TOWARDS THE VANISHING POINT OF OUR CONSTITUTUTION
AN INQUEST ON INDIA'S ENTRY INTO THE WTO, AND THE BITs

(by Shiva Kant Jha)

NOTE

[This is my first draft of my essay on an important constitutional issue of global importance. I wanted to make it the Postscript VII to my memoir, *On the Loom of Time, Portrait of My Life and Times* (2nd Edn). But my auto-limitations not to exceed certain number of pages led me to abridge it in the form of an Appendix to the Postscript VI of my Memoir (see pages 593-602 of my book, now on my www. shivakantjha.org). In deference to certain comments of my readers, I am putting even the original draft of the Postscript VII on my website for information, reflection, and appropriate actions of my readers. I solicit your comments on any aspect of the matter dealt with by me.]

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वे स्वे कर्मण्यभिरतः संसिद्धि लभते नरः (The *Gita* 18-45)

One attains perfection by discharging Duties.

['This Statement is inscribed on the top of entry gate to Rajya Sabha]

सत्यधर्मविहीनेन न सन्दध्यात्कथञ्चन **[Never enter into treaties with those who do not believe in Truth & Dharma.]**

Acharya Vishnu Sharma in his *The Panchatantra*

"Acquiescence for no length of time can legalize a clear usurpation of power." Justice Dixon observed, "time does not run in favour of the validity of legislation" [1]

[H.M. Seervai, *Const. Law* 4th ed. p.181 quoting Wynes, *Legislative,Executive and Judicial Powers in Australia* 5th ed. p. 21 and fn 86].

1. THE CONSPIRATORS

In this Postscript, I intend to cast a glance over the WTO Treaty and the Bilateral Investment Treaties in the context of our Constitution whose seminal features I have discussed in the Postscript VI. As this is a mere Postscript, with obvious space constraints, I would write with utmost precision. This should be read in keeping in mind Chapter 27, especially the table at pp. 424-426 of the Memoir. In this context, I may submit that a close study of Chapter 24 ('Our Constitution at work') would help my readers understand the thesis to be presented in this Postscript. In the decision of the Delhi Hugh Court, in *Shiva Kant Jha v. Union of India* [(2009-TIOL-626-H.C.-DEL)], discussed in the said Chapter, the High Court has recognised that in some situations our courts can surely examine the constitutional validity of the treaties.

In this Postscript, first I would present a short critical note highlighting the context and the drivers of the WTO Treaty and the BITs so that my readers can have some awareness of the corporate conspiracy so dexterously devised in this phase of market-driven Globalisation..

I think it worthwhile to draw attention to the 3 stages which 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 the 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. This subservience of the political realm of the nation states to the economic realm was facilitated by the deliberately contrived changes in the international states system[2], as these tiny-tots, called the 'states', can provide secret jurisdictions to help predatory capitalism to grow, and the inscrutable High Finance to make money grow on trees, and then to intrude as investments in the global jurisdictions to capture trade and economic resources.

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[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 in my Memoir at p. 413

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 imperial powers had their broad objectives no different from those of the East India Company. These objectives were --

> (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 same 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]

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[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)

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

With the 'roaring nineties' began an aggressive phase of neoliberalism . My study and reflections never convinced me that in 1990s there were valid reasons 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). This fact I had brought 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 we have no option but to sink or swim. Let us see how we respond to the challenge. Humanity seems driven to a point in the cosmic existence: whether to become a Schopenhauer to kill God and own self with same finish; or, to become a Arjuna with a philosophic comprehension that makes life on the earth a most enjoyable phase for selfless activities for *Dharma*. 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 over their constitutions. The MNCs, and all those who work for them, worked [6]

[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

aggressively. 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 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

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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

[9] **Stiglitz** is an American economist and a professor at Columbia University and a recipient of the Nobel Prize in Economic Sciences (2001). He was the chief economist of the World Bank.

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

[10] Stephen Clarkson Canada's Secret Constitution: NAFTA, WTO and the End of Sovereignty? ISBN: 0-88627-281-5 October 2002

> with an IO's mandate, it could abrogate its commitment — as the United States and Britain did by withdrawing 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 (hereinafter compendiously called 'the Questioned Treaties') as the Executive Government possesses no constitutional, or extra-constitutional powers to indulge in the *Treaty formation* beyond the powers granted by our Constitution. The *Peoples' Commission Report on GATT*[11] has recorded its finding. After examining the WTO Treaty in the light of our Constitution, in the concluding paragraph of the Chapter 7 of the *Report* it says (to quote from p. 164)

> "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*

[11] see **Postscrip**t 6 (II)

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).

(III) An Overview: the WTO Treaty and the BITs

The WTO Treaty:

"A MAJOR blunder committed under American pressure by the Indian government since Independence is the secret entry into the GATT (General Agreement on Tariffs and Trade) Treaties sans parliamentary debate or other 'ratification processes', exploiting the constitutional vacuum in the matter of treaty ratification."

Shri V.R. Krishna Iyer rightly reacted in 2002

also see:

(i) *Peoples' Commission Report on GATT Ch. 7 [by* V R Krishna 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)

(ii) Shiva Kant Jha, *Judicial Role in Globalised Economy* Chap. 18 (Wadhwa, 2005)

(iii) Shiva Kant Jha, *Final Act of WTO: Abuse of Treaty-Making Power* (2006)

(iv) Muchkund Dubey, *An Unequal Treaty* pp. 9-10

The Bilateral Investment Treaties

These treaties, more than 80 at present, are wholly the Executive acts in our country. These are secretively done. They are neither presented to, nor approved by, our Parliament. They involve outgoings from our Consolidated Fund, yet these are neither implemented by Parliament, nor approved by it. Thus the constitutional regime of Parliamentary control over finance is frustrated. .

(IV) 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. 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. This act was *ex facie,* simply *ultra vires* the Executive Government's powers. These treaties have serious impact on our nation. The WTO Treaty, as the operative global realities show, produced (or are producing) several sinister effects: viz. (i) wrongful assignment of the Judicial Power of the our sovereign state to the foreign fora; (ii) wrongful assignment of the Legislative Power of our Parliament to the WTO, and permitting its wrongful intrusion into the domestic space of our decision-making; (iii) wrongful perception of the Executive functions, wrongful outsourcing of the Executive functions, and wrongful abdication of the duties prescribed under the Constitution; (iv) wrongful change in Primary Governmental Functions; (v) wrongful abridgment of the Citizens' Private and Political Rights including Voting Rights; (vi) wrongful violations of our Fundamental Rights; (vii) wrongful subversion of our Constitution's Basic Structure of our Constitution: in effect wrongful subversion of our Constitution itself. Our Executive Government, without constitutional competence, subjugated even our superior courts, including our Supreme Court, to become the WTO-compliant. Article XVI (4) of the WTO Charter mandates:

> " Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements".

(i). The WTO Treaty, and the Agreements under its umbrella, involve not only many provisions warranting on-going negotiations to develop new dimensions to the provisions already set forth in the Treaty, and the other Agreements, but also to enter into new obligations as and when decided over years as justified under the ever-widening trajectory of the WTO. Such treaties are not the ordinary treaties. Such a treaty is called *pactum de contrhendo* the nature of which is thus explained by Oppenheim *International Law* p. 1224):

> "A *pactum de contrahendo* is an agreement upon certain points to be incorporated in a future treaty."

(ii). The obligations cast on us alive, and those to be born, are couched in such wide words (we may call them 'Gattese' whose meaning can be widened, and structures morphed, in the process of annexing newer areas from our 'domestic space'. Art. III(2) [12] entrusts to it wide zones of functions. There was a time when

[12] '2 The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.'

the 'domestic space' and 'the international space' were co-ordinate circles each sovereign within its realm, though common people had hardly much to bother about the antics in the 'international. space'. Under the WTO-BITs regime the second circle is largely intersecting the first circle showing the intrusion of the foreign institutions and treaty-commitments into the 'domestic space'. The way the things are continuously being crafted, soon that time is coming when 'the domestic space' would become a tiny sub-set of the other. As the constitutions of the nation states cannot survive without sovereign inner space to be regulated by the people, the world is fast declining into the veil of tears (see 'Aside' in the Postscript II).

(iii). The WTO Treaty subsumes within the ambit of its policies, as set forth in all the diverse Agreements within its umbrella for which, as its Article II says, 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", and its institutional functions are stated in Article III to facilitate " the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements" and would " provide the forum for negotiations" and " further negotiations" among its Members concerning their multilateral trade relations in matters" To make its run with binding force, it " administer the Understanding on Rules and Procedures Governing the Settlement of Disputes.".

(iv). 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-World Bank- compliant. (Art III (5) of the WTO Charter).

(v). 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 .

(vi) 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. It shocks when we see the audacity of the international tribunal's unwise comments on our Supreme Court in the first published BIT arbitration under the Indo-Australian BIT. Even earlier decisions of the DSB had embarrassed our nation and Parliament.

(vii) Art XVI (5) excludes entering of *reservation* by any State. The WTO Treaty has to be accepted as it stands. In effect, the servitude is total!.

(viii) The decision-making process at the WTO is wholly undemocratic, and entirely secretive, promoting the corporate agenda by hook or by crook. Our Government signed it at Marrakesh in Morocco without knowing full well what obligations were being cast on our country. This remind us of how the German delegation was treated in the Hall of Mirrors wherein the Treaty of Versailles was drawn up, and the German plenipotentiary was summoned to sign the document without buzz. We all know that " parliamentary participation in the Uruguay Round and WTO negotiation process was and continues to be almost non-existent, with the notable exception of the US Congress. National parliaments are mostly faced with the negotiations only after they are finished. The results are presented to them as a *fait accompli*. " [13] This love for opaqueness had some sinister purpose to promote. Stiglitz has underscored it, and testified it in the light of his own experience gained " in gained at the Council of Economic Advisors".[14]

(V) OVERARCHING FEATURES OF THE WTO & BITs

. The two key concepts, which work under GATT, the BITs, and the Regional Trade Pacts , are: (a) National treatment, and (b) the Most-Favoured-Nation principle. Stiglitz has very perceptively observed: "The GATT system was built on the principle of non-discrimination: countries would not discriminate against other members of GATT. This meant that each country would treat all others the same— all would be the most favored, hence the name: the most favored nation

[13] Markus KRAJEWSKI, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' : Journal of World Trade **35(1)**: 167–186, 2001.© 2001 *Kluwer Law International. Printed in The Netherlands*

[14] see the Memoir at p. 232

principles [MFN principles], the bedrock of the multilateral system. Alongside this went the principles of national treatment: foreign producers would be treated the same, and be subject to the same regulations, as domestic producers. "[15] Those who went in for the two concepts as they are incorporated as the cornerstones of GATT were all under some unwholesome spell. They did not create a level field for the domestic producers and the foreign producers. If they tilted the balance in terms of the BITs, or assurances (express or implied) given, they could have no option but to consider the interest of the foreigners sacrosanct. The Government must not adversely affect the interests of the foreign producers
, but can surely hang its own citizens! In this strange world of global commercial depravity, the fair weather friends know how to serve their interests best. They get the best of all the worlds. It was a folly to put the nationals of a country and the foreign investors in the same bracket.

An ordinary citizen is at a loss to understand how the MNF Principle could be incorporated in GATT and the BITs without adopting the democratic methods of deliberating their worth and appropriateness without considering the well-deserved riders to which they deserve to be subjected. I do not know if our Government understood its folly even after the *White Industries* Case in which the Indian position was rejected by the Arbitration Tribunal by borrowing the MNF benefit, to operate against the interests of India, from the India-Kuwait BIT[16] that had obliged the host State to grant "effective means of asserting claims and enforcing rights", a seminal clause the import of which had been interpreted earlier in *Chevron-Texaco v Ecuador* with reference to the Article II(7) of the US-Ecuador BIT.

I, as an examiner of the LL.M. papers of various universities, had expected even an average law students to know these concepts which are now

[15]Stiglitz, *Globalization at Work* p, 75

[16] The Republic of India has breached its obligation to provide "effective means of asserting claims and enforcing rights" with respect to White Industries Australia Limited's investment pursuant to Articles 4(2) of the BIT incorporating 4(5) of the India-Kuwait BIT… (Para 16.1.1 of the Award ordered by the Tribunal)

being unwisely stretched by the international lawyers and lobbyists. Oppenheim had insightfully observed at pp. 1332-33 of his *International Law*, Vol. I)

> "Whereas most favored nation clauses were originally a matter for bilateral treaties, the introduction of such clause in major multilateral treaties such as the General Agreement on Tariffs and Trade involves significant changes in the practical operation of such clause. A bilateral clause could be the subject of purely bilateral considerations, with termination of the treaty as an ultimate, and not unrealistic sanction. A multilateral clause particularly in so extensive a treaty as the GATT, makes the bilateral cancellation of a concession almost impossible save at the price of withdrawing from the GATT, which would we likely to involve the withdrawing state in the loss of advantage far outweighing the significance of the bilateral concession which it would like to cancel....."
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> "There has also been, particularly in recent years, an increasing awareness that the problems and needs of developing countries are different from those of industrialised countries for whose economic systems traditional most favoured nation clauses have primarily been adapted: a balanced international systems of preference has been though a more appropriate way of meeting their needs than the extension of most favoured nation treatment. "

When such provisions were incorporated as the cornerstone of the GATT, then the draft treaty should have been widely discussed and deliberated. Neither our Government, nor our Parliament had occasions to discuss them. The template for the GATT was supplied by the most infamous treaties to which the imperialists made the native governments sign in the past. The Treaty of Munghyr pertained to end certain disputes between Mir Kasim and the East India Company.[17] The immanent command under the Treaty was : the Nawab must facilitate and protect the trade and investment convenient for the English, but not equally convenient for the natives!.

[17] Majumdar & Ors, *An Advanced History of India* p. 663

(VI) 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.

(i) 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 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* the sovereign states! The case in point is the Award under the Indo-Australian BIT declared, under the UNICITRAL Rules, in M/S *White Industries Australia Limited vs the Republic of India (Award* made in London on 30 November 2011).One can notice in the whole affair gross constitutional transgressions by our Executive Government that earned for our Supreme Court an undeserved censure by three foreigners purporting to act as the arbitrators. Its Award made our Government pay (ultimately out of people's resources) for the faults of delay in disposal of the case by our Supreme Court of India.

(ii) In the matters of the BITs, as in the matters of the WTO, a country must learn from the experiences of others: let us think of what poor Pakistan learnt by entering into a BIT,[18] what Canada learnt from its experience,[19] and also how

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[18] *SGS SociétéGénérale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 *(SGS v. Pakistan)*
http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205

[19] The Massachusetts Act regulating State Contracts with Companies doing business in Burma (Myanmar) provided that public authorities of Massachusetts not to procure goods and services from companies involved with Myanmar because of human rights violations. "The Act was declared unconstitutional by the United States Court of Appeals for the First Circuit because it violated the US Constitution.88 The Massachusetts Act was also subject to a WTO dispute settlement procedure initiated by the EU and Japan against the United States. The proceedings were eventually abandoned because of the Appeals Court's ruling. However, a WTO decision in favour of the claimants could have had a similar result to the decision of the Court of Appeals.As a result of the combination of the limiting effect of WTO law and its lack of democratic legitimacy, WTO law limits governmental policies without the necessary level of legitimacy. As shown above, the democratic deficit of WTO law makes it less

Ecuador is down to suffer[20], how Australia is wracked by the BIT obligations[21]. Ecuador is a 'monist' country where a treaty gets a direct effect in the domestic jurisdiction, yet its Constitutional Court held that the BITs were unconstitutional for being in breach of Articles 190 and 422 of the Ecuadoran Constitution. The effect of Articles 417-422 is to impose constitutional restriction on the powers to enter into Treaties. It is to be seen that the Constitution of Ecuador grants the President[1] the power to enter into 'Treaties' whereas the President of India has no such specific powers granted to *him* , and all his powers are derived under the strict constitutional restraints.

(iii). 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 in 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' that is not right.

(iv) The BITs, by defining “investment” and “investor” in their 'definitions Article', provide rich possibilities to set up STRUCTURE OF DECEPTION by crafting Special Purpose Vehicles (SPV), or Special Purpose Business (SPB) entities through dexterous corporate structuring. Even if the home state of a foreign investor has no BIT with India, it can compel India to provide it facilities on the

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legitimate than democratically enacted national law." Markus KRAJEWSKI, ' Democratic Legitimacy and Constitutional Perspectives of WTO Law' *Journal of World Trade***35(1)**: 167–186, 2001.

[20]*Occidental Petroleum Corp.and Occidental Exploration and Production Co. v. Republic of Ecuador,* ICSID Case No. ARB/06/11 *(Occidental v. Ecuador)*

[21] *JT International SA v Commonwealth of Australia*[2012] HCA 43 (5 October 2012)

basis of some BIT with a country having BIT relationship with India. It is a sort of Treaty Shopping . Even where substantive business operations are required, on probe the requirement can be stage-managed, or simply evaded. What had seen how the Indo-Mauritius Tax Treaty had been abused (see Chapter 23 of the Memoir). The words of wisdom of the Delhi High Court was not heard. On our own Government's appeal, the Supreme Court reversed that decision under the circumstances stated in that Chapter. Our Supreme Court considered appropriate to make a futile *crie de Coeur* to the Government to come out with a remedy! It was 2003. That Circular 789 of 2000 is still operative ! The evil of 'Treaty Sopping has grown.

(v) The 'Questioned Treaties' have created, and would create, many more situations when the acts of the Executive Government, done through such 'Treaties', would put illegal drain on our revenues and resources without legal authority, and without Parliamentary sanctions, or supervision. This would be a subversion of our Constitution, and also intrusion into our inner domestic space. These 'Questioned Treaties' can lead to the violation of Articles 112 to 116 of our Constitution. Our Revenue goes to the Consolidated Fund of India. Art. 112 (3) of the Constitution charges 'expenditure' on that Fund. This 'expenditure' includes, as Art. 112(3) (f) says, "any sums required to satisfy any judgement, decree or award of any court or tribunal". Whilst this Constitutional mandate is systematically violated under the regime established by the WTO, and the BITs. I understand it has been violated recently by honouring the illegal Arbitral AWARD in M/S *White Industries Australia Limited vs the Republic of India,* made in London on 30 November 2011. It matters not whether the compensation goes from our Consolidated Fund, or from the fund of the Coal India as this company is 100% Government company with all shares held in the name of the President. As the BITs are not *implemented*, no expenditure can be made by our Government out of people's money this way.

The Broad Features of the BITs with reference to the Indo-Australia BIT

Through this strange Trojan Horse everything of value for the predatory capitalism under the WTO/ BITs Regime, enters to operate into our domestic space through the BITs and the Regional Trade Pacts.[22] The broad features of the BITs and of the 'Investment Chapters' in the Regional Trade Pacts deserve a close

[22] Please see the various provisions under the Comprehensive Economic Partnership Agreement between the Republic of India, and Korea (CEPA) [the Preamble, Articles 1.2, 2.3, 2.6, 2.7, 2.8]; and the Comprehensive Economic Cooperation Agreement between the Republic of India and Singapore (CECA) [THE Preamble, Art. 1.1, 1.2,].

consideration. Ian Brownlie, after a close examination of BITs[23], has marked two dominant features. These features are evident in the Indo-Australia BIT, and also in the other BITs to which India is a party: these are---

I. Besides "the dispute resolution clause, investment treaties offer substantive protections to investors. These may be divided into *absolute* standards, which are not contingent on specified factors or events, and *relative* standards, which are dependent on the host state's treatment of other investors and investments. Examples of the former include guarantees of full protection and security, compensation for expropriation, and fair equitable treatment. Examples of the latter include most-favoured-nation and national treatment. "

II. " Ordinarily, only a breach of these standards will provide a basis of claim; the ordinary breach of an investment agreement will not. The situation may be different where the investment treaty includes a so-called 'umbrella clause' which guarantees the observation of obligations assumed by the host state with respect to the investor. whether this equates the breach of an investment agreement to a breach of an investment standard-- and the scope of the obligation if it does -- is uncertain and controversial. "

The reach of the BITs can be analyzed with the reference to the Indo-Australia BIT because the most terms are repeated in other BITs, and for the purpose of the core point I intend making in this Postscript. It is enough to analyze the important Articles thus:

Art. 3 Promotion and Protection of investments	(I) encourage and promote favourable conditions for investors of the other Contracting Party (ii) investments or investors of each Contracting Party shall at all times be accorded fair and equitable treatment. (iii) accord within its territory protection and security to investments (iv) shall not impair the management, maintenance, use, enjoyment or disposal of

[23]Brownlie, *Principles of Public International Law* (8th ed.) p. 742

	investments.
Art. 4 Treatment of investments	(1) Each Contracting Party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory treatment no less favourable than that which it accords to investments of its own investors. (2) A Contracting Party shall treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country. (3) In addition, each Contracting Party shall accord to investors of the other Contracting Party treatment, with respect to the management, maintenance, use, enjoyment or disposal of investments, which shall not be less favourable than that accorded to investors of any third state.
Article 7 Expropriation and nationalisation	Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation") the investments of investors of the other Contracting Party except for a public purpose, on a non discriminatory basis, in accordance with its laws and against fair and equitable compensation. **(ii)** An investor whose investment is expropriated may, under the law of the Contracting Partymaking the expropriation, seek review of the expropriation measures by a judicial or other independent authority of that party, as appropriate**.**
Art 9. Repatriation of investment and returns	
Art. 12 Settlement of disputes between an investor and a Contracting Party	

& Article 13 Disputes between the Contracting Parties	
	(emphasis supplied)

Latest Developments

The Preamble to the *Indo-Australian BIT* says**:**

" CONSIDERING that investment relations should be promoted and economic cooperation strengthened **in accordance with the internationally accepted principles of mutual respect for sovereignty, equality mutual benefit, non discrimination and mutual confidence;**...."

and there are other BITs likely to be invoked by **Vodafone**, **Telenor** and many others, which have 'stabilization clause', or some variant on this idea. This concept is at the core of the plea that after having admitted investment, nothing can be done that goes to the investors' detriment except on some 'hard to prove' exceptions. It is likely that our Government's actions in some cases would be challenged on the ground of breaching what has come to be called the 'STABILIZATION' clauses [24] about which Brownlie's*Public International Law* (12th ed.) p. 629 has aptly observed:

> "The term 'stabilization clause' relates to any clause contained in an agreement between a government and a foreign legal entity by which the government party undertakes not to annul the agreement nor to modify its terms, either by legislation or by administrative measures. The legal significance of such clauses is controversial, since the clause involves a tension between the legislative sovereignty and public interest of the state party and the long-term viability of the contractual relationship. If the position is taken that state contracts are valid on the plane of public international law then it follows that a breach of such a clause is unlawful under international law. "

[24]Brownlie, *Public International Law* (12th ed.) p, 629

VII. GROUNDS

1. **Our Government has misread our Constitution**. 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[25] 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 the "hip-pocket of unaccountable powers", and enjoys some sort of *carte blanche* at the international plane. The said communication to the UNO deserves to be withdrawn as right from 1951 it has misguided all everywhere! This sort of erroneous view became so endemic that the Executive Government framed Rule 7 of the Second Schedule of the Transaction of Business Rules 1961, framed in exercise of the powers conferred by clause (3) of article 77 of the Constitution, making the approval of the Cabinet "imperative for all treaties/ agreements"[26] but could be dispensed with in certain types of Treaties: one of which is "COMMERCIAL AGREEMENTS". This 'Order' had been signed by Dr. Rajendra Prasad, the President, on January 14, 1961. This approach revealed itself in many *obiter dicta* in some old cases, but they deserve no weight as in those cases the issues pertaining to the Treaty-making power were not the issues to be *decided*. Besides, some of such observations were mechanically repeated in a few judicial orders, but none had reasons to point out that they were misconceived. One is reminded of C.K. Allen who explained how mere *obiter* finds spurious circulation through uncritical repetitions. Allen in his *Law in the Making* (at p. 262) very aptly 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……'

. The WTO Treaty, and the Agreements under its umbrella, involve not only many provisions warranting on-going negotiations to develop new

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[25]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)

[26] quoted in *National Treaty Law and Practice* ed. Duncan B Hollis, Merritt R. Blakeslee & L. Benjamin Ederington p. 356-357 (2005 Boston)], that has quoted the whole text of our Government to the U.N. Secretary General referred to in this W.P.

dimensions of the provisions already set forth in the Treaty, and the other Agreements, but also to enter into new obligations as and when decided over years. Such treaties are not the ordinary treaty. Such a treaty is called a *pactum de contrahendo* .What does it mean? It is simple. Once a member of the WTO, one is caught in the python's clasp.

2. Wrongful Change in Primary Governmental Functions.

(a) A constitution is sacred to a nation because of its three fundamental purposes; (i) it establishes government, (ii) establishes how government will function, and (iii) protects the rights of citizens. The commitments of our government (under the Uruguay Round of GATT, with a close nexus with the IMF and the World Bank, have the direct and inevitable effect of subverting our Constitution's mandatory mission, and our Fundamental Rights & other constitutionally protected interests. (b) The Market Economy, it is well known, is founded on the ideas of Friedrich von Hayek who, in *The Road to Serfdom,* considers FREEDOM as the function of the MARKET, and those of Milton Friedman pleading analogous thesis in his *Capitalism and Freedom* and *Free to Choose*.[114] It is obvious that the idea of ' Social Justice' that seethes through the Preamble, and the Articles 14, 19, 21 and 29 of our Constitution, is ignored, even negated. 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'. Prof. Stiglitz, who had been the senior vice president and chief economist of the World Bank,, and is a recipient of the Nobel Memorial Prize in Economic Sciences, has perceptively said:

> "Even within the international institutions, seldom is global policy discussed in terms of social justice. There is a pretense that there are no trade-offs, and that, accordingly, decision making can be delegated to technocrats, who are assigned the complex task of finding and managing the best economic system, and who are thought to be better equipped than politicians to make objective decisions."[27]

3. Wrongful change in the Government's perspective & mission.

[27]Joseph Stiglitz,*Making Globalization Work* p. 279

For that through the 'questioned treaties', our executive government made, through opaque acts, wrongful change in primary governmental functions having the effect of modifying our Constitution's mission, and its 'soft structure'. This dereliction of constitutional duties and the subversion of our Constitution can be well inferred from the facts set out in the following table:

Our Constitution is the command and instruction issued by 'We the People'.	**By subjugating the political realm to the economic realm, the Corporate *Imperium* has bidden/persuaded/cajoled our Government to subject themselves to the obligations under 'Questioned Treaties' wherefrom an exit is extremely difficult, and under whose regime and realm we are sure to suffer a new i*mperium*.**
The Preamble of the *Constitution of India* says: **"...to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC....."**	**(i) WTO Treaty, 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." (ii) Each Party shall ensure, in its territory, the observance and fulfillment of its obligations and commitments under this Agreement. (Art. 15.1 of .the CEPA between India and Korea). (iii) Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered

	agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements. The DSB of the WTO, Art 22(1) (iv) The Advocates of this Globalisation process to establish corporate *imperium*, the BITs, the CEPAs, and the WTO Treaties subject the domestic institutions to binding obligations, asserting that the domestic laws, including the Constitution, must bend, and break but to comply with the obligations under the 'Questioned Treaties'.
The Preamble to the Constitution of India: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: **JUSTICE**, social, economic and	(i) from the Preamble to the WTO Treaty:[28] *"Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

[28] "This leads to the main shortcoming of the theory of the constitutional functions of GATT and WTO law. By focusing on those individual rights which are potentially violated by trade policies, the theory only focuses on the constitutional function of limiting government.81 GATT and WTO laws are perceived as limits to discretionary governmental policies. Whether or not these policies are justifiable from a constitutional perspective is not the subject of the theory's analysis. The underlying theoretical model of these arguments is the understanding of a constitution by Buchanan and von Hayek. According to their view a constitution shall only define decision-making rules and shall not include any material goals, such as social justice, welfare, environmental protection or equal treatment of men and women.83 The ideal of the theory of the constitutional functions of GATT and WTO law is therefore the model of the minimalist State.84Howes and Nicolaidis rightly conclude that the theory is "an attempt to take politics out of the global equation".. KRAJEWSKI

political; **LIBERTY**, of thought, expression, belief, faith and worship; **EQUALITY** of status and of opportunity; and to promote among them all **FRATERNITY** assuring the dignity of the individual and the unity and integrity of the Nation;	*Determined* to preserve the basic principles and to further the objectives underlying this multilateral trading system,... " (ii) From the Preamble to the TRIPS *Desiring* to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition; (iii) From the Indo-Australia BIT**:** **"** RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations between them, particularly with respect to investment by investors of one Contracting Party in the territory of the other Contracting Party; CONSIDERING that investment relations should be promoted and economic cooperation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality mutual benefit, non discrimination and mutual confidence; ACKNOWLEDGING that investments of investors of one Contracting Party in the territory of the other Contracting Party would be made within the framework of laws of that other Contracting Party; and

	RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the Contracting Parties... <u>(iv) The Preamble to the India-Singapore Comprehensive Economic Cooperation Agreement :</u> " DESIRING to promote mutually beneficial economic relations; AIMING to enhance economic and social benefits, improve living standards and ensure high and steady growth in real incomes in their respective territories through the expansion of trade and investment flows; BUILDING on their respective rights, obligations and undertakings as developing country members of the World Trade Organization, and under other multilateral, regional and bilateral agreements and arrangements; REAFFIRMING their right to pursue economic philosophies suited to their development goals and their right to regulate activities to realise their national policy objectives; RECOGNISING that economic and trade liberalisation should allow for the optimal use of natural resources in accordance with the objective of sustainable development, seeking both to protect and preserve the

	environment;" (v) The Preamble to the Indo-Korea CECA: AFFIRMING their commitment to fostering the development of an open market economy in Asia, and to encouraging the economic integration of Asian economies in order to further the liberalisation of trade and investment in the region; REAFFIRMING that this Agreement shall contribute to the expansion and development of world trade under the multilateral trading system embodied in the WTO Agreement; BUILDING on their respective rights and obligations under the WTO Agreement and other bilateral, regional and multilateral instruments of cooperation to which both Parties are party; FURTHER REAFFIRMING their rights to pursue economic philosophies suited to their development goals and their rights to realise their national policy objectives;...

4. Our Right to Vote frustrated. If the legislative power, vested in Parliament, is allowed to be divided, as 'Questioned Treaties' do, between Parliament and the WTO, then a fundamental constitutional principle would be destroyed. The Indian citizens do not vote for the WTO representatives. The citizens have elected our representatives to make law in consonance with our Constitution, and to approve legislative policies. These two are the essential functions of Parliament. We have neither empowered Parliament, nor the Executive to shed off legislative functions to anybody else. The effect and efficacy of the Right to vote for electing our

representatives for discharging great constitutional functions for our benefit can neither be negotiated in some international casino, nor cast away into the WTO vault. Hence, our Executive went counter to our Constitution by agreeing to assign legislative functions to a foreign body causing grave injury to the citizenry of this country. The effect of what they did through the 'Questioned Treaties' is a wrongful abridgement of the voting rights of the Indian citizens. For these reasons, the 'Questioned Treaties' are, it is submitted, domestically invalid.

5. Encroachment on the Legislative field.

(a). Through the terms of a Treaty the Executive can encroach on any field of legislation making it impossible for Parliament to take its initiative even if it ever decides to do this, as that particular legislative field might stand previously occupied by the legislation in terms of the obligations under the WTO Treaty, or the BITs. Our Parliament can be coerced to enact law to implement the Treaty Obligations. This is what had happened whilst bringing about Amendments in the Patents Act [Amendments (in 1999, 2002, 2005, 2006) which were necessitated by India's obligations under TRIPS under the WTO regime. It is strange that in enacting some major laws, our Government showed studied forgetfulness of the Preamble to the Constitution, the Fundamental Rights, Directive Principles of State Policy, and an evident servility to the WTO. 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 inter alia 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;"

(b) The legislative powers and functions are distributed as per the provisions of Part XI of our Constitution. At any given point of time, while considering the constitutional powers and functions of Parliament, it is essential to draw a distinction: between the legislative exercise of powers, and the legislative possession of such powers. But both the powers are subject to our Constitution. The Executive whether it acts under Article 53 or Article 253, must exercise that power in accordance with the provisions of our Constitution. Our Constitution, whilst granting legislative powers, adopt the functional view of treaties so that their effect on polity is not lost sight of.

6. W*rongful outsourcing of Judicial Power.* The judicial power of this Hon'ble Court has been shed off in favour of a foreign body by our Executive even

without Parliamentary approval though this shedding off could not have been done even under the constituent power of Parliament as that would go counter to the very basic structure of our Constitution. The effect of this Article XVI (4) of the WTO Treaty is to issue a command to our High Courts and our Supreme Court to come to conform with the WTO obligations even if that may require disobedience to our Constitution!

The WTO, the BITs, and the Regional Trade Pacts oust[29] the jurisdiction of our Law and Courts by providing for mandatory adjudication and decisions by the decisions by the DSB of the WTO, and the Arbitral Bodies mainly under the UNICITRAL Rules (also in some cases by the ICSID Tribunals affiliated to the World Bank). This procedure ousts jurisdiction of all domestic courts, including our Supreme Court.
even frustrates the jurisdiction of this Supreme Court even on matters *sub judice* by unilaterally kicking up cause for International Arbitration as it was done in M/*S White Industries Australia Limited vs the Republic of India*, or, as it is likely to happen apropos our Supreme Court's decision in *Novartis Case* { as has already happened in Australia against the decision of the Australian High Court in *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012 against which Ukraine has gone to the DSB, whereas the co-respondent has gone to the International Arbitration under Australia-Hong Kong BIT}. The ouster of our Domestic Jurisdiction through the DSB of the WTO, and/ or the Arbitral Tribunals, ' is wholly unjustified as neither our Constitution permits this wrongful ouster, nor there is any valid Treaty to warrant this.

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7. Wrongful intrusion in domestic space.

The Executive Government that entered into the 'Questioned Treaties' is an organ created to function under this 'Sovereign Republic'. 'Sovereignty' is reflected in the constitutional distribution powers. The narrowing of the 'domestic space' can even go that far as to annex the sphere conventionally controlled and regulated only by the constitution. The 'Questioned Treaties' have violated our 'Sovereignty' as is clear from the observations in the *Peoples' Commission Report on GATT*

[29] "International jurisprudence shows that international tribunals are not subject to *lispendens* when the parallel case is pending in a domestic forum."*observed in SGS SociétéGénérale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 *(SGS v. Pakistan):* point developed in that decision at fn. 131.

[by V R Krishna 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).[30] Ian Brownlie, himself an international lawyer, has noticed how the idea of 'Sovereignty' has been scuttled in this period of market-ruled Globalisation to help the imperious institutions of the present-day economic realm to subjugate the institutions of the political institutions of the nation states: to quote him--

> "A stronger challenge is the opposition to sovereignty as the key organizing concept of the international community. With the emergence of privatization and globalization as influential forces within the world economy, it is argued, sovereignty bears less resemblance to the way things are, a perception heightened when viewed against a background of anti-formalism and rule scepticism: from that perspective, sovereign equality, a formal rule if ever there was one, is an obvious target."

8. The effect of non-implementation.by Parliament. The law on this point in our country is the same as it is in the UK. Brownlie states the UK position with utmost brevity hen he says:[31]

> "Once a treaty is implemented by Parliament, the resulting legislation forms part of UK law and is applicable by in the courts as so implemented....." Questions surrounding the interpretation of treaties and statutes in English law can generally be divided into two categories: the interpretation of enabling instruments, and the interpretation of other legislation in light of treaties entered into, both incorporated and unincorporated."

Incorporation of treaties can be made in 4 ways: (i) by granting specific priority as in Section 2(1) of the European Communities Act, 1972 ; (ii) by providing that the Acts shall apply 'under and in accordance with ' the relevant Extradition Treaty, the terms of which are directly before the courts' (as in Sections 3 and 4

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[30]" We are further called upon to examine whether the Government's singing of the Final Act constitutes a violation of India's sovereignty. The Preamble to the Constitution states that "We the People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular Democratic Republic..." It is a settled part of our jurisprudence that the Preamble sets forth the goal of our political society so that it may be invoked to determine the ambit of fundamental right because it is the ideals of sovereignty, socialism, secularism and democracy which are elaborated by the provisions of the Constitution. " (at p. 160 of the *Report*)

[31] Brownlie, *Principles of Public International Law* p. 64-66

the Extradition Act 1989 [32] [But Oppenheim comments: "But even in such circumstances a court may still ignore the treaty: *R.v. Davidson* (1976) 64 Cr. App R. 209."]; (iii) Where the provisions of a Treaty are set out in a Schedule to an Act (e.g. The Diplomatic Privilege Act 1964. [But *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…."]; and (iv) 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. There is nothing in public domain evidencing the implementation of the BITs by our Parliament.[33]

9. Wrongful breach of the U.N. Resolutions and the negation of the new international economic order.

The increase in the number of independent states over the last 30 years has drawn attention to the economic disparities between members of international community.[34] In 1974 a special session of the UN General Assembly adopted a Declaration and a Programme of Action establishing a New Economic Order recognising a host of the claims of the States including territorial integrity and **non-interference in the international affairs of other States**.[35]

We all know that the U.N. Resolutions command a lot of respect, and are indicative of the evolution of customary International law.[36] But the tiny minority of the developed States were, for obvious reasons, not happy with such restraints. They had tried to make their writ run in the Uruguay Round deliberation too. As in the Agreement on Trade-related Investment Measures (TRIMs), they did not get the terms they needed to protect their interests as the investors in

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[32] *Oppenheim* p. 59

[33] One researcher has posed a question: "The general question here is as to the status of international treaties not enacted by the parliament in the Indian legal system: do they enjoy the status of law within the domestic legal regime?" To give a positive answer to the question thus posed, he relies on certain decisions of our Supreme Court:: viz. *Jolly George Verghese v Bank of Cochin,1980(2) SSC 360, DK Basu v State of Bengal, 1997(1) SSC 416, People's Union for Civil Liberties v Union of India, 1997 (3) SSC 433, Vishaka v State of Raajsthan, 1997 (6) SSC 241.* But I do not agree with this inference. To follow a decision for the fairness of some of the observations judicially made is not to accord it the status of law, or to treat it as precedent,

[34] Oppenheim, *International Law* (9th ed.) p. 345

[35] Oppenheim, *International Law* (9th ed.) p. 337

[36] Ian Brownlie, Principles of Public International Law (8th ed.) p, 193

other countries. they were out for aggressive BITs and the regional pacts.As through the BITs, they succeeded in intruding into a country's getting many things done to protect their 'investments', they succeeded slowly, and through stealth, in allowing themselves to have their ways to get over the UN Resolutions relating to the economic order. How, and why it happened deserve to be kept in view. Oppenheim says :

> "The legal effect of these three principles instruments, which lay the foundation of the 'new international economic order', is uncertain. In form they are resolutions of the General Assembly and therefore do not directly establish legal rights and obligations for all states, although in many of its provisions the Charter uses ostensibly binding treaty language. The Declaration and Programme of Action were adopted without a vote but subject to formally expressed dissent on a number of important points by some states; the Charter was adopted by 120 votes in favour, six against, with ten abstentions, those 16 non-affirmative votes representing developed states which would be directly affected by many of the provisions of the Charter. It seems probable that at the present time the three instruments represent (save insofar as they restate existing rules of international law) formally expressed aspirations of the international community rather than legally binding rights and obligations. While improvements in the economic conditions of developing countries are desirable, their realisation is dependent more on the existences of an orderly and acceptable framework which will encourage the necessary investment from other countries than on the assertion of 'rights' which tend to have the opposite effect. Thus emphasis on the control (or sovereignty) of states over their resources, if carried to the extreme of an assertion of an unfettered right to expropriate the assets of those who are working those resources, does not encourage the development of those resources so as to assist the economic advancement of the state whose resources they are ; the right to fair compensation in accordance with international law is a necessary part of the balance. So too the 'right to development' requires, for its counterpart, proper provision to protect the interests of donors of aid to developing countries and to provide investment guarantees for overseas investors."[37]

This is what has been called 'the BIT Revolution'. Ian Brownlie has observed about the BITs:

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[37] *Oppenheim* p. 338

> "Since 1962, the climate of opinion has shifted, from the Charter of Economic Rights and Duties of States, via the collapse of the USSR, to the BIT 'revolution', still in space. The position was summarized by the tribunal in *CME v Czech Republic...."*

If the globalists working for the 'Corporatocracy' can bring about this sort of 'revolution' thus, why can't 'We the People', the Political Sovereign of this country, throw such BITs into bits? The Bilateral Investment Treaties contemplate two legal systems in our country, one for the foreign investors, and the other for our own people. As our Supreme Court missed this mandate, and delayed disposing of *White's Case*, it was criticized[38] at the foreign fora, and for the fault of our Supreme Court, the Union of India was held liable to compensate the foreign investor Company by paying a huge amount! Through the WTO Treaty, the BITs, and other trade pacts they have already succeeded in making two systems in one country, as had been done when we were under the servitude of the East India Company. The WTO Treaty, the DSB of the WTO, the overriding provisions in the BITs and other regional trade pacts have established tribunals at the international fora to decide the disputes raised under those treaties. The jurisdiction of our domestic courts stands ousted.

10. BASIC STRUCTURE OF OUR CONSTITUTION: Subversion of the federal polity

There are basic features which cannot be amended even in exercise of the constituent power. But the effect of our acceptance/ ratification of the WTO Treaty, and the BITs 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 of its functions, or the Superior Judiciary of its jurisdiction, or to modify the objectives for which our Constitution exists. Our Supreme Court, in *Kesavananda's Case* (AIR 1973 SC1461), determined certain features of our Constitution constituting its 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

[38] "Thus, at international law , the courts of India are not entitled to treat such enforcement in the same manner as they would a hearing of a matter that has been brought at first instance for the India courts. In effect, by failing to hear the matter within a reasonable period, India has failed to decide for or against the enforcement of the Award held by White during the period of over nine years, in a matter in which the India courts are necessarily allowed only limited jurisdiction. It follows that India has failed to conform to the required standard of justice under international law and its conduct constitutes a denial of justice." (4.3.7.) [This was one of the points in *White's Case* which must have worked grant compensation for, what they considered, the remissness of our Supreme Court treated just as ordinary organ of the State.]

between the legislature the executive and the judiciary; and (5) Federal character[39] of the Constitution. The Executive Government cannot enter into treaties which can injure, or jeopardise the basic structure of our Constitution. What cannot be done by Parliament and the Superior Courts, can never be done a few creatures of the Executive working under the opaque system.

11. What our Parliament cannot do in exercise of its constituent power cannot be done by the Executive alone through its Treaty-Making Power.

In the context of Article 368 of our Constitution, a question crops up : Is it constitutionally permissible to effect changes through its Treaty-Making power which amount to virtually (and in substance) the Amendments to the Constitution. What our Parliament cannot do in exercise of its constituent power cannot be done by the Executive alone through its Treaty-Making Power. It is submitted that to allow this to happen would be a fraud on our Constitution. .

12. To learn from experience: We have seen how after the Australian High Court decision in *JT International SA v Commonwealth of Australia*[2012] HCA 43 (5 October 2012). Ukraine has challenged the Australian action setting up the plain packaging regime by invoking the TRIPS Agreement through the DSB of the WTO; whereas. Philip Morris challenged that invoking an investment treaty between Hong Kong and Australia. Their ways were so annoying that the Australian Prime Minister has decided to do away with such embarrassing provision in the BITs. It is just a matter of time when our Supreme Court's recent decision in *Novartis A.G. versus Union of India* [Civil Appeal Nos. 2706-2716 of 2013] would be questioned both before the WTO's DSB , and under some BIT! If it happens, it will be our misfortune to witness and suffer.

13. Triumph of the opaque system: lack of transparency in the BITs.

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[39] "Thus an international treaty or agreement entered into by the Union Government in exercise of its executive power, without the concurrence of the States, with respect to matters covered by Entries in List II of the Seventh Schedule, offends the Indian Constitutional Federalism, a basic feature of the Constitution of India and is therefore void *ab initio*. The Final Act is one of that nature. This our prima facie opinion on the question whether the Final Act is repugnant to the Federal nature of the Constitution and we strongly urge the Union Government to do nothing which abridges that principles." [The *Peoples' Commission Report on GATT* (by V R Krishna 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) at p. 150.]

I agree with the expert columnists who think**: "** This complete lack of transparency relating to ITAs is worrying."[40] I have told you a lot about the Executive's love for opaqueness (see Chapt. 23). Even the exposition of the goings-on, as set forth in Chapt. 26 is greatly relevant. Perhaps the only reason for the lack of transparency in the matters pertaining the BITs is the Government's belief, on the pleading of the interested parties, that the principle of 'Confidentiality' demanded, and justified, the lack of transparency. But this is wholly misconceived. The BITs are not the ordinary commercial contracts in which the clause of 'Confidentiality' may be considered justified even by implication. To do so would be an instance of the privatization of 'sovereignty'. As our elected Government is managing the national resources through the BITs and the regional pacts (their 'Investment Chapters), everything pertaining to these must come to public domain. What I had written against the lack of transparency in the WTO applies wholly to the BITs. This aspect of the matter I have dealt with in Chapter 26. This lack of transparency hinders our exercise of our Fundamental Rights granted to us **under Art 19(1)(a) of the Constitution of India that grant the fundamental "right to freedom of** speech and expression". In *R. v. Cmmr of Police Ex p Blackburn* (No 2)[104] 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… ."[105]

And the fundamental right to "freedom of speech and expression" cannot be exercised properly unless with it goes the Right to Know[106]. This Hon'ble Court has recognized the supreme importance of the Right to Know as a condition precedent to the right granted to us under Article 14 and 19.. 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. Our Supreme Court has recognized the supreme importance of the Right to Know. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express*

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[40] http://indianexpress.com/article/opinion/columns/a-bit-of-a-secret

Newspapers Bombay Pvt. Ltd[41] [followed in *S.N. Hegde v. The Lokayukta, Banglore*[42].], the 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."

DENOUEMENT

MY *YAKSHA PRASHNA* TO OUR GOVERNMENT

The precise purpose of the Postscript is not to hold an inquest on the WTO or the BITs. For that the right place would be the High Courts, or the Supreme Court. Its purpose is neither to weigh the institutions and their agenda as such things can be done through memorials to our Government, or through a high pressure global protest. 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*

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