NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION

A
Consultation Paper*
on

TREATY-MAKING POWER UNDER OUR CONSTITUTION

* The views expressed and the suggestions contained in this paper are intended for the sole purpose of generating public debate and eliciting public response.

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Part - I

1. INTRODUCTION

Entering into treaties and agreements with foreign powers is one of the attributes of State sovereignty. No State can insulate itself from the rest of the world whether it be in the matter of foreign relations, trade, environment, communications, ecology or finance. This is more true since the end of the World War II. The advent of globalization and the enormous advances made in communication and information technology have rendered independent States inter-dependent. Every State has entered into and is entering into treaties – be it multi-lateral or bilateral – which have a serious impact upon the economy and the social and political life of its society. In spite of the fundamental importance of the treaty-making power, it has unfortunately received very little attention in our country, though in many other countries, good amount of research and debate has gone into it. We in India cannot afford to ignore this subject any longer, particularly because of the experience of W.T.O. treaties signed by our Government without consulting or without taking into confidence either the Parliament or the public or, for that matter, groups and institutions likely to be affected adversely thereby. The Agreements signed on Intellectual Property Rights, trade, agriculture and services are so far-reaching that there is a body of opinion, which honestly thinks that some of the provisions of these Agreements are adverse to our national interest - so much so that the Human Development Report, 1999 published by the U.N.D.P. has called for a review – a roll back – of the Agreement on Trade-related Intellectual Property Rights (TRIPs) to protect the health of the people and economies of the developing countries. At page 10, the Report says "Intellectual property rights under TRIPs Agreement need comprehensive review to redress their perverse effects undermining food security, indigenous knowledge, bio-safety and access to health care." It may be that some people may not agree with the above opinion expressed in the Human Development Report, but that is not the issue. There can be no dispute with the proposition that the power to enter into treaties, agreements and covenants/conventions has, in some cases, serious impact upon our economy, our security and the life and livelihood of our citizens as such – whether beneficial or prejudicial. It is a highly potent power. Many other agreements containing clauses having deleterious effects upon our economy have also been signed during the Uruguay Round of Trade Negotiations. The questions we must address therefore are: to whom does this power belong – whether to the Executive or to the Parliament? and if it is the power of the Executive, whether it is subject to Parliamentary control or supervision? What is the impact of treaty-making power conferred by entry 14 of List I of the Seventh Schedule and Article 253 of the Constitution upon the federal structure which we have adopted for ourselves? We may have to incidentally examine what is the position in other countries, whether common law countries or others, and how they are grappling with the issues arising in this behalf.

2. It would be appropriate to examine, in the first instance, the legal background to our constitutional scheme. It is well known that British India had been following the British practice in the matter of treaty-making. What the British practice is can better be set out in the words of Privy Council in its celebrated decision in ATTORNEY GENERAL FOR CANADA Vs. ATTORNEY GENERAL FOR ONTARIO (1937 A.C. 326 = AIR 1937 P.C…..). It said:

> "It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law…

> Parliament, no doubt, has a constitutional control over the Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers, the problem is simple. Parliament will either fulfill, or not, treaty obligations imposed upon the State by its Executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses."

It would be equally relevant to notice the context in which the said observations were made. The question before the Privy Council concerned the competence of the Federal power to implement international obligations in areas of provincial jurisdiction without provincial cooperation. (It may be remembered that Canada is a federal State with a distribution of powers between the federal government and the Povinces). The Privy Council held that the federation had no power to legislate in respect of the matters, which fell within the exclusive jurisdiction of the Provinces. This was so held in the light of S.92 of the British North America Act, 1867.

3. It would be legitimate to presume that our Founding Fathers were acutely aware of this decision and have consciously provided for a departure therefrom in two respects. Firstly, they expressly included the treaty-making power within the legislative competence of the Parliament (as I will explain presently) and secondly they incorporated Article 253 in Part XI of the Constitution. I may elaborate:

4. Article 246 effects a distribution of legislative power between the Union and the States. Article 246(1) says:

> "… Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List")."

Clause (2) speaks of the concurrent power of Parliament and State Legislatures to legislate with respect to matters in Concurrent List (List III) while clause (3) empowers the State Legislatures to legislate with respect to matters in the State List (List II). Clause (4) empowers the Parliament to make laws with respect to Union territories without any limitation of division of legislative power.

5. The Seventh Schedule to the Constitution (which is referable to Article 246) contains three Lists: Union, State and Concurrent. Entries 13, 14, 15 and 16 in the Union List are relevant, particularly Entry 14. They read as follows:

> "13. Participation in international conferences, Associations and other bodies and implementing of decisions made threat.
>
> 14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
>
> 15. War and peace.
> 16. Foreign jurisdiction."

From a reading of Article 246 along with the said Entries, it is obvious that the Parliament is competent to make a law with respect to the several matters mentioned in the above entries. In other words, treaty-making is not within the exclusive competence of the Executive. It is squarely placed within the legislative competence of the Parliament. By virtue of Article 73 of the Constitution, however, the Executive power of the Union extends, in the absence of parliamentary legislation, to the matters with respect to which the Parliament has power to make laws subject, of course, to constitutional limitations. It is well known that the Parliament has not so far made any law regulating the procedure concerning the entering into treaties and agreements nor with respect to their implementation. Equally clearly, no law has been made regulating the manner in which the Government shall sign or ratify the international conventions and covenants. The resulting situation, unfortunately, is that it is left totally to the Executive

to not only enter into treaties and agreements but also to decide the manner in which they should be implemented, except where such implementation requires making of a law by Parliament. And the fact of the matter is that once the Executive Government enters into a treaty, it would be, ordinarily speaking, quite embarrassing for the Parliament to reject the treaty – more so in view of the provisions of the Vienna Convention on the making of Treaties which though not yet ratified by India (according to the information given by the concerned Ministries) indicates certain consequences flowing from the conclusion of a treaty. Theoretically speaking, however, it is always open to the Parliament to disapprove a treaty entered into by the Executive whereupon the treaty will have to effect whatever. Moreover, if any treaty or agreement violates any of the provisions of the Constitution, it would be totally incompetent and ineffective and even the Vienna Convention would not stand in the way, as explained hereinafter.

6. Now, let us turn to Article 253. Article 253 is one of those set of Articles, which provide certain exceptional situations in which the Parliament can legislate with respect to matters in the State List. Ordinarily speaking, Parliament cannot make a law with respect to a matter in State List. State Legislatures alone have the exclusive power to legislate with respect to those matters. Article 253 reads:-

> "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, associated or other body."

This Article empowers the Parliament to make any law, for the whole or any part of the territory of India, for implementing "any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body." Conferment of this power on the Parliament is evidently in line with the power conferred upon it by Entries 13 and 14 of List I. The opening words of the Article "Notwithstanding anything in the foregoing provisions of this Chapter" mean that this power is available to Parliament notwithstanding the division of power between the Centre and States effected by Article 246 read with the Seventh Schedule. In the light of this Article, it is evident, the situation similar to the one arising in Canada by virtue of the 1937 decision afore-mentioned, may not arise.

7. After the commencement of the Constitution, quite a few cases have arisen where the Supreme Court had to interpret Entries 14 and 15 of List I of the Seventh Schedule and Articles 73 and 253. While it would not be necessary to refer to all of them, it would be enough if we refer to the decision of the Constitution Bench in MAGANBHAI ISHWARBHAI PATEL Vs. UNION OF INDIA (1970) 3 SCC 400 = AIR 1969 SC 783). In view of a border dispute between India and Pakistan in the area of the Rann of Kutch, the matter was referred by both the countries to Arbitration. According to the award made by the Arbitrators, Kanjarkot and a few other villages fell to Pakistan. When this award was sought to be given effect to by the Government of India, certain persons approached the Gujarat High Court questioning the power of the Central Government to, what they called, ceding a portion of the territory of India to a foreign power. The matter was ultimately carried to the Supreme Court. The majority opinion was rendered by M. Hidayatullah, Chief Justice, on behalf of himself, V. Ramaswami, G.K.Mitter and Grover, JJ while J.C.Shah, J delivered a separate but concurring opinion. The Court held in the first instance that it was not a case of cession of territory, but a case of identifying the true border between two States. While agreeing that cession of territory cannot be effected without amending the Constitution, the Court held that such a course was not necessary in that case. In the course of the Judgment, however, the court went into and discussed the treaty-making power in view of the fact that Government of India had entered into an agreement with Pakistan to refer the dispute to third party arbitration. (M. Hidayatullah, Chief Justice, prefaced his discussion (para - 24) thus:

> "A treaty really concerns the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it has to be implemented and this can only be if all the three branches of Government to wit the Legislature, the Executive and the Judiciary, or any of them, possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some

jurisdictions, the treaty or the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law notwithstanding. Such treaties and awards are 'self-executing'. Legislation may nevertheless be passed in aid of implementation but is usually not necessary."

8. The learned Chief Justice then referred to the legal position in U.S.A., France (under 1958 Constitution), U.K. as also to Section 113 of the Indian Evidence Act, 11872 and observed:-

9. "The Constitution did not include any clear direction about treaties such as is to be found in the United States of America and the French Constitution.")

10. If I may say, with the greatest respect at my command, the above statement of law does not appear to take notice of the effect of placing the treaty-making power in the Union List which necessarily means that Parliament is competent to make a law laying down the manner and procedure according to which treaties and agreements shall be entered into by the Executive as also the manner in which they shall be implemented. It bears repetition to say that under our Constitution, treaty-making power is not vested in the Executive or the President – as has been done in some other Constitutions. It is squarely placed within the domain of the Parliament. Theoretically speaking, Parliament can by making a law prohibit the Executive to enter into a particular treaty or a particular kind of treaties; similarly, it can also direct the Executive to enter into a particular treaty or may disapprove or reject a treaty signed and/or ratified by the Executive. It is a different matter that Parliament has not chosen to make a law in that behalf, leaving the Executive totally free to exercise this power in an unfettered and, if I may say so, in an unguided fashion.

11. The learned Chief Justice then referred to Articles 1, 3, 73 and 253 as well as Entries 14 and 15 in List-I of the Seventh Schedule and to the earlier decision of the Court and observed:

> "The precedents of this Court are clear only on one point, namely, that no cession of Indian territory can take place without a constitutional amendment. Must a boundary dispute and its settlement by an arbitral tribunal be put on the same footing? An agreement to refer the dispute regarding boundary involves the ascertainment and representation on the surface of the earth a boundary line dividing two neighboring countries and the very fact of referring such a dispute implies that the Executive may do such acts as are necessary for permanently fixing the boundary. A settlement of a boundary dispute cannot, therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. It only seeks to reproduce a line, a statutable boundary and it is so fixed. The case is one in which each contending State ex facie is uncertain of its own rights and therefore consents to the appointment of an arbitral machinery. Such a case is plainly distinguishable from a case of cession of territory known to be home territory."

12. Shah J. who delivered a separate but concurring judgment dealt specifically with Article 253 and made certain observations which are relevant and which constitute the basis for the judgment of the Bombay HighCourt in P.B.Samant v. Union of India (1994 Bombay 323). The facts and the ratio of the judgment of the Bombay High Court deserve a closer look inasmuch as it deals directly with the issue discussed herein.

13. It was a petition filed by certain public-spirited individuals seeking the issuance of a writ of mandamus restraining the Union of India from entering into final treaty relating to Dunkel proposals [#] without obtaining sanction of the Parliament and State Legislatures. The contention was that in exercise of its executive power, the Union Government cannot trench upon the matters in the State list. It was submitted that Dunkel proposals dealt with subjects like agriculture, irrigation, cotton and other matters which are within the exclusive domain of the states. It was submitted that the said proposals will also affect the maintenance of roads, bridges, communication etc. which too are in the state list. It was therefore contended that unless the consent of the states is obtained, the Union Government cannot enter into any agreement on the said proposals which are being discussed as part of Uruguay Round of Trade Negotiations under the auspices of GATT. In reply to these submissions, the Union of India relied

upon article 253 of the Constitution and the decision of the Supreme court in Maganbhai. It was submitted that not only the Union is entitled to enter into treaties by virtue of Entry 14 in list 1 of the seventh Scheduled to the Constitution, Parliament alone can alone make law to give effect to such treaties and international agreements. Reliance was placed particularly upon the following observations of Shah J. in his separate but concurrent opinion in Maganbhai: "The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power; thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of executive power, rights of the citizen or others are restriced or infringed, or laws are modified, the exercise of power must be supported by legislation : where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power."

14. The High Court agreed with the Respondents. Relying upon the observations of Shah J. quoted above, the High Court held : "The observations made by the learned Judge establish that the executive power conferred under Article 73 is to be read along with the power conferred under Article 253 of the Constitution of India. The observation leave no manner of doubt that in case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of matter in the State list in pursuance of the treaty or the agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list."

15. The Division Bench also dealt with the further submission of the learned counsel for the petitioners to the effect that the decision of the Supreme court in Maganbhai on Article 73 and 253 should be understood as limited only to those cases where the treaty or agreement covers matters which are in the Union List or in the Concurrent List. In particular they relied upon the proviso to Article 73 which says that the executive power referred to in sub-clause (a) of clause 1 of that article "shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any state to matters with respect to which the legislature of the state has also power to make laws." # The submission was that the executive power of the Union Government cannot extend to matters in the State List. This argument of the learned counsel was rejected holding, "it is difficult to accede to the contention that though the Parliament has power to enact laws in respect of matters covered by the State list in pursuance of treaty or the agreement entered into with foreign countries, the executive power cannot be exercised by entering into treaty as it is likely to affect the matters in the State list."

16. The Division Bench noted the submission of the learned counsel for the Union of India that the treaty in question was not a self-executing treaty and that the provisions of the treaty can be given effect to only by making a law in terms of the agreement/treaty. The Court finally observed: "the issue as to whether the Government should enter into a treaty or agreement is a policy decision and it is not appropriate for the courts in exercise of jurisdiction under article 226 of the Constitution of India to disturb such decisions."

Part II

(i) Kinds of Treaties

17. Treaties are of two kinds: first category treaties are those which become binding as a result of signatures affixed at the completion of the negotiations. Examples of this kind of treaties are simple bilateral agreements. Then there are treaties which require a further step to be taken after the text has been established by signature before the treaty will take effect, whether by way of ratification or by legislation, as the case may be. Examples of this kind of treaties are the multi-lateral treaties which are

generally far more important than the simple bilateral agreements. As has happened in the case of Uruguay Round of Trade negotiations held under the auspices of GATT, a Final Act is prepared, at the end of the negotiations, recording the result of the several multi-lateral treaty negotiations, which is signed by the delegations of the participating countries. The signature of the treaty, which is usually subject to subsequent ratifications, follows later. As a matter of fact, multi-lateral treaties routinely provide for ratification in case of those who have signed the treaty and for accession in case of those who have not signed the treaty.

18. Since 1980 – that is in the year in which the Vienna Convention on the Law of Treaties, 1969 entered into force, as contemplated by Article 84 thereof – all aspects of treaty-making are regulated by the said Convention. Of course, it is stated that India has not yet ratified the same. Even so, its provisions do deserve notice. Article 27 of the Convention stipulates that the States cannot be excused or be relieved from compliance with the treaty entered into by them on the basis of or by reference to inadequate national law. This rule is however subject to Article 46 which says that such a plea is available in case the violation of domestic law "was manifest and concerned a rule of its (State's) internal law of fundamental importance." This would mean that if the Union Executive signs any treaty which violates any of the provisions of our Constitution, it will be a good defence to the binding nature of that treaty. (Article 18 obliges the country which has signed the treaty from taking any action pending ratification of the treaty, which runs counter to the treaty.) It is thus evident that any treaty or international agreement entered into by the Union Executive beyond its power (i.e. power conferred by Article 73) or in violation of the constitutional limitation indicated hereinbefore, is only not binding on India, it is unconstitutional and inoperative. To be more specific, any treaty signed by the Union Executive concerning or affecting the entries in the State List or the Concurrent List in the Seventh Schedule to the Constitution would be incompetent and unenforceable since its executive power does not extend to matters in State or Concurrent List. Also because, no law has been made by the Parliament, as contemplated by the proviso to Article 73(1), extending the executive power to State or Concurrent List in the matter of treaty-making, assuming that Parliament can do so even in respect of matters in State List.

19. Do we know the number of treaties, conventions and covenants that have been entered into since Ward War II – leave aside the earlier period? According to former Australian Governor General, Sir. Ninian Stephen, it is not less than fifty thousand. True it is, this is an inescapable – if not an inevitable – process, as pointed out by the Prime Minister of New Zealand Mr. Bolger, who said on 6th June, 1997:

> "We live in a globalised world economy….Individual countries, no matter how large or powerful, cannot themselves deal with such transnational issues as climate change, capital flows, resource conservation and drug trafficking…. The role of Government in international relations is increasingly one of identifying and aligning self-interest with the values most of its electorate hold to be important, and then protecting and projecting those values into its dealings with other Governments and international organizations… In an inter-dependent world, pure sovereignty – the complete control of one's own affairs – is not possible."

20. It cannot be denied that these treaties are eating into the power of the nation/states to manage their own affairs and are correspondingly enhancing the power of the market and multi-national corporations. Those thousands of treaties and other international agreements and declarations have the effect of transferring partially, by the nations themselves, of their sovereignty in recognition of their inter-dependence on one another and their absolute need in today's world to relate to other nations and to do so in part through the medium of international treaties and conventions giving rise to new international law and a growth of common-form laws. One example is the TRIPs Agreement whereunder all the member countries are obliged to change their national laws to accord with the Agreement, which is largely patterned upon U.S. laws.

21. The core issue in our system of Government, as on today, is not whether the State Sovereignty is restricted by these treaties, but whether the exercise of State sovereignty (i.e. treaty-making) by the Executive Government restricts the parliamentary sovereignty to an unacceptable extent. It is my respectful submission that it does. Many of these treaties particularly multilateral treaties concerning

trade, investment, patents, services and agriculture are bound to have pervasive and significant implications for our legal and administrative system, our economy and on the individual rights of the citizen – indeed for our constitutional ethos as such. This, no doubt, is happening in many other countries too. And it is precisely for this reason that there is concern all over the world that the practice whereunder the treaties are entered into by the Executive without significant Parliamentary or public involvement is not only undemocratic but also dangerous. It is being felt generally by jurists all over the world that the Parliament and the public must be involved more and more in the process of treaty-making because it is ultimately the people whose rights and entitlements are going to be affected by these treaties. Indeed, in New Zealand, a Bill called New Zealand International Legal Obligations Bill, 1997 was introduced which seeks to provide for parliamentary approval of treaties and requires the Ministry of Foreign Affairs and Trade further to inform the House on the progress of the treaty negotiations, particularly the multi-lateral treaties. But, then the question arises: is it possible for the Parliament, having regard to its manner of functioning, to look into and approve or ratify each of the treaties and agreements which the Executive has to enter into in the course of its international dealings. To elaborate the core issue, the several questions that arise in this behalf are: (1) Which treaties are deemed to be sufficiently important to be referred to the Parliament? (2) Who is to determine the importance of a particular treaty for being referred to the Parliament? (3) At what stage should the Parliament come into the picture – whether before entering into the treaty or after it is signed but before it is ratified or only when a legislation is required to be made to give effect to the treaty? (4) What form should the reference to Parliament be – should it be subjected to a positive resolution of approval or should it be provided that the treaty be laid before the House for a particular period, on the expiry of which the Parliament must be deemed to have approved it by default and so on? Some jurists have suggested a middle ground which seeks to balance the power of Executive to freely make and execute an international agreement with other nation States and the requirement of an increasing Parliamentary involvement. An Australian Jurist, Naylor says:

> "The object of the reform process should be to ensure that the Parliament is able to participate in the process in a way that ensures that the commonwealth (Executive government) is not unduly hampered in its ability to participate in foreign affairs and meet its international obligations."

22. In this connection, we must take note of a practical problem – what I have referred to just now as the manner of functioning of Parliament – that the Members of Parliament are exceedingly busy – in any event, busy with matters of momentary or local concern and that it is extremely difficult to persuade them to read and absorb, let alone evaluate, the contents of all the treaties with which our country may be concerned. Do we not know that even such extremely important matters as the budget proposals are very often approved by applying the guillotine because most of the time of Parliament is consumed by less important and sometimes topics of no relevance to Parliament – apart from frequent shut-downs.

23. Before proceeding to examine the issue further, it would be appropriate to notice the practice obtaining under several country-jurisdictions in the world.

(ii) AUSTRALIA

24. It would be appropriate to begin with Australia since it is not only a common law country but also a federation. The Australian Constitution Act, 1900 provides for distribution of powers between the Federal Government and the States. Under Section 61 of the Constitution, the power to enter into treaties is an Executive power. Even so, the Prime Minister of Australia announced in the Parliament in the year 1961 that henceforward the Government will lay on the table of both Houses texts of the treaties signed for Australia, whether or not ratification is required, as well the texts of those treaties to which the Government is contemplating accession. It was stated that the Government would not, as a general rule, proceed to ratify or accede to a treaty until it has been laid on the table of both Houses for at least 12 sitting days. Be that as it may, a practice has developed in that country whereunder Australia would not ratify a treaty or accept an obligation under the treaty until appropriate domestic legislation is in place in respect of treaties where legislation is necessary to give effect to the treaty obligations. Several proposals have been made by groups of parliamentarians to provide for greater overview by Parliament of the treaty-making power and also to identify and consult the groups which may be affected by the

treaty. All of them are strongly critical of the lack of transparency in the treaty-making process. One of the NGOs in that country, namely, National Farmers Federation has suggested that not only the treaties should be laid on the table of the House before they are finalized but the text of the treaty should be accompanied by a statement clearly setting out the important treaty obligations being undertaken by the country thereunder, what effect the treaty will have on the Australian national interests including economic, social and environmental and the extent of consultation already held by affected groups and so on – impact assessment statement, if one can call it, for short.

25. In May, 1996, the Foreign Minister made a statement to the House of Representatives outlining a new treaty-making process. According to this, the treaties will be tabled at least for 15 sitting days, after signature but before they are ratified, to allow for parliamentary scrutiny. This arrangement was to apply to both bilateral and multi-lateral treaties and to their amendments. Where however urgent action has to be taken, a special procedure was devised under which the Agreements will be tabled in the House as soon as possible with an explanation of reasons for urgent action. Further, the States will be consulted before entering into treaties and any particular information about the treaties will be placed before the Premiers and Chief Ministers' Department. The Government has also agreed in principle to append a statement indicating the impact of the proposed treaty to the papers laid before the House. A joint Standing Committee on treaties was established comprising Members of both Houses and consisting of Federal and State Officers who shall meet twice every year and consider and report upon the treaties tabled before the House.

26. In the year 1997, a Bill was introduced in the Federal Legislature mainly with a view to partially affirm and partially supersede the decision of the Australian High Court in MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS V. TEOH (1995) 183 CLR 273. The said decision enunciated two propositions: (a) that under the Australian constitutional system, a treaty entered into by the Federal government does not become a part of domestic law and is not enforceable by courts until legislation is undertaken by competent legislature in that behalf and (b) a treaty or an international Convention/Covenant signed/ratified by the Federal government gives rise to a legitimate expectation at law that could form the basis for challenging an administrative decision. The Bill was intended to affirm (a) and to over-rule (b). It is not known whether it has been made into an Act.

(iii) FRANCE:

27. The power to conclude treaties is vested in the President of the Republic by virtue of Article 52 of the French Constitution. The President not only negotiates but also ratifies the treaties on his own. The role of the Parliament appears to be quite restricted. According to the said article, the Parliament comes into picture only in the case of certain types of treaties and that too after the terms of the treaty have been decided upon. Even then, the Parliament's power is only to approve or reject its ratification. The types of treaties contemplated in Article 52 include peace treaties, trade treaties, human rights treaties and treaties ceding, exchanging or adding territories. Article 55 of the French Constitution indeed provides that concluded treaties do not require implementing legislation in order to be enforceable. Once a treaty has come into/force, it overrides any conflicting domestic legislation even if such legislation happens to be passed subsequent to the ratification of the treaty.

(iv) UNITED STATES OF AMERICA:

28. Article II, Section 2 of the U.S. Constitution, which deals with the powers of the President, states, inter alia, that the President is empowered "by and with the Advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur …" The President initiates and conducts negotiations of the treaties and after signing them, places them before Senate for its "Advice and Consent". The two famous instances in which Senate refused to ratify or approve the treaty signed by the President are (a) the Treaty of Versailles concluded at the end of World War I and (b) Comprehensive Test Ban treaty on nuclear tests.. President Wilson, who was indeed the moving spirit behind the Versailles treaty, signed the treaty together with allied nations but when it was presented to the Senate,

it rejected the same – effectively withdrawing U.S.A. from European affairs until the developments in Germany under Hitler brought it back into it. Even the Comprehensive Test Ban on nuclear tests (CTBT) was the handiwork of the President Clinton and his predecessors. In view of this constitutional position, a practice has developed in that country according to which, the Senators i.e. important persons among them, are associated with treaty making from the very beginning so that it may be easier for the President to get the treaty ratified later by the Senate.

29. A distinction is made in the U.S.A. between treaties and agreements. [It is interesting to note that the Vienna Convention on the Law of Treaties applies only to treaties and not to International Agreements (Article 2)]. So far as the treaties are concerned, they are required by the Constitution to be submitted to Senate for approval/ratification. But, so far as the agreements and particularly, those that are known as Executive agreements, are concerned, they are entered into and signed by the President in exercise of his Executive power. Since such agreements are not considered treaties. The type of agreements so contemplated are those relating to foreign relations and military matters which do not affect the rights and obligations of the citizens. In so far as the trade agreements are concerned, a different procedure is evolved. Since the Congress has the constitutional authority to regulate commerce with foreign nations under Article 1 of the Constitution, such treaties are subject to ratification by both Houses but only by a simple majority.

30. With respect to the effect of the treaties, Article VI Section 2 of the Constitution expressly provides that "All treaties made or which shall be made with the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the contrary notwithstanding." This is a fundamental departure from the British practice. The treaty not only overrides any federal law of the country but also overrides any provision in the Constitution of the State or the laws made by any State Congresses to the contrary.

31. Argentina and Mexico, it appears, follow the United States pattern.

(v) <u>SWITZERLAND:</u>

32. The legal position in Switzerland is distinct altogether. The Executive authority in Switzerland is exercised by Federal Council headed by the President and the Federal Chancellor. The Federal Council has seven members elected at a joint meeting of the two Houses of Parliament. The Federal Council negotiates and signs the treaties. Once it is negotiated and signed, it is ratified/finalized in four different ways :

(a) In some cases Parliament authorises the Federal Council in advance not only to sign a treaty but also to bring it into force.

(b) There are treaties which require approval of the Parliament before they become enforceable.

(c) A treaty may be subjected to an optional referendum as provided for in Article 89(3) of the Constitution. The categories of treaties subjected to this procedure are treaties which are effective for an indefinite period, without the possibility of denunciation.

(d) In some cases, the agreement has to be approved by a compulsory referendum as provided for in Article 89(5). The agreements subjected to this procedure are those which provide for adherence to supra-national organizations and organizations for collective security.

33. Thus there are four different processes for concluding a treaty in Switzerland depending upon the nature of treaty. The advantage of this system is that it allow for adequate scrutiny of those agreements which have significant implications for the nation and affect the rights of the citizens. Of course, in the case of urgent and sensitive treaties, an alternative method is provided where the

Parliament can only denounce the agreement if it does not agree with it, but there is no question of approval or ratification by the Parliament.

(vi) CANADA

34. The Canadian Constitution Act, 1982 (British North-American Act, 1867) does not contain a specific provision with reference to external affairs. However, following the British practice and particularly the decision of Privy Council in ATTORNEY GENERAL FOR CANADA Vs. ATTORNEY GENERAL FOR ONTARIO referred hereinbefore, the Federal Government exercises the exclusive power to enter into treaties on behalf of Canada.

35. The peculiar feature of the Canadian Constitution is that even the Provinces have the power to enter into international agreements, which, it is said, are not binding in international law. The Government normally seeks the approval of the Parliament before ratifying an important Treaty though there is no such constitutional obligation. Approval is given in the form of resolution by both Houses of Federal Legislature. The Constitution also requires that any legislation required to implement a treaty can be enacted only by the provinces and it is because of this requirement that a good amount of consultation with the provinces is undertaken before concluding a treaty.

(vii) UNITED KINGDOM:

36. The legal position in U.K. has been succinctly set out in the decision of the Privy Council aforementioned. Indeed the ratio of the said decision has been recently affirmed by the House of Lords in J. H. RAYNER LIMITED Vs. DEPT. OF TRADE AND INDUSTRY (1990 (2) A.C. 418) wherein has been observed :

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty."

37. So far as the effect of concluded treaties on the domestic law is concerned, the English law is at variance with the law in the United States. Generally accepted principle in English law is that in case of conflict between the British statutes and the provisions of a treaty, the former prevails. This is supposed to be a principle of constitutional law. Where, however, the Parliament undertakes legislation to give effect to an international convention, it has been held that the courts must presume that Parliament intended to fulfill the international obligations undertaken by the States. This Rule was qualified by the Court of Appeal in SALOMON Vs. COMMISSIONER OF CUSTOMS AND EXCISE (1967 (2) Q.B. 116) saying that such a course is permissible only where the terms of legislation are not clear and are capable of more than one meaning and further where there is cogent extrinsic evidence showing that the enactment was intended to fulfill obligations under a particular convention. As late as 1985, Lord Fraser of Tullyhelson said in CCSU v. Minister for Civil Service (1985 AC 374) "Conventions are not part of law in this country". Since 1974, the English courts have consistently taken the view that in so far as the provisions of International Conventions of Human Rights are concerned, they can be taken into account in the course of interpreting and applying British statutes. In several decisions, the courts have taken into account the treaty-based standards concerning Human Rights to resolve the issues of common law including legality of telephone tapping (MALONE Vs. METROPOLITAN POLICE COMMISSIONER – 1979 (1) Ch. 344), Contempt of Court (ATTORNEY GENERAL Vs. BBC –1981 A.C. 303 – House of Lords) and freedom of Association (CHEALL Vs. ASSOCIATION OF PROFESSIONAL EXECUTIVE, CLERICAL AND COMPUTER STAFF – 1983 (2) A.C. 180 – House of Lords).

(viii) OECD COUNTRIES

38. In a majority of 24 OECD countries, Parliamentary approval is required at least in case of certain categories of treaties, excluding of course the self-executing treaties.

Part III

(i) The effect of Treaties on Indian Domestic Law:

39. As would be evident from the decision of the Supreme Court in MAGANBHAI, India has been following, even after the advent of the Constitution, the British practice in the matter of treaty making. In other words, the law enunciated by the Privy Council in ATTORNEY GENREAL FOR CANADA is being followed here. According to these decisions, the treaties entered into by the Union of India do not become enforceable at the hands of our courts and they do not become part of our domestic law. This was so held by the Supreme Court in Jolly Verghese v. Bank of Cochin (1980 (2) SCC 360 = 1980 SC. 470 AIR). V.R. Krishna Iyer J speaking for the court held: *"India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not the latter. A.H.Robertson in "Human Rights - in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. From the national point of view the national rules alone count……with regard to interpretation, however, it is a principle generally recognized in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations."* The court quoted with approval the statement of law in Xavier v. Canara Bank Limited (1969 KLJ 927 at 931 and 933), a decision of the Kerala High Court, where it was held that until domestic legislation is undertaken to give effect to the letter or spirit of an international covenant or declaration, the covenant or declaration cannot be held to have the force of law and can not be enforced by the Courts in India.

40. At the same, we must take note of a recent decision of the Supreme Court, where a slightly different viewpoint was adopted. Reference is to the decision of the court in D.K Basu v. State of West Bengal (1997 (1) SCC 416). The Government of India had acceded to and ratified the International Convention on Civil and Political Rights, 1966. Article 9(5) of the said Convention declares that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". The Government of India had, however, made a reservation to this clause while ratifying the said Convention saying that Indian law does not recognize any such right. The Supreme Court however opined that "That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right of a citizen. (See with advantage Radul Sah v. State of Bihar; Sebastian M. Hongray v. Union of India; Bhim Singh v. State of J & K; Saheli, A Women's Resources Centre v. Commr. Of Police.) There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. (See Nilabatai Behera v. State)." This decision indicates not only a recognition of an International Covenant ratified by India but also a readiness to ignore the reservations appended by our country while ratifying the Convention, in the light of the law developed by the Supreme Court.

41. In PEOPLE'S UNION FOR CIVIL LIBERTAIES v. UNION OF INDIA (1997) 3 SCC 433), the question to what extent the conventions and covenants signed by the Government of India can be enforced through courts was specifically gone into. After noticing the decision of the Australian High Court in MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS v. TOEH (1995) 69 Aus LJ 423), the court observed: "The main criticism against reading such conventions and conventions into

national laws is one pointed out by Mason, C.J. himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making the law is that of Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Indeed, it appears that at the time of ratification of the said Covenant in 1979, the Government of India had made a specific reservation to the effect that the Indian legal system does not recognize a right to compensation for victims of unlawful arrest or detention. This reservation has, of course, been held to be of little relevance now in view of the decision in Nilabati Behera [See page 313, para 43 (SCC p.438, para 42) in D.K.Basu]. Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the Covenant with the sanctity of a law made by Parliament. As pointed out by this Court in S.R.Bommai v. Union of India, every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such."

42. The court also referred to the position of multi-lateral treaties in United States and England with reference to certain decisions of those countries. (It may be remembered that so far as United States of America is concerned the United States Constitution itself says that a treaty signed by the President and approved by the senate becomes enforceable and overrides any US law to the contrary). Even in Britain a slightly different view is taken so far as Human Rights conventions are concerned and also in view of that country's accession to Rome treaty.

43. The question was again considered by the Supreme Court in Visakha vs. State of Rajasthan (1997) 6 SCC 241). The court was concerned in that case with the protection to be afforded to working women from sexual harassment at workplace so as to make their fundamental rights meaningful. Relying upon Articles 14, 15, 19(1)(g) of the Constitution, the court observed that "any international convention not inconsistent with the fundamental rights and in harmony with this spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of the constitutional guarantee. This is implicit from Article 51© and the enabling power of Parliament to enact law for implementing international conventions and norms by virtue of article 253 read with entry 14 of the Union List in the Seventh Schedule to the Constitution. Article 73 is also relevant. It provides that the executive power of the Union shall extend to matters with respect to which Parliament has power to make laws. The executive power of the Union, is therefore, available till Parliament enacts legislation to explicitly provide the measures needed to curb the evil." The Court relied upon the Convention on Elimination of all Forms of Discrimination Against Women (which Convention has been ratified by the Government of India on 25.06.1993 though with certain reservations) and upon the Beijing Statement of Principles of Independence of the Judiciary in the Law Asia Region.

44. With a view to obviate any controversy or ambiguity on this aspect, it may be necessary to amend Article 253. The existing article may be numbered as clause (1) and the following "clause (2)" may be inserted therein:-

> "(2) A treaty, agreement or convention concluded by the Government of India in exercise of the executive power vested in it by Article 73(1) of this Constitution read with clause (1) of this article, shall be treated or construed as an instrument having the force of law within the territory of India and no rights or entitlement shall be founded upon such treaty, agreement or convention."

(ii) Absence of consultation with Parliament in the matter of treaty-making – the Indian experience

45. Taking advantage of the fact that Parliament has chosen not to make any law regulating the treaty-making power, the Union Government has been, taking advantage of Article 73 of the Constitution,

freely entering into treaties on its own without reference to the Parliament. Only where legislation is required to give effect to the terms of a treaty or a convention or a covenant has the Central Government been approaching the Parliament to make laws in those terms. By way of example, it would be instructive to notice what happened in the case of TRIPs agreement. The draft Agreement (on TRIPs) – which according to the HDR 1999, published by UNDP, was being pushed mainly by the multi-national drug companies – ran counter to almost each and every major premise of the "Background" paper submitted by India to the Negotiating Committee on July 27, 1989. India was evidently rattled by the draft Agreement on TRIPs produced by the Conference. The Government probably thought it would be appropriate to bring the matter to the notice of Parliament. Accordingly, the Standing Committee of Parliament attached to the Commerce Ministry consisting of forty Members of Parliament drawn from all political parties, considered the draft Agreement and submitted a Report on November 13, 1993. The Standing Committee opposed all the major stipulations and terms contained in the draft agreement. It opined that product patent system should not be imposed on India since it would result in steep increase in prices of medicines. It said that it should be left to the Indian state to determine whether it will go in for product patent or not. The Parliamentary Committee also opposed the 20-year period for the patents and the provision of the draft agreement which entitled the patent holder not to manufacture drugs and medicines within India while at the same time enjoying the benefits of patent in India. It also apposed the onerous conditions attached for permitting transition period to countries like India (which were not only developing countries but also did not recognize product patent till then). What is relevant to mention however is that the Government of India signed the TRIPs agreement in 1994, practically in the same shape as the draft agreement, without again approaching the Parliamentary Committee or the Parliament. The question that arises in such a situation is what was the relevance of consulting the Standing Committee of Parliament and then signing the agreement in total disregard of the Report and recommendations of the Parliamentary Committee. It is obvious that had there been a law regulating the treaty-making power of the Government and if such law had provided for either prior approval, ratification, consideration or discussion of the treaty before it comes into force, such a thing could not have happened. It needs to be emphasized that TRIPs agreement is not the only agreement signed by the Government of India in the course of Final Round of Uruguay negotiations. We have signed several agreements concerning trade, services, agriculture and so on - all of which seriously impinge upon our economy, upon our agriculturists, businessmen and industrialists. The results of these agreements are already becoming evident to us. Cheap agricultural, industrial and engineering goods from South-east Asia and China are flooding our markets driving out local producers. We do not know what is going to happen after 1.4.2001 when the existing quota and other restrictions will disappear, leaving the field free for free trade in goods, services, agricultural products and what not. It is a matter of common knowledge that neither the Parliament nor the people of this country were taken into confidence before signing these agreements having such serious repercussions upon the life and the lives of the citizens of this country. It therefore becomes essential to think of subjecting the treaty-making power of the Central Government to appropriate checks and controls, as is sought to be done in several countries all over the world.

(iii) Attempts at amending the Constitution to provide for Parliamentary scrutiny of the treaty-making power of the Union Executive:

(a) On 5th March, 1993, Shri George Fernandes, Member of Parliament, Lok Sabha gave notice of intention to introduce the Constitution (Amendment) Bill, 1993 for amending article 253 to provide that treaties and conventions be ratified by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States.

The Bill was not listed for consideration during the life of that Lok Sabha.

(b) Shri Satyaprakash Malviya, Member, Rajya Sabha tabled a question (No.6856) enquiring whether the Government proposes to introduce any legislation to amend the Constitution to provide for parliamentary approval of international treaties.

The question was answered on 12.05.1994 in the negative.

(c) In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution (Amendment) Bill, 1992 to amend Article 77 of the Constitution of India providing that "every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament".

[On 17th July, 1994,Shri Chitta Basu, Member of Parliament, Lok Sabha gave notice of his intention to introduce a Constitution (Amendment) Bill, 1994 on the same lines as suggested by Shri M.A. Baby. This Bill, however, had not been taken up for consideration during the life of that Lok Sabha.]

46. The Private Member's Bill to amend the Constitution introduced by Shri M.A. Baby, M.P. in February 1992 came up for discussion in the Rajya Sabha only in March, 1997. Shri Baby spoke passionately in support of the said Bill pointing out in particular the adverse consequences flowing from the several WTO Agreements signed and ratified by the Government in 1994 [Uruguay Round of GATT Negotiations] without reference to the Parliament. Shri Pranab Mukherjee, M.P. spoke at length on the said Bill. He pointed out that there are two sides of the picture. He pointed out that where parliamentary approval is required, it has led to certain complications. He gave the example of the United State's Senate refusing to ratify the treaty of Versailles concluded at the end of the World War in spite of the fact that President Wilson had played a crucial role in bringing about the said treaty. The Senate yet rejected the treaty. He then referred to the two treaties signed between India and Nepal on harnessing water resources of Mahakali and other rivers and the other with Bangladesh on sharing of the Ganga waters. He submitted that had these agreements been submitted to Parliament for ratification/approval – particularly the treaty with Bengla Desh – it would have been extremely difficult to obtain such approval or ratification in the prevailing circumstances. At the same time, he agreed that his intention was not to say that the Parliament should be kept in dark or that the authority of the Parliament in this behalf should be denied. He pointed out that any GATT/WTO Agreements, signed and ratified by the Government of India, can be implemented only by Parliament by making a law in terms of the agreement as provided by Entry 14 of List I of the Seventh Schedule to the Constitution read with article 253. [He then pointed out the impracticality of bringing the borrowing power of the Centre also under the control of Parliament, with which aspect we are not concerned herein]. He pointed out further that the Parliament is not so constituted as to discuss the international treaties and agreements in an effective manner. He pointed out that even votes on account and budget demands involving thousands of crores of rupees are being passed without any discussion. In such a situation, he pointed out, entrusting the Parliament with the power to oversee any and every treaty and agreement and convention being entered into or signed by the Government of India would not be practicable and would also not lead to desirable consequences. He also pointed out that one of the reasons for the success of European Union and ASEAN as 'economic blocs' is that the decision makers of the constituent countries, i.e. their executive, is by and large free to take decisions in matters of common interest. Ultimately, he suggested that there should be informed debate and discussion on the issue and that one should not rush with such measures. He also pointed out that under our present system of Parliamentary Government, executive has to render continuous accountability to Parliament and that the Parliament can always question the acts and steps taken by the Government. He finally opined than more debate should go into the matter before effecting such an amendment.

47. It is also brought to our notice by certain experts in the field that the present method has worked well in India for the last 50 years except perhaps in the case of WTO treaties (agreements entered into in the course of Uruguay Round of GATT Negotiations). It is pointed out that as a matter of fact:

(1) The views of all concerned ministries are taken into consideration and different interests are identified and reconciled before the Cabinet is requested to approve a treaty. As part of this consideration, the administrative ministry is also required in consultation with and approval from the Department of Legal Affairs of the Ministry of Law to identify the need for any implementing legislation either by way of amendments to the existing law or by the enactment of a new legislation.

(2) Treaties of importance are first brought to the attention of the Parliament and decision of ratification is kept pending in the absence of a clear decision, approval by Parliament. The comprehensive Treaty on banning the Nuclear Tests (CTBT) is an example.

(3) Important treaties are placed before the Parliament. In some of the cases, discussion was also held and resolutions were passed approving such treaties. The Tashkent Declaration 1966, the Treaty of Peace, Friendship and Cooperation between India and USSR 1971 and the Shimla Agreement 1972 are the examples.

(4) Treaties ceding territory of India are subject to constitutional amendment.

48. Reliance is based upon the following statement of Shri K. Narayan Rao contained in his article "Parliamentary Approval of Treaties in India" published in the Indian Year Book of International Affairs in 1960-61 at pages 22/38-39):

> "Generally, in no country do all treaties require approval by the legislature. The executive still maintains its hold on certain types of treaties such as, for instance, agreements relating to technical matters. But … the following matters at least require legislative approval. Treaties of cession, treaties requiring legislation for implementation, treaties involving financial burdens on the State, treaties of alliance and treaties entailing far-reaching political consequences"

49. The speech of Shri Pranab Mukherjee in Rajya Sabha and the opinion of jurists set out hereinabove bring out the opposing view to the one suggested by us hereinabove. We are, however, not satisfied that the circumstances pointed out by Shri Mukherjee and the experts, induce us to revise our views expressed here-in-before. We have already taken note of the fact that the parliament, as it is now constituted, is not in a position to consider debate or take a decision on each and every treaty, agreement and convention proposed to be entered into or signed by the Government of India. We have ourselves recognized this fact. This fact has also been taken note of in other countries as well which too has been pointed out here-in-before at the appropriate place. We have indeed suggested for a small parliamentary committee, which will examine and determine which treaties/agreements/conventions should go before Parliament for fuller consideration and which need not go for such consideration. The latter category of treaties can be entered into by the government of its own. In fact, it may also be possible to say that broadly speaking, treaties of extradition, treaties establishing diplomatic relations, to give an illustration, can be kept out of the purview of the proposed parliamentary committee as well. But it is not possible to lay down any such general categorization. The matter is better left to the parliamentary committee as suggested by us. We must also mention that the difficulty pointed out by Shri Pranab Mukherjee in case certain treaties are referred to Parliament for approval, cannot be made the basis for denying the parliamentary scrutiny of such treaties, as pointed out by the learned Member himself. Even if such treaties are concluded by the Government without reference to the Parliament, the Parliament is entitled to discuss those treaties and reject them if they so choose. We must also point out the very few examples given by experts where certain treaties were referred to Parliament before ratification are more political in nature, which have attracted national and international attention and do not establish a practice of the executive obtaining parliamentary approval. Indeed it is conceded by the said experts that WTO treaties signed in 1994 without obtaining Parliamentary approval [indeed in case of one agreement TRIPS contrary to the recommendations of the parliamentary committee attached to the Ministry of Commerce] have very grave impact upon the nation's economy, namely, its agriculture, its industry and its business – which are already being felt by the people of this country as mentioned here-in-before.

(iv) Role of Judiciary in Treaty-making:

50. Judiciary has no specific role in treaty-making as such but if and when a question arises whether a treaty concluded by the Union violates any of the Constitutional provisions, judiciary come into the picture. It needs no emphasis that whether it is the Union Executive or the Parliament, they cannot enter into any treaty or take any action towards its implementation which transgresses any of the constitutional limitations. I have already recorded my views on the judgment of the Bombay High Court in P.B. Samant. I am sure that if and when any such question is considered by the Supreme Court, it will be considered in greater depth.

Part IV

Recommendations:

51. The first thing that should be done by Parliament is to make a law on the subject of "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries" as contemplated by Entry 14 of List 1 of the seventh Schedule to the constitution. The law should regulate the 'treaty-making power' (which expression shall, for the purpose of this discussion, include the power to enter into agreements and the implementation of treaties, agreements and conventions). There is an urgent and real need to democratize the process of treaty making. Under our constitutional system, it is not the prerogative (if we can use that expression) of the Executive. It is a matter within the competence of Parliament and it should exercise that power in the interest of the State and its citizens. In a democracy like ours, there is no room for non-accountability . The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of accountability should be introduced into the process. Besides accountability, the exercise of power must be open and transparent (except where secrecy is called for in national interest) – what was called by President Wilson of USA, "open covenants openly arrived at". We may have already suffered enough by entrusting that power exclusively to the Executive. They do not appear to have been vigilant in safeguarding our interests, at least in some instances. The said power can no doubt be given only to the Union Executive and none else but then the law must clearly delineate the exercise of the power. In particular, it must provide for clear and meaningful involvement of Parliament in treaty-making. As has been done in some countries, there must be constituted a committee of Parliament to whom every treaty/agreement/convention proposed to be signed and/or proposed to be ratified shall be referred. While placing the draft/signed treaty before such committee, a statement setting out the important features of the treaty/agreement, reasons for which such treaty/agreement is proposed to be entered into, the impact of the treaty/agreement upon our country and upon our citizens, should be clearly and fully set out. The committee must decide within four weeks of such reference whether the treaty should be allowed to be signed by the Union Executive without referring the matter for consideration to Parliament or whether it should be referred to Parliament for consideration. It is obvious that such a decision shall have to be taken having regard to the nature of the particular treaty/agreement and its impact upon our country or on the rights of our citizens. The committee should not have too many members. About 10 to 15 would be adequate but they must be drawn from all political parties in Parliament. They must be elected by both the Houses separately, or jointly, as the case may be. The members once elected shall continue in the committee for the duration of the life of the House or the cessation of their membership, as the case may be. The committee would be a statutory committee clothed, of course, with all the powers of a Parliamentary Committee.

52. As a matter of fact, it would equally be desirable if the law made by the Parliament categories the treaties/agreements/conventions/covenants viz., (a) those that the executive can negotiate and conclude on its own and then place the same before both Houses of Parliament by way of information. In this

category may be included simple bilateral treaties and agreements which do not affect the economy or the rights of the citizens; (b) those treaties etc. which the executive can negotiate and sign but shall not ratify until they are approved by the Parliament. Here again, a sub-categorisation can be attempted: Some treaties may be made subject to approval by default (laying on the table of the House for a particular period) and others which must be made subject to a positive approval by way of a resolution; (c) important, multi-lateral treaties concerning trade, services, investment, etc. (e.g. recent Uruguay round of treaties/agreements signed in 1994 at Marrakesh), where the Parliament must be involved even at the stage of negotiation. Of course, where a treaty etc. calls for secrecy, or has to be concluded urgently, a special procedure may be provided, subject to subsequent Parliamentary approval consistent with the requirements of secrecy.

53. The law made by Parliament must also provide for consultation with affected group of persons, organizations and stake-holders, in general. This would go to democratize further the process of treaty making.

QUESTIONNAIRE
ON
TREATY-MAKING POWER UNDER OUR CONSTITUTION

1. (a) Do you agree with the proposition that entry 14 of List I of the Seventh Schedule to the Constitution read with Article 253 marks a departure from the Law obtaining in U.K. on the question of Executive's power to enter into treaties and agreements with foreign powers and its power to sign/ratify international conventions and covenants;

   (b) Is the Union Executive entitled to enter into a treaty affecting the matters mentioned in the State List (List II) and Concurrent List (List III) in the Seventh Schedule to the Constitution without being empowered by Parliament by making a law as contemplated by the proviso to clause (1) of Article 73 and/or without the consent of the concerned State Legislatures?

   (c) Whether the present position should remain unchanged?

2. (a) Do you support the proposal that the Parliament should enact a law clearly laying down the powers of the Executive in the matter of treaty-making? (The expression "treaty-making" includes entering into agreements with foreign powers as well as ratifying international conventions and covenants.)

   (b) Or whether it is not advisable to enact any such law taking into consideration the possibility of problems being created by one or more States if their consent/concurrence is made necessary?

   (c) Whether the control of Parliament be restricted only to treaties/agreements affecting the national economy?

3. Do you support the proposal to amend Article 253 by inserting a new clause – clause (2) – providing expressly that no treaty etc. concluded by the Executive shall have any force of law within the territory of India and that no rights or entitlements can be founded upon such treaty by any one?

4. Do you agree with the 'Recommendations' at pages 42 to 44 of the Consultation Paper? If not, in what respects?

5. Should a consultation process be made obligatory with both governmental and non-governmental experts in the field, before the Government signs/ratifies a treaty/agreement?

6. Have you any suggestions to make on any of the issues dealt with in the Consultation Paper particularly with respect to the question how to make the treaty-making power subserve and promote the nation's interest? If so, please state them.

[#] Arthur Dunkel was the chairman of the Uruguay Round of GATTA negotiations until he was replaced in 1993-94.

[#] Indeed, the use of the word "also" in the said proviso indicates that the executive power of the Union may not be available even with respect to matters within the Concurrent List.