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## Rapporteurs Session

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first principle is that trade is the engine of growth and the second principle is that Capital must move from country to country. He further added that no country can be self sufficient in capital, whether it is in the form of money or in the form of technology and asked the developed countries to remember that when they grew, they grew on the capital that was transferred from the poor countries of today to those countries.

He expressed the view that it was easy to write a law or a regulation or put controls but it is much more difficult to dismantle a control or to abolish a law or to abolish a regulation. He expressed his intention to reduce the 500 pages volumes of the Red Book to not more than 70 pages by the 1st April 1992.

He remarked that delicensing of industry is the beginning of de-control and he also said that the proposition that customs is a source of revenue is an obsolete concept and the customs 'tariff walls' must be brought down. He also said that, we have the investment climate in India to attract foreign investment.

He concluded by saying that in India there is a world trade regime which is fair and non-discriminatory and assured that India would do its best to ensure that a set of rules are accepted in the world and that a multi-lateral trading organisation does come into existence as a successor to GATT (General Agreement on Trade and Tariffs). Later Mr. Henri Grondin, President of the Union International des Avocats addressed the gathering and Mr. Lalit Bhasin, Advocate, Supreme Court of India, proposed a vote of thanks.

## RAPPORTEUR'S REPORT

**Abhishek Singhvi**

**Advocate, Supreme Court**

The seminar got off to an excellent start with a scintillating inaugural function. Mr. Venugopal who had worked tirelessly over the past few weeks in organising the seminar welcomed and introduced all those in the dais. Far too many meetings and seminars end in airy nothings. So, therefore, Mr. Venugopal's statement that this international seminar would culminate in a concrete publication and presentation of views to our policy makers was most welcome and reassuring. Mr. Henri Grondin, current President of this oldest Association of Lawyers pointed out that UIA has 150 member Bars and associations spread over 70 countries and that it has done sterling work in upholding the independence of the judicial and legal family worldwide.

Chief Justice Kania in his Presidential Address emphasised the need for drastic revision of economic policies to keep pace with the monster of inexorable population growth. The architect of the economic perestroika which we are all discussing Finance Minister Manmohan Singh traced the incomparable resource base of India in terms of manpower, natural resources and technological skills. He then dwelt on the essential elements of the new dispensation — delicensing, automatic entry of foreign enterprise, removal of MRTP restrictions under Chapter III, injection of competition in the economy by abolishing all export subsidies, redeployment of surplus workers and free convertibility of the rupee in the near future. Most significantly he underlined the Government's resolve, I quote, "is highest priority" he said towards inflation control and expected its reduction shortly. The Finance Minister, Ladies and Gentlemen, was being gentlemanly as the guest should be amongst his lawyer hosts. For he referred to lawyers as "nice people despite their formidable reputation" and he said "despite the finesse with which they defeat designs of the Government". But, for the Finance Minister there is no need to be so kind. He should be heartened by the fact that others have been far less charitable to the lawyers and digs at lawyers as a class are legion. There is a one which says that lawyers must first get on, and then get honour and then get honest. And the one which states that lawyers are the only people in the world who draft a 10,000 word document and still call it a Brief. And no less a person than Lord Chancellor Broham said, he defined the lawyer as a learned gentlemen who rescues the client's estate from his enemies to keep it for himself. In his vote of thanks the Attorney General, Mr. G. Ramaswamy pointed out the cross roads of law and economics straddled by this international seminar and welcomed the presence of the heads respectively of the legal judicial family namely Chief Justice of India and of the economic family namely the Finance Minister. He proposed a hearty and warm vote of thanks to the foreign delegates and office bearers of the UIA who had travelled long distances to attend this seminar and also to all those present.

Mr. Palkhivala's Keynote address was marked by originality of thought, precision of communication, unparalleled elegance and facility of language and the painting of a canvass as large as the universe with a few broad bold strokes. He berated bureaucratic imperialism. He called public sector units money guzzlers and black holes, castigated mindless socialism and predicted that doctrinaire socialism would soon be dust on the shelf of the Indian history, expressed astonishment at India managing to remain poor despite attaining the summit of human thought over five "luminous millennia" as he called them and exposed the malaise reflected in the incipient opposition to liberalism from three principal quarters, the substandard politician, the rigid unbending steel frame bureaucrat functioning, as he said, in a thought-free zone and certain Indian businessmen. But on balance his prognosis was positive optimism and cheering with an explicit confidence in the long-term future of this country. He based his optimism on the innate vitality of India. Hearing Mr. Palkhivala one was reminded of an economist, in fact J. M. Keynes complement to lawyers when he said "to the law and lawyers who are the trustees not of civilisation but of the possibility of civilisation".

The second session where Mrs. Malini Sood was rapporteur was kicked off by the Chairman Mr. Ashok Desai repeating President Truman's hunt for a one-handed economist since all economists seem to switch to the other hand every time and everywhere. One was reminded in keeping Mr. Ashok Desai's reference to Truman of Bismark's lament who said that when a man says that he approves of something in principle it means that he has not the slightest intention of putting it into practice. But fortunately the economists we had over the last 2 days suggested both principle and practical policies. The Minister of State for Industry, Prof. Kurien started with the voluntary disclosure to the fact that hitherto his Ministry's task had been to put obstacles in industrial development. He went on to point out the abolition of all licensing excepting for 16 specified areas, its replacement by simple reporting requirement of filing a memorandum, the fact that 3000 memoranda had been filed in the recent past, automatic clearance within a week or so for all foreign investment upto 51 percent, discretionary non-automatic clearance beyond 51 per cent and elimination of permission for bringing in foreign technician. He pointed out the existence of two restrictions; one the need to match dividend repatriation with export earnings albeit only for an initial period of 17 years, and secondly import matching required for import of capital goods. In response to questioning by Mrs. Nesargi and Mr. Nishit Desai, the Minister stressed the irreversible nature of the new policies based upon a national consensus and also stressed the institutional continuance of the Government of India. He also said that Government had an open mind regarding review of the list of industries for which delicensing had been announced and in which for some industries a licence was until now required. Mr. Kalyan Banerjee's address supported by a detailed paper emphasised the direct nexus between foreign direct investment and GATT since the latter was dealing directly with the issue of linking export performance with foreign investment. Prof. McDermott whose paper has been taken as read and who could not be present in person in Delhi, sought to justify the U.S. stand on Intellectual Property Rights without which U.S. Companies overseas, to him, are jeopardised in their commercial dealings. According to Prof. McDermott, the United States has no option but to either obtain multilateral agreements in GATT covering I.P.R. or using special 301 to prevent what he called expropriation of precious U.S. Intellectual Property Rights by other countries. Mr. Kalyan Banerjee's anecdote regarding the bureaucrat who would outlive even God tellingly brought home the point that in the ultimate analysis since it is the same faceless bureaucracy which is supposed to usher in and manage new liberal spirit, a psychological sea-change is necessary in that institution. Like a diplomat as it is said of a diplomat a bureaucrat is also trained to be disarming even when his country is not doing so.

With Mr. K. N. Bhat chairing and Ms. Lira Goswami reporting, the third session was initiated with Mr. K. Sampath emphasising the four-fold system of any tax regime: low rates, simplicity, stability and proper administration of tax laws. He made a number of useful suggestions for consideration. He called for bringing uniformity and identity in tax rates on private, public and foreign companies, to abolish double taxation on dividend income, to make uniform the differing definitions of residence under the present Income Tax Act and of course

under FERA, to enlarge the exceptions to the rule of deeming certain incomes as having arisen in India so as to exempt foreigners and foreign corporations from having their other incomes deemed to be Indian income and to provide for foreign exchange accounts to be maintained by Indians in India. These, I think, would certainly be amendments which would lead to improvement and changes which would reflect progress. Nishit Desai's presentation was crisp pointed and audiovisual. He emphasised the fundamental attudinal changes required to recognise the new global interdependence, the new borderless world as he called it, and the comparatives advantages flowing therefrom. One was reminded in this context of the ancient Sanskrit adage *Vasudheiva Kutumbakam* — the universe is a family. Mr. Nishit Desai's non-tax policy proposals included greater simplification of memoranda required to be filed under the new regime in place of licensing, review of the list of the licenced industry with a view to eliminating some of them like white goods, inclusion of retail shopping centres as part of the tourism industry and the formulation of a proper disinvestment policy. His tax proposals included a reduction in personal and corporate taxes to about 30 per cent, the reduction of the effective tax burden on foreign companies from the presently unacceptably high level of 68 per cent and the restoration of parity between foreign and Indian companies wherein transfers to subsidiaries of foreign companies are presently treated as being liable to capital gains or gift taxes. Some of these proposals might seem drastic in comparison to the old dispensation we have been having but as Galbraith put it, the man who makes his entry leaning against an infirm door gets an unjustified reputation for violence. Something is to be attributed to the poor state of the door. The Minister of State for Law, Mr. Kumaramangalam, repeated the elements of liberalisation which had been listed by the Finance Minister in his inaugural speech and pointed out that FERA had been made a paper tiger by amendments and a Chapter III of the MRTP had been abolished. The fighting spirit of the Karate expert as he was introduced by Mr. Bhat was reflected in his firm assertion of Indian independence and self respect and his point that any review of IPR (Intellectual Property Rights) would not be taken under threat of super 301 by USA. Persuasion, said Mr. Kumaramangalam would always be more effective as far as India was concerned than pressure. He also made the important point that the Government was considering the Feasibility of providing a special legal framework for foreign investors to reduce or eliminate the delays of litigation which all of us have to suffer from.

The fourth session with Mr. Ryan Karanjawala reporting began with the chairman Mr. Anil Divan emphasising the need for simplicity in tax returns. He recounted the plight of the hapless assessee of Alan Herbert's *Misleading Cases*. The Minister of State for Finance, Mr. Rameshwar Thakur pointed out the continuing relevance of a mixed economy and the proposal to set up a national Direct Taxes Court. He also referred to the expert committees set up for taxes and banking, the Chelliah Committee, and the Narasimhan Committee, and said that the reports would be carefully considered for implementation. Despite the obviously good intention to reference to the Committee, I was reminded of a wag who described the Indian propensity of appointing committees by saying that

a committee is often a group of individuals appointed by the unwilling to do the unnecessary. Mr. Nitish Sengupta itemised the advantages available to foreign investors of India on account of the large market, healthy private sector, high profitability of Indian companies and foreign companies in India and availability of infrastructural and managerial resources. Confidence in India was justified, he said since there has never been any nationalisation of foreign companies except on a couple of occasions along with general across-the board nationalisation of the whole activity. Both Mr. Dadachanji and Mr. Dara Mehta provided an extremely useful address, extremely valuable because they depicted the somewhat ugly face of Indian industry or Indian economic policy. Mr. Dadachanji deprecated the repeated legislative changes which represented as he said the absence of advance planning absence of certainty and impossibility to plan your entire year. The pernicious nature of retroactive legislation going back many decades, the distortion of the arbitral process which I think is now come to a stage of pre-litigation litigation uncertainty for foreign companies arising from the ambiguous Bhopal judgements and the irony that 40 per cent foreign equity without export obligation may be preferable to some rather than 50 per cent with an export obligation. And finally the impractical and counter productive insistence upon 360 days supplier's credit for export units. Mr. Dara Mehta emphasised the extremely important point I think regarding the necessity to promulgate a clear, precise and comprehensive set of laws and legal rules encapsulating a plethora of Notifications, Press Notes, Policy statements and guidelines concerning new economic policies. In my opinion this is immediately necessary. As a judge put it in a different context: it is not only necessary in drafting to attain a degree of precision which a person reading in good faith can understand but it is also necessary to attain, if possible the degree of precision which a person reading in bad faith cannot misunderstand. And that is why it is important to supplant this regime of Press Notes, the Notification and Policy statements with a categorical legislative scheme. Both Mr. Dadachanji and Mr. Mehta I think admirably accomplished Robert Burn's mandate to teach us to see ourselves as others see us.

The fifth and last session with Mr. Krishnamani reporting was potentially likely to be the most controversial and explosive. As pointed out at the outset by the Chairman, Jayanti Natarajan it proved to be highly satisfying with each participant although having different view points sometimes diametrically opposed, stating their cases with clarity, precision, dignity, conviction and without any rancour or malaise. Mr. Fali Nariman's address was fortified with the most useful and comprehensive paper. Calling for a conscious avoidance of shin kicking litigation and the toxicity of anger in mass tort or toxic tort cases, Fali Nariman emphasised the need for advance planning for mass tort disasters and the creation of the funds of insurance, avoidance of litigation and most importantly the proper ascertainment of the numbers and injuries of the genuine victims which ought never to be exaggerated. Although he did not say so it was clear that the finality of the Supreme Court judgments on the subjects could not be disturbed according to him notwithstanding the dissatisfaction of the academics. As someone has put it, the law is what the last judge in the last court in the last case on the subject says it is. And you all agree that the Supreme

Courts all over the world indeed are right because they are final and not necessarily final because they are right. Prof. Madhava Menon who otherwise opposes the Bhopal settlement skillfully avoided the thicket of Bhopal controversy by focussing on the evolution of legal principles to deal with tort cases. He canvassed support I think for three very important principles (1) that enterprise liability should provide a valuable basis for extending the M. C. Mehta principle of fixing tort liability according to the capacity of the tortfeasor to pay (2) legitimacy of awarding interim compensation before determining final liability under inherent powers of the court and the CPC and under the Indian Constitution and (3) the validity of the economic deficiency principle developed by lower economists providing for no fault liability and for distribution of costs of social accidents. One could not but agree with Prof. Menon's statement that no one can make life cheap for any foreign investor. And finally the inevitable Prof. Upendra Baxi I think treated us to an address which in my opinion was both lyrical and poetical. Whether one agrees with him or not, it is undeniable that as Keynes said and as was quoted by Mr. Palkhivala in the Key Note address Mr. Baxi's words were an assault of thought on many minds, thinking and unthinking. Here was an address, I thought, that taught us the qualities of controlled aggression and use of supreme caustic and ascerbic comments to drive home a message effectively. Upendra Baxi traced the genesis of Bhopal questioned the fact whether institutional responses would have been different or the same if the victims were different from the poor of Bhopal emphasised the threat of runaway technology, made the point about re-victimisation of the victims by the law and the sheer arrogance of judicial power and the full circle of irony of viewing Union Carbide as a victim instead of a tortfeasor. He castigated the Supreme Court settlements as being violative of natural justice, unjust and unfair and providing unprecedented criminal immunity from prosecution to UCL. He ended with a note of caution and a caveat regarding potential genetic Bhopals which he thought were brewing in India and made an impassioned plea for the evolution and stipulation of human rights standards for foreign investors especially dealing with hazardous materials. I think very valuable points to provide the countervailing thrust of the entire debate.

And that brought us to the end of a very enjoyable two days.