UNCITRAL South Asia Conference

Inaugural Address

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Chief Justice of India

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A very good evening to Ms. Anna Joubin-Bret, Secretary of UNCITRAL, Mr. R. Venkataramani, Attorney General for India, Dr. Rajkumar Ranjan Singh, Minister of State for External Affairs of India, Mr. Fali S. Nariman, eminent senior advocate and Chairperson of the UNCCI, distinguished judges of the Supreme Court and the High Courts, and ladies and gentlemen. At the very outset, I would like to congratulate UNCITRAL, the Ministry of External Affairs, the Government of India, and the UNCITRAL National Coordination Committee, India (UNCCI) for their joint effort in organizing this event, which reinforces India's decades-long engagement with UNCITRAL and facilitates the exchange of ideas and perspectives amongst South Asian countries.

I am delighted to be able to deliver the inaugural address at the South Asia Conference, which was last held in India in 2016. Then, too, I had the pleasure of attending the conference. I believe that the conversations which take place at such events serve as a sounding board for ideas that morph into best practices, which in turn are sometimes incorporated into law. We have each amassed years of institutional experience and through deliberative efforts such as this conference, are able to share insights from our experiences with one another. Even as our own experiences guide us, we must each learn from other countries and the successes and difficulties that it has faced with its people, businesses, and legal systems. This

is all the more possible in this conference because South Asian countries have much and more in common – the many similarities in our cultural and social set up undoubtedly seep into our business practices and legal systems. Our economies are also inter-connected, especially in the digital age. I hear that platforms such as Instagram have emerged as unlikely online marketplaces which facilitate business amongst the countries in South Asia. Our legal frameworks must evolve in tandem with the expansion of the digital economy. I am happy to share that last week, India and Singapore signed a Memorandum of Understanding on advancing cooperation in judicial education and research. This is one of many MoUs that India has signed with South Asian nations, that foster knowledge-sharing and collective advancement. When countries walk hand-in-hand, the progress of one becomes the progress of all.

A tainted relationship, legal or otherwise begets distrust. The parties battling this distrust must now brace for a legal battle and attempt to resolve their dispute. This is already a daunting and expensive process for most. Legal battles, once begun, have no end in sight. Throw cross-border laws and international parties into the mix and you have a dispute that makes for an even more expensive, time-consuming, and oftentimes confusing affair. As members of the legal community, we know better than anyone that this is hardly a profitable phenomenon, especially for smaller and mid-sized enterprises.

Alternate dispute resolution mechanisms were previously considered to be *"rough justice"* - an imperfect substitute for judicial review by courts. Parties and jurors alike, perceived arbitrations and other out-of-court mechanisms as a deprivation of the opportunity to have their day in court. I believe that at least a part of this hostility stemmed from a lack of transparency about the procedures to be adopted and a lack

of clarity as to the outcome of a challenge to a final arbitral award. Of course, new ideas and processes are initially viewed with mistrust.

Sunshine, as they say, is the best disinfectant. Fortunately, UNCITRAL assisted countries in the simplification and uniformization of their laws and rules, which in turn has made the justice delivery system more accessible. The UNCITRAL model law framework seeks to harmonize laws in different jurisdictions in an attempt to overcome the friction that may result from our diverse cultural and legal landscapes. The success of its model law framework requires no explication. India's law on arbitration and conciliation has relied on the UNCITRAL model law. Legislative efforts in India in ensuring clarity, as well as judicial thrust on party autonomy significantly reduced the sense of unease amongst contracting parties. With its eye on best practices, India has steadily charted a course where arbitrations are the preferred mode of dispute resolution.

The Indian Council of Arbitration, our first-ever national arbitration institution, was established in 1965. We now have about 35 such institutions across the country. The Delhi International Arbitration Centre, for instance, went from handling 78 cases in 2009 to 5868 cases in 2022.[1] In 2013, a survey of corporate outlook towards arbitration described India's future as an arbitrating country as "*cautiously optimistic*."[2] Today, I take the liberty to state that India's future as an arbitrating country is cemented. Mediation and arbitration result in a significant reduction of costs for the parties to the dispute. These savings are particularly beneficial for

1 Statistics 2015-2022, Delhi International Arbitration Centre, Available at https://dhcdiac.nic.in/statistics-2/.

2 Corporate Attitudes & Practices towards Arbitration in India, Price Waterhouse Coopers, pg 19 (May 2013) Available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

smaller or mid-tier enterprises who will not be required to shell out large sums by way of legal fees for court proceedings that may take years to conclude.

Indian courts have encouraged the use of ADR mechanisms over the years. In enforcing arbitration agreements, they have remained watchful of attempts to undercut party autonomy by artfully drafted contracts. In *ICOMM Tele Limited* v. *Punjab State Water Supply and Sewerage Board*,[3] the Supreme Court struck down a term which required a party to deposit 10% of the dispute value as a pre-condition to invoking arbitration. In *NTPC Ltd. v. SPML Infra Ltd*,[4] one of the parties to the agreement in question sought to initiate arbitration even though there was a settlement between the parties. A Supreme Court bench of which I was a part reiterated that disingenuous litigations cannot be tolerated in the name of party autonomy.

I would also like to take this opportunity to share some recent initiatives of the Supreme Court with you. In India, and in other countries as well, private players are perceived as being technology friendly while public institutions are thought to live in the stone age when it comes to the adoption of latest technologies. This is perhaps not an unfair perception because government offices and courts are often late to the party. But lawyers and litigants have had cause to celebrate of late - from filing and record-keeping to real-time information systems, everything is being done digitally. Electronic case management systems are available at the click of a button. The Supreme Court issues entry passes through a virtual platform, live-streams hearings of certain constitutionally significant cases and releases transcripts of oral arguments in those cases. These initiatives are with a view to making the courts accessible to

3 (2019) 4 SCC 401, paras 9-27.
4 2023 SCC OnLine SC 389, para 44.

the common person. I daresay that some of our technology-based initiatives have surpassed those of arbitrations.

I was intrigued by the CLOUT or the Case Law on UNCITRAL Texts[5] - an open-access resource that contains decisions of courts and arbitral awards relating to UNCITRAL texts. A summary of these cases is made available on the searchable CLOUT database. I am sure some of you would have benefitted from the immense industry that has produced this resource. Similar to the CLOUT, the e-SCR or the electronic version of the Supreme Court Reporter provides free access to about 34,000 judgments to lawyers as well as members of the public. All judgments are uploaded on the platform within 24 hours of pronouncement. In the interest of uniformity and harmonizing the manner in which the judiciary functions, we recently introduced a uniform citation system. Like CLOUT, these initiatives aim to democratize access to information.

As we tackle barriers to information and resources, we should begin to look beyond our traditional destinations for arbitration. Disputes are location-agnostic, and so should be their resolution. Many businesses from tier-2 and tier-3 Indian cities have a commercial presence across the globe.[6] The same is undoubtedly true for businesses located in smaller cities in the countries of South Asia. Such parties who are not located in the metropolises must have equal access to resources which enable ADR. This conference is the ideal place for such a discussion to begin. But it

5 Case Law on UNCITRAL Texts (CLOUT), United Nations Commission on International Trade Law, Available at https://uncitral.un.org/en/case_law.

6 Sanika Athavale, Tier 2 and 3 cities will be called 'emerging clusters', says Karnataka Government Times of India (September 5, 2023) https://m.timesofindia.com/city/bengaluru/tier-2-and-3-cities-will-be-called-emerging-clusters-says-karnataka-government/articleshow/103373209.cms; Sathosh Mahanlingam, Why Companies are gaining ground and expanding in India'a Tier 2 and 3 cities, Time of India (May 25, 2023) https://timesofindia.indiatimes.com/blogs/voices/why-companies-are-gaining-ground-and-expanding-in-indias-tier-2-and-3-cities/

must not end here. We must find a way to make smaller businesses a part of the conversation.

I am told that UNCITRAL Working Group-III is discussing Investor-State Dispute Settlement Reforms (ISDS, for short). I recollect addressing this topic in 2016 during my panel discussion at the UNCITRAL conference here in Delhi. At that point, the question of whether UNCITRAL should address ISDS reforms was unsettled. We have come a long way since then – the UNCITRAL Commission has just adopted the first texts on ISDS reforms, pertaining to the code of conduct for arbitrators and judges in the ISDS process as well as mediations which take place during this process. This is an example of the pivotal role played by India at UNCITRAL and particularly in having this topic allotted to a Working Group of UNCITRAL.

The global community is yet to reach a consensus on some issues regarding investor-state disputes. For instance, some Bilateral Investment Treaties envisage a permanent court as the forum for the resolution of disputes instead of arbitral tribunals, which have traditionally been the forum of choice. Such developments must be discussed by UNCITRAL's Working Groups. International investment law has been criticized for being disadvantageous to developing countries.[7] It is therefore essential that the formulation of any new systems in international investment law, such as the creation of a permanent court, adequately account for these concerns and ensure that they do not remain areas of concern. I am glad that the Secretary-General of ICSID, Ms. Meg Kinnear, is here and will be speaking at the conference. While India is not a member of ICSID, it appreciates the contribution of ICSID to the

7 M Sornarajah (one of the experts on international investment law, currently a Professor Emeritus at NUS, Singapore) and others have consistently criticized the skewed dynamic between the Global North and the Global South in international investment law

various deliberations under the aegis of UNCITRAL. The need of the hour is a fair and balanced system for the resolution of investor-state disputes.

If such an investment court were to become a reality, we must explore the possibility of floating courts, instead of the traditional system where all parties travel to a single place where the court is located. This would make the court more accessible to all countries. The host country agreements with the PCA are one of the avenues by which this could be achieved. Perhaps it is also time for India to revisit its Host Country Agreement with the PCA after more than a decade, to explore the possibility of strengthening PCA's presence in India. This could see India as a seat or venue for investment treaty cases and promote international arbitration in India.

Finally, I am pleased to note that various international arbitral institutions have curated regionally diverse panels of arbitrators. I am certain that this diversity is a contributor to the success of these institutions in transcending geographical and cultural barriers. However, the gendered compositions of these panels are hard to miss. We face what is called a diversity paradox i.e. a mismatch between our stated objectives and actual appointments. Less than 10% of all Indian arbitrators on various international institutional panels are women.[8] The ICC's 2022 Report on Gender Diversity identified 'unconscious bias' as contributing to this problem. It suggests using gender-neutral pronouns in our legislation and rules. It is heartening to see that some arbitration rules have taken the cue in employing gender-neutral pronouns in their texts. However, the overwhelming majority of empanelled

8 Archismita Raha, Juhi Gupta, Shreya Jain, Growing Gender Diversity in International Arbitration: A Half Truth?, Kluwer Arbitration Blog (September 28, 2021), Available at https://arbitrationblog.kluwerarbitration.com/2021/09/28/growing-gender-diversity-in-international-arbitration-a-half truth/#:~:text=While%20commemorating%20the%20five%20year,from%2021.1%25%20in%202019%E2%80%9D.

arbitrators are men. Women, as persons of all genders, belong also in all institutions of dispute resolution.

Speaking of and more importantly, speaking to some of these issues is critical to the development of law and policy on dispute resolution. I congratulate the organizers for the choice of issues slated to be discussed here. I look forward to the lively discussions that will ensue in the course of this conference. Thank you.