## APPENDIX TO POSTSCRIPT VI

# GLOBAL ECONOMY : A DEAL WITH THE DEVIL

*Was this the face that launched a thousand ships*
*And burnt the topless towers of Ilium?*
*Sweet Helen, make me immortal with a kiss!*
*Her lips suck forth my soul: see, where it flies!*
*Come, Helen, come give me my soul again.*
*Here will I dwell, for heaven be in these lips,*
*And all is dross that is not Helena.*

*Christopher Marlowe, Doctor Faustus*

### A. *The Conspirators at work*

I think it worthwhile to draw attention to the 3 stages that are conspicuously present in the modern economic history: these are —-

**Stage I**: The think-tanks of the imperialists learnt certain lessons from the realities which were obvious in mid-19th century. The *Encyclopaedia Britannica* notes: "In the middle years of the century (the 19th century) it had been widely held that colonies were burdens and those materials and markets were most effectively acquired through trade."[1]

**Stage II:** Till World War II, the era was of old imperialism, under which the wielders of imperial powers were directly present in the colonies and the subservient territories. In the post-World War II phase, the USA became most dominant, later hegemonial. 'The Big Business', represented by the corporations, mainly MNCs (Multinational corporations) and TNCs (Transnational Corporation), called the shots. It may not be far from truth if we say that the political sovereignty began yielding to '*corporate imperium*' under the U.S. leadership.

**Stage III.** Whilst the formation of the UN was on the global political assumptions, the corporate interests, dominant in the Conference at Bretton Woods in 1944, gave birth to the IMF, and the World Bank, and later, in 1995, to the formation of the WTO bidden by Art. III (5) of its Charter to 'cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies'.[3] "Two of the Bretton Woods institutions-the IMF and the World Bank-were actually created at the Bretton Woods meeting. The GATT was created at a subsequent international meeting."[4] In pursuing their strategies the powers had their broad objectives no different from those of the East India Company. These objectives were —

---

1. Asa Briggs in the *Encyclopaedia Britannica* Vol. 29 p. 85 (15th Ed.); This Memoir 373-374; This Memoir pp,373, 394
2. Prof. Sol Picciotto: see this Memoir at p. 413
3. "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies."
4. David Korten, *When Corporations Rule the World* (pp. 158-159)

(*a*) how best and most to get access to the resources of the foreign markets, both to get access to trade and domestic resources on favourable terms.

(*b*) how to devise ways to plough back the profits (and now the virtual money), as INVESTMENT, in the foreign lands on high return, and under sovereign guarantees through treaties, and a well-crafted regime to provide international protection ( viz. under the umbrella of the WTO Treaty, the BITs, the Regional Trade Pacts, and many other international consensual instruments.

In 1990s, the IMF stressed the importance of trade agreements that would assure capital the freedom of movement as goods. It proposed three principles:

- Foreign companies should have complete freedom of choice as to whether they participate in a local market by importing goods or by establishing a local production facility.
- Foreign firms should be governed by the same laws and be accorded the same rights in a country as domestic firms.
- Foreign firms should be allowed to undertake any activity in a country that is legally permissible for domestic firms to undertake."[5]

With the 'roaring nineties' began an aggressive phase of neoliberalism. My study and reflections never convinced me that in 1990s there were valid reasons for us to become a suppliant before the IMF, or to become unwisely WTO compliant. I have already mentioned that ' the maelstrom of the financial crisis in the early eighties was largely stage-managed to provide a free play for the corporate *imperium' ( See*. p. 347 of the Memoir). I had brought this fact to the notice of our before our Supreme Court in my PIL W.P.(C) No.445 / 2006. The roaring nineties could have been made to become a phase of great opportunities, but it became a period when we witnessed a melodrama of fraud and collusion that made GREED triumphant. What happened is best illustrated by the sordid saga of Enron. Joseph Stiglitz begins Chapter 10 of his *The Roaring Nineties* with the following portrait of a most illustrious corporation: Enron.

> "Enron, the energy company that went from almost nothing to an enterprise with annual reported revenues of $101 billion to collapse in bankruptcy, all within a few short years, has become emblematic of all that went wrong in the Roaring Nineties- corporate greed, accounting scandals, public influence mongering, banking scandals, deregulation, and the free market mantra, all wrapped together. Its overseas activities too are an example of the darker side of U.S. globalization, crony capitalism, and the misuse of U.S. corporate power abroad."

In the years which succeeded, ethical degradation became an endemic feature of our public life creating the climate of gloom and doom. The quick succession in scandals and scams, frequent waves of corruptions at high places, the systemic non-responsiveness to public criticism and judicial censure have brought us at a crossover point where tragedy of waste is inevitable. Let us see how we

5. David Korten, *When Corporations Rule the World* p. 123

respond to the challenges of our times. Humanity seems driven to a point where it has no option but to decide whether to be a Schopenhauer who killed God and own self with same finish; or, to become a Arjuna ascendant the chariot of action in pursuit of his *dharma* for the weal of all. The choice is ours. This is the freedom that is most precious.

## THE DIMENSIONS OF THE CONSPIRACY

Erection of the new Theatres for Operations (viz. the WTO, the IMF, and the World Bank, etc.) was done with great skill to trap the nation states, and trump their constitutions. The MNCs, and all those who work for them, worked[6] aggressively to achieve their objectives. We have seen several instances of the MNCs and their benefactors coming together to ensure the success of their agenda and strategy.[7] On close reading of the history of the Western imperialism, they discovered the potentialities of treaties to promote the process of the market-driven globalisation. Stiglitz has very precisely put his ideas to show how easily the treaties can be made to trump the constitutions.

> "Worse still, multinationals have learned that they can exert greater influence in designing international agreements than they can in designing domestic policies..... But the secrecy that surrounds trade negotiations provides a fertile medium for corporations wishing to circumvent the democratic process to get rules and regulations to their liking."[8]

As these treaties require, in express terms, collaboration and cooperation with the IMF, and the World Bank, it is worthwhile to take note of the dominant features which make them key-players in the present-day trade and investment

---

6. "The Roundtable took an especially active role in campaigning for the North American Free Trade Agreement (NAFTA). Recognizing that the public might see free trade as a special-interest issue if touted by an exclusive club of the country's 200 largest transnationals, the Roundtable created a front organization, USA*NAFTA, that enrolled some 2,300 U.S. corporations and associations as members. Although USA*NAFTA claimed to represent a broader constituency, every one of its state captains was a corporate member of the Business Roundtable. All but four Roundtable members enjoyed privileged access to the NAFTA negotiation process through representation on advisory committees to the U.S. trade representative. Using the full range of communication resources available, Roundtable members bombarded Americans with assurances through editorials, op-ed pieces, news releases, and radio and television commentaries that NAFTA would provide them with high-paying jobs, stop immigration from Mexico, and raise environmental standards." David C. Korten, *When Corporations Rule the World* p. 145
7. "TRIPs Agreement during the Uruguay Round of Negotiation was pushed by developed countries at the behest of the Associations 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 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 any negotiations. TRIPs itself provided for review mechanism Thus contentious issues remained in this Agreement. Government of India in a number of communications themselves and collectively with other countries raised certain important issues with WTO - Council on TRIPs for clarification and for review." Report of the *People's Commission on Patent Laws* under the Chairmanship of Shri I. K. Gujral (January, 2003)
8. Stiglitz, *Making Globalization Work* p. 197

regime: their broad features are thus summarized by Joseph Stiglitz[9] in his *Globalization and its Discontents:*

> "The IMF was founded on the belief that there was a need for collective action at the global level for economic stability, just as the United Nations had been founded on the belief that there was a need for collective action at the global level for political stability. The IMF is a public institution, established with money provided by taxpayers around the world. This is important to remember because it does not report directly to either the citizens who finance it or those whose lives it affects. Rather, it reports to the ministries of finance and the central banks of the governments of the world. They assert their control through a complicated voting arrangement based largely on the economic power of the countries at the end of World War II. There have been some minor adjustments since, but the major developed countries run the show, with only one country, the United States, having effective veto. (In this sense, it is similar to the UN, where a historical anachronism determines who holds the veto-the victorious powers of World War II-but at least there the veto power is shared among five countries." (at p. 12)

"If financial interests have dominated thinking at the International Monetary Fund, commercial interests have had an equally dominant role at the World Trade Organization. Just as the IMF give short shrift to the concerns of the poor-there are billions available to bail out bank, but not the paltry sums to provide food subsidies for those thrown out of work as a result of IMF programs, the WTO puts trade over all else. (at p. 216)

**(II) STRATEGY DEVISED**

The WTO Treaty, the BITs, and the Regional Trade Pacts are the Treaties the sort of which the history of the world had not known. This aspect needs to be considered to see whether it was proper for a constitutional democracy like ours to enter into such treaties (to be referred hereinafter as 'the Questioned Treaties). The impact of the WTO Treaty has been thus insightfully summarised, in its global perspective, by Prof. Stephen Clarkson of the University of Toronto[10] : to quote —

> "When a country signs a treaty it partly *internationalizes* the state's legal order to the extent that domestic laws are harmonized with the norms embodied in the accord. Before the advent of the new global trade order, even hundreds of international organizations (IOs) did not constitute a significant constitutional challenge to the conventional nation state, whose legal sovereignty was barely compromised. If a state strongly disagreed with an IO's mandate, it could abrogate its commitment — as the United States and Britain did by withdraw-

9. **Stiglitz** is an American economist and a professor at Columbia University and a recipient of the (2001). He was the chief economist of the.
10. Stephen Clarkson Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty? ISBN: 0-88627-281-5 October 2002

> ing from UNESCO because they considered that its policies responded too much to Third World concerns. Nor was a government bound to comply with a ruling by an international body that it considered adverse to its interests or incompatible with its culture. Canada has occasionally been willing to flout international law that challenges a constitutional norm, but generally it has self-consciously played a model role: when it has been shown to be in violation of a multilateral convention that it has signed, it has mended its ways. In sharp contrast with most international organizations, the WTO creates a new mode of economic regulation with such broad scope and such unusual judicial authority that *it has transformed not just the nature of global governance, but the political order of each of the 144 states that had become members by 2002*." (italics supplied)

The Executive Government of India transgressed its Constitutional and inherent limitations by accepting international obligations, at the international plane, in terms of the WTO Treaty (and the Agreements under its umbrella), the Bilateral Investment Treaties, and the CECAs. The Executive Government possesses no constitutional, competence to enter into such treaties. Any claim to extra-constitutional powers is inconceivable in view of the text and the context of our Constitution. The point for the consideration by our citizenry is whether such treaties, as aforementioned, are domestically valid. After examining the WTO Treaty in the light of our Constitution, the *Peoples Commission Report on GATT*[11] *ob*serves in the concluding paragraph of the Chapter 7 of the *Report* :

> "We have dwelled into these constitutional questions taking both a wider and narrower view of the constitutional enterprise. The issues are not narrow issues of law and legality but democracy, justice and constitutional governance. From both the narrow and wider perspectives, the Uruguay Round negotiations have been conducted by the Union of India in a way that has undermined democracy in ways inimical to fundamental rights and re-written India's Constitution in ways subversive of its basic structure, The people for whom the Constitution exists have been excluded from knowledge of what is in store for them. The States have been denied consultation even though the Uruguay Round affects the latter's rights and responsibilities in that most crucial of areas— agriculture. *The sovereignty of the nation has been bargained away. Such a treaty is not constitutionally binding within the Indian Constitutional system and, in the facts and circumstances, cannot be given effect to.*" (at p. 164) [italics supplied]

This Chapter 7 of the *Report* is devoted to the thorough examination of the constitutionality and the constitutional validity of India becoming a member of the WTO. The Hon'ble Delhi High Court has considered the said Chapter 7 in its judgement *Shiva Kant Jha v. the Union of India (*See Chap. 21 of the Memoir).

---

11. The Commission consisted of Justice V. R. Krishna Iyer, former Judge, Supreme Court of India; Justice O. Chinnappa Reddy, former Judge, Supreme Court of India; Justice D. A. Desai, former Judge, Supreme court of India; and Justice Rajinder Sachar, former Chief Justice of Delhi High court.

### B. *The Root of All Errors*

It seems our Executive Government betrayed the trust reposed in it by our Constitution by considering that it operates under no **constitutional restraints** in the matters of Treaty-Making. It is evident from what it communicated[12] to the Secretary General of the UNO informing him, and the whole world also, that *"the President's power to enter into treaties (which is after all an executive act) remains unfettered by any "internal constitutional restrictions."* Our Government seems to believe that it possesses a "hip-pocket" of unaccountable powers", and enjoys some sort of *carte blanche* at the international plane. This clarification given by our Government to the UNO is incorrect as it does not accord well with our Constitution's fundamental norms discussed in the Postscript VI.

I think it is high time for our Government to withdraw that Memorandum of April 19, 1951 sent to the Secretary General of the UNO. If that is not done, our superior courts can mandamus the Government to withdraw that Memorandum. The morbid effect of the Memorandum can be noticed on a number of judicial observations over years after 1951. This reminds me of what C.K. Allen said:

> "And yet it is remarkable how sometimes a dictum which is really based no authority, or perhaps on a fallacious interpretation of authority, acquires a spurious importance and becomes inveterate by sheer repetition in judgments and textbooks……' [Allen in his *Law in the Making* ( at p. 262)]

### C. *Short Reflections on the WTO. the BITs, and the DTAAs*

**The Prelude**

The Postscript VI is a synoptic presentation on our constitutional fundamentals. It is high time for us to reflect on some of the major treaties with an enormous intrusive effect on our sovereign domestic space. The constraints of space do not permit their elaborate treatment here, but some seminal points deserve to be touched to stimulate my readers to measure our acts, and weigh our deeds in terms of our commitments under the Constitution which we had given to ourselves**.**

#### (a) THE WTO

The Final Act, establishing the WTO, was agreed on December 15, 1993, and it was formally signed at the Ministerial level in Marrakesh on April 15, 1994. Whilst the USA implemented it through a legislation duly passed by the Congress, India agreed to it through a mere executive act by keeping our country and Parliament all in dark. The Final Act ran into several hundred pages which our Government, in all probability signed and ratified, even without reading, and in any case, without understanding the terms. It is difficult to understand why our Executive succumbed to the corporate pressure, under the US hegemony, to become a party to the Final Act. Article II says, the WTO " shall pro-

12 U.N. Doc. ST/LEG/SER.B/3, at63-64 (Dec. 1952) (Memorandum of April 19, 1951) quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston)

vide 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". By mandating that for "greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies", the WTO members are required bidden to become 'the IMF- the World Bank- compliant' : [Art III (5) of the WTO Charter]. The WTO would "administer the Understanding on Rules and Procedures Governing the Settlement of Disputes" which has a wide reach &, binding effect, retaliatory character, features of being a global court capable of developing its own jurisprudence to seep through other deliberations, and capable of intruding into the domestic jurisdiction through Art. XVI (4), the deliberations of the WTO's DSB, and the corpus of the international arbitral decisions. Art XVI (4) commands the nation states to a mandatory duty: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." If they fail to do so, be they Parliaments or the Supreme Courts, they can be held internationally responsible, for which the States would invite on themselves humiliating sanctions. We are required to remain the WTO-compliant; and there may come moments when we may find our courts and legislature constrained to uphold the WTO agenda at the cost of the values treasured in the Preamble to our Constitution. [ *Also see* Chapters 21 & 29 of this Memoir ]

**(b) THE BITs**

We understand that the Bilateral Investment Protection Treaties number more than 2500 (or 3000?) .in the world, and about 80, or more, to which India is a party. I further understand that many other BITs are in the pipeline.

One can rightly wonder how the Axis of Evil worked to implement the Trade-Related Investment Measures (TRIMs) of the WTO by adopting the fraudulent device of getting the core terms of the TRIMs domestically implemented by dexterous transposition and adroit transformation through the terms of the BITs, themselves lacking credentials for domestic operation because the BITs are not implemented by our Parliament. Besides, what belonged to the commercial realm became the subject-matter of BITs by getting ensconced on the high pedestal of international relationship traditionally kept apart as the subject-matter to be dealt with by the high contracting parties of a given treaty. An ordinary commercial contract is stage-managed to become a treaty *inter se* sovereign states

Many of the fundamental principles of the WTO Trade Regime, are again to become the seminal and characteristic principles in the BITs. It is worthwhile to consider the very *raison de tre* for the BITs. The type of the present-day trade demanded opportunities for INVESTMENT across the world. The corporate colonialism ousted the need of any domestic 'implementing' legislation for a treaty to have domestic effect. They innovated this with the full unethical and unconstitutional complicity of the Executive Governments. These provisions were incarnated into the BITs and the Regional Trade Pacts ( mainly in their 'Investment Chapters). These could be bilateral, or multilateral. Through such Agreements efforts were made to nestle private domestic contracts belonging to the realm of 'commercial transactions' (*jure gestionis* ), into the Sovereign Treaties

(*jure imperii*) in order to elevate the private commercial obligations to the level of sovereign commitments to be enforced, not only by the domestic courts, but even by the international *binding* arbitrations at the option of the investors of other lands. The whole pursuit to nestle private contract in the interstices of the 'sovereign act' is, it is submitted, wholly fraudulent, and clearly contrary to the civilized norms of fair behaviour. It is a privatization of 'sovereignty' unfairly brought about. .

After analysing the various Phases, through which the provisions of the TRIMs evolved, Mr. M. Dubey, who had access to the WTO deliberations, observes in his *An Unequal Treaty*:

> "Besides, there is considerable force in the argument that investment measures have broader macro-economic and strategic objectives. They are not adopted only with the trade purpose in view. In fact, they serve such broader purposes as exercise of sovereignty over natural resources, creating employment, etc. The provisions of the TRIMs Agreement, when applied to developing countries, will most likely have the effect of undermining any plan or strategy of self-reliant growth, based on the technology, capital goods and raw materials available locally. It can also prove to be a drain on the limited foreign exchange reserves of developing countries, adversely affecting their balance-of–payments position and their capacity to repay their debts. Thus the Agreement on the whole seriously restricts policy autonomy in an area that has traditionally been viewed as being primarily of domesticconcern."

### (c) TAX TREATIES (DTAAs)

In *Azadi Bachao*, *Vodafone*, and in the recent Andhra Pradesh High Court M / *s.Sanofi Pasteur Holding SA*, our courts have, it is humbly felt, erred in not realizing that it was not proper for them to rely on *John N. Gladden v. Her Majesty the Queen* 85 D.T.C. 5188, *John N. Gladden v. Her Majesty the Queen* 85 D.T.C. 5188, *Chong v. Commissioner of Taxation* [2000] FCA 635, *The Estate of Michel Hausmann v. Her Majesty The Queen* [1998] Can. Tax Ct. LEXIS 1140; *Barber-Greene Americas, Inc. v. Commissioner of Internal Revenue* [1960] 35 TC 365, because in Australia, Canada, the USA, and also in the U.K, the Tax Treaties are done *through enactments* by their legislature whereas in our country they are only executive acts done through an opaque administrative process. In their Tax Treaties any terms could be prescribed as those had legislative mandate in their support.

The Hon'ble Courts should have considered the 'tax treaties' rather than 'fiscal treaties' that form a larger set of which 'tax treaties' is a sub-set. Tax treaties come within the conjoint constitutional discipline of Art. 265 of our Constitution, and Sec. 90 of the Income-tax Act, 1961, whereas all other treaties can be done in exercise of the executive powers *simpliciter*. .

A tax treaty is a self-executing treaty. " **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."[13] "The binding force of the treaty under international law is to be distinguished for its internal applicability. Internal applicability is a consequence only of treaties which-like tax treaties – are designed to be applied by domestic authorities in addition to obligating the States themselves, in other words, self-executing treaties."[14] Tax treaty rules assume that both contracting State tax according to their own law, unlike the rules of Private International law ; therefore, treaty rules do not lead to the application of the foreign law.

The notion that a tax treaty can override the law of the land is incorrect. The law of the land permits certain benefits to those who come within the scope of a tax treaty on compliance with certain statutory pre-conditions; whereas a tax treaty (DTAA) prescribes the specific entitlements in favour of those who come within the scope of a tax treaty. Both the things must go together. The words of the statute should be so interpreted as to promote the objective for which the contracting parties had reached their *consensus ad idem* (meeting of minds to do, or not to do, certain things). The terms of a tax treaty should not be widened as to transgress the frontiers of the grant of the statutory powers. The law of the land always prevails. Every effort is to be made to honour treaty obligations without transgressing law. The unwise passion of the so-called globalists must be restrained.

### (d) Types of Treaties

It is possible to classify treaties into 4 broad groups with their differential features helpful in the interpretation of the treaty provisions:

(1) Where priority to a treaty is specifically granted by a statute. "In the U.K. it was a constitutional innovation to enable treaty provisions to take direct effect as law in the U,K., but that result was achieved, consistently with constitutional principle, by statute: European Communities Act 1972, s. 2(1)." [Oppenheim, *International Law* p. 72, (9th ed. )

(2) Where the Orders in Council under the Extradition Act 1870 [now replaced by the Extradition Act 1989 allowing for equivalent Orders in Council under ss. 3 and 4] provide that the Acts shall apply 'under and in accordance with ' the relevant Extradition Treaty, the terms of which are directly before the courts'[15] But Oppenheim comments: "But even in such circumstances a court may still ignore the treaty: *R.v. Davidson* (1976) 64 Cr. App R. 209."[16]

(3) Where the provisions of a Treaty are set out in a Schedule to an Act (e.g. The Diplomatic Privilege Act 1964, *Oppenheim* comments: at p. 59 fn. 25:

> "since it is not wholly clear in that case whether the court would be applying a treaty, or a Schedule to an Act (which happens to be in identical terms with the provisions of a treaty): the latter is probably the correct view…..][17]

---

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

14 *Klaus Vogel on Double Taxation Conventions, p 20*

15 *Oppenheim* p. 59

16 Oppenheim p. 59 fn. 25

17 *Oppenheim* p. 60

(4) Where treaties belong to the category in which come the Double Taxation Avoidance Agreements. These Treaties are done in exercise of the statutory power (Section 90 of the Income-tax Act, 1961) within the frontiers and under the discipline of Art. 265 of our Constitution (which imports in our Constitution analogous provisions from the Bill of Rights 1688). The terms of a Tax Treaty can operate in the domestic jurisdiction only to the extent of their conformity with Section 90 of the Income-tax Act, 1961 framed to give effect to the Art. 265 of our Constitution. Tax Treaties *in our country* do not come under the types (1) to (3) *supra*.

[*Also see Chapt. 23 of this Memoir*]

### D. *Denouement : My Yaksha-prashna To My Readers*

**The precise purpose of this Appendix to the Postscript VI is not to hold an inquest on the WTO or the BITs on the constitutional grounds. For that the right place would be the High Courts, or the Supreme Court. Its purpose is neither to weigh their institutions, nor to examine their agenda as such things can be done at the political level, or through high pressure global or regional protests. Its purpose is just to pose a constitutional question in the Biblical language to be answered in the light of the Postscript VI:**

**By What Authority Do you Do These Things?**

*— Matthew 21:23; Mark 11:28: & Luke 20:2*