THE HIGH COURT OF DELHI AT NEW DELHI

Under Art 226 of the Constitution of India

CWP (PIL) NO. OF 2006

In the matter of:

SHIVA KANT JHA

A-320 SFS, Sarita Vihar

New Delhi-110 044 …. Petitioner-in-person

V.

1. UNION OF INDIA

Through The Secretary (Revenue)

North Block, New Delhi

2. Through Secretary (the Ministry of Commerce & Industry),

Udhyoga Bhawan, New Delhi

3. Central Board of Direct Taxes

Through its Chairman

North Block, New Delhi

…. Respondents

WRIT PETITION UNDER ART. 226 OF THE CONSTITUTION OF INDIA

It is a Petition under Article 226 of the Constitution of India for issuance of appropriate directions, declarations, orders or writs to [A] the Central Government in certain matters pertaining to the transgressions of legitimate province of the Central Government's Treaty-Making Power evident in the constitutional illegality and impropriety manifest in (i) the Double Taxation Avoidance Agreements, especially the provisions relating to the Mutual Agreement Procedure, and (ii) in the ratification and adoption of the Uruguay Round Final Act (popularly known as the WTO Treaty); and, on such counts, praying for a remedy holding such treaties domestically inoperative; and (iii) the provisions relating to the MAP set forth in the CBDT's Instruction No 12 of 2002 (dated Nov. 1, 2002 F. No. 480/3/2002- FT), and in Rules in Part IX-C of the Income-tax Rules, 1962, *ultra vires;* and for [B] for getting the substitution and insertion by the Finance Act 2003, and the insertion of Section 90A by the Finance Act 2006 into the Income-tax Act, 1961 declared ultra vires the Constitution; and [C] for seeking declaration on the ambit and

reach of the Central Government's Treaty-Making Power within the parameters of our Constitution..

To,
The Hon'ble Chief Justice
and His Hon'ble Companion Justices of the
Hon'ble Delhi High Court.

The humble petitioner of the petition above named
MOST RESPECTFULLY SHOWETH:

The Context

1.The issues raised in this Writ Petition had been raised in a petition under Art 32 before the Supreme Court of India on August 19, 2006. The matter came up for a preliminary hearing before a Division Bench of the Hon'ble Supreme Court on Oct. 9, 2006. The Writ Petition had to be withdrawn as the Hon'ble Judges persistently observed that this Petitioner should have invoked jurisdiction of the High Court under Art 226 of the Constitution. Per its order the Court granted 'liberty to seek other appropriate remedies'. With an earlier precedent in *P.N. Kumar v. MCD* (1987) 4 S C C 609 in mind, the Petitioner withdrew the petition, and filed it , with appropriate modifications, before the Hon'ble High Court of Delhi on Oct 10, 2006 invoking its jurisdiction under Art. 226 of the Constitution of India.. On Nov. 17, 2006 a Division Bench of this High Court directed the petitioner to file a petition 'more focused, short and precise to the issues raised', and for that reason granted ' permission to withdraw the petition with liberty to file a fresh petition, making it short and precise and particularly, focusing on the main issues.' Hence this petition shortened by more than 50% and has been virtually re-written in compliance with this Hon'ble Court's directions, and keeping in view the nature of pleading in the writ procedure as explained by the Hon'ble Supreme Court in *Bharat Singh & Ors v. State of Haryana & Ors*. (AIR 1988 SC 2181). It was not possible to make it more precise as some of the greatest constitutional issues, raised for the first time before an Indian court, are to be placed per this petition before this Hon'ble Court. The issues raised have got great domestic and international consequences in this phase of Economic Globalization; and the judicial decisions thereon would be of concern to the people in most jurisdictions world over. This petition is filed wholly and exclusively *pro bono publico* in due discharge of what the petitioner considers his

public duty as a citizen of the Republic of India.

1A**. That this Writ Petition is structured thus;**

THE OBJECTIVE

2.That this writ petition brings certain matters to the attention of the Hon'ble Court :

(i) to vindicate the Rule of Law to get the unlawful conduct of the administrative authority stopped seeking, in public interest , the issuance of appropriate directions, orders or writs in the nature of mandamus or declaration to the Central Government so that the executive acts, *ultra vires* the Constitution of India, are stopped; and

(ii) to vindicate the supremacy of the Constitution of India by assailing certain administrative acts, and statutory provisions as they appear to be ex facie *ultra vires* on account of their being in breach of the Fundamental Rights and the Basic Structure of the Constitution .

The core questions raised in the Writ Petition

3. That the core issue in this Writ Petition questions the abuse of the Treaty-Making Power by the Executive-government causing cussed breach of the mandatory constitutional commands which are peremptorily binding on the Central Government as they govern its competence both at the international plane while forming a treaty, and in the domestic jurisdiction whilst implementing that. It is submitted that the Central Government has no extra-constitutional power to be exercised at international plane *de hors* the mandatory constitutional and statutory provisions. The Executive, being a creature of the Constitution with only *conferred* power, cannot violate our Fundamental Rights, nor can with treaty-terms shed-off legislative or judicial power in favour of foreign body. No treaty can empower the Executive to enter into a treaty to subvert a statute, and to cause discrimination *inter se* the citizens and the foreigners (also non-

residents). The impropriety reaches its climax when this is done through acts without statutory foundations thereby making them without jurisdiction; and it reaches its gruesome apex when the deeds are crafted in an opaque system without even Parliament knowing them.

4.Writ Petition seeks remedies under Art 226 of the Constitution of India praying:

(i) that the provisions relating to Mutual Agreement Procedure (MAP) be held *ultra vires* and without a statutory foundation (vide Art 25 of the OECD Model of the Double Taxation Avoidance Agreements (DTAAs for short) adopted in most of the DTAAs) [the texts[1] whereof would be produced before the Hon'ble Court when needed (the Indo-Mauritius DTAA is a most relevant illustration)]; and that, as a matter of express consequence, the Instruction [No 12 of 2002 dated Nov. 1, 2002 F. No. 480/3/2002- FTD issued by Government of India, Department of Revenue [***Annex "A"***]; and the Rules (prescribed in Part IX-C of the Income-tax Rules, 1962) [***Annex "B"***] pertaining to them be held bad for being *ultra vires* and violative of Articles 14, 19, and 21 of the Constitution;

(ii) that certain substitution and insertion made in the Finance Act 2003 in Section 90 of the Income-tax Act 961, and Section 90A of the said Act, are bad as they transgress constitutional limitations ensuing from the Articles 14, 19, 21 and 226 of the Constitution of India, and suffer from the vice of excessive and unguided delegation;

(iii) that the Double Taxation Avoidance Agreements entered into by the Central Government be held domestically inoperative on account of the fact that that our Executive lacked competence to enter into such Agreements, and also on account of the violations of the Fundamental Rights under Articles 14, 19,21, and also Art 265 of the Constitution of India;

(iv) that it be declared that the Central Government was constitutionally incompetent to sign/ratify/adopt the Uruguay Round Final Act on account of its trespass on topics to which the writ of the Executive-government does not run on account of express constitutional limitations;

(v) that it be held that it was wrong to bypass our Parliament in treating – making process having deep and long-lasting domestic impact on the lives of our people, and having deep impact on the operative laws, and on the legislative fields under the 7th Schedule of the Constitution of India,, and also by overriding /threatening many constitutional

[1] K. Srinivasan, *Guide to Double Taxation Avoidance Agreements* [Vidhi Publishing Pr Ltd N. Delhi]

provisions and institutions in the process of making our polity WTO-compliant.; and

(vi) that this Hon'ble Court may declare the valid principles governing treaty-making; with a direction that it is high time that Parliament should frame law in exercise of its legislative power determining the zones:

(a) where the agreements are routine and administrative which can be done at the executive level;

(b) where treaties can be made through Parliamentary ratification, or through legislative enactment as has been done in the USA in the case of Agreements with wide domestic and commercial impact ; and

(c) where a treaty affects the structure of our polity and the basic structure of our Constitution it be ratified by Parliament/ adopted by the Executive after obtaining a specific mandate from our people through a referendum (as was done in the U.K. through the Referendum Act 1975).

***Locus Standi* of the Petitioner:**

5. That the Petitioner, belonging to a family that produced some distinguished freedom fighters; he too had made sacrifice in the Struggle for India's Independence. He is a public-spirited taxpayer having Permanent Account No ACGPJ 5126 Q who served the nation as a member of the Indian Revenue Service for more than 34 years, and retired with credit superannuating in March 1998 from the post of the Chief Commissioner of Income-tax. The Petitioner considers it his fundamental duty to bring to the notice of the Hon'ble Court through this Petition the gross illegality and unreasonableness of the aforementioned Instruction and the Rules; and the remissness on the part of the Central Government in discharge of certain public duties: a pursuit justified by the judicial observations in *R v Inland Revenue Comrs*[2]*; National Federation of Self-Employed and Small Businesses Ltd*[3] ; *S.P. Gupta & Ors v President of India & Ors* (AIR 1982 SC 149); *Vestey v Inland Revenue Comrs* (1977)3 AII ER 1073 at 1079, (1998) Ch 177 at 197-198; *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mog*[4]*; Ratlam v. Shri Vardichan; Pillo Mody v. Maharashtra*[5]*;* and under persuasion from Art 20 of the Constitution of the Federal Republic of Germany laying

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[2] *[1982] 2 All ER 378 at 388*
[3] *[1981] 2 All ER 93 HL*
[4] [1994] 1 All ER 457
[5] *H.M.Servai,* Constitutional Law of India *4th ed. Vol I , 1381-2*

down a general principle of democratic polity under a government under constitutional limitations. In *R. v. Secretary of State for Foreign Affairs, ex parte World Developed Movement Ltd*[6] the QBD granted *locus standi* in a PIL recognizing the importance of vindicating rule of law, the importance of the issue raised, the likely absence of any other challenger, the nature of the breach of duty against which relief was sought and the prominent role of the applicant.

6.That this Hon'ble Court had granted him a locus standi to move a PIL in *Shiva Kant Jha & Anr v. Union of India*[7]*:* recording words of appreciation which are for this petitioner a joy forever: per S.B. Sinha, C.J

> "We would however like to make an observation that the Central Govt. will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bring into focus as to how the Govt. of India had been losing crores and crores of rupees by allowing opaque system to operate."

This Petitioner is discharging his public duty keeping in mind what Lord Diplock said in *National Federation of Self-Employed and Small Businesses Ltd*[8]:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped…."[9]

Justice Bhagwati, in *S.P. Gupta & Ors v President of India & Ors* (AIR 1982 SC 149), observed:

> "We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective."[10]

It is submitted that this Petitioner has no other interest; hence, he not launching an Adversarial litigation under which, to quote . Dr Bernard Swartz, " the public character of the proceedings is more than a mere form."[11]

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[6] [1995] 1 All er P 611

[7]. (2002) 256 ITR 563 (Del.).

[8] *[1981] 2 All ER 93 HL*

[9] [1981] 2 All ER 93 at 107

[10] *A I R 1982 S.C. at p.194*

[11] Bernard Schwartz & H W R Wade, *Legal Control of Government*, pp. 216-217 Quoted by H M Seervai in *Constitutional Law of India*,4th ed, p.1487 fn. 64.

7. That this petitioner prays for grant of *locus standi* believing, to saying in the words of Harold Pinter, the 2005 Nobel Prize Winner for Literature:

> "that despite the enormous odds which exist, unflinching, unswerving, fierce intellectual determination, as citizens, to define the real truth of our lives and our societies is a crucial obligation which devolves upon us all."

The Broad Issues

8 That the broad issues are summarized at the threshold for an easy comprehension of the Writ Petition: these are—

1. Whether the tax treaties (the DTAAs), to the extent they violate the constitutional limitations on the Central Government's treaty-making competence, are domestically inoperative;
2. Whether the adoption and ratification of the Uruguay Round Final Act (the so-called WTO treaty) transgress the constitutional limitations on the Central Government's treaty-making competence; and, if the answer is in affirmative, then whether on account of that it is inoperative within the domestic jurisdiction; or alternatively, is inoperative to the extent of non-conformity with the Fundamental Rights, Basic Structure, and other mandatory constitutional limitations;
3. Whether the Instruction No 12 of November, 2002, issued by Government of India, Department of Revenue (Foreign Tax Division), and the rule in Part IX-B of the Income-tax Rules, 1962 , are *ultra vires* Art. 14, 19, and 21 of the Constitution, and, for that reason, deserved to be quashed;
4. Whether the substitution and insertion by the Finance Act 2003 in Section 90 of the Income-tax Act 1961, and Section 90A inserted in the said Income-tax Act by the Finance Act, 2006, are constitutionally invalid; and
5. Whether there is a case for judicial declaration of the law governing treaty-making within the parameters of the Constitution of India; and, if the answer be 'yes', then grant of an appropriate declaration thereon for the guidance of the Government, and information to the people of the Republic of India.

9. This humble Petitioner seeks a declaration on the law of treaties under the parameters of our Constitution. To assist this Hon'ble Court he has made references to the suggestions on this point made by:

(i) The National Commission to Review the Working of the Constitution ***Annex 'C'*** pp. 181-183 (printed pp 34-36)

(ii) Suggestions on Treaty-Making Procedure given by the People's Commission ***Annex 'C'*** Pp.183-184 (printed pp 36-37) *[Report submitted herewith]*

(iii) This Petitioner's Suggestions on valid Treaty Making Procedure

Annex 'C' pp. 184- 185 (printed pp 37-38)

This Hon'ble Court may declare the law on the point under consideration; and may suggest (as a sort of judicial *cri de Coeur*) to Parliament to frame law on the treaty-making procedure.

Structure

10. That the structure of this Writ Petition is expressed diagrammatically thus:

Transgressions of Constitutional limitations

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Illustrated through facts in two key-areas of

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(i) the Tax treaties (Segment I) **(ii) the WTO Treaty. (Segment II)**

II A

This Petitioner's position in nutshell; and core legal propositions constituting legal perspective.

11. This Petitioner's stand taken in the Writ Petition, are stated in nutshell at the threshold itself to put the issues before this Hon'ble Court under a sharp focus:

(i) Our State's legal Sovereignty reveals itself in the terms of our Constitution only [except in those unfortunate moments, perish the thought, when a constitution goes down the gutter, and the crude realities of realpolitik become the sole determiner as it had become when the treaties like the Treaty of Allahabad, or Treaty of Versailles, or the Treaty of Surrender were signed by the vanquished under the spiky boots of the ruthless victors];

(ii) Our State has no Sovereign power, unbridled and unlimited, to enter into a treaty even at the international plane; it has only a Treaty-making *capacity* under the constitutional limitations. As the Executive represents our State at international plane , it acts only as *the authorized agent of the State*, and as such it is incompetent to transgress the obvious limitations on its power imposed by the Constitution which creates it and keeps it alive only with controlled competence. "In general it seems that the rown makes treaties as the authorized representative of the nation." (Keir & Kawson, *Cases in Const Law* p.160 which can run the risk of acting

without capacity if it goes in breach of the constitutional limitations on its capacity. Oppenheim observes[12]:

> 'If the Head of State ratifies a treaty without first fulfilling the necessary constitutional requirements (as, for instance, where a treaty has not received the necessary approval from Parliament of the state), his purported expression of his state's consent to be bound by treaty may be invalid."

Art 53 of the Vienna Convention states that if a treaty which at the time of conclusion conflicts with peremptory norm of international law it would be void. And Article 45 of the Vienna Convention – probably reflecting rules of customary international law – allows a state (by way of exception) to invoke non-observance of its internal law as a basis for invalidating its consent to be bound by the treaty only if the rule of internal law relates to competence to conclude treaties, if it is a rule of fundamental importance, and if the violation is manifest, i.e objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith**.**

(iii) "It is well established as a rule of customary international law", says Oppenheim, " that the validity of a treaty may be open to question if it has been concluded in violation of the constitutional laws of one of the states party to it, since the state's organs and representatives must have exceeded their powers in concluding such a treaty.. Such constitutional restrictions take various forms." This aspect of the matter has been pursued in Section IV of this Writ Petition.

(iv) Nothing turns on the concept of "inherent sovereign power" theory because sovereignty inheres in our Constitution, and it is essentially, as Oppenheim says, " a matter of internal constitutional power". Oppenheim, while analyzing what Sovereignty means in the 20th century, observed:

> "Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein"

Even the U S Supreme Court has observed in *Hamdan's Case [Hamdan v. Rumsfeld, Secretary of Defense*, et al decided by the U.S. Supreme Court on June 29, 2006] that 'The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check. [*Justice Breyer*, with whom *Justice Kennedy*, *Justice Souter,* and *Justice Ginsburg* join, concurring.]

(v) 'A number of states in their constitutions have made express provision for limitations on their national sovereign powers in the interest of

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[12] Oppenheim, *International Law* (Peace) ibid p 1232 para 606

international co-operation. These provisions are to the effect that certain sovereign rights and powers of the state may be limited in connection with international organizations, or may be conferred upon or transferred to international organizations. This has particularly become necessary in some states whose constitutions provide for certain rights and powers, for example the power to legislate, to be exercised only by organs of the state: by becoming a member of an international organization which can in some degree be said to be exercising such powers, the state, in absence of a provision envisaging a transfer of those powers, could be said to be acting unconstitutionally and the resulting exercise of the powers by the organization could be said to be ineffective within the state.'[13]

Under the Constitution of India there is no provision for limitations on the national sovereign powers of our State which can grant an overriding effect on the constitution .

(vi)The constitutional limitations work both in matters of

(a) treaty *formation*, and

(b) treaty i*mplementation*.

The opinion of Lord Atkin (in *Attorney General for Canada v. Attorney General of Ontario*) on the possibilities of different approaches in the aforementioned two segments are right under the British constitution but invalid under our Constitution for numerous reasons including the express indication in the narration under entry 14 of the Union List which suggests that our Constitution contemplates within its matrix both the *formation* (entering into) and *implementation* of a treaty. Lord Atkin himself observes that different considerations would be at work in a federal polity and under a system of governance under a written constitution with express constitutional limitations.

New Realities and Art 51 of our Constitution

(vii) That in the *Minister of State for Immigration and Ethnic Affairs v Teoh*[14], case, the Court found that by entering into a treaty the Australian Government creates a **"legitimate expectation"** in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. Whilst the effect of this norm would be submitted later in *para* 69(vii) p. 21of the Writ Petition, it is worthwhile asserting that the conventional differentiation between the governmental acts with fall outs at the international plane, and the acts impacting the rights and interests of the

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[13] Oppenheim, *International Law* (Peace) pp. 125-126

[14] (1995) 128 ALR 353, (1995) 69 ALJR 423

subjects/ citizens within the realm (domestic jurisdiction), which had been once upon a time made by of Sir R. Phillimore's decision in *The Parlement Belge* [vide *para* 23 p. 30 of this Petition], and which was quoted in *Maganbhai v. Union*[15] , does not survive now. Now we live in a world in which the executive acts done at the international plane, seep into domestic sphere to act often as catalytic agent, but most often as prime over and operative force, mostly, now, through the executive process. Under the Law of Nationality the States protect the interests of their nationals in foreign jurisdictions, but under, what this Petitioner would call the Post-modern International Law, the mighty States promote their business and corporate interests subjecting the not so-fortunate interests under the noxious burden of executing their agenda best if done covertly, otherwise by coercing their Parliaments through the pleas of *fait accompli.* The realities of the day are captured in the following lines from Noam Chomsky's *Hegemony or Survival* (p. 13):

> 'The whole frame-work of international law is just "hot air", legal scholar Michael Glennon writes: 'The grand attempt to subject the rule of force to the rule of law" should be deposited in the ashcan of history –a convenient stance for the one state able to adopt the new non-rules for its purposes, since it spends almost as much as the rest of the world combined on means of violence and is forging new and dangerous paths in developing means of destruction, over near-unanimous world opposition'"

Now, thanks to the Uruguay Round Final Act, adopted by our Central Government under an opaque system, we are led to such a morbid pass as would be evident from such illustrations as these:

(a) The effects of the TRIPS are certain coerced legislation, certain defeats at the WTO's Disputes Settlement Body, ouster of the jurisdiction of our Superior Courts, encroachment on our Sovereign Space, infraction (accomplished/threatened),…creation of inter-governmental fora to implement the TRIPS agenda without the nation knowing (the technique of Stealth) [crafted through the memorandum of understanding], censure and command under the U.S. Trade Act of 1974, which puts India on Priority Watch List in 2006, in words with which only a country under seize can put up. We are mandated: "The United States also encourages India to join and implement the WIPO Internet Treaties." Even our judiciary is told how to behave.[16] Under the U S Trade Act 1974 Trade Representative can initiate action against India for punitive retaliation etc. if he is of opinion that our Government has violated a

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[15] AIR 1969 SC 783

[16] " India's criminal IPR enforcement regime remains weak, with improvements most needed in the areas of border enforcement against counterfeit and pirated goods, police action against pirates and counterfeiters, judicial dispositions resulting in convictions for copyright and trademark infringement, and imposition of deterrent sentences. The United States urges India to address these issues during the coming year and thereby strengthen its IPR regime. To that end, the United States welcomes deeper cooperation with India…"
http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_Index.html

trade agreement (such as a World Trade Organization (WTO) agreement or the North American Free Trade Agreement. That Act even says ". 1. An act, policy or practice is considered to be unreasonable if it is unfair and inequitable, even if it does not violate the international legal rights of the United States."[17] And all this to help the MNCs and to promote their agenda

(b) Again thanks to the WTO Treaty the MNCs are even going to the extent of asserting, in ways much more devastating that what is suggested in *Minister of State for Immigration and Ethnic Affairs v Teoh*[18], that Section 3(d) of our Patents Act is unconstitutional as it is in breach of the TRIPS Agreement! In effect the executive act, without Parliament's involvement, saddled this nation with obligations which ride roughshod over the Constitution. Such an atrocious challenge is natural when the Mashelkar Committee considers Article 27 " a specific mandate" holding that there is " a perception that even the current provisions in the Patents Act could be held to be TRIPS non-compliant". Hence, in its view, our law is to be made" **TRIPS compliant.'** One wonders if there is any difference between the Committee's approach and that of a MNC like Novartis AG. Both seem to assume that a treaty made by the opaque system can provide an anvil under our Constitution to crack even our statute to pieces on the ground of its being *ultra vires* the TRIPS. [And this is the abiding assumptions in the terms of reference to the Mashelkar Committee on Patents and its answers thereon on which more is submitted underneath **Ground 14 at p. 116 of the Writ Petition**.]

The core point is: Was this sort of Treaty contemplated by our Constitution to be done this way?

(viii) The core pleadings in this Writ Petition is squarely in tune with the decisions of the Hon'ble Supreme Court in [19]; *Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha & Ors* (Case No.W. P.(civil)1of 2006); *I.R. Coelho (Dead) By LRs v. State of Tamil Nadu & Ors.* Date of judgment 11/01/2007.

(ix) No treaty was ever done in the past having as wide and as long-lasting an impact in the domestic jurisdiction as the ratification of the Uruguay Round Final Act by the Executive. The U.S. adopted it, with several reservations, though an Act of the Congress. The U.S. rightly thinks that a treaty usurping the legislature's power over trade and commerce must be ratified by an Act, and only then to be adopted by the President. Like other recent trade agreements, including NAFTA, the United States-Canada Free Trade Agreement, the United States-Israel Free Trade Agreement and the Tokyo Round Agreement, the Uruguay Round Agreements was constitutionally

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[17] http://www.osec.doc.gov/ogc/occic/301.html

[18] (1995) 128 ALR 353, (1995) 69 ALJR 423

[19] AIR 1960 S C 845

executed by the President and approved and implemented by Act of Congress. In the U.K. accession to the EEC Treaty was after Parliamentary approval; participation was through enactment, and after obtaining a *referendum*.

(x) The issues presented in this Writ Petition deserve to be considered, or reconsidered. in the post- *Royappa-Maneka Gandhi-Ajaya Hasia-Kesavanda*-.ethos, keeping in view the crudities of the Economic Globalization.

(xi) Under our constitutional system whilst within domestic jurisdiction the terms of a treaty can be challenged if they contravene statutory or constitutional limitations, no statute or a constitutional provision can be challenged before our domestic court for enforcement of treaty terms *de hors* them.

(xi) The constitutional powers and duties required by our Constitution to be exercised within the domestic jurisdiction, or having impact within the domestic jurisdiction, can not be abdicated, ignored or subjected to extraneous restrictions for any reason whatsoever. In the context of the Irish Constitution (Ireland has a written Constitution from which a lot of borrowings our Constitution-makers had made), in *Crotty v An Taoiseach* [1987] 2 CMLR 666 the Court observed[20]:

> 'It would be quite incompatible with the freedom of action in foreign relations conferred on the Government to qualify it or to inhibit it in any manner by formal agreement with other States to do so. The free do, does not carry with it the power to abdicate the freedom or enter into a binding agreement with other States to exercise power to decide matters of foreign policy in a particular way or to refrain from exercising it save by particular procedures and so to bind the State in its freedom of action in foreign policy.'

(xi) The central thesis in this Writ Petition is founded on propositions inter alia the following:

(1) The Central Government has no unbridled power in its hip-pocket to be exercised at international plane (through treaty making, or foreign relations) *de hors* the Constitution of India, as the Union of India has no such power conferred under the Constitution.

(2) It a constitutional solecism to think that any Treaty (be it a Tax Treaty or the WTO Treaty or treaties of other conceivable species) can ever enable the Executive to transgress constitutional competence.

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[20] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mog*[1994] 1 All ER 457

(3) There are only two Articles in our Constitution granting Treaty-making power: Art 73 and Art 253. They, in effect, say what this Petitioner is asserting in the Petition. Art 73 subjects the exercise of power to constitutional limitations. And Art 253 can if invoked only if a Treaty is constitutionally valid. If the executive enters into a treaty, agreement or convention in breach of the basic features of our Constitution, or the Constitution's mandatory mandate, then such an agreement, treaty or convention is constitutionally invalid: hence domestically inoperative and *non est*. Our courts, as the creatures of the Constitution, must uphold the Constitution by declaring such a treaty, agreement or convention bad. Ours is a written constitution under which all the organs of the polity are the creatures of written constitution: hence bound by its limitations, both express and implied. Our Supreme Court clearly stated in *Ajaib Singh v. State of Punjab*[21]:

> "Neither of Articles 51 and 253 empowers the Parliament to make a law which can deprive a citizen of India of the fundamental rights conferred upon him".

This Petitioner's view is fully supported by (a) *Peoples' Commission Report on GATT* by V R Krisna Iyer, O Chinappa Reddy, D A Desai, (all the former Hon'ble Judges of the Supreme Court); and Rajinder Sachar (the then Hon'ble Chief Justice of Delhi High Court); (b) V R Krishna Iyer, Dialectic and Dynamics of Human Rights in India pp.364-365; and Shiva Kant Jha, *Judicial Role in Globalised Economy* pp 306-307

(4) This Petitioner deems it a cardinal principle of our jurisprudence that Hon'ble Court is the ultimate decision-maker in the matter of what sort of norms (their ambit and reach also) of International Law are expected to be given effect within the constraints and culture of polity as structured by our Constitution. "The modern rule". Stephension LJ quoted the illuminating comment of Lord Alverstone CJ, in *West Rand Centrla Gold Mining Co v R*[22]:

> "…any doctrine, so invoked must be one really accepted as binding between nations, and the international law, sought to be applied must, like anything else, be proved by satisfactory evidence which must shew either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, any civilized state would repudiate it. …. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be Construed so as to include as part of the Law of England, opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts."

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[21]. AIR 1952 Punj. 309 at 319.; Vide **Annex 'C'** printed pp 14-15 being an extract from Shiva Kant Jha's *Final Act of WTO: Abuse of Treaty-Making Power;* and also Shiva Kant Jha , *Judicial Role in Globalised Economy* pp 306-307 [pub. By Wadhwa & Co,]

[22] [1905] 2 KB 391

Lord Atkin said in *Chung Ch Cheung v. R*[23]*:*

> "….so far at any rate as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law".

Cockburn CJ said in *R. Keyn*[24]*:*

> ' For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have recived the assent of the nations who are to be bound by it….."

The tsunami of economic globalization has subordinated the political realm to the economic realm established under the overweening majesty of Pax Mercatus. Geza Feketeluty has brought out this reality thus:

> "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures."[25]

'[But in this world we are faced with a complex nerve-wrecking problems. Our executive may through its commitments at the international plane, give rise to international customary law on a particular point; or may make our country party to a treaty having domestic or extra-domestic impact. This situation is likely to be worse as the institutions of economic globalization are clearly in a position to call the shots. Under such circumstances we must uphold our Constitution. No norm of international law can be so forged/evolved as to enable the executive to defile or deface the Constitution.'[26]

IIB

WHAT THIS PETITIONER WANTS IN THIS WRIT PETITION

12. That this humble Petitioner, in effect, wants that this Hon'ble Court may:

(i) quash the impugned Instruction, Rules,[vide para 4(i) *supra*], the substitution and insertion by the Finance Act 2003 in Section 90 of the Income-tax Act 1961, and Section 90A inserted in the said Income-tax Act by the Finance Act, 2006 on the ground of their being *ultra vires;*

(ii) to hold that the executive acts done through the Treaty-making power , to the extent they offend our Fundamental Rights and the Basic Structure of our Constitution , are *pro tanto* inoperative within the territory of India on account of their being *ultra vires* the Constitution of India;;

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[23] [1938] 4 All ER 786 at 790
[24] (1876) 2 Ex D 63 at 202
[25]. 2001 *Britannica Book of the Year*. 191.
[26] Shiva Kant Jha , *Judicial Role in Globalised Economy* p. 281 [pub. By Wadhwa & Co,]

(iii) to declare the law governing the Treaty-making power of the Central Government within the parameters of our Constitution as the creatures of the Constitution cannot transgress constitutional limitations determining the ambit of proper constitutional competence [this Hon'ble Court may consider various suggestions given by (i) the National Commission to Review the Working of the Constitution; (ii) (ii) Suggestions on Treaty-Making Procedure given by the People's Commission**;** (iii) This Petitioner's Suggestions on valid Treaty Making Procedure [vide **Annex** 'C'. pp. 148-185].

(iv) to declare that the execution of the Double Taxation Agreements and the adoption and ratification of the Uruguay Round Final Act (the WTO Treaty, for short) are beyond the executive government's constitutional competence; hence these are *ex facie* domestically inoperative.

III

TREATY MAKING POWER: THE CONTEXT

13.That the issues raised in this Writ Petition are articulated on the core constitutional principles synoptically set forth in para 3 *supra*. This Petitioner formulates the constitutional principles relevant to the issues raised with utmost precision to be expanded and exfoliated if this Hon'ble Court grants a chance. This Petitioner's comprehensive position on the Central Government's Treaty-making power is set forth in ***Annex** 'C'* being an extract from his book *Final Act of WTO: Abuse of Treaty-making Power*. [also Shiva Kant Jha, *Judicial Role in Globalised Economy*[27] Chapters 15 pp. 293-313].

14. That this Petitioner deems it appropriate to synoptically state the main strand of his reasoning. Our Supreme Court in "Reference by The President of India under Article 143 (1)[28] declared a fundamental constitutional principle in course of answering a question, framed by the Court (para 31): " What then is the nature of the treaty-making power of a sovereign State?"

> "State[d] broadly the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by constitutional amendment will naturally depend on the

[27] published by Wadhwas, Nagpur & N Delhi

[28] AIR 1960 S C 845 [Coram : B. P. Sinha, C.J.I., S. K. Das, P. B. Gajendragadkar, A. K. Sarkar, K. Subba Rao, M. Hidayatullah, K. C. Das Gupta and J. C. Shah, JJ.]

provisions of the Constitution itself. We must, therefore, now turn to that aspect of the problem and consider the position under our Constitution."

In *Raja Ram Pal vs. Hon'ble Speaker, Lok Sabha & Ors* (Case No.W. P.(civil)1of 2006) the e Hon'ble Court, per Y.K. Sabharwal, CJI., explained our Constitutional Scheme observing:

"To appreciate the contentions, it is necessary to first examine the constitutional scheme.
That the Constitution is the Supreme lex in this Country is beyond the pale of any controversy. All organs of the State derive their authority, jurisdiction and powers from the Constitution and owe allegiance to it. This includes this Court also which represents the judicial organ."

In effect, there is, for good constitutional reasons, a departure from the British view on the Treaty-making power of the Crown succinctly stated in the oft-quoted dictum of Lord Atkin set forth in *Attorney General for Canada v. Attorney General of Ontario* [1937] A.C. 326 at 347. Lord Atkin's distinction between (1) the *formation*, and (2) the *performance* of the obligations created under a treaty is correct and well understandable under the British constitution. Under the British Constitution the Crown is *not a creature* of the constitution, it is, of course, an integral part of the constitution. The British constitutional history is an expanded metaphor of the struggle conducted over centuries in the name of people against the absolute power of the Crown. Even this day there is nothing wrong in saying that the Crown has all the powers conceivable except that which it lost to Parliament and the Courts in course of the country's grand and majestic constitutional history. At the international plane the Crown exercised its inherent powers unquestioned by the courts till its acts offended the law made by Parliament, or worked to the prejudice of people's legally protected interests compendiously known as their rights. Treaty is done in exercise of prerogative power by the Crown under the constitutional supposition that it concerns the Crown's foreign affairs, not of much concern to the subjects of the realm. The exercise of this power was not of much consequence till the beginning of the 20th century. Hence the formation of a treaty at international plane was wholly in the Executive's province. *In India the Executive possesses no extra-constitutional power.* As a creature of the Constitution it is subject both in the matter of the *formation* of a treaty and the *performamce of obligation* to the limitations placed by the Constitution and the law. Our Constitution grants our Parliament a specific legislative competence to frame law governing not only the *implementation* of a treaty, but also its

formation (vide entry 14 of the Union List in the 7th Schedule of our Constitution). Thus our Constitution renders the British view *ex facie* anachronistic. Whether a member of the Executive-government functions in Delhi, or Detroit, it must conform to the Rule of Law as established under our Constitution, as it a constitutional principle of the highest importance that it has no hip-pocket.. In the U.K the Crown is still the inheritor of inherent powers not yet deprived of; in India the Executive would sink or swim in terms of the Constitution.

15.. *The Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar (at pp. pp. 137-144, esp. p. 139-140) [The Report would be filed before the Hon'ble Court] gives a graphic account of the **constitutional limitations** on Treaty-Making Power: to quote—

> "The limitations on the exercise of the Treaty-making power flow from certain principles which are fundamental to constitutional governance of India. The *first* is the general principle of accountability which requires government to account to the people for every exercise of power through the aegis of institutions set up by or under the Constitution. Such accountability may be through the law which lays down norms which discipline and govern the exercise of the power. Where no such law exists –and none exists to discipline the exercise of the treaty-making power – the government is not free to do what it likes. Where the government chooses to proceed without serious recourse to any form of accountability, other institutions of governance cannot stand idle by. Where Parliament is rendered powerless, other institutions must secure this accountability to such measure as may be deemed necessary. Where something is done in secret, simply breaking the veil of secrecy may be enough. It all depends on the facts and circumstances. The *second* principle which is fundamental to the rule of law is that no person's rights can be altered without reference to 'law'. If the executive simply interfere with the exercise of rights or alter them in any way other than *de minimus* infringement, this would constitutionally improper and call for the interdiction of judicial process. The *third* set constraints flow from the basic structure of the Constitution. Although the basic structure doctrine was first enunciated to contain an over-extensive use of power to amend the Constitution, the principles underlying the basic structure are also crucial aids to interpretation and factors to be borne in mind when considering the exercise of the executive power."

A miscomprehension which must be removed.

16. That the simplistic view, adopted by many under the influence of the British constitutional practice, is that a Treaty is not a matter of domestic concern unless it affects:

(a) the law of the land, and

(b) the vested rights protected under the law.

These issues are to be considered under the parameters of the Constitution of India:

(i) The Executive power, under our Constitution, is co-terminus with the powers of Parliament; but at any given point of time the ambit of the Executive power is wider than the legislative field occupied by the Parliamentary enactments. But the Executive power, too, must be exercised not *de hors* the constitutional provisions. No Treaty can authorize, even in the realm of the exercise of the Executive power, to ride roughshod over our Constitution's commitments to the nation. Our Supreme Court has perceptively observed that in most matters the exercise of the Executive power "are not far removed from legislation"[29]. Hence the exercise of the executive power cannot avoid total subservience to the constitutional limitations.

(ii) The Executive can coerce our Parliament to implement a Treaty provisions by hoisting the dread of India's *international delinquency.* Chapter and verse can be quoted from the text-books of International Law and the decisions of the international tribunals to mesmerize and coerce our representatives. What this Petitioner has stated is not a *reductio ad absurdum*: it has already taken place several times.[30].

(iii) There are numerous key-areas in our national governance and socio-economic management where the Executive policy decisions and administrative directions can bring about changes in utter disregard of the constitutional limitations. This is much facilitated in our country on account of lack of public vigilance, and the enormous impact of the economic gladiators and looters under mask, and the emergence of the features of a Sponsored State. Executive can subject our country to several international and domestic commitments of momentous consequences. Every student of history knows that the Weimer Constitution of Germany was destroyed by the covert and overt maneuverings of the Executive Government. As a citizen this Petitioner believes the bell is tolling for our Constitution too.

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[29] *Jayantilal Amritlal v. F.N. Rana* AIR 1964 SC 648

[30] also 'Uruguay Round Final Act: A Betrayal of the Nation' in Shiva Kant Jha's *The Judicial Role in Globalised Economy* pp. *341-356*

(iv) . The *Report of the Peoples' Commission on GATT* (by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges) has rightly summarized the correct constitutional principle when it said[31]:

> "The Constitution makers intended the government to be possessed of an executive power which is wider than the narrower duty to give effect to legislation (see *Ram Jawawayya Kapur v. UoI* AIR 1955 sc 549). But in exercise of this wider power, the rights of citizens cannot be taken away without specific legislative sanction and authority (*Bijoe Emmanuel* AIR 1987 SC 788).This rule is fundamental and a necessary adjunct to the recognition of a wide executive power. Equally, in normal circumstances, it is somewhat sanguinely assumed that all exercise of the executives power would be consistent in a manner consistent with the principles of the basic structure of the Constitution. But, normal times tread unwarily into abnormality. That is why the touchstone of the basic structure has been inducted to discipline the exercise of even those special exercises of sovereign power such as the imposition of President's Rule and the like (see *S.R. Bommai* (1994) 3 SCC 1; …. The older view that the exercises of executive power are immune from judicial review has now correctly been abandoned (see *Central for Civil Services Union v. Minister of Civil Service* (1984) 3 All ER 935).

(v) It is often said that the treaty provisions, when they offend a law, or cause prejudice to the vested rights of people, require Parliamentary consent for implementation. But the Executive has open to it vast areas wherein it is free to implement treaty terms by purporting to exercise its powers in the executive realm which is much wider than the conventionally conceived legislative realm. It is submitted that this sort of fine distinction is, under the present-day polity, totally otiose and anachronistic. The point emerges very clear that despite the laws protected under the 9th Schedule to the Constitution, the Government is liberally granting corporate *zamindaris* by facilitating them even *de hors* statutes.

(vi) It is a matter of great concern that the Executive has subjected our nation to international obligations by compromising with the jurisdiction of our Supreme Court. The Articles III and XVI virtually subjugate our Superior Courts to the WTO.

> Article III**, Paragraph 3.** The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.
>
> **Article XVI, Paragraph 4.** Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

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[31] At p. 140 of the Report

Was it proper for the Executive to do so by signing this WTO Treaty in 1994 at Marrakesh? By all standards that act was *utra vires,* and, in effect, the betrayal of our Constitution. Our courts are duty bound to uphold the Constitution as it is bound under oath to do so. In *Marbury v. Madison*[32], the Chief Justice Marshall refers to the effect of the judge's oath in words which time cannot make stale till our Constitution meets the fate of the Weimer Constitution:

> "How immoral to impose on them, if they were to be used as the instrument, and the knowing instruments, for violating what they swear to support!"… Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take oath, becomes equally a crime."

The Executive had no power to sign a Treaty which had the effect of shedding off to a foreign body our judicial and legislative space.

(vii) In the *Minister of State for Immigration and Ethnic Affairs v Teoh*[33], case, the Court found that by entering into a treaty the Australian Government creates a "legitimate expectation" in administrative law that the Executive Government and its agencies will act in accordance with the terms of the treaty, even where those terms have not been incorporated into Australian law. The Court also said that where a decision-maker intends to act inconsistently with a treaty, the person affected must be given a chance to argue against it. If not, the decision could be set aside on the ground of unfairness. It is clear from the facts (of which this Hon'ble Court should take a judicial notice), that the mere fact of ratification by the Executive can generate legitimate expectations of the MNCs etc. And we would have no option to honour them otherwise India would be considered a delinquent under Public International law may, perish the thought, expose our country to cruise missile! This Hon'ble Court may consider this aspect of the matter. Very recently we have read in the newspaper that the US administration told our Government to ensure that the Cola company is not vexed in India. That was an act of intervention the seriousness of which went unnoticed in our low-arousal society.

(viii) Under the imperative agenda to promote the vested interests of the Market, under the direct and camouflaged directives of the trinity of the present-day global architecture (the IMF-World Bank-WTO), the Executive has forgotten the constitutionally mandated land reforms which could have ensured means

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[32] 2 L Ed 60 (1803)
[33] (1995) 128 ALR 353, (1995) 69 ALJR 423

of livelihood for the common Indians. The strategy of the Executive Government, in its most sinister form, is evident in 'agriculture'. [34] Now under their mandate agriculture is being corporatized, agri-business under the corporate *imperium* is being promoted in most ruthless manner, seed sovereignty is gone, water is fast ceasing to be a human right, starvation deaths of the poor farmer have ceased to be of concern to the *de luxe* India of high net worth creatures with their heart abroad.

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[34] Daniel Bell, in his *The Coming of the Post-Industrial Society*: *A Venture in Social Forecasting* very aptly said that politics has become the 'cockpit' of the post-industrial society. Politics has become the visible instrument of the invisible hand controlled and guided by the corporate imperium ruling now the world under the U.S leadership. This trend manifests itself in many segments of socio-economic management of country. One such segment is agriculture involving the plight of the agriculturists, tillers, and farm labourers. Whilst the lobbyists for the de luxe India, and the protagonists of the India incorporated plead for reducing taxation to a vanishing point, they are most vociferous for subjecting the income from agriculture to tax by eliminating exemption granted to it under Section 10 of the Income-tax Act, 1961. The constitutional mandate to reduce the concentration of wealth, and the various statutory commands under the land ceilings and reforms Acts have virtually been given up, or diluted to the point of being wholly effete. In this present day market economy we are moving in the reverse gear. We have allowed our State to become a Sponsored State. Granting huge plots of land to the Special Economic Zones, and corporations including MNCs are creating a breed of neo-zamindars.

Their interests are being promoted by the executive government through international agreements done under the oblique system, which has been constructed through the studied art of deception and craft of corruption.

The strategy the waxing neo-colonialists is to destroy our way of life by turning the agriculturists and tillers to a band of serfs and slaves for the corporate masters which are a crazy herd of greedy reapers of super profits.. Corporatization of agriculture is clearly a new zamindari settlement. It would be of the worst type as we would by ruled by heartless corporations having an evident symbiotic relationship with the government, which would exist as their protectors and facilitators. This assertion is borne out by examining the attitudes of our government to the taxation of agricultural, and of capital gains. In 1970 the definition of 'agricultural income' was altered retrospectively to cast a net wider. In 1973 the statute was amended to provide for the inclusion of agricultural income in one's total income for the purposes of determining the rates applicable to one's total income. Now the sinister idea to tax agricultural income is on the anvil. These facts are meaningful when we see how untaxing and mitigation of tax have been liberally provided in recent years in the segment of capital gains. With effect from 1.4.88 in the case of a share held in a company the holding period for being treated as a short-term gain became 12 months instead of 36 months in other cases. After 1991 our government played surrogate mother for the FIIs, MNCs, and others of similar feathers. Capital market liberalization allowed investment capital to flow in and out. The predatory international financiers made best of this crazy international capital churn. Now the position is those who reap rich harvests do not pay any tax, except that insignificant domestic segment which now bears only a much-attenuated burden.

Liberalization of the financial and capital markets let loose a flood of short-term capital which Stiglitz explains as "… the kind of capital that looks for the highest return in the next day, week, or month, as opposed to long-term investment in things like factories." The view of the IMF and its protégées is that their transactions in capital and capital gains be not taxed; if at all taxed, they be taxed less. They are not troubled by qualms of conscience. Writing about the U S tax policy Stiglitz has observed in his *Roaring Nineties*: "Another example was what we did with tax policy. As the bubble was going up and getting worse, what did we do? We cut capital gains taxes, saying to the market: if you make more money out of this speculative bubble, you can keep more of it. If you look at what happened to tax policy during the nineties, it is quite astounding. What we did in 1993 was raise taxes on upper-middle-income Americans who worked for living, and then in 1997 we lowered taxes for upper income Americans who speculated for a living. You ask the question: what sorts of values did this change represent?" Things are worse in our country. Rightly did Thomas Balogh say in his *The Irrelevance of Conventional Economics*: " The history of economic theory is a tale of evasions of reality."

It would be a disaster if the agriculturists and the farm labourers were marginalized by the corporate power, which believes for obvious reasons in commercialism, corporatism, consumerism, hedonism, and acute crazy greediness. India's culture would be destroyed if our agriculture were ruined. And this is what the neo-colonialists want. With the ruin of agriculture the verve that sustains our independence and culture would also go. Besides, is not what Edward Gibbon said in the 18th century wholly true for us: 'All taxes must, at last, fall upon agriculture.'

(ix) The compradors have asserted themselves as they had done when the Company Bahadur had captured power for corporate loot. The minority governments of Shri Chanda Sekhar, and Shri P.V. Narsingh Rao and the spate of coalition governments turned India a Sponsored State with rampant corruption in public life reminding one of the the morbid stories of sordid bribes of the early history of the East India Company in our country. As the Company Bahadur got appointed its minions in the Nawab's government to run the show where the interests of the Company lay, a breed of IMF-World Bank-WTO trained persons, (quoting abracadabra of neo-corporate colonialism from Felstein, Milton Friedman , Frederich von Hayek….; and hoisting what was being done by Regan in the USA and Mrs. Thatcher in the U.K. as the supreme acts of prudence) made our government forget its constitutional commitments: the crowning act of this degradation being the WTO Treaty done in 1994. What, writing about the Treaty of Versailles, Pandit Nehru writes with reference to President Wilson, David Lloyd George, and Clemenceau, is equally true, perhaps much more true, of our wielders of power. Pandit Nehru had said:

> "…. And to these three men fell the great task of moulding the world afresh and healing its terrible wounds. It was a task worthy of supermen, demigods; and these three men were very far from being either. Men in authority – kings, statesmen, generals, and the like – are advertised and boomed up so much by the Press and otherwise that they often appear as giants of thought and action to the common people. A kind of halo seems to surround them, and in our ignorance we attribute to them many qualities which they are far from possessing. But on closer acquaintance they turn out to be very ordinary persons. A famous Austrian statesman once said that the world would be astounded if it knew with what little intelligence it is ruled So these three, the "Big Three", big as they seemed, were singularly limited in outlook and ignorant of international affairs, ignorant even of geography!"[35]

We need this Constitution as an impregnable dyke against their anti-people act. This was the reason why the *Case of the Five Knights* was rejected by the framers of the U.S Constitution [vide **Annex** 'C' p. 167].The Executive cannot bid farewell to the

[35] Glimpses p.677 Jawaharlal Nehru Memorial Fund , OXFORD UNIVERSITY PRESS 10th ed

Welfare State. The reality which is being generated under the directives of the aforesaid trinity has been portrayed in a modern allegory:

> "The Cloud Minders, episode 74 of the popular science fiction television series *Star Trk,* took place on the planet Ardan. First aired on Feb. 28, 1969, it depicted a planet whose rulers devoted their lives to the arts in a beautiful and peaceful city, Stratos, suspended high above the panet's desolate surface. Down below, the inhabitants of the planet's surface, the Troglytes, worked in misery and violence in the planet's mines to earn the interplanetary exchange credits used to import from other planets the luxuries the rulers enjoyed on Stratos."

19. That in "*A Consultation Paper on Treaty-Making Power under our Constitution"* placed before the National Commission to Review the Working of the Constitution, it has been appropriately observed:

> "**(iv) <u>Role of Judiciary in Treaty-making:</u>**
>
> " Judiciary has no specific role in treaty-making as such but if and when a question arises whether a treaty concluded by the Union violates any of the Constitutional provisions, judiciary come into the picture. It needs no emphasis that whether it is the Union Executive or the Parliament, they cannot enter into any treaty or take any action towards its implementation which transgresses any of the constitutional limitations….. I am sure that if and when any such question is considered by the Supreme Court, it will be considered in greater depth."

It is submitted that this is the most appropriate time to examine these high constitutional issues for the first with reference to two types of Treaties which are being questioned by this Writ Petition.

17.That, it is submitted in passing, that as this Hon'ble Court is accustomed to treat every violation of the Fundamental Rights, and other constitutional rights with all the seriousness that its constitutional role as the upholder of the Constitution demands, it would consider the issues raised in this Writ Petition under that judicial broad spectrum as without this the infarctions of our Constitution by the Executive wing of the government which has allowed itself to be transformed from a welfare state committed socio-economic justice into a proto-fascist dispensation working for f an emerging senate of the MNCs and their ilk promoting on the wreck of our Constitution neo-liberal agenda. The gruesome reality is graphically captured by Noam Chomsky[36]:

> 'Governments now face a "dual constituency conundrum', which pits the interests of the voters against foreign currency traders and hedge-funds managers 'who conduct a moment-to-moment referendum 'on the economic and financial policies of developing and developed nations alike", and the competition is highly unequal."

[36] Chomsky, *Hegemony or Survival* p.138

But the WTO Treaty, which is a radical revision of our Constitution, was done even without Parliamentary approval, not to say of referendum which political prudence and constitutional commitments imperatively required. It is the most crying moment of our history when this Hon'ble Court is invited by this Petition to tell the Executive, 'This Far, and No Further'[otherwise this great Republic is bound to reap whirlwinds of which the looming and much-invited catastrophe of the World War III would just be a minor flake]. The issue raised in this Writ Petition is a most important constitutional question as the nation has good reasons to shudder at the inevitable consequences of the Alliance to be brought about by the Executive Government under the Agreements to come up as a sequel to the Henry J Hyde US-India Peaceful Atomic Energy Cooperation Act (Hyde Act) under the scenario the luridness of which is portrayed by Praful Bidwai in these lines quoted with approval by Noam Chomsky[37]

> "It sees Hindus and Jews (plus Christians) as forming a 'strategic alliance' against Islam and Confucianism."

Does our Constitution permit the Executive to form and ratify such treaties without even Parliamentary deliberations *on the actual and final draft of a treaty*? This Hon'ble Court should declare the ambit of the limitations under which the Executive government can tread on the thin crust of lava.

18.. That the constitutional validity of the impugned treaties and the declaration of the impropriety of the treaty-making process which has given birth to them give rise to the issues of greatest constitutional importance affecting the lives of the common millions and the very fate of our Sovereign Socialist, Democratic Republic. Treaties are now virtually possible *inter se* corporations and our government. This is in addition to the treaties between the sovereign governments under corporate *imperium.* The impugned Treaties show a massive transfer of 'rights' from citizens to investors in the new global economy. At a time when peoples all over the world feel that their fundamental democratic rights as citizens (e.g., the Universal Declaration of Human Rights) and the ecological rights of the planet (e.g., the Earth Charter from the Rio Summit on the Environment) are not protected by governments, the rights and freedoms of transnational

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[37] ibid p. 160

corporations are being guaranteed through trade and investment treaties that have become the new global economic constitutions. This transfer of rights, in turn, is reinforced by radical shifts in the balance of power between the government and corporations.' The WTO treaty, cast in the format of *pactum de contrahendo*, is surely the most offending to the very fundamentals of our polity and the Constitution.

21. That the corporate *imperium* is, as both the Tax Treaties and the WTO Treaty show, are under the evident patronage and protection of the hegemony of the U S A which now considers International Law a mere " hot air" and reserves to itself ' "the right to act "unilaterally when necessary", including the "unilateral use of military power" to defend such vital interests as "ensuring uninhibited access to key markets, energy supplies, and strategic resources"'[38]. It asserts its inherent right to access to protect its commercial interest. The interests protected under the Treaty terms can be enforce by even anticipatory intervention enforced by broad spectrum of forces ---from trade sanctions to cruise missile or the horrendous space weapons to protect '" U S national interests [military and commercial] and investments" including missile defense, as well as "space-based strike weapons" enabling "the application of precision force from , to, and through space"" [39] Should the Executive through an Opaque System be allowed under our Constitution to frame treaties as it is doing? If this is permissible then our Constitution, with all its fundamental rights and basic features, is in , perish the thought, in a terminal illness.

No Power to the Executive at the International Plane .

19. Our Constitution does not grant our Executive any external sovereignty through affirmative grants. Under our Constitution it is wrong to think that power over external affairs, in origin and in its essential character, is different from that over internal affairs. The President speaks or listens as a representative of the nation but only within Constitutional limitations. The Executive under our Constitution cannot preempt law. If this is allowed to happen, our Constitution may be driven by the Executive to commit suicide by its own boot-straps; and our Democracy will come to an end.The constitutional limitations, within which all executive power is to be exercised, are set forth in our Constitution itself. Our Constitution organizes and distributes the whole of the State

[38] President Clinton, address to U N, 27 Sept 1993; quoted by Noam Chomsky, Hegemony Or Survival p.15
[39] Chomsky p. 229

power through its well-knit structure leaving the Executive with no hip-pocket with reserve power outside the ken of the Constitution. All the organs of the State have only *conferred* powers. The idea of Sovereignty, finding references in some judicial dicta, is irrelevant for a government under a written constitution with entrenched rights for the people. *Oppenheim*[40] aptly observes:

> "The problem of sovereignty in the 20th Century. The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power and authority, conceived as the highest, underived power within the state with exclusive competence therein"

Under our constitutional frame-work the question of inherent power does not arise. The right question is: whether the government possessed the legal power to do what it has done. Prof. Laski observed :

> " We have to make a functional theory of society in which power is organized for ends which are clearly implied in the materials we are compelled to use. The notion that this power can be left to the unfettered discretion of any section of society has been reveled as incompatible with the good life. The sovereignty of the state in the world to which we belong is as obsolete as the sovereignty of the Roman Church three hundred years ago". [41]

The historical evolution of the idea of Sovereignty is worth being kept in view.[42]

[40] Oppenheim, *Inter. Law* 9th ed. Vol. 1 'Peace' p. 125
[41] ibid p. 102
[42]

Centuries	**Const law perspective**	**International law perspective**
1. 16th century	The monarch had unlimited and absolute *"L'Etat,c'est moi"* [I am the State]. Sovereignty was invoked to establish supremacy over the feudal and church powers.	The Sovereign , Bodin said, could not be bound by the laws which he makes (*majestas est summa in cives ac subditos legibusque soluta potestas*).
2. 17TH century	Thomas Hobbes' the *Leviathan (1651)* (or commonwealth) is 'an artificial man', **sovereignty** is its soul, the magistrates are its joints, 'reward and punishment, by which fastened to the seat of the sovereignty every joint and member is moved to perform his duty, are the nerves that do the same in the body natural' "But this doctrine of inherent sovereign power of the Executive was tamed finally by the Bill of Rights	Hobbes in *Leviathan,* and James I in *The Law of Free Monarchies.* Hobbes carried forward the thesis of Bodin making it grosser in support of the absolutist State. The international sphere was the battle ground for the wolves, practically of no concern for ordinary men for whom Hobbes had nothing but contempt.

3. 18th and the	'The theories of John Locke at the end of the 17th century and of Jean-Jacques Rousseau in the 18th century, that the state is based upon a compact of its citizens, through which they entrust such powers to a government as may be necessary for common protection, led to the development of the doctrine of popular sovereignty that found expression in the U.S. Declaration of Independence in 1776. Another twist was given to this concept by the statement in the French constitution of 1791 that "Sovereignty is one, indivisible, unalienable and imprescriptible; it belongs to the Nation; no group can attribute sovereignty to itself nor can an individual arrogate it to himself." The idea of popular sovereignty exercised primarily by the people became thus combined with the idea of national sovereignty exercised not by an unorganized people in the state of nature, but by a nation embodied in an organized state.'	Though published in 1625 the *De Jure ac Pacis of Grotius* had wide impact in the evolution of international law**.**

4. 19th th century	John Austin in his *The Province of Jurisprudence Determined* (1832) He ' came to the conclusion that sovereignty was vested in a nation's parliament. This was the supreme organ that enacted laws binding upon everybody else *but that was not itself bound by the laws and could change these laws at will.* This particular description again fitted only a particular system of government, such as prevailed in Great Britain in the 19th century.' ii But a new experiment in America. *The Constitution created a government under limitations both in the domestic jurisdiction, and at the international plane.* 'When this idea of legislative sovereignty crossed the Atlantic Ocean, it did not really fit the American situation. The Constitution of the United States, being the fundamental law of a federal union, did not endow the national legislature with supreme power but imposed important restrictions upon it. A further complication was added when the Supreme Court of the United States asserted successfully its right to declare laws unconstitutional. While this development did not lead to a concept of judicial sovereignty*, it seemed to vest the sovereign power in the fundamental document itself, the Constitution.* This system of constitutional sovereignty was made more complex by the fact that the authority to propose changes in the Constitution and to approve them was vested not only in Congress but also in the several states and special conventions called for that purpose. It could be argued, therefore, that sovereignty continued to reside in the states or in the people, who, under the terms of the 10th Amendment to the Constitution, retained all powers not delegated to the United States by the Constitution or expressly prohibited by it. Consequently, the claims by the states' rights advocates that states continued to be sovereign were bolstered by the difficulty offending a sole repository of sovereignty in a complex federal structure; and the concept of dual sovereignty of both the union and the component units found a theoretical basis. Even if the competing theory of popular sovereignty were accepted, vesting sovereignty in the people of the United States, it still might be argued that this sovereignty need not be exercised on behalf of the people solely by the national government, but could be divided on a functional basis between the federal and state authorities.'	Imperialism and colonialism created realpolitik commande by the imperial powers for mercantilist and imperial pursuits. For common people the antics at the international plane hardly mattered

AN ESSENTIAL DIGRESSION

20. That this Petitioner deems it appropriate to draw up at the threshold a perspective in which the issues, especially those relating to the adoption/ratification of the Uruguay Round Final Act, are to be judicially appraised. This is done, in brief, by highlighting the importance of the 'context' and by a fleeting analysis of the contextually relevant the trinity[43] erected as the cornerstone of our Constitution: the Fundamental Rights, the Directive Principles, and the Preamble.

(A) **Context.**

The Value of the Context

21. That Glanville Williams, explaining the concept of 'context', says:

> "It is, nevertheless, difficult to reconcile the literal rule with the "context" rule. We understand the meaning of words from their context, and in ordinary life the context includes not only other words used at the same time but the whole human or social situation in which the words are used."[44]

The Hon'ble Supreme Court too had observed the same in *Union v. Sakalchand*[45]*:*

In *Shelley v. Kraemer* 334 US 1-23 the U.S Supreme Court pointed out that the historical context in which the Fourteenth Amendment became a part of the Constitution indicates that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on consideration of race and colour; and the provisions of the Amendment are to be construed with this fundamental purpose in mind.

22. That the context under which this Hon'ble Court should examine the various issues as raised in this Writ Petition is this overweening hegemony of the Economic Globalization which ruthlessly, but masquerading as a benefactor, subjugates the political realm the power structure (polity) which we had organized by through the Constitution of which, under oath, this Hon'ble Court is the "upholder" (uphold 'Hold up, support, sustain; maintain unimpaired and intact' *Shorter Ox. Dict*.). The core situation, in which

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[43] *Dalmia Cement (Bharat) Ltd v. UoI* (1996) 10 SCC 104; *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC at 194; *Minerva Mills v. UoI* AIR 1980 SC 1789; *Paschim Banga Khet Mazdoor Samity v. W.B*. AIR 1996 SC 2426

[44] G. Williams, *Learning Law* 11th ed p 104

[45] AIR 1977 SC 2328 at p. 2358

the issue raised in this Petition is to be considered, has been graphically portrayed by Geza Feketeluty thus:

> "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures."[46]

This Petitioner submits that the Executive, *de hors* our Constitution, has turned our country into a Sponsored State where reality is fast becoming unreal.

B. **Juridical Analysis of Rights and Interests under the interstices of the Part III and Part IV of our Constitution.**

23. That this analysis is worthwhile as it is relevant to both the following situations as follows:

(a) If the matter under consideration is examined under the parameters of the British law, especially with reference to the observations of Sir R. Phillimore's decision in *The Parlement Belge* (1870), 4 P.D., pertaining to treaty-making which we had followed till the commencement of our Constitution. These are three situations in which Parliament's approval/mandate is essential;

(i) where any Parliamentary law stands affected by the terms of a treaty;

(ii) where the incidence of taxation is created or varied by the terms of a treaty; and

(iii) where treaties affect private rights in a broad sense as conceived in *The Parlement Belge.*

(b) If the matter is examined wholly within the parameters of our Constitution, (as, it is submitted, is the right thing to do), the treaty law in the post-Constitution phase continues to be what it was before the commencement of the Constitution[47] but overridden by the provisions of our Constitution [viz. Articles 135 and 372 of the Const.] as the powers of the Executive in our country are only *conferred* powers

24. That the Fundamental Rights enforced through remedies provided under Art. 32, are also part of the *basic structure* except the right to property which is no longer a fundamental right. As forming part of the basic structure in our Constitution, **the fundamental rights are under express symbiotic relationship with other basic features**: viz. in *Kesavananda's Case* (AIR 1973 SC1461, also *S. R. Bommai v. Union of*

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[46] 2001 *Britannica Book of the Year*. 191.

[47] *Gujarat v. Vora Fiddali* (AIR 1964 SC 1043) this Hon'ble Court held that in India Treaties occupy the same status, and adopt the same treaty practice as in the United Kingdom. The British Parliament which enacted G.I. Act, 1935 did not embody the American view of treaties in it. The existing law was continued by the G.I. Act,1935 by the Indian Independence Act 1947, and by our Constitution.

India AIR 1994 SC 1918) the Hon'ble Supreme Court determined certain features of our Constitution constituting basic structure: these are—

(1) Supremacy of the Constitution;

(2) Republican and Democratic form of Government;

(3) Secular character of the Constitution.

(4) Separation of powers between the legislature the executive and the judiciary

(5) Federal character of the Constitution.

25.**That the symbiosis between the Fundamental Rights and the Directive Principles have been often stressed by the Supreme Hon'ble Court**[48]. "With the expanding horizons of socioeconomic justice, the Socialist Republic and Welfare State which the country endeavors to set up…. The thrust of Article 14 is that the citizen is entitled to equality before law and equal protection of laws. In the very nature of things the society being composed of unequals **a welfare State** will have to strive by both executive and legislative action to help the less fortunate in society to ameliorate their condition so that the social and economic inequality in the society may be bridged."[49] "The broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle and, therefore, a law designed to promote a Directive Principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice for all. If the law was aimed at the broader egalitarianism of the Directive Principles…."[50], "The Constitution envisages the establishment of a **welfare state** at the federal level as well as at the State level."[51] In *Kesavananda's Case* (AIR 1973 SC1461 at 1641) , Hegde and Mukherjea JJ. observed:

> "The Fundamental Rights and Directive Principles constitute the "conscience of the Constitution…". There is no antithesis between the Fundamental Rights and Directive Principles ….and one supplements the other."

26. That this symbiosis can be illustrated with reference to Articles 14 and 21. In *Indra Sawheny v. UoI* (AIR 1993 SC 447 para 4) the Hon'ble Supreme Court held that Art 14 is to be understood in the light of the Directive Principles. Art. 14 cannot triumph unless effective steps are taken to realize the objectives set forth under Articles 38 and 39, 39A,, 41…. How can Art. 21 be really effective in our polity unless there is right to

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[48] Per Majority, Bhagwati J. contra, in *Minerva Mills Ltd. v. Union of India* AIR 1980 SC1789: "Fundamental rights occupy a unique place in the lives of civilized societies and have been variously described in Judgments of the Supreme Court as "transcendental" 'inalienable' and "Primordial." …..The Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.' the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience.

[49] *D. S. Nakara v. Union of India* AIR 1983 SC 130

[50] *Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Ltd.* AIR 1983 SC 239

[51] *Paschim Banga Khet Mazdoor Samity v. W.*B. AIR 1996 SC 2426

livelihood? In *Narendra Kumar v. State of Haryana* IT (1994) 2 SC 94 the Hon'ble Supreme Court observed that the right to livelihood is an integral facet of the right to life. In a number cases the activist dimensions of Art. 21 have been creatively explored. After a detailed analysis of the provisions pertaining to the TRIPS under the WTO Treaty the People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar observes:

> " In view of the foregoing changes to the existing laws required by the TRIPS Agreement and Agriculture Agreement and the anticipated effect on the price of medicines and self-sufficiency of food, we are of the view that the Final Act will have a direct and inevitable effect on the fundamental right to life enshrined in Art 21 of the Constitution" [52]

27. Art. 37 make the Directive Principles non-enforceable by the court, "but the principles laid down are nevertheless fundamental in governance of the country and it **shall be the duty of the State** to apply these principles in making laws." Jurisprudence recognizes rights some of which are enforceable whilst others are not.[53] In fact, our Hindu jurisprudence defines *dharma* as *kartavya* only[54]. Leon Duguit does not recognize rights: he recognizes **duties** only.[55] The Duty cast under Art 37 is cast on the State to be discharged for the benefit of 'We, the People' who have their interests protected by the Constitution. As a treaty, cast in the protocol of *pactum de contrahendo,* is a treaty to strive through negotiations to effect someday somehow the objectives of the treaty not fait accompli at the outset,, the Directive Principles generate legitimate expectations, often intersecting and often interacting with the Fundamental Rights, to create a welfare State. The State can take its time in view of scarce resources to fulfill its duties, but it would exceed its authority if it abrogates them, or frustrates them, or make their realization *prima facie* as remote as an *Eldorado*. Duguit's oft-quoted view is, to quote Allen[56] :

> 'In other words, the notion of public service replaces the conception of sovereignty as the foundation of public law.'

And it is worthwhile to note what Prof Smith has observed on the *types of rights*:

> " …….constitutional provisions about individual rights are far far from homogenous. They may be manifestly non-justiciable, ostensiblely justiciable but in reality non-justiciable, or truly justiciable. They may be statements of

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[52] The People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar at P. 157
[53] Allen, *Law in the Making* p. 40
[54] Mulla, *Hindu Law*. Introduction by Desai.
[55] Allen, *Law in the Making* p. 40
[56] Allen, *Law in the Making* p. 40

> objectives that ought to be pursued under the constitution; such statements may well appear in a preamble (as in India and Tanganyika) in so far as they perfect general aspirations or in a set of directive principles of state policy or principles of law-making in so far as they purport to impose on the state a positive but unenforceable duty to act in conformity with them in the interests of the people……..They may be rules of strict law purporting to confer rights on individuals to secure the fulfiment of duties owed to them, or otherwise restricting the competence of the legislative and executive organs of the state for the protection of individual interests. Persons aggrieved by legislative acts or omissions that violate the letter or spirit of the constitution may or may not be afforded an opportunity of obtaining judicial redress."[57]

Noting the nature of the Directive Principles, in his Rau Lectures, Hegde J had said:

> "….a mandate of the Constitution, though not enforceable by courts is none the less binding on all organs of the State. If the State ignoresthese mandates, it ignores the Constitution."[58]
>
> ´….the view that the principles were not bindingif they were not enforcable by law, originated with John Austin, and Kelson propounded a similar view. However, Prof. Goodhart and Roscoe Pound took a different view. According to them, *those who are entrusted with certain duties will fulfill them in good faith and according to the expectations of the community*."[59]

28. That under our polity both the Fundamental Rights and the Directive Principles protect people's interests generating in the case of the Fundamental Rights a set of enforceable rights under Art 32, whereas in the case of the Directive Principles a set of non-enforceable rights holding as its content legitimate expectations from the State with an overarching objective of the **welfare state**. Welfare State in England was a policy decision of the Crown and the Parliament. *In India, the welfare State is the very mission of the Constitution which neither Parliament nor the Executive can ditch for any reason whatsoever.* In India the radical transformation to the regime of Market can be done only by 'We, the People', or , to a limited extent, by the exercise of the constituent power.

IV.

SEMINAL FACTS

[Pertaining to the two Segments: I. the Tax Treaties (pp. 34 – 67 , and Segment II. the WTO treaty (pp. 67-91)]

SEGMENT I (Tax Treaties)

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[57] de Smith, *The New Commonwealth And Its Constitutions* pp. 165-166
[58] Hegde, *Directive Principles in the Constitution of India* ('the Rau Lectures') p. 49
[59] Hegde, *Directive Principles in the Constitution of India* ('the Rau Lectures') p. 49-50

(A) What this Petitioner's targets in this segment of the Writ Petition: the gravamen of the Grievance

29. The main points of criticism for judicial consideration are these four:

(i). To the extent the Double Taxation Agreements discriminate *inter se* the native assesses and the foreigners in the matter of taxation on income where the taxable events take place in the territory of India, they offend Art 14 of the Constitution which, besides being the most important of fundamental rights, is one of the basic feature of the Constitution of India. Viscount Simonds *Collco Dealings LTD v. IRC*[60] aptly observed:

> "But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking steps to protect its own revenue laws from gross abuse or save its own citizens from unjust discrimination in favour of foreigners."

(ii) As the introduction/implementation of the provisions pertaining to the Mutual Agreement Procedure through the Instruction No 12 of 2002 dated Nov. 1, 2002, and the Rules prescribed in Part IX-C of the Income-tax Rules, 1962, already mentioned in *para* 4(i) *supra*, are without statutory foundation, and are, thus, subversive of the Rule of Law, as they mandate ruthless subversion of many seminal provisions of the Income-tax Act, 1961,causing gross impermissible discrimination, this Hon'ble Court is requested to hold them invalid Executive acts on account of being *ultra vires* its power to make DTAAs in exercise of a delegated authority granted under Section 90 of the Income-tax Act 1961..

(iii) The aforesaid Instruction and the Rule are ex facie violative of Art 14 as they effect gross discrimination; and Art 19(1) of the Constitution as they create an Opaque System which surely denies our Right to Know without which the fundamental right under Art 19(1)(a) becomes otiose.

(iv) The substitution and insertion in Section 90 of the I.T. Act, and the insertion of Section 90A in the said Act be either read down or held *ultra vires* the constitutional limitations

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[60] [1961] 1 All E R 762 at 765

(B) The Provisions Summarized:

30. That 'general conception as to the scope of income-tax' with reference to the legislative field under entry 82 of the union List of the 7th Schedule was explained by the Privy Council in *Wallace Bros & Co. Ltd*[61] which declared propositions including these:

(i) The resulting *general conception as to the scope of income-tax* is, that given *a sufficient territorial connection* between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income

(ii) The general conception as to the scope of income-tax finds a place in the phrase "taxes on income" as used in the Government of India Act, 1935 [now entry 82 of the Union List of the 7th Schedule to the Constitution of India.]

(iii) The principle – sufficient territorial connection –not the rule giving effect to that principle –residence – is implicit in the power conferred by the Government of India Act, 1935.

As the entry 82 of the Union List under our Constitution harks back to the provision under the Government of India Act, 1935, the ambit of fiscal jurisdiction under it involves the *principles of territoriality and 'territorial nexus'* as the imperative determiners of the chargeable income under the Income-tax Act, 1961 framed under the authority granted by Art 265 of our Constitution.

31. **That the Concept of Avoidance of Double Taxation:** Section 90(1) of the Income-tax Act says: "The Central Government may enter into an agreement with the Government of any country outside India……" *for avoidance of double taxation.* That concept of **Double Taxation** has been explained in *Black's Law Dictionary:*

> "The imposition of comparable taxes in two or more States on the same tax payer, for the same subject-matter or identical goods."

And *Stroud's Judicial Dictionary* explains this concept in the following words *:*

> "Whatever the precise scope of the rule against double taxation is, it must at least involve that it is the same income, that it is the same person in respect of the same piece of income that is being double taxed, whether

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[61] 16 ITR, 240, PC) :AIR 1948 PC 118 at pp120-21

2. H.M Seervai, *Constitutional Law of India,* VOL –III, p-2321

directly or indirectly, and that the double taxation is by British assessment"

On close analysis the definition given in this technical dictionary following ingredients are noticed :

(i) The imposition must be of *comparable taxes*;

(ii) The incidence of tax should be on the *same tax- payer*;

(iii) The *subject matter* (or the taxable event) should be the same subject matter.

"**Tax treaty rules** assume that both contracting States tax according to their own law; unlike the rules of private international law, therefore, treaty rules do not lead to the application of foreign law."[62] A tax treaty is to ensure that the tax payers do not suffer the injustice of double taxation if both the state of residence and of source assert to tax an assessee's total income or a part of it. What a treaty for Avoidance of Double Taxation does, is to make a sort of rough factors analysis of capital and labour in the creative matrix from which income originates. The calculus of evaluation leads to the formulation of norms for the quantification of taxation of the doubly taxed persons, not with an idea to grant the benefit of non-taxation. Sovereign States do not come to picture, as they are not taxed in view of the international practice recognized under international law. They have no business to play a surrogate role for the unjust enrichment of their residents. Any such attempt would be all the more heinous if it is for the benefit of the masqueraders.

32. That the power conferred under section 90 (1) is a <u>delegated power</u> which can be exercised within the frontiers prescribed under the law[63]. The exercise of *discretion* falls in the "condition precedent" category. The prime condition is under section 90 (I) (b) that the agreement into which the Central Government enters with the Government of any other county outside India is "*for the avoidance of double taxation of income under this Act* and under the corresponding law in force in that country." The power to exercise delegated power is given to promote certain statutory purposes. If its remit is transgressed, it is clearly acts *ultra vires*; and such an act amounts to malice in law.[64]

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[62] *Klaus Vogel on Double Taxation Conventions p.20; Philip Baker pp.34-35; Art.23(1) of the Indo-Mauritius DTAC.).*

[63] K Srinivasan, *Guide to Taxation Avoidance Agreements* 4th ed 1.6

[64]. *Education Sec v. Tameside* BC(50) 1977 AC 1014, quoted at page 1535 of Seervai's *Constitutional Law*, Vol – II; Lord Somervell quoting *Brett v. Brett* in *AG v Prince Earnest Agustus* 1957 AC 436 at 473 [quoted in Seervai, *Cons. Law* pg. 189]; per Justice Krishna Iyer in *M.P v. Orient Paper Mills* (AIR 1977 SC 687 overruled on another point in *Orissa v. Titagarh Paper Mills Ltd*. AIR 1985 SC

This proposition is illustrated in matters of foreign affairs in *R. v. Secretary of State for Foreign Affairs, ex parte World Developed Movement Ltd*[65] in the context of the Overseas Development Act 1980 where the QBD holding, to quote from the headnote:

> "Although the Foreign Secretary was entitled , when considering whether to provide overseas aid to developing country pursuant to s. 1 of the 1980 Act, to take into account political and economic considerations,….., the grant of the aid had to be for the purpose of s. 1, namely the promotion of economically sound development.

Parliament & the Nation bypassed: An Opaque System reigns

33. The treaties which deplete the Consolidated Fund of India (as do the tax treaties), and the treaties which have wide and over-arching impact on our lives and culture, it is submitted, cannot be done by bypassing Parliament. The Tax Treaties are done by the Executive without our Parliament knowing anything about them. It is strange that Section 296 of the Income-tax Act 1961 requires that certain Rules and Notifications be placed before Parliament, but the Tax Treaties are done under the opaque executive system. In all other major countries of the world, Parliamentary approval/enactment is essential[66]. Section 19 of the Foreign Trade (Development and Regulation) Act , 1992 requires that every order and rule made by the Central Government before Parliament.

34.The attitude of contempt that our Executive has shown to Parliament is disgustingly nauseating to our citizenry as, to certain extent, we are ourselves present in Parliament. Didn't . Sir Thomas Smith say on Parliament as far back 1565!:

1293; per Lord Esher M.R. in *R. v. Vestry of St. Pancras*; *Federation of Self-employed and Small Business Ltd*. (1981) 2 ALL ER 93 at 107 (HL) quoted in *S.P. Gupta v. President of India & Ors*. (AIR 1982 SC 149 at page 190.; *Rohtash Industries Ltd. v. S.P. Agarwall*, AIR 1969,SC 707.; *The Cheng Poh v. Public Prosecutor*, (1980, AC 458, PC) discussed by H.M. Seervai on opp. 1125-1128 of his *Constitutional Law*, vol -II.; Lord Denning in *Breen v. A.E.U* (1971) 2 QB 175.; *Padfield v. Minister of Agriculture, Fisheries and Food* (quoted by Seervai, *Constitutional Law of India,* Vol-II 4th ed.P. 1529).

[65] [1995] 1 All er P 611

[66] (a) US legal practice.

The United States Constitution provides in Article VI, cl. 2

Discussed in *Aiken Industries, Inc. Commrs*

(b) German Legal practice

> "In Germany, a tax treaty is enacted in accordance with Art. 59 Abs. and Art 105 of the *Grundgesetz* (the Federal Constitution). [Klaus Vogel *on Double Taxation Conventions*, 3rd ed. p. 24].

(c) Canada : A tax treaty is by enactment viz. Canada-U.S. Tax Convention Act, 1984. discussed in *Crown Forest Industries v. Canada*

(d) Australia: Every tax treaty is enacted under International Tax Agreements Act 1953

(e) U.K.: A tax treaty is enacted through an Order in Council in accordance with Section 788 of the Income and Corporation Act 1988 which prescribes : "Before any Order in Council proposed to be made under this section is submitted to Her Majesty in Council, a draft of the Order shall be laid before the House of Commons, and the Order shall not be so submitted unless an Address is presented to Her Majesty by the House praying that the Order be made".

(f) In other countries tax treaties are enacted. [*Philip Baker* F-1 to F-3]

(g) Treaty practice in different countries with different constitutional provisions materially differs. But one thing is common, They subject treaty making to an effective legislative supervision. Oppenhheim's *International Law* pp 52-86

"And, to be short, all that ever the people of Rome might do either in Centuratis comitiis or tributes, the same may be done by Parliament of England which representeth and hath the power of the whole realm, both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorneys, of what preeminence, state, dignity, or quality so ever he be, from the prince (be he king or queen) to the lowest person in England. And the consent of the Parliament is taken to be every man's consent"[67]

(C) An Illustrative Case of a discriminatory and grossly unfair DTAA

35. That the grossness of discrimination against the common citizens and in favour of the foreigners, though they are both the assesses within the province of the income-tax law, can be illustrated with reference to the concrete cases of the Indo-Mauritius Double Taxation Avoidance Agreement, and the Indo-Singapore Double Taxation Avoidance Agreement with reference to the taxation of capital gains:

(i) In terms of Art 13(4) of the Mauritius DTAA, the capital gains of a Mauritius resident derived from transactions (in the interstices of which taxable events take place) in India are to be taxed in Mauritius where it is not chargeable to tax. Under Art. 13(4) of the Singapore DTAA, read with Art 1 of the Amending Protocol, the capital gains of a Singapore resident derived from India is to be taxed in Singapore where it is not chargeable to tax.

(ii) The gruesomeness gets highlighted that the beneficiaries of such Agreements are granted extra-statutory, and extra-constitutional remedies. Art 25 of the Indo-Mauritius DTAA contemplated the procedure for the Mutual Agreements of the Competent Authorities. So does Art 27 in the Indo-Singapore DTAA. The latter reaches the climax of arbitrariness when it prescribes that the tax disputes can be taken to an international forum to be decided by an international body. In effect, it links the dispute settlement with the disputes settlement procedure under the WTO system. As the Protocol amending the Indo-Singapore DTAA has been signed after the entry into force of GATS, a dispute between the two countries as to whether a measure falls within the scope of DTAA can be brought before the

[67] quoted from *De Republica Anglorum* 48-9 in G. R. Elton, *The Tudor Constitution* (Cambridge) p. 235

Council of Trade in Services by either country as per the footnote to Para 3 of Article XXII of GATS[68].

36. That the gravity of the problem may increase as the Executive is manipulated to grant the tax benefits to the vested interests operating through the tiny-tots on our planet which are largely the failed States, or tax havens, or self-centric systems out to cause unjust enrichment to themselves by hook or by crook. We hear *that* India's decision to grant tax sops to Singapore-based FIIs under the comprehensive economic cooperation agreement (CECA) has prompted oil-rich Saudi Arabia and Kuwait to pitch for similar concessions in the double taxation avoidance treaties that are being negotiated with Indian tax authorities. We have on this planet States like Cape Verde, Cote Divoire, , Timor-Leste, Dominica, Nauru, besides the well-known destinations about which less said the better. Milton's Comus to which the Supreme Court referred in *Shrisht Dhawan v. Shah Bros*[69] makes his Comus say:

''T is only daylight that makes sin.

37. That in Mauritius, for long, incidence of tax was nil. Even now, the Global Business Category 1 is taxed at 15% but a generous foreign tax credit is available so that the effective rate is 1.5% . Mauritius does not tax capital gains, while the corporate tax liability is 3-4%. A handful of Mauritian 'management companies'. These companies, in turn, control hundreds of 'global business companies', or GBCs, incorporated in Mauritius. "In April-June this year, a total of Rs 4,165 crore came in through Mauritius to India — as against Rs 1,105 crore from the US. By the end of the year, the money flowing in from Mauritius to India could be as high as Rs 15,000 crore. In 2005-06, a total of Rs 11,441 crore came in through this route, more than double the Rs 5,141 crore in 2004-05, which in turn was almost double the Rs 2,609 crore that had come in in 2003-04. Compare that with the relatively piddly Rs 2,210 crore that came in through the US in 2005-06."[70] 'Round Tripping' and 'Treaty Shopping' by investors done under mask by the thid States'

[68] **General Agreement on Trade in Services:** *Article XXII:* A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[68] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

[69] *AIR* 1992 S C 1555

[70] *The Businessworld* of 11. 12. 2006

residents is a fraud of the worst order . How the process operates is illustrated by a journalist through the **sequences of boxes vide page 40A** .” The department had estimated a revenue loss of over Rs 5,000 crore caused by treaty shopping.”.[71] Besides, Mauritius earns hefty commissions on the shell companies from foreign lands, and obtains jobs for the financial service providers. But ‘We, the People of India’ suffer loot illustration a worst sort of discrimination and unfairness. It is doubtful whether to call this a *tax?* In effect, it amounts to be *fees* for a lot of services and advantages available to them in the tax havens which have set up an opaque system. The tax payers constitute a class; and *inter se* them, there cannot be any classification further on reasonable criteria having no reasonable nexus with the object of the Income Tax Act. We should give to Section 90 (1) (b) a construction which does not expose it to a lethal Constitutional radiation. It is well settled that the provision should be so read as to save it from being *ultra vires* Article 14 of the Constitution of India (*Jagdish Pandey vs. Chancellor, Bihar University* AIR 1968 SC 353, 357). The submissions in this Writ Petition proceed on the constitutional invalidity of the acts of the Executive Government, as any effort to justify them with reference to any Parliamentary power would make the constitutional radiation recoil on that to set it *not est.*

37A.. What irks every citizen of this country is a set of facts neatly summarized in a recent article by Anjuli Bhargava in the *Businessworld* of Dec 11, 2006; to quote :

> “Firstly, the treaty, which had originally proposed to help Mauritian firms to invest in India and vice versa, was increasingly being used by global investors instead. The Indian view is that the GBC-1s can hardly be called true Mauritian companies. Sure, they have been incorporated in Mauritius, but they have no real operations there. In fact, the only purpose of their formation has been to avoid paying taxes in India. According to Indian officials, the GBC-1s are nothing more than shell companies …..
>
> To support their argument, the Indian side points to growing global concern on the emergence of tax havens as more and more countries find their tax base eroded on this count. The OECD's model tax convention clearly states: "Abuse of a treaty occurs… if a person (whether or not a resident of a contracting state) acts through a legal entity created in a state essentially to obtain treaty benefits that would not be directly available." Indian authorities say that the treaty with Mauritius is being routinely abused by this definition. They point out that the treaty was signed earlier and Mauritius, subsequently, modified its laws to allow for setting up of GBC-1s, encouraging investors to 'treaty shop'. Internationally, there has also been growing concern on the use of such conduit companies. "There is no proof of who owns these companies. The benefits go to people who are not genuine residents of Mauritius," says a government official. Not knowing

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[71] Manju Menon The Times of India, 19 Jan.’ 07

the origin of the real investors and the money is certainly worrying. In other tax havens, there has been evidence of money from drug and crime cartels being laundered thanks to the secrecy promised. That might not be the case in Mauritius, but then there is no real way of knowing because the data on the investors of these companies is not available to the Indian authorities. ….

Finally, there is the question of revenue loss to India. As the volume of transactions through Mauritius increases exponentially, the revenue loss is also turning out to be substantial because of the taxes being avoided. It has been estimated by the Indian side that the notional tax loss on the profits of just 20 such companies is Rs 140 crore in one year. "Now multiply this by the number of companies and every year and the quantum jumps dramatically," says an official. He argues that since more and more money is now being routed through Mauritius, this loss is rising. According to Indian finance ministry sources, the total gain to Mauritius on account of the treaty works to only Rs 100 crore a year in terms of licence fees, renewal fees and so on, and only around 1,000 people are employed directly in the management companies. "It is evident that the loss of revenue on account of just 20 companies is more for India than the total gain to the Mauritian economy," says a source. That alone, they argue, is grounds enough for India to ask for substantive modification."

An *entente cordiale* of Collusion and Fraud.

38. The abuse of the Agreements for Double Taxation of Income, in effect, promotes Collusion and Fraud through their congeneric operation through an opaque system led the depredation on our country's economic resources, and as a matter of natural consequence contributed to moral degradation and national insecurity. The plea was that , on analysis, a Treaty Shopping is a conjoint product of *Collusion* and *Fraud*[72] *inter se* the vested interests in Mauritius and the residents of the third States. The strategy was crafted through a network of collusion. As Comus was an offspring of Bacchus and Circe, a Treaty Shopping is fathered by Collusion and Fraud in Darkness to help those who want to launder money generated by the most unscrupulous methods, through bribery, receipt of kick-backs, drug-trafficking, insider trading, embezzlement, computer fraud, under invoicing-over invoicing, and other tainted activities spawning numerous scams having deep lethal consequences for the welfare of common people.

(D) Clause (a) substituted in Section 90 and sub-Section (3) inserted in the said Section by the Finance Act, 2003 are *ultra vires*.

39. The Finance Act 2003 substituted the following clause (a) for the existing clause (a) in sub-Section (1) of Section 90 of the Income-tax Act, 1961:

"(a) for the granting of relief in respect of---

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[72] "In such a proceeding, the claim put forward is fictitious the contest over it unreal and the decree passed therein is mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that claimant has managed to obtain the verdict of the Court in his favour and against his opponent by practicing fraud on the Court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as a result of an understanding between the parties. While in the collusive proceedings the combat is mere sham, in a fraudulent suit it is real and earnest

(i) income on which have been paid both income-tax under this Act and income-tax in that country; or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country to promote mutual economic relations, trade and investment, or……"

The Finance Act 2003 also inserted sub-Section (3) which runs thus:

> " Any term used but not defined in this Act or in the agreement referred in sub-section 90 (1) shall, unless the context otherwise requires, and is not inconsistent with the provisos of this Act or agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette.

40 This humble Petitioner submits that the aforementioned substitution and insertion are *ultra vires* for reasons mainly these 3:

(1) Amorphous words with unsettled meaning would frustrate operation within the judicially determined frontiers for delegated legislation.

41.That in Linguistics we have recognized two very common phenomena pertaining to semantic change: (i) semantic narrowing, and (ii) semantic widening. In semantic narrowing the meaning sheds off much of its occupied territory, and becomes narrower in its import. In semantic widening a word captures new senses to become wider in its import. In the former some referents are lost whereas in the latter new referents are acquired. But the words by which delegated power to enter into an Agreement is granted under Section 90(1)(a) of the Income-tax Act, 1961, belong to a category which is different from both the categories mentioned: they are silhouettes, they are the empty vessels in which any content can be poured per wish of the Executive.

42. The policy of the Income-tax Act is to explain with precision the meaning of words used in the statute so that the imposition of tax or exoneration from its charge should be in clear terms. This is the reason why non-legal terms are defined. This is done to preclude any arbitrary perception on the part of the taxpayers or tax-gatherers. To illustrate: the term "infrastructure facility" is used in Section 80-1A of the Income-tax Act. This is a general term with a settled meaning: it means "the basic structural foundations of an enterprise". Yet Section 80-1A of the Act defines it in the Explanation to Section 80-1A(4). Section 90(1) grants certain powers to the Central Government. If the power is given in words, the sweep of whose meaning endows

the executive a limitless power is not clear, then the amplitude of the grant such would be unreasonable and arbitrary.

43. Nobody now can comprehend fairly , or draw the precise frontiers of the terms used in the substituted Section 90(1): the terms are--- "to promote mutual economic relations, trade and investment". The word mutual has been defined by the New Shorter Oxford Dictionary to mean "of a feeling, action, etc : experienced, expressed, or performed by each of the parties concerned towards or with regard to the other ; reciprocal" The word 'economic' means, in its primary sense, "concerned with economics and with the organization of money, industry, and trade of a country, reign, or social group.'[73] 'Relations' means : " Relations are contacts between different people or groups of people and the way in which they behave towards each other, for example how they communicate or cooperate". 'Economic relations' meant one thing to the author of *The Economic Consequences of Peace,* J.M. Keynes, but entirely different to Thomas Balogh who in his *The Irrelevance of Conventional Economics* said: "The modern history of economic theory is a tale of evasions of reality." 'Economic relations' does not suggest the same to the champions of economic statism and the proponents of economic liberalism. 'Economic relations' means something to Monnet but much different to Hayek. Even in our country we have in plenty, shaping our economic polices, who are either the Monnetists or the Hayekians. 'Economic relations' in the post-Betton Woods have undergone a remarkable change, for good or bad we know not. The words 'trade' and 'investment' have acquired tremendously wide meaning after the Uruguay Round of Final Act which set up the WTO, and of which India is a member. In TRIMs (Trade Related Investment Measures) they insisted on discussing the *trade effects* of investment measures. The widening dimensions of 'economic relations' revealed in macro economic polices in the present economic architecture are such that the word TRADE has acquired a protean malleability it never had. The word "economic relations" is baffling when we think of the persons with whom we contemplate our 'economic relations'. There are countries whose jurisprudence deserve to be called 'civilized jurisprudence", to borrow the expression from the Statute of the International Justice. But there are states in which everything is *res commercium* , even good faith is on selling counter.

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[73] *Collins Cobuild English Language Dictionary*

43A. That this Petitioner submits that the terms in sub-section(3) raise an important constitutional question. Such provisions as in sub-Section (3) would create serious problems in judicial interpretation of terms which like Puck in Shakespeare's Midsummer Night's Dream can be made to put on even an ass's head. In the process of clarifying terms such meaning can be jetted into them that all, including lexicographers, courts, and ordinary citizens, would feel aghast and flabbergasted. The Petitioner submits that sub-Section (3) of section 90 offends common sense.

44. It is possible, with a little of sophistry, to bring anything within the growing trajectory of 'economic relations' comes within this expression. These words used in Section 90(1) (a) bring to our mind what *C.S Calverley* said, "*And as to the meaning, it's what you please'.* And W.S. Gilbert rightly said: "*The meaning doesn't matter if it's only a chatter of a transcendental kind."* Then, what is the predicate, what is the referent of these words which would guide the Executive in entering into the Agreements with other countries? What are the intelligible guidelines to the Executive for framing the terms of such Agreement? It is all fog, mist, and smog. Should we grant the Executive such limitless powers in open-ended terms? And that to within the jurisprudence of the income-tax law?

(2) The impugned provisions are in breach of the judicially settled Grammar of the Delegation of Power.

45. That as the Agreement under Section 90(1) is made in exercise of a delegated power, there must be some *objective criteria*, some objective standards for judging the propriety of the exercise of power. In *Council of Civil Service Unions v. Minister for the Civil Service* ([1984] 3 All ER 935) Lord Brightman concurred with Lord Fraser in observing after a detailed examination of the delegation cases, that " the decision-making process …..arises **under** and **must** be exercised in accordance with the terms of that order [the 1982 Order in Council]."(emphasis supplied). With such words as "to promote mutual economic relations, trade and investment" as the pre-conditions for exercise of power by the executive how can our courts examine the *vires* of an executive action? The provision, if allowed to stand, would frustrate Judicial review as none would be able to question the legality of the executive action as everything conceivable can pass under the rubric 'economic relations'.

That to grant such wide power to the Executive, especially in the realm of income-tax law would be a breach of a fundamental principle of constitutional and administrative law, and also would be a folly, if we do not draw lessons from history. The right legal perspective emerges from Allen says in these words:

> "…The fact, is, however, that nobody on earth can be trusted with power without restraint. It is 'of an encroaching nature', and its encroachments, more often than not, are for the sake of what are sincerely believed to be good, and indeed necessary, objects."[74] (*italics* supplied).

Can the Executive be permitted to say: "Hands off: the executive knows more and understands better what is to be done here. You are not judges of these matters." It is the good fortune of Democracy that courts have rejected this view for our 'common weal'. And Prof. Wade in his *Administrative Law* (4th ed., 1977) puts the right position in nutshell in these precise but suggestive words:

> "As has been seen, the courts are to-day resistant to the whole notion of uncontrollable power and this is the best security against another lapse"

The Taint Of Excessive And Impermissible Delegation.

46. That the delegated power granted under the substituted and inserted provisions in Section 90 of the Income-tax Act is not canalized, but is unconfined and vagrant. It is, in view of the reach of the terms used, delegation running riot.. In a delegation of this sort the U.S. Supreme Court in Schechier Poultry Corp's Case[75] struck down certain provisions under National Recovery Act. The extent of delegation of power granted by the impugned provisions, it is submitted, cannot be sustained in the light of the principles set forth in *Ramesh Birch v. Union of India*[76]*; Corporation of Calcutta v. Liberty Cinema*[77]

47.The Central Government can put any sort of content in any term erasing semasiology out of existence. King Canute could bid the waves: "thus far and no further". Our Government is made mightier: it can tell the words how far to go, in which way to go, and for what to go. A legal provision which says so is *ex facie*, it is submitted, arbitrary and irrational in blend. That the only restriction on the power of the Central Government is that it cannot stuff the terms with what is not agreeable to "the provisions of this Act or agreement". The Central

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[74] Allen, *Law and Orders* 3rd ed. p. 297
[75] 1934 U.S. 495, 79 l.. ed
[76] AIR 1990 SC 560
[77] AIR 1965 SC 1107 "*Corporation of Calcutta v. Liberty Cinema"*

Government may empty the terms of meaning agreeable to linguistic usage, judicial interpretation, and the view of common people for whom the law exists. To illustrate: the terms " *promote" " mutual" "economic" " relations" "trade" and "investment"* are not defined in this Act or in the Agreement. Sub-Section (3) is part of the noxious strategy to make our system opaque to the delight of the high-flyers and shrewd players in the misty economic architecture of this morally decadent phase of economic globalization.

(3) Our **Constitution does not permit such provisions**

48. That an important constitutional question relates to the competence of Parliament to frame the impugned statutory provisions. Art 265 of the Constitution provides "No tax shall be levied or collected except by the authority of law." The term "law" in this article. means *a valid* law (as it means in Art. 21 of the Constitution). Taxation power includes power to impose tax, power to mitigate tax, power to grant remission or exemption. The Executive in India, as in the U.K., is not competent to do any of the aforementioned act without an authority of law enacted by Parliament. The conjoint effect of Articles 109, 110 and 265 of the Constitution of India is that the Executive can do only what it is permitted to do (and in the manner it is permitted to do) by Parliament through an enactment. The provisions substituted in Section 90 by the Finance Act 2003 are couched in language which gives a vast scope to the Executive. This sort of widening of the executive authority is not warranted under Art. 265 of the Constitution. Our Constitution subjects the executive in matters of finance to the tightest control possible.

(E) SECTION 90A OF THE INCOME-TAX ACT 1961 IS ULTRA VIRES

49. That the climax in the studied violations of the constitutional limitations is reached in the provisions of Section 90A of the Income-tax Act, 1961, inserted by the Finance Act 2006. It provides:

> "90A. (1) Any specified association in India may enter into an agreement with any specified association in the specified territory outside India and the Central Government may, by notification in the Official Gazette, make such provisions as may be necessary for adopting and implementing such agreement
> (a) for the granting of relief in respect of
> (i) income on which have been paid both income-tax under this Act and income-tax in any specified territory outside India; or
> (ii) income-tax chargeable under this Act and under the corresponding law in force in that specified territory outside India to promote mutual economic relations, trade and investment, or
> (b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that specified territory outside India, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that specified territory outside India, or investigation of cases of such evasion or avoidance, or
(d) for recovery of income-tax under this Act and under the corresponding law in force in that specified territory outside India.
(2) Where a specified association in India has entered into an agreement with a specified association of any specified territory outside India under sub-section (1) and such agreement has been notified under that sub-section, for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.
(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.
Explanation 1.For the removal of doubts, it is hereby declared that the charge of tax in respect of a company incorporated in the specified territory outside India at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such company.
Explanation 2.For the purposes of this section, the expressions
(a) "specified association" means any institution, association or body, whether incorporated or not, functioning under any law for the time being in force in India or the laws of the specified territory outside India and which may be notified as such by the Central Government for the purposes of this section;
(b) "specified territory" means any area outside India which may be notified as such by the Central Government for the purposes of this section.'. “

50. That the most objectionable features of the aforementioned provisions are, in brief,:

(i) Treaties are made under International Law between/among the sovereign States or certain international organization viz the UNO: it is never done between the private bodies, incorporated or not, especially when it has a bearing on the State’s sovereign functions like taxation.

(ii)It is true that the Vienna Convention on the Law of Treaties provided that it is possible for the State to grant confirmation later[78] ; but it does not contemplate this sort of wide frontiers to the commercial operators of all sorts emanating from foreign lands often enmeshed in mist and fog.

(iii) An “Agreement’ under International Law is a species of Treaty. Agreement, contemplated by Section 90A is a perfected agreement *inter se* the contracting parties, and is not subject to the government’s approval: the law does not make its *vineculam juris inter se the contracting parties* subject to any approval.

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[78] *Article 8*
Subsequent confirmation of an act performed
without authorization
An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unlessafterwards confirmed by that State.

(iv) The Central Government "may, by notification in the Official Gazette, make such provisions as may be necessary for adopting and implementing such agreement." The Central Government 'may' or may not do so, but the Agreement would operate *inter se* the parties *proprio vigore*. Such norms of private agreements can seep through the memoranda of understanding, which our Executive creates with foreign countries, in the creation of executive policies affecting the rights and interests of the common people of India .

(v) This would promote a dense opaque system under public administration of this country as it can facilitate an infamous Arthur Anderson (India) to agree to the no less infamous WorldCom of the USA to bring Indian taxation to zero, and to frustrate all efforts at investigation and tax-recovery.

(vi) This would promote an opaque system contriving a zone of corruption and corporate hegemony vide Ground 23 *infra* at p. 122. It is well said by Joseph Stiglitz:

"Sunshine is the strongest antiseptic."

. .

(vii) Assuming, *arguendo,* that the Agreement cannot operate without the adoption of it by the Central Government, the Executive Government, knowing its track-record, would just illustrate the syndrome which has made us the 'most corrupt nation' in the world. In *Shivajirao Nilangaker Patil v. Mahesh Madhav Gosavi*, AIR 1987 SC 294 at page 311and 306 (repeated in R. *S Das v. Union AIR* 1987 SC 593 at 598) the Court said;

> "But it has to be borne in mind that things are happening in public life which were never even anticipated before. There are several glaring instances of misuse of power by men in authority and position. *This is a phenomenon of which the Courts are bound to take judicial notice."*
>
> "This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country, along with or even before cleaning the physical atmosphere. The pollution in our values and standards is an equally grave menace as the pollution of the environment. Where such situations cry out, the Court should not and cannot remain mute and dumb."

(viii) Parliamentary scrutiny is excluded, transparency is tabooed, to the shocking point that even the system of information to Parliament by placing the draft or the *fait accompli* on its table is not provided.

(ix) The private bodies would enter into agreement for the avoidance of double taxation without intelligible guidelines. It can bring about for such creatures even to zero. It is all fog, mist, and smog. Should we grant the private players such limitless powers in open-ended terms? And that to within the jurisprudence of the income-tax law? If they are granted such powers then this trickle of impropriety may turn into the *tsunami* on democracy.

(x) That the delegated power granted under the inserted provisions is not canalized, but is unconfined and vagrant. It is, in view of the reach of the terms used, delegation running riot. Now the power to perform a sovereign act is being delegated to private players operating under an opaque system. The extent of delegation of power granted by the impugned provisions, it is submitted, cannot be sustained in the light of the principles set forth in *Ramesh Birch v. Union of India*[79].

(xi) Besides, it is submitted that the second constitutional question relates to the competence of Parliament to frame the impugned statutory provisions. Art 265 of the Constitution provides "No tax shall be levied or collected except by the authority of law." The term "law" in this article. means *a valid* law (as it means in Art. 21 of the Constitution). Taxation power includes power to impose tax, power to mitigate tax, power to grant remission or exemption. The Executive in India, as in the U.K., is not competent to do any of the aforementioned act without an authority of law enacted by Parliament. The conjoint effect of Articles 109, 110 and 265 of the Constitution of India is that the Executive can do only what it is permitted to do (and in the manner it is permitted to do) by Parliament through an enactment. Parliament's control is complete as the concept of Money Bill, as defined in Art 110 of the Constitution includes all that can touch taxation. Money Bill contains provisions pertaining to the *imposition*, *abolition, remission, alteration, or regulation of any tax.* The provisions substituted in Section 90 by the Finance Act 2003 are couched in language which gives a vast scope to the Executive. This sort of widening of the executive authority is not warranted under Art. 265 of the Constitution

[79] AIR 1990 SC 560

(xii) A Section 90A (2) grants an overriding effect to such agreements on Parliament's enactment. Our Constitution does not permit such a death wish on the part of Parliament.

(xii) That it would be a tragedy of our Republic if we do not subject the Executive to the Rule of Law and the principle of Parliamentary Supremacy. Within its domain our Parliament enjoys sovereignty. Our position is no different from that of the British Parliament about which Laws LJ. said in *Thoburn v Sunderland City Council*[80]*:*

> "The British Parliament has not the authority to authorize any such thing. Being sovereign, it cannot abandon its sovereignty."

. It is for this reason it cannot give *carte blanche* to the Executive

(xiii) As to sub-Section(3) of Sec 90A the Central Government can put any sort of content in any term erasing semasiology out of existence. King Canute could bid the waves: "thus far and no further". Our Government is made mightier: it can tell the words how far to go, in which way to go, and for what to go. A legal provision which says so is *ex facie*, it is submitted, arbitrary and irrational in blend. The words may suffer jeopardy through studied manipulation. The Executive can with ease see ambiguity where it does not exist, and in the garb of clarifying may resort to legislation. Sub-Section (3) is part of the noxious strategy to make our system opaque to the delight of the high-flyers and shrewd players in the misty economic architecture of this morally decadent phase of economic globalization.

(F) Mutual Agreement Procedure

(a) The Mutual Agreement Procedure: in India it lacks a statutory foundation, hence it is dead at nativity.

51. That before this Petitioner examines the impugned provisions , he would show, at the outset, how analogous provisions were introduced in Britain whose Parliamentary form of government we share, and in the USA whose model of constitution we have adopted.

(a) The MAP provisions in the Tax Treaties concluded by Britain and the USA are broadly the same as in our Tax Treaties, because these countries have drawn on the OECD models of the tax treaties. In Britain, the government found it appropriate to provide MAP with a statutory foundation. Under the *non obstante* clause of Section 778 (3) of the British I.C.T.A.

[80] [2002] 4 ALL ER 183

1988 grants the MAP provisions an override on the Act. In India there is no such provision. Yet when in the United Kingdom it was considered expedient to incorporate the provisions pertaining to the Mutual Agreement Procedure it was felt that it could not be done without a specific statutory mand for so doing. It is for this purpose that Section 815 AA was introduced which inserted a new Section 815AA into the British Taxes Act[81].

(b) The United States devised methods under which neither the purpose of MAP is defeated, nor the statuary protocol is subverted. On this point, the CAG in its Report for the year ended March 2004 (Systems Appraisals) says (at p. 107):

> "Incidentally, Ministry may like to note that the Revenue Procedure 2002-52 of Inland Revenue Service (IRS) of USA, specifically provides for coordination between the appellate authorities and IRS. The US competent authority will not, without the consent of appellate authorities accept or continue to consider a taxpayer's request for assistance if the matter is already agitated in the Courts. Further, in

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[81] *"815AA - Mutual agreement procedure and presentation of cases under arrangements*.

> (1) Where, under and for the purposes of arrangements made with the government of a territory outside the United Kingdom and having effect under section 788-
> (a) a case is presented to the Board, or to an authority in that territory, by a person concerning his being taxed (whether in the United Kingdom or that territory) otherwise than in accordance with the arrangements; and
> (b) the Board arrives at a solution to the case or makes a mutual agreement with an authority in that territory for the resolution of the case,
> subsections (2) and (3) below have effect.
> (2) The Board shall give effect to the solution or mutual agreement, notwithstanding anything in any enactment; and any such adjustment as is appropriate in consequence may be made (whether by way of discharge or repayment of tax, the allowance of credit against tax payable in the United Kingdom, the making of an assessment or otherwise).
> (3) A claim for relief under any provision of the Tax Acts may be made in pursuance of the solution or mutual agreement at any time before the expiration of the period of 12 months following the notification of the solution or mutual agreement to the person affected, notwithstanding the expiration of the time limited by any other enactment for making the claim.
> (4) Where arrangements having effect under section 788 include provision for a person to present a case to the Board concerning his being taxed otherwise than in accordance with the arrangements, subsections (5) and (6) below have effect.
> (5) The presentation of any such case under and in accordance with the arrangements-
> (a) does not constitute a claim for relief under the Tax Acts; and
> (b) is accordingly not subject to section 42 of the Management Act or any other enactment relating to the making of such claims.
> (6) Any such case must be presented before the expiration of-
> (a) the period of 6 years following the end of the chargeable period to which the case relates; or
> (b) such longer period as may be specified in the arrangements."

> case of simultaneous process under MAP and appeal, the concerned representatives will consult each other so that the terms of resolution and the principles and facts upon which it is based are compatible with the position that the competent authority intends to present to the foreign competent authority with respect to the issue. However, in India, no such procedure has been adopted."

But in our country administrative lawlessness is so much ingrained that no compunction is felt in introducing so noxious a provision as MAP through the Executive's act. If through the executive act at international plane, our Executive can subvert the Constitution without even our nation knowing it, how easy it is for it to subvert the Rule of Law through such acts. This Petitioner now adverts to these provisions to prove his criticism thus made.

(b) MAP: The provisions Evaluated

52..That it is worthwhile to examine the provisions relating to MAP [vide Art 25 from the Indo-Mauritius DTAC . The impugned provisions invite comments *inter alia* these:

(1) Art 25(1) provides an additional remedy to the foreigners who can opt for it at their own choice as an exploratory remedy the quest for which can be abandoned at choice. Why not grant a similar remedy of administrative clemency to all other taxpayers? Besides, whether a taxable transaction accords with the terms of a treaty is a matter of *interpretation which is a judicial function*. Lord Diplock in *Black-Clawson Ltd* [(1975) 591 at 638 observed:

> "In construing it the court must give effect to the words of the statute would be reasonably understood to mean by those whose conduct it regulates…..Parliament, under our Constitution, is sovereign only in respect of what it expresses by words used in the legislation it has passed."

Once the Agreement was framed, it is for the courts to interpret it, to declare what it means.

(2) Art (2) is unreasonable and arbitrary to the point of gross absurdity. The Competent Authority is utterly incompetent under the law to call for any information, much less to investigation matters concerning thereto, from any body, be he a taxpayer or tax-gatherer. He is a nonentity under the Income-tax Act, and will be no more than a mere usurper of power. Why to grant this sort of

arbitrary power to the creatures of administrative procedure under an opaque system by stripping the statutory authorities of their jurisdiction granted to be exercised under the sunshine? In an appeal from Nigeria in *Eshgabayi Eleko v. Govt. of Nigeria*[82][14] Lord Atkin made the following observation which our Supreme Court has quoted with approval[83][15] in several cases:

> "In accordance with the British jurisprudence no member of the executive can I interfere with the liberty and property of a British subject except on the condition that he can support the legality of his action before a court of justice." (Emphasis supplied.)

(3) But the climax of unreasonableness is reached when these administrative authorities are given legislative power to modify statutory limitations! This is ex facie unreasonable, and in clear breach of the constitutional limitations.

(4) Art (3) is an assortment of strange ideas. How can the interpretative function go to the exclusive domain of administrative deliberations sans power and authority? How can such an authority decide cases the cases of the Treaty Shoppers? Such cases do not come within the Scope of a bilateral treaty. Do the Competent Authorities become the Plenipotentiaries of the Contracting States out to negotiate new treaty terms?

(5) Art (4) is more than a façade of pretension. When the writ of a Competent Authority cannot run in his own country how can it spill over to other lands? Such provisions can be framed only to shroud the real design. This Petitioner strongly underscores this point as he believes that the Government is capable of *studied negligence.* Is not the decision of the House of Lords in *Government of India v. Taylor* (27 ITR 356 HL)[it was an appeal by the Ministry of Finance, Government of India] a monument of our administrative incompetence which deservedly courted a judicial rebuff that the public law of the foreign States is not given?

Even the Indian Judicial System is being subverted by ousting even the Constitutional jurisdiction of our Superior Courts.

(6) Art 27 in the Indo-Singapore DTAA drives impropriety to a climax of arbitrariness when it prescribes that the tax disputes originating under the

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82[14] (1931) A.C. 662 at 670

83[15] *A.K. Gopalan v. The State A I R 1950 SC 27 ; Basheshar Nath's Case A I R 1959 SC 149*

Indian Law can be taken to an international forum to be decided by an international body. In effect, it links the dispute settlement with the disputes settlement procedure under the WTO system. Such a provision, never known in the laws of taxation in India, bring to mind the morbid apprehension of the ousting of the jurisdiction of the Superior Courts, a syndrome which, in the context of the Disputes Settlement Body, would be discussed **later at pp. 106-109** highlighting the view of David Korten who rightly calls the Disputes Settlement Body of the WTO as "the World's Highest Judicial and Legislative Body"[84].

(c) THE IMPUGNED INSTRUCTION NO 12 OF 2002[85]: ultra vires to the core

(a) The Instruction No. 12/2002 Analyzed.

53.. The main features emerging from the instructions set forth in impugned Instruction No. 12/2002 are analyzed and evaluated hereunder:

(a) The Instruction enables the taxpayer to opt for a grievance settlement procedure *by circling out the statutory procedure* of investigation, adjudication, and judicial control. The procedure devised in the Instruction subverts the Income-tax Act. It is a settled legal proposition that whilst the framing of an income-tax assessment is a normal exercise of his jurisdiction by an Assessing Officer, its appellate or supervisory correction are mere statutory bequest[86]. Neither his jurisdiction can be divested, nor the mechanism of control and correction prescribed in the statute can be abrogated, or overridden. 'Competent authority' is an unknown creature under the Income-tax Act 1961. A 'Competent authority' is an executive construct under the so-called tax treaties who arrogates to himself authority to subvert the quasi-judicial administrative scheme under the statute, well supervised by the regular courts of law through appellate process or judicial review. Lord Hewart CJ. in *Rex v. Special Comrs* [87]observed (quoted in Kanga & Palkhivala's *Income-Tax* at p. 1509 of the 8th ed.):

> "The fact that the notice of appeal had been given not merely made it possible but made it obligatory upon the Commissioners that they should take certain steps, not merely or primarily in the interests of the individual Appellant but in the performance of their duties imposed upon them in the interests of the general body of the taxpayers, to see

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[84] David Korten, *When Corporations Rule the World* p. 174
[85] dated Nov. 1, 2002 [F. No. 480/3/2002-FTD Govt. of India, Ministry of Finance, Department of Revenue, (Foreign Tax Division)]
[86] Harihar v. CIT 9 ITR 246
[87] 20 T.C. 381, 384

what the true assessment ought to be, and that process, a public process directed to public ends, cannot be stopped at the option or whim of the Appellant who after giving notice begins to realize that if he pursues his appeal it may be worse for him"

The following comments on the Instructions are worthwhile:

(i) The scheme of the I.T. Act contemplates framing of an assessment order by an Assessing Officer, which on the first appeal before the CIT (Appeals) is amenable to correction under jurisdiction wider than the appellate jurisdiction exercised by the courts under the CPC[88]. The competence of the first appellate authority under the Income-tax Act is not restricted to dealing with the subject-matter of appeal: he may examine all matters covered by the assessment order and correct the assessment in respect of all such matters even to the prejudice of the assessee, and may remand the case to the Assessing Officer for inquiring into items which were not the subject-matter of appeal.[89] The object of the Act is to raise revenue, not a *paisa* less, not a *paisa* more. It is strange that this impugned Instruction not only grants an option to certain preferred taxpayers, it even subverts the statutory procedure for the determination of income-tax.

(ii) The beneficiaries of this impugned Instruction are so special that may not undergo a scrutiny by the Assessing Officers. Why should they be the sheltered and pampered souls whose tax affairs are to be hurried and hushed under a procedure, perverse and extra-statutory?

(iii) How can such taxpayers 'initiate this procedure after the receipt of the assessment order, during the course of the appellate procedure"? Has the rule of law stated by Lord Hewart CJ gone with the wind?

(iv) The Instruction is worried about 'time-limits' under a treaty, but is carefree about the breaches of the 'time-limits' which the Parliament prescribed in the Act. Whose case is being promoted?

(b). That the climax of what is grotesque is reached in the last shibboleth which says that the limitation provisions prescribed in the statue do not apply if anything is decided under the MAP. The modification of the provisions pertaining to Limitation is always considered a legislative act. It can neither be done under the Instruction, nor under the rules made by the CBDT. The Instruction says that the

[88] *Narrondas v. CIT* 31 ITR 909
[89] *CIT v. Mcmillan* 33ITR 182, 193-94.

time-limit prescribed under the Income-tax Act "will not restrict the implementation of the agreement arrived at by the Competent Authorities." The idea that administrative authorities can do away with the mandatory statutory time limit is not acceptable under our legal system. It is well settled that, as H.M. Seervai puts it, 'On principle, a court cannot lay down a period of limitation, because that is a legislative, and not a judicial function.'[*Const. Law* p.1585].The OECD Commentary too says:

> "The purpose of the last sentence of paragraph 2 is to enable countries with time-limits relating to adjustments of assessments and tax refunds in their domestic law to give effect to an agreement despite such time-limits. This provision does not prevent, however, such States as are not, on constitutional or other legal grounds, able to overrule the time limits in the domestic law from inserting in the mutual agreement itself such time-limits as are adapted to their internal statute of limitation. In certain extreme cases, a Contracting State may prefer not to enter into a mutual agreement , the implementation of which would require that the internal statute of limitation had to be disregarded. Apart from time limits there may exist other obstacles such as a "final court decisions' to giving effect to an agreement. Contracting States are free to agree on firm provisions for removal of such obstacles."[90]

In our country imposition or abrogation of any provisions relating to Limitation can be effected only by a legislative Act. Hence the direction relaxing limitation provisions are *ultra vires*.

54. That the Commentary on the OECD Model, after specifying the purpose of MAP, requires the enactment of provisions to make the rules under MAP conform to the domestic law. It says:

> "However, some countries may need to modify this grant of power to their competent authorities in conformity with their domestic laws."[91]

In India it was essential to do so because a tax treaty is done by the Executive in exercise of delegated power. Art. 25 is wider than what is permissible under Section 90 of the Act. Art 25 (1) refers to " taxation not in accordance with Convention". It does not adhere to the limitations of Section 90. .That the OECD Model recognizes that in many jurisdictions the competent authorities are bound by the court decisions. It says:

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[90] K. Srrinivasan, *Guide to Double Taxation Avoidance Agreements* 4th ed p. 2. 172

[91] Quoted from *Guide to Double Taxation Agreements* by K.Srinivasan P. 2.168

"If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even to present or pursue a claim under the mutual agreement procedure. In some States, competent authority may be able to arrive at a satisfactory solution which departs from the Court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation."[92]

55. That the Instruction creates in the following observation a remarkable *tour de force* of Arbitrariness:

> "After careful consideration of these issues it has been decided that once the Competent Authority communicates the decision to the Chief Commissioner / Director General in respect of any taxpayer, the effect shall be given to the decision of the Authority *treating it as a part of provision of the Treaty itself as applicable to the particular case of the applicant*" [emphasis supplird]

How, and under which legal authority, this strange fiction is being created? The ego of the Chief Commissioner / Director General may be fed on the idea that their directions, as dictated by the faceless Competent Authorities, are erected, through a fiction, as the very terms of a treaty. But this is not how treaties are made. The Competent Authorities are neither the alter-ego of the two Heads of States, nor their plenipotentiaries.

56. That the impugned Instruction clarifies how the decisions under the MAP are to be given effect where the assessment proceedings are pending.

> "This will be one of the simplest cases for giving effect to the decisions. The Assessing Officer will give effect to the decision arrived at under MAP while completing the assessment irrespective of the fact that a different view has been taken in the preceding years. However, the tax-payer shall be required to give an a acceptance of the decision under MAP and he will not have any right to appeal under any of the provisions of the I.T. Act against the issues so decided once he accepts it. Therefore, an undertaking to this effect, has to be obtained from the assesses under signature of a person authorized to sign the return before giving effect to the decision under MAP. Moreover, while completing the assessment, the facts of MAP proceedings, decision taken under MAP and also the fact that assessee has given an undertaking to abide by such decision and not to file appeal may be

[92] IBID P. 2.171

expressly mentioned in the order. The order shall be passed under section 143(3) read with section 90(2) of the IT Act and the relevant Article of the Treaty."

For the following reasons the aforesaid instruction is invalid as it is arbitrary and illegal.

(i) It says "The Assessing Officer will give effect to the decision arrived at under MAP while completing the assessment irrespective of the fact that a different view has been taken in the preceding years." The Assessing Officers are directed to give effect to the directions by the Competent Authorities, even if that involves the reversal of the view founded on the decisions of the jurisdictional High Courts or this Hon'ble Court. This Hon'ble Court has held[93] that "the law declared by this Court is binding on the Revenue/Department and once the position in law is declared by this Court, the contrary view expressed in the circular should per force lose its validity and become *non est*". *Hindustan Aeronautics Ltd v CIT*[94] says that:

> "…. when the Supreme Court or the High Court has declared the law on the question arising for consideration it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court.".

The Hon'ble Supreme Court took note of the statutory role of the statutory authorities under the taxation laws, and crisply observed in *Sirpur Paper Mills Ltd. v. The Commissioner of Wealth Tax Hyderbad* 1970 (1) SCC 795.

> " It does not, however, imply that the Board may give any directions or instructions to the Wealth –tax Officer or to the Commissioner in exercise of his quasi-judicial function. Such an interpretation would be plainly contrary to the scheme of the Act and the nature of the power conferred upon the authorities invested with quasi-judicial power."

With this principle goes the mandate which the Delhi High Court has formulated in these words *Gee Vee Enterprise v Addl. CIT*[95]

> "The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the

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[93] *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* C.P. 4022 OF 1999 dated Feb 23, 2005

[94] AIR 2000 SC 2178 at 2180

[95] (1975) 99 ITR 375 at 386.

return when the circumstances of the case are such as to provoke an inquiry."

57. That the impugned Instruction says that the Assessing Officers shall give effect to such determinations "under section 143(3) read with section 90(2) of the IT Act and relevant Article of the Treaty." . Final order that an authority passes *discloses the source of legal power to pass such an order*. Section 143(3) is a power of that sort. Section 90(2) is not the source any power authorizing the framing or modification of the Assessment Order. That Section 90 (2) of the Income-tax Act contemplates the transmission of the *statutory* benefits (on account of some statutory change) to the beneficiaries of a tax treaty. The CBDT's own Circular, already quoted proves that this part of the Instruction is not true. Section 90(2) speaks of the beneficial "provisions of this Act" , not the beneficial provisions of this tax treaty. The Authority sees in the Section an expression which simply does not exist.

58. That the impugned Instruction clarifies how the decisions under the MAP are to be given effect where <u>the appeals</u> are pending before the CIT(A) are pending.

> "In cases where the assessments have been completed and the assessee has filed an appeal before the CIT (A), the A.O. shall give effect to the decision and bring such facts to the notice of CIT (A). The A.O. shall also obtain an undertaking from the assessee regarding withdrawal of appeal on the issues on which decision under MAP has been received. The assessee shall also undertake not to agitate the decision under MAP any further. There may be cases where the decision under MAP may require the AO to re-compute the income after incorporating certain findings (like guidelines regarding attribution of income to and deduction of expenses on PE). In such cases, re-computation of income shall be carried out by the AO by passing an order under section 143(3) read with section 90(2) and the respective Article of the DTAC."

How bizarre this instruction is would be evident from the following:

(a) The A.O. is directed to "give effect to the decision and bring such facts to the notice of CIT (A)." This procedure is arbitrary, and productive of much public mischief. Not only the normal courtesy would be given up, the CIT(A) would become a helpless rubber stamp. The statute has not made him so pathetic. Some CIT(A) may simply refuse to take cognizance

of such a request. In *Pahwa Chemicals Pvt Ltd vs the Commissioner of Central Excise*[96] the Hon'ble Supreme Court has rightly observed:

> 'These administrative directions cannot take away. jurisdiction vested in a Central Excise Officer under the Act.'
>
> 'But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.'

(b) In such cases, re-computation of income shall be carried out by the AO by passing an order under section 143(3) read with section 90(2) and the respective Article of the DTAC. Assessment under Section 143 is understandable, but that it can be done read with Section 90(2) is strange and inconceivable. . *Section 143(3) is a power to frame an assessment order, as Section 254 is the source of power of the Income-tax Appellate Tribunal to pass its appellate order.*

59. That the Instruction clarifies how the decisions under the MAP are to be given effect where the appeals are pending before the Income-tax Appellate Tribunal are pending.

> "In such cases, the assessment order u/s 143(3) would have been revised u/s 250 as per the directions of the CIT(A). The MAP decision may give certain relief to the assessee. Such relief is to be read as if provided under the Act and accordingly the order u/s 250 will have to be revised by the A.O. as per provisions of sub section 90(2) read with relevant Article of the DTAC relating to MAP after incorporating the relief allowed under MAP. However, this will be carried out only after the assessee withdraws his appeal from the ITAT on the points on which the decision has been arrived at under MAP. Similarly, in cases where department has filed an appeal before the ITAT, the same shall also be withdrawn on the issues which have been decided under MAP."

The instruction is a strange assortment of multiple fictions devised by the Executive to subvert the statute. The amazement which this Instruction inflicts reaches is noxious apogee when one notices the last line of the para just quoted. It is an established law that in tax matters there is no *lis* in formal sense. All the authorities, which includes the ITAT, have the common and constant pursuit to determine what is the correct quantum of tax payable by assesses. This process, the public process serving evident public ends can never be stopped by an appellant even if be the Income-tax Department.

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[96] (2005) 2 SCC 720at p. 27 [Coram: S.N. Variava, Dr AR. Lakshmanan and S.H. Kapadia, JJ.]

When the ITAT is seized with the matter as an appellate authority, it is bound to function the way the Special Appeal Commissioners function in *Rex v. Special Commissioner* (20 TC 381 at 384, quoted by *Kanga & Palkhivala* at p. 1509).

44. That under the Mutual Agreements Procedure even the issues of fraud on account of Treaty Shopping can be decided by the Competent Authorities. To crown it all, Art. 27 of the Indo-U.S. Convention permits under its sub-article 4 the prescription of a "unilateral procedures, conditions, methods and techniques to , facilitate bilateral actions and the implementation of mutual agreement procedure". How can the Competent Authorities decide such issues?

The Competent Authorities under the MAP.

60. That under the OECD Commentary the ambit of power to the Competent Authorities is very wide. The Commentary says:

> "In seeking mutual agreement, the competent authorities must first, of course, determine their position in the light of the rules of their respective taxation laws and of the provisions of the convention, which are as binding on them as much as they are on the taxpayer. Should the strict application of such rules or provisions preclude any agreement, it may reasonably be held that the competent authorities, as in the case of international arbitration, can, subsidiarily, have regard to the considerations of equity in order to give the taxpayer satisfaction."

Such wide powers cannot be given in *tax matters* to the administrative authorities without a statutory authorization. *This sort of provision violates Art 226 of the Constitution of India.* To equate his powers with those of the international arbitrators is to provide the Competent Authorities a vast discretion, and wide power to destroy the Rule of Law itself in an important segment of public law.

61. The Competent Authority's only qualification is that he is an "officer" whom the Central Government in exercise of unbridled discretion appoints as such. Is it fair to ride roughshod the rule of law in order to entrust tax determination with a faceless bureaucrat of any significance under the opaque administrative system out the vigilance of law, and the gaze of common citizenry? We must not forget what Allen in these words which have become *locus classicus*:

> "…The fact, is, however, that nobody on earth can be trusted with power without restraint. It is 'of an encroaching nature', and its encroachments,

more often than not, are for the sake of what are sincerely believed to be good, and indeed necessary, objects."[97] (*italics* supplied).

Some lobbyists of the companies, who now vaunt to rule the World, may plead "Hands off: the executive knows more and understands better what is to be done here. You are not judges of these matters." It is the good fortune of Democracy that courts have rejected this view for our 'common weal'. And Prof. Wade in his *Administrative Law* (4th ed., 1977) puts the right position in nutshell in these precise but suggestive words:

> "As has been seen, the courts are to-day resistant to the whole notion of uncontrollable power and this is the best security against another lapse"

62. That even the OECD Commentary recognizes that under the domestic laws of Contracting States other authorities also, including courts, have the right to interpret the international treaties and agreements " that this is sometimes the exclusive rights of such authorities."[98] It is settled law that in our country the function to declare what law is on a particular point is exclusively of the courts, not of the faceless bureaucrats**. U**nder the MAP procedure, the Competent Authorities can even decide whether someone is a Treaty Shopper. The Treaty Shoppers do not come within the Personal Scope of a tax treaty; *so this issue is alien to the mechanism of bilateral dispute resolutions by the Competent authorities*. The OECD Commentary on paragraph 3 of Art. 25 states:

> "The second sentence of paragraph 3 enables the competent authorities to deal with such cases of double taxation as do not come within the scope of the provisions of the convention……An exception must, however, be made for the case of Contracting States whose domestic law prevents the convention from being complemented on points which are not explicitly or at least implicitly dealt with; in such cases, the convention could be complemented only by a protocol subject , like the convention itself, to ratification or approval"[99]

No country tolerates a continuing fraud. It is because of this no country approves **Treaty Shopping** about which:

(i) Prof Ray August[100] in a paragraph on "countermeasures" in his *International Business Law* (4th ed. 2004):

> "In countries that do not have specific anti-abuse legislation, the problem of treaty shopping is attacked using general principles of equity. Common law countries (including Australia, Canada, and the United Kingdom) use a "substance over form" approach. That is, their tax authorities attempt to determine if the movement of income

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[97] Allen, *Law and Orders* 3rd ed. p. 297
[98] ibid 2.173
[99] ibid p. 2.173
[100]. Ray August, Professor of Business Law at Washington State University.

between foreign affiliated companies is based on legitimate commercial reasons or if it is merely a sham set up in order to obtain treaty benefits. Civil law countries (including France and Germany) use an "abuse" approach. In other words, their tax authorities ask whether a particular arrangement of companies constitutes an abuse, a misuse, or an improper use of a tax-treaty."[101]

(ii) Dr M.L. Upadhyaya[102] considers the Treat Shopping a FRAUD ON THE CONSTITUTION: to quote from his detailed Opinion:

"There is no express or implied provision or suggestion to extend the benefits arising out of such treaty to the nationals of third States. In reality, the nationals of the third states pretending to be national entities of one of the contracting states claim such benefits. Objections are raised to such claims. If one of the Contracting States wants to condone this apparent illegal or unethical practice, how should it go about it. There are two courses open. One either the two states by consent amend the terms of the treaty and provide for by an express term in the treaty and then amend its laws, if the said amendments have financial implications affecting its revenues. But if the executive without amending the laws give a clarification of the provision of the treaty and the law and by executive fiat condones the manifestly illegal practice and does what was not initially intended by the treaty, it would certainly be a fraud on the Constitution and a colourable exercise of power. This is clearly an attempt to do indirectly what it could not do directly."

To permit Treaty Shopping in India is clearly "a fraud on the Constitution and a colourable exercise of power". *It is strange that the MAP provisions want to legitimize this gross dereliction in a way morbid and sinister to the core.*

(d) MAP contemplates an executive agreement not recognized under our Constitution

63. The impugned Instruction and the impugned Rules create a noxious fiction the like of which is unknown in International Public Law. It says: to quote--

"7.After careful consideration of these issues it has been decided that once the Competent Authority communicates the decision to the Chief Commissioner / Director General in respect of any taxpayer, the effect shall be given to the decision of the Authority treating it as a

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[101]. Deloitte, Haskins & Sells International, *Treaty Shopping: An Emerging Tax Issue and its Present States in Various Countries*, p. 7 (1988).

[102]. Prof. (Dr.) M L Upadhyaya, Vice President, Amity Law School President, Amity Law School *Former Dean*, *Faculty of Law:*Calcutta University and Jabalpur University:*Director*, Central India Law Institute, Jabalpur:*UGC Visiting Professor*,National Law School of India University, Bangalore.

part of provision of the Treaty itself as applicable to the particular case of the applicant. In order to give effect to the decision under MAP, the A.O. may have to deal with any one of the following situations:"

On analysis, in plain English, the above means the following:

(i) The Chief Commissioner / Director General is mandated to treat the direction by a Competent Authority in a given individual case *as a stipulation* of a tax treaty.

(ii) The Competent Authority is deemed a plenipotentiary representing the State.[A treaty is normally negotiated between plenipotentiaries provided by their respective governments with "full power" to conclude the treaty within the scope of their instructions.]

(iii) Though he adds to a treaty or supplements it through acts under MAP, his act requires no evaluation by the political executive, and it does not require any ratification.

(iv) He can forge any sort of treaty terms in an opaque system without Parliament and the nation knowing about it.

(v) Though such deemed terms operate under the domestic law, it is a wholly an executive creation setting at naught Parliamentary supremacy expressed through the statute.

(e) THE IMPUGNED RULES IN PART IX-C OF THE INCOME-TAX RULES, 1962[103] are *ultra vires*

The impugned Rules are ultra vires

64. That that this Petitioner submits that the impugned rules, inserted in Part IX-C of the Income-tax Rules, 1962, are *ultra vires.* These rules are said to be framed in exercise of powers under Section 295(2)(h) of the Income-tax Act, 1961. Section 295 of the Income-tax Act 1961 deals with the CBDT's rule making power. Its sub-Section (1) says:

> "The Board may, subject to the control of the Central Government, by notification in the Gazette of India, make rules for the whole or any part of India for carrying out the purposes of this Act."

Section 295(2) provides: to quote—

> "In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters-
>
> (a)…,….

[103] notified on Feb. 6, 2003

(h) the procedure for giving effect to the terms of any agreement for granting of relief in respect of double taxation or for the avoidance of double taxation which may be entered into by the Central Government under this Act;"

65. That the rule making power has been granted to the CBDT to frame rule "for carrying out the purposes of this Act." Subversion of the statute under the garb of the exercise of the rule making power is inconceivable. It is inconceivable to think that the purpose of the Income-tax Act[104] is served by framing such Rules. The Rules validate and facilitate

(a) the operation of DTAAs framed in breach of the statutory and constitutional provisions;

(b) the operation of MAP which is *ultra vires* the statute lacking conspicuously in statutory foundation;

(c) the unjust enrichment of those whose interests are sheltered and promoted causing wrongful gains for them, and wrongful loss to our own country.

66.. That how can any reasonable person consider this impugned Instruction and the impugned rules as mere matters of *procedure*[105]? *Procedure* is a particular way of accomplishing something or of acting: it is a particular way of transacting business. The impugned Rules to be held *intra vires* would require an impermissible enlargement of the meaning of the expression "procedure". Any administrative enlargement of the meaning of the term is simply impermissible. The impugned Instruction [which subverts the entire mandatory scheme of the statute, which relaxes the provisions pertaining to limitations, or which prevents statutory civil servants from their rightful role, and which both adds to treaty terms and gives effect to treaty stipulations in breach of the statute] is *ex facie ultra vires.* Such provisions riding roughshod the statute cannot pertain to matters *per se mere* procedure.

67. That the Rule 44H says that the Competent Authority in India "shall call for and examine relevant records with a view to give his response to the competent authority of the country

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[104] The Object & Purpose of the Income-tax Act 1961, as its preamble and the scheme of the Income tax Act, 1961 suggests, is to collect tax in accordance with the law. Lord Scarman observed in *Inland Revenue Comrs v National Federation of Self- Employed and Small Businesses Ltd*[104]*:* "The duty has to be considered as one of several arising within the complex comprised in the care and management of a tax, *every part of which it is their duty, if they can, to collect*."[Italics supplied]. Lord Hewart observed in *Rex v. Special Commissioner* (20TC 381 at 384, that the duties imposed upon the Commissioners of Income tax are "in the interest of the general body of tax payers, to see what the true assessment ought to be, and that process, a public process directed to public ends."

[105]" 1. the method and order followed in doing something. 2.an established routine for conducting business at a meeting or in a law case. 3. a course of action."-- *Chambers 21st Century Dictionary*; an established or official way of doing something…"*Compact Oxford Dictionary*;

outside India.' The Rule is unreasonable because it is a mere window-dressing. The Competent Authority has no statutory power to do so. He does not possess even the power which an Inspector of Income-tax possesses. It is to be noted that our country has not till now entered into an Agreement which grants investigative power as does in 'the Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands, for the Exchange of Information relating to Taxes'.

FACTS

SEGMENT II (apropos the WTO Treaty)

UNCONSTITUTIONAL GOVERNMENTAL ACTION COMPLAINT
Constitutional Validity of India's participation in the World Trade Organization as a member questioned as it is repugnant to the provisions of our Constitution and therefore, unconstitutional.

(a) Submissions at the outset

68. That this Petitioner thinks it appropriate to raise issues with terseness and maximum of brevity though it is a complex subject as the to Treaty runs into several hundred pages which our Government, in all probability signed and ratified even without reading.

69.That this Petitioner submits that the Uruguay Round Final Act is a treaty beyond the contemplation of the Executive Power, or Legislative Power *as conceived under the Constitution of India.* This Petitioner fails to understand why our Executive succumbed to the corporate pressure, under the U S hegemony, to become a party to the Final Act. This act was ex facie *ultra vires* its power, and was likely to have an octopus-grip on our whole polity, internal and external. It turns India into a Sponsored State, and drives our Constitution to the margin. **This sort of Treaty, if at all it was contemplated to effect, should have been done only after a popular r*eferendum*** (vide **Annex 'C'** pp. 184-185 (printed pp. 37).

70. How a democratic government functions, even where there is no written constitution , is illustrated by what was done in **the U.K**. while entering into the EEC:

(a) It was only with the approval of Parliament a Treaty of Accession was signed in Brussels in 1972.

(b) Effect was given inside the U.K. to the treaties establishing and regulating the European Communities by the European Communities Act 1972

(c) 'The passing of the Referendum Act 1975, under the authority of which the referendum was held , implied that the Government and members of Parliament generally presumed that, if the result of referendum in the U.K. as a whole went against continued membership, this country would withdraw from the EEC and Parliament would pass legislation repealing the European Communities Act and disentangling our domestic law from Community law."[106]

(d) The European Assembly Elections Act 1978, per Section 6, provided that no treaty which is intended to increase the powers of Assembly shall be ratified by the U.K. unless it has been approved by an Act of Parliament. Normally treaties are ratified by the Crown (or executive) although legislation is required subsequently if they are to have effect within the U.K. In this instance the Executive is precluded from even concluding an agreement without legislative approval."[107]

In the **U.S.A**. the WTO Treaty was through an enactment after setting up a compressive mechanism for consultations with the federal units, and after declaring that nothing in the Treaty can override the law of the land [**Annex 'C'** pp. 154-155 (printed pp. 7-8)]

71. That the U.K adopted a pragmatic and fair approach appreciating the great domestic impact of the treaty, though under the conventional jurisprudence it could *form* a treaty under an unbridled prerogative power needing Parliamentary approval only in two situations when their *implementation* affects the norms of the positive law settled during the days of Long Parliament, and when it affects taxation (whether through imposition or mitigation).

72. . The Executive government signed and ratified the Uruguay Round Final Act without taking the nation in confidence by obtaining our Parliament's approval, and without conforming to the constitutional limitations as if the Executive was signing and ratifying a Treaty like the Treaty of Versailles, or the Treaty of Surrender. But, on proper analysis, that Treaty is no different from the Treaty of Surrender as it is in complete defilement and defacement of our

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[106] *Hood Phillips' Const & Adm. Law* p. 74

[107] ibid 100 Section 1(3): says: "(3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament." And *European Parliamentary Elections Act 2002* states in Art 12 vide **C/M** pages :

Constitution by subjugating the nation under a *pactum de contrahendo* to a regime under which (a) our Fundamental Rights have been violated; the constitutionally mandated objectives of the Government are substituted by the objectives articulated under the Uruguay Round Final Act; (c) the legislative power has been shed off in favour of the WTO and other institutions arising from the cauldron of the Act as their overt and covert commands create a situation of *fait accompli* to coerce Parliament to enact law toeing such lines, and as also because the Executive makes a trespass on several legislative fields, yet not occupied by Parliamentary enactments, thereby precluding our Parliament to legislate in future on such fields as they would stand occupied by the WTO commands masquerading as the policies of the government implemented under Art 73 of the Constitution; (d) the judicial power has been illegally granted to foreign bodies, like the Disputes Settlement Body by reducing even our Supreme Court to the level of a subordinate court of residuary jurisdiction; (e) by commanding our domestic institutions, like Parliament and the Superior Courts to conform their laws to the obligations under the Uruguay Round Final Act; (f) by begetting constitutional amendments, and powers to amend the Constitution, to render it Market friendly even in matters which not even our Parliament can amend even in exercise of its constituent power; (g) riding roughshod on the profoundest principle of constitutional polity, of which the earliest masterly exposition was done by Chief Justice Marshall in *Marbury*.

73.That it is shocking to find a senior member of the Cabinet so utterly innocent of history and law. This gentleman's statement is thus recorded in Report of the Constitution Review Commission[108]:

> "46. The Private Member's Bill to amend the Constitution introduced by Shri M.A. Baby, M.P. in February 1992 came up for discussion in the Rajya Sabha only in March, 1997. Shri Baby spoke passionately in support of the said Bill pointing out in particular the adverse consequences flowing from the several WTO Agreements signed and ratified by the Government in 1994 [Uruguay Round of GATT Negotiations] without reference to the Parliament. Shri Pranab Mukherjee, M.P. spoke at length on the said Bill. He pointed out that there are two sides of the picture. He pointed out that where parliamentary approval is required, it has led to certain complications. He gave the example of the United State's Senate refusing to ratify the treaty of Versailles concluded at the end of the World War in spite of the fact that President Wilson."

What more this nation can expect from a person who had visited Mauritius to facilitate the making of this infamous Indo-Mauritius Double Taxaion Avoidance Convention in 1982? This gentleman said what is expected from a comprador of the Sponsored State. *Quis custodiet ipsos custodies* (Who will Watch the Watchmen ?). In 1994, when the

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[108] http://ncrwc.nic.in/
http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm Accessed 11 July 2006

Uruguay Round Final Act was signed, India was not a vanquished nation, and our Constitution was not writhing under the boots of the victors. This Petitioner has already stated that neither the Treaty of Versailles, nor the Uruguay Round Final Act is a Treaty or Arrangement is within the comprehension of our Constitution. This Petitioner has developed this lurid point in [**Annex 'C'** pp 176- 181 (printed pp29 34)]

(b) India's Handling of the Uruguay Round negotiations

74. Explaining the background of the Uruguay Round Final Act, Muchkund Dubey writes[109]:

> "During the best part of this period, the Government of India did not take any step known to the public, to renegotiate on issues of interest to India. No indication was given to the Parliament or to the public that the minimum must which India should have taken up for negotiation had been identified. Nor was there any indication that either the Director General of GATT or major negotiating partners had been notified of India's negotiating position. On the contrary, the notes prepared and statements made by the Government of India sought to bring out great virtues of the Draft Dunkel Text from the point of view of India and gave reasons why India should sign this text on the dotted lines. During this period, the Government of India also stuck to its policy of not taking any initiative to mobilize the support of other developing and like-minded countries, to bolster its position. It was only towards the end of 1992, and that too under the strong pressure of nation-wide agitation mounted against some key provisions of the Dunkel Text, that the Government of India bestirred itself and identified a few issues in which our interest needed to be protected. But that was too little and too late. There was no substantial change in the Dunkel Draft as finally adopted, from the point of India's interest."

In the early phases of the negotiations India was assertive on her stand that the ambit of the negotiations could not subsume issues relating to IPR protection as this issue was not relevant to a liberal multilateral trading system. Then came the sudden reversal of India's position and an abject surrender in the mid-term review in Geneva in April 1989. What led to this shift in Government of India's position was not clear at first. But soon the real reason was known. " From the mid-term review session of the Trade Negotiation Committee in Montreal in December 1988, the word passed on to the Indian delegation at the political level was: "Do not appear to be ganging up against the Americans". In operational terms, it meant that India should not try to be on the vanguard of the struggle of the developed countries ……."[110].The Peoples'

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[109] *An Unequal Treaty* pp. 9-10
[110] ibid p.8

Commission[111] too had reasons to wonder why the Government of India did not publish a position paper explaining the reasons for the radical shift in India's stance and the likely impact of providing enhanced levels of intellectual property protection and liberalization of investment and service industries demanded by the U.S.

75. That there was a much greater need to get the Uruguay Round Final Act approved by our Parliament where its constitutional conformity would have been deliberated. On September 19, 1991 itself 250 Members of Parliament and Eminent Persons (including some former Chief Justices and Judges of this Hon'ble Court) signed a Press Release wherein transgressions of constitutional limitations, and encroachment of Parliamentary were brought out with remarkable perspicacity and perceptiveness: to quote[112] –

> 'The worst aspect of the GATT Agreement/ Treaty is that the role of our Parliament in law-making will be substantially curtailed. To protect the sovereignty and dignity of the Indian people and Parliament, we seek that the Government places a Resolution to reiterate the need for ratification by Parliament of international treatises entailing the introduction of new legislation and wholesale amendment of existing legislation and incurring of financial costs. This will ensure the Indian people and Parliamentarians that the debate in Parliament at the GATT treaty ratification stage will not be a mere formality. The right of Indian Parliament to legislative the domestic laws through the democratic process is inalienable and must be upheld at any cost.'

And the Times of India dated 21.09. 91 made the following comment on the afore-quoted Press Release[113]:

> 'In a democracy, Parliament is supreme and Parliamentary scrutiny of the international commitments made by the government cannot, therefore, be bypassed. Indeed, in the world's second largest democracy, the US Congress itself enjoys such a prerogative and exercises it with telling effect. The Parliament of a mature democracy like India must have similar jurisdiction."

This reminds us of what John Maynard Keynes warned 70 years ago "that nothing less than the democratic experiment in self-government was endangered by the treat of global financial market forces"[114] which, in this Petitioner's submission, was unleashed under the rogue financial system imposed on us through the commitments under the WTO Treaty.

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[111] *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai , the former Judges of the Supreme Court,and Rajinder Sachar, the former Chief Justice of Delhi High Court.
[112] *A Comment in Defence of Indian Patent Regime* [Enlarged ED] National Working Group on Patent Laws (79, Nehru Place, N.Delhi) p.3
[113] *ibid*
[114] Noam Chomsky, *Hegemony and Survival* p. 138

76. The *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai , the former Judges of the Supreme Court, and Rajinder Sachar, the former Chief Justice of Delhi High Court [hereinafter referred as *Report of the Peoples' Commission on GATT*] found that the entire negotiating process was neither transparent, nor it showed any accountability to the elected representatives of people in a democracy[115]. It further found that adequate information regarding India's stance at the GATT negotiations, and the position taken by other countries was not given to the people or their representatives. The nature of the possible impact of the treaty under negotiation was never brought in public domain. The results of the Uruguay Round of Multilateral Trade Negotiations ("Dunkel Draft") came out in several hundred pages in December 1991 as a *fait accompli.* The element of coercion struck at the outset itself where the Draft Treaty said:

> "No single element of the Draft Final Act can be considered as agreed till the total package is agreed."

The Draft Treaty, the Peoples' Commission felt, exemplified realpolitik: take-it-or-leave-it. The Commission found facts to hold that the steps taken by the Government after December 1991 barely disguised the fact that the Government intended to comply with the U.S. demands at GATT regardless of what Parliament, the States or the public had to say. The Government authenticated the Final Act on April 15, 1994. Even in December 1993 the Members of Parliament were demanding information on the Dunkel Draft. Many members of the Rajya Sabha walked out in protest. The Minister of Commerce refused to discuss the Dunkel Draft in Parliament before accepting it. The Government failed to make any coherent analysis which could explain the basis for the Government's claim that India had more to gain than lose by accepting the Draft Treaty. The Government cited in the support of its view a report by the Organization for Economic Cooperation and Development. It is an irony of the worst type that our Government chose to be deluded by the OECD report! The Final Act was agreed on December 15, 1993, and it was formally signed at the Ministerial level in Marrakesh on April 15, 1994. On December 31, 1994 the Government Promulgated an Ordinance amending the Patents Act 1970; and acceded to the World Trade Organization, an institution to dominate the whole economic architecture of the World which commenced work from Jan. 1, 1995.

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[115] Report *of the Peoples' Commission on GATT* gives a meaningful Chronology of events: to vide pp. 11-`12 of the Report:

3.1995: Introduction of Patents Bill (Amendment) Bill, 1995 in Lok Sabha and its passing by Lok Sabha with a slender majority. The Bill could not be introduced in Rajya Sabha due to strong opposition by Opposition and Independent Members of Parliament in Rajya Sabha."

One wonders how the Executive couldn't wait for an adequate popular deliberations when the Marrakesh Declaration of 15 April 1994 said in so many words:

> "…..so that it can enter into force by 1 January 1995 or as early as possible thereafter. Ministers have furthermore adopted a Decision on Trade and Environment."

63. That the real state of affairs was thus brought out in the Consultation Paper on Treaty Making Power placed before the Constitutional Review Commission (forming part pf the Vol. II of the Report)[116]:

> "We in India cannot afford to ignore this subject any longer, particularly because of the experience of W.T.O. treaties signed by our Government without consulting or without taking into confidence either the Parliament or the public or, for that matter, groups and institutions likely to be affected adversely thereby."

77. After the ratification of the Final Act of Uruguay Round of GATT negotiations, our Government came under an obligation to implement the various agreements incorporated in the Final Act. The Trade Related Aspects of Intellectual Property Rights (TRIPS) was implemented by amending various IPR Laws to make them conform to the treaty obligations. Our Parliament found itself up against a *fait accompli*. Our sovereign Parliament got subjected to the servitude of the overweening exogenous forces. It worked under a crypto-psychic pressure, if not under a psychosis, of the breach of international obligations, which could not only embarrass our country in the comity of nations, it could have even exposed the country to sanctions. Those who had brought about this situation had brave words to blabber, but others found themselves in a Kafkaesque no-exit situation. This mood was evident in the speeches made in both the Houses of Parliament when the Patents (Second Amendment Bill) was under consideration. Whilst Pranab Mukherjee excused the unequal treaty as it was begotten in an unequal world, Manoj Bhattacharya was quite outspoken in his sublime wrath. With an iron in his soul he said in the Rajya Sabha:

> "This is a very complicated Bill and this does not concern only today, nor does it concern only the immediate tomorrow, but it concerns the years to come. And it concerns the interests of all the under-developed countries and all developing countries, to whom we must show that India will provide leadership in all manner".
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> "One thing transpired, that there is an element of helplessness; they are trying to plead that we are in a helpless condition, that we cannot do it because we are

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[116] http://ncrwc.nic.in/ http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm Accessed 11 July 2006

> already a member of the WTO, we are already committed we are already in the trap; and so we cannot come out of that trap, and for that only we have to effect these changes to the already existing very, very good and very, very progressive Indian Patents Law of 1970".
>
> "Kindly forgive me for saying so, the multi-national corporations work only to amass super-profits".
>
> "They work only to amass super-profits. They are not satisfied. Their lust is not satisfied with the profits only. Their lust is satisfied only with super-profits. They are working only for super-profits. They have no concern for the public health, they are not concerned for the ailing children of ours, they have got no concern for the malnutritioned women of our country and they have no concern for the poor people of this country".

Whilst all these happened, our leaders, the press and other opinion-makers were over busy with the inane trivialities of self-seeking politicking. Never had such an indifference ever been shown by a democratic country when it had sufficient presentiment of a strange tsunami creeping fast to overtake it. This plight of the nation takes mind again to the days of the Nawab of Awadh when, whilst the imperial forces were on his head, the Nawab was playing with pigeons. This Petitioner recalls someone writing about a person who played chess in his portico unmindful of the fact that inside the house he was being robbed and his wife raped![117]

65. That, after giving a graphic account of how our country was driven to be handcuffed by the Uruguay Round Final Act, *the Report of the Peoples' Commission on Patents Laws in India* (by Shri I.K.Gujral, Prof Yashpal, Prof Muchkund Dubey, Shri B. L. Das and Dr Yusuf Hamied) observed:

> "The WTO treaty was signed. No real debate took place except for the outcry. The protest of the Parliamentary Standing Committee was ignored…….In fact India had no other choice but to accede to what the WTO decreed on pain of sanctions."

And one is driven to believe that the Executive-government, in exercise of treaty-making power, reduced our Constitution and its institutions to abject servitude. One cannot avoid this feeling if one considers how the Patents Act, 1970 was amended after being coerced by the decisions of the Disputes Settlement Body of the WTO which held, inter alia, that India had not complied with its obligations under Art 70.9 of the TRIPs Agreement and had not established a system for grant of Exclusive Marketing Rights. The deed of the Executive-government led our country to shabby discomfitures in the

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[117] The game of chess in Middleton's *Women beware Women;* and T S Eliot*, The Waste Land*

DSB and its Appellate Forum in a set of Cases[118] (India-US re. Quantitive Restrictions; India-Bangladesh re. Anti-Dumping Measures, etc) which made our Parliament buckle making its sovereignty a figment of delight for the unworthy, a matter of concern for us as under this polity the Rule of Law in the constitutional sense becomes a farce.

78. The *Report of the Peoples' Commission on GATT* examined at length in its Report the various aspects of the Agreement in question, and held unanimously that it was in breach of the mandatory constitutional principles as it violated the constitutional discipline by violating the valid constitutional norms and limitations pertaining to:

(a) Constitutional basics; (b) Judicial Review;
(c) Treaty-making power, (d) Federal structure,
(e) Fundamental Rights,(f) Democracy, and
(g) Sovereignty.

And they held at p. 164:

> "Such a treaty is not constitutionally binding within the Indian Constitutional System and, in the facts and circumstances cannot be given effect to."

And at p. 179:

> "If the Constitution is what the Judges have told us it is and the text with the Preamble explicates it, the TRIPS part vis a vis Indians will in all probability be *ultra vires*."

This Petitioner agrees with the findings of in the *Report of the Peoples' Commission on GATT* (by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai , the former Judges of the Supreme Court, and Rajinder Sachar, the former Chief Justice of Delhi High Court) that our acceptance and ratification of the Uruguay Round Final Act was clearly unconstitutional.

(a) for violating our Fundamental Rights,
(b) for being the Executive's act under the opaque system abdicating our sovereignty in socio-economic space,
(c) for breaching the basic features of our Constitution,
(d) for violating the mandatory constitutional limitations under Articles 73 and 253 of the Constitution,
(e) for violating the constitutionally mandated principles and directives viz. (i) Constitutional basics, (ii) Judicial Review, (iii) Treaty-making

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[118] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm

power,(iv) Federal structure, (v) Fundamental Rights, (vi) Democracy, and (vii) Sovereignty.

Another *Commission* consisting of Shri I.K.Gujral, Prof Yashpal, Shri B.L.Das, Dr Yusuf Hamied also came to the similar conclusions.)

The Commission's Report is very comprehensive. This Petitioner would file copies of the said Commission's Report before this Hon'ble Court in course of the preliminary hearing of this Writ Petition.

79. That it is impossible to understand the constitutional issues raised in this Writ Petition unless this Hon'ble Court considers the morbid phenomenon of Sponsored State under which our Constitution is ridden roughshod by the corporate interests by corruptly enchanting our Government under the spell of the new comprador. In the early history of British India two models of imperialism were minted: in one the imperialist power controlled the administration and the markets leaving the façade of the Nawab's government intact to receive all the brickbats from his people for things getting wrong; in the other no such pretence was maintained, and power was directly assumed over the people who could see the targets of their wrath, or objects of their veneration straight within their sight. The Sepoy Mutiny was a great revolution terribly underplayed by the British historians. But the imperialists learnt a lesson that the best strategy was to capture market for trade leaving political power with the native factotum[119]. This preference for vampirism won approval of the think-tanks of the distraught imperialists who swung to the second model. This model is the delight of the neo-imperialists of our days where there is a scramble of power to capture the markets and the economic resources of others under deceptive strategy. The IMF-World Bank strategy illustrates what the early imperialists had thought and devised. The Uruguay Round Final Act is also designed to promote this morbid strategy going counter to the very grain of our Constitution.

80. That this Petitioner submits that the horrendous Treaty like the Uruguay Round Final Act should have been considered by our people through *referendum*, because 'We, the People' alone are competent to decide whether to have this Constitution, or not. [This point has been developed [vide **Annex 'C'** pp.181-185 (printed pp. 34-38]**.** This Treaty

[119] The *Encyclopedia Britannica* notes: "In the middle years of the century (the 19th century) it had been widely held that colonies were burdens and that materials and markets were most effectively acquired through trade." [Asa Briggs in the *Encyclopedia Britannica* Vol. 29 p. 85]

was not a conventional consensual engagement: it was a *pactum de contrahendo,* being the most far-reaching negotiations ever undertaken under GATT.[120]. It involved an undertaking to negotiate or conclude a set of pre-fabricated agreements. The signing of this Final Act was a most important event of modern times[121]. When a Treaty is done in the protocol of *pactum de contrahendo*, the contracting Parties agree to carry on negotiations to achieve arguments as conceived in that Treaty. Such a Treaty is infinitely more dangerous than the Treaty whose terms meet the eye at a given moment. To hope that we would stand erect at the later stages of the negotiations would be hoping against hope knowing how our Executive cringed at Marrakesh, and how much ready it is to further the interests of those who have no commitment to our Constitution, and to wish.

81. That this Petitioner intends to examine the features of this Act to demonstrate how grossly it offends our Constitution, and how atrociously it shows the Executive's usurpation and desecration of legislative and judicial powers. This Petitioner begs to be pardoned for saying that by ratifying this Act, done even without Parliament's approval (not to say of referendum), the Executive signed, in most *ultra vires* way, the very obituary of the Constitution we had given to ourselves.

(c)RELEVANT PROVISIONS OF THE FINAL ACT.

82. That for the sake of convenience this Petitioner draws this Hon'ble Court's attention to certain specific provisions of the Final Act, and also of those provisions of our Constitution which lead this Petitioner to assert that the Government Action transgressed the mandatory constitutional limitations: but first some extracts from the Final Act;

Article I. The World Trade Organization (hereafter referred to as "the WTO") is hereby established.

Article II, Paragraph 1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

Article II, Paragraph 2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereafter referred to as "Multilateral Trade Agreements") are integral

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[120] D.P.O'conell , *International Law* Vol 1 Chap 7

[121] Muchkund Dubey, *An Unequal Treaty* (World Trading Order After GATT) p. 11

parts of this Agreement, binding on all Members.

Article III, Paragraph 3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

Article XVI, Paragraph 4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

Article XVI, Paragraph 5. No reservations may be made in respect of any provision of this Agreement…….

Articles from Annex 2 of the Agreement Establishing the World Trade organization, "Understanding on Rules and Procedures Governing the Settlement of Disputes.

Article 1, Paragraph 1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

Article 2, Paragraph 1. The Dispute Settlement Body (DSB) is hereby established to administer these rules and procedures…….

Article 6, Paragraph 1. If the complaining party so requests, a panel shall be established at the DSB meeting following that at which the request first appears as an item on the DSB's agenda…..

Article 12, Paragraph 7. Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB…..

Article 16, Paragraph 4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.

83. This Petitioner, hereinafter, summarizes his case to show how our Executive acted in breach of its mandatory constitutional obligations governing, in peremptory manner, its competence. This Petitioner lodges the following Complaints before this Hon'ble Court, though he intends to develop them with reference to the constitutional provisions in the Section dealing with **GROUNDS**:

(i)Violation of our Fundamental Right; (ii)Wrongful Change in Primary Governmental Functions; (iii)Wrongful Assignment of the Legislative Power of Parliament; (iv)Wrongful Assignment of the Power to Regulate;(v) Wrongful Assignment of the Judicial Power; (vi) Our Constitution virtually wrongfully Amended; The impugned Executive Act is in breach of the judicially pronounced principles; (vii) The Uruguay Round Final Act violates some core and basic features of our Constitution, viz:

(a) Constitutional basics,
(b) Judicial Review,
(c) Treaty-making power,
(d) Federal structure,
(e) Fundamental Rights,
(f) Democracy, and
(g) Sovereignty.

85. That it is important to note that whenever the WTO is criticized for being undemocratic, it counters asserting[122]:

> "What is more, the WTO's trade rules, resulting from the Uruguay Round trade talks, were negotiated by member governments and ratified in members' parliaments."

So far India is concerned, the WTO is clearly undemocratic *as this Treaty was not "ratified in members' Parliament*".

(d) SAMPLING SOME PROVISIONS FROM THE URUGUAY ROUND FINAL ACT

86. That never in this World ever a Treaty was done more comprehensive, more embracing, and more dominating, with widest spectrum, than the Uruguay Round Final Act. Not only it defies a systematic analysis in any clear frame of reference, it also deceives and ditches any honest analyst as its protocol of *pactum de contrahendo*[123] half reveals and half conceals the truth within. It is an Agreement to Agree to terms , on negotiations under duress, with regard to matters some clear, some in silhouette, but many creeping through mist. Besides, it has so many casements for corporate delight that anything can be interjected into it by through pressure and persuasion.

87.That this Petitioner intends to put a fleeting focus on the following two segments to show how they are clear usurpation of our Sovereignty, breach of fundamental

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[122] http://www.wto.org/english/thewto_e/whatis_e/10mis_e/10m10_e.htm
[123] a *pactum de contrahendo*[123]: it involves an undertaking to negotiate or conclude another agreement or agreements [D.P.O'conell , *International Law* Vol 1 Chap 7].

constitutional limitations, encroachment on or shedding off of the legislative power of Parliament, directed in a morbid peremptory tone of command which only a nation under the victors' boots can tolerate. This Petitioner would refer specifically to the following two areas merely to illustrate the ambit and the reach of the Uruguay Round Final Act:

(a)Agreement on Agriculture

(b) Agreement on the Trade-Related Aspects of Intellectual

(i)Agreement on Agriculture

88. That the Agreement on Agriculture consists of four portions: the Agreement on Agriculture itself; the concessions and commitments Members are to undertake on market access, domestic support and export subsidies; the Agreement on Sanitary and Phytosanitary Measures; and the Ministerial Decision concerning Least-Developed and Net Food-Importing Developing countries. The WTO admits:

> '*Overall, the results of the negotiations provide a framework for the long-term reform of agricultural trade and domestic policies over the years to come.* It makes a decisive move towards the objective of increased market orientation in agricultural trade….. The agricultural package also addresses many other issues of vital economic and political importance to many Members. These include provisions that encourage the use of less trade-distorting domestic support policies to maintain the rural economy, that allow actions to be taken to ease any adjustment burden, and also the introduction of tightly prescribed provisions that allow some flexibility in the implementation of commitments. Specific concerns of developing countries have been addressed including the concerns of net-food importing countries and least-developed countries.'…

Further, under this Agreement , the Members are required to reduce the value of mainly direct *export subsidies* to a level 36 per cent below the 1986-90 base period level over the six-year implementation period, and the quantity of subsidised exports by 21 per cent over the same period. In the case of developing countries, the reductions are two-thirds those of developed countries over a ten-year period (with no reductions applying to the least-developed countries) and subject to certain conditions, there are no commitments on subsidies to reduce the costs of marketing exports of agricultural products or internal transport and freight charges on export shipments. Where subsidised exports have increased since the 1986-90 base period, 1991-92 may be used, in certain circumstances, as the beginning point of reductions although the end-point remains that based on the 1986-90 base period level.

It is made clear that *the package is conceived as part of a continuing process with the long-term objective of securing substantial progressive reductions in support and protection.* In this light, it calls for further negotiations in the fifth year of implementation which, along with an assessment of the first five years, would take into account non-trade concerns, special and differential treatment for developing countries, the objective to establish a fair and market-oriented agricultural trading system and other concerns and objectives noted in the preamble to the agreement.

89.That the Agreement on Agriculture commands, *inter alia* other things, the following:

> "(a) To reduce domestic support, measured in terms of AMS (Agregate Measurement of Supports), by 20%;
>
> (a) To reduce barriers to trade (comprising tariff and tariffed non-tariff barriers) by 36% (tarrification means that all border non-tariff barriers will be replaced by tariffs yielding the same level of protection); besides all agricultural tariff lines will have to be bound;
> (b) To reduce export subsidies by 36% of budget outlays and 24% in quantity;
> (c) For those countries which decide to convert their non-tariff barriers into equivalent tariffs, to maintain the current level of market access and to grant minimum access through tariff quotas representing 4% of domestic consumption in the base year in the first year of the implementation period, going up to 8% by end of the period. For an agricultural commodity that is designated staple food in a developing country, the minimum access opportunity would have to be 1% of consumption in the first year, going to 2% at the beginning of the fifth year, and further to 4% at the beginning of the tenth year…."[124]

90. That this Petitioner considers the tone and the temper of the above stipulations no different from those shown by the imperialists even in such treaties as the Treaty of Allahabad, the Treaty of Nanking, the Treaty of Wanghia and the Treaty of Whampoa while effecting the earlier version of the Sponsored State.

91. That the Executive while ratifying the Act forgot all the constitutional commitments to create an agrarian structure based on justice and equality. One of the Fundamental Duties is (to cherish and follow the noble ideals which inspired our national struggle for freedom". It is to say the obvious that the sequel to the Fundamental Duty requiring a citizen to do

[124] Dubey, *An Unequal Treaty* p. 75.

certain thing in certain way, is inevitable to require the Government not be carefree about that. In this connection the following deserve to be considered:

(i) "It was during the struggle of independence itself that the Indian National Congress had realized that political independence without social and economic freedom was not enough. It was also accepted that the permanent settlement of 1793 must be repealed and actual cultivator of land should be granted ownership rights. The Congress Agrarian Reforms Committee had prepared a blue print of the abolition of intermediaries of all kinds."[125]

(ii) "The Planning Commission noted the existence of impediments of the pre-independence agrarian system and realized that their removal was necessary to bring about changes in the agrarian structure to realize the constitutional objective of a just social order……The programme[126] was further divided in five phases as follows:

(1) Abolition of Intermediaries;
(2) Tenancy reforms with security to actual cultivators;
(3) Redistribution of surplus ceiling land;
(4) Consolidation of holdings; and
(5) Updating of land records"[127]

(iii) "The Constitution (Twenty-fifth Amendment) Act, 1971 inserted a new Article 31C in the Constitution to protect legislations enacted to give effect to directive principles contained in Article 39(b) and (c) against a challenge on the ground of alleged inconsistency with fundamental rights guaranteed by Articles 14, 19, and 31. The validity of the Article was also upheld……The Supreme Court from beginning till today has upheld the validity of agrarian reform legislation against all kinds of attack."[128]

92.That the effect of the Agreement on Agriculture is in utter forgetfulness of our constitutional commitment of binding nature. The constitutional commitments have been given up under the WTO instructions/ influence. Zamindari system is back. The Special Economic Zones, and other ventures in the Special Economic Zones are negation of our constitutional commitments. Farmers are dying in thousands: how many are dead is a matter for speculation for our Stock-Market ruled Government. One expert has this to say[129]:

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[125] Prof. M.L.Upadhyaya, *Law, Poverty & Development* (Taxman) p. 104
[126] Government of India, Planning Commission, the Eighth Five Year Plan, Vol II, p. 33
[127] Prof. M.L.Upadhyaya, *Law, Poverty & Development* (Taxman) p. 105
[128] ibid 105-106

[129] *http://www.navdanya.org/news/06may08.htm*

> "Dr. Vandana Shiva, Director, Research Foundation for Science, Technology and Ecology has called the suicides of more than 40,000 farmers a genocide. This genocide is a result of deliberate policy imposed by the WTO and the World Bank, implemented by the Government, which is designed to destroy small farmers and transform Indian agriculture into large scale corporate industrial farming. The suicides are a result of debt and debt is a result of a rising cost of production and falling prices, both linked to free trade and trade liberalization policies in agriculture. Sonia Gandhi, the Congress President has cautioned the Prime Minister to not rush head long into Free Trade Agreements in the context of farmers suicides."

All this is happening when not less than one-third of the World GDP is stashed in the tax havens. The speculators thrive on extractive investments. We give concessions worth Rs 90,000 to the corporate world. Our country's black economy is at least 40% of GDP and the government is losing at last Rs. 4.5 lakh crores of taxes. So that the exploitative practices go unnoticed we have built an Opaque System under which the CBDT issued Circular 789 of April 13, 2000 preventing the statutory authoritative from looking into the loot from the tax havens. And all this despite our Constitution which grants us Right to Know, and despite our commitment to transparency under the *U.N. Convention against Corruption,* and also to the provisions as to transparency mandated even under the Uruguay Round Final Act. It is distressing to say that our government may break new grounds for resources by granting lands to the corporate zamindars, by granting right to exploit our resources by conferring licenses and franchises to corporations to rule the country. If water resources are exhausted, riverbeds can be leased or auctioned. When all these are exhausted, human beings, now fast becoming commodities (vide David Riesman's *The Lonely Crowd*), can be sold in international market. After all under the WTO regime it is the Market which rules. India's Constitution , it is possible to argue, stands repealed to the extent it conflicts with the commands of Market, and the WTO.

93. That the only purpose of submissions made hereinbefore is to respond to a rhetorical question which this Petitioner puts to himself: Was our Executive Government competent to enter into the Treaty under question in exercise power under Article 73 of the Constitution ? The Petitioner's submission before this Hon'ble Court is: NO.

(ii) **Agreement on the Trade-Related Aspects of Intellectual**

94. That the TRIPS Agreement was done under abhorrent circumstances, and in breach of our Fundamental Rights. The following two observations deserve to be noted:

(i) "TRIPS Agreement during the Uruguay Round of Negotiation was pushed by developed countries at the behest of the Association of Multinational Corporations viz. The Intellectual Property Committee (USA), Keidanren (Japan) and UNICE (Europe). In fact these Associations submitted a joint Memorandum to the GATT Secretariat in June 1988 and this became the basis for the TRIPS frame-work. On the other hand USA enacted special 301 and super 301 laws and started pressurizing many countries to accept the TRIPS frame-work. Thus this Agreement became part of the Final Act virtually without negotiations…"[130]

(ii) " In view of the foregoing changes to the existing laws required by the TRIPS Agreement and Agriculture Agreement and the anticipated effect on the price of medicines and self-sufficiency of food, we are of the view that the Final Act will have a direct and inevitable effect on the fundamental right to life enshrined in Art 21 of the Constitution" [131].). [The possible price escalation has been discussed by the *People's Commission* at pp. 153-154 of its Report.]

(iii) "The main reason for bringing the protection of IPRs under the trading system under GATT was to secure the right to use the GATT retaliatory trade sanctions because other enforcement mechanisms at the national and international levels, were proving inadequate."[132]

95. That it is worthwhile to compare between the Patent Act of India, 1970 and the TRIPS Agreement:

- "The Indian Act excludes nuclear energy, methods of agriculture and horticulture and bio-technological processes and products from patentability. The TRIPS Agreement makes all these methods and products patentable.
- Under the Indian Act, only process patents can be granted to food, medicines, drugs and chemical products. The TRIPS Agreement provides for granting product patents also in these areas.

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[130] The Commission consisted of Shri I.K.Gujral, Prof Yashpal, Shri B.L.Das, Dr Yusuf Hamied p. 40
[131] The People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar at P. 157
[132] Dubey, *An Unequal Treaty* p. 25.

- The duration of patents according to the Indian Act is 5 to 7 years for products for which only process patent is granted and 14 years for those for which product patent is also granted. Under the TRIPS Agreement, it will have to be 20 years in all cases…….”[133]

96. .On macro-micro view the WTO Treaty brings out the following seminal changes/ effects:

(i) It brings about a paradigm **shift from a Welfare State to a Market Economy** with Adam Smith’s Invisible Man conspicuously engineering the waxing needs, the increasing greed, the enhancement of the corporate *imperium.* The “Agreement on Subsidies and Countervailing Duties” boldly declares this shift:

‘*Members* hereby *agree* as follows:

Article 29 - Transformation into a Market Economy

‘ Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.’

The Marrakesh Declaration of 15 April 1994 reveals the WTO’s overarching commitment to Pax Mercatus through it determination:

‘*Determined* to build upon the success of the Uruguay Round through the participation of their economies in the world trading system, based upon open, market- oriented policies and the commitments set out in the Uruguay Round Agreements and Decisions,’

And there is close nexus with the Bretton Woods institutions as is evident from the preamble to the ‘Agreement Between the International Monetary Fund and the World Trade Organization’[134]. Stiglitz aptly said:[135]:

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[133] Ibid p. 24

[134] ‘CONSIDERING the growing interactions between economic policies pursued by individual countries arising from the globalization of markets;

RECOGNIZING the increasing linkages between the various aspects of economic policymaking that fall within the respective mandates of the International Monetary Fund ("Fund") and the World Trade Organization ("WTO"), and the call in the Marrakesh Agreement for greater coherence among economic policies internationally;

RECOGNIZING the close collaborative relationship existing over the past several decades between the Fund and the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade, and the importance of continuing and strengthening such a relationship between the Fund and the WTO;

HAVING REGARD to Article X of the Fund's Articles of Agreement, which provides that "the Fund shall cooperate within the terms of this Agreement with any general international organization and with public international organizations having specialized responsibility in related fields";

HAVING REGARD to Article III.5 of the Marrakesh Agreement Establishing the World Trade Organization, which provides that "with a view to achieving greater coherence in global economic policymaking, the WTO shall cooperate, as appropriate, with the International Monetary Fund";

"But the IMF is not particularly interested in hearing the thoughts of its 'client countries' on such topic as development strategy or fiscal austerity. All to often, the Fund's approach to developing countries has had the feel of a colonial ruler.

When in 1912, the British government in India shifted its capital from Calcutta to New Delhi the great poet *Akbar Allahabadi* wrote a very significant couplet[136]:

The Britishers come from Calcutta to tread Delhi,
We have seen their trade, let us see their rule.

After seeing their rule, after suffering under that, 'We, the People' made our Constitution mandating as a matter of overarching constitutional policy: creation of the circumstance and conditions for a welfare State.. Perhaps, they would have suffered for India's Independence if they could have a pre-vision there would some locust-eaten years in our nation's history when the faltering hands of their progeny would facilitate the hegemony again of the *banya raj* by ratifying a treaty as noxious as the Treaty of Versailles which ended the First World War, or the Treaty of Surrender which ended the Second World War.

(ii) The WTO Treaty sets up an undemocratic institution to implement, with the IMF and the World Bank, the Bretton Woods agenda, and the mandate of the Washington Consensus having the effect of subjugating the Political Realm structured under our Constitution for the protection of democracy, and promotion of social justice in order to manipulate Public policy of the State to come to terms with the ideas of the mainstream neoclassical economics. The triumphal march of the Market, taking all institutions for granted as its minions, has generated forces which are taking us fast towards the Sponsored State.

(iii)The Executive signed the WTO Treaty under a completely opaque system by shifting Agriculture from the domain of the States to the domain of the Union's power thereby subverting the federal structure of constitutional polity considered

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HAVING REGARD to the Declarations in the Marrakesh Agreement on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking and on the Relationship of the WTO with the Fund, and to the provisions of Article XV:1, XV:2, XV:3 and Articles XII and XVIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and of Articles XI, XII, and XXVI of the General Agreement on Trade in Services (GATS) concerning cooperation and consultation, including on exchange and trade matters; …'

[135] *Globalization and Discontent* pp 40-41

[136]

by this Hon'ble Court a feature of our Constitution's basic structure.Our Fundamental Rights stand jeopardized. The waxing forces of globalization have acted adversely even on internationally accepted human rights. This point is clear from a resolution of the Sub-Commission on the Promotion of Human Rights which

> " Reminds all Governments of the primacy of human rights obligations over economic policies and agreements."(Economic and Social Council Distr. General E/CN.4/Sub. 2/2000/ L.11/Add.1 of 17 August 2000)

A time has come when the courts shall have to recognize that if they show reluctance in interfering in the governmental actions on the ground of non-intervention in economic matters, they would soon find that their restraints would, in the end, turn out to be an institutional death-wish. Days of Holmes are dead and gone. Warren went ahead on the track but could not go whole hog as the corporate *imperium* could not withstand too many of his onslaughts. In this Petitioner's view, in our tryst with destiny it is for our courts to play the role, which Apollonius played in John Keats *Lamia*. (Apollonius, whose glance alone made the fraudulent Lamia fumble and crumble proving *satyameva Jayate*!*)*.

(iv) All this has led to a process of the frustration of our Fundamental Rights by creating virtually two Indias, one of the growing breed of high net-worth persons, and the greedy India Inc. and the other of the ill-fed, ill-clad, ill-educated, and starving millions. This growing discrimination defeats social justice and inequality. This sort of discrimination emanates from the policies, legislative and executive, being implemented by our government in gross forgetfulness of its constitutional commitments.

(v)The morbid effects, evident and potential, of the adoption of the Final Act was examined at length by the Peoples' Commission which found this treaty grossly violative of the Fundamental Rights and the Basic Structure of the Constitution [vide the *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges,[**a copy of the Report enclosed**]. As this Petitioner adopts them, they are not repeated here; but deserve to be considered.

(vi) This was not a conventional consensual engagement: it was a *pactum de contrahendo*[137]. It involved an undertaking to negotiate or conclude a set of pre-fabricated agreements. The signing of this Final Act was a most important event of modern times[138]. Its impact would be deep and wide on all institutions,

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137. D.P.O'conell , *International Law* Vol 1 Chap 7.

138. Muchkund Dubey, *An Unequal Treaty* (World Trading Order After GATT) p. 11.

social, economic and political. It is to be noted that India's Commerce Minister by signing the Uruguay Round Final Act has virtually subjected the whole country to obligations of serious nature under the threat of international delinquency. Under this *pactum de contrahendo* there are provisions, which would circle out the role of the courts including that of the Supreme Court by privatization of justice under the aegis of the WTO's Disputes Settlement Body.

97. That the only purpose of submissions made hereinbefore is to respond to a rhetorical question that this Petitioner puts to himself: Was our Executive Government competent to enter into the Treaty under question in exercise power under Article 73 of the Constitution ? The Petitioner's submission before this Hon'ble Court is: NO.

THE SYNDROME OF THE SPONSORED STATE UNDER WHICH OUR CONSTITUTION IS DEFACED AND DEFILED.

98. That it is respectfully submitted that juristic approach to our Constitutional rights must take account of the factors which are turning our Republic into a Sponsored State. This ethos has been created through the Treaties and Agreements done under the executive power. Hazards to our Constitution, and the transgressions of fundamental limitations deserve to be considered on the evaluation of the octopus grip which a Sponsored State permits. Roscoe Pound said that the march of jurisprudence is from analytical to functional. This Petitioner submits that any functional comprehension of our Constitution is meaningless unless the issues are examined under the aspects of the present-day realities created by the hegemonic economic realm under the twin forces unleashed by the greedy Market (Pax Mercatus), and the corporate hegemony.

99.That one of the pronounced features of the Sponsored State is the unbridled executive for promoting the interests of the capitalists, imperialists, and the stooges whom we call

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" ……Thirdly these were the most far-reaching negotiations ever undertaken under GATT. For the first time, it brought agriculture under the discipline of GATT. It established separate rules and regimes in the new areas of TRIPS, TRIMs and Services. The Final Act includes as many as 19 new instruments constituting Multilateral Agreements on Trade in Goods, 4 Plurilateral Trade agreements, an Agreement each on TRIPS and Services, an Understanding on Dispute Settlement, an Agreement on Trade Policy Review Mechanism and numerous Decisions and Declarations adopted at the Marrakesh Ministerial Meeting.

Finally, these were also the first GATT trade negotiations which went beyond the traditional GATT jurisdiction of regulating trans-border trade transactions and paved the way for a massive intrusion into what may be called "the sovereign economic space" of the developing countries. The new regimes under TRIPS, TRIMs and Services provide for right to establishment and operation in the sovereign territory of other states and significant moderation in the macro-economic policies followed by Member States, which go much beyond the realm of trade. These regimes will have serious implications in terms of abridging the economic sovereignty of developing countries, upsetting their development priorities and inhibiting their pursuit of self-reliant growth based on the maximum utilization of their own material and human resources."

comprador. This Petitioner, while examining the features of the Sponsored State, has stated[139] in his *Judicial Role in Globalised Economy* on the Sponsored State*:*

> "Now to the main topic. Under the sponsored state system which Clive set up he found that despite the dewani which enabled to promote the commercial interests of the East India Company with no holds barred, it was essential to manage the system of governance from inside the ramshackle and truncated political structure over which Mir Jafar or Mir Kasim presided as nawab. Clive pursued this objective with a stroke of stealth by securing for Rida Khan, who was Clive's deputy diwan, the post of the nawab's deputy. The inevitable consequence was the emergence of powerful coterie of bureaucrats and self-seekers who worked for the Company whilst swore loyalty to the nawab."

How can we trust the executive to exercise the power which ignores our people, scuttles our Constitution, and proves that all our Freedom Fighters were fools who fought for this Country's Independence? This Petitioner's words should not be treated as an aspersion on anybody as he cannot do it when his family produced some distinguished Freedom Fighters, and he himself had suffered, with joy, the trials and tribulations of the Struggle for Freedom.

100. That there is a special reason why express Parliamentary approval of a Treaty is essential. As submitted earlier, in a Sponsored State, the high bureaucrats cannot be wholly trusted. Even now we have a lot of Rida Khans at work. It is in public domain that a lot of civil servants who worked as negotiators in the matters of the Uruguay Round Final Act, and the WTO, succeeded in ensuring for themselves high assignments in the WTO, World Intellectual Property Organization (WIPO) etc. We have seen that most often key posts in the high realm of economic management go to those who have undergone training at the IMF or the WTO. This syndrome becomes all the more gruesome when we recall the observation of Justice Shah in the Shah Commission Report, that there is "the Root of All Evil" emanating from the nexus between the politicians and the bureaucrats.

101. That our commitments under the Agreements under consideration are designed to drive our Republic towards the syndrome of the Sponsored State, the features of which

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[139] at p. 24

this Petitioner has examined in "Towards the Sponsored State" being the Chapter 1 of his book *The Judicial Role in Globalised Economy* [vide **Annex** 'D']. The terms under the Uruguay Round Final Act, and the mandates of the WTO require, as the East India Company had once demanded: (i) lowering down/ elimination of tariffs; (ii) unrestricted market access for the Company's goods; (iii) the government to function as the protectors [the stick-wielders for the Company (the *lathaits*); (iv) the Company's causes were to be tried in the Company's courts, not in the Nawab's courts; (v) the Nawab to reign as a titular head but the real power was exercised by the functionaries of the Company whose employees masqueraded as the Nawab's functionaries…….

VI

[Grounds of Segment I (Tax treaties) from pp. 91-111; for Segment II (WTO Treaty) pp. 111-135]

102. GROUNDS

GROUNDS OF SEGMENT I

[1.i] **For that the Tax Agreements as presently made are in breach of Art 14 of the Constitution. These establish a most offending regime of taxation unfairly discriminating the domestic tax payers by showering undeserved and unreasonable benefits to the foreigners who at best are only our fair weather friends; and at the worst, are security risks for our country.**

[1.ii].For that the idea of 'Classification' is inbuilt in the mandatory provisions of the Income-tax Act, 1961. In *Ram Krishna Dalmia v. Justice S. R. Tendolkar*[140] Das J. stated that the decisions affirming the principles relevant to the Right to Equality can be classified into five classes:

(a). A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the Court. In determining the validity or otherwise of such a statute the Court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought

[140] AIR 1958 SC 538

to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the Court finds that the classification satisfies the tests, the Court will uphold the validity of the law.

(b) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the Court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the Court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the Court will strike down both the law as well as the executive action taken under such law.

(c) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the person or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the Court will uphold the law as constitutional.

(d) A statute may not make a classification of the persons or things to whom their provisions are intended to apply; it may leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance to the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed follow such policy or principle, then the impugned executive action be held illegal, not the statutory provision which is evaded.

[1.iii]. For that the Income-tax Act, 1961 itself indicates " the persons or things to whom its provisions are intended to apply" and " the basis of the classification of such persons

or things' is prescribed in the statute itself. The situation, with which this Writ Petition deals, comes in the first category of cases mentioned by Das J. in *Ram Krishna Dalmia Case.* The Income-tax Act,1961 makes it clear that all assesses, whether resident or not, are chargeable in respect of income accruing, or received, or deemed to accrue or arise or to be received in India; while residents alone are chargeable in respect of income which accrues or arises and is received outside India. Norms of residence, in effect, emanate from *territorial nexus*. It prescribes the mode of computation of "total income". It prescribes in specific and precise terms where grant of tax mitigation or tax exemption is considered warranted. *The Act does not entrust the Central Government, or any of its agencies or instrumentalities to exercise the power de hors the statute on any ground whatsoever.* It is a high constitutional principle that we would not like to be taxed under the Executive fiat, nor untaxed through the Executive concession, even through its clemency.

[1.iv]. That it is well established in the income-tax jurisprudence that whilst the burden of proof to establish the changeability to tax of a receipt to income-tax is on the Revenue, the burden of proof to escape from the tax-net through *a deduction* or *an exemption* is on the assesses. Once in the case of a non-resident a taxable event takes place in the territory of India, the non-resident is chargeable to tax thereon as a matter of mandatory law. If that assessee pleads to exit from the tax-net by invoking the provisions of an Avoidance of Double Taxation Agreement, the burden is on him to establish the existence of all the conditions for availing of the benefit to the satisfaction of the Assessing Officer, who is a quasi-judicial statutory authority having an exclusive jurisdiction to frame an assessment. Under the Indian legislative practice "avoidance of double taxation" is a term of art", already explained by this Petitioner.

[1.v]. For that the effect of this Petitioner's submissions is to highlight:

(a) that we are concerned with a situation which squarely comes within the first of the five categories to which Das J. refers;

(b) that the statute grants to the Executive neither the Dispensing Power nor the Power of Executive Clemency.

[1.vi]. For that nobody knows how and why the negotiators adopted the OECD Model of a tax treaty in 1982. It is inappropriate to attempt trying to pry into the obscure reasons. But something that is in public domain is sufficiently suggestive. Swraj Paul wrting about his experience in India writes in his memoir *Beyond Boundaries* that by then a nexus existed between economic power and political power. He mentions how in 1982 there were serious efforts to invite the NRIs to invest in India. Dr. Manmohan Singh, then Governor of the Reserve Bank of India, endorsed with verve the policy of NRI portfolio investment. "He went on to outline the scheme and the streamlined procedures which would enable investors to remit funds and also secure repatriation of them." Even this Petitioner, while talking to Dr Manmohan Singh, in the context of some other PIL under hearing before the Hon'ble Delhi High Court, got straight from the horse's mouth that the prime object of the Indo-Mauritius tax treaty, when it was made, was to have more of foreign exchange as India needed it most at that time. The Petitioner appreciates the candour of Dr Singh in stating so though his researches have led him to the view that the maelstrom of the financial crisis in the early eighties were largely stage-managed to provide a free play for the corporate *imperium* which in the early eighties had established its sway thanks to the policies set afoot by Ronald Regan, the U.S. President under the pressure and persuasion of the U.S. corporate interests which were massively propagated as the only public interests. There could have been less precarious ways to get over the crisis. What had happened in America was itself a Mask of Deception. The 1982 debt crisis was used as a device dexterously devised by the experts, by the corporate interests masqueraders of all sorts.. In early eighties Mrs Indira Gandhi, the then Prime Minister, was depressed by the twists and turns of her circumstances. This provided an opportunity to the vested interests to serve heir interests. Some pleaded for this Model for framing the Indo-Mauritius Double Taxation Avoidance Convention as it was integral to the policy of wooing the foreign investors. The foreign investors had their own agenda to pursue. There were others who felt it a good device to park and launder tainted wealth outside. By 1982 the corporate-driven U.S. hegemony had succeeded in subjugating the political realm to the economic realm at the global level. The subjugation of the political realm was brought about by skill and stealth in a manner this felicitously described by Korten:

> "The full political resources of corporate America was mobilized to regain corporate control of the political agenda and the court system. High on the political agenda were domestic reforms intended to improve the global competitiveness of the United States by getting government "off the back" of business. Taxes on the rich were radically reduced. Restraints on corporate mergers and acquisitions were removed. And the enforcement of environmental and labour standards was weakened, The government sided with aggressive U.S. corporations seeking to make themselves more globally competitive by breaking the power of unions, reducing wages and benefits, downsizing corporate workforces, and shifting manufacturing operations abroad to benefit from cheap labour and lax regulations."[141]

[1.vii]. For that this sort of discrimination cannot be justified on any ground. Revenues go to the Consolidated Fund of India, and bear different attributes, and are under Parliamentary Control for specified purposes. The consolidated Fund is a real wealth of the country under Public Trust. It is the constitutional mandate that every paise of revenue must be collected, as not even the whole of the executive is competent to waive a single paise of taxes of Income Tax raised under this statute. This is the rationale why not a paise of revenue is ever written off by the executive. The write-off procedure in the Income tax department is merely a process for transferring the uncollectible dues to the Register of Dead demands to be pursued for recovery, if possible, within the period of limitation. Foreign exchange or foreign investment do not belong to this category of countries resource. Nobody knows, not even the Reserve Bank what is the chemistry of the foreign exchange. The rainbow that the author has painted on specious pleas would vanish if Joseph Stiglitz's discussion of the Role of Foreign Investment in *Globalization and its Discontents* is gone through. It is unwise to evade realities. While investing in India the FIIs are interested in reaping quick profits. They are hardly interested in our economic growth. What they bring is 'hot money' which comes in and goes out through financial market strategy and stratagem. Often this is a device for bringing ill-gotten wealth parked outside the country; often it is a device to transmit ill-gotten wealth inside the country into some booming foreign market or into the safe haven of secretive offshore bank accounts. The tax treaties are the ignoble examples of how special privileges are extracted by them from our Government not only to escape the right incidence of taxation, but also to

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[141] David C. Korten, *When Corporations Ruled the World* p. 64 referring to Walden Bello, with Shea Cunningham and Bill Rau, Dark Victory: *The United States, Structural Adjustment, and Global Poverty* pp. 4-5

become beneficiaries of a special procedure of disputes settlements under the tax treaties' Mutual Agreement Procedure.

[1.viii]. For that the plea that the discrimination is justified as it helps raising foreign investments (substantial part of which is 'hot money') is wholly unfair and arbitrary as this is founded on the total miscomprehension of the role of revenue in a State, and the role of foreign funds in our economy. The former goes to the Consolidated Fund of India, kept under close Parliamentary trust and supervision for public welfare, whereas the latter is for the delight of the MNCs, the India Inc., and the high net-worth individuals, with roots outside, deluding the common people to wait with tongue-tied patience till the "trickle down effect" of the reforms gets them an Eldorado.

[2.i]. For that the Classification of the assesses into those who bear the brunt of full taxation, and those who do not is unfair, unreasonable and arbitrary:

(a). as the doctrine of classification was developed to give a reasonable content and significance to the constitutional commandment under Art. 14 of the Constitution. In *Ram Krishna Dalmia v. Justice S. R. Tendolkar*[142] this Hon'ble Court observed:

> "In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be funded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Art. 14 condemns discrimination not only by a substantive law but by a law of procedure."

(b) as the terms of a Tax Treaty are violative Art 14 of the Constitution as they go counter to the principles of valid 'classification' which contemplates:

(i) the classification must be based on *an intelligible differentia* which distinguishes those that are grouped together from others;

(ii) the differentia must be reasonably related to the *object* of the statute; and

(iii) the *differentia* and the <u>object</u> are distinct and separate..

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[142] AIR 1958 SC 538

(c) as per the *preamble* and the *scheme* of the Income tax Act, 1961, the OBJECT of the Act is to collect tax as per the law . In view of the overarching *object* of the Act, all those who come within the purview of the Act are the *assesses* constituting a common class as they effect taxable events in the territory of India through commercial transactions in the interstices of which income gets generated.

(d) as the effect of the terms of the Indo-Mauritius tax treaty (and of other analogous tax treaties), and the terms in various other Double Taxation Avoidance Agreements, is clearly to provide tax mitigation or tax exemption to the beneficiaries under the treaty. The net effect is either the lessening of the tax burden, or even the total deflection of the tax burden through grant of exemption. The valid approach could only be to factorize the contributions coming from other territories; and to reasonably reduce the tax burden under the Indian tax law on the taxable event taking place in the territory of India. The residents and the non-residents are all assesses under the Income-tax Act. The classification under which only one group of assessees is subjected to no taxation is invalid as the criteria for the classification cannot have a reasonable nexus with the *object* of the Act

(e) as a democratic government cannot discriminate between the domestic taxpayers and the foreigners equally placed as they are all assesses deriving income from the taxable events taking place in the territory of India. The FIIs, and other masqueraders can come through Mauritius to reap massive profits, and carry their funds through an area of darkness, paying no tax in India, and no tax in Mauritius. If they are from the USA, they are masters to choose their ways. For them the Indo-US DTAA says (Art 13) says:

> "Except as provided in Art 8 (Shipping and Air Transport) to this Convention, each contracting State may tax capital gains in accordance with the provisions of its domestic law."

If they want to pay a pittance of tax as charity they file returns showing capital gains; if they decide to eat up this poor country's rightful claim, they file returns claiming their income as business income on which they pay no tax on the plea that they do not have "permanent establishments in India". PE is now a device to promote unjust enrichment.

Our law does not know this concept of PE. It is a brainchild of the capitalist exploiters, which has been introduced administratively in the tax treaties without legal foundation All our tax treaties are, as presently done, in breach of the Art 14 of our Constitution. Someday our Supreme Court will have to look into this. Why should those who sink or swim with the destiny of this country pay tax on capital gains when those who would be the first to ditch are not taxed? This question deserves to be answered keeping in view the ideas of tax-equity and justice rather than on legalese and quibbling. Did not a judge of the Hon'ble Supreme Court say in a judgment: "It is the common man's sense of justice which sustains democracies and there is a fear that may outrage that sense of justice." Adopting John Bright's saying, it can be said: "that the trouble with great thinkers is that they usually think wrong", and the trouble with realistic appraisal is that it usually lacks reality. The reality in country is that we have two Indias, justified by our compradors on the analogy of China, which works on the modality of one country but two systems, and further justified by these strange economists about whom Edmund Burke had rightly said in the "age of sophisters, economists, and calculators", democracy of people is under the risk of being "extinguished for ever.

(e) as the habit of the Executive government to discriminate against own citizens is illustrated even by the recently concluded Protocol amending the Indo-Singapore DTAA (signed in January 1994) prescribing that tax residents will enjoy capital gains tax exemption on investments in India, bringing the Treaty into line with the India-Mauritius treaty. Hence capital gains arising to a Singapore resident on sale of shares of Indian companies would not be taxable in India. Consequent to this protocol, capital gains derived by a Singapore resident would be liable to tax only in Singapore. At present, there is no capital gains tax in Singapore, so in effect such gains would not be taxed even in Singapore.

(f) as t it is arbitrariness, smacking of things not worth mentioning, that whilst our citizens pay tax on Capital Gains, but the foreigners and the non-residents are exempted from capital gains tax. In 1983 this discrimination was grossly made in the Indo-Mauritius DTAC, and 2005 it is repeated with same grotesqueness, after CECA by the modification in Art 13 of the Indo-Singapore DTAC. But discrimination reaches a

climax when one notices a clear strategy of the Executive to help the foreigners: to illustrate—

> The propositions have been settled by the Supreme Court to distinguish between shares held as stock-in-trade and shares held as investment. Guidelines to decide this mixed question of fact have already been given by the courts. The Executive is under a legal duty to instruct the Assessing Officers to evaluate transactions in shares (whether by the FIIs or the domestic players; whether they operate from Mauritius or from the U.S.A.) in the light of the judicially settled principles.How can a democratic government discriminate between the domestic taxpayers and the foreigners equally placed. The clear policy of the government is not to tax the FIIs. They can come through Mauritius to reap massive profits, and carry their funds through an area of darkness, paying no tax in India, and no tax in Mauritius. If they are from the USA, they are masters to choose their ways. If they want to pay a pittance of tax as charity they file returns showing capital gains; if they decide to eat up this poor country's rightful claim, they file returns claiming their income as business income on which they pay no tax on the plea that they do not have "permanent establishments in India". PE is now a device to promote unjust enrichment. It would be better to entrust a UN body to impose tax on all international transactions so that from this revenue it could run its whole show without depending much on the U S largesse. Our law does not know this concept of PE. It is a brainchild of the capitalist exploiters, which has been introduced administratively in the tax treaties without legal foundation All our tax treaties are, as presently done, in breach of the Art 14 of our Constitution. Someday our Supreme Court will have to look into this.

(g). as while assessing the reasonableness of the 'classification' we cannot afford to miss the fact that the benefits under a tax treaty is made available, by and large, to the foreigners. To the extent they are entitled to tax reductions in order to make the levy of tax rational and fair, they must get the benefit. But the *principle of proportionality* cannot be forgotten. In this phase of globalization, it becomes our bounden duty to save our resources for our suffering millions. We believe that what Viscount Simonds said is good for us:

> "But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking steps to protect its own revenue laws from gross abuse or save its own citizens from unjust discrimination in favour of foreigners."[143]

For that the terms of a tax Agreement must be held *domestically non-operative* (not void as a treaty cannot be declared void by a domestic court) if they violate Art. 14 of the Constitution. Under that Article, the 'classification' contemplates that

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[143] [1961] 1 All E R 762 at 765

(i) the classification must be based on *an intelligible differentia* which distinguishes those that are grouped together from others;

(ii) the differentia must be reasonably related to the *object* of the statute; and

(iii) the *differentia* and the object are distinct and separate..

[3.]For that a Classification *Inter Se* The Denizens Of Darkness And Those Under The Sunshine:

[3.i]. as in view of the secretive style of the global operators and gladiators, Treaty benefits are deceptively stolen by Treaty shoppers. With Luxembourg we have no bilateral tax treaty, yet its residents masquerade to obtain benefits under a bilateral Tax treaty inter se alien contracting parties. The celebrated dictum of Lord Denning: 'Fraud unravels everything'"[144] goes unnoticed. But if this happens then all other bilateral tax treaties would be reduced to irrelevance and the income-tax law would become a paradise for marauders leaving the people of India to rue their lot under consolation that the sovereign act of a sovereign friendly State deserves acceptance as a matter of uncritical assumption. This is not a figment of imagination of the petitioner; it has already have taken place. The Authority for Advance Rulings in a case reported as *XYZ/ABC Equity Fund, In re* , [2001] 250 ITR 194 is a recent case in which the applicant-company moved for rulings on certain points, describing itself as a collective investment vehicle resident in Mauritius. It is a *vehicle* which in modern commerce means by: "A privately controlled company through which an individual or organization conducts a particular kind of business, esp. investment" The Authority records in its order:

> "The applicant has stated in the petition before us that it is a private equity fund (similar to a venture capital fund). It has allotted a large number of shares on a private placement basis to a limited number of prospective investors spread over Belgium, France, Germany, Hong Kong, Japan, Kuwait, the Netherlands, Singapore, Switzerland, the United Kingdom and the United States of America."

If in the spacious "vehicle" an assortment from such large parts of the globe can sail together across the Indian Ocean to India, than why not construct a vehicle, registered in Mauritius, wide enough to be a Noah's ark where all the treaty-shoppers from all the

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[144] *Lazarus Estate Ltd. v. Beasley*[1956] 1 QB 702 and 712

parts of the globe can be accommodated rendering all double taxation avoidance agreements other than the Indo-Mauritius DTAC irrelevant and otiose. The Indo-Mauritius DTAC should not be made the vanishing point of all other tax treaties. It is strange that what could have been at its best a mere *reductio ad absurdum* has already taken place with the culpable complicity of our own Government. It would be fair and just to take into account, while appraising the conformity of the situation to Art. 14 of the Constitution, the morbid effects of Treaty shopping.

(3.ii) It is unreasonable and arbitrary, and thus subversive of our Constitution amd Democracy to help create conditions for an obdurate and deception-driven Opaque System under which even the security of the nation is compromised.

[4]. For that the Distinction Between The Jural And Constitutional Zeitgeist Of India And That Of the OECD Goes Unnoticed Causing A Breach Of Art. 14 (Old Doctrine.):

[4.i]. as not to notice an important distinction between the jural and constitutional zeitgeist of India and that of the OECD countries for whom the OECD Model of tax Agreement had originally been drawn up, is enough in itself to prove a breach of Art. 14 of the Constitution of India. The pronounced differentia for an examination under the focus of Art 14 of the Constitution are noted as under:

(i) In the OECD countries a tax Agreement is a legislative act whereas in India it is an administrative act in exercise of the power delegated to the Executive under Section 90(1) of the Income-tax Act, 1961.

(ii) In the OECD countries a tax Agreement cannot be questioned in view of the relevant provisions under their constitutional law.

(iii) The power to structure the terms of a tax Agreement in the OECD countries is wider as it is in tune with their legislative practice developed in the OECD countries during the interregnum between the Two World Wars, and thereafter.

(iv) The question of legality cannot be raised in the OECD countries, as in such countries the courts cannot declare the exercise of legislative power *ultra vires*. In the United States the Supreme Court exercises this power, but in the U.S.A. a tax Agreement is done under the terms of the Constitution, not exposed to Judicial Review they struck by an invisible radiation of the Fundamental Rights.

(v) In India a tax Agreement is neither discussed in Parliament, nor it is tabled in the House.

(vi) In India the terms of the grant of power to the Executive is extremely precise, and constitute express limitations on the Executive power in

consonance with the Indian legislative practice determining the meaning of the terms of art used in Section90(1).

[5]. For that the Tax Treaties lead to unreasonable and unfair results to the prejudice of our people. *The Petitioner's Case Under Art. 14: Its New Dimension:*

[5.i]. as in *Ajay Hasia v. Khalid Mujib Sehravardi*[145] this Hon'ble Court[146] spelt out a new dimension of Art 14 in these words of great power and import:

> " It was for the first time in *E. P. Ayyappa v. State of Tamil Nadu*, (1974) 2 SCR 348: (AIR 1974 SC 555), that *this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness… From a positivistic point of view* equality is antithetic to arbitrariness.'" …… "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of *equality or non-arbitrariness pervades Article 14* like a brooding omnipresence."

We should note a constant to which Galbraith refers: "…as between grave ultimate disaster and conserving reforms that might avoid it, the former is frequently preferred." Let us consider the issue of foreign exchange: for whom? For what? From which source? Why this indulgence to the capital market? The issue cannot be addressed without keeping in view the profile of the players on the stock market, and the role of the MNCs, FIIs, OCBs and their analogues. Liberalization of the financial and capital markets let loose a flood of short-term capital which Stiglitz explains as "… the kind of capital that looks for the highest return in the next day, week, or month, as opposed to long-term investment in things like factories." The IMF has taught that if a red-carpet welcome is not given to foreign capital, it goes out or refuses to come in. The shared view of the IMF and its protégées is that their transactions in capital, and capital gains be not taxed; if at all taxed it be taxed less. This syndrome is endemic in every Sponsored State. The East India Company wanted a revenue system more beneficial to them than to the natives. It is the same stance illustrated in tax policy even in the USA to which Stiglitz referred while portraying the Roaring Nineties:

> "Another example was what we did with tax policy. As the bubble was going up and getting worse, what did we do? We cut capital gains taxes, saying to the market: if you make more money out of this speculative bubble, you can keep more of it. If you look at

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[145] AIR 1981 SC 487

[146] Coram : Y. V. ChHandrachud, C.J.I., P. N. Bhagawati,, V. R. Krishna Iyer, S. Murtaza Fazal Ali and A. D. Koshal, JJ.

> what happened to tax policy during the nineties, it is quite astounding. What we did in 1993 was raise taxes on upper-middle-income Americans who worked for living, and then in 1997 we lowered taxes for upper income Americans who speculated for a living. You ask the question: what sorts of values did this change represent?"

Such provisions as these, reveal the grotesque failure of the government in "saving its own citizens from unjust discrimination in favour of foreigners.

[5.2]. That the Executive acted with *arbitrariness,* and *unreasonably*, thus in breach of Art 14 (the New Doctrine) by exceeding the frontiers of power granted under Section 90 of the Income-tax Act, 1961. The power to exercise delegated power is given to promote certain statutory purposes. If its remit is transgressed, it is clearly acts *ultra vires*; and such an act amounts to malice in law. In *State of UP v. Hindustan Aluminium Corporation* the Supreme Court of India observed:[147]

> "Challenge to an Order of the State Government on the ground of malice in law is another aspect of the doctrine of ultra vires, for an offending act can be condemned simply for the reason that it is unauthorized. Bad faith has often been treated as interchangeable with unreasonableness and taking a decision on extraneous considerations. In that sense, it is not really a distinct ground of invalidity. If a discretionary power has been exercised for an unauthorized purpose that is enough to invite the Court's review, for malice is "acting for a reason and purpose knowingly foreign to the administration".

This proposition is illustrated in matters of foreign affairs in *R. v. Secretary of State for Foreign Affairs, ex parte World Developed Movement Ltd*[148] in the context of the Overseas Development Act 1980 where the QBD holding, to quote from the head note:

> "Although the Foreign Secretary was entitled , when considering whether to provide overseas aid to developing country pursuant to s. 1 of the 1980 Act, to take into account political and economic considerations,….., the grant of the aid had to be for the purpose of s. 1, namely the promotion of economically sound development.

In short, the principle at work is: "A power is exercised fraudulently if its repository intends to achieve an object other than that for which he believes the power to have been onferred."[149] Such act is arbitrary, and thus in breach of Art 14 as interpreted in *Ajay Hasia* Case.

[5.3]. as the only that construction on the terms of Section 90 be placed which is in consonance with the Article 14 of the Constitution of India otherwise the Section would

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147. AIR 1979, SC, 1459.

148 [1995] 1 All er P 611

149. de Smith, *Judicial Review of Administrative Action*, 4th ed. p. 335.

be *ultra vires* the Constitution robbing the Central Government of the power which it purports to exercise while entering into Agreements for the Avoidance of Double Taxation.

[5.4]. as it is highly arbitrary and unreasonable to starve our Consolidated Fund meant for welfare of our nation by crafting such terms in the Double Taxation Agreements to facilitate our country's loot, even unmindful of national security issues, thus creating the evident conditions for the emergence of two Indias: one of the common-run of 'We, the People', the suffering millions whose existence is being fast forgotten, and the High Ner Worth Individuals, corporations, fraudsters, tricksters, masqueraders operating through mist and fog from various tiny-tots of the terra firma and cyberspace. It is submitted that this Hon'ble Court should adopt a pragmatic approach to protect Fundamental Rights otherwise they would be bled to death through strategy and stratagems.

[6.] **For that many of the Tax Treaties create an Opaque System under which our Right under Art. 19 of the Constitution suffers:**

[6.i]. as the Art 19(1)(a) of the Constitution of India grants to the citizenry of this Republic a fundamental "right to freedom of speech and expression". The fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the Right to Know. This Hon'ble Court has recognized the supreme importance of the Right to Know. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*[150] [followed in *S.N. Hegde v. The Lokayukta, Banglore*[151].], this Hon'ble Court observed:

> "We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of our Constitution. That right has reached new dimensions and urgency. That right, puts greater responsibility upon those, who take upon the responsibility to inform."

[150] AIR 1989 SC 190 [Coram : Sabyasachi Mukharji, and S. Ranganathan , JJ.
[151] AIR 2004 NOC 169 (KANT

[6.ii]. as the Tax Treaties in general, and the MAP provisions in particular, creates An Opaque System in which the craft of corruption and the art of deception reign. As "sunshine is the strongest antiseptic", nothing is disliked more by the money-launderers, crooks, fraudsters and scamsters than transparency. Our Tax Treaties are done neither after Parliamentary consideration nor after any sort of public scrutiny. Some features are quite pronounced underscoring the point being made out:

(a) They feel that their sovereign shell would enable them to amass wealth by providing a regime wherein virtues and vices would become *res commercium.*. The massive abuse of the Indo-Mauritius Double Taxation Convention is an example.[152] At the September 19-21, 2000 Commonwealth meeting of Finance Ministers in Malta, many small States showed unhappiness with the Organization for Economic Co-operation and Development (OECD) as, they felt, the Organization was subjecting them to sanctions for unlawful tax practices for operating offshore financial centres. "Those countries insisted that as sovereign states they reserved the rights to impose their own tax regimes."[153] Their criticism was more strident in the conference held in Barbados chaired by Prime Minister Owen Arthur.[154]

(b) The provisions pertaining to Exchange of Information in the Ind-Mauritius, or the Indo-Singapore are no more than mere eyewash , as in such countries the Competent authorities do not have competence to command anyone to supply information. Besides, they are secretive. We have had enough such experiences in the past. A careful Government would have at least provided some extra-territorial authority as is provided in Art. 6 of the Agreement between the Government of the U.S. and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands for the Exchange of information Relating to Taxes. It says:

> "The requested party may, to the extent permitted under its domestic laws, allow representatives of the competent authority of the requesting party to enter the territory of the requested party in connection with a request to interview persons and examine records with the prior written consent of the persons concerned."

(c) The fact that the Circular 789 dated April 13, 2000**[155]**, issued by the Central Board of Direct Taxes still rules bidding our statutory authorities to put on blinkers when one transact through a tax haven. The said

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[152] vide *Shiva Kant Jha v. Union of India* (2002) 256 I T R 563 (Del.)
[153] 2001 *Britannica Book of the Year*, p. 379
[154] 2002 *Britannica Book of the Year* , p.377
[155] *[2000] 243 ITR (St.) 57*

Circular is an edict for opaqueness, and amounts to national disgrace. It is tolerated as it promotes the interests of those who call shots with motives unworthy to the core, and to shield them from critical public gaze. Anything that is done to exclude transparency is wrong. We are under obligations to implement the terms of the *U.N. Convention against Corruption* approved by the General Assembly of the United Nations by resolution 58/4 of 31st October 2003. This Convention calls upon the States[156]:

(a) to ensure that Transparency and Accountability in matters of public finance are promoted;

(b) to make effort for prevention of corruption in public life.

Even the Trade Policy Review Mechanism under the Uruguay Round Final Act says:

"B. Domestic transparency.

Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems"

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(d) The Competent Authorities are the bureaucrats accustomed to function in an opaque executive system. When a case is adjudicated in a regular tribunal or courts, people get notice of things happening. The procedure should have analogous to that in the USA or the judicial control of the superior judiciary should have been retained.

[6.iii]. as the net effect of the impugned provisions is to scuttle our Right to Know without which the right given to us by Art 19 is meaningless.

[7]. For that Tax Treaties as being done cause prejudice to our Right under Art 21 of the Constitution of India;

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[156] **Article 5 Preventive anti-corruption policies and practices**: 1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability. 2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption. 3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. 4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

[7. i]. as this Petitioner believes that our socio-economic realities continue to be the same which were graphically described by this Hon'ble Court in *Olga Tellis v. Bombay Municipal Corporation*[157]. That the concept of Right to Life as conceived under Art. 21 has been held to include:

(i) the right to live with human dignity;
(ii) the right to enjoy all aspects of life which go to make a man's life meaningful, complete and worth living. The concept got an activist dimension under *Maneka v. Union of India*[158];
(iii) the Right to Know as "there is also a strong link between art. 21 and the right to know…"[159];
(iv) The Right to Reputation[160]
(v) The right to health, life and livelihood[161] and education

[7.ii] as the studied discrimination in matters of taxation to the prejudice of the common people of India leads to the depletion of the resources of our Welfare State when most of our people are bound on the wheel of fire of abject poverty. A visit to the villages in Bihar, especially during the floods, would make those, who still have their souls not sold, feel that even Heidegger's or Franz Kafka's world is brighter and better laced with a faltering hope. In most parts of the country most people are , even after 50 years of India's independence, bound on the wheel of fire. What this Petitioner has stated is a brief deduction from things he has himself seen. The Tax Treaties go to create, along with some other forces, a rogue financial system which works with the twin strategy of Deception and Corruption. The Hon'ble Delhi High Court in its Judgment observed:

> "We would however like to make an observation that the Central Govt. will be well advised to consider the question raised by Shri Shiva Kant Jha who has done a noble job in bring into focus as to how the Govt. of India had been losing crores and crores of rupees by allowing opaque system to operate".

These morbid things are happening when nearly 380 million Indians live on less than a dollar a day. Our country's $ 728 per capita GDP is just slightly higher than that of sub-Saharan Africa. An expert has drawn the following bleak picture[162]:

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[157] AIR 1986 SC 180
[158] AIR 1978 SC 597
[159] AIR 1989 SC190, 202
[160] AIR 2004 KANT 169 (NOC)
[161] *Reliance Petrochemicals Ltd v Proprietors of Indian Express* AIR 1989 SC 190. 202

> "Malnutrition affects half of all children in India, and there is little sign that they are being helped by the country's market reforms, which have focused on creating private wealth rather than expanding access to health care and education. Despite the country's growing economy, 2.5 million Indian children die annually, accounting for one out of every five child deaths worldwide; and facilities for primary education have collapsed in large parts of the country (the official literacy rate of 61 per cent includes many who can barely write their names). In the countryside, where 70 percent of India's population lives, the government has reported that about 100,000 farmers committed suicide between 1993-2003."

The plight of our common people, which P. Sainath had drawn up in *Everybody Loves a Good Drought* (p. 48) is still gruesome as it was just a few years back.[163]

[7.iii] as the Revenues go to the Consolidated Fund of India, under Parliamentary Control, for running the Welfare State. To deplete the resources of the Consolidated Fund through discriminatory practices is to subvert our people's right under Art 21 of the Constitution.

[7A]. For that the *insertion* of provisions in section **90A of the I.T.Act**, done by the Finance Act, 2006, are *ultra vires* as they offend Art. 14, Art. 19 as already mentioned. Besides they offend Art. 265 of the Constitution of India also.

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[162] 'Myth of the New India' by Pankaj Mishra, *The Hindustan Times*, N.D., 9 July 2006.

[163] "…. every third human being in the world without safe and adequate water supply is an India. Every fourth child on the globe who dies of diarrhea is an Indian. Every third person in the world with leprosy is an Indian. Every fourth being on the planet dying of water-borne or water related diseases are an Indian. Of the over sixteen million tuberculosis cases that exist at any time world-wide, 12.7 million are in India. Tens of millions of Indians suffer from malnutrition. It lays their systems open to an array of fatal elements. Yet, official expenditure on nutrition is one per cent of GNP."

"More than 60 per cent of primary schools in India have only one teacher, or at best two, to take care of five classes (I-V). Most of these are in the rural areas. They lack even the minimal facilities it takes to run a school. The NCERT's Fifth Survey found that of 5.29 lakh primary schools ,well over half had no drinking water facilities. Close to 85 per cent had no toilets. As many as 71,000 had no buildings at all, pucca or katcha. Many others had 'buildings' of abysmal quality." "The first five year plan gave education 7.86 per cent of its total outlay. The second plan lowered it to 5.83 per cent. By the fifth plan, education was making do with 3.27 per cent of the outlay. In the seventh plan, the figure was 3.5 per cent. As the problems of her children 's education grew more, India spent less and less on them.'" "Mass illiteracy and lack of education hurt in other ways too. They mean India's most basic capabilities will remain stunted. So economic development will---has to ---suffer. No major reforms will last that do not go with basic change in this area." "Who constitutes the nation? Only the elite? Or do the hundred millions of poor in India also make up the nation? Are their interests never identified with national interest? Or is there more than one nation?"

[7B.] For that the delegation of power granted under the impugned Section is not canalized but are unconfined and vagrant: hence bad.

[8.] HENCE this Petitioner, as a summing-up, submits, on the aforementioned Grounds pertaining to Segment I that :

(i) That the Instruction No 12 of 2002 dated Nov. 1, 2002 [F. No. 480/3/2002- FTD], issued by Government of India, Department of Revenue (Foreign Tax Division), and thé Rules in Part IX-C of thé Income-tax Rules, 1962 are *ultra vires* the provisions of the Section 90 of the Income-tax, and the relevant provisions of the Constitution of India, especially Art 14. If this matter of gross administrative lawlessness, as illustrated by the impugned Instruction and the impugned Rules, is not remedied and the subversion of the Statute is not corrected, if this act of statutory and constitutional solecism is not rejected and quashed, if this illegitimate executive adventure is not judicially deprecated and contained, then the Rule of Law would suffer; and the Executive, as the emerging Leviathan, would behave the way it behaved in the time of the Stuarts with limitless Dispensing Power.

(ii). That the impugned Instruction and the impugned rules clearly violate Art. 14 as it discriminates unfairly between the assesses who are ordinary citizens of this Republic, and the foreigners and masqueraders taking advantages under a tax treaty; and as this knocking down of the rule of law must be considered irrational and arbitrary rolled into one.

(iii). That the effect of the terms of the DTAAs is clearly to provide tax mitigation or tax exemption to the beneficiaries under the treaties. The net effect is either the lessening of the tax burden, or even the total deflection of the tax burden through grant of exemption. The *valid approach could only be to factorize the contributions coming from other territories; and to reasonably reduce the tax burden under the Indian tax law on the taxable event taking place in the territory of India.* The residents and the non-residents are all assesses under the Income-tax Act. The classification under which only one group of assesses is subjected to no taxation is invalid as the criteria for the classification cannot have a reasonable nexus with the *object* of the Act.

(iv). That the impugned Instruction and the Rules have the effect of establishing an opaque system by subverting the statutory mode of investigation, determination and appellate control. This has the effect of robbing transparency and legal accountability. It is likely to affect our fundamental right under Art 19(1)(a) of the Constitution of India by imperiling our Right to Know without which a sound

Public Opinion cannot be formed. And the fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the Right to Know.

(v). That the Republic of India has now turned out a country of two nations, one of 97% of the Indians surviving on the precipice, and the rest whose wealth is increasing in a crescendo. The impugned Instructions and the impugned Rules fail to protect the loot of our national resources by masqueraders and fraudsters depleting our national resources essential to enable us to enjoy "the right to life" which at present, stands denied to most of our common people even in such key-areas as *education* and *health*. It is high time to hold that the impugned Instruction and the impugned Rules promote an opaque system destructive of the Rule of Law and promotive of the possibilities of corruption and arbitrariness. Using the famous words of Lord Russell of Killowen CJ, it can be boldly asserted:

> 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires'*.[164]

(vi). That the impugned Instruction and the Rules subvert the Income-tax Act by depriving the quasi-judicial statutory authorities of their rightful jurisdiction and their mandatory duties; and through such insidious acts undermine the Rule of Law.

(vii) That, to redress the situations in time to come this Hon'ble Court may declare, in the context of our Constitution, the ambit and the limitations of the Treaty-making power of the Union of India pertaining to Tax Treaties and also Treaties other than Tax Treaties. This Petitioner, after referring to the suggestions by the Constitution Review Commission and the Peoples' Commission (headed by the three eminent judges of our Superior Courts) has offered his suggestions for judicial consideration [vide **Annex 'C'** pp. 183-184 printed pages 34-38].

(viii) That the insertion and substitution in Section 90 of the Income-tax Act and the insertion of Section 90A in the Income-tax Act, 1961 are bad as it is *ultra vires* on account of non-conformity with Articles 14, 19, 21, and 265 of the Constitution of India, and are unreasonable as they grant uncanalized arbitrary powers to the Executive not within the discipline of the ambit of permissible delegation.

GROUNDS: SEGMENT II

[Apropos the Uruguay Round Final Act and India's Participation in the WTO]

(Points 9-51 *infra*)

[9]. For that never were the words of Lord Denning, which he uttered in 1949 in his public lecture (*Freedom under the Law* p. 126):

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[164] *Kruse v. Johnson* [1988] 2 QB 91 at 100

> "Just as pick and shovel is no longer suitable for winning of coal, so the procedure of mandamus, *certiorari* and actions on case are not suitable for the winning of freedom in the new age."

more timely than in evaluating the complaints as to the violation of Fundamental Rights in this phase of Economic Globalization when there is an evident and dexterous strategy to drive our Republic towards the *Sponsored State* [**Annex 'D'**] wherein Social Justice and Democracy become neglected values. For "the winning of freedom in [this] new age" this Hon'ble Court should take a holistic view as to the survival of our Fundamental Rights in this age where corporations rule, where Market conditions and controls ethical and value judgments, when there is a commoditization of individuals, where the Strategy of Corruption and Craft of Deception are triumphant, where we have virtually two Indias, one the India of the India Inc. and the high net-worth creatures, and the India of starving and suffering millions, where covert and sinister invasions on Fundamental Rights made under camouflage. Our Constitution is totally incompatible with the Sponsored.

[10]. For that as perspective is always a determiner of a decision, this Hon'ble Court should consider the realities begotten by the syndrome of the Sponsored State, more specifically, 'Sponsored Government' under the WTO commitments aggravated by the IMF Directives. The Uruguay Round Final Act itself speaks of a close relationship between the WTO and the IMF (vide 'Declaration on the Relationship of the WTO with the IMF'). The Final Act establishes the Rule of the Market (vide Art 29 of the Agreement on Import Licensing Procedure[165]). In implementing our Fundamental Rights in this Sponsored State, this Hon'ble Court may have to widen the reach of our Fundamental Rights because in the Sponsored State it is the extra-constitutional commitments which control the government through a dexterous camouflage by making the government a mere front only. This Hon'ble Court may have to revise the judicially created conventional norms governing the enforcement of Fundamental Rights. This Hon'ble Court has already advanced in this matter when it observed in *Maneka Gandhi* (AIR 1978 SC 597):

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[165] 'Members in the process of transformation from centrally-planned into a market, free enterprise economy may apply programmes and measures necessary for such transformation.'

"The attempt of this Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

The new realities demand a new perspective. Judge Manfred Lachs of the ICJ in *In the North Se Continental Shelf Case*[166] had aptly observed:

> "Whenever law is confronted with facts of nature or technology, its solution must rely on criteria derived from them. For law is intended to resolve problems posed by such facts and it is herein that the link between law and the realities of life is manifest. It is not legal theory which provides answers to such problems; all it does is to select and adapt the one which best serves its purposes, and integrate it within the framework of law."

(A) Wrongful Change in Primary Governmental Functions

[11]. For that by accepting commitments under the Uruguay Round Final Act under the aegis of the WTO, our Executive government has blatantly breached the commands of the Preamble to the Constitution, and the Fundamental Rights read with the Directive Principles. A constitution is written by citizens to establish the government they live under. The prime purpose of a constitution is to delineate how government will operate and function. In the Pax Mercatus, whereunder the corporations become the Leviathan, the government surrenders itself to the World Bank and its cognate the IMF. How can our Fundamental Rights survive erect to protect us when the head of our Executive runs the risk of being a cringing slave? This Petitioner is not over-painting a scenario in gruesome and morbid colours. If it happened in Indonesia, it can happen in India. In fact it might have already happened but none has yet written an account as graphic as that about Indonesia by Joseph Stiglitz[167]:

> "But the IMF is not particularly interested in hearing the thoughts of its 'client countries' on such topic as development strategy or fiscal austerity. All to often, the Fund's approach to developing countries has had the feel of a colonial ruler. A picture can be worth a thousand words, and a single picture snapped in 1998, shown throughout the world, has engraved itself in the minds of millions, particularly those in former colonies. The IMF's managing director , Michel Camdessus (the head of the IMF is referred to as its 'Manging Director'), a short, neatly dressed former French Treasury bureaucrat, who once claimed to be a Socialist, is standing with a stern face and crossed arms over the seated and humiliated president of Indonesia. The hapless president was being forced, in effect, to turn over economic sovereignty of the country to the IMF in return for aid his country needed. In the end, ironically, much of the money went not to help Indonesia but to bail out the 'colonial power's 'private sector creditors. (Officially, the 'ceremony' was the signing of a letter of agreement, an

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[166] ICJ 1969, 3 at 222.
[167] *Globalization and Discontent* pp 40-41

> agreement effectively dictated by the IMF, though it often still keeps up the pretence that the letter of intent comes from the country's government!)'

It is time for us to play our role as prescribed by our Constitution, perceived by unsullied prudence, to our democracy and the Constitution from the noxious fumes of this 'petri-dish' of the corporate colonialism which commands all institutions, judiciary not excluded, to decide everything on the sole criterion: whether the decision is market-friendly

A government which reduces itself to such a sordid situation is surely a continuous perpetrator of the subversion of the Constitutional objectives enshrined in the Fundamental Rights. How can the State grant 'equal protection of the laws' (Art 14) when the Executive government, representing the State of India, drives our nation to such a predicament? Slaves are never known to protect their liberty; they tend to fall in love with servitude itself (but with an incessant denials). Hence, this Petitioner submits that this Court may hold that through treaty making power our government is denying us our Fundamental Rights, or, to be most charitable, jeopardizing them in a manner where not to see their breach is to be oblivious of history and unmindful of the operative realities. Issue of this sort is to be decided on the principle of probability remembering what J. Bronowski considers the very human specific trait:

> "There are many gifts that are unique in man; but at the centre of them all, the root from which all knowledge grows, lies the ability to draw conclusions from what we see to what we do not see, to move our minds ``through space and time, to recognize ourselves in the past on the steps of the present." [168]

[12]. For that a constitution is sacred to a Nation because of its three fundamental purposes; it establishes government, establishes how government will function, and protects the rights of citizens. The commitments of our government (under the Uruguay Round of GATT, of which the apex institution is the WTO, with a close nexus with the IMF and the World Bank) have the direct and inevitable effect of subverting our Fundamental Rights. The Market Economy, it is well known, is founded on the ideas of Frederich von Hayek who in *The Road to Serfdom* considers freedom as the function of the market, and those of Milton Friedman in his *Capitalism and Freedom* and *Free to Choose*.[169] It is obvious that the idea of Social Justice seethes through the Preamble to Arts 14, 19, 21 and 29 (only to illustrate), and this idea is given a go bye the Fundamental

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[168] J. Bronowski, *The Ascent of Man* Ch I

[169] 'Nowhere is the gap between rich and poor wider, nowhere are the rich richer and the poor pooerer , than in those societies that do not permit the free market to operate.' *Free to Choose* 179

Rights stand subverted. And this is the mandate of the Market Economy which the WTO has imposed on us through the deeds of our Executive. Hayek considers the concept of 'social justice' the most powerful threat to law conceived in recent years. Social justice, said Hayek, 'attributes the character of justice or injustice to the whole pattern of social life, with all its component rewards and losses, rather than to the conduct of its component individuals, and in doing this it inverts the original and authentic sense of liberty, in which it is properly attributed only to individual actions'.[170] In *Indra Sawheny v. UoI* (AIR 1993 SC 447 para 4) the Hon'ble Supreme Court held that Art 14 is to be understood in the light of the Directive Principles. But how incompatible are the commitments under the WTO to Art 39 of our Constitution, not to say of the others! This Article has been described as having its object the securing a Welfare State; and this Directive Principle can be utilized for construing provisions as to fundamental rights.[171]

[13]. For that Articles 14 or 21 are designed to survive only in a Welfare State. But the realities being shaped under the neo-liberal reforms protocol being prescribed by the WTO go counter to our constitutional policies and mandatory constitutional norms. Some illustrative ideas dear to the WTO agenda are just sprinkled here by way of illustration:

- The Welfare State is bidden a good-bye. The role of the government is narrowed to act merely as the protector and facilitator of the neo-capitalists believing in, as Gailbraith[172] says,:

(i) tax reduction to the better off,

(ii) welfare cuts to the worse off

(iii) small, 'manageable wars' to maintain the unifying force of a common enemy, the idea of 'unmitigated laissez-faire as embodiment of freedom', and

(iv) a desire for a cutback in government.

- The government may break new grounds for resourced by granting lands to the corporate zamindars, by granting right to exploit our resources by conferring licenses and franchises. If in the process water resources are exhausted, riverbeds can be leased or auctioned. When all these are exhausted, human beings, now fast becoming commodities (see David Riesman's *The Lonely Crowd*), can be sold in international market.

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[170] Hayek , *The Constitution of Liberty* quoted by Peter Watson, *A Terrible Beauty* p. 518
[171] *Keshvanand Bharti* AIR 1973 SC1461; Snjiva Coke AIR 1983 SC 239
[172] J.K. Galbraith, Culture of Contentment (Boston)

- It is mandated that the planning which promotes socialism should be given up. But Government through its policies promote the interests of big corporation which work under oligopolistic situation by establishing a symbiotic relationship between the government and the business.[173]

The operative facts of our country's socio-economic management amply show the adoption of the neo-liberal agenda of the neo-colonialism of the Pax Mercatus under which there would, in the end be only one touchstone for decision- making: whether it is market-friendly?

[14]. For that it is strange that in enacting some major laws, our Government shows studied forgetfulness of the Preamble to the Constitution, the Fundamental Rights, Directive Principles of State Policy, but is nauseatingly imperious in pointing out its servitude to the Uruguay Round Final Act. To illustrate: the Protection of Plant Varieties & Farmers' Rights Act, 2001 states in its Preamble:

> "……And whereas India, having ratified the Agreement on Trade Related Aspects of Intellectual Property Rights should *interalia* make provision for giving effect to sub-paragraph (b) of paragraph 3 of article 27 in Part II of the said Agreement relating to protection of plant varieties;"

The new unconstitutional trends are evident in many areas which have been explained by the People's Commission in their *Report of the Peoples' Commission on GATT* already referred.

The measure of the servitude to which our Executive has subjected this country, which we call with pride the Sovereign Socialist Democratic Republic, is illustrated by numerous acts effected through treaties, to mention one most dominant right now in our national consciousness. The terms of reference to the *Mashelkar Committee* on the Patents (Amendment) Bill, 2005, was to "make Patents Act *compatible with* India's international obligations, particularly ….. TRIPS Agreement." The terms of reference were dexterously pregnant with an idea that a slavish compliance with the TRIPS on most favourable terms to the Pax Mercatus had be assumed, and the imposed agenda had to be promoted even on most specious reasoning. The answers, which the Committee has given despite wise dissents, are the foregone conclusions from the premises built in the terms of reference themselves. The Mashelkar Committee considers in its Report that Article 27 is " a specific mandate", and holds that there is " a perception that even the current provisions in the Patents Act could be held to be TRIPS non-compliant". Hence, in its view, our law is to be made " **TRIPS compliant.'** Even a statute, not in tune with TRIPS, can be assailed by some foreign gladiator in our courts as *ultra vires*!

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[173] Ibid 590

Such things are, history says, natural in a Sponsored State. But we do not elect Parliament under our Constitution to carry our the concealed references of the vested interests. A Sovereign State would just be a pretender first rate if, in effect, it has lost freedom, courage and imagination. As this Hon'ble Court is the upholder of the Constitution, it is time for it to save it if it can.

[14A] We are told by our Superior Courts that there are constitutionally prescribed ways for amending our Constitution, and there are provisions which cannot be even amended. But one wonders how, and under what authority, the constitutional objectives have been modified turning our Welfare State into a Market Economy.[174] It is submitted this Hon'ble Court should cast an Apolline critical gaze so that neither the Executive can ride roughshod on the Constitutional fundamentals, nor the supreme law of our land, which we have given to ourselves, sweating blood, is defiled and defaced.

[15]. The new unconstitutional trends/acts are evident in many areas which have been explained by the People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar (at pp. 127-179 of the Report to be filed in the Hon'ble Court). This Petitioner avoids repeating them, or even updating them as his sole object is to suggest a broad probability in favour of his case.

(B) Violates our Fundamental Rights

(Art 14 breached)

[16]. For that conformity with the WTO-IMF commitments are subversive of Art 14 of the Constitution as it is impossible for the mandate of this Article to operate in the ethos thus created; and the facts emerging over the recent years prove this. The Right to Equality is not only a fundamental right but it is also a basic feature of the Constitution. Art 14 has two facets:

(i) Art 14 is a constitutional command directed against the 'State' on whose behalf the Executive government enters into a treaty. The executive act, even if done at the international plane, would be in breach of Art 14; hence domestically not enforceable.

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[174] "My research had not cast doubt on the validity of general claims about market efficiency but also on some of the fundamental beliefs underlying globalization, such as the notion that free trade is necessarily welfare enhancing.' Joseph Stiglitz, *Making Globalisation Work* p.x

(ii) Art 14 confers the Right to Equality to any person as a correlative to the duty that is cast on the 'State' not to deny equality before the law or the equal protection of the laws within the territory of India; and this right inheres in any person, or groups of persons, or their political formation, the nation.

[17[. For that conformity with the WTO-IMF commitments are subversive of Art 14 of the Constitution even if 'the doctrine of classification', which is a subsidiary rule not needing an over-emphasis[175], is applied. These issues deserve to be examined only in the macro-perspective, not under micro-perspective of individuals. The duty under Art 14 is cast on the 'State', and is to be discharged in favour of persons both as individuals, and as groups. How can the state of nations become as described in the following quotations unless Articles 14 and 21 are systematically and blatantly breached (to let the figures speak) :

(i) *Prof. Fatima Meer* states[176]:

> " The rich countries enjoy 60% of the world's GNP but have only 15% of the world population. In 1960, 20% of the world's richest countries had 30 times the incomes of the poorest 20%; in 1997, 74 times.The gap between the world's richest and poorest countries has doubled in the last 50 years. It was 3:1 in 1820, 11:1 in 1913, 35:1 in 1950 and 72:1 in the nineties. World poverty is escalating, as is too unemployment with one third of the world's labour force being unemployed or underemployed."[177]

(ii) P .Sainath comments[178]:

> " **I**ndia is a classic example of engineered inequality. On 20 October, *The New York Times* had a front page lead celebrating the birth of a class of people in India who spend their weekends at malls. It failed to mention that this year, India slipped three places in the human development ranking of the United Nations. We now stand at rank 127. This year's UN Human Development Report had found that for the bulk of the Indian population, living standards are lower than those of Botswana – or even the occupied

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[175] *L.I.C of India v Consumer Education and Research Centre* AIR 1995 SC 1811, 1822
[176] http://www.humanities.mcmaster.ca/gandhi/Lectures/2001-Meer.htm accessed 5 July 2006
[177] "The gap that separates the world's rich and poor, both within and between countries, is unconscionable and growing. … the 20% of the world's people who live in the wealthiest countries receive 82.7 % of the world's income; only 1.4% of the world's income goes to the20% who live in the world's poorest country." David Karten, *When the Corporations Rule* p. 108
[178] http://www.india-seminar.com/2004/533/533%20p.%20sainath.htm

territories of Palestine. So while some of the richest people in the world live in India, so do the largest number of the world's poor.

The euphoria over one good monsoon (actually, we've had several these past 15 years) seems to have erased any debate in the media on what's happening in Indian agriculture. Small farms are dying. Investment in agriculture is down. Rural credit has collapsed and debt has exploded. Many are losing their lands as a few celebrate at the malls. In March this year, as Professor Utsa Patnaik points out, the per person availability of foodgrain was lower than it had been during the notorious Bengal Famine of 1942-43.Thousands of farmers have committed suicide since the late 1990s. In a single district of Andhra Pradesh, Anantapur, more than 2400 farmers have taken their own lives since 1997. Elsewhere in India, like in Gujarat or Mumbai, the loss of countless jobs in industry is boosting religious fundamentalism. In the 2002 violence in Gujarat in which over 1500 lives were lost, many of the rioters were workers from shut-down textile mills.

The huge new inequalities are feeding into existing ones: For instance, in a society where they are already disadvantaged, hunger hits women much harder. Millions of families are making do with less food. In the Indian family women eat last. After they have fed their husbands and children. With smaller amounts of food being left over now, poor Indian women are eating even less that they did earlier. The strain on their bodies and health becomes greater. Yet, health care is ever more expensive.

So what sort of a society are we building in the new, confident India? We are closing small health centres and opening super luxury hospitals that 90 per cent of Indians cannot afford; shutting down primary schools and opening colleges based on exorbitant donations for admissions; closing libraries and opening multiplexes; winding up bus depots and services as we expand the airport systems."

And the above state of affairs is largely crafted by the WTO commitments. An expert observes:

> "Some of these changes are the result of WTO regulations, We removed Quantitative Restrictions on imports in April 2001 fully two years ahead of the time we are required to do so by the WTO! The portrayal of the Indian farmer as non-competitive is also sleight of hand; sensing the changing environment, the industrialized nations increased their subsidies 2-6 times in 1980s, and are now reducing them fractionally, portraying this as a scale-back of government support! It is a myth that the Indian farmer is not competitive. There is no level playing field in India. The free market is a farce. Who are the people who negotiated on India's behalf at the WTO? What positions do they now hold? During the earlier round of GATT negotiations, we saw that many who allegedly represented India instead sold the country down the drain, and took plush jobs in the west for their own personal gain."

> Nearly 380 million Indians live on less than a dollar a day. Our country's $ 728 per capita GDP is just slightly higher than that of sub-Saharan Africa. A sort of s genocide is a result of deliberate policy imposed by the WTO and the World Bank, implemented by the Government, which is designed to destroy small farmers and transform Indian agriculture into large scale corporate industrial farming. International agribusiness is intent upon driving the family farm into bankruptcy. Starvations by the farmers are much reported in our Press which is now accustomed to sing the glories of the waxing neo-colonialism.

The U.N has warned that inequality between and within countries has often accompanied greater economic globalization, and observed:"[179] "That simple truth is sometimes forgotten. Mesmerized by the rise and fall of national incomes as measured by GDP, we tend to equate human welfare with material wealth", said Watkin, head of UNDP's Human Development Report Office. *The U.N. Human Development Report* 2006 underscores this point of distress.

[18]. For that it is breach of Art 14 of the Constitution of India to create conditions under which the ideals set forth by our Constitution are defeated by creating two Indias, one of the growing breed of high net-worth persons, and the greedy India Inc. and the other of the ill-fed, ill-clad, ill-educated, and starving millions. This growing discrimination defeats social justice and inequality. This sort of discrimination emanates from the policies, legislative and executive, being implemented by our government in gross forgetfulness of its constitutional commitments.

'This hijacking of the market for agriculture by a handful of agribusiness, which is what the rules of WTO are -- the Agreement on Agriculture is basically putting all of agriculture into the hands of ADM, ConAgra and Cargill, and all the seed sector into the hands of Monsanto -- it must necessarily destroy more and more farms, more and more farming, and push more farmers to suicide for a while, unless we get a change.' Billions of subsidies to the farmers in the USA drive down the prices of agricultural goods. It is this sort of economic architecture which led thousands of farmers to commit suicide, unsung and unwept. Such policies, mandated under the **WTO-IMF** directives, lead to the shocking delight for a few, and sorrow for many calling to mind what Blake said:

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[179] The U.N. Human Development Report 2006 (http://hdr.undp.org/hdr2006/) makes clear the entrenched inequality across the globe. "Globalization has given rise to a protracted debate over trends in global income distribution, but we sometimes lose sight of the sheer depth of inequality -- and of how greater equity could dramatically accelerate poverty reduction," said Watkins.

Some are born to Sweet delight,

Some are Born to Endless Night.

[19]. For that the governmental actions impeached through the Grounds, in this Segment II of this Writ Petition, show an utter disregard for the principles of reasonableness and fairness, and thereby it violates the constitutional mandate which this Hon'ble Court expounded in *Ajay Hasia v. Khalid Mujib Sehravardi*[180] :

> " It was for the first time in *E. P. Ayyappa v. State of Tamil Nadu*, (1974) 2 SCR 348: (AIR 1974 SC 555), that *this Court laid bare a new dimension of Article 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness… From a positivistic point of view* equality is antithetic to arbitrariness. ….The principle of reasonableness, which legally as well as philosophically, is an essential element of *equality or non-arbitrariness pervades Article 14* like a brooding omnipresence."

Kruse v. Johnson[181] and *Slattery v. Naylor*[182] strike similar note as even in the context of the British system certain bye-laws were held "unreasonable", hence bad.

[20]. That this Petitioner would submit that it was highly unreasonable on the part of the Executive government:

(i) to slice off/ shed off certain legislative power in favour of the WTO;

(ii) to assign certain judicial power in favour of the DSB of the WTO;

(iii) to effect a wrongful change in Primary Governmental Functions, enjoined by the Constitution;

(iv) to enter into a devastating treaty, (as the *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar, the former Judges under an opaque system violating certain basic features of our Constitution, viz:

(a) Constitutional basics, (b) Judicial Review,
(c) Treaty-making power, (d) Federal structure,
(e) Fundamental Rights, (f) Democracy, and
(g) Sovereignty; and

(v) to transform, through conduct, this Treaty virtually into self-executing treaty camouflaged, of course, under the *pactum de contrahendo* protocol (evidenced by the Amendments done under the Patents Act, and the Lifting of Quantitative Restrictions under the binding decisions of the DSB of the WTO).

(<u>Art 19 breached</u>)

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[180] AIR 1981 SC 487
[181] (1898)2 Q.B. 91.
[182] (1888) 13 App. Cas 446

[21]. For that the controlling organization created by the Uruguay Round Final Act, the WTO, defeats our Fundamental Right under Art 19(1)(a) of the Constitution of India grants to the citizenry of this Republic a fundamental "right to freedom of speech and expression". In *R. v. Cmmr of Police Ex p Blackburn* (No 2)[183] Salmon L.J. aptly said:

> "It is the inalienable right of everyone comment fairly upon any matter of public importance. This right is one of the pillars of individual liberty---freedom of speech, which our courts have always unfailingly upheld… The criticism here complained of, however, rumbustious, however wide of mark, whether expressed in good taste or in bad taste, seems to me to be well within (the limits of reasonable courtesy and good faith)."[184].

And Edmund Davies L.J. highlighted, in his characteristic style, the reach and importance of this right in these suggestive words:

> "The right to fair criticism is part of the birth-right of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse, and its curtailment must be jealously guarded against. It applies to the judgments of the courts as well as other topics of public importance."[185]

And the fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the Right to Know. This Hon'ble Court has recognized the supreme importance of the Right to Know. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*[186] this Hon'ble Court observed:

> "We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broaden horizon of the right to live in this age on our land under Art. 21 of our Constitution. That right has reached new dimensions and urgency. That right, puts greater responsibility upon those, who take upon the responsibility to inform."

[22]. For that the WTO is a secretive body sans transparency, and sans democratic commitment to unfold itself to critical public gaze. How the WTO functions has been

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[183] (1968) 2 QB 150
[184] ibid p 155
[185] ibid p.156
[186] AIR 1989 SC 190 [Coram : Sabyasachi Mukharji, and S. Ranganathan , JJ.

vividly described by Joseph Stiglitz, the winner of the Nobel Prize foe Economics 2001, and a former Chief Economist at the World Bank, in these words[187]:

> "The problem of lack of transparency affects each of the international institutions, though in slightly different ways. At the WTO, the negotiations that lead up to agreements are all done behind closed doors, making it difficult ---until it is too late ---to see the influence of corporate and other special interests. The deliberations of the WTO Panels that rule on whether there has been a violation of the WTO agreements occur in secret. It is perhaps not surprising that the trade lawyers and ex-trade officials who often comprise such panels pay, for instance, little attention to the environment; but by bringing the deliberations more out into the open, public scrutiny would either make the panels more sensitive to public concerns or force a reform in the adjudication process".

[23]. For that this Hon'ble Court should rule on this point as our Executive Government is fond of areas of darkness like the tax havens, and do not have the pangs of conscience in issuing directions like the CBDT Circular No 789 of April 30 of 2000 which commands the statutory authorities under the Income-tax Act, 1961, to go in blinkers when transactions are routed through Mauritius, a popular tax haven. Secrecy goes against our Public Policy and international *jus cogens*, as it breeds corruption. Stiglitz aptly says[188]:

> 'Earlier, in my days at the Council of Economic Advisors, I had seen and come to understand the strong forces that drove secrecy. Secrecy allows government officials the kind of discretion that they would not have if their actions were subject to public scrutiny. Secrecy not only makes their life easy but allows special interests full sway. Secrecy also serves to hide mistakes, whether innocent or not, whether the result of a failure to think matters through or not. As it is sometimes put, "Sunshine is the strongest antiseptic."

[24]. For that this Hon'ble Court may protect our Right under Art. 19

from illegal invasions by our Government, or by any other body.

<u>(b) Art 21 breached</u>

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[187] Joseph Stiglitz, *Globalization and its Discontents*. (Penguin) p.227-228
[188] ibid pp. 228-229

[25]. For that our Right under Art 21 is bound to suffer under the predatory system of economic management which our government has uncritically accepted under corporate duress. This Hon'ble Court in *Vincent v. UoI* (1987) 2 SCR 468 at 478 considered right to health enshrined in the Right to Life under Art 21. The Court observed:

> "As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution-makers envisaged."

The commitments made by the Executive under the Final Act were criticized by *the Report of the Peoples' Commission on Patents Laws in India* (by Shri I.K.Gujral, Prof Yashpal, Prof Muchkund Dubey, Shri B. L. Das and Dr Yusuf Hamied) which observed:

> "The provision of our Constitution should be fully respected and there should be no compromise in amending our patents laws with these provisions".[189]

[26]. For that "the changes to the existing laws required by the TRIPS Agreement and Agriculture Agreement and the anticipated effect on the price of medicines and self-sufficiency of food will have a direct and inevitable effect on the fundamental right to life enshrined in Art 21 of the Constitution" (to quote the view of the Commission by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai, the former Judges of our Supreme Court; and Rajinder Sachar, former Chief Justice of Delhi High Court)[190]

[27]. For that the TRIPS promote the interests of the corporate oligarchy by generating monopoly, which is bound to affect the Right to Life which our Constitution grants. Mrs Gandhi, while addressing the WTO conference in Geneva, on May 1981, expressed what accords well with Art 21. She said:

> "My idea of a better ordered world is one in which discoveries would be free of patents and there would be no profiteering from life or death."

Prices of life-saving drugs are bound to increase so much that for many Right to Life would become meaningless. It is evident from the price differentials clear from international comparison of drug prices.[191]

(c) Art 29 breached

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[189] at p. 85

[190] The People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder Sachar at P. 157

[191] Such a chart is given at p. 34 in Dubey's *Unequal Treaty*

[28]. For that our Right to Culture, granted by Art. 29 of the Constitution is alarmingly threatened by the corporatism, consumerism, crash materialism being generated by Market engineered and facilitated by the WTO. In 1915 Einstein wrote to Lorentz in Holland "that men always need some idiotic fiction in the name of which they can face one another. Once it was religion, now it is the State". This Petitioner would say: "Once it was religion, then it was the State, now it is the Market, Pax Mercatus". We had tamed the State power through the Constitution, now there is time to tame the Market before it destroys our culture.

[29]. For the Right to Culture is available to all citizens, whether they belong to the majority or minority group. [*State of Bombay v. Education Society* (1955)1 S.C.R. 568]

[30]. For that the waves of sub-culture are being generated to destroy our cultural moorings so that not only we would subject ourselves to servitude under hypnosis, but we would be exhibiting the slave's syndrome by falling in love with our slavery. The neo-liberalism is a variant on neo-colonialism out to destroy everything we are proud of. In the Sponsored State, that the British established, we had lost independence but had protected our culture, though bruised and somewhat battered; but yet having potentialities enough to let us organize for a Struggle for Independence. But the Sponsored State, that our commitments under the Uruguay Round Final Act have built under the command of the WTO, would become the veritable Waste Land of all we are proud of. This would be so as culture is learnt in an environment, and it is lost if the environment becomes negative.

[31]. For that the persuaders and pressurizers, working as the lobbyists and the compradors for the WTO, are creating an ethos under which our Constitution, already much defaced and defiled, would fare much worse than the Weimer Constitution in Germany. The morbid state of affairs pose a lot serious risks which include risks as sinister as these:

(i) The Universities are fast coming under the corporate influence. Universities are now becoming both producers of commodities (future employees) as well as

consumers. Corporations are playing a growing role as the universities are tempted to turn to the corporate

sector to supplement the budget of the institution. This coming together of the academy and the business world is having an impact on the culture as the universities are fast moving towards commercialism under the subjugation of Market.

(ii) We are bidden to take into account the impact of legal institutions and rules on markets, and to undertake an economic analysis of law. The Chicago University and the Yale Law School are the centres for the study of law and economics wherein economics dominates legal discourse. H*omo juridicus* is becoming *homo economicus*. Public policy of the State is manipulated to come to terms with the ideas of the mainstream neoclassical economics. This trend would impact even the functioning of judiciary.

[32]. For that this Hon'ble Court should take a judicial notice of hegemonic and monochromatic culture that the Market is generating, and issue such directions, or make such observations as this Hon'ble Court considers proper in exercise of its role as the guardian of the Constitution warrants.

Wrongful Assignment of the Legislative Power of Parliament

[33]. For that the Uruguay Round of GATT, according to the Articles already quoted above [*para 82 at pp. 78 supra*] require the Members to ensure their laws, regulations, and administrative procedures conform to the obligations under the Final Act as agreed. The Agreement establishing the WTO, establish a procedure, whereby, if member nations are unable to negotiate a mutually satisfactory solution to a dispute or controversy, then the Disputes Settlement Body (DSB) may adopt a solution as recommended by a Panel. This adopted ruling is legally binding upon the disputing parties, and all other member nations of the WTO. Therefore, when a Panel ruling is adopted by the DSB, the DSB, in effect, performs a legislative act.

Our Supreme Court in *Kesavananda's Case* (AIR 1973 SC1461) determined certain features of our Constitution constituting basic structure,; these are—

(1) Supremacy of the Constitution;
(2) Republican and Democratic form of Government;
(3) Secular character of the Constitution.
(4) Separation of powers between the legislature the executive and the judiciary
(5) Federal character of the Constitution.

These basic features, read with the provisions of Articles 79,107, 245 and 246 of the Constitution of India, have the express and implied effect of suggesting that the legislative powers of our Nation are constitutionally earmarked for the nation's democratic body, our Parliament. If rulings adopted by the DSB are legislative acts, legally binding upon member nations, then a part of the legislative power granted to Parliament by Constitution, no longer remains in Parliament, but instead, it stands been assigned to the WTO. Nowhere in the Constitution is even Parliament, not to say of the Executive, given authority to assign any part of its legislative powers to any other institution, much less to a foreign institution being a creature of a dubious Treaty made under an Opaque System. The Final Act is a 'law-making treaty' which occupies the sovereign space of decision-making, whether legislative or executive. If a portion of the legislative power of Parliament is now vested in the WTO, then the structural constitutional provisions have been breached. For this reason our acceptance of the Uruguay Round Final Act and participation in the WTO as member is repugnant to our Constitution.

[34]. For that the Parliament under Article 81 of the Constitution of India is a body of representatives we have elected to frame law and to hold the Executive under accountable and responsible to it. The constitutional effect of this had been highlighted centuries back by Sir Thomas Smith in his Exposition on Parliament in his *De Republica Anglorum* already quoted.

[35]. For that if the legislative power vested in Parliament is allowed to be divided between Parliament and the WTO, then a fundamental constitutional principle would be destroyed. The Indian citizens do not vote for WTO representatives. The citizens have elected our representatives to make law in consonance with our Constitution. We have neither empowered Parliament, nor the Executive to shed off legislative functions to any body else. Hence, our Executive went counter to our Constitution by agreeing to assign legislative functions to a foreign body. The effect is a wrongful abridgement of the voting rights of the Indian citizens. For these reasons, the acceptance of the Uruguay Round Final Act and our membership in the WTO, is repugnant to our Constitution and unconstitutional.

[36]. For that Article XVI (4) has the effect of making the WTO the highest legislative and judicial body. This Article says:

> " Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements."

David Korten, after describing the WTO as "the World's Highest Judicial and Legislative Body", aptly says[192]:

> "A key provision in some 2000 pages of the GATT agreement creating the WTO is buried in paragraph 4 of Art XVI……The 'annexed Agreements' include all the multilateral agreements relating to trade in goods and services and intellectual property rights. Once these agreements are ratified by the world's legislative bodies, any member country can challenge, through the WTO, any law of another country that believes deprives it of benefits it expected to receive from the new trade rules"

Our Parliament and Judiciary are now placed under a peremptory command to conform its laws to the WTO obligations. And this unthinkable has happened under the executive act done under an Opaque System. This Petitioner has already referred to the Press Release by 250 eminent persons showing how atrocious was this act of the executive in foisting the Uruguay Round Final Act on us, those born and also those yet to be born. They said, *inter alia* others:

> 'The worst aspect of the GATT Agreement/ Treaty is that the role of our Parliament in law-making will be substantially curtailed. To protect the sovereignty and dignity of the Indian people and Parliament, we seek that the Government places a Resolution to reiterate the need for ratification by Parliament of international treatises entailing the introduction of new legislation and wholesale amendment of existing legislation and incurring of financial costs…."

[37]. that a close reading of the Uruguay Round Final Act shows the following very clearly:

> (a) The tone of the legal texts of the Final Act is legislative. The norms are structured in the typical "if-then" (protasis-apodosis) format. The prescribed norms are mandatory as the Act commands total subjection to its terms, or a clear exit. It prescribes punitive measures including retaliatory actions.

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[192] David Korten, *When Corporations Rule the World* p. 174

(b) The *Black's Law Dictionary* defines ' legislative function' as under:

'1. The duty to determine legislative policy. 2. The duty to form and determine future rights and duties.'

This *Dictionary* defines 'norm' to mean 'a model or standard accepted (voluntarily or involuntarily) by society or other large groups, against which society judges someone or something.'

The obligations under the Act are couched in style of legislative character. Neither our Executive, nor even Parliament, has jurisdiction to shed off the legislative function to any external body. 'We, the People' have not granted the power to delegate this essential democratic function.

(c)If at all the matters are brought up before Parliament to implement through legislation, our Parliament:

(i) would find itself helpless against a *fait accompli, and subject to* the Executive coercion of the sort to which Manoj Bhattacharya referred in the *Rajya Sabha*: to quote a fragment--

"One thing transpired, that there is an element of helplessness; they are trying to plead that we are in a helpless condition, that we cannot do it because we are already a member of the WTO, we are already committed we are already in the trap; and so we cannot come out of that trap, and for that only we have to effect these changes to the already existing very, very good and very, very progressive Indian Patents Law of 1970".

Shri Pranab Mukherjee considerd the Treaty 'unequal treaty as it was begotten in an unequal world'. A politician can be excused for saying so in these locust-eaten years, but our Constitution and its guardian must frown upon it. Our country is strong enough to resist any infliction of gross inequality. It is, of course, quite possible for our Executive to let us down because of the terrible come down in political morality: a fact which even this Hon'ble Court has taken note of.[193]

[**38].** that the Uruguay Round Final Act contains overweening norms for implementation, encroaches on the realm of Parliamentary & Executive decision making, and commands subservience to, as *the Report of the Peoples Commission on Patents Laws for India*[194] says, "a totally new environment for policy and law making at the national and international levels".

[39]. For that Uruguay Round of GATT, Article II, Paragraph 1, states that, "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments

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[193] This Hon'ble Court in Shivajirao *Nilangaker Patil v. Mahesh Madhav Gosavi*, AIR 1987 SC, also R. *S Das v. Union AIR* 1987 SC 593 at 598 pointed out the degradation in public life.

[194] The Commission consisted of Shri I.K.Gujral, Prof Yashpal, Shri B.L.Das, Dr Yusuf Hamied.

included in the Annexes to this Agreement". This is clearly a Wrongful Assignment of the Power to Regulate Commerce with Foreign Nations. In contrast, entry 41 of the Seventh Schedule to the Constitution of India grants to Parliament power to frame law pertaining to "Trade and commerce with foreign countries; import and export across customs frontiers; definitions of customs frontiers". It is also evident that this Agreements under the Final Act would have an impact on Part XIII of the Constitution (Trade, Commerce and Intercourse within the Territory of India). Nowhere in our Constitution is the Executive, or even Parliament, given authority to assign its power to regulate commerce with foreign nations to a second party, or to bestow authority upon that alien party to make laws. For these reasons, the enactment of GATT and membership in the WTO, is repugnant to our Constitution and unconstitutional.

[40]. For that we are a Democracy because we elect our representatives for framing laws for our governance; we are a Republic because our representatives and other State functionaries are bound by our Constitution to lead us towards the constitutional goals. The Constitution cannot be allowed to become dysfunctional and void. If that happens, then our government itself is illegal and unlawful, and can no longer hold claim to being a Republic.

[41]. For that our Parliament under our Constitution is bidden to pursue legislative policies in conformity with the Fundamental Rights, and is required to implement the Directive Principles of State Policy. The Executive's commitments under the WTO have conspired to subjugate such constitutionally determined objectives to the objectives of the Pax Mercatus under the WTO. The pressure to which our Parliament is subjected stands illustrated by the way Patents Amendments were brought about under tremendous crypto-psychic pressure which made Parliament to bend and buckle. Another instance is what happened as a sequel to the decision by the Disputes Settlement Body on the Complaint by the United States in matters of Patents.[195] India was forced to lift Quantities

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[195] http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds50_e.htm

On 2 July 1996, the US requested consultations with India concerning the alleged absence of patent protection for pharmaceutical and agricultural chemical products in India. Violations of the TRIPS Agreement Articles 27, 65 and 70 are claimed. The DSB Panel found that India has not complied with its obligations under Article 70.8(a) or Article 63(1) and (2) of the TRIPS Agreement by failing to establish a mechanism that adequately preserves novelty and priority in respect of applications for product patents for pharmaceutical and agricultural chemical inventions, and was also not in compliance with Article 70.9 of the TRIPS Agreement by failing to establish a system for the grant of exclusive marketing rights. India moved to the Appellate Body which, on 19 December 1997, upheld, with modifications, the Panel's findings on Articles 70.8 and 70.9, but ruled that Article 63(1) was not within the Panel's terms of reference. On 14 January 1999, the US requested consultations with India in accordance with Article 21.5 of theDSU (without prejudice to the US position on whether Article

Restrictions in pursuance to the directions of the DSB and its Appellate Forum . At the DSB meeting of 5 April 2001, India announced that, with effect from 1 April 2001, it had removed the quantitative restrictions on imports in respect of the remaining 715 items and had thus implemented the DSB's recommendations in this case. The lifting of the Quantitative Restrictions have deprived many farmers their means of Livelihood in a patent breach of Art 21 of the Constitution. The Fundamental Rights are breached in many ways but our Commands that all such ways must be blocked, and violations remedied under Art 32 of the Constitution.

Wrongful Assignment of the Judicial Power

[42]. For that by and large we share the common law tradition. In *Att-Gen v BBC* [1980] 3 All ER 161 at 181 Lord Scarman recognizes that under the common law tradition, whether in the U.K. (with an unwritten constitution) or Australia (with a written constitution) the judicial power is a species of sovereign power [of the State]:

> '…. Though the United Kingdom has no written constitution comparable with that of Australia, both are common law countries, and in both judicial powers is an exercise of sovereign power. I would identify a court in (or 'of') law, i.e. a court of judicature, as a body established by law to exercise either generally or subject to defined limits, the judicial power of the state…".

The judiciary exercises the judicial power of the State. Art 144 of the Constitution of India directs all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court.

[43]. For that Article XVI (4) of the WTO Charter mandates that each " Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements". This undermines the Rule of Law. The Understanding on Dispute Settlement mandates a procedure sans transparency, sans judicial control, sans all the trappings of procedural fairness and moderation considered sacrosanct under civilized jurisprudence. There is not much distance between retaliation or cross-retaliation, and retortion and reprisal.

21.5 requires consultations before referring to the original panel.) regarding the *Patents (Amendment) Ordinance, 1999,* promulgated by India to implement the rulings and recommendations of the DSB.

[44]. For that it is a matter of history that in India the administration of civil justice was closely associated with the management of revenue, and the grant of Diwani rights in 1765 comprised both these functions."[196] The Company and their English employees secured the administration and management of the civil courts , leaving the administration of criminal law in the hands of the natives. The English believed that with the control over the administration of civil justice they could protect their person and property better; they could carry on their arbitrariness and the loot of the land without any effective judicial control. This system protected and promoted their trade and investment. The colonialists were accustomed to follow this approach in all the countries which had come under their sway. In China too somewhat similar situation was brought about after establishing their privileges including the most-favoured-nation (MFN) which ensured trading equality This was brought about through the Treaty of Nanking, the Treaty of Wanghia (with the United States in 1844), and the Treaty of Whampoa (with France in 1844). Later on the colonial power obtained certain benefits of extraterritoriality also. This had the effect of exempting them "from the application or jurisdiction of local law or tribunals."

How close is this to Article XVI (4) of the Agreement Establishing the WTO which obligates :

> " Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

And Article III(3) prescribes:

> "The WTO shall administer the Understanding on Rules and Procedures Governing the Settlements of Disputes …in annex 2 of this Agreement."

Article 23 (12) of the Disputes Settlement Understanding, deals with strengthening of this Multilateral System.

[45]. For that under the Uruguay Round of GATT regime we have agreed that if a member nation of the WTO is offended by any breach of the Treaty obligation, it can bring this issue or controversy before the DSB for resolution. If the DSB adopts a panel report in favor of the offended Nation, or in favour of its national, we have agreed, without reservation, to nullify the offending law. Therefore, DSB adopted rulings result in the

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[196] R.C. Majumdar et al, *An Advanced History of India* p. 788

repeal of the Indian law. The decision of the Appellate body becomes final. Our domestic courts, even this Hon'ble Court, become irrelevant. In effect The Articles quoted above establish that the DSB as the super Supreme Court. Nowhere in the Constitution is the Executive or Parliament given authority to assign the judicial power to any other body but that created under our Constitution. The Judicial Power of our Superior Courts can be taken away or diluted only when our Constitution, perish the thought, is dead and gone; and the citizenry and institutions kiss dust in grossest infamy. How could our Executive ratify such noxious provisions unmindful our the Constitution created by 'We, the People'.

[46]. For that the effect of Article XVI (4) is to make the WTO the highest legislative and judicial body. This Article says:

> " Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements."

The judicial power of this Hon'ble Court has been shed off in favour a foreign body by our Executive even without Parliamentary approval though this shedding off could not be done even under the constituent power of Parliament as would go counter to the very structure of our Constitution. The effect of this Article is to issue a command to our High Courts and this Hon'ble Court to come in conformity with the WTO obligations even if that may require its giving up of the constitutionally mandated view. This sort of commitment is the enactment of the Sponsored State Syndrome in the fifth decade of our Independence.

[47]. For that the enactment of GATT and our membership in the WTO, is repugnant to our Constitution and unconstitutional.

<u>Our Constitution wrongfully Amended</u>.

[48]. For that all Constitutions include a procedure for amending its provisions. Our Constitution prescribes a procedure for amending its provisions. This amendment procedure is rigorous to preclude frivolous changes, and it demands a higher level of passage than a simple legislative act. Besides, there are basic features which cannot be amended even in exercise of the constituent power. But the effect of our acceptance/

ratification of the Final Act is to bring about amendments in our Constitution even in matters we consider fundamental. No amendment can be effected to subvert the Rule of Law, to rob Parliament or the Superior Judiciary of its jurisdiction, or to modify the objectives for which our Constitution was framed .nt power by the Executive;

Judicially Pronounced Principles of Constitutional Governance Breached

[49]. For that the impugned Executive Act is in breach of the judicially pronounced principles articulated by Chief Justice John Marshall in his opinion written in the case of *Marbury v. Madison*[197]*:*

[50]. For that the Uruguay Round Final Act makes a departure from the constitutionally mandated provisions concerning:

(a) Constitutional basics, (b) Judicial Review,
(c) Treaty-making power, (d) Federal structure,
(e) Fundamental Rights,(f) Democracy, and
(g) Sovereignty.

Detailed reasons, to substantiate points above are not being narrated here as they are set forth in detail in the following marked

The Findings of the People's Commission in their *Report of the Peoples' Commission on GATT* by V.R. Krishna Iyer, O. Chinnappa Reddy, D.A. Desai and Rajinder

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[197] *Marbury v. Madison* [2 L Ed 60 (1803)]: Some of the principles which the Chief Justice considered 'long and well established' are as follows:

1.That the people have an original right to establish, for their future government, such principles as in their opinions shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.

2.This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.

3. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on which they are imposed and if acts prohibited and acts allowed are of equal obligation.

4. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power, in its own nature, illimitable.

5. This theory is essentially attached to a written constitution and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

This Petitioner adopts their reasons and findings.

[51]. For that Part IVA (*Fundamental Duties*) cannot be duties for our people, but liberties for the Executive to crush carrots for our Executive. Our Executive entered into the Agreements under question in breach of several constitutionally prescribed duties. How can this promote 'the noble ideals which inspired our national struggle", and " protect the sovereignty of India" when through this Executive Agreements our country is being turned into a Sponsored State.

VII

WHAT OUR DOMESTIC COURT CAN DO

85. That this Hon'ble Court is competent to hold a Treaty *domestically non-operative* to the extent it is beyond the constitutional competence of a contracting party even if it is duly concluded, and internationally binding. (Lord McNair, *The Law of Treaties*, Chapter IV, p. 82; Starke, *Introduction to International Law*, pp, 77-78). The Court can even direct the Central Government to take corrective and remedial actions even at international plane. Commenting on *Teh Cheng Poh v. Public Prosecutor,* Malaysia, 1980 LR, 458 PC at p. 472 ; H. M. Seervai observes, "….. the importance of *Poh's* Case lies in the fact, that in the opinion of the Privy Council a *mandamus* would lie against the Cabinet to advise H.M. to revoke the Regulations." (*Constitutional Law of India*, p. 1131).

86. That this Hon'ble Court is under duty to preserve and protect the Constitution. Our Constitution mandates in clear terms. Even in *Marbury v. Madison*[198], the Chief Justice Marshall had said:

> "From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose on them, if they were to be used as the instrument, and the knowing instruments, for violating what they swear to support!"… Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If such were the real state of things, this is worse than solemn mockery. To prescribe, or to take oath, becomes equally a crime."

And in evaluating the submissions of the Executive of this Sponsored State, this Hon'ble Court should keep in view the perceptive assessment of the Executive in our day made by Harold Pinter, the 2005 Nobel Prize Winner for Literature, in his Nobel Lecture:

> " Political language, as used by politicians, does not venture into any of this territory since the majority of politicians, on the evidence available to us, are interested not in truth but in power and in the maintenance of that

[198] 2 L Ed 60 (1803)

> power. To maintain that power it is essential that people remain in ignorance, that they live in ignorance of the truth, even the truth of their own lives. What surrounds us therefore is a vast tapestry of lies, upon which we feed."

Our Constitution is to be protected from the 'Full spectrum dominance' of the corporate *imperium*. Our *talisman* for decision-making has to be only that which the Father of our Nation prescribed (as displayed in Gandhi Smriti, Birla House, New Delhi):

> "I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test:
>
> Recall the face of the poorest and weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny? In other words, will it lead to Swaraj for the hungry and spiritually starving millions?
>
> Then you will find your doubts and yourself melting away."

The Limits of the Doctrine of Restraints.

87. That this Petitioner is sure that if Chief Justice Warren would have been at the helms of the affairs of the U.S. Supreme Court, he would have responded to the realities of this economic globalization by collapsing the distinction between the human rights situations and the economic situations. The hydra of the economic globalization has so enmeshed us that our human rights are exposed to great jeopardy. Now it has become the greatest constitutional duty of this Hon'ble Court to see that our human rights granted to us under the Articles 14, 19, 21, and 25 are not lost on any specious pleading, for any reason whatever. This Petitioner has referred to Chief Justice Warren as he has discovered in the post-Warren Court a streak of conservatism and tilt towards the Market: ideas which are not in tune with our Constitution. Our Supreme Court adopted judicial approach, which characterized the decisions of the Warren court. Time has rendered obsolescent those dicta wherein this Court had struck a note of caution in examining the legality of tax issues in deference to Parliament. The present tsunami of circumstances unleashed under the architecture of economic globalization is a jeopardy *sui generis*, a like of which never known in human history. This Hon'ble Court is under the constitutional oath to uphold the Constitution, even if the Executive or the Legislature betrays its cause.

88. This is to CERTIFY that this Petitioner had filed a Writ Petition before the Hon'ble Supreme Court under Art. 32 of the Constitution of India. As set forth in *para* 1 of the Writ Petition, the Hon'ble Court permitted the petitioner to withdraw the Writ Petition with a permission of avail of an appropriate remedy. Hence, this Petitioner prefers this petition under Art 226 of the Constitution of India.

VIII

103. PRAYERS

That under the circumstances aforementioned, and apropos GROUNDS set forth above in this Writ Petition, this Petitioner most humbly prays that this Hon'ble Court may be graciously pleased:

(a) to quash the Instruction No. 12 of 2002 dated Nov. 1, 2002 [F. No. 480/3/2002-FTD Govt. of India, Ministry of Finance, Department of Revenue, (Foreign Tax Division)], and the Rules in Part IX-C of the Income-tax Rules 1962 pertaining to MAP as they are *ultra vires* being *ex facie* in breach of fundamental rights Art 14, 19(1)(a), and 21 of the Constitution of India;

(b) to hold that the Agreements for the Avoidance of Double Taxation of Income-tax, entered into by the Central Government, are repugnant to the provisions of our Constitution, and the Income-tax Act, 1961: hence are *ultra vires*;

(c) to hold that the Tax Treaties, as presently being done, offend both Sections 90 of Income-tax Act, and the Petitioner's Fundamental Rights, esp. Art. 14, and other constitutional limitations;

(d) to hold that if the Tax Treaties , as presently made, are held in conformity with Section 90 of the said Act, then the Section 90 itself would crumble for being in breach of Article 14 of the Constitution on account of unreasonableness, arbitrariness, and patent illegality;

(e) to hold that the substitution and insertion in Section 90 of the Income-tax Act 1961 made by the Finance Act 2003; and Section 90A of the Income-tax Act, 1961, inserted by the Finance Act 2006 are *ultra vire* as being

violative of Arts 14, 19, 21 and 265 of the Constitution of India; and also in breach of the judicially settled norms governing the reach and ambit of delegation of power. (vide paras 39- 50 at pp. 42-51; Grounds 7A-7B at p. 109) ;

(f) to hold the Final Act Embodying The Results of the Uruguay Round of Multilateral Trade Negotiations, the Final Round of the General Agreement on Tariffs and Trade, the Agreement Establishing the World Trade Organization, and our participation in the World Trade Organization, as a member of that organization, repugnant to the provisions of our Constitution and therefore, unconstitutional and, hence, domestically inoperative on account of being, in effect, "like a pact with the devil"[199];

(g) to order that the Central Government has no extra-constitutional power, or has no inherent sovereign power, which it can utilize at the international plane transgressing the limitations placed by our Constitution, as it has no extra-constitutional power in its hip-pocket;

(h) to declare that the Central Government's Treaty-Making Powers are subject to the constitutional limitations which operate both against the Executive, and Parliament;

(i) to hold that even the consensual acts in the form of a treaty, or an agreement, or convention, to which reference is made in Art 253 of the Constitution of India, must be valid within our constitutional parameters as subject to the constitutional limitations;

(j) to order that no exercise of the executive power (whether through Instructions, Circulars, subordinate legislation or Agreements, understandings, announcements etc. in pursuance to the obligations under the Uruguay Round Final Act, and the Agreements done under the auspices of the WTO) can override the Constitution of India without adopting the right constitutional procedure;

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[199] "For much of the world, globalization as it has been managed seems like a pact with the devil. A few people in the country become wealthier; GDP statistics , for what they are worth, look better, but ways of life and basic values are threatened. For some parts of the world the gains are even tenuous, the costs more palpable. Closer integration into the global economy has brought great volatility and insecurity, and more inequality. It has even threatened fundamental values." Joseph Stiglitz, *Making Globalisation Work* p.292

(k) to declare that neither the Executive Government, nor our Parliament is competent to ignore or give up constitutional directives and commitments, even in exercise of Treaty-Making Power, without bringing about appropriate amendment to the Constitution of India;

(l) to direct that no functionary of the Central Government, acting as an administrator, or manager, or negotiator, or holder of full powers, or acting as plenipotentiary, or any other analogous capacity, is competent to transgress constitutional limitations whether they act within domestic jurisdiction, or at international plane;

(m) to declare that it would promote national interest better if those who negotiated (whether from India or in foreign jurisdictions) a Treaty, be prevented at least for five years before they accept an office of profit, or any other sort of assignment, in the organizations or institutions created under the terms of that Treaty, or having a dominant interest in such a Treaty;

(n) to order complete transparency in the negotiations and ratification of Treaties so that our Right to Know is not jeopardized, except in the rarest of Cases of the Treaties coming within a small segment where critical national defense, or security, is primarily involved, though even in such matters Petitions should lie to this Hon'ble Court to be considered by it in camera, or under such other procedure it deems fair and just to evolve with a view to balancing the competing public interests in transparency and national security;

(o) to direct[200] our Executive Government to take immediate initiative so that our Parliament may frame law in exercise of power granted to it under Entry 14 in the Union List of the 7TH Schedule to the Constitution of India as this step is needed in this phase of Economic Globalization;

(p) to declare the constitutional principles in conformity with which the Treaty-Making Procedure can be prescribed;

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[200] *Teh Cheng Poh v. Public Prosecutor* [1980 LR, 458 PC at p. 472]: The Yang di-Pertuan Agong was immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him. The Privy Council held: "This however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion."

(q)to pass such order/orders, or directions/ guidelines (in terms of the plenitude of the constitutional power emanating from Art 226, or from the reach of the constitutional oath, or from any other legal and constitutional source) which the Hon'ble Court considers fit and proper in the interest of justice *pro bono publico;*

® (without prejudice to the aforementioned Prayers) to direct the Central Government to initiate the process of re-negotiations, modifications, revision etc so that the impugned treaties are made to conform to the imperative commands of our Constitution; and

(s) to permit this Petitioner to raise such other grounds, with the leave of this Hon'ble Court, which he may deem his duty to raise in course of the proceedings before the Court for the proper conduct of the matter.

(Shiva Kant Jha)

New Delhi: Feb. 15, 2007. Petitioner-in-person