2023 UNICITRAL SOUTH ASIA CONFERENCE
INAUGURAL ADDRESS OF
SH. R. VENKATARAMANI, Ld. ATTORNEY GENERAL FOR INDIA
(14th September, 2023)

Good evening, Ladies & Gentlemen,

Hon'ble Dr. Justice DY Chandrachud; Chief Justice of India

Ms. Anna Joubin-Bret; Secretary of UNCITRAL

Dr. Rajkumar Ranjan Singh, Hon'ble Minister of State for External Affairs, Government of India

Mr. Fali S. Nariman; Senior Advocate, Supreme Court of India and Chair of UNCCI

1. On 28th November 2016, the Hon'ble President of India spoke at the golden jubilee celebrations of UNCITRAL and hailed it as one of the most contributing UN organs. The Hon'ble President truly perceived UNCITRAL as an invaluable platform enabling countries to compare, examine, debate, and adopt principles both of universal and domestic importance and relevance. The harmonious and non-political nature of deliberations at UNCITRAL was rightly appreciated. Those were prophetic words looking towards progressive set of norms and rules that can be safe resting grounds for all nations on the common engagement of promoting international common goods.

2. I am indeed more than delighted today to be called upon to warmly invite all the UNCITRAL community who have open minds, keen intellects, common aims and sharing inclinations, all driven by the common urge to constantly refine and improve our principles and exchanges. This common urge is ancient, as ancient as the silk route of the past. From the limited persuasions towards building laws only partly common to all humankind we are in the midst of capturing persuasions towards building laws of both universal content but with necessary diversities that can add to the richness of universal content.

3. The narrow channels of knowing each other through limited editions of knowledge and conditioned by host of historical factors, have given way to being with each other at the global level. We understand the need for constitutional rather than managerial mindset for transforming international law. What is said as "an international order based on more and more inclusiveness and embedded liberalism" is what should be the driving force behind our common urge towards common public goods. The inclusiveness of dialogue is not only more and more room for ideas from all over but also room for being in as many places as we should be.

4. I fondly bring to the fore the essays published in honour of our legendary Fali S. Nariman, a rich collection of ideas and propositions sprinkled with the gathering of equally rich and long lasting contributions of Mr. Nariman to the Arbitration world. The arbitration world does not exist without his name. It is my honour to be with him today and like a Lilliputian gather a few humble insights from the vast playfield built by him. Rightly has the title of the book "International Arbitration and Rule of law' been chosen. The rule of law we intend to talk and reflect is itself a vast canopy of ideas and togetherness, mediated by the common need for mediated and shared world of thoughts and precepts . An "end of history perspective" floated by Fukuyama while attractive, for political visions or ideologies, may not do justice to the world of justice and ideas of justice. The last refinement above doing justice will always remain a challenge.

5. So it is that we have assembled here today to put all our thoughts and urges to celebrate UNCITRAL, and to draw a canvas that can keep us together on the pursuit of common goals. Speaking on behalf of India, I consider this sooner than expected UNCITRAL congregation here as India's humble contribution towards the discovery of the commonwealth of justice and peace, in the world of trade, commerce and the new domains of human and natural resources shaped by the technology.

6. In his 2013 monograph titled "the Geneva consensus -making trade work for all" the former EU Trade Commissioner Pascal Lamy promoted the Geneva consensus as an alternative to the neo liberal Washington consensus, and he emphasised on the, 'stronger policy coherence through better coordination among the legally separate, international monetary, financial, trade , investment, environmental and human rights institutions and policies in order to enhance their potential synergies.' On the other hand we listen to the criticism about privileging foreign investor rights without adequate regard to regulatory duties of host states reconciling investment regulation with economic and non-economic public interest or public goods subjects which too is a matter of genuine concern. All these need to be debated while we talk about the urgency to bring about expedition and coherence in our arbitration world and redrawing conflict of principles and rules, to raise the importance of fairness in all aspects of economic transactions and outcomes. I think all this may mean multilevel judicial and rule comity.

7. A little digression may be granted. Adhocism is a learner's field. Domestically we keep critiquing the entrenched adhocism in the arbitration world, though one can notice creation of ad hoc tribunals anywhere in the world, as in the awards in *CME vs CZECH Republic* or *Lauder vs Czech Republic*. So also cases pertaining to foreign investments fall frequently within the wide range of activities of the PCA. Even though we have travelled fairly long distances in our bilateral treaty processes, and learned from experiences touching upon even definitional issues such as "investment", or "dispute", we are occasionally drawn into the legal or political nature of a given dispute or the element of directness of the dispute to investment. (see the decision on jurisdiction of in *siemens vs Argentina* August 2004). Few other issues also seem to arise, such as the unity of investment, indirect investments, the legality of investments, the origin of the invested funds, etc. The ICSID Convention experiences and rules on constituent subdivisions (the *Hamster vs Ghana* Award of June 2010) and

our own lessons on such matters also demand quick attention. The scope and irrevocability of consent to arbitration, or interpretation of consent continue to be matters of arguments and contest. The fork in the road provision provides interesting examples of understanding the triple identity tests and their application.

8. Some emerging examples of establishment of a permanent international investment court system to adjudicate investment disputes, may also be noticed. What I have in mind is the EU example of setting up a Multilateral Investment Court (MIC). Brazil is another example which has so far stayed outside the investment world. This time Brazil has come up with an Investment Cooperation and Facilitation Agreement (ICFA). ICFA are different from traditional BITs: rather than aiming to protect investment, they seek to facilitate and encourage it by setting rules for cooperation and risk mitigation. Thus we see above trends into the world of investment disputes resolution mechanism as also slowly moving away from the existing institutional mechanism. A 2021 study on the work of a UNCITRAL Working Group III by Friedrich Ebert Stiftung, a German Think Tank offers an interesting framework for discussions on the multitude of proposals touching upon a unified disputes resolution authority in the field of investment law and also paying attention to matters such as importance of diversity and sustainable development. We always remind ourselves that promotion of optimistic but unrealistic alternatives can dissipate the momentum for real reform.

9. As I understand, all investments, intellectual and material, must now be in the service of sustainable development.

10. We may also notice that in most cases in investment arbitration applicable substantive law combines international law and host state law tribunals in the majority of cases applied to both systems of law. (see the award in *CMS vs Argentina* 12 may 2005). Studies looking at investor treaties and arbitration have also critiqued significant inconsistencies in tribunal awards. Some of

these studies for eg. International economic law :the state and the future of the discipline; or proportionality and deference in investor-State Arbitration are powerful persuasions demanding probing exchanges. I do not propose to exhaustively catalogue the chapter titles for discussion in the conference as that would be the prerogative of more informed minds.

11. Finally the office of Attorney general gives me the authority to make nation friendly and host country statements - India has made all the final arrangements for PCA to have its seat in this ancient land of ahimsa and bondage of diversity. This long pending agenda has moved finally into its ribbon cutting stage. Maybe a long gestation brings a healthy baby .I congratulate the deep and abiding commitment of government of India to the global commons where creativity, innovation and liberty consistent with equality and fairness, will usher in new understandings of resources sharing, and to this significant nod of welcoming PCA as an important domestic partner, which will carry all the players in the arbitration world ,into exploring the ideas of sharing in fertile and novel ways. We will very soon fix the best and auspicious day and invite all of you for another sumptuous day of many treats.

12. India has crossed another milestone. The India International Arbitration Centre Act 2019 has come as a much needed statutory intervention. This law will facilitate growth of robust institutional structures, in turn providing for significant institutional connections, both domestic and global. An expeditious transition into institutionalising the Indian arbitral world, is expected to happen. With the IIAC being headed by a former Judge of the Supreme Court and having been declared as a centre of national importance, one can visualise greater expedition and all round motions in the Indian arbitral world.

13. The word of treaties, the debates on redrawing the contours of the bilateral and multilateral treaties, the discussions on the working group III of UNCITRAL on ISDS reforms, etc as also a multilateral investment disputes resolution institutions, are all matters which may give us many more insights about the

road ahead. The idea about international investment legal framework seems to have already, directly and indirectly entered our discourses. I may not be wrong in stating that UNCITRAL will be the resource venue and platform of taking stock of all this.

14. International Investment Law is anything but international. It is stitched together by a cobweb of bilateral investment treaties reflecting local concerns and priorities. The elements of IIAs are unidimensional and the template is prepared by a narrow set of capital exporting countries. These instruments have led to spread of inequitable norms, practices and outcomes, which need to be deleted. These norms and practices have also become somewhat immutable leading to stagnation. There is a pressing need to revisit the template and contents of the current model of investment treaties. I wish to make a case for why a New Delhi Declaration on Global Investment Law, spearheaded by India is the need of the hour. The current dialogue which India is engaged in with few countries on revised bilateral norms should also help us in this regard.

15. Much more than what I have talked about will be debated in the coming two days. If the appeal being made here for greater global or international sharing, has to be realistic, my talk today will be incomplete if I do not look forward to the New Delhi Convention not because we only want to compete, but because ideas and exchanges must find more and more hospitable places for their sprouting and growth.

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