CHAPTER 18
THE URUGUAY ROUND FINAL ACT: A BETRAYAL OF THE NATION

SYNOPSIS

What experience and history teach is this-- that people and governments never have learnt anything from history, or acted on principles deduced from it.

—Georg Wilhelm Hegel quoted by G.B. Shaw in *The Revolutionist's Handbook*

Everyone complains of his memory, but no one complains of his judgment.

—Rochefoucauld

1. A Treaty : *Sui Generis*

The Treaty of Versailles, signed at the end of the World War I by Allied and Associated Powers and by Germany on June 28, 1919 in the Hall of Mirrors in the Palace of Versailles, France, was a political treaty with vast economic consequences which Keynes portrayed, with remarkable fidelity, in his *The Economic Consequences of the Peace.* The Uruguay Round Act, signed at the Ministerial level at Marrakesh in Morocco on April,1994, is the greatest economic treaty with vast political consequences to be chronicled someday by some one much abler than me. The magnum opus signed in the Hall of Mirrors mirrored the diplomatic art and craft of the "Big Three": David Lloyd George of Britain, Georges Clemenceau of France, Woodrow Wilson of the United States. The Uruguay Round Act reflected the ruthless might of the U.S-led corporate *imperium* and their sovereign satellites. The developing countries made sublime and dreary noise, but then they all fell in line. The Hydra, which emerged from the Treaty of

Versailles, destroyed, through economic battering rams, the political paradigm built after their heart's desire. It is right to say that the seeds of the Second World War had been sown in the Peace Treaties of Versailles. The Pax Mercatus, which triumphs in the present global economic architecture, must await its fate through the consequences of its own deeds. With the Final Act goes a string of Agreements covering diverse areas to be mentioned later. The Agreement establishing the WTO became effective from Jan. 1, 1995. This was not a conventional consensual engagement: it was a *pactum de contrahendo*[1]. It involved an undertaking to negotiate or conclude a set of pre-fabricated agreements. The signing of this Final Act was a most important event of modern times[2]. Its impact would be deep and wide on all institutions, social, economic and political. The Report of the Peoples' Commission on GATT[3], has brought out the momentous importance of the Uruguay Round in these words of insight and power:

> "The extensive written and oral submissions which have been made before us by the learned counsel, academicians and scientists make it clear that one fact is undisputed: the Final Act is *sui generis* among modern treaties in that it does not limit its concerns to cross-border issues such as the levy of tariffs and quotas or boundary disputes. Instead, the Final Act intrudes extensively in every aspect of the domestic economy. The Final Act seeks to restructure vital areas such as domestic food supply, production of essential medicines, sanitary and health standards, manipulation of genes and creation of new life forms, investment parameters, infrastructure, telecommunications, air transport, banking, insurance, and the entire-service economy. There is virtually no sector of economic life which remains untouched by the Final Act. The Final Act is, in short, an invasion of a new form, a transformed East India Company, which seeks to subject the structure and functions of the Indian economy to external diktat. This is revitalized and restructured economic colonialism in that the nation state is once again marginalized. This time, however, no single foreign power bears the mantle of colonial rule. The locus of

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1. D.P. O'Connell , *International Law* Vol 1 Chap 7.
2. Muchkund Dubey, *An Unequal Treaty* (World Trading Order After GATT) p. 11.
   " ……Thirdly these were the most far-reaching negotiations ever undertaken under GATT. For the first time, it brought agriculture under the discipline of GATT. It established separate rules and regimes in the new areas of TRIPS, TRIMs and Services. The Final Act includes as many as 19 new instruments constituting Multilateral Agreements on Trade in Goods, 4 Plurilateral Trade agreements, an Agreement each on TRIPS and Services, an Understanding on Dispute Settlement, an Agreement on Trade Policy Review Mechanism and numerous Decisions and Declarations adopted at the Marrakesh Ministerial Meeting.
   Finally, these were also the first GATT trade negotiations which went beyond the traditional GATT jurisdiction of regulating trans-border trade transactions and paved the way for a massive intrusion into what may be called "the sovereign economic space" of the developing countries. The new regimes under TRIPS, TRIMs and Services provide for right to establishment and operation in the sovereign territory of other states and significant moderation in the macro-economic policies followed by Member States, which go much beyond the realm of trade. These regimes will have serious implications in terms of abridging the economic sovereignty of developing countries, upsetting their development priorities and inhibiting their pursuit of self-reliant growth based on the maximum utilization of their own material and human resources."
3. Submitted by Justice V.R. Krishna Iyer, Justice O.P.Chinnappa Reddy and Justice D.A. Desai, all former Judges of the Supreme Court; and Justice Rajinder Sachar, former Chief Justice of Delhi High Court. Pp.174-175 [Centre for Study of Global Trade Systems and Development, New Delhi (1996)].

control is instead masked and muted behind the veil of contractual consent by all nations to the new internationalism dovetailed in the euphoria of liberalization and privatization sweeping the world in the aftermath of the Soviet Union.

If the nature of the Final Act is *sui generis*, so too has been its genesis. For the first time, the concerns of democratic governance, namely, the transparency and accountability of decision-making have been shifted from the national level to the international scenario. Once the concerns were whether national and state governments disclosed sufficient information to the people to permit informed decision-making. Today, what is disturbing is whether entire state governments have been kept ignorant of negotiations by the executive on matters which fall exclusively within their legislative purview such as agriculture. Likewise, one now wonders whether the entire Union Parliament has been dodged and deceived by an Executive which has negotiated away its sovereign legislative power without so much as bringing the matter to Parliament's attention. We face a situation in which Chief Ministers of several states have repeatedly sought consultations and briefings with the Prime Minister only to be met with stony silence. The meaning of democratic discipline has been transformed and made ever more difficult by the fact that grass roots activists and social groups must lobby and pressure the executive not only at the national level but at exotic locations such as *Punta del Este*, Uruguay."

No sector of any importance in modern economy remains outside the ambit of the Final Act.

In this Chapter, the author intends to highlight only those aspects of the Uruguay Round Final Act, which is relevant to a short discussion about India's Treaty Making Power. The way we conducted the Uruguay Round negotiations, and assumed obligations under the Act, are matters of serious concern for all of us. Lord Meghnad Desai has rightly said[4]: " The hope of India lies not in its politicians but in its citizens, they have to take their own future in hand and order its shape."

It is a matter of pity that our Government could not visualize in course of the Uruguay Round negotiations that it was involved in a treaty-making process the like of which history had never known before. It behaved no better than the Nawab of Oudh while negotiating the Treaty of Allahabad. We do not know what was the precise brief to the negotiators, how that was changed in course pf the negotiation process. The author is driven to believe that Adam Smith's 'invisible hand' is non-existent in the Market. One is led to believe that our Government was driven headlong by some overweening factors reminiscent of Furies haunting Clytemnestra and Orestes in *Oresteia* by the great Aeschylus. It was not a riddle of destiny. The emerging situation was of our own making. We must learn lessons and mend our ways. The challenges of our times require courage and moral imagination of a high order.

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4. *India Book of The Year 2002 p. ix* (Encyclopedia Britannica: The Hindu.).

2. India's Handling of the Uruguay Round negotiations

Explaining the background of the Uruguay Round Final Act, Muchkund Dubey writes[5]:

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

In the early phases of the negotiations India was assertive on her stand that the ambit of the negotiations could not subsume issues relating to IPR protection as this issue was not relevant to a liberal multilateral trading system. Then came the sudden reversal of India's position and an abject surrender in the mid-term review in Geneva in April 1989. What led to this shift in Government of India's position was not clear at first. But soon the real reason was known. "From the mid-term review session of the Trade Negotiation Committee in Montreal in December 1988, the word passed on to the Indian delegation at the political level was: "Do not appear to be ganging up against the Americans". In operational terms, it meant that India should not try to be on the vanguard of the struggle of the developed countries ……."[6].The Peoples' Commission too had reasons to wonder why the Government of India did not publish a position paper explaining the reasons for the radical shift in India's stance and the likely impact of providing enhanced levels of intellectual property protection and liberalization of investment and service industries demanded by the U.S.

The Peoples' Commission found that the entire negotiating process was neither transparent, nor it showed any accountability to the elected representatives of people in a democracy. It further found that adequate information regarding India's stance at the GATT negotiations, and the position taken by other countries was not given to the people or their representatives. The nature of the possible impact of the treaty under negotiation was never brought in public domain. The

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5. *An Unequal Treaty* pp. 9-10.
6. *Ibid* p.8.

results of the Uruguay Round of Multilateral Trade Negotiations ("Dunkel Draft") came out in several hundred pages in December 1991 as a *fait accompli.* The element of coercion struck at the outset itself where the Draft Treaty said:

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

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

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

> "This is a very complicated Bill and this does not concern only today, nor does it concern only the immediate tomorrow, but it concerns the years to come. And it concerns the interests of all the under-developed countries and all developing countries, to whom we must show that India will provide leadership in all manner".

"One thing transpired, that there is an element of helplessness; they are trying to plead that we are in a helpless condition, that we cannot do it because we are already a member of the WTO, we are already committed we are already in the trap; and so we cannot come out of that trap, and for that only we have to effect these changes to the already existing very, very good and very, very progressive Indian Patents Law of 1970".

"Kindly forgive me for saying so, the multi-national corporations work only to amass super-profits"

"They work only to amass super-profits. They are not satisfied. Their lust is not satisfied with the profits only. Their lust is satisfied only with super-profits. They are working only for super-profits. They have no concern for the public health, they are not concerned for the ailing children of ours, they have got no concern for the malnutritioned women of our country and they have no concern for the poor people of this country".

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

3. Constitutionality of the Final Act Federal Character of our Constitution was ignored

In *Kesavanand* our Supreme Court held that our polity created by the Constitution is federal in character.[7] In *Bommai's Case* the Court observed that democracy and federalism are the essential features of our Constitution and are part of its basic structure[8]. B. P. Jeevan Reddy, J. observed: (for himself and on behalf of S. C. Agrawal, J.)- The fact that under the scheme of our Constitution, greater power is conferred upon the Center *vis-a-vis* the States does not mean that States are mere appendages of the Center. Within the sphere allotted to them, States are supreme. K. Ramaswamy, J said: Federalism envisaged in the Constitution of India is a basic feature in which the Union of India is a basic feature in which the Union of India is permanent within the territorial limits set in Article 1 of the Constitution and is indestructible. The State is the creature of the Constitution. Neither the relative importance of the legislative entries in Schedule VII, List I

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7. The basic structure may be said to consist of the following features:
   (1) Supremacy of the Constitution;
   (2) Republican and Democratic form of Government;
   (3) Secular character of the Constitution.
   (4) Separation of powers between the legislature the executive and the judiciary.
   (5) Federal character of the Constitution.
   Kesavananda Bharati v. State of Kerala AIR 1973 SC1461
8. *S. R. Bommai v. Union of India* AIR 1994 SC 1918.

and II of the Constitution, nor the fiscal control by the Union *per se* are decisive to conclude that the Constitution is unitary.

In terms of Art. 73 of the Constitution the executive power of the Union extends to entering into treaties. Those powers are co-terminus with the Union's legislative power under entries 13 and 14 of List I of the Seventh Schedule. And under Art. 53 of the Constitution, the executive power of the Union vests in the President. The Constitution requires that the executive power of the President must be exercised in accordance with the Constitution. An inevitable corollary of this is that the President, in his exercise of power to enter into treaties or agreements, must act in accordance with the Constitution, otherwise it would violate the Federal principle, and would be in breach of the basic feature of the Constitution. The Peoples' Commission explained the correct constitutional position thus:

> "It is true that Article 253 enables Parliament to make laws for implementing any treaty agreement or convention with any other country or countries or any decision made at international conferences, associations or other bodies and Article 73 (1) (b) provides for the executive power of the Union in respect of the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.
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> Article 253 and 73 (1) (b) both deal with an expost *facto* situation, that is, a consequential situation arising out of an international treaty, agreement or convention already entered into. They confer the necessary legislative and executive power to implement such treaty, agreement, etc. however made but must be one made according to the Constitution and not contrary to the Constitution. For example, the Union Government cannot barter away the sovereignty of the people of India by entering into a treaty making India a vassal of another country and then invoke Articles 253 and 73 (1) (b) to implement the treaty. Such a treaty would be void *ab initio* being repugnant to the basic features of the Constitution, namely, the sovereignty of the people.

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 (of Uruguay Round) is one of that nature. This is 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 principle."[9]

The provisions of Art 253 of our Constitution was noticed by Oppenheim while examining the effect of the distribution of sovereign powers *inter se* the federation and its federating units. *He says:*

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[9]. *The Report of Peoples' Commission on GATT* p150.

> "The division of powers between the federal state and its member states affects *the capacity of federal states to contract and give effect to international obligations*. ….Federal states may accordingly often find themselves either unable to conclude treaties relating to matters falling within the legislative competence of the member states or, after having validly concluded such treaties, unable to give effect to them. In some federal states, such as Australia or India, the constitution seems to give some powers to the federation to legislate in matters covered by treaties concluded by federation."[10]

This aspect cannot be lost sight of by the Contracting States while concluding a treaty. It has been observed: In case of a federal, or other composite state, it may be necessary to distinguish the federal state's constitutional power to conclude a treaty or to incur international obligations towards other parties, and its power under the constitution to enforce compliance with the treaty on the part of the constituent states[11]: see *Concordat (Germany) Case*[12].

But Oppenheim missed to see the difference between India and Germany in the matter of the constitutional provisions granting to the Union an overriding authority in treaty making power. Art. 73 of the German Constitution provides that the Federation has *exclusive power* to legislate in matters of foreign affairs. 'Exclusive' means 'involving the rejection or denial of something else or everything else.' Art 32 of the German Constitution deals with Foreign Relations. It says that relations with foreign States are a responsibility of the Federation; but prescribes: "Insofar as the States have power to legislate, they may, with the consent of the Government conclude treaties with foreign States." And Art. 59 says that the President represents the Federation in its international relations. He concludes treaties with foreign States on behalf of the Federation.

In India, exercise of all powers, executive or legislative, are under constitutional limitations. Our Constitution has not granted the executive any 'exclusive' power to enter into a treaty or agreement. Our Constitution subjects the executive power of treaty making to the following two limitations:

(i) It must not contravene our fundamental rights, and must not breach the basic features.

(ii) It must satisfy the existence of the condition precedents in exercise of power under Art 253, i.e. there must exist an agreement done by the executive without transgressing constitutional limitations.

This author would like to mention a third condition also: the agreement which Art 253 contemplates must not be bad on account of an evident taint of coercion, and other unconscionable features. There are good grounds to think that the Uruguay Round Final Act is both coercive and unconscionable.

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10. *Ibid* 253 Art 253 of the Constitution of India.
11. *Oppenheim* 1285.
12. ILR, 24 (1957).

4. Our Fundamental Rights threatened

In the context of the US Constitution, Justice Homes in *Missouri v. Holland*[13] considered it appropriate to mention that the court might consider if an impugned treaty was forbidden by "some invisible radiation from the general terms of the Tenth Amendment." The Fundamental Rights cannot be overridden under treaty making power. It should be considered a fundamental principle of our constitutional law. It puts the whole world under notice. If the Contracting States ignores this, their very capacity to enter into a treaty is affected. Against such an act even the people of a country can have a grievance; and they would be well within their bounds to take recourse to ways to unsettle the house of cards built through an unequal treaty. It is time to reject "the doctrine asserting the invalidity of 'unequal treaties' has found no general acceptance" as it is unfair and unjust, advocated only by the proponents of neo-imperialism, whether of the States or corporations.

In *Ajay Hasia v. Khalid Mujib Sehravardi*[14] our Supreme Court[15] spelt out a new dimension of Art 14 holding *that Article has highly activist magnitude as it embodies a guarantee against arbitrariness.* The comprehensive account given in the earlier Section of this Chapter should convince the reader that the way the Government handled the Uruguay Round is both unreasonable and arbitrary.

The fundamental right to "freedom of speech and expression" granted by Art 19(1)(a) of our Constitution cannot be exercised properly unless with it goes the Right to Know. Our Supreme Court recognized the supreme importance of the Right to Know. In *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd*[16] it 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."

This Right to Know is immensely important under our constitutional system, at least for the following five reasons:

(i) That we reserve to ourselves the right to keep the organs of the Constitution under our broad scrutiny so that as the ultimate source of political power we are ready to respond to challenges of the realities if our destiny so demands. We have not forfeited our ultimate rights, nor do we

(ii)

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13. 252 US 416, 64 L. Ed. 641 (1920).
14. AIR 1981 SC 487
15. Coram : Y. V. Chandrachud, C.J.I., P. N. Bhagawati,, V. R. Krishna Iyer, S. Murtaza Fazal Ali and A. D. Koshal, JJ.
16. AIR 1989 SC 190 [Coram : Sabyasachi Mukharji, and S. Ranganathan , JJ.]

want to forget our ultimate duties, as the members of this political society constituted at present as the Republic of India.

(ii) That as the players of diverse constitutional roles we are decision-makers on points touching the public resources and their management. It is impossible to exercise this function without Right to Know.

(iii) That for due discharge of the Fundamental Duties under Part IVA of the Constitution we must exercise our Right to Know in its full amplitude subject only to the restrictions prescribed in Art 19(2) of the Constitution.

(iv) That our country has suffered a lot on account of administrative opaqueness which reached its umbral zone during the Emergency, the saga of which Justice Shah narrated in his celebrated *Shah Commission Report*. Granville Austin writes about India:

> "The rampant corruption of which elected and appointed officials are believed guilty by citizens should be understood in terms of the survival society---of the scriptural injunction to help one's own (this in a society where religious observance is common)---even while it is clear threat to the credibility of democratic governance."[17]

We have stated in Art 51 of the Constitution that we would foster respect for international law. We are under obligations to implement our duties under the *U.N. Convention against Corruption* approved by the General Assembly of the United Nations by resolution 58/4 of 31 October 2003. This Convention was signed in Merida in Mexico. Besides many other things of great value this Convention calls upon the states:

(a) to ensure Transparency and Accountability in matters of public finance must be promoted;

(b) to make effort from members of society at large for preventing public corruption.

The facts set out in the Section dealing with India's " handling of the Uruguay Round Negotiations", and those in the chapter on "the Opaque System" would bear out the point which is being made here. The WTO is, along with the IMF and the World Bank, the most dominant institutions of the economic architecture. Their system is opaque, and they are completely unaccountable to people. They are undemocratic to the core, and do everything to ensure the supremacy of the executive power. All this explains why people of our country remained in dark all along in knowing how the negotiations were handled, and what sort of

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17. Granville Astin, *Working A Democratic Constitution* p.642 (Oxford 1999).

obligation was undertaken in the ever expanding treaty cast in the format of *pactum de contrahendo.*[18]

Our Supreme Court has held that Article 21 of the Constitution includes a right to live with human dignity and includes all those aspects of life which go to make a man's life meaningful, complete and worth living. Right to health is part of right to life. The Peoples Commission examined in its Report various aspects to ascertain the impact of the Final Act on Right to Life, and came to the following conclusion:

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

5. Certain fundamentals of our democratic polity are under risk

Democracy is recognized as a basic feature of our Constitution. Our government is accountable through Parliament to the people. Accountability and transparency are the two requisites for our Constitution to remain at work. The Peoples' Commission in its Report examined whether the Government of India, in signing the Final Act, violated the principle of democracy. After a careful and detailed analysis the Commission concluded that the Democratic Principles were violated. The Commission observed:

> "In view of the foregoing history of the Government of India's handling of the Uruguay Round, we conclude that the Union Government has engaged in negotiations at GATT in a manner which escapes any democratic discipline, namely, the Union Government has failed to inform the Parliament, the State Assemblies, any other branch of government or the public of the position it took at the Uruguay Round, the reasons supporting such position and any changes thereto, and the stance taken by other nations. The Government never issued a comprehensive analysis of the impact of the proposed treaty on India including basic parameters such as increase in volume of imports and exports, effect on employment and inflation. The Government refused to conduct any meaningful discussions in Parliament and even rebuffed requests for consultations by Chief Ministers of several states.
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> *The minimum level of information provided by the Union Government made it impossible for either the people or their elected representatives to meaningfully participate in the decision of whether to sign the Final Act or render the Union accountable for its actions."*[19] [italics supplied]

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18. D.P.O'conell , *International Law* Vol. 1 Chap 7.
19. at p. 160.

6. Our Sovereignty is compromised

The ideals of sovereignty, socialism, secularism and democracy are set by the Preamble to the Constitution which elaborates and illustrates them with operative provisions. Hence any interpretation of Art. 73 and Art. 253 must take into account the implications of the exercise of the treaty making power on our country's sovereignty. Our Supreme Court aptly observed[20]:

> "The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define, this power of sovereignty is, however, subject to Constitutional limitations."

The Peoples' Commission examined whether the Final Act impinges on India's internal sovereignty by preventing the Centre or the States from legislating on any subject. The Final Act is comprised of 28 sections and covers subject in virtually the entire economy, *inter alia,* agriculture, investment, intellectual property, textiles, pharmaceuticals, health and sanitary standards, regulation of the professions, banking and finance, insurance, telecommunications and air transport. By providing detailed requirements in numerous areas of the domestic economy, the Final Act usurps the legislative power of the Centre and the States to a great extent. The legislative power of the Centre and the States is enumerated and divided in the Seventh Schedule of the Constitution read with Article 246. The Final Act deprives the Centre of its exclusive legislative power *qua* several entries in List I of the Seventh Schedule. It is worth noting that Parliament cannot abandon its sovereignty and the conditions of its legislative supremacy. No Parliament can bind its successor unless it acts in conformity with the law and the Constitution, and does not ride roughshod the people's wishes. An act contrary to public good carries its own seeds of destruction.

It is also to be noted that the obligations under the WTO regime are bound to encroach more and more on our sovereign space. Nobody, when this country signed the Final Act, thought that the WTO directives would shape even the taxation policies of our country. It is interesting to note how things stand now. In his article on "WTO and Direct Taxation" (on the Website of the WTO, Geneva) Michael Daly writes:

> "International rules concerning measures that affect trade and those regarding direct taxation appear to have similar goals, namely the removal of obstacles to the cross-border movements of goods, services, capital, labour and technology"

We shall have to identify the WTO-inconsistent measures, and to remove them. We have to shape our tax policies in conformity with our WTO obligations otherwise we can be subjected to punitive retaliation. It does not satisfy us that the USA bore with fortitude the brunt of the WTO retaliation against its FSC/ETI Scheme, which was repealed by the Congress in 2004. The acceptance of the

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20. *Synthetics v. State of U.P.* (1990) 1 SCC 109.

decision of the WTO's Disputes Settlement Body might have been a mere strategy on the part of the USA to pull the wool over others' eyes to make the WTO ride roughshod over the sovereign space of other nations.

One interesting constitutional issue crops up: can even Parliament disown or compromise its sovereignty. An answer is clear and emphatic No. "Being sovereign, it cannot abandon its sovereignty"[21].

7. Some Suggestions by the Peoples' Commission

All this led the Peoples' Commission on Patents Laws for India[22], to quote with approval the views of the earlier Commission, which this author has already quoted vide fn, 9 of this Chapter. The Commission, after a comprehensive examination of the Government's treaty making power, made some very valuable recommendations for implementation. It is worthwhile to quote it here:

> "In the light of the above, it is recommended:
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> (a) Whilst the treaty making power (Article 73 read with List 1 entries 13 and 14) vests in the Union and requires legislation in order to translate the treaty into validly enforceable law (Article 253), the treaty making power cannot be seen as a law unto itself, but must operate within the discipline of the Constitution. This is all the more important because the world is being increasingly governed by treaties, which are being enforced through their own mechanisms, and by intense social, economic and political pressure.
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> (b) The discipline of the Constitution requires that the Union government, which is the exclusive repository of the treaty making power, cannot, and should not, enter into treaties which undermine the Constitution. In particular, treaties would be violative of the Constitution if they affect or

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21. *Thoburn v. Sunderland City Council* [2002] 4 All ER 166 at 183: per Laws LJ." Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the 1972 Act. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the 1972 Act which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law they could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorize any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has is my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle."

22. Chairman: Shri I.K. Gujral, the former Prime Minister of India; and Members: Prof. Yashpal, Prof. Muchkund Dubey, Shri B.L. Das, and Dr Yusuf Hamied.

in-fringe fundamental rights or affect matters which are in the exclusive concurrent domain of the States (Lists II and III) or affect the secular and socialist dimensions of the Constitution (see Preamble and Articles 38, 39 and 51 of the Constitution amongst other articles of the Directive Principles).

(c) Procedurally, before a treaty (especially a multilateral treaty) is signed it is imperative that it should be (i) placed for discussion before parliament with full particulars (ii) placed within the public domain for discussion (iii) circulated to the States for their opinion and discussion and (iv) not confirmed until and unless this discussion is over. This exercise necessarily needs to be repeated as further issues arise in respect of any one treaty.

(d) *Parliament needs to set up a special treaties committee which earmarks treaties for consideration and ensures that the public, federal and parliamentary process is compiled with specially listing areas for confirmatory procedures.*

(e) There is nothing in the Constitution which forbids this process being regulated by statute which should be enacted."[23][italics supplied].

Before this author comes out with his suggestion, certain pressing points deserve to be noted.

Our Government was under heavy pressure to accept the imposed treaty terms. There was no resistance because even before the signing of the Uruguay Round Final Act our country was moving fast towards economic liberalization under the pressure of the IMF and the World Bank. The United States ensured this by putting strong pressure. Even before the Final Act was ratified our Government was made to move fast in taking preparatory steps to implements the imposed obligations. There was a dedicated pursuit to promote the goals dear to the corporate *imperium*, and their invincible mentors.

Whilst we did not care for our law and the Constitution while signing the Final Act, the United States framed specific statutory provisions. Under Section 3511 the U.S.Code. the Congress approved the trade agreements listed in that Section itself. The list contains reference to the WTO Agreement and the 18 agreements annexed to that Agreement. It framed the 'Uruguay Round Final Act 1993 to deal with the application of the Trade Agreements in the country's domestic jurisdiction. It maintained the primacy of domestic law over the obligations imposed by the Final Act. Section 3512 of the U.S. Code incorporates the material provision which is quoted hereunder:

"(1) United State Law To Prevail In Conflict- No provision of any of the Uruguay Round Agreements, nor the application of any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction- Nothing in this Act shall be constructed-

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23. Report of *the Peoples' Commission on Patent Laws* for India January , 2003 pp. 111-112.

(A) To amend or modify any law of the United States, including any law relating to—

(i) The protection of human, animal, or plant life or health,

(ii) The protection of the environment, or

(iii) Worker safety, or

(B) To limit any authority conferred under any law of the United States, including section 2411 of this title, unless specifically provided for in this Act."

The Act grants primacy even to the federating units' laws when in conflict with the Final Act. Section 102(b)(2)(A): 'No State law, or the application of such a State law, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, except in an action brought by the United States for the purpose of declaring such a law or application invalid.' It also deserves to be noted that in the USA a federal statute is binding on the courts even if it is in conflict with previous customary international law or treaty.[24] And this is so despite the fact that under Art VI of the U.S Constitution the treaties are part of the supreme law of the land.

But in our country our Government showed no vigilance, and remained indifferent to people's interest, and its mandatory constitutional obligations. Some heart-searching is called for; certain duties are to be discharged before it is too late. This is a point to ponder unless we have lost confidence in ourselves.

The role of Parliament deserves to be recognized. It should not be embarrassed with a fait accompli. This is a disrespect for Parliament, and disregard for democracy. This fact is now being recognized even in England where treaty making power is derived from the Crown's prerogative. Oppenheim notes this feature, and states:

> "That departure from the traditional common law rule is largely because according to the British constitutional law, the conclusion and ratification of treaties are within the prerogative of the Crown, which would otherwise be in a position to legislate for subjects without Parliamentary assent. Since failure to give any necessary internal effect to the obligations of a treaty would result in a breach of the treaty, for which breach the United Kingdom would be responsible in international law, the normal practice is for Parliament to be given an opportunity to approve treaties prior to their ratification, and, if changes in law are required, for the necessary legislation to be passed before the treaty is ratified."[25]

Oppenheim points out that in India the law :

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[24]. *Oppenheim* p. 76 fn. 99.
[25]. *Oppenheim* p. 60.

(i) requires legislation in order that a treaty may create rights and obligations enforceable in the courts,

(ii) confers priority on a statute over a treaty (and over customary international law) should the two be in conflict, and

(iii) recognizes the need to interpret a statute so as, if possible, to avoid such a conflict.[26]

8. The Author's Recommendations

This author's research and reflection have led him to recommend to our countrymen and our government that steps be immediately taken to bring about certain constitutional changes to the following effect:

(i) Treaties which modify or override the domestic laws must be ratified only after Parliament's approval through a legislation, or on a resolution by the Lok Sabha (the way a tax treaty is done in the U.K.).

(ii) Treaties of domestic operations, affecting the areas for legislative operations under the entries in the Seventh Schedule, should be ratified only after Parliamentary approval is accorded or the bill is enacted as an Act.

(iii) Treaties affecting constitutional provisions, other than those affecting the basic features of the Constitution should be made only after obtaining an advisory opinion of the Supreme Court thereon as to its constitutional validity.

(iv) Treaties, which affect the basic features of our Constitution, should be subjected to popular referendum, after obtaining the opinion of the Supreme Court thereon, before they are ratified.

The following two comments are worthwhile:

(i) If the procedure of reference to the Supreme Court is to be avoided, then a treaty should be ratified after Parliamentary approval accorded in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.

(ii) Our Constitution does not prescribe recourse to referendum. But people's claim that such treaties be decided through a referendum emanates from the very fact that 'We, the people' have adopted, enacted and given to ourselves the Constitution. Whatever protocol of referendum is chosen it must be an effective plebiscitary device to support the terms of

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26. *Oppenheim p. 78* and fn. 111.

> a contemplated treaty. As Chief Justice Marshall could hold in *Marbury v. Madison*[27] that the power of Judicial Review emanates from the judicial oath taken under a written constitution with entrenched rights, so should our courts and our Parliament see the legitimacy of this procedure in the fact that, when all is said, political sovereignty inheres in the people of India.

The adoption of the above-suggested procedure would help our country to withstand the pressures to which it is subjected in handling the international negotiations. If a particular draft treaty is not approved per procedure described above, the government would have no option but not to proceed further. "This would put the onus on the rest of the members of the WTO to accommodate us and modify the take-it-or-leave-it character of the Uruguay Round package."[28] This would make the process of treaty making transparent, and democratic. This would help our government to answer effectively the predatory international financiers that the executive government of India works under constitutional limitations, which it cannot evade. An idea must be drummed into the ears of all, that obligations under a treaty should neither be created in darkness, nor carried out under an opaque system. This would put every body under notice that ratification as such does not entitle anybody to any legitimate expectation before the treaty's incorporation into domestic law as per procedure suggested. This procedure would inhibit the executive from taking things for granted.

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27. (1803) 1 Cranch 137, 177-79, 2 L ed. 60.
28. Dubey, *An Unequal Treaty* p.135.