Eastern culture that values conciliation; they don't favour litigation; they don't favour arbitration as such because in an arbitration you have one side winning and one side losing. So that almost any effort will be made to see that the litigation is avoided. But how the relationship affects investments, I suppose is the attitude that we take. It will either be a paternal one or a sort of social one between co-equals. But the idea of a legal relationship will not be very much present in the minds of the Japanese investor.

Chairman: This is the final phase of our 2 day seminar. We have three presentations, one a paper by Mr. Lee Bian Tian and two oral presentations.

SOME ASPECTS OF AN INVESTMENT GUARANTEE IN SINGAPORE

by

LEE BIAN TIAN

An investment guarantee may perhaps be defined as a guarantee granted by one State to another State usually in exchange for a similar guarantee against certain political or non-commercial risks particularly expropriation and prohibition or restrictions against repatriation of capital and earnings in respect of investments of nationals of either State made or to be made in the territory of the other State. Singapore's first agreement relating to an investment guarantee was entered into on 25th March, 1966, with the United States of America. This was followed by agreements with Canada on 30th July 1971. the Netherlands on 16th May, 1972, the Federal Republic of Germany on 3rd October, 1973, the United Kingdom on 22nd July, 1975, and with France on 8th September, 1975. It would appear that these agreements only emerged recently because a deliberate policy to foster the growth of new industries in Singapore was only first initiated in or about 1959. Apparently the idea behind these agreements was primarily to provide an added incentive to non-nationals to make direct investments in Singapore.

2 Before 1966, the 1959 agreement relating to an investment guarantee between the USA and the then Federation of Malaya was extended on 24th June, 1965, to the whole of Malaysia (of which Singapore then formed part) by an exchange of notes of that date between the USA and Malaysia. After separation on 9th August, 1965, the 1959 Agreement continued to apply between the USA and Singapore by agreement between them and by virtue of section 13 of Annex B to the Separation Agreement. It had since been superseded by the investment guarantee agreement of 1966.

3 To be eligible for approval as guaranteed investments under the terms of an investment guarantee agreement entered into by Singapore (IGA), investments must be investments of nationals of the other State party to it. An IGA does not automatically apply to investments in Singapore of nationals of the other State party to it. It applies to a particular investment only if specifically so approved in

writing by the Development Division of the Ministry of Finance, or by the Economic Development Board (EDB) which is an agency of the Singapore Government.

4 What investments should Singapore guarantee under its IGAs? Should a distinction be made between old investments and new, or between investments in manufacturing and non-manufacturing activities? There seems to be some basis for suggesting that generally Singapore should not guarantee under any of its IGAs investments of nationals of the other State party to it which had already been established in Singapore before the signing of such IGA or before an application is made to the Singapore Government for such guarantee. Singapore's guarantee under an IGA is primarily intended to provide an additional incentive to investors of the other State party to it to invest capital in Singapore and it perhaps also furnishes a consideration for the making of such an investment. Obviously, this incentive does not apply to old investments and past consideration is no consideration. Looked at in another way one can say that political or non-commercial risks which might inhibit some investors from investing capital in Singapore and which the IGAs protect against had apparently been discounted or accepted by the investors who had made the old investments. No doubt Singapore would guarantee under its IGAs new investments that in its view show promise of furthering the development of its economic resources and productive capacities or of contributing to its economic and social development and new portions of any appropriate additional plant expansion of a major nature and distinct from the original plant. Indeed Singapore's present policy is to lay great emphasis on the promotion of manufacturing industries under its IGAs. Of course this policy does not preclude the possibility of Singapore guaranteeing investments in non-manufacturing activities under its IGAs. An investor of the other State party to an IGA is eligible to apply to the Singapore Government for any of his investments in Singapore to be guaranteed by Singapore under the IGA. The decision rests entirely upon the Singapore Government whether it would do so or not, whether the investment is old or new and whether such investment is in respect of a manufacturing or non-manufacturing activity. If the Singapore Government decides not to do so, the investor might still wish, nonetheless, to retain or to proceed to make such investment in Singapore. Hence, it is possible for investments of such an investor to be established in Singapore without being guaranteed by Singapore under the relevant IGA. No doubt each application for Singapore's guarantee under an IGA would be considered on its merits and in the light of prevailing economic policy.

5 The IGAs do not absolutely prohibit expropriation of investments in Singapore of nationals of the other State party to any such IGA. Such expropriation is permissible on condition that it is done, say, for public purposes (as in the case of the UK and France) or for the public benefit (as in the case of the Federal Republic of Germany) or in the public interest (as in the case of the Netherlands) and that adequate or just compensation is paid without undue delay and is freely transferable in the currency of the other State party concerned.

6 The IGAs guarantee the right of repatriation from Singapore of capital and the returns from it in respect of investments of the other State party to any such IGA. The returns from an investment means

the amounts yielded by it and includes profits, interests, capital gains, dividends, royalties and fees.

7 In most of the IGAs, the term "investment" is defined very widely. The definition of investment in the (UK) IGA appears to be a typical one. Article 1 of the (UK) IGA provides, *inter alia,* as follows:

> "For the purposes of this Agreement:
>
> (a) 'investment' means every kind of asset and in particular, though not exclusively, includes:
>
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
>
> (ii) shares, stock and debentures of companies or interests in the property of such companies;
>
> (iii) claims to money or to any performance under contract having a financial value;
>
> (iv) intellectual property rights and goodwill;
>
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources."

8 Would bank overdraft facilities guaranteed by an investor of the other State party to an IGA for the use of its guaranteed subsidiary company in Singapore be protected under the relevant IGA? This question was asked by a Singapore subsidiary company of a parent company of and established in the other State party concerned. The Singapore subsidiary company explained that in the event of nationalisation or expropriation, its parent company abroad had to make restitution to its parent company's bankers and therefore such guarantee should be considered to be subject to political risks which was the purpose of the IGA to protect against. It is understood that the question was answered in the affirmative. It certainly does seem sensible to treat money drawn in Singapore for a guaranteed investment on bank overdraft facilities guaranteed by the investor abroad the same as money brought directly into Singapore for such investment by such an investor.

9 Would an IGA afford protection against infringement of copyright by third parties? This point arose with regard to one of Singapore's more recent IGAs. The facts were as follows. A decade ago, a Singapore company set up by investors of the other State party to that IGA was granted pioneer status. It was engaged in the recording and manufacture of gramophone records, cassettes and cartridges. After the IGA was signed, the company applied to the Singapore Government for approval as a guaranteed investment under the IGA and such approval was promptly given. Not long after that, the company wrote to the Ministry of Finance alleging that the police had continuously refused to enforce the Copyright Act for the last five years and thereby encouraged blatant piracy of its products. It contended that the absence of any reasonable copyright protection in Singapore over a prolonged period of time appeared to be inconsistent with the terms and intention of the IGA, although it appreciated that the treaty was of comparatively recent origin. The company then inquired whether in view of the existence of the IGA the influence of the Ministry of Finance could be brought to bear in such a way that the police would enforce the legislation which, in its view, existed

to prevent the copying of recordings. It is understood that the Ministry of Finance replied that if the company had evidence of infringement of its copyright, remedies were available in the Singapore law courts. There is certainly much to be said in favour of the view that the risk of piracy of the company's recordings or of infringement of its copyright by any person or of loss sustained by it as a consequence thereof are not political or non-commercial risks. Therefore these are properly excluded from the scope of the IGA and the company was rightly left to its ordinary legal remedies.

10 Should a legal dispute arise directly out of an investment between Singapore and a national of the other State party to an IGA, there are provisions in some IGAs obligating Singapore to refer such dispute to arbitration of the International Centre for Settlement of Investment Disputes established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18th March, 1965. Singapore is a signatory to the Convention and has enacted the Arbitration (International Investment Disputes) Act (Cap 17) to implement the Convention.

11 All IGAs of Singapore envisaged the possibility of the other State party to any such IGA giving guarantees to its nationals in respect of their investments in Singapore against similar political or non-commercial risks. Should such other State party make any payment of compensation to its nationals under such a guarantee in respect of their investments in Singapore, all rights of its nationals against Singapore in respect of such investments are subrogated to the other State party. This right of subrogation is enshrined in most of the IGAs of Singapore.

12 Some IGAs last ten years, some twenty. Normally they are automatically renewed for further similar periods, unless their expiry at the end of a validity period is confirmed by either party giving to the other notice to that effect. On expiry or termination of an IGA, investments approved while the IGA was in force continue to be guaranteed under the IGA for a further period of, for example, ten or twenty years, as the case may be.

13 Although the existing IGAs contemplate the possibility of Singapore investments being made in the territory of, and guaranteed by the other State party to any such IGA, it is expected within the foreseeable future that very few, if any, of such investments might materialise. Rather, most if not all new investments to be guaranteed under such IGA are expected to be made in Singapore by nationals of the other State party to it. Perhaps it is rather early to assess the full impact these IGAs would have on the investment scene of Singapore. Except the IGAs with the USA which was entered into in 1966, all other IGAs were signed within the last seven years. However, the early signs tended to indicate that these IGAs have sufficiently proven their worth as an additional incentive to further assist the promotion of desirable manufacturing industries and other beneficial economic activities in Singapore.