CHAPTER 14
INTERNATIONAL LAW AND THE FOREIGN ADMINISTRATIVE ACTS

SYNOPSIS

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But the quinecunx of heaven runs low, and 'tis time to close the five ports of knowledge.

—Sir Thomas Browne in *Garden of Cyrus* Ch 5.

1. The needs of the Time

The waves of time do not pass leaving the quincunx of our ways of looking at the world and ourselves unaffected. T.S Eliot portrayed the pangs of the wasteland of the interregnum between the two Great World Wars in his *The Waste Land*. But this period of depression was followed by a phase of remarkable creativity in various segments of life, letters, and law. Lord Diplock in 1982 in *I.R.C. v. Fed. Of Self-Employed*[1] said that he regarded a comprehensive system of administrative law developed over a period of 30 years as the "greatest achievement of English Courts in my lifetime". How we should respond to the challenges of our world of high technology but of low morality? Some wisdom can be gained from what Judge Manfred Lachs of the International Court of Justice said in *In the North Sea Continental Shelf Case*[2]*:*

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

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1. (1982) A.C. 641.
2. ICJ 1969, 3 at 222.

We have to revisit all our legal norms, domestic or international, to reorientate them for the needs of our time, to cope up with the new realities of the economic globalization of the present phase. There is now a tremendous increase in the global interdependence and solidarity. At the same time, this world was never so inclement and inequitable to the common people than it is now.

2. Our Raw Realities

McLuhan, the Canadian futurist, considered the modern world *a global village*. The *Chambers 21st Century Dictionary* says, *global village:* "means the world perceived as shrunk to the size of a village, both because of mass communication and also in relation to the way in which changes in one area are likely to affect the rest of the world." The *New Shorter Oxford English Dictionary* traces the origin of the expression in North America, and defines it: "the whole world considered as a single community brought together by high technology and international communications". The profile of the political structure of the world shows that it consists of sovereign States at different levels of political integration, socio-economic attainments, socio-political morality and cultural achievement. Some of them have vast potentialities of development whereas many others have not much scope to do so on account of poor natural and human resources. The countries less endowed with resources are ironically more prone to assertion of their sovereignty. Many of them tried, in varying measures, to turn their countries into spheres of darkness where the possessors of the ill-gotten wealth can find best places to keep that un-noticed by those who are swindled. Many of such States are the members of United Nations, and are the recognized players in international politics because of their sovereign status.

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

> "Clearly, the reality of globalization has outstripped the ability of the world population to understand its implications and the ability of governments to cope with its consequences. At the same time, the ceding of economic power to global actors and international institutions has outstripped the development of appropriate global political structures."[3]

Attitudes towards statesmen have also undergone a change. Earlier we had a conventional view that the 'statesman exists simultaneously in two realms; the domestic political system whence his authority derives, and the international system in which he represents his state to the world.'[4] Leopold von Ranke propounded the view known as 'the primacy of foreign policy', whereas Eckhart Kehr pleaded for "primacy of domestic policy". This author is of the view that

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3. 2001 *Britannica Book of the Year*. 191.
4. *Encyclopaedia Britannica* Vol. 21 797.

the government created under a written constitution, like ours, cannot transgress its constitutional limitations.

In the last five decades of the 20th century great strides were made in the sphere of public international law. Dutch jurist Hugo Grotius portrayed the legal relationship of the absolute states at international plane. At that time States that mattered were only a few. The rules resembled the rules of game in which sharp practices were the privilege of the mighty. The range of the subjects of international law has remarkably increased in the recent decades. With the break-up of colonialism in the post-Second World War era, a host of new States have emerged. New States are being minted even now. But a most dominant theme is that international law is shaped by the desires of the mighty states that forge them to suit themselves for their own economic gains, and geopolitical reasons. International organizations have acquired international personality. With the onset of the economic globalization, the economic organizations and institutions, like the IMF, World Bank, and the World Bank emerged as international persons. Because of their enormous power, they are in a position to condition the evolution of international law after their heart's desire. As they exist to protect and advance the interests of the corporate *imperium*, this results in the triumph of *Pax Mercatus*. This sort of system is bound to be both opaque and undemocratic.

International law develops through treaty norms and the customary norms. Because of growing interdependence and interactions amongst the States, international law is now in its most creative phase. The recent global developments have effected a remarkable impact of international law on the domestic systems of the States. Justice Michel Kirby has aptly noticed this phenomenon when he said:

> 'In interpreting legislation, and in developing, by analogy, the principles of the common law, an important development has occurred in most Commonwealth countries since Justice Cook's dicta were written in the 1970s and 1980s and since I wrote my BLF decision in 1986. I refer to the growing influence of international law of fundamental human rights. This is, as Justice Cooke was to remark in the New Zealand Court of Appeal in *Tavita v. Minister of Immigration*[5] "a law undergoing evolution".

But in this world we are faced with a complex nerve-wrecking problems. Our executive may through its commitments at the international plane, give rise to international customary law on a particular point; or may make our country party to a treaty having domestic or extra-domestic impact. This situation is likely to be worse as the institutions of economic globalization are clearly in a position to call the shots. Under such circumstances we must uphold our Constitution. No norm of international law can be so forged/evolved as to enable the executive to defile or deface the Constitution. This aspect of the matter would come up for consideration in a separate chapter "The Uruguay Round Final Act: A Betrayal of the Nation".

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5. [1994] 2 NZLR 257 at 260 and 270.

II

In this Part the author intends to examine the legality of certain foreign administrative acts in India. This topic is of great importance in this phase of globalisation. The world now consists of a vast number of states; many of them are clearly rogues. What sort of attitude we should hold towards their administrative acts done in their territories but having effects in our territory? If an act of foreign government per se is accepted in our country there may be disastrous consequences. If this is recognised on the principle of comity, or under any other norms of international law, it may be possible for a government on an atoll to depredate a sub-continent (which virtually our country is) by virtue of its pretence of being a sovereign State. This subject would be examined in this Chapter with reference to the Certificate of Residence issued by the Mauritian tax authorities. Though the Supreme Court has sustained the CBDT Circular 789 whereunder a direction was issued not to explore the real operative realities in a given case but to accept the Certificate as the evidence both for residency and beneficial ownership, this author examines the subject as the Court has asked the Executive and Parliament to devise an appropriate remedy against the misuse of the tax treaty. As the matter is in public domain this author deems it fit to state the following:

The circumstances under which the said Circular was issued, and its effects, are explained at length in the chapter on "The Indo-Mauritius DTAC". The Circular No. 789 creates the following two legal presumptions with reference to the Certificate of Residence granted by the Mauritian tax authorities:

(a) It says that a Certificate of Residence issued by the Mauritian Authorities "will constitute sufficient evidence for accepting the status of *residence*."

(b) It says that the said Certificate shall be treated as a conclusive proof for establishing "*beneficial ownership* for applying the DTAC accordingly".

The entities operating from or through Mauritius are granted in routine course certificates of residence by the Mauritian income-tax authorities. There is no provision for granting this under the Indo-Mauritius DTAC or under the Income-tax Acts operative in India or Mauritius. But it is a practice in tax havens to grant this certificate in order to preclude any investigation into the question of residency of the entities operating from or through their jurisdictions. In Monaco, a *Carte de Sejour* (residency permit) is granted on complying routine formalities, which include an evidence of some deposit in a Monegasque bank. In *Johansson v. US*[6], the US Court of Appeals, 5th Circuit, rejected the Certificate of Residence granted by the Swiss authorities to Johansson indulging in Treaty-shopping to evade tax. Those who procure the certificates of residence are accustomed to plead that such certificates should be accepted without demur as authority of sovereign governments to grant the certificates could not be questioned. It is well settled

6. (1964) 336 F. 2 ed. 809 (U.S.C.A/ 5 Ct.).

that under international law, foreign administrative act in public law field is not to be given effect. *Oppenheim* correctly observes:

> "There is probably no international judicial authority in support of the proposition that recognition of foreign official acts is affirmatively prescribed by international law."[7]

The Assessing Officers under the Income-tax Act work under a structured role in a statutory protocol. It is a fundamental principle that only *real* income is taxable in the hands of *real* earner. The principle was thus stated by Lord Scarman in *IRC v Burmah Oil Co. Ltd* (1982) STC 60 HL quoted with approval by Lord Brightman in *Furniss v. Dawson* (1984) 1 ALL ER 530 at 541 and also by our Supreme Court in *McDowell & Co v. CTO* (154 ITR 148 SC at page 157):

> "First, it is of the utmost importance that the business community (and other, including their advisers) should appreciate, as my noble and learned friend Lord Diplock has emphasized, that Ramsay's case marks 'a *significant* change in the approach adopted by this House in its judicial role' towards tax avoidance schemes. Secondly, it is now crucial when considering any such scheme to take the analysis far enough to determine *where the profit, gain or loss is really to be found*."

An assessee must establish that it is entitled to the benefits under a DTAC. Onus of showing that a particular class of income is exempt from taxation lies on the assessee[8]. "**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."[9] "Tax treaties, unlike conflict rules in private international law, do not face the problem of choosing between applicable domestic and foreign law. Instead, they recognize that each Contracting State applies its own law and then they limit the contracting States' application of that law."[10]

The role of the Assessing Officers has been well explained by Delhi High Court in *Gee Vee Enterprise v Addl. CIT*[11]

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

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7. Section 112; also Michael Akehurst "Jurisdiction in International Law" *The British Year Book of International Law* 1972-73 pp. 145, 245-250.
8. 27 ITR 1.4 (S C), 29 ITR 529 (SC), 57 ITR 532,536 SC.
9. *Klaus Vogel on Double Taxation Conventions p.20; Philip Baker pp.34-35;* .
10. *Klaus Vogel on Double Taxation Conventions p 26.*
11. (1975) 99 ITR 375 at 386.

They are quasi-judicial authorities whose jurisdiction to do their duty can not be taken away by any administrative action [Orient *Paper Mills Ltd. V. Union Of India* [12]*; Sirpur Paper Mills Ltd v. CWT. Hyderabad*[13]*; S.R. Chaudhary v. State of Punjab and Others* [14]*; Kishan Prakash Sharma v. Union of India*[15]*]*.

3. Norms of comity do not apply in revenue law

It is wrong to say that under the norms of international comity the Certificate issued by foreign authorities are to be accepted. The norms of international comity are just an act of courtesy analogous to the norms of international morality. "The [the rules of international law] are legally binding, while the latter are for the most part rules of goodwill and civility, founded on moral right of each state to receive courtesy from others."[16] . Starke refers to two leading cases which show that the norms of 'international comity' do not apply in revenue matters, and in matters relating to the control of drugs (at p. 21):

> "'Comity', in its general sense, cannot, however, be invoked to prevent the United Kingdom, as a sovereign state, from taking steps to protect its own revenue laws from gross abuse; see decision of the House of Lords in *Colleco Dealing Ltd v. IRC*[17]. Likewise, a charge of conspiracy to commit offence of importing dangerous drugs into the United Kingdom, based on an alleged agreement made outside British jurisdiction, is not in violation of 'international comity'[18].

And in *Collco Dealings Ltd v. IRC* [1961] 1 All ER 762 at 765 Viscount Simonds observed in the context of the a Double Taxation Avoidance Agreement:

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

4. Certificate of Residence

In *Trendtex Trading Corpn v Central Bank* [1977] 1 All ER 881 at 894 the Court of Appeal of the United Kingdom was evaluating a Certificate granted by the ambassador of Nigeria stating that a particular organization was a department of State. Under public international law he represented the Sovereign State of Nigeria in the United Kingdom. Lord Denning observed in the said judgment:

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12. AIR 1969 SC 48.
13. 1970(1) SCC 795.
14. 2001(7) SCC 126.
15. 2001(5) SCC212.
16. J.G. Starke, *Introduction to International Law* 10th ed. p.20.
17. [1962] AC 1 at 19, [1961] 1 All ER 762 at 765.
18. *DPP v. Doot* [1973] AC 807 at 834-835.

> "It is often said that a certificate by the ambassador, saying whether or not an organization is a department of state, is of much weight, though not decisive: see *Krajina v Tass Agency*. But even this is not to my mind satisfactory. What is the test, which the ambassador is to apply? In the absence of any test, an ambassador may apply the test of control, asking himself: is the organization under the control of a minister of state? On such a test, he might certify any nationalized undertaking to be a department of state. He might certify that a press agency or an agricultural corporation (which carried out ordinary commercial dealings) was a department of state, simply because it was under the complete control of the government. I confess that I can think of no satisfactory test except that of looking to the functions and control of the organization. *I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organization was under government control and exercised governmental functions.* That is the way is which we looked at it in *Mellenger v New Brunswick Development Corpn*.:
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> '[The corporation] has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does….' [Italics supplied]

In the context of the Certificate of Residence granted by the Mauritian authorities it can be said that the Indian tax authorities were well within their jurisdiction to examine the operative of facts from the observation-post of the Indian tax law to see the real profile of facts. They had to appraise the issue in the light of correct legal principles.

In the cases of the treaty shoppers the Certificate of Residence creates an opaque smokescreen which facilitates the commission of fraud. Jurisprudence of every civilized country recognizes the success of fraud is contrary to public policy. Our Supreme Court in *Shrisht Dhawan v. Shaw Brothers.* (AIR 1992 SC 1555 at 1564, para-20) observed:

> "Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence."

It is well settled that even the judgments of the superior courts in foreign jurisdiction can be ignored if they are contrary to public policy. *[Israel Discount Bank of New York V. Hadjipateras*[19]; *Smith v. East Elloe Rural District Council*[20]. In *Owens Bank Ltd. v. Bracco*[21] *Abouloff v. Oppenheimer & Co*[22]. In *Abouloff,* Lord Coleridge CJ concludes his judgment by saying[23]:

> 'I think, therefore, on the broad ground that no man can take advantage of his own wrong, and that it is a principle of law that no action can be maintained on the judgment of a court either in this country or in any other, which has been obtained by the fraud of the person seeking to enforce it, that the defence is good…'

19. [1983] 3 ALL ER 129.
20. [1956] AC 736.
21. [1992] 2 All ER 193 HL.
22. (1982) 10 QBD 295, [1881-5] All ER Rep 307].
23. (10 QBD 295 at 303, [1881-5] All ER 307 at 310).

There is no strength in the argument that as the Certificate granting citizenship cannot be questioned, so also the Certificate of Residence or incorporation granted by the Mauritian authorities cannot be questioned. The Delhi High Court rejected this argument thus:

> "Conclusiveness of a certificate of residence granted by the Mauritius tax authorities is not contemplated under the treaty or under the income-tax Act. Whether a statement shall be conclusive or not must be provided for under a legislative act e.g. Indian Evidence Act. When evidence in relation to a matter under issue is produced before the authorities exercising judicial function by reason of a circular issued by CBDT it cannot be prescribed that such evidence shall be conclusive. Such a provision as regards conclusiveness of a certificate must find place in the statute itself, as for example we may notice that such a certificate of citizenship having regard to the provisions of Section 9(2) of the Citizenship Act read with Rule 30 of the Citizenship rules speaks of such a contingency."

5. The Rules of Interpretation

General rules of treaty interpretation were referred, in brief, in the chapter on "Supreme Court on Treaty Shopping". There is a tendency on the part of the courts to rely on the OECD views expressed in their *Commentaries*, and other writings. In *Azadi Bachao* our Supreme Court relied heavily on the OECD ideas. But in a subsequent decision in *Commissioner of Income-tax v. P V A L Kulandagan Chettiar*[24] it was not inclined to bank on them so heavily. There is a school of thought that would prefer to make the Supreme Court a reflecting mirror or the sounding board of the OECD thoughts. In an article on "Judicial interpretation of Tax Treaties—Educating the Judges" Brian Cleave[25], commenting on the *Kuladagan,* someone has severely criticized our Supreme Court for showing 'a complete misunderstanding of the structure and effect of tax treaty based on OECD principles".

Not to notice an important distinction between the jural and constitutional zeitgeist of India and that of the OECD countries, for whom the OECD Model of tax Agreement had originally been drawn up, is enough in itself to prove a breach of Art. 14 of the Constitution of India. On a *posteriori* reasoning the following features of the Indo-Mauritius Double Taxation Convention emerge for the purposes of examining the *vires* of the Convention when scrutinized under the focus of Art. 14:

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

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24. [2004] 267 ITR 654.
25. *BCAJ* (Bombay Chartered Accountant Journal) Vol 39 Part 2 p.135.

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

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

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

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

(vi) In India the terms of the grant of power to the Executive is extremely precise, and constitute express limitations on the Executive power in consonance with the Indian legislative practice determining the meaning of the terms of art used in Section 90 (1).

The author deems it appropriate to mention, in brief, the constitutional positions in different countries, especially the OECD[26] countries to stress the above point. In the *U.S.A*. a tax Agreement is done in terms of Art. VI, cl. 2 of the Constitution mandating " *** all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." In *Australia* a tax treaty is enacted; and in all matters arising under a treaty the High Court has original jurisdiction. The French Constitution not only contemplates enactment of tax treaties, it even prescribes in Art 54 of the French Constitution when the Constitutional Council can review them. It says:

> "If, upon the demand of the President of the Republic, the Prime Minister or the President of one or other Assembly or sixty deputies or sixty senators, the Constitutional Council has ruled an international agreement contains a clause contrary to the Constitution, the ratification or approval of this agreement shall not be authorized until the Constitution has been revised."

Like India, *Ireland,* accepts the recognized principles of international law as the binding norms of conduct in relations with other states. [(Art 29(3), Art. 29 (5) and (6) of the Irish Constitution prescribes:

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26. Members in the OECD in the 1980s included Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and United States. It aims at achieving the highest possible economic growth and employment and rising standard of living in member countries. It also works for maintaining financial stability and for liberalizing international trade and a movement of capital between countries.

"(5.1) Every international agreement to which the State becomes a party shall be laid before the House of Representatives.

(5.2) The State shall not be bound by any international agreement involving a charge upon public funds unless the House of Representatives shall have approved the terms of the agreement.

(5.3) This section shall not apply to agreements or conventions of technical and administrative character.

(6) No international agreement shall be part of the domestic law of the State save as may be determined by Parliament."

Under Art 73 of the Constitution of *Japan* the Cabinet "concludes treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet." Art 231 of the Constitution of *South Africa* provides detailed rules governing International Agreement: to quote—

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred in sub-section (3).

(3) An international agreement of technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is entered into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless inconsistent with the Constitution or an Act of Parliament…"

In the *United Kingdom* a Double Taxation Avoidance Agreement is an *enactment* as it is done through Order in Council on the *resolution* passed by the House of Commons. In *CIT v. Vishakhapatnam Port Trust*[27], the Andhra Pradesh High Court relied on a Belgium tax treaty but missed the point that Art. 68 of the Constitution of that Country "provides that treaties of commerce and treaties which may impose obligations on the state or individuals have effect after the assent of Parliament."[28] Analogy is often dangerous[29].

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27. [1988] 144 ITR 146 AP
28. *Oppenheim* p. 64
29. "Vide the view of Sir Francis Bacon, the Lord Chancellor of England 1618-21 evoked in Chapter on "The Supreme Court on Treaty Shopping".

Our Courts should concentrate on the statutory terms and the constitutional parameters under which we work. In *Thoburn v Sunderland City Council*[30], the Queen's Bench Division was considering certain vital legal issues in the context of certain provisions of European Communities Act 1972. Laws LJ. made the following two constitutional points which are of relevance for us as we share on these points the British constitutional perspective[31], and also as the law pertaining to the treaties recognized in India is on the British model;[32]: as modified by the provisions of our Constitution. The QBD said:

> *"….we are dealing here with the strict legal position, and not with the realpolitik of thing…" .*
> *" Whatever may be the position elsewhere, the law of England disallows any such assumption."*

6. Let us read the text of tears

> *Must helpless man, in ignorance sedate*
> *Roll darkling down the torrent of the fate?*
>
> —Dr Samuel Johnson in *Vanity of Human Wishes*

It was quite a painful experience to read the decision of the House of Lords in *Government of India v Taylor (27 ITR 356)* wherein the House of Lords rejected our government's case for the following two reasons:

(a) in no circumstances will the Courts of a country directly or indirectly enforce the revenue laws of another country and therefore no State can sue in a foreign country for taxes due under the law of that State;

(b) a claim for foreign taxes is not a liability, which the liquidators of a company in liquidation are bound to discharge.

The propositions, which the House of Lords laid down, in that case are the established propositions of public international law, which even a junior-most lawyer is supposed to know. It nauseates a citizen to know how foolish was our government in being so relaxed in recovering tax dues whilst the assessee was in India, but becoming so foolhardy in a foreign land. Forty years gone; our Government has not cared to incorporate recovery mechanism in most of the tax treaties. Such a lapse could be either because of inexcusable remissness, or because of some studied design. It would serve no purpose to dwell more on the point.

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30. [2002] 4 ALL ER 156, at p.183.
31. *Samsher Singh v. Punjab* AIR 1974 SC 2192.
32. The British Parliament which enacted G.I. Act, 1935 did not embody the American view of treaties in it. The existing law was continued by the G.I. Act,1935 by the Indian Independence Act 1947, and by our Constitution. *Gujrat v. Vora Fiddali* (1964) AIR, SC 1043.

Our government failed to take note of Section 90(1)(d) which contemplates that a tax treaty can provide "for recovery of income-tax". The CAG points out in Report No 13 of 2005:

> "While specific provisions exist in DTAAs with South Africa, Belgium and Denmark, these are conspicuous by absence in DTAAs concluded with USA, UK, and Singapore."

There is no agreement with Mauritius under section 90 (1) (d) or under section 228 A of the Income Tax Act which can help in recovering the tax if ultimately the non-residents under consideration are found liable to Indian tax. With Mauritius we do not have even such seemingly effective provision as we have with Poland under Article 28A (Assistance in Collection) of the Indo-Poland Double Taxation Avoidance.

Our government could, in exercise of the delegated power, bring the Income-tax Act to its vanishing point by becoming so charitable, at the expense of own country, even to the unworthy masquerades poaching into our resources and eating into our moral fibre. It could without inhibition devise the procedure for Mutual Agreement in a tax treaty even without any statutory foundation, but failed in protecting the nation's interest in obtaining its dues from the foreign depredators. The government, which with a battery of law officers could fight against itself in the Court to lose its own case, could, naturally, not find time, even over decades, to revisit the tax treaties to incorporate into them the provisions for gathering information in foreign lands and for recovering its revenue dues. This sort of indifference illustrates a design:

(a) the Contracting states bear no responsibility to proceed against, or help our government in proceeding against the defaulting resident of those states;

(b) the Contracting states can allow the Treaty Shoppers to have their way, and escape the responsibility to trace their assets for the purposes of tax recovery; and

(c) the rogue Contracting states can allow its land (of course, for some commission or some other gains) to become a channel for laundering ill-gotten wealth, to become a theatre of delight for the crooks to prosper.

Many more aspects of the matter would come up in a separate chapter on "The Indo-Mauritius DTAC".

While the author agrees with Disraeli that 'Man is. …being born to believe', yet it is beyond him to believe that our government of knowledgeable people, some of them decorated by foreign universities or apprenticed in the IMF and World Bank, could betray the nation's interests through its culpable mishandling of the Uruguay Round. The author would highlight a few feats of gross inaptitude and

impropriety, terribly nauseating the citizenry, in a separate chapter: "Surpassing Belief: the Uruguay Round".

Such lapses are generally the outcome of flaws in our national character. But there is one factor spiking us with its peak: it is hubris without moral compunction. It is a matter of concern that international public law is not seriously studied in our country, nor it is seriously taken in the courts. This author's this impression, which he had formed as an examiner of LL M papers of various universities, was confirmed while arguing *Azadi Bachao* before the Supreme Court. In *Attorney General of Canada v. Kubicek*[33] the Canadian Federal Court of Appeal was construing certain Articles of the OECD Model. It got a valuable assistance from Professor Brian Arnold. *Crown Forest Industries v. Canada* (1995) 2 S.C.R. 802 was decided by the Canadian Supreme Court [coram: L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, and Iacobucci, JJ.]; with the Government of the United States as an Intervenor. In *Trendex Trading Corporation Ltd v. Central Bank of Nigeria*[34] experts including D.P. O'Connell assisted the Court of Appeal. There was a time when the Attorney General of the eminence of M.C. Setalvad would frankly write in his *My Life*:

> "Almost at the outset of the discussion I stated that my knowledge of international law was elementary and I would in early stages make that fact clear to the Court so that I could leave parts of the case dealing with international law to my colleagues."[35].

Professor Waldock, Professor Guggenheim and Soskice argued our case before the International Court of Justice. But the days of humility are gone. We are driven to live in a milieu which brings to mind the portrait of a degenerate time graphically portrayed by Bertrand Russell to which a reference has been made in the chapter on "Towards the Sponsored State").

It is high time for us to learn from our lapses. In this era of global solidarity and interdependence our armoury of knowledge must be rich, our will must be strong, our mind must remain critical and vigilant. We live in a world where no folly is now excusable. An alternative to knowledge is disaster, sure and certain. If we are not fast-learners, we are our own gravediggers. A collective vigilance is needed to escape the fate to which Thomas Gray refers in these well-known lines:

To each his suff'rings: all are men,
Condemned alike to groan;
Tender for another's pain,
Th' unfeeling for his own.
Yet ah! Why should they know their fate?

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33. [1997]3 C.T.C. 435; Source: http://decisions.fct-cf.gc.ca/fct/1997/a-671-96.shtml.
34. [1977] 1 All ER 881 CA.
35. at p. 229.

Since sorrow never comes too late,
And happiness too swiftly flies,
Thought would destroy their paradise.
No more; where ignorance is bliss
'Tis folly to be wise.