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KEYNOTE ADDRESS

LEGAL REFORM AND BUSINESS REGULATION IN THE UNITED STATES

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It so happened that around the date Lalit *ji* kindly asked me to speak about legal reform and business regulation in the United States certain events relevant to the topic were taking shape in the United States and at home here.

In the United States, the Committee on Foreign Investments approved the 130-million dollar purchase by VSNL of the undersea fiber optic cable network of Tyco International Ltd.

The Committee on Foreign Investments is an inter-agency committee that makes recommendations to the President. The President has the authority to prohibit any acquisition, merger or takeover of a United States business by a foreign citizen or entity if it could threaten the national security of the United States.

While this was happening in the U.S., back in India, a change of guard was taking place at VSNL itself. Three years ago, VSNL had become a private sector company. An independent director, first appointed to its board by the Government of India, was being appointed its chairman by the support of its private sector shareholders. It was a great day for the reform process.

To be sure, these developments have nothing to do with my being asked to speak. But they are pointers to the enormous potentials and pitfalls of the reform process. On one hand, reforms have helped someone like a VSNL to transform itself from being a government monopoly to a potential global powerhouse. On the other hand, reforms often implicate a variety of issues of national concern.

Let me give an example. The same Committee that approved the VSNL-Tyco transaction began almost exactly 2 years ago, an investigation of Hutchison Whampoa Ltd. Hutchison wanted to buy the vast fiber-optic network of Global Crossing. Global Crossing was the largest telecom company in the United States to go into bankruptcy. The Committee rejected Hutchison's proposed purchase. And what was the ground? National security. It

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found “credible evidence” that the principal shareholder of Hutchison had close relationship with the government of China.

Now, as to Hutchison, it is the largest shareholder of one of India’s largest cell phone company.

Someone among us might ask this question – should India have a catch-all review process similar to that of the U.S.? So that national interests can be safeguarded should existing laws and regulations relating to review of foreign investments are not adequate for the purpose?

This highlights the complex nature of the reform process. Here, I am reminded of the words of a famous jurist. “The life of the law,” he said, “has not been logic, it has been experience.” Those among us wrestling with issues relating to the reform process are constantly learning to walk the tight rope. They are mindful that reform should not become, unwittingly, the sale of precious national assets and national opportunities, let alone a risk to security.

Laws evolve through experience. Let me give an example. Fifty years ago, no divorce was possible in the United States without grounds. Admissible grounds varied from state to state. Most states, in the '50s for instance, recognized cruelty as a valid ground for divorce. The result: in 1950, cruelty accounted for three-fifths of all divorces. Really? Well, the husband and the wife colluded to end the relationship. Did the judges know? Of course; but the motto was: don’t ask, don’t tell. It was – so to speak – “cheating in the shadow of the law.”

But New York – the state where I practice – had to be different! In New York, divorce was available on the ground of adultery. So New York developed a weird form of collusive adultery. A man would check into a hotel, and a woman and a photographer would appear. I need not go into the details. The flavor of the charade is neatly captured in the title of a magazine article from 1934. It read: “I was the Unknown Blonde in 100 New York Divorces.”

What makes for successful legal reforms? (By the way, law *is* “infrastructure” in the same sense that roads, airlines and telecoms is) One good reason that comes to mind: **spotting real needs and addressing them swiftly.** Let me give two examples. Both, from events that took place when I first arrived in America.

I lived in New Jersey. Shortly after I arrived – and again, it has nothing to do with my arrival – New Jersey increased the speed limit for driving on the freeway – from 55 mph to 65 mph. It seemed that almost everybody was anyway exceeding the 55 mph limit. One of the legislators who introduced the bill offered the following explanation for the proposed change. He said: “We do not want our citizens to have contempt for our laws.”

Take the other example. A child, Megan Kanka, was raped and strangled in New Jersey by a man who lived across the street from her. He had two prior convictions for sex crimes. The neighbors, including the Kanka’s, never knew about his dark past. When the killer’s background became known, a great cry of horror rose up. So, what did New Jersey do? It

soon passed a law: Megan's Law. Under Megan's Law, sex offenders, after they get out of prison, must register with the authorities. From then on, they are marked men. Law follows them wherever they go and wherever they live. For the most dangerous, the authorities have a duty to notify "everybody likely to encounter the person registered, including the neighbors." Megan's Law spread from state to state; many have put up their registries on the Internet.

More recently, take the Sarbanes Oxley Act. It is the most significant piece of securities legislation in a generation. It requires, among other things, that chief executives and chief financial officers of public companies certify – under risk of criminal prosecution – the accuracy of financial statements. But the Act could just as well be called the "Enron-WorldCom Response Act."

But is the onus of reform only on the Government? Let's see. In the United States, the best and most enduring laws – for example, the Uniform Commercial Code – have come out of voluntary work by lawyers, judges and law professors. The premise is simple: (i) America is a work-in-progress, and (ii) it is for the brightest and the wisest in the legal community to help create, monitor and reform the laws we want.

The American Law Institute ("ALI") is a good example of such voluntary work. ALI has 3,000 members consisting of judges, lawyers, and law teachers. They are admitted to membership based on professional achievement and demonstrated interest in the improvement of the law. Members have voluntarily given, literally, billions of dollars of legal time – and you know how expensive U.S. lawyers are – to the creation and reform of tens of restatements, uniform and model laws. Such institutions of legal scholarship have a ripple effect across the country – one that is felt even in the work of a law clerk in a small law firm in a small town.

We make the laws to govern ourselves. Some of the most ubiquitous laws that relate to regulating businesses and professions in the U.S. involve **self-regulation** by the business or profession. The government does not presume to know everything. It presumes that those who engage in a business or profession best know its problems and how to fix them. It works. It works because it is better than having the government or the tort lawyer knock your doors.

But there is one thing the government can do best. It can reform the manner in which administrative discretion is exercised. America, as you know, makes a bewildering number of laws. In 1977 alone, Newsweek said, we made 150,000 laws, regulations and ordinances. A fraction of what we do today. Almost every aspect of living and doing business is regulated by the federal, state or local government. As in India, actions of governmental agencies – SEC, IRS, EPA, NLRB, DOL, to mention a few – constantly impinge on businesses. Yet, for the most part, the exercise of administrative discretion is transparent, unobtrusive and painless. Why?

Because administrators are not lords. They are subject to *ex-ante* limitation specifying the bounds of their authority and to *ex-post* review to assure that actions stay within those bounds. To paraphrase a noted legal thinker, discretion is like a hole in a doughnut – a

sambhar vada – it does not exist except in an area left open by a surrounding belt of restriction. It is sufficiently circumscribed beforehand and sufficiently well-monitored afterwards.

One final thought – and it relates back to the example of ALI. Before writing industry-specific codes – such as the proposed Federal Securities Code – ALI simplified and restated the basic laws. They probably did what the Webster English dictionary defines “reform” to be: “to renew”; “**to amend or improve by change of form or by removal of faults or abuses.**” Those of us wrestling with issues relating to reform do not have their sights on a tree – a law for a certain business or industry – but all of the forest. Thank you.