Chapter – VI
Praxis And Challenges In Negotiating Public Health In Trade Treaties: An Empirical Analysis

ABSTRACT
“Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times either of war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the State competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State. But the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals. The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.”

M Hidayatullah, Chief Justice of India in Maganbhai Ishwarbhai v. Union of India, AIR 1969 SC 783.
PRAXIS AND CHALLENGES IN NEGOTIATING AND IMPLEMENTING PUBLIC HEALTH IN TRADE TREATIES: AN EMPIRICAL ANALYSIS

The State shall endeavour to — (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and (d) encourage settlement of international disputes by arbitration.

Article 51

Subject to the provisions of this Constitution, the executive power of the Union shall extend— (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Article 73 (1)

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, association or other body.

Article 253
Parliament has exclusive power to make laws with respect to…

“Entering into treaties and agreements with foreign countries
and implementing of treaties, agreements and conventions
with foreign countries.”

Article 246 (1) read with Entry 14, List-I, Schedule VII

In this chapter the researcher envision bringing forth the constitutional mandate and basis for negotiation of the international trade and investment treaties and implementation of treaties already entered into by India. A plain reading of the existing constitutional provisions, reproduced above, suggest that the Constitution of India extends to the central executive the exclusive and unfettered right to negotiate and sign international treaties. The trade and investment treaties are no exceptions to this scheme under the Constitution. However, a closure scrutiny of the Constitutional provisions in light of the given federal structure points to the wide gap and constrains in the national policy space with respect to negotiation and implementation of international trade and investment treaties by India. An attempt has been made to assess the current treaty negotiation and implementation practice in India in different scenarios i.e. where there is a need for a domestic legislation to give effect to the treaty provisions, or where treaty obligations are self-executing, most bilateral trade and investment agreements virtually fall under this category, or where a treaty obligation is in conflict with Indian law, or where an Indian domestic (federal or state) law is in conflict with a treaty obligation.

In light of the practice adopted by other democracies (Australia, Canada, France, United Kingdom and United States of America), it is also envisioned to examine the extent and ambit of the executive power of the Government of
India to negotiate and sign treaties, especially on subjects given in the State or Concurrent List. It is also important to examine the role of parliament in treaty making and any need to develop a new law clearly stipulating a treaty making process to bring certainty and avoid any violation of the Constitutional policy space of the individuals that undermines the fundamental rights or the States that undermines the federal polity.

The chapter concludes with an empirical analysis of the understanding of the treaty making process in the country among various stakeholders, in particular, from a public health perspective. Stakeholder’s opinion about the impact of trade and investment treaties on public health obligations under national and international laws is presented. In particular, it is envisioned to gauge the feasibility of implementing stronger tobacco control measures, including plain packaging, in India and assess the opportunities and barriers for such a tobacco control policy in wake of the existing and proposed international trade and bilateral treaties entered into by the Country.

6.1. TREATY NEGOTIATION AND IMPLEMENTATION IN INDIA

In fact, the constitutional provision for “entering into treaties and agreements with foreign countries and implementing of treaties\(^1\), agreements and conventions with foreign countries”\(^2\) have been left to the legislative power of the Parliament of India. Parliament is competent to make a law laying down the manner and procedure according to which treaties and agreements shall be

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\(^1\) According to the Vienna Convention on the Law of Treaties (in force since 1980) ‘treaty’ means “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” However, only a minority of such agreements have “treaty” in their title. Other common names include “convention”, “protocol” and “agreement”.

\(^2\) Entry 14, List-I, Schedule VII of the Constitution of India.
entered into by the Executive as also the manner in which they shall be implemented. However, since the adoption of the Constitution, the Parliament has not enacted any legislation providing for treaty making process, including its negotiation and implementation, by the Government of India. Parliament has not chosen to make a law in that behalf, leaving the Executive totally free to exercise this power in an unfettered and in an unguided fashion. In the scheme of the Constitution, treaty making power is squarely vested under the purview of the Parliament and not in the Executive or the President as is the case with some of the other country’s constitution.

However, in absence of the a Parliamentary legislation the Executive branch of the Government, represented by the President of India\(^3\) exercise that power within the purview of Article 73(1)(a) that extends the executive power to all aspects on which the Parliament is authorized to make law including treaty making\(^4,5\). In exercise of its executive powers, the President makes rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.\(^6\) It is within the Rules framed under this provision of the Constitution,\(^7\) that the President has allocated the business of “Political treaties, agreements and conventions with foreign and Commonwealth countries” to the Ministry of External Affairs the Ministry is also responsible for “international declarations, treaties, conventions and conferences; references received from the United Nations and other specialised agencies and organisations thereof.” On the other hand the Ministry of Commerce and Industry is responsible for:

\(^3\) Article 77 (1) Constitution of India  
\(^4\) Entry 14, List-I, Schedule VII of the Constitution of India.  
\(^5\) Union of India v Azadi Bachao Andolan (2004) 10 SCC1  
\(^6\) Article 77(3) Constitution of India  
\(^7\) The Government of India (Allocation of Business) Rules, 1961
Chapter VI: Praxis And Challenges In Negotiating Public Health In Trade Treaties: An Empirical Analysis

“I. International Trade

1. International Trade and Commercial Policy including tariff and non-tariff barriers.

2. International Agencies connected with Trade Policy (e.g. UNCTAD, ESCAP, ECA, ECLA, EEC, EFTA, GATT/WTO, ITC and CFC).

3. International Commodity Agreements other than agreements relating to wheat, sugar, jute and cotton.

4. International Customs Tariff Bureau including residuary work relating to Tariff Commission.

II. Foreign Trade (Goods & Services)

1. All matters relating to foreign trade.

2. Import and Export Trade Policy and Control”

Several other Ministries and Departments of the Government of India look after specific areas of international relations including treaty making within their field. From the interview with key stakeholder in the Ministry of Commerce, it was clear that all international treaties entered into by India are vetted by the Legal and Treaties Division of the Ministry of External Affairs, Government of India. Therefore, the current practice at best can be said as an interim arrangement by the Government of India as it chooses to avoid any legislative guidance in its unfettered treaty making powers. However, this also means that all treaties at some point, unless they are already self-executing in nature, require a legislative support from the domestic laws. As a result, any treaty entered into

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8 Though by virtue of the Entry 14, List-I, Schedule VII of the Constitution of India, the Parliament can by making a law prohibit the Executive from entering into a particular treaty or a particular kind of treaties; or 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.
by the Government of India face different scenarios when it comes to its implementation.

Firstly, the treaties or treaty provisions those are in line with the domestic laws and do not require any further legislation to give effect to the treaty provisions: Such treaties are the most easily negotiated and entered into and may not have any difficulty for the executive branch of the government. Several provisions of the Environment related treaties, human rights treaties, treaty provisions illicit trade in arms and drugs etc. can come under this category. Even several provisions of the WHO-FCTC were already adopted and included under COTPA by the time the former was adopted and came in to force in 2005.

Secondly, the treaty implementation demands adoption of new legislation to ensure compliance with its requirements: Several treaty obligations under FCTC remain unfulfilled pending amendment of domestic laws relating to tobacco control. The scenario is similar for several other international human rights, environment protection and other treaties. Even trade and investment treaties, if not self-executing, require further legislative action or delegated legislation on tariffs, duties etc. on specific products under the treaty. The courts have taken a liberal view on the implementation of such treaties, if they do not expressly run into conflict with the domestic laws, directing their implementation akin to domestic laws. Judicial pronouncement in matters of sexual harassment at work place based on the treaty provisions under CEDAW, is a case in point. The Supreme Court in this matter referring to CEDAW, to which India is a party, held that international treaties signed by
India have the status of law in India, so long as these treaties are not inconsistent with Indian law.⁹

**Thirdly, when a treaty runs into conflict with the domestic legislation:** In such matters, the Treaty may not get implemented until it gets the required parliamentary nod or the state legislature’s nod that removes the difficulty by an enabling legislation to give effect to the treaty obligations. Amendment to the Indian patent and other intellectual property rights laws in wake of the treaty obligations under the WTO Agreements is an appropriate illustration.

**Finally, when a treaty obligation is in conflict with the justiciable rights of the individuals and the states’ rights under the federal structure of the Constitution of India:** In such cases, the matter again goes to the Parliament to be examined in accordance with the law making provisions of the Constitution and established principles relating to fundamental rights and the Centre-State relationships.

It is important to note that there is a difference between negotiation or signing of a treaty and the implementation of the obligations therein. According to Lord Atkin, "it is important to distinguish between the formation and the performance of the obligations constituted by a treaty. The rule is well established within the British Empire that the making of a treaty is an action of the executive and the legislature becomes involved only if the performance of the treaty requires legislative action." ¹⁰ The same position was elaborated by the Supreme Court of India in following terms:

"The Constitution of India makes no provision making legislation a condition of the entry into an international treaty in times of war or

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⁹ Vishaka v State of Rajasthan, 1997 (6) SCC 241
¹⁰ Attorney-General for Canada v Attorney-General for Ontario [1937] AC 326
peace. The Executive is qua the State competent to represent the State in all matters international and may incur obligations which in International Law are binding upon the State. There is a distinction between the formation and the performance of the obligations constituted by a treaty. Under the Constitution the obligations arising under the agreement or treaties are not by their own force binding upon Indian nationals or others. The power to legislate in respect of treaties lies with the Parliament and making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizens and others which are justiciable are not affected, no legislative measure is needed to, give effect to the agreement or treaty.\textsuperscript{11}

It may be noted that the need for the role of the parliament comes in when the international treaty signed by the central executive of India, operates to restrict the rights of citizens or others or modifies the laws of the State, and has to be transformed into domestic law and not otherwise.\textsuperscript{12} Earlier the Supreme Court was of the opinion that treaties signed by India are not part of the domestic legal regime unless they have been transformed into domestic law, i.e. no relief in absence of a national law.\textsuperscript{13} However, considering a case related to compensation for unlawful detention, the Court took note of the ICCPR Article

\textsuperscript{11} Maganbhai Ishwarbhai v. Union of India', AIR 1969 SC 783
\textsuperscript{13} Jolly George Verghese v Bank of Cochin, 1980 (2) SCC 360
9(5)²⁴ and held that, although there is no explicit constitutional provision, the government should nevertheless pay compensation for the unlawful detainment.²⁵ Further referring to Article 17 of the ICCPR²⁶ in a case involving breach of right to privacy, the Court held that it is an accepted proposition of law that rules of customary international law that are not contrary to the municipal law should be deemed to be incorporated in the domestic law.²⁷ Chief Justice Sikri, gave significance to international treaty obligation as early as in Keswanand’s case and held, “[I]t seems to me that, in view of Article 51 of the directive principles, this Court must interpret the language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India.”²⁸

Consistent with the Bangalore Principles of Judicial Conduct, the Supreme Court has thus developed a test that if an international treaty is not inconsistent with domestic legal provisions it should be enforced in the country. However, what happens if the treaty is in conflict with a national law or a law enacted by the state legislature? As per the judicial precedents, the domestic legal provision should prevail. However, if we look at the negotiation and performance of the trade and investment treaties a situation may arise where a treaty obligation, e.g. national treatment, may undermine the ability of the States to enact legislation that extends incentives to local industries and

²⁴ Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
²⁵ DK Basu v State of Bengal, 1997 (1) SCC 416 (at para 42)
²⁶ Article 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.
²⁷ People’s Union for Civil Liberties v Union of India, 1997 (3) SCC 433 (Para 23)
investments. The trouble with implementing TRIPS provisions in India is a testimony when treaty obligation is in conflict with national law. Government of India tried compliance with an Ordinance amending the Indian Patent Act 1970 and later when Parliament (Upper House) refused to pass the law, by facilitating mailbox system for receiving patent application through administrative order. However, the United States of America took India to the WTO DSB for failing to provide legal security for applications of potential patentees. The DSB agreed with the US.  

6.2. TREATY MAKING IN OTHER COUNTRIES

Post liberalization there has been increasing instances of engagement with the global community through regional, multilateral and bilateral treaties and agreements, in particular in the field of trade and investment. Given the sheer number of treaties and the areas these treaties cover from within a sector or across the sectors affecting the national economy and the polity, it is important to have an established, predictable and pre-defined process for treaty making. A process defined under law will avoid the uncertainty around questions of entry into a treaty negotiation and its implementation thereafter by the executive wing of the Government. Though the Constitution of India presents a robust framework for maintaining a healthy relationship with the global community and commands respect for international law, there is a felt need for a detailed guideline, for the Government of the day before taking a decision to initiate or enter into treaty negotiation. In this regard it may be relevant to see how some of the other democracies have streamlined treaty making processes in their countries. Below is a brief comparison of the treaty making process

adopted and practiced by other large democracies in the world. For the purposes of comparison the constitutional and legal provisions of the United States of America, the United Kingdom, Australia and Canada dealing with the extend of treaty making power and the process followed has been highlighted.

6.2.1. Treaty making in The United States of America

In the United States of America, the treaty-making power vests in the President with the advice and the consent of the Senate, and with the concurrence of two-thirds of the Senators. A treaty entered into / ratified by the USA is considered the Supreme Law and it is only when the terms of a treaty require that a law must be passed that it has to be so passed and not otherwise. In the United States of America a treaty concluded with a foreign State by the, President of the United States alone, without the consent of the Senate, is not, according to their Constitution, binding upon the Nation and the foreign power derives no rights under it…A treaty is the supreme law and a treaty may repeal a statute and vice versa. It is only when the terms of a treaty require that a law must be passed that it has to be so passed.20

The United States considers all treaties equivalent in status to Federal legislation and makes a distinction between the terms treaty and agreement. The word treaty is reserved for an agreement that is made by and with the Advice and Consent of the Senate (Article II, section 2, clause 2 of the Constitution) while an agreement not submitted to the Senate are known as executive agreements.21 With respect to treaty negotiations, the U.S. Department of State provides the Foreign Service with detailed instructions for

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20 Maganbhai Ishwarbhai Patel vs Union of India and Another. 1969 AIR 783 (Supreme Court of India, decided January 9, 1969).
the negotiation and conclusion of treaties and international agreements. These instructions are part of the Foreign Affairs Manual, Circular 175. Circular 175 summarizes the constitutional requirements for determining whether an international agreement should be considered a treaty or an agreement. It outlines the general procedures for negotiation, signature, publication, and registration of treaties and international agreements.22 Following is the broad process for the two distinct agreements.

6.2.1.1 Outline of the Treaty Making Process

- Secretary of State authorizes negotiation.
- U.S. representatives negotiate.
- Agree on terms, and upon authorization of Secretary of State, sign treaty.
- President submits treaty to Senate.
- Senate Foreign Relations Committee considers treaty and reports to Senate.
- Senate considers and approves by 2/3 majority.23 President proclaims entry into force.

6.2.1.2. Outline of the Agreement Making Process

- Secretary of State authorizes negotiation.
- U.S. representatives negotiate.
- Agree on terms, and upon authorization of Secretary of State, sign agreement.
- Agreement enters into force.

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23 The Senate does not ratify treaties—the Senate approves or rejects a resolution of ratification.
6.2.1.3. Fast Track “Trade Agreement Negotiating Authority”

The US adopts a fast-track mechanism of treaty negotiation and implementation for certain kinds of trade agreements. Such fast-track trade agreement negotiating authority provides for an expedited procedure for congressional consideration of international trade agreements. The President is authorized by law to enter into trade agreements to reduce U.S. tariff and non-tariff barriers with other countries. Such law provides that Congress will consider trade agreements within mandatory deadlines, with a limitation on debate, and without amendment, as long as the President meets prescribed requirements set out by law.\textsuperscript{24} In the past various congressional legislation and resolutions have been used to exercise this authority by the President of the USA.

Among the first such legislation was the Reciprocal Trade Agreements Act of 1934 established a policy under which Congress delegated authority to the President to negotiate reciprocal reductions of tariff barriers. The Trade Act of 1974 required more extensive consultations between Congress and the President during trade negotiations. After the expiry of the Act of 1974 such fast track negotiations took place through congressional and senate resolutions until both the House passed the Bipartisan Trade Promotion Authority Act of 2002 (BTPAA), contained in Title XXI of the Trade Act of 2002 which granted renewed trade negotiating authority to the President. Although the authority expired during the 110th Congress, implementing bills for trade agreements entered into before July 1, 2007, it remained eligible for expedited legislative

consideration.\textsuperscript{25} Notwithstanding the expiration of BTPAA authorities to negotiate public health in trade agreements, the Obama Administration is observing the relevant procedures of the Act of 2002 in the ongoing negotiations of the regional, Asia-Pacific trade agreement i.e. the Trans-Pacific Partnership Agreement (TPPA).\textsuperscript{26} Given this congressional oversight on all treaty making process in the US, efforts have been made to strengthen the fast-track procedure to require meaningful congressional inputs into treaty negotiations.\textsuperscript{27} This is evident with the practice among the US presidents to nominate members of the Senate in the negotiation of important treaties\textsuperscript{28,29}.

\textbf{6.2.2. Treaty making in United Kingdom}

All treaties entered into by the United Kingdom are subject to the procedures provided under the Constitutional Reform and Governance Act, 2010 (CRaG Act). The CRaG Act details the procedures for the ratification of treaties and puts parliamentary scrutiny of treaties on a statutory footing. Under the Act all treaties (except those mentioned under Section 22 and 23 of the Act) which are

\textsuperscript{25} The procedures, referred to in the Bipartisan Trade Promotion Authority Act (BTPAA) as "trade authorities procedures," originally applied to bills for agreements entered into before July 1, 2005, but could be extended to bills for agreements entered into before July 1, 2007, if the President requested an extension and neither House of Congress adopted an extension disapproval resolution before July 1, 2005. P.L. 107-210, §2103(c), as amended, 19 U.S.C. §3803(c). No such resolution was voted upon. The President's authority to negotiate and enter into agreements addressing both tariffs and nontariff barriers is set out at §2103(b) of the act, 19 U.S.C. §3803(b). The BTPAA required the President to notify Congress at least 90 days before he entered into an agreement.


\textsuperscript{28} During the War of 1812, Delaware senator James Bayard was a member of the delegation to negotiate the Treaty of Ghent. President William McKinley shrewdly named three U.S. senators to negotiate the treaty in 1898. Presidents Franklin Roosevelt and Harry Truman involved the chairman, Tom Connally, and the ranking Republican of the Senate Foreign Relations Committee, Arthur Vandenberg, in the creation of the United Nations.

\textsuperscript{29} Senate History. Treaties. Available at: \url{http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm} accessed on 21-06-2017.
to be entered to by the UK, cannot be ratified unless they have been laid by a
Minister of the Crown before parliament for 21 sitting days without either House
having resolved that it should not be ratified. Such treaty laid before the
Parliament is to be accompanied by an Explanatory Memorandum (EM) which
explains the provisions of the treaty and the reason for Her Majesty’s
Government seeking ratification of the treaty. It may be noted that when a
treaty Command Paper is laid before Parliament it is sent together with its
accompanying EM to the relevant department Select Committee in the House
of Commons. The treaty is ratified if the statutory period has expired without
the House of Commons having resolved, within such period, that the treaty
should not be ratified. Prior to the introduction of the CRaG Act, all treaties
were laid before Parliament under the Ponsonby Rule.

6.2.3. Treaty making in Australia

The power to enter into treaties is an executive power within Section 61 of the
Australian Constitution and accordingly, is the formal responsibility of the
Executive rather than the Parliament. Although the Australian Constitution does
not confer on the Parliament any formal role in treaty making, after the reforms

30 S. 20 of the Constitutional Reform and Governance Act 2010. Available at:
31 S. 24 ibid.
32 S. 20(5) ibid.
33 S. 20(4)(b) ibid.
34 This parliamentary practice began as an undertaking given by Arthur Ponsonby, the Under-
Secretary of State for Foreign Affairs in the first government of Ramsay Macdonald, in the
course of the Second Reading of the Treaty of Peace (Turkey) Bill on 1 April 1924. The
undertaking was in two parts: to lay every treaty, when signed, for a period of 21 sitting days
before ratification and publication in the Treaty Series; and to inform the House of all other
‘agreements, commitments and understandings which may in any way bind the nation to
specific action in certain circumstances’. The Ponsonby Rule was withdrawn during the
subsequent Baldwin government, but it was reinstated in 1929 and gradually hardened into a
constitutional practice, observed in principle by all governments, except in special cases, for
instance in an emergency.
of 1996, all treaties (except those the Government decided are urgent or sensitive) are tabled in both Houses of Parliament for at least 15 sitting days prior to binding treaty action being taken. Treaties are tabled in the Parliament with a National Interest Analysis which notes the reasons why Australia should become a party to the treaty. Where relevant, this includes a discussion of the foreseeable economic, environmental, social and cultural effects of the treaty action; the obligations imposed by the treaty; its direct financial costs to Australia; how the treaty will be implemented domestically; what consultation has occurred in relation to the treaty action and whether the treaty provides for withdrawal or denunciation. Treaties which affect business or restrict competition are also required to be tabled with a Regulation Impact Statement. The Joint Standing Committee on Treaties considers tabled treaties. The Committee can also consider any other question relating to a treaty or international instrument that is referred to it by either House of Parliament or a Minister.

If Commonwealth legislation is required to give effect to a treaty, the Government relies on the external affairs power in Section 51 (xxix) of the Constitution. However such legislative power is also governed by the constitutional scheme. The Commonwealth legislature may not enact a law to remove constitutional rights to give effect to a treaty obligation or impair the

35 The concerns relating to Parliament’s lack of a role in the treaty-making process in Australia led to a 1995 Senate inquiry into the treaty-making power. The report, ‘Trick or Treaty? Commonwealth Power to Make and Implement Treaties’, made wide ranging suggestions for reform to the way Australia became party to international treaties. The majority of the recommendations were adopted by the Commonwealth Government through the Council of Australian Governments (COAG) in June 1996.


existence of the state or their capacity to function as States in violation of the federal polity of the country. In matters of particular sensitivity and importance to the State and Territory Governments, the Principles and Procedures for Commonwealth-State-Territory Consultation on Treaties are followed.  

6.2.4. Treaty making in Canada

Unlike USA and following with the British tradition, Canada follows dualist model\(^3^9\) for entering into and implementing international treaties. The negotiation, signature and ratification of international treaties are controlled by the executive branch of the federal government, while Parliament is responsible for the implementation of such treaties at the federal level.

Canada’s Constitution does not explicitly delineate federal or provincial authority with respect to the conduct of international affairs. Before 1947 the British Crown had the authority to enter into international treaties and the Canadian Parliament implemented those treaties in Canada under section 132 of the Constitution Act, 1867. In 1926, Canada acquired power to establish foreign relations and to negotiate and conclude its own treaties with the enactment of the Statute of Westminster in 1931 that confirmed powers over external affairs originally outlined in the 1926 Balfour Declaration. This was later confirmed in the 1947 Letters Patent Constituting the Office of Governor General of Canada. As the federal government gained full powers over foreign affairs, section 132 of the Constitution Act, 1867 became obsolete. Thus the powers vested under the British Crown devolved to the Federal Cabinet of

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39 A treaty that has been signed and ratified by the executive still requires incorporation through domestic law to be enforceable at the national level. Turning international law into domestic law is not a self-executing process in Canada.
Canada. To enhance the parliamentary involvement in the ratification process, in January 2008, the federal government announced that all treaties between Canada and other states or entities would be tabled in the House of Commons before ratification.

Treaty implementation in Canada vests completely with the Parliament to incorporate the treaty provisions under the domestic law. This requirement flows from a domestic constitutional norm that maintains a fundamental separation of powers between the executive and the legislative branches of government. While the federal executive may ratify treaties for all of Canada and the Federal legislature may give effect to such treaties for all of Canada, if the subject matter of the treaties touches on any of the legislative powers listed in section 92 of the Constitution Act, provincial legislative approval is required to implement the treaty and give it effect domestically.

A look at the processes and procedures adopted by different countries suggest that a legislative or at the least a policy guideline for negotiation and implementation of international treaties goes a long way, not only to secure parliamentary support on the treaty but also avoiding any conflict with the constitutional rights and federal policy of the country.


41 The Clerk of the House of Commons distributes the full text of the agreement accompanied by a memorandum explaining the primary issues at stake, including primary obligations, national interests, federal–provincial/territorial considerations, implementation issues, a description of any intended reservations or declarations, and a description of consultations undertaken. The House of Commons is given 21 sitting days to consider the treaty before the executive takes action to bring the treaty into effect through ratification or other preliminary measures, such as introducing legislation. The House has the power to debate the treaty and to pass a motion recommending action, including ratification.

6.2.5. A comparative analysis and options for India

A quick comparison of treaty making power across various democracies suggests that similar to India, it is the executive branch of the Government that has the authority to enter into and negotiate international treaties. However, the manner in which such executive power is exercised is different in different countries. While in the US, as they follow the principle of monism, any treaty ratified becomes the de facto law of the land and therefore, before the executive could ratify the treaty it requires that the treaty is accepted and adopted by the senate and the congress. On the other hand in the United Kingdom treaty making process is governed by a legislative mandate under the Constitutional Reform and Governance Act, 2010. The process in UK, Australia and Canada is similar in the sense they require that any treaty is presented to the Parliament with a 2-3 weeks’ time to deliberate on and provide its inputs before it is ratified by the executive wing of the government.

With several matters related to national interest being subject matter of treaty making, Australia also requires that every treaty before it is presented to the Parliament is accompanied by a National Interest Analysis of that treaty. Where a particular treaty requires changes in the domestic laws and regulations to ensure treaty implementation then such treaty is presented with a Regulation Impact Statement to the Australian Parliament. Further, it is the Joint Standing Committee on Treaties of the Australian Parliament that considers all the tabled treaties. In absence of a clear legislative guideline on treaty making, taking a cue from the Australian practice, the Indian Parliament can also decide to scrutinize treaties by constituting a parliamentary standing committee on treaties. Given the extensive powers of the parliamentary committees under the
Indian system, to demand response form the executive on any matters, such
check and balance will protect the national interests in treaty making and
implementing.

Any treaty before it is ratified could be sent to such standing committee of the
parliament for scrutiny and if necessary the committee could seek clarifications
and demand for sustainable impact assessment. In case a treaty, prima facie
impacts health or in particular deal with demerit goods like tobacco and alcohol,
demand the committee could require health impact assessment of the treaty in
question. This process will also ensure that the parliamentary committee could
take inputs from all stakeholders and incorporate necessary changes in the
treaty. This will help in taking forward an integrated approach to treaty making
in the country, and avoid any later side effects with its implementation.

With respect to protect the essence of the federal structure in treaty making it is
important to take note of treaties that deal with subject matters in the List II of
the Seventh Schedule of the Constitution of India. Learning from the Canadian
experience, which in such matters requires approval of provincial legislature to
implement the treaty and give it effect domestically. This is significant to note
from a public health perspective as “public health” is a subject matter of
legislation for the states to make law in India. Therefore, any treaty having an
impact on public health should be implemented only with proper consultation
and consent of all the Indian states, or should be implemented in states that
have so consented. This was also recommended by the Sarkaria Commission
on Centre-state relationships for matters listed in the concurrent list.

Looking at the provisions of the Constitution Article 253, read with item 13, 14,
15 and 16 in the Union List of the Seventh Schedule, the Constitution of India
squarely places 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. A plain read of the Constitution makes it clear that the 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. The status quo must change. It is high time now that the Parliament should consider providing legislative guidance on the executive and legislative powers of treaty making, i.e. whether, all treaties should require an enabling legislation by the Parliament? Or only in case which involves subjects in the State List? Whether consultation with state should be mandatory on treaties which involve the latter? And provide for a standard and transparent process that should be followed for treaty negotiation and implementation. In absence of such guidance, it becomes difficult to

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44 Ibid.
implement certain international obligations, like the failure in adoption of the Lokayuktas Bill, 2011 dealing with prevention of corruption in public offices.\footnote{The central issue during the Parliamentary debate on this Bill was whether the Union could impose its own statute on a Lokayukta on the States, very many of which already had that institution established by the State laws. The Government of India claimed that its Bill was in implementation of the United Nations Convention Against Corruption, which the U.N. General Assembly adopted on October 31, 2003. India ratified it on May 12, 2011. Efforts in the past proposing/demanding legislative guidance on treaty making in India: 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”. d) 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.}

Keeping in mind the constitutional nuances of separation of powers and the Centre-state relationships the government of the day should approach the Parliament with a comprehensive legislation dealing with treaty making process in the country. The efforts made in the past to propose for clear legislative guideline under the Constitution to provide for such process should be reconsidered and adopted as may be appropriate.\footnote{Efforts in the past proposing/demanding legislative guidance on treaty making in India: 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”. d) 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.}

The current government however has been making efforts to engage the state governments through a different mechanism, which more as an administrative arrangement sans Parliamentary approval. The government has mooted the idea of a Centre-State investment agreement to be signed between the Centre and various State governments to ensure effective implementation of BITs or
bilateral investment treaties. According to the Finance Minister, “this will ensure fulfilment of the obligations of the State government under these treaties. States which opt to sign these Agreements will be seen as more attractive destinations by foreign investors.” And the States which chooses not to sign, this will be informed to India’s BIT partner. This may be a short term solution, like having an oversight by a Joint Parliamentary Committee but may not replace or fulfill the aspirations as any law made by the Parliament under item 14 of List I will achieve.

6.3. TRADE TREATIES AND PUBLIC HEALTH – THE INDIAN EXPERIENCE

Treaty negotiation and implementation in other countries is more structured with set procedures, processes and guidelines both legislative and administrative. Countries have delineated specific department wise responsibilities for negotiation of treaties, besides the requirement to present an explanatory memorandum\(^{47}\) or a national interest analysis\(^{48}\) to the Parliament minimize any subsequent challenge to the treaty making process or its implementation. In absence of a set procedure or guidelines it is difficult for India to say it safely if all the departments of the Government have the same understanding of the treaty obligations or for that matter the Parliament or the state legislature are apprised of the fine prints under a treaty impacting their legislative authority. The following section present an empirical analysis of the interviews with stakeholders engaged in implementation of public health laws, especially tobacco control laws and policies, in the country and how they find the treaty making process, in particular related to trade treaties and the lone

\(^{47}\) United Kingdom and Canada

\(^{48}\) Australia
public health treaty, in the country and the foreseen challenges in complying with such treaty obligations.

6.3.1. Quantitative Analysis

With intent to assess the practice followed in treaty making and the importance attributed to public health in such treaty making process interviews were conducted with key responsible departments within the Government. The key departments for the purpose i.e. Health and Family Welfare, Commerce and Industry and Revenue were significant to get the government’s perspective on the issue. Representatives from the civil society working on health and consumer rights including the biggest UN health organization i.e. the World Health Organization were approached to provide the health and consumer’s right perspective. Interviews were conducted with legal experts on health and trade and academia to get an independent and balanced opinion on harmonization of trade and health issues in treaty negotiation and its implementation. Finally, international experts were interviewed to get an international perspective to the issue at hand and their opinion on India’s progress towards introducing plain packaging of tobacco products. The overall distribution of stakeholders for the interviews is given below in table 6.1.

<table>
<thead>
<tr>
<th>Sl#</th>
<th>Category of Respondents</th>
<th># of Interviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Department of Health and Family Welfare</td>
<td>4</td>
</tr>
<tr>
<td>2</td>
<td>Department of Commerce &amp; Industry and Revenue</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>Civil society organisations</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>Legal experts from health, trade and international law</td>
<td>3</td>
</tr>
<tr>
<td>5</td>
<td>Academia</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td>International Experts</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td><strong>Total Interviews</strong></td>
<td><strong>19</strong></td>
</tr>
</tbody>
</table>
The inputs from the stakeholders were analyzed in two parts, firstly, making an assessment of their knowledge, awareness and perception about the treaty making process, impact of trade treaties on public health, harmonization of trade and health rights of individuals and states and on issues like health impact assessment and carving out of demerit products like tobacco from trade treaties. Secondly, making a qualitative assessment based on a framework developed to assess the feasibility and the socio-legal environment around introduction of plain packaging as a tobacco control measure in India.

### 6.3.1.1 Assessment of knowledge

Majority of the stakeholders (84%) interviewed had a fair knowledge of the ill effects of tobacco use and its burden on health, economy, environment and the society at large. Almost equal number of stakeholders (79%) had knowledge about international treaties, treaty obligations of a country and had a fair understanding of the public health impact of trade and investment treaties. The Table-6.2 below represents analysis by number of stakeholders while the Figure-6.1 represents the percentage.

<table>
<thead>
<tr>
<th></th>
<th>International treaties</th>
<th>Public health impact of treaties</th>
<th>Treaty obligations</th>
<th>Burden of tobacco use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>16</td>
</tr>
<tr>
<td>No</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Not sure</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>
6.3.1.2. Assessment of Awareness

Almost 80% of the respondents were aware of the provisions and obligations under the WHO-FCTC whereas only 68% stakeholders were aware of the plain packaging recommendations under Article 11 Guidelines of FCTC and the general treaty making process followed in the country. The Table-6.3 below represents analysis by number of stakeholders while the Figure-6.3 represents the percentage.

<table>
<thead>
<tr>
<th>Knowledge</th>
<th>% of Stakeholders Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burden of tobacco use</td>
<td>75</td>
</tr>
<tr>
<td>Treaty obligations</td>
<td>70</td>
</tr>
<tr>
<td>Public health impact of treaties</td>
<td>75</td>
</tr>
<tr>
<td>International treaties</td>
<td>70</td>
</tr>
</tbody>
</table>

Almost 80% of the respondents were aware of the provisions and obligations under the WHO-FCTC whereas only 68% stakeholders were aware of the plain packaging recommendations under Article 11 Guidelines of FCTC and the general treaty making process followed in the country. The Table-6.3 below represents analysis by number of stakeholders while the Figure-6.3 represents the percentage.

<table>
<thead>
<tr>
<th>Table-6.3: Awareness of stakeholders about</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty making process</td>
</tr>
<tr>
<td>------------------------</td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Not sure</td>
</tr>
</tbody>
</table>

Almost 80% of the respondents were aware of the provisions and obligations under the WHO-FCTC whereas only 68% stakeholders were aware of the plain packaging recommendations under Article 11 Guidelines of FCTC and the general treaty making process followed in the country. The Table-6.3 below represents analysis by number of stakeholders while the Figure-6.3 represents the percentage.
6.3.1.3. **Assessment of perception**

Most of the respondents believed that public health should be included as a non-negotiable standard in treaty negotiations and agreed on the constitutionality of such inclusion in the national treaty making process. Majority of the stakeholders were positive about following Australia’s decision on plain packaging dismissing any effect of the outcome of the WTO challenge to Australia’s decision. Most of the respondents also considered the need to harmonize and balance trade and health issues and considered that health should trump trade and for this purpose most of the stakeholders interviewed agreed with the proposition to carry out a health impact assessment of all trade and investment treaties. On the issue of carve out, majority of the stakeholders agreed that it will be in the larger public health interest to keep tobacco out of the ambit of the trade and investment treaties. The Table-6.4 below represents analysis by number of stakeholders while the Figure-6.3 represents the percentage analysis.

<table>
<thead>
<tr>
<th>Public health as non-negotiable standard</th>
<th>Constitutionality of public health</th>
<th>Follow Australia’s PP decision</th>
<th>Harmonise health and trade interests</th>
<th>Health impact assessment</th>
<th>Carve out</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>15</td>
<td>13</td>
<td>15</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

**Figure-6.3: Perception of Stakeholders**

<table>
<thead>
<tr>
<th>Opinion/Perception</th>
<th>Carve out</th>
<th>Health impact assessment</th>
<th>Harmonise health and trade interests</th>
<th>Follow Australia’s PP decision</th>
<th>Its constitutionality</th>
<th>Public health as non-negotiable standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Stakeholder Response</td>
<td>0</td>
<td>10</td>
<td>20</td>
<td>30</td>
<td>40</td>
<td>50</td>
</tr>
</tbody>
</table>

A Thesis Submitted by Amit Yadav for the Award of Ph.D. Degree in Law
6.3.1.4. Stakeholder analysis from the quantitative study

Given the diversity of the stakeholders interviewed for the purposes of this study including the views from practicing lawyers and academicians, the results reflect actual position relating to treaty making process and its understanding among the stakeholders in the country. Though majority of the respondents expressed that they were aware of the treaty making process in the country and what an international treaty obligation entails. Respondents were also aware that such international treaties may have public health impact and especially the burden due to tobacco use. Even at this highest level of awareness, 5% of the respondents were not aware of any of the aspects of international treaty or their obligations or impact of such treaties on public health while 21% were not sure about these issues. It is important therefore, that stakeholders’ training on treaty making process, international treaty obligations and the health impact of such treaties is conducted in the country.

Considering that FCTC is an international law having binding obligation on India, 20% respondents not being aware of the treaty will threaten its very implementation in the country. Further greater numbers of respondents i.e. 32% were not aware of the plain packaging recommendations under the FCTC. Similar numbers of respondents were also not aware of the treaty making process in the country. Several respondents were also cautious while recommending health impact assessment and suggested that it involves money and any treaty could impact several other aspects beyond health e.g. labour, security, environment, agriculture etc. As an alternative, some of them suggested that instead of health impact there should be a sustainable impact assessment and health impact should be part of it. With respect to following the
Australia’s decision of plain packaging, more than 15% did not have any opinion while another 15% suggested that India should not rush into taking such decision. The indecisiveness of the stakeholders was also observed in terms of adopting carve out as a policy option for keeping tobacco control measures out of the ambit of treaty obligations in particular the jurisdiction of ICDS. A detailed analysis in both health impact assessment and carve out proposition has been done below in the qualitative section along with the observations and comments received from the stakeholders.

While nearly 80% respondents perceived public health as non-negotiable standard in treaty negotiations, considered public health as a constitutional mandate while suggesting harmonization of trade and health interest in treaty negotiations, more than 20% of the respondents were not sure about these issues. These aspects were also further examined through qualitative probes and are presented below in the qualitative section.

6.3.2. Qualitative analysis

The recorded interviews were read and transcribed for developing a coding system to characterize content. The data was cleaned and transcripts of the interviews were verified against the audio-recordings to clarify the unclear sections where ever required. As part of the analysis, codes were applied to the narrative segments; similarly coded data were displayed in matrices; data was examined to discern the primary concepts and associations across interviews with stakeholders; finally the interpretation of the data was carried out in light of the aims of the study and the relevant literature.

As a first step, five transcripts were coded and applied codes were compared to develop a list of a priori codes based on the interview schedule. These codes
were then defined and grouped into categories which resulted in analytical framework comprising themes, codes and their descriptions. The analytical framework was used to code the remaining transcripts and indexing (See Table-6.5 below). The transcripts were coded in ATLAS.Ti (6.2.11). Any new codes emerging from all the remaining transcripts were added to the analysis framework. The results of the analysis are reported as, and under, the themes that emerged. Although findings are presented under distinct thematic categories for ease of interpretation and discussion, these are not very strict descriptions because participants often spoke about multiple themes simultaneously.

<table>
<thead>
<tr>
<th>Sl#</th>
<th>Theme</th>
<th>Codes</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Compliance</td>
<td>T&amp;IT_para_comp</td>
<td>Compliance to basic Parameters - constitutional, human rights, health, legal social, environmental</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Impact_Economical</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Impact_Environment</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>Non-negotiable parameters</td>
<td>T&amp;IT_para</td>
<td>Non-negotiable parameters while considering a trade and investment treaty</td>
</tr>
<tr>
<td>3</td>
<td>Legal instruments/obligations</td>
<td>Legal_inst</td>
<td>National and international legal instruments/obligations</td>
</tr>
<tr>
<td>4</td>
<td>Public health influence</td>
<td>T&amp;IT_PH</td>
<td>• Impact of trade and investment agreements on public health</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Public health concerns on trade and investment</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Effect of protecting public health on T &amp; I interest</td>
</tr>
<tr>
<td>5</td>
<td>Methods to resolve inconsistencies</td>
<td>Treat_Incons</td>
<td>Proposed options to resolve/ removed/ bargained/ harmonised inconsistency between two treaties</td>
</tr>
<tr>
<td>6</td>
<td>Response to WTO challenge</td>
<td>WTO_Aust</td>
<td>Perception on India’s response to WTO challenge to Australian decision</td>
</tr>
<tr>
<td>7</td>
<td>Effectiveness and feasibility of Health Impact Assessment</td>
<td>Need_HIA</td>
<td>Effectiveness and feasibility of Health Impact Assessment for resolving any apparent, expected or unforeseen conflicts between public health and trade interests</td>
</tr>
<tr>
<td>8</td>
<td>Tobacco in trade and investment agreements</td>
<td>T&amp;I_Tob</td>
<td>Opinion on keeping tobacco out of the purview of trade and investment agreements</td>
</tr>
</tbody>
</table>
6.3.2.1. Compliance with basic parameters

Majority of stakeholders reported that environment, health and the economy must be kept in mind while entering into a trade and investment treaty. Political parameters like sovereignty, bilateral relations with other countries were also mentioned as important parameters. Health was considered to be closely linked to economy, and it was opined that the earnings form tobacco should be weighed against the losses due to negative health impacts. Environment was also stressed while taking into account the paper used in packing cigarettes causing deforestation and other manufacturing processes such as curing and pre-curing by burning woods. Tobacco is also a water and land intensive crop which contributes to further environmental burden.

One participant mentioned that the provisions of Article 301 of the Constitution of India should be kept in mind, which mandates that the trade and commerce in the Country shall be free. He highlighted the significance of Article 38 of the Constitution “as a beacon in effecting the said treaties, which directs that the State shall, as far as possible, strive to minimize the inequalities in every aspect…there should be equal distribution of resources and equal opportunity,” not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. These parameters however, are not applied in real sense. Basic human rights, public health and poverty were found to be overlooked though considered important by majority of the respondents.

“Constitutional, Legal Social issues are basic parameters (as they cover remaining issues like human rights, health, environmental also) that must be complied with in every trade and investment
One participant noted that political and business interests are dominant at the time of negotiation of any treaty.

“Government departments should follow and comply with all constitutional and legal parameters when allowing FDI or entering into other trade and investment agreements. In a Treaty there should be feedback from related or concerned stakeholders/ministries as this will provide filters to clean adverse impacts.”

6.3.2.2. Non-negotiable parameters while considering a trade or investment treaty

Key informants opined that Health, insurance and consumer protection were all non-negotiable parameters while considering a trade or investment treaty.

“Consumer protection, environmental protection and health protection are non-negotiable.”

A realistic non-negotiable parameter for a trade and investment treaty mentioned was that a country should endorse and follow the basic minimum as provided in the domestic Constitution in addition to the international commitments. From a ministerial point of view, it was advised to contact the Legal and Treaties Division of Ministry of Foreign Affairs while the bilateral investment treaties are being framed afresh and the nodal department for this is the Ministry of External Affair.
Inter-ministerial delegation for multilateral treaties and trade agreements was stressed upon by one participant, the core principle of this being transparency in negotiation of the treaties.

“No treaty should violate international public health obligations like those under WHO-FCTC or national obligations under COTPA. All treaty must comply and not infringe any constitutional rights.”

However, it was also pointed that most of the times such negotiations take place in the shadow of domestic sovereignty and the seriousness of the state’s position at any given negotiation table. Strongly sovereign LMIC states (such as Brazil, India, China, Argentina, South Africa) have been known to put their foot down on their domestic interests even when they are negotiating with far stronger economies such as the US, Japan, EU etc.

6.3.2.3. Legal instruments and obligations

According to one of the respondent the key national and international legal instruments, within the framework of which, the treaty negotiations take place are the Vienna Convention, the Indian Constitution, and TRIPS obligations. However, it was noted, there is a tendency to seed more ground in the pursuit of attracting greater foreign investments in the country. The UAE-India bilateral investment treaty is one among such treaties.

Largely, the stakeholders considered that the international investment agreements and the regional trade agreements were all valid in their objective and implementation.

Public opinion and debates were thought to provide a platform and scope for such negotiations and were thought to constitute an important part of framing of any laws or legislations for negotiation and implementation of a treaty. One of
the respondents noted that Article 253\textsuperscript{49} of Constitution of India was to be taken into consideration in the treaty making process. Another respondent reported that:

“The obligation imposed by a human rights treaty such as the ICESCR, which recognizes the human right to health and food (Article 12), imposes broader and vaguer obligations. These obligations do not require a country to ensure that all citizens are healthy or to provide food to everybody, but they do require a country to move expeditiously towards guaranteeing these rights.”

Legal obligations related to regional security, constitutional rights and environmental interest were also cited to be taken into consideration while negotiating a trade and investment treaty. The WHO FCTC, TRIPS and other obligations under International Human Rights Conventions and Treaties were also deemed important to be followed in treaty negotiations and their implementation.

“Constitution of India, national economic policy, the national security policy (e.g. before ratifying the WHO FCTC Protocol on Prohibition of Illicit Trade in Tobacco Products) laws regulating and prohibiting to cash and benami (sham) transactions, laws protecting intellectual property rights (e.g. champagne enjoys protection in France, Indonesia protects Kretek through a cultural law and the protection extended to bidis in India) may be considered the broader legal framework for treaty negotiations.”

\textsuperscript{49} Article 253: “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, association or other body.”
6.3.2.4. Public health impact of trade and investment treaties

Almost all the stakeholders interviewed responded in the affirmative that trade and investment treaties have a bearing on the public health outcomes. The respondents stressed on the economy of taxation vs treatment, i.e. need for addressing the public health concerns over the economic benefits of trade and investment agreements. It was observed that health has a bearing in most of the trade and investment deliberations e.g. pharmaceuticals, asbestos, essential medicines list, avian influenza, meat ban etc. The major industries affected by such agreements are tobacco, alcohol, pharmaceutical and food industry. It is important to study in detail the health impact of any trade and investment agreement vis-à-vis these industries and their customers. Though FDI is banned in tobacco products in India but sugar and sweet beverages attract lots of foreign investments which is being further encouraged.\(^5\) One of the respondents explained this in terms of tobacco related impacts:

“The burden of tobacco use has to reduce, that would also save lot of money for the government…effective measures like pictorial health pictorial warnings should be considered to reduce the more money from being spend on awareness.”

One participant noted that investments in health and welfare, while being preconditions for sustainable and robust economic growth, tend to have a lower priority especially in less economically powerful countries. This is due to the fact that a long term view and perspective, which only governments can envision and enforce, is absent. In absence of the political will and a due

process that recognizes the significance of public health in trade and investment treaties, such investments get the short shrift in favour of economic restructuring episodes. Some stakeholders consider public health to be a non-issue in a trade negotiation; they concentrate on legalities, patents, trademark, intellectual property etc. Respondents agreed that a basic principle to follow was that overall benefits should outweigh the total risks that may be foreseen. This would imply that steps taken to protect public health will not always adversely affect trade and investment. Even if it does affect, no compromise on the public health aspect should be done, as in long term the cost of neglecting health could be immense.

To stress upon the bearing that trade and investment agreements play on public health, one of the respondent explained how a bad treaty agreement could end up promoting alcohol, tobacco or fatty foods. A health focus treaty could prevent such a burden. A country could dump unhealthy food in another country without the receiving country even realizing the adverse impacts of such dumped products e.g. export of turkey tail and mutton flaps by US to the countries in the Pacific like Samoa. Such ‘dumping’ of agricultural products not only results in high levels of cheap turkey tail and mutton flap imports leading to increased consumption of fatty and unhealthy diet but also undermine domestic agricultural production.51,52 In the context of significant agricultural subsidies in high income countries, local production of (often healthier) foods cannot

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compete with such cheaper imports.\(^5^3\) On the other hand advertisement of john players clothing range in India are across all media, whereas the same is branded as tobacco product outside including the neighboring countries. Such advertisements amount to cross border advertising of tobacco products. To deal with such eventualities, a country must have effective regulations and mechanisms to balance cost versus benefits through a panel of experts or a standing commission with membership from all ministries to look at all treaties.

6.3.2.5. Harmonizing inconsistencies between two treaties

One participant opined that inconsistency between two different treaties could be harmonized through constitutional process. Depending on state’s domestic legal capacities, these inconsistencies were found to be a matter for states to ensure obligations taken on are asymmetric both internationally and horizontally (between their various treaties). Another suggestion provided was to introduce a general clause with reference to treaties in general or entered into with a specific purpose. It was illustrated that most specialized treaty like WHO FCTC should take precedence over a general treaty like WTO Agreement. Another legal principle is that Later in time treaty (WHO FCTC) takes precedence over existing treaty (WTO Agreements). In line with the global UN treaties and state’s obligation under the constitution of India, it was observed that in case of an inconsistency “health trumps trade”. As Uruguay argued while defending its decision to introduce largest pictorial health warnings that it spends more on treating tobacco induced diseases with greater loss to the exchequer, so it does not make an economic sense to promote

tobacco and thus public health should trump. Moreover, TRIPS flexibility provides for trade to bend to protect public health.

Another suggestion was to have a provision in re-interpretation, or an annex on all treaties with potential inconsistencies with respect to trade and health. The safeguard clause of health in agreements/treaties should be worded very carefully to ensure no scope of misinterpreting such clauses for satisfying any other commercial interests. It was reported that, for harmonization of any inconsistency between treaties in India, stakeholder consultation between Ministries are arranged which is largely an informal process carried out by the executive branch of the Government as no formal approval from Parliament is stipulated under the Constitution.

It was noted by a respondent that United Nations recently included tobacco control (implementation of WHO FCTC as the key to reduce the global NCD burden) also as part of sustainable development goals 2030. This suggests that there is a positive political response globally on tobacco control thus there is no need to compromise with the strong lobby of tobacco industry. One of the respondent suggested that, “Taking steps to protect public health is a state responsibility, and also to some extent an international obligation, but as the great Israeli diplomat Abba Eban said, “Men and nations behave wisely once they have exhausted all the other alternatives”.

With respect to treaty implementation, one of the respondents observed that, “if we take human rights treaty and WTO treaty, WTO treaty will have a greater force as it has a structured mechanism for ensuring compliance while various human rights issues arising are not addressed by human rights treaty properly.
Such inconsistency between two different treaties can be harmonized through domestic constitutional process.”

Majority of the respondents stressed on controlling and limiting the influence of corporates and political benefactors, and redrafting the abused or unbalanced Global Treaties. Negotiations were thought by most participants to be a strong element in resolving inconsistencies. One of the respondents suggested a process that could be followed to resolve inconsistencies and includes: first identifying the inconsistencies, followed by assessing them to rule out negative public health impact, a thorough review of all related previous treaties, conducted by an expert committee formed with members or officials involved with the earlier treaties negotiation.

An illustration of treaty negotiation and harmonization is evident in the draft text and the final treaty text under WHO FCTC Article 5.3 which relates to tobacco industry interference is reproduced below:

First text proposed at 2nd Session of the FCTC Intergovernmental Negotiations (INB): “The Parties shall undertake to adopt legislative, executive and administrative measures to regulate and to prohibit the export of tobacco products that do not conform to the exporting country’s own domestic standards.” By 4th Session a new text evolved on preventing industry interference, which read “The Parties shall adopt and ensure satisfactory implementation of means to protect public health policy from undue interference by tobacco companies, their subsidiaries, affiliated parties and other entities.”

What finally remained as the treaty text is “In setting and implementing their public health policies with respect to tobacco control, Parties should act in such
a way as to protect these policies from commercial and other vested interests of the tobacco industry.”

On the other hand for tobacco industry liability the initial texts were very strongly worded:

First text: “The tobacco industry should be held accountable for past, present and future public health harm caused by its products worldwide;”

Second text: “The tobacco industry should be held responsible for the harm its products cause to public health and the environment, with each Party determining the scope of such responsibility within its jurisdiction.”

However, what remained as treaty text was only the text agreed for the current Article 19 (1) on general liability and compensation i.e. “For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.”

Another issue that was discussed but not included in the treaty text was the discussion on tobacco trade. At the First Session the text under proposed General Guidelines (now Article 4) read, “Trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” This was refined by the Second INB to read, “Tobacco-control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.”

At the Fourth Session of INB, following four options were presented on the negotiating table but none could find place in the final treaty text of Article 4.

[Priority should be given to measures taken to protect public health when tobacco control measures contained in this
Convention and its protocols are examined for compatibility with other international agreements.]

or

[The Parties agree that tobacco control measures shall be transparent, non-discriminatory and implemented in accordance with their existing international obligations.]

or

[Tobacco control measures should not constitute a means of arbitrary or unjustifiable discrimination in international trade.]

or

[Tobacco control measures taken to protect human health should not be deemed as constituting a means of arbitrary or unjustifiable discrimination in international trade.]

It was suggested by the respondents, that it is important to weigh the cost benefit analysis of such treaty and the inconsistencies in question. Countries need to ensure check and balances and make it a point to get suggestion from health ministry while negotiating with trade people. Thus, any inconsistency between two treaties should be removed keeping in mind the wellbeing of all communities and stakeholders being affected and not merely for political and economic gains.

6.3.2.6. India’s take on the ongoing dispute at WTO against Australian decision to implement plain packaging

There was an overall positive response on the course India should take in the wake of WTO challenge to Australia’s decision to implement plain packaging of
tobacco products. Although, it was stated by many participants that what has worked in Australia may work somewhat differently in India.

“Deterrent, I do not think so. India protects the rights of its people.

As Ukraine suspended WTO challenge to Australia, India can also do that (introduce plain packaging) but needs to consider the interests of all stakeholders too.”

While it was opined that India should not be deterred by the WTO dispute over Australia’s decision, respondents also cautioned to avoid a situation that creates possibility of being sued. While key respondents felt that the decision is most likely to be in favour of Australia, there was a slight concern that a decision against Australia could be a problem for countries, which are considering plain packaging norms. Overall, all respondents stated that support should be provided to Australia as its decision to introduce plain packaging was in the interest of public health and if a country is concerned about improving public health it should not be deterred by the WTO challenge to Australian decision of plain packaging.

“Caution is appropriate; Australia has not jumped into it. They covered all aspects. They were prepared. India must not jump into it. However, it is late and (India) must not wait for a decision (from the DSU at WTO) on Australia’s case. We must work on our conflicts and review our safeguards to move in that direction.”

6.3.2.7. Health Impact Assessment of trade and investment treaties

All participants stressed the need to conduct Health Impact Assessment to help resolve any discrepancies and harmonize public health and trade interests. While the idea was endorsed by majority of the respondents, certain
complexities in the implementation were pointed out. The nature of this assessment, in terms of it being retrospective and projecting forward based on the parameters of the treaty has to be taken into consideration. A paucity of data, technical and scientific knowledge could limit the options for the country.

Many trade and investment treaty clauses (for example, on expropriation) are found to be vague and based on multiple triggers kicking in before a clause becomes operational - this could increase the complexity of making a health impact assessment. Further, considering that the basic thrust of most trade and investment treaties is to fundamentally protect the interests of capital, a conflict between capital and public health would most likely see the upholding of the interests of capital. In such a situation, political will and the need for political classes to increase economic strength and capacities may become a wild card, and public health could fade into the background.

Therefore, as pointed out by a respondent,

“A policy has to be formulated and adopted in this behalf by the Government. This means that both the public health and the investments and trade interests are important for the growth of the Country. However, there cannot be any compromise on one in order to promote the other. Therefore, a golden midpoint has to be reached by formulating a policy which would cover the procedure for assessment of health impact as well as impact on trade/investment.”

Respondents provided robust reasoning as to why a Public Health Impact Assessment should be made mandatory for all trade and investment treaties. A Health Impact Assessment would lead to incorporation of special provisions
within the treaties exclusively supporting public health initiatives and also
enable the treaties to support and strengthen the public health laws e.g.
tobacco control laws of any country. Additionally, it could help eliminate
loopholes and grey areas in the treaties that may directly or indirectly support
vested interests. A risk-benefit analysis of health and trade aspects of the treaty
could help in derailing such vested interests like that of the tobacco industry. As
one of the respondent observed:

“For most of the projects now a days environmental impact
assessment is an important aspect and same formula should be
applied to carry out health impact assessment of all trade and
investment treaties. It is not the question of feasibility but what the
nation values most. Whether it is well being of people or
commercial interest at the cost of health of the people. The health
impact assessments should become an integral process of
treaties and licensing of establishments for businesses. It is very
much feasible and can be done easily.”

Another respondent strongly supported the idea of carrying out an HIA and
suggested,

“Any bilateral and multilateral trade and investment agreements
should be conducted in consultation with and with participation of
all relevant stakeholders including labour unions, consumer
unions, environmental protection groups and health professionals.
Human and health rights impact assessments must necessarily
be conducted for all proposed and existing bilateral and
While stressing the need to maintain a balance between the impacts of health and trade and investment, it was also pointed out that health impact assessments are not yet perfect and require some more practice, experience and evidence. Furthermore, feasibility of implementation depends on political will and capacity. One of the respondents suggested that, "theoretically it is a good idea, but politically may not be tangible." Population impact assessments largely include all aspects like economic, health, environment etc. and HIA may not be a good tool for a multi-stakeholder buy-in and may end up being a weaker argument or tool for trade negotiations in light of diverse political and economic demands. Another respondent echoed the same and cautioned that, an HIA may be "a good idea and ideal thing to do but may not be feasible. It will require a panel of experts to review all treaties, which in turn will need a procedural infrastructure and institutionalization of the process."

6.3.2.8. Tobacco carve out\textsuperscript{54} under trade and investment treaties

Majority of the stakeholders opined that tobacco as a product should be kept separate from all trade and investment treaties. It was opined, "If tobacco products were excluded, countries would not be worried about their tobacco control rules being consistent with trade treaties. Governments would not be chilled by threats or trade challenges." This can be illustrated by the way Malaysia has excellently argued for a tobacco carve-out in the TPPA talks.

It was stated that excluding tobacco products from the purview of the trade and investment agreements could solve the problems posed by trade agreements

\textsuperscript{54} A carve-out is formulated as an exception and functions as a removal in the context of an agreement or a treaty.
in implementing effective tobacco control. However, it was cautioned that unless an economically viable alternative to tobacco, both as a crop and source of livelihood, is made available to accommodate the farmers, workers and others engaged in tobacco for their livelihood, this proposal may face even greater opposition.

The idea to keep tobacco out of trade and investment agreements was thought to be sensible as tobacco is not a good which should be freely traded in a manner that would improve standard of living or contribute to progress (unlike other goods). To ensure increased feasibility of this measure, licensing should be effectively enforced. This may be achieved by ratifying and implementing the WHO FCTC Protocol on Prohibition of Illicit Trade in Tobacco Products. A need to work on demand side measures as stipulated under the FCTC was also stressed by the respondents, as a reduction in demand would lead to the opportune moment to prevent inter country trade in tobacco.

The practice has been that countries prepare a negative list certain products are included in this list. Several BITs have tobacco in their negative list. However, carving out may result in countries and interested parties raising questions that when such products are being allowed within the domestic boundaries, why should they be kept out of international trade and argue that such a step will encourage a parallel illicit trade system and smuggling of imported brands. With respect to other products with health concerns, people have divided opinion e.g. alcohol, electronic cigarettes, fatty foods etc. In such cases carving out becomes a difficult proposition. One of the respondents emphasized on the point that there should be a stronger national regime in place. International business tactics cannot be challenged without having
stricter domestic laws. According to him, “The real battle is the demand side battle and to curb demand for such products, efforts should be made to reduce the demand which shall reduce the supply as well.”

6.3.2.9. Stakeholder analysis from the qualitative study

The stakeholders largely understand and gave importance to public health concerns arising out of any trade and investment treaty. While describing the basic parameters in treaty negotiations stakeholders observed that health, environment, economy, security and sovereignty must remain as the key aspects on the table besides adherence to the constitutional framework of rights and duties of the individual and the state. It may be noted that this would include protection extended under the Constitution for fundamental rights of the citizen, including the right to health. As another top priority at the negotiation should be the protection of the federal scheme by providing sufficient avenue for consultation with the states to avoid any trespass by the Centre relating to matters in the state list and ensure consistent, harmonised and uniform regulatory framework related to matters in the concurrent list. Ensuring compliance with the constitutional mechanism was considered to be a non-negotiable issue in any treaty negotiation including trade and investment treaties. Any treaty, directly or indirectly, infringing upon the constitutional structure per se will require a constitutional amendment for its implementation, which is the prerogative of the Parliament and not the executive authority which negotiates the treaty.

Another non-negotiable parameter, along with the constitutional mandates, is the judicial pronouncements and interpretations on key constitutional issues. Promotion and protection of public health and ensuring right to health for the
citizens of India falls under this category. Any trade and investment treaty must being negotiated must take into account the basic legislative, judicial and constitutional policy framework of the country including those related to protection and promotion of public health. It is in this respect that a legislative guideline for treaty making and ensuring a sustainable impact assessment becomes important. The Government of the day could also seek inputs and guidance from through a Joint Parliamentary Committee exclusively constituted for this purpose.

The international treaty negotiations take place under the international legal framework of the Vienna Convention on the law of treaties,\(^{55}\) and must be followed in both negotiation and implementation of such treaties. It may further be noted that the Vienna Convention on the law of treaties provides that a treaty entered later in point of time is applicable and also that a treaty having a special nature is applicable over a treaty having general applicability. This is important from the point of view that FCTC is a treaty entered into later in point of time than WTO agreements and also deals with a specific issue i.e. tobacco control. Though WTO is a special treaty relating to trade, FCTC is the last word when it comes to tobacco control and countries implementing a public health measure to prevent tobacco use should do so in line with the recommendations of FCTC and by invoking the health exception under WTO agreements. It is also important that international legal framework should also be kept in mind while doing a treaty negotiation, as for all practical purposes, international law is applicable as domestic law *mutatis mutandis*, unless it runs contrary to or is inconsistent with a domestic legislation. With respect to protection of public

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health in international trade and investment agreements reliance on the international human rights treaties must be made as second to none.

Considering that health is a paramount asset not only for an individual but only healthy citizens can make a healthy nation, any treaty, if evident prima facie will affect public health must be negotiated with utmost care and keeping in mind the right to health of the citizens protected under the Constitution. It must also be considered that trade in demerit goods like tobacco, alcohol, fatty food etc. are antithesis of the right to health and wellbeing envisioned under the constitutional framework and the plethora of judicial pronouncements. Yielding to the trade and property rights, within a trade and investment treaty, in demerit goods or anything that is adverse to public health will directly serve and contribute towards the promotion of a trade which is profoundly adverse to the public interest.

However, as indicated by various respondents during their interaction with the researcher, there is a wide gap in term of what the national and international legal or domestic constitutional provisions mandate and what effectively decides the outcome of any specific treaty negotiation. Political and economic considerations besides, national security are the key drivers of the treaty making process with little or no say from those concerned with the health of the citizens in the same government.

Nevertheless, respondents suggested that governments should adopt a harmonious way of removing difficulties between trade and health aspects within a treaty environment. Keeping both international human rights treaty obligations and the constitutional mandates, it may be said that right to health as restricted as it may be interpreted should be given precedence over trade
rights. The Constitution of India gives former the status of fundamental right with little curbs, while the latter is a limited fundamental right for citizens with possibility of greater, even unrestricted, curbs. The arbitration tribunal's decision in favour of Uruguay – to implement larger graphic warnings and impose trade restrictions that allow selling of only one brand of cigarettes i.e. no variants of same brand – is an acknowledgment of the sovereign right to protect public health while regulating trade.

In the wake of decisions of the investor state dispute against Uruguay sustaining larger graphic warnings and Australian plain packaging, India, at this stage, is all set to take that leap of introducing plain packaging. With implementing larger 85% graphic health warnings since April 2016 the logical next step for India is to adopt plain packaging. However, several stakeholders suggested that, though India could introduce plain packaging, it should make sure that other measures supporting a plain packaging decision are in place including greater awareness among both tobacco users and tobacco sellers.

One of the important aspects before introducing plain packaging of tobacco products in India is regulating rather prohibiting sale of tobacco products in individual sticks, loose and un-packaged form.

One of the key suggestions from the stakeholders was to undertake a health impact assessment of all trade and investment treaties, except for a few suggesting an overall sustainable impact assessment and the health impact assessment only in cases where there is a direct and present threat to public health due a particular treaty. However, as discussed in the previous chapters, for a long term solution of ensuring consideration of right to health, environment and human rights perspectives in trade and investment treaties, a
comprehensive law should be passed by the Parliament. In the short term, this function could be discharged by a designated Joint Parliamentary Committee. The mandatory requirement of sustainable impact assessment or health impact assessment should be a legal mandate and not just a piecemeal executive decision.

To safeguard right to health, in particular, to protect people from the ill effects of tobacco and to prevent its promotion through opening up new markets, stakeholders suggested that carve out could be the best option forward. A tobacco carve out will prevent use of trade and investment treaties to protest and challenge stronger and effective domestic regulations on tobacco control. Though, the researcher feels that nothing in any existing trade and investment treaties prevents Government of India from taking a tobacco control measure in line with WHO-FCTC, even stronger tobacco control measures will still be protected under the constitutional right to health and its judicial guarantee time and again. Having full reliance to this stated legal position, it may be suggested that if a country or several countries party to a treaty negotiation could agree on a tobacco carve out, it will save the exorbitant wastage of time and resources that is triggered by the investor state dispute settlement process. It is contended, against the proposal of carve out, that once treaties start having a tobacco carve out, other public health aspects will also up in the race to be part of such carve out which may not be possible for all countries to agree upon. Another unintentional impact of such carve out could be countries will not give necessary consideration rather undermine other public health threats with tobacco being the only focus in such trade and investment agreements.
Therefore, a tobacco carve out, though a win-win situation for global tobacco control efforts, it must be taken into account by the countries during a treaty negotiation that, such carve out in no way undermines the applicability of other public health exceptions of WTO trade regime or under any national and international human rights and constitutional framework.

Chapter VII