Chapter – VII

Conclusions And Recommendations

ABSTRACT

“For a country with limited technical and economic resources, such as Uruguay, adhesion to the FCTC and involvement in the process of scientific and technical cooperation and reporting and exchange of information represented an important if not indispensable means for acquiring the scientific knowledge and market experience needed for proper implementation of its obligations under the FCTC... In the Tribunal’s view, in these circumstances there was no requirement for Uruguay to perform additional studies or to gather further evidence in support of the Challenged Measures. Such support was amply offered by the evidence-based FCTC provisions and guidelines adopted thereunder.”

July 8, 2016: ICSID Award in Phillip Morris v. Uruguay (ICSID Case No. ARB/10/7/Para 393 and 396)
7.1. EPILOGUE AND FINDINGS

The study was set out to explore the protection extended to public health under the international trade and investment regime while undertaking a closer look at the various international, multilateral and bilateral trade and investment agreements of India. The study examines public health as an essential part of ‘right to health’ enshrined as a priority not only within the Constitution of India but within both the international trade law and the public health law, exemplified by the adoption and implementation of the maiden public health and one of the highly embraced treaty within the UN i.e. WHO FCTC. The study, through doctrinal and non-doctrinal approaches, sought to know the extent to which the treaty making process in India is concerned about protection of public health, at least as envisaged under the Constitution of India. An extensive literature review on trade, investment and public health, including the judicial observations from the Indian and other country’s courts and international arbitration tribunals and WTO tribunals, specifically in the context of tobacco control, has been presented. A constitutional analysis of the materials reviewed has been undertaken to study their implications for India and to answer the key problems and questions being address in this study.

In the post liberalisation era the obstinate over emphasizing of the benefits of trade and investment agreements bothers the researcher. It is more so when such trade and investment treaty is likely to adversely impact public health in breach of the constitutional protections to right to health. It is important that the national and international trade regime should be subjected to harmonisation to
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protect the right to health of the citizens as envisioned under the constitution and the global public health charter i.e. the who constitution. specifically, given the colossal burden it inflicts to the human health, economy, environment and development, tobacco should be kept out of any trade and investment agreement in conformity with the spirit of the who fctc – a globally acclaimed and acknowledged beacon of protection and promotion of public health - through stronger, effective and evidence based tobacco control measures. the present study has carefully explored the question of constitutionality involved in the trade and investment agreements entered into by india besides undertaking a comprehensive review of national and international trade and health laws and judicial pronouncements relating to the subject matter in the five key chapters of this thesis besides introduction and the conclusion. a brief synoptic review of these chapters is discussed in the following paragraphs.

chapter one or the introduction gives a background with brief overview of the theme of the present research, the statement of problem, literature review and the methodology applied in this work. the chapter while describing the significance of public health and its impact on the broader health and well-being of individuals and the community highlights the impending threats to public health due to increasing use of tobacco, specifically in the post liberalisation global economic scenario. the greatest threat to public health today is from NCDs and the greatest risk factor of NCDs is tobacco use, it is responsible for the 60% of all NCDs in India. However, tobacco continues to be a legally available consumer product aggressively marketed by the big tobacco multinationals, local companies, traders, manufacturers and extensively traded...
globally by nations. It is to highlight this dichotomy of advancing trade interests, especially in LMICs, at the risk of public health; this chapter conceptualises and contextualise the key questions relating to the international trade and health regime. It also puts in perspective the realm of right to health enshrined under the Indian Constitution and its several judicial interpretations. The chapter justifies the need for undertaking this research along with the proposed title. It further explains the specific objectives of the study while underscoring the need for studying the legal and policy framework related to trade and health, with a particular focus on its impact of tobacco use and tobacco trade, while testing the constitutional sanctity of the trade and investment treaties (freedom of trade) vis-à-vis protection of public health (right to health). Given the accelerated pace of economic activities among and between countries and greater number of them preferring to enter into exclusive trade and investment agreements, the chapter elucidates the need for undertaking a closer look at the trade and investment agreements entered by India\(^1\) to examine if the public health interests of the people of India are protected therein.

Chapter two of the study presents a review of the international trade and health regime besides explaining the health and other exceptions or restrictions acceptable against trade within the international trade law. The chapter dealt with the key question i.e. whether WTO trade and patent rights regime was in conflict with the basic health rights? Are there challenges in ensuring compliance with the international health and trade treaty obligations? In examining this, the chapter includes establishment of GATT to the full blown international trade regime under WTO and put these agreements with a

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\(^1\) India entered into nearly 100 trade and investment agreements in the last couple of decades.
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perspective of international law. It also reviews the development and implementation of more than 50 odd health based treaties between 1851 and 1944 besides the League of Nations Health Organisation, established after World War I, and adoption of the Constitution of World Health Organisation in 1948. While the discussion for establishment of WHO and WTO had started almost parallel in the 1940s WTO was established almost 5 decades later in 1995. In terms of global membership as well, the Constitution of WHO has been embraced by 194 member states\(^2\) while WTO lags in global acceptance with only 162 member countries. The chapter argues that both trade and health scholars should take this fact into account while comparing or assessing these two obligations for member states and suggest according equal if not greater importance to the Constitution of WHO as compared to WTO Agreements. The global health agency had play significant role in elimination of several dreaded diseases including small pox and polio and provides standards for global health and wellbeing. Significance of international health law and the global commitment to the same can be estimated from the fact that, even the most recently and the lone Health Convention under WHO, i.e. the Framework Convention on Tobacco Control have more Parties with 181 members compared to the WTO’s whole membership.

Supremacy of health as the greatest asset to human kind is also acknowledged under the various exceptions and specific health related provisions within the WTO regime. The Non-Tariff Measures, Technical Barriers to Trade and Health Exceptions under all WTO agreements besides special reference to importance of public health in the Doha and Punta Del Este Declarations underscore the

\(^2\) All of them Member States of the United Nations except for the Cook Islands and Niue
growing acceptance of public health as the silver line in international trade negotiations and dispute settlement regime. It highlights that the WHO FCTC, by now, is the de facto international standard for regulating tobacco trade globally and should be so considered within the trade and investment regime. It further goes one to evaluate India’s standing vis-à-vis FCTC implementation. The chapter also explores the concept of sovereignty with respect to international treaty mechanisms with special reference to trade and investment agreements. It also deals with the liberty exercised by the corporations within the bilateral and multilateral trade agreements and the need to follow UN principles on corporate’s responsibility to respect human rights principles and work towards sustainable development. In wake of globalisation and the rising appetite for growth and development, governments are willing to part or forgo or constrain some of the sovereign rights. However, this must not leave everything on the market forces and ensure that the multi-national and trans-national corporations must respect and act in accordance with both the international and the domestic legal and constitutional frameworks. It is to this end that the chapter finally refers to the human rights and public health obligations of transnational corporations as envisaged by the United Nations and embodied under the UN Global Compact.

The third chapter of the study attempts to examine the constitutional framework for regulating trade and health in India. An analysis of the pre and post Constitution position with respect to protection of public health and regulation of trade under in India is presented to assess if there is a comprehensive constitutional mechanism to advance public health when compared to trade in the country? From the provisions of the Indian Penal Code relating to offences
affecting the public health, safety, convenience, decency and morals, the Code of Criminal Procedure providing powers to magistrate to prevent and deal with public health emergencies, the provisions under the Government of India Act 1935 relating to public health and the first public health legislation i.e. the Madras Public Health Act of 1939 the chapter covers key legal developments in recognising the significance of public health within the Pre-constitution domestic legal framework. The chapter further elaborates on the legal provisions under the Constitution of India that envisage protection and promotion of public health both as a fundamental right of citizens, under Part III of the Constitution and as a duty of the state under Part IV and duty of the citizen under Part IVA. The constitutional extent of the legislative powers of not only the state and central government is examined keeping in mind the areas that have direct or indirect bearing on health but also under the Local Self Governance i.e. the constitutional health obligations of Municipalities, Panchayats, District and Regional Councils have been highlighted in the chapter.

In a similar way the extent of protection to trade rights under the Constitution have been analysed. From what was envisaged to be part of the fundamental rights in the Constituent Assembly, trade and commerce, found mention only in Part XIII of the Constitution, except for Article 19(1)(g) which has been strictly interpreted to be vested in citizens only and not available to non-citizens. With respect to trade the Constitution allows reasonable restrictions in public interest under Article 19(6), Article 302 and 304(2). These express provisions have been examined in this chapter as they underscore the prominence given to health over trade rights by the framers of our Constitution.
Extending the discussion on constitutional right to health, the fourth chapter tries to answer the key question on how to strike a balance between right to health and right to trade from a perspective of promoting public health while ensuring sustainable development? In doing so, it brings out the human and health rights perspectives of public health issues and looked at the developments in human rights regime that acknowledge sound public health as *sin qua non* to enjoyment of right to health as a fundamental human rights. The chapter delineates essential characteristics of right to health while examining various national and international judicial observations on the significance of public health (specifically from tobacco control) when compared to trade rights. The chapter concludes that there are sufficient legal and judicial edicts, not only in India but globally as well, citing prominence of public health over anything else, in particular over any commercial interest.

From Article 21 of the Constitution to provisions of the Criminal Procedure Code the Apex Court has considered promotion, protection and maintenance of public health as a principal duty of the state functionaries in exercise of their day to day powers. It is thus evident that the constitution gives every citizen a right to live with dignity and decency, including food, nutrition, education, maternity benefit, child care, adequate medical treatment, preventive health measures for all. As pronounced, the safety, health and peace to all is guaranteed while none can

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3 It is significant to note that, nearly 115 constitutions around the world speak about the right to health.

4 Recent judicial decisions across different countries have given precedence to public health considerations over the commercial interests of the tobacco industry. See ECJ, *Poland v Parliament and Council*, Case C-358/14, Judgment (4 May 2016); *Pillbox 38 (UK) Limited v Secretary of State for Health*, C-477/14, Judgment (4 May 2016); *Philip Morris Brands SARL and Others v Secretary of State for Health*, C-547/14, Judgment (4 May 2016); *United Kingdom High Court of Justice, Queen’s Bench Division, British American Tobacco and Others v Secretary of State for Health*, Case Nos: CO/2322/2015, CO 2323/2015, CO/2352/2015, CO/2601/2015 and CO/2706/2015, Judgment (19 May 2016); *Supreme Court of India, Karnataka Beedi Industry Association and Anr. v Union of India and Anr.*, Special Leave Petition (C) Nos. 10119-10121, Order (4 May 2016).
carry on any trade or business which may seriously affect this guarantee extended to the Community. The constitutional principles are very clear in terms of the superiority of right to health over trade rights. The chapter further analysis implementation of the WTO agreements in upholding public health measures affecting Parties abilities to trade, in particular reference to disputes over tobacco control measures. However, at the global level any measure pursuant to public health must be non-discriminatory and meet international standards. The tobacco control measures taken by several countries have been questioned several times, however, with the global standards as acknowledged under WHO FCTC and its guidelines have been quoted and accepted by both the domestic judiciary and international arbitrators in support of such measures. While analysing implementation of FCTC mandates, WTO cases, investment disputes, domestic litigation in other countries and judicial pronouncement from India related to tobacco control measures have been extensively discussed in the chapter.

In the fifth chapter, we examined various trade and investment agreements entered into by India and whether they are in line with the constitutional mandates of protecting public health. Therefore, we tried to answer, firstly, if the present construct of the trade and investment agreements involving India is adequate from a constitutional perspective? Secondly, if there was a need for a mechanism to address future international and bilateral trade and health agreements? The chapter provides an in-depth analysis of the FTAs and how different products have been treated within such FTAs and in particular, whether tobacco is in negative list or preferential tariff or tariff exemption list of products. The provision concerning health exceptions as provided under the
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WTO agreements is also examined in reference to all FTAs. Further a comprehensive analysis of 83 bilateral investment treaties is attempted in light of the model investment treaties developed by the UNCTAD. Some of the key provisions reviewed include the MFN status, investor state dispute, compensation, health exceptions, termination, applicable laws and cooling off for the agreements. The chapter concludes that although the FTAs have health exception clauses but almost all the investment agreements do not have this safety clause except one. This is contrary to the model agreement suggested by UNCTAD. Further, definitions of the terms used under the agreements have been broadly expressed and agreed, in particular terms like investor and investment, which even allow corporations from third countries to create a SPV/SPB and take benefit of the investment agreements by investing through such SPV/SPB. The number of BITs entered into by India prima facie does not present any public health threat, however they also do not cater for any public health eventuality or dispute that may arise in the future within such BITs. It is in this regard the model BIT introduced by the Government of India fills some of the gaps when compared to the current BITs. In summary, there is need for greater structural and institutional changes for the BITs to be compliant with the Constitutional mandates of protecting public health. The chapter also presents a critical analysis of the impact of these FTAs and BITs on the extraordinary increase in use of tobacco and proliferation of its trade in the country while looking at the measures to prevent further escalation of the FTA and BIT induced tobacco burden.

In the penultimate chapter we try to answer one of the key questions about lack of policy coherence and integration at substantive and procedural levels in
treaty negotiations in India that adversely affect public health interests compared to the trade interests of the country. The chapter looked at the procedures established and followed in the country for implementing any international treaty obligation and the practical troubles with implementing international agreements in absence of a specific law in this regard even after 67 years of implementing the Constitution. We make a comparison of treaty implementation mechanisms in the other large democracies like the USA, Canada, Australia and the United Kingdom and conclude that a legislative or at the least a policy guideline for negotiation and implementation of international treaties must be adopted by the law makers in India. While for the short term, a parliamentary oversight on all treaty related matters through a Joint Parliamentary Committee is recommended. This will not only secure parliamentary support on the treaty but also avoid any conflict with the constitutional rights and federal polity of the country that may come in the way of treaty implementation at a later time. Finally, the chapter documents the empirical assessment of the impact of trade and investment treaties on public health obligations under national and international tobacco control laws. In this respect, an analysis of the stakeholders knowledge and perceptions was conducted to understand if the public health obligations, in particular those related to WHO-FCTC, are being complied with in India or not. In conducting the empirical analysis, we found it difficult to get stakeholder’s interested in the subject and respond to the questionnaire. Most of the respondents who agreed to the interview were either related to the field or were working on the issue and therefore had some understanding of the subject. The empirical assessment also point to the need for establishing and strengthening procedures and
mechanisms for treaty negotiations and implementation. Among the most important of the measures suggested were inter-sectoral coordination and a whole of government approach to treaty making and implementation. The respondents also felt that making the department of health a mandatory stakeholder in such treaty negotiations was critical to protect public health obligations of the government. Responding to the question, if a health impact assessment of all governmental policy decisions be made mandatory? Stakeholders responded in the positive for all international treaties and bilateral trade agreements and proposed carve out of hazardous products like tobacco completely from the ambit of the trade treaties or at least from the preview of the investor-state dispute settlement. The chapter concludes that there are no critical legal or policy challenges in implementing stronger tobacco control measures, including plain packaging, in India. However, it might only be feasible if such step is taken as part of a comprehensive tobacco control policy and not as a radical overnight step.

7.2. KEY FINDINGS

Based on the above discussion and conclusions following inferences have been drawn:

1. **All international treaties must be respected and implemented in the same spirit.** The Preamble of United Nations Charter commands, ‘justice and respect for all obligations arising from treaties and other sources of international law’. As the principal instrument of International law the charter lays down the fundamental principle of treaty implementation in a comity of civilised nations. By default, all treaties,
whether WTO, WHO, or FCTC, binding to a member state must be complied and all obligations arising thereunder met, respected and dealt in a just manner. Further, Article 103 of the Charter expressly provides that in case of conflict between any other treaty and the charter Parties obligations under the Charter shall prevail.\(^5\)

The Preamble, however, documents the determined resolve of the people of United Nations to ‘promote social progress and better standards of life (emphasis added by the researcher) in larger freedom’. To say the least, the Charter clearly beckons all means and mechanisms under the UN system towards achievement of this social objective. It may be noted that the charter uses terms like ‘social’ at 52 occasions, ‘economic’ 42 times, ‘health’ 4 times while trade is not at all used in the whole charter. This also reflects the priority for social welfare and development under the global legal framework wherein ‘health’ having being identified as one of them.

In this regard, the UN Committee on Economic Social and Cultural Rights (CESCR) underscored the connection between tobacco control and the obligation to protect the right to health when it observed that, “violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This

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5 Article 103 of the UN Charter: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
category includes such omissions as... the failure to discourage production, marketing, and consumption of tobacco.”

2. **Public health, as a constitutional priority is finely knitted in the legal, constitutional and judicial framework of the country as a part of fundamental right to health:** The social principle from the UN Charter was adopted by the framers of the Constitution of India and later by the Indian Judiciary in its wider interpretation of the Constitution in guaranteeing right to health. It can be conclusively said that health is a fundamental human right under Article 21 while freedom to trade under Article 19(1)(g) is not free from reasonable restrictions, which could go to the extent that the very freedom may be denied. In the light of Articles 22 to 25 of the UDHR and the ICESCR read with the principle of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen.

The Indian Constitution, by its construct, has a solid base in protecting fundamental human rights of the people of India. It equally postulates respect for international treaty obligations and relations between and among civilised nations. Plethora of legislation at the national and state level has been enacted to ensure protection and promotion of public health with constitutional responsibility to this effect vested in the institutions of local self-governance. The catena of judicial decisions have further bolstered public health by reading right to health within the Constitution and going beyond by laying needed guidelines and appropriate directions for the executive and the legislatures to guarantee

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A Thesis Submitted by Amit Yadav for the Award of Ph.D. Degree in Law
right to health for every Indian. Protection from exposure to tobacco smoke has been considered as part of fundamental right to life of citizen.

3. There is increasing global dependence on international trade and investment agreements to achieve greater economic development and growth: Increasing interaction among nations within the international legal framework coupled with globalization has compelled nation states to concede a part of their sovereignty for collective global welfare and wellbeing. However, trade must be done with ethics and value that is sustainable. While states, in their trade and investment interactions, should retain the sovereign right to protect and promote the health of their citizens; the multinational corporations must as well respect human rights of the people where they invest or do trade including people’s right to health. Until such time trade in tobacco is not completely prohibited globally or within in a certain jurisdiction like in Bhutan, tobacco MNCs should respect international health laws and in particular comply with all mandates under WHO-FCTC in addition to the domestic tobacco control laws and regulations.

4. Having a positive correlation with tobacco use and its trade in the country, the international trade and investment agreements of India raise several public health concerns: India is currently party to more than 70 bilateral investment agreements and about score of free trade agreements. Each of these agreements is unique in its nature serving different economic purposes. However, none of the agreement has ever been evaluated for its effectiveness, or whether it has fulfilled the

7 There is a complete prohibition on trade in tobacco products in Bhutan since 2004.
purpose as envisaged, or in particular, their impact on public health and wellbeing of the people of India. It is startling to note that on the one hand foreign investment is banned in tobacco while same is allowed indirectly, that to with special tariff concessions, under some of the FTAs. Trade and investment in tobacco and its allied products is largely allowed under all the FTAs barring certain exceptions where tobacco is in negative list. A critical analysis the FTAs and the BITs also reveal that they have contributed to increased use of tobacco in the country and thereby responsible for the colossal health, economic and environmental burden due to tobacco use. Such scenarios are a result of an absence of any institutional mechanism to review the treaties and their implementation in line with the constitutional mandates and other international obligations.

5. Trade interactions between and among countries and by foreign investors are subject to the international health standards applied in a non-discriminatory manner: One of the basic tenets of the GATT and the comprehensive WTO Agreements, in particular related to the technical barriers to trade, is the recognition of the primacy of public health in trade interactions, with the Doha Declaration as its grand testimony. Several of the trade disputes, both inter-country and investor-state, decided by the WTO’s DSB and other arbitration tribunals have decided in favour of measures necessary to deal with a public health concern, to protect human life or health. However, the exception of public health can be sustained if such action is not inconsistent with other key WTO principles. Moreover, modern trade and investment
agreements have moved beyond traditional trade matters, such as non-discrimination and the removal of technical barriers to trade, to include granting rights for the private sector to participate in rulemaking, enhanced protections in favour of intellectual property owners, and specific processes to be observed by governments before issuing regulations. There is a clear danger that such provisions, designed to protect legitimate commercial interests, may in practice be used by the tobacco industry in attempts to frustrate policies to protect public health and find ways to circumvent the principles of FCTC Article 5.3.\(^8\)

6. **National and international judicial and arbitration tribunals recognise, acknowledge and accept WHO-FCTC as an international standard for tobacco control:** Since its coming into force in February 2005, WHO FCTC have greatly influenced the judicial mind across globe, including in countries who are not Party to the Treaty e.g. Argentina, USA, in adjudicating matters, whether writs, appeals or arbitration disputes, relating to public health policy making on tobacco. Decisions have been handed in favour of compliance and implementation of FCTC provisions in South Africa, Sri Lanka, Columbia, Thailand etc. besides our own Courts taking cognizance of India's obligations under the Treaty. The tobacco industry squarely lost all challenges to plain packaging of tobacco products before different courts and arbitration tribunals (Norway, United Kingdom, Australia) and the dispute against larger graphic warnings in Uruguay. All adjudicating authorities have extensively relied and quoted the Convention to uphold

the tobacco control policy measures. This has global ramifications. As president of Uruguay puts it, “the judgment won by Uruguay against the multinational Philip Morris is of global significance. Governments of a number of countries that have anti-tobacco policies that could be targeted by tobacco companies tied their fate to the Uruguayan case.” It is encouraging to know that FCTC have garnered the status of international standard in regulating tobacco globally and have been so recognised and acknowledged under the international trade and investment platforms.

7. Indian judiciary upholds public health as fundamental to peoples’ welfare and wellbeing and precludes any trade, business or occupation that is contrary to public health: The Apex Court has by now authoritatively established that right to health is part and parcel of right to life as enshrined under the Constitution of India. While explaining that restrictions on trade are allowed under Article 19(6) which could be on the ground of ‘public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution’. It may be noted that all aspirations of public health are mentioned in various Articles of Part IV. Any trade in noxious or dangerous goods, e.g. tobacco or alcohol, can be held illegal and no one may claim to carry out such trade or business as of right.

8. In spite of provisions under the Constitution of India, there is ambiguity in treaty making process with no clear legislative or executive guideline: There is lack of clarity on the treaty making and treaty implementation process in the country exposing the gap in inter-
departmental coordination on complex issues involving multiple stakeholders. Unlike other countries compared in this study, India does not have a legislative framework for treaty making and implementation. This in turn renders treaty agreements to fall in between the legislative and policy gaps and at times treaty obligations or its implementation runs into and is at loggerheads with the constitutional and federal polity.

In addition to the trouble with implementing a treaty entered into by the Union at the state level, the treaty making process also excludes the multiple stakeholders from various ministries of the Union in crucial aspects related to their department which is a subject matter of a treaty negotiation. A trade and investment treaty is not the sole prerogative of the departments of trade, commerce or industry as such treaties also impact environment, health, education, agriculture etc. requiring an integrated approach to treaty making process which is missing in our system.

9. **Tobacco control is a key to achieving the post 2015 Development Goals, in particular the Health Goals:** Tobacco use is one of the greatest threats to economic growth and development. Globally, Tobacco kills over 6 million people each year. 600,000 non-smokers are killed each year from exposure to second hand smoke. Nearly half of these deaths are women, and over a quarter are children under age of five. In 2010 alone, adult smokeless tobacco use was estimated to have caused 266,592 deaths, mostly in the South East Asia Region. With highest use among the poor and low-income families, tobacco reinforces a vicious cycle of poverty. Even a small diversion of income toward
tobacco can have a significant impact on their health and nutrition. Even tobacco cultivation increases poverty, with the majority of tobacco farmers as smallholders are driven into debt by the industry's exploitation of their labour. UN Sustainable Development Goals of 2030, therefore, rightly identified implementation of WHO FCTC as one the means to achieve the global target of reducing NCD burden, a third by thirty, to meet the ‘health for all’ goal.

10. Tobacco industry have been exploiting trade and investment agreements to their advantage by resisting domestic regulations: FCTC clearly presents the irreconcilable conflict of interest between tobacco control and the tobacco industry and recommends keeping the industry away from TC policy making. From the negotiations of the Trans-Pacific Partnership, plain packaging of tobacco products in Australia, regulation of flavoured tobacco products in Canada or USA or introduction of larger graphic warning in Uruguay the tobacco industry tried hard to press trade and investment agreements to scuttle the domestic regulations and desisting countries from FCTC compliance. This may not be the key concern for India, considering that the Indian tobacco industry is largely comprised of domestic manufacturers with very limited foreign partnerships - that too in cigarette manufacturing which again is a minor product in terms of market share (from the 35% tobacco using adult population in India, most of them either chew tobacco (26%) or/and smoke bidi (9%). However, the cigarette industry has used the trade and investment agreements to increase its base in the country as cigarette consumption has increase manifold in the
country since liberalisation. The cigarette MNCs has already started threatening government of losing investment and tax revenue against their proposal to prohibit all foreign investments in tobacco in India.

11. The Government face challenges within its own quarters in coordinating public health policies with its trade and investment priorities: This inconsistency clearly evident from the fact that one of the departments is engaged in promoting tobacco growing, auctioning, selling and exporting,\(^9\) while the other earnestly trying to reduce tobacco consumption, cultivation and manufacturing.\(^{10}\) However, the solace in the larger tobacco control policy framework in India from the trade and investment perspective is that foreign direct investment is prohibited in manufacturing of cigars, cigarettes of tobacco and tobacco substitutes. Government is further contemplating to prohibit foreign investment in technology collaboration in any form, including licensing for franchise, trademark, brand name and management contract in the tobacco sector, which is currently permitted. Such investments pose a threat for public health as dormant detonators under the existing trade and investment agreements giving room for the industry to bring claims against the government under the, investor friendly, investor-state dispute settlement mechanisms.

12. WHO FCTC being both a treaty on special subject matter i.e. tobacco and also entered and adopted later in time holds supremacy on other general trade and investment agreements: All treaties are binding upon the parties to it and they are required to

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\(^9\) Department of Commerce and Industries manages the Tobacco Board of India.

\(^{10}\) Ministry of health and Family Welfare runs a National Programme on Tobacco Control.
implement them in good faith. Parties may not even invoke the provisions of an internal law as justification for non-performance of a treaty obligation. Therefore, both trade and health agreements adopted by the countries have binding effect and provisions of WHO FCTC affecting trade in tobacco, it being a subsequent treaty, should prevail over WTO agreements. The WTO agreements, with respect to trade in tobacco, should apply only to the extent that its provisions are compatible with those of the WHO FCTC.

13. **Right to health and wellbeing of the population given greater prominence than trade rights even under international trade, investment and intellectual property rights regime:** Trade related intellectual property rights have been interpreted by the courts of this country to not only protect IPR but more importantly to meet the constitutional obligation of providing good health care to its citizens. The Patent Act itself makes it clear, ‘that patents granted do not in any way prohibit Central Government in taking measures to protect public health’ and that the ‘patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public’. While deciding a matter concerning patent of a cancer drug (*Novartis Case*), the Supreme Court acknowledged that, the TRIPS Agreement has sufficient flexibility (vide Articles 7, 8 and 27), which was further reaffirmed by the Doha Declaration (in paragraphs 4 to 6), to enable the member States to control the patent rights in a manner as to avoid any adverse impact on public-health. While deciding against the patent, the Court also took view of several requests made to the Government of
India, India being the leader in the global supply of affordable antiretroviral drugs and other essential medicines, to take necessary steps to continue to account for the needs of the poorest nations that urgently need access to antiretroviral, without adopting unnecessary restrictions that are not required under the TRIPS Agreement and that would impede access to medicines. This also confirms the sovereign’s right to take decision in the best of the public health interest of its citizens.

14. No legal and policy barrier in introducing plain packaging of tobacco products in India: Norway became the latest entrant to this strong, effective and evidence based tobacco control policy bandwagon on December 9th, 2016 with its Parliament adopting the plain packaging legislation. India, with 85% pictorial warnings on both sides of tobacco products, is ready for introducing plain packaging as the next strong and effective tobacco control measure and all it may require is a strong political will. It is legally possible under the existing tobacco control law by proposing a minor amendment while the tobacco industry may not have a credible argument against it nor any of the existing trade or investment agreements preclude the government from taking such non-discriminatory policy decision.

7.3. TESTING OF HYPOTHESES

In light of the conclusions and key findings discussed above and after a critical analysis of the information collected through secondary data, on free trade agreements and bilateral investment agreements of India, and the empirical
data, from key stakeholders’ interviews, we now test the two hypotheses with which we began our research enquiry.

Hypothesis 1 – The legal and constitutional policy framework of India sufficiently protects the public health interests of the people of India.

As discussed above and in particular with greater detail in chapters III and IV it is clear that the legal and constitutional policy framework in India assure protection and promotion of public health. This assurance has been strengthened and further guaranteed by the Indian judiciary, in particular, the Supreme Court of India. In plethora of judgements beginning the celebrated Ratlam Municipality case in 1980, the Apex Court has maintained that right to health is an essential and inseparable part of Article 21 and an effective realisation of the right to life was inconceivable without protection of public health as envisaged under Part IV of the Constitution. The prominence of right to health over freedom to trade in India is inbuilt within the constitutional framework and its judicial interpretation. The Court had further held, in Sheela Barse’s case, that conventions which had been ratified by India, and elucidate norms for the protection of children, cast an obligation on the state to implement their principles, i.e. the treaties, even if unincorporated into national law, have binding effect. Given this observation of the court and the reading of the Constitution in favour of public health, it can safely be inferred that public health interests must be protected while entering into a new or implementing the existing trade or investment agreements.
This is also consistent with the international legal principle of “pacta sunt servanda”. With respect to implementing the only global public health treaty, this translates to mean that not only are the WTO agreements binding on India, but it is also legally required to meet her obligations under the WHO FCTC. And as already said, health gets a prominence over trade in under the scheme of the Constitution.

**Hypothesis 2 – The existing trade and investment agreements of India ensure compliance with the Indian legal and constitutional policy mandates concerning protection of public health.**

In view of the study findings, the analysis of India’s compliance and disputes under WTO, other multilateral and bilateral free trade agreements and investment agreements, the researcher finds it difficult to conclude, if all the agreements comply with the fundamental legal and constitutional policy mandates. The absence of a clear legislative or even an executive guideline for treaty making in accordance with the constitutional distribution of legislative powers under the federal polity further raises the question on the adoption and implementation of any treaty. Given the constitutional and judicial status of right to health, the researcher finds it difficult to assume constitutionality of all the trade and investment agreements in absence of an evaluation of these agreements, besides no prior health impact assessment has been done. As indicated by the key stakeholders, most of these treaties are not even considered for internal peer review by the concerned stakeholder departments i.e. environment, labour, agriculture and most importantly the health.
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The researcher concludes, that the parliament needs to invoke its power under Article 246 (1) - read with Entry 14, List-I, Schedule VII - to make laws with respect to “entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.” Until such time, all the trade and investment agreements may be considered as isolated live wires that may cause grave harm and run havoc in case of an unforeseen public health emergency. The researcher also notes that, all the free investment agreements, except for a few, do not have the protection of public health exception clause, leaving national public health interests vulnerable to challenge by foreign investors. Therefore, we would like to conclude that except for a few trade and investment agreements, others do not fulfil the legal, constitutional or judicial policy mandates with respect to protection and promotion of public health. We make this humble suggestion that such trade and investment agreements may be considered for amendment to make them compliant with the fundamental laws i.e. the Constitution of India and while incorporating the best from UNCTAD and the improvised model investment agreement of 2015.

7.4. RECOMMENDATIONS

In the light of the findings of this research, we would like to make following recommendations:

1. There is an urgent need for a law dealing with international treaties with an integrated whole of government approach to provide a
comprehensive due process for treaty making and treaty implementation in the country: Parliament of India needs to enact a law to put in place a comprehensive mechanism for treaty negotiation, adoption and implementation keeping with the international standards and the Indian constitutional principles. What is required is to adopt a consensus-driven and consultative approach to enhance the role of Indian Parliament and State Governments in the field of treaty-making. The law will help institutionalise a whole of government response to any international agreement to be entered by India including fast track response in case of urgent matters concerning international treaties in accordance with the international standards and the law of treaties as under the Vienna Convention. It will help ensure an inter-departmental integrated approach to ensure whole of government responsibility in all treaty negotiation and later its implementation, appropriately translated within the domestic legal and administrative framework.

2. **Constitute a Joint Parliamentary Committee to evaluate the existing treaties and scrutiny on-going negotiations and future treaties as a standing body providing parliamentary oversight in treaty making:** Considering the lack of time and appetite among the law makers to pass a law on treaty making, the government should make an effort to deal with the situation by providing some institutional mechanisms for review and evaluation of treaty making. A standing Joint Parliamentary Committee should be constituted comprising of members from both the Lok Sabha and the Rajya Sabha. Since members of the Rajya Sabha act as the representatives of the states, the states concerns over the
issues related to state and concurrent list that is subject matter of a treaty negotiation or implementation could be adequately dealt by this committee. Further, keeping with the global reforms introduced in treaty making process, the Government should establish a national coordination body that brings all stakeholders and their inputs to the negotiating table for each and every treaty including trade and investment agreements. This will help in adopting an integrated approach to treaty making, leaving little room for violations of health, environment and human rights enshrined under the constitution which otherwise remain unattended in normal treaty negotiation process.

3. **There is need for better treaty drafting to ensure harmonious compliance with public health and trade interests:** It is imperative that treaty drafting should be given utmost importance with respect to its content and compliance with the fundamental national and international instruments. I.e. any draft treaty must find a balance to uphold both the national legal and constitutional obligations while also maintaining respect for the UN Charter or other international laws as applicable. It must be seen that trade and investment agreements do not infringe upon the health rights of citizen and rights of the sovereign states to take effective measures for the promotion and protection of the health of their populations.

4. **Amend the existing trade and investment agreement that is not in line with international public health standards:** Trade interests are subject to health and wellbeing of the people both at WTO and under national legal framework, therefore, all treaty obligations including
investment treaties should reflect the same. A multi-department review committee (including health) for undertaking a critical review of all trade and investment agreements should be constituted to ensure its sustainability. Treaties not in line with this mandate, upon review, should be amended to meet the national and international health standards. Another way to resolve the conflict between health and trade objects under such treaties is to have a provision in re-interpretation, or an annex on all treaties with potential inconsistencies with respect to trade and health.

It may be worth noting here that Australia and Singapore have agreed (although not yet ratified) to amend their existing bi-lateral trade and investment agreement to exempt tobacco, adding the following Article:

“ARTICLE 22

Tobacco Control Measures – No claim may be brought under this Section in respect of a tobacco control measure\(^{19}\) of a Party.

19 “Tobacco control measure” means a measure of a Party related to tobacco products (including products made or derived from tobacco), such as for their production, consumption, distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as fiscal measures such as internal taxes and excise taxes, and enforcement measures, such as inspection, recordkeeping, and reporting requirements. “Tobacco products” means products under Chapter 24 of the Harmonised
Given the gravity of the worsening global tobacco epidemic, India should consider ways to ensure that the agreements they negotiate will not delay, block, or undermine tobacco control measures of their own government as well as those of foreign governments. Efforts to institute a “whole of government” approach to the WHO FCTC must include all stakeholders including trade ministries, and obligations emanating from WHO FCTC e.g. under Article 5.3 to protect policies from the interests of the tobacco industry must apply equally to trade policies.

5. **Express greater respect for public health principles in global trade, commerce and economic discourse:** It is important for the global community as a whole to take a serious view of the significance of public health, even in matters of economics and trade. The present research conclusively points to the fact that the global trade regime is not against the idea of protection and promotion of public health. It is under the trade treaties that the public health exceptions have been carved out with special mention of the importance of public health in extraordinary declarations, e.g. Doha Declaration, Punta Del Este Declaration and the WHA resolution 59.26. However, there is this constant need for the countries to remind themselves of the obligations under these declarations and show greater respect for these instruments while negotiating another round of a trade and investment treaty. This will help maximize the potential economic benefits of trade and investment while
insulating against negative health impacts. Countries must accept WHO and FCTC recommended standards as ‘international standards’ for the health exception clauses and the SPS and TBT agreements, besides increasingly using international law for ensuring compliance with WHO and in particular FCTC recommendations.

It is significant to note that WHO enjoys observer status in various WTO committees and councils’ including the Technical Barriers to Trade Committee and the Council for Trade-Related Aspects of International Property while, the WTO Secretariat holds the same status in various bodies operating within the institutional framework of the WHO, the meetings of the FCTC Conference of Parties. This engagement between the two special UN agencies needs to be strengthened and more formalised to garner support across stakeholders and harmonise implementation of both trade and health treaties by the Parties to WHO FCTC and WTO Agreements.

6. **Greater policy coordination and training of public health experts in trade issues and trade officials in public health matters:** The lack of capacity among the officials in different stakeholder departments on matters of trade and investment treaties or about the public health implications of such treaties presents the greatest challenge for treaty negotiation. With the health community, on the one hand, and the trade and investment communities on the other, the barrier could only be overcome by imparting cross learning through common trainings to such stakeholders. Thus, increasing health official’s capacity to engage with trade and investment officials on questions of trade policy and that of the
trade or investment officials on public health, increasing their capacity to identify the potential implications of their actions for public health will influence their capacity to negotiate a treaty that confirms or takes into account the health needs. Such policy coordination will also prevent a colossal scenario in which some WTO Members object to tobacco control measures at the WTO, despite their support for the same measures in the WHO FCTC deliberations. Governments should ensure that health representatives are involved in trade policy-making, e.g. through inclusion in trade delegations and the development of interdepartmental committees on trade related matters.

7. **Undertake a sustainable impact assessment of potential trade and investment agreements:** Given the absence of a legislative or policy requirement to carry out a pre-assessment of the impact of trade and investment agreements, as followed in some of the countries, we feel that the Indian Government should mandate, *ex ante* sustainable impact assessment of the economic, social, health and environmental implications of a potential trade agreement. The best case scenarios for such arrangement will be under a law delineating the treaty making process as suggested above. Such impact assessment should be free from any influence by the industry or individuals having commercial or vested interest in the subject matter and in particular, the process should be in compliance with Article 5.3 of WHO-FCTC. Like the environmental impact assessment as already carried out on trade and development projects, adding the component of health impact assessment will help in including specific provisions within such treaties to strengthen and
advance public health objectives besides the existing domestic public health laws e.g. tobacco control law of any country. It will also keep in check any vested interest like that of the tobacco industry from interfering with the public health policy process aimed at protecting and saving lives from the deadly trap of tobacco. To this effect, the Government must put in place a robust infrastructure and institutionalise the process.

8. **Introduction of plain packaging of tobacco products in India:** experience and evidence from Australia, the first country to introduce plain packaging of tobacco products in the world, reveal that it is an effective tobacco control measure to reduce tobacco use – especially among young. Responding to the question, if India should introduce plain packaging or wait for the decision in Australia’s case before the WTO DSB, several respondents opined for implementing plain packaging with caution and some suggested to be careful in implementing the plain packaging in India. However, about in an year’s time the tobacco industry has tasted defeats, one after another, in plain packaging legal challenges including in following matters:

- **Australia** – Constitutional challenge dismissed by High Court of Australia Aug. 15, 2012.\(^{11}\)

- **Australia** - A Philip Morris legal claim under bilateral Hong Kong- Australia investment agreement dismissed Dec. 17, 2015.\(^{12}\)

[https://www.pcacases.com/web/sendAttach/1711](https://www.pcacases.com/web/sendAttach/1711)
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- **United Kingdom** – On May 19, 2016, a tobacco industry legal challenge was dismissed.\(^{13}\) On Nov. 30, 2016, a tobacco industry appeal in this case was dismissed.

- **France** – Plain packaging legislation upheld on Jan. 21, 2016 as constitutional by France’s Constitutional Council.\(^{14}\)

- **European Union** – On May 4, 2016 the European Court of Justice dismissed a tobacco industry legal challenge to the provision in the new *Tobacco Products Directive* that explicitly states that 28 EU countries have the option of implementing plain packaging.\(^{15}\)

- **Uruguay** – A Philip Morris legal claim under bilateral Switzerland-Uruguay investment agreement dismissed July 8, 2016 regarding significant packaging restrictions (though not plain packaging).\(^{16}\)

In view of these decisions world across and considering that nothing in the present trade and investment treaties or in any of the domestic

\(^{13}\) *British American Tobacco & others v Department of Health*, [2016] EWHC 1169 (Admin), England and Wales High Court of Justice, Queen’s Bench Division, Administrative Court, May 19, 2016.  
\(^{14}\) Constitutional Council [France], *Loi de modernisation de notre système de santé* [Law to modernize our health system], Decision n° 2015-727 DC of 21 January 2016.  
\(^{15}\) *Philip Morris Brands and Others*, European Court of Justice (ECJ), 4/5/16, Case C-547-14.  
\(^{16}\) *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, July 8, 2016. The Philip Morris claim was brought under a bilateral Switzerland-Uruguay trade and investment treaty. ICSID is an arbitration body affiliated with the World Bank.
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legislation prevents India from implementing plain packaging, the Ministry of Health and Family Welfare should consider amending COTPA to leapfrog in implementation of evidence based and effective tobacco control policy in India.

9. **Amend the Constitution of India to add “tobacco” under Article 47 and make it res extra commercium:** Given the unequivocal evidence on the hazardous impact of tobacco use on the present and future generation of this country, which unfortunately was not available at the time Mr. Bhupinder Singh Mann suggested the same in the Constituent Assembly, the government should propose an amendment to Article 47 and add “tobacco” adjacent to “alcohol” under that Article to restrict tobacco use and enable states to completely prohibit tobacco use in the country as already done in the Kingdom of Bhutan. This amendment will make tobacco ‘res extra commercium’ and thereby any restriction on its trade and commerce, production, distribution and supply including manufacturing and sale could be regulated or prohibited unfettered by the different state governments or as may be appropriate by the central government for the whole of the nation.

10. **Institutionalise good corporate governance based on international standards and respecting human rights including peoples’ right to health:** As today’s corporates play a greater role in policy formulation at national and international level, it is important to reign the corporations by demanding compliance with highest standards of corporate governance. The latest amendment to the Company Act to introduce mandatory contribution for activities under corporate social responsibility
is one such step. Similarly, we suggest that, a legal infrastructure is developed wherein, corporations should be asked to comply with international standards for transparency, be just and fair in their business dealings with customers including governments besides meeting the standards set under the UN global compact for respecting human rights including right to health of citizens. Corporations should be trained and their capacities built as part of corporate education to give equal respect to both national and international trade and health laws. They must understand the constitutional mechanism with respect to providing prominent to citizen’s right to health over freedom to trade. Further, corporations must see WHO, if not greater, in equal stead with the WTO principles and obligations. Further, corporations should be held liable for violating such standards and in particular those responsible for selling demerit goods should be dealt with iron hands. Though India pioneered PILs it is still lacking in class action litigation and no significant development in compensation jurisprudence has taken place in the country. Both are necessary to ensure that corporates comply with the requirements of good governance and do business in a sustainable manner. We feel that governance of industries like tobacco and alcohol should be under strict vigilance of the regulatory authority to prevent any interference by them in public health policy making. This is expressly provided for tobacco industry under Article 5.3 of the WHO FCTC the same may be done under domestic laws for alcohol industry.
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11. **Educate the next generation of lawyers, administrators and health professionals about significance of public health and right to health:** Given that the students of today are the lawyers, judges, arbitrators, administrators, trade negotiators and health professionals of tomorrow, it is very important that they get a comprehensive understanding of the significance of public health and a correct understanding of right to health. The education and training system for such professionals, in particular the law students should mandatorily focus on the legal and constitutional framework for public health as a right to health. Public health law should become a compulsory subject for the undergraduates and offered as a specialisation for the students at master’s level. In addition, such course should include modules on the implications of trade and investment agreements on public health. In the same manner, the medical health students should also have mandatory training, as part of their curriculum, on public health law including modules on impact of trade and investment agreements on public health. This will help in developing their understanding on the implications of their actions and decisions on public health interest of the common citizen of this country.

12. **Adopt transparency as a benchmark in all treaty negotiations including trade and investment treaties:** Aware of the benefits of being transparent, global governments have agreed to bring transparency in investor state dispute resolution by adopting the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, also known as the Mauritius Convention on Transparency.
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All governments including the Government of India should ratify the Mauritius Convention to ensure that there is transparent investor-state arbitration processes through open hearings and access to documents and amicus submissions—those presented by interested third parties—in disputes filed under investment treaties concluded prior to April 1, 2014. For the subsequent and future treaties, compliance to the Mauritius Convention can be included as part of the trade and investment agreement. Besides, a transparent process should be followed for all treaties, from their conceptualisation to negotiation, adoption, implementation and evaluation for a just and fair treatment to all stakeholders. The mandates of this treaty could be included in the above suggested law or under the institutional mechanism proposed hereinafore.

7.5. FUTURE RESEARCH

Based on the results and findings of this study, there are several areas that merit further research.

1. **Firstly**, with the era of liberalisation and increased import of products on special tariffs have on the one hand caused price competitiveness and on the other increased accessibility of such products. However, this has also increased the adverse effects of such products on human health. Similarly the greater harm has been from products like tobacco and alcohol. The impact of such liberalisation, added with tariff concessions under the trade and investment agreements, is different on different strata of the population based on their gender, education, family and
2. **Secondly,** we have concluded in this study that most of the investment agreements are not in line with the constitutional policy mandate on public health. An in-depth research can appraise the actual impact of these agreements and the public health challenges posed by them.

3. **Thirdly,** having done research on the possibility of plain packaging of tobacco products in India, there is a need to undertake a full-fledged research on this aspect to test the hypothesis that with the lessons of WHO FCTC, governments could command much greater policy space for protecting and promoting public health besides tobacco control or plain packaging. The researcher could explore whether the experiences of tobacco control could be extended or replicated in dealing with other public health problems.

4. **Fourthly,** given the problems with data collection for policy analysis, a future research could focus on greater engagement of policy stakeholders for collecting in-depth qualitative and quantitative data to construct a statistical model for evaluation of the existing and future trade and investment agreements. Without going into any subjective analysis of the agreements such future research could provide some objective parameters and indicators for assessment on which every trade and investment agreement could be tested.
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5. **Fifthly,** this research work refers to several legislative and judicial efforts made in the last 67 years to protect and promote public health in the country. This constitutes the legal and constitutional framework for protection and promotion of public health in India, which may not be ignored while entering into a trade and investment agreement. However, a future research could be undertaken to analyse and evaluate the role played by such legislation and judicial pronouncements in improving the health conditions and social determinants of the people of India in absence of a national public health law.

6. **Finally,** the research suggests that corporate governance and corporate liability is necessary to ensure that trade and investment treaties keep with the public health objectives and obligations of a particular country. Further research could be undertaken to assess the laws and regulations concerning corporate governance in India with empirical data to evaluate performance of corporate India on such global public health standards. The research could give an idea on the interference and influence corporations have on specific treaties, treaty making process and their implementation that have far reaching impact on legal and constitutional entitlements and obligations effecting public health outcomes.

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