion of UNCITRAL texts in training curricula and broader promotion of the uniform interpretation of UNCITRAL texts.

"I was pleased to learn from the Chief Executive of Hong Kong, Mrs Carrie Lam, and from the Secretary for Justice, Mr Rimsky Yuen, that such partnership is to continue in the years to come on a regular basis. The UN remains committed to enhancing this collaboration and is very grateful for the generous support of Hong Kong, China," says Serpa Soares.

"The [RCAP] started as a pilot project, thanks to the far-sighted and generous support of the Republic of Korea, through the minister of justice and the Incheon Metropolitan City [where the centre is headquartered]," he says. "Its success is well illustrated by the recognition by UN member states that it is no longer a pilot project but a well established partner in the development and promotion of comprehensive legal reforms. This was reaffirmed when China, through the Hong Kong SAR and its Department of Justice, agreed to support the regional centre with the secondment of a legal expert, further enhancing its ability to deliver that mandate."



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He says that, while much of the drive is happening in the context of the WTO Trade Facilitation Agreement (TFA), it should be noted that a growing and tangible number of legal reforms are taking place in the fields of arbitration, contract law, public procurement, e-commerce, secured transactions and insolvency. "Not only among the signatories of the WTO TFA, but also within ASEAN, or economic co-operation initiatives like APEC or the Belt and Road initiative, or yet in the context of multilateral and plurilateral regional trade agreements, such

as RCEP [Regional Comprehensive Economic Partnership], states are becoming aware of how they can benefit the most from modern and harmonized legal standards for cross-border trade and investment, as are the ones provided by UNCITRAL," he says.

"For instance, in all those settings, paperless trade is a key pillar. They promote cross-border paperless trade requiring legal interoperability and mutual legal recognition. For that to happen, states are progressively agreeing to maintain a legal framework governing electronic transactions consistent with the principles of the UN Convention on the Use of Electronic Communications in International Contracts 2005 and of the recent 2017 UNCITRAL Model Law on Electronic Transferable Records.

"Let me also highlight two very concrete projects that are being delivered in this part of the world and that show well how the work of UNCITRAL, and of its regional centre, are impacting the legal infrastructure that enables investment and trade. The first is the "EBRD [European Bank for Reconstruction and Development] and UNCITRAL Initiative on Enhancing Public Procurement Regulation in the CIS Countries and Mongolia".

"This programme is designed to promote the 2011 UNCITRAL Model Law on Public Procurement and encourage upgraded public procurement regulation in the CIS [Commonwealth of Independent States] countries and Mongolia to the new standard. And the second one is the collaboration with the Asian Development Bank to deliver technical assistance for reforming arbitration laws in the Pacific Small Island Developing States, being the recent Fijian arbitration law the first output of this agreement, the first of its kind.

"These initiatives are good practices of co-ordination with other organizations and development banks, and are key to helping states develop: (1) integrated trade law reforms, instrumental to their work towards the (2) sustainable development goals; and are consistent with (3) aid-for-trade policies agreed multilaterally, namely in the context of the OECD [Organization for Economic Co-operation and Development]." ▲