



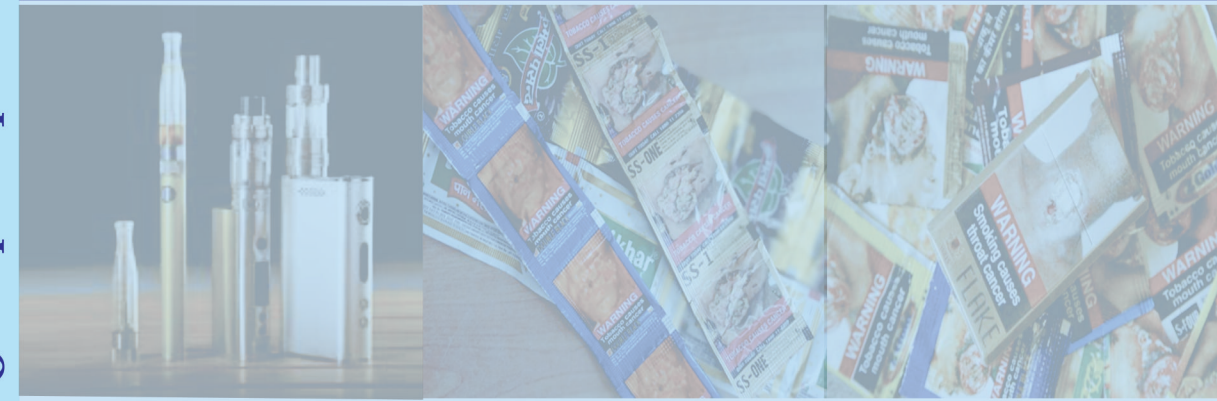
Tobacco Control Law in India ORIGINS AND PROPOSED REFORMS

2020

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Prof. (Dr.) Ashok R. Patil

Professor of Law

National Law School of India University

Bengaluru



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FOREWORD



Tobacco use is a serious public health challenge worldwide. Medical science clearly recognizes tobacco as the single most significant cause of mortality and morbidity across the globe. It has assumed the dimension of an epidemic resulting in enormous disability, disease and death. In addition to disease burden, tobacco use results in severe social, economic and environmental burden. Tobacco and related industries have been employing sustained tactics to attract new generations of tobacco users.

As a result, tobacco kills over 1.2 million in India, every year. One million deaths are due to smoking, with over 200,000 due to secondhand smoke exposure, and over 35,000 are due to smokeless tobacco use. India's deaths due to smokeless tobacco use are especially concerning, as they account for 64% of the world's smokeless tobacco-attributable deaths. 27% of all cancers in India are attributable to tobacco use.

The death and disease caused by tobacco has an economic impact as well. Smoking-attributable Health Expenditure in India is estimated at 133.2 billion Rs (13,300 crores), or 3.5% of the Total Health Expenditure. Total Economic Cost of Smoking, taking into account loss of earning capacity, is estimated at 1.82 trillion Rs (182,000 crore), or 1.8% total GDP.

India has been very conscious of the harmful effects of tobacco use and the efforts of the tobacco industries to attract young people to the world of tobacco. The Cigarettes (Regulation of Production, Supply and Distribution) Act of enacted in the year 1975, made display of health warnings mandatory on cigarette packaging as well as advertising. However, with the influx of scientific evidence and availability of myriad of tobacco products, the need

was felt for framing a comprehensive legislation on tobacco control, which was introduced in 2003, in the form of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003 (COTPA). The Act extends to most forms of tobacco products available in India. It bans smoking in most public places, sale of tobacco products to minors, direct and indirect advertisement in addition to specifying mandatory display of pictorial health warning on tobacco packs.

Though the Act is intended as a comprehensive law on tobacco control, it was adopted over 15 years ago and was developed before the coming into force of the FCTC. With the passage of time and a greater understanding of the full range of measures necessary to combat the tobacco epidemic, lacunas in the Act have become apparent and proved to be a major challenge in its effective implementation.

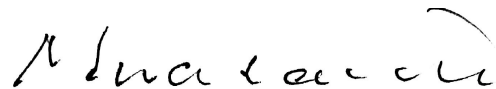
These gaps in the current law are highlighted by the WHO Report on the Tobacco Epidemic (GTCR) 2019, which provides the status of countries' implementation of key tobacco control measures on a biannual basis. India has adopted best practices in cessation and health warnings on packs. In all other policy areas, India falls into the "Moderate" category, with no forward progress since the 2008 report.

This Book depicts comprehensive analysis of COTPA, identifying the gaps therein, and proposing reforms which are in consonance with the recommendations of the parliamentary committees, best practices adopted by other countries and the guidelines specified under the global public health treaty on tobacco control, World Health Organization Framework Convention on Tobacco Control (WHO FCTC). The recommendations in Part III of this Book would ensure India will also have best practice in 'Smoke-free' and 'Advertising bans'. Where a recommendation would impact the WHO analysis for the GTCR, this is highlighted in Part III.

The effort to fulfil the obligation under the FCTC, which India ratified as early as in 2004, is aligned with the State's primary duty of improving and protecting public health under the Constitution of India. Right to life under article 21 of the Constitution of India is incomplete without right to live with human dignity which includes right to health. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41, 42 and 47. The Hon'ble Supreme Court has confirmed that Right to Health is an integral fact of meaningful Right to Life. The Hon'ble Supreme Court has also upheld policies, legislations regulating trade and use of tobacco in public interest and an endeavour to protect Right to life.

This Book is a product of the untiring efforts of faculty and students of the National Law School of India University (NLSIU) with valuable contributions from the research team of the CTFK, Washington DC, USA especially on global best practices. This Book, is compiled with the purpose of raising awareness among policy-makers, experts, civil societies and the public at large about the need for a comprehensive legislation on tobacco control. It is also intended to be used as reference for students, researcher, academicians and other stakeholders to conduct further studies.

Congratulating Prof. (Dr.) Ashok R Patil, Chair Professor, Chair on Consumer Law and Practice, NLSIU Bangalore & Campaign for Tobacco Free Kids (CTFK) team for taking the initiative. I wish and hope that this will be well received by all the stake holders.



Hon'ble Justice

M.N. Venkatachaliah

Former, Chief Justice of India

PREFACE




India has the second largest number of tobacco users (268 million or 28.6% of all adults in India) in the world – of these at least 1.2 million die every year from tobacco related diseases. One million deaths are due to smoking, with over 200,000 due to secondhand smoke exposure, and over 35,000 are due to smokeless tobacco use. Nearly 27% of all cancers in India are due to tobacco usage. The total direct and indirect cost of diseases attributable to tobacco use was a staggering Rupees 182,000 crore which is nearly 1.8% of India's GDP. There is ample evidence about tobacco products being the killer. These should be made inaccessible to save Indians from a lifetime of misery and suffering. It is critical to strengthen the country's tobacco control law to galvanize the ongoing efforts to check the tobacco epidemic in India, especially during these challenging times.

Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) were introduced in 2003 to regulate the availability and advertising of most forms of tobacco products in India. The Act extends to most forms of tobacco products available in India. It bans smoking in most public places, sale of tobacco products to minors, direct and indirect advertisement in addition to specifying mandatory display of pictorial health warning on tobacco packs. Though the Act is intended as a comprehensive law on tobacco control, it was adopted over 15 years ago and was developed before the coming into force of WHO FCTC. With the passage of time and a greater understanding of the full range of measures necessary to combat the tobacco epidemic, lacunas in the Act have become apparent and proved to be a major challenge in its effective implementation. These gaps in the current law are highlighted by the WHO Report on the Tobacco Epidemic

(GTCR) 2019, which provides the status of countries' implementation of key tobacco control measures on a biannual basis. India has adopted best practices in cessation and health warnings on packs. In all other policy areas, India falls into the moderate category, with no forward progress since the 2008 report.

In this light this book is an attempt to comprehensively analyse the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA 2003) so to identify the gaps and recommends legislative reforms based on parliamentary committees reports, best practices adopted by other countries and the guidelines specified under the global public health treaty on tobacco control, World Health Organization Framework Convention on Tobacco Control (WHO FCTC) to which India is a signatory. It intends to make the Indian legal framework on regulation of tobacco more robust and more effective in achieving its goals. The said book in report form is submitted to Ministry of Health and Family Welfare, Government of India for their consideration with the purpose of raising awareness among policy-makers, experts, civil societies and the public at large about the need for a comprehensive legislation on tobacco control. It is also intended to be used as reference for students, researcher, academicians and other stakeholders to conduct further studies.

I would like to acknowledge the untiring efforts of CTFK team members viz., Ms. Vandana Shah; Mr. Robert Eckford; Mr. Ranjit Singh & Dr. Vishal Rao for their kind valuable inputs. I would also like to extend my gratitude to Vice-Chancellor and Register of NLSIU for their co-operation and support. I would also like to thank Mr. Akshay Yadav & Mr. Arjun Singal of NLSIU for their active role in bringing up this endeavour. I truly hope that this book proves to be very helpful to all the concerned stake holders like Policy makers, experts, public at large, researcher, legal fraternity, or academia and give effect to the spirit of the law.



Prof. (Dr.) Ashok R Patil

Professor of Law

Chair Professor, Chair on Consumer law and Practice,
National Law School of India University, Bangalore

LIST OF LEGISLATIONS, BILLS, RULES AND REPORTS

1. The Constitution of India.
2. The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.
3. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.
4. The Delhi Prohibition of Smoking and Non Smokers Health Protection Act, 1996.
5. The Sikkim Prohibition of Smoking and Non Smokers Health Protection Act, 1997.
6. The Goa Prohibition of Smoking and Spitting Act, 1997.
7. The Himachal Pradesh Prohibition of Smoking and Non Smokers Health Protection Act, 1997.
8. The Meghalaya Prohibition of Smoking and Non Smokers Health Protection Act, 1998.
9. The Assam Prohibition of Smoking and Non Smokers' Health Protection Act, 1999.
10. The Rajasthan Prohibition of Smoking and Non Smokers Health Protection Act, 1999.
11. The West Bengal Prohibition of Smoking and Spitting and Protection of Health of Non-Smokers and Minor Act, 2001.
12. The Karnataka Prohibition of Smoking and Protection of Health of Non Smokers Act, 2001.

13. The Andhra Pradesh Prohibition of Smoking and Health Protection Act, 2002.
14. The Jharkhand Prohibition of Smoking and Non Smokers Health Protection Act, 2002.
15. The Tamil Nadu Prohibition of Smoking and Spitting Act, 2003.
16. The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001.
17. The Cigarettes and other tobacco Products (Prohibition of Advertisement and Regulation of trade and Commerce, Production, Supply and Distribution) Bill, 2015.
18. The Cigarettes and other tobacco Products (Prohibition of Advertisement and Regulation of trade and Commerce, Production, Supply and Distribution) Rules, 2004.
19. WHO Report on the Global Tobacco Epidemic, 2019.
20. The 196th Report of Committee of Subordinate Legislation on the Prohibition on Sale of Cigarettes and other Tobacco Products around Educational Institutions Rules, 2004.
21. The 210th Report of Committee of Subordinate Legislation on the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004.
22. WHO Framework Convention on Tobacco Control, 2003.
23. Department Related Parliamentary Standing Committee on Human Resources. Development 111th Report on COTPA Bill, 2001.

LIST OF CASES

1. Association of Medical Super Speciality Aspirants and Residents v. Union of India (2019 Indlaw SC 785).
2. Devika Biswas v. Union of India (2016 Indlaw SC 1032).
3. Health for Million v. Union of India (Civil Appeal No. 5912-5913/2013).
4. Laxmikant v. Union of India (1997) 4 SCC 739.
5. Love Care Foundation v. Union of India (W P No. 1078; M/B of 2013).
6. Murli S. Deora v. Union of India (2001) 8 SCC 765, AIR2002SC40.
7. State of Punjab v. Mohinder Singh Chawla (1997) 2 SCC 83 (1996 Indlaw SC 2054).
8. Tamil Nadu Medical Officers Association v. Union of India (2020 Indlaw SC 441).

LIST OF ABBREVIATIONS

COTPA	:	The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003
CSR	:	Corporate Social Responsibility
CTFK	:	The Campaign for Tobacco-Free Kids
DSA	:	Designated Smoking Areas
DSR	:	Designated Smoking Room
EU	:	European Union
FCTC	:	Framework Convention on Tobacco Control
FDA	:	Food and Drug Administration
GDP	:	Gross Domestic Product
GTCR	:	Global Tobacco Epidemic Report
NCI	:	National Cancer Institute
TAPS	:	Tobacco Advertising, Promotion and Sponsorship
v.	:	Versus
WHO	:	World Health Organisation

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HISTORY OF TOBACCO CONTROL LEGISLATION IN INDIA

1.1 Introduction

The use of tobacco in one form or the other can be traced back to the 16th century. However, it took nearly 400 years for the world to identify the life-taking diseases like cancer of different forms and various other respiratory and cardiovascular diseases caused by the consumption of tobacco. Medical science now clearly recognizes tobacco use as the single most significant cause of mortality and morbidity across the globe. In order to deal with the enormity of the health hazards caused by tobacco in India, progressively stricter regulation of tobacco products have been introduced, starting with the Cigarettes (Regulation of Production, Supply and Distribution) Act 1975 (The Cigarettes Act), which included provisions that made it mandatory to display a statutory warning “Cigarette smoking is injurious to health” on all packages of cigarettes and in all advertisements.

Taking account of the enormity of the tobacco hazard both in India and elsewhere, and the international consensus on the need to act to reduce the death and disease caused by the growing tobacco epidemic, the Government in India felt the need to introduce a more comprehensive anti-tobacco legislation based on the recommendations of the Parliamentary Committee on Subordinate Legislation, 1995. Accordingly, The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COPTA) was enacted to provide for, among other matters, a ban on most forms of

tobacco advertisement, smoking in public places, sale to minors and display of mandatory pictorial health warning on tobacco packs.

1.2 The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.

The Statement of Objects and Reasons of the Cigarettes Act 1975, inter alia, states: “Smoking of cigarettes is a harmful habit and, in course of time, can lead to grave health hazards. Research carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer, chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostate, mouth, pharynx and oesophagus; peptic ulcer etc., are also reported to be among the ill-effects of cigarette smoking”.

The key provisions of the Cigarettes Act, 1975 mandate:

- Every package of cigarettes produced supplied or distributed shall bear thereon, or on its label, the specified warning, i.e., “cigarette smoking is injurious to health”.
- Every advertisement of cigarette shall carry the specified warning, i.e., “cigarette smoking is injurious to health”.

The Cigarettes Act, 1975, however, was not sufficiently comprehensive in its coverage as it did not include non-cigarette tobacco products such as beedis, cigars, chewing tobacco etc., and the warning specified under the Act was far too mild to be an effective deterrent.

1.2.1 The Committee on Subordinate Legislation Report 1995 on the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975.

In February 1995, the Parliamentary Committee on Subordinate Legislation of the Tenth Lok Sabha proposed to examine the rules and regulations framed under the Cigarettes Act, 1975. In the 22nd Report of the Committee on

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Subordinate Legislation, which was presented to the House on 22 December 1995, a series of substantive suggestions were made for measures to achieve better results in the field of tobacco control.

The key recommendations of the Parliamentary Committee were:

1. There should be a total ban on all forms of advertisement which promote the use of tobacco.
2. There should be a total ban on the sponsoring of major sports/ cultural events by cigarette and other tobacco product companies.
3. There should be a ban on display of scenes glamorizing smoking in films, plays and advertisements on television.
4. There should be a complete ban on smoking in the public transport system, domestic air flights and government vehicles.
5. There should be a complete ban on sale of cigarettes to persons below 18 years of age.
6. Health warnings should be made effective by using symbols and pictorial depictions. Health warnings should be extended to cover *beedis*, cigars, *cheroots*, all tobacco products such as *paan masala*, toothpaste, toothpowder, *gutka*, cut tobacco, chewing tobacco, snuff tobacco, etc. The size of the health warnings should be as large as the brand name of the tobacco products and the warning should be prominently displayed on both sides of the package.
7. Health warnings should be displayed prominently at every shop where cigarettes, *beedis* or other tobacco products are sold.
8. The government should make stringent penal provisions to effectively deal with violation of the provisions of the law.
9. Initiatives may be taken by the Ministry of Agriculture to persuade farmers to switch over to alternative crops and raise the level of

awareness of the health hazards involved in the use of tobacco through proper education.

On the basis of the suggestions made by the Parliamentary Committee on Subordinate Legislation, the Union Ministry of Health and Family Welfare introduced the Tobacco Control Bill in the Rajya Sabha (Upper House of Indian Parliament) on 7 March 2001.

1.3 The State/UTs Governments, Prohibition of Smoking and Protection of Non-Smokers Health Acts:

In the interregnum between the Cigarettes Act of 1975 and COTPA 2003, several State and Union Territories enacted their own Tobacco Control Laws i.e., the Prohibition of Smoking and Protections on Non-Smokers Health Acts.

- i. The Delhi Prohibition of Smoking and Non Smokers Health Protection Act, 1996
- ii. The Sikkim Prohibition of Smoking and Non Smokers Health Protection Act, 1997
- iii. The Goa Prohibition of Smoking and Spitting Act, 1997
- iv. The Himachal Pradesh Prohibition of Smoking and Non Smokers Health Protection Act, 1997
- v. The Meghalaya Prohibition of Smoking and Non Smokers Health Protection Act, 1998
- vi. The Assam Prohibition of Smoking and Non Smokers' Health Protection Act, 1999
- vii. The Rajasthan Prohibition of Smoking and Non Smokers Health Protection Act, 1999
- viii. The West Bengal Prohibition of Smoking and Spitting and Protection of Health of Non-Smokers and Minor Act, 2001

- ix. The Karnataka Prohibition of Smoking and Protection of Health of Non Smokers Act, 2001
- x. The Andhra Pradesh Prohibition of Smoking and Health Protection Act, 2002
- xi. The Jharkhand Prohibition of Smoking and Non Smokers Health Protection Act, 2002
- xii. The Tamil Nadu Prohibition of Smoking and Spitting Act, 2003

The salient feature of these sub-national laws include:

- The majority of the State Acts, primarily regulates smoking forms of tobacco products and inter-alia bans smoking in places of public work or use and in public service vehicles. Airports, restaurants and eating houses are listed as “public place”, where smoking is comprehensively banned and without exemption of allowing smoking in designated areas.
- The majority of the State Acts, bans sale of tobacco products to person below the age of 18 years. However, for State of Goa the Act bans sale of tobacco products to person below the age of 21 years.
- The majority of the State Acts, bans storage, sale and distribution of tobacco products within 100 meters of any educational institutions. In some Acts this ban also extends to 100 meters of Hospital, Health Institution, Public Office, Court and Places of worship.
- The majority of the State Acts, comprehensively bans advertisements of tobacco products, and without exemption of allowing advertisements at point of sale of tobacco products.
- The majority of the State Acts, fine for smoking or spitting of tobacco in places of public work or use and public service vehicles

and for sale of tobacco products to minors or near educational institutions extends to Rs 500/-.

- The majority of the State Acts, offences are cognizable.
- Some of the Acts extend to both smoking as well as smokeless forms of tobacco products such as cigarette, cigar, beedies, chewing tobacco, gul (tobacco), tobacco paste, supari with tobacco, pan-masala, zarda, snuff, ghutka etc. Thus these Acts ban smoking as well as spitting in places of public work or use and public service vehicles.

1.4 The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001

1.4.1 Statement of Object & Reasons and Scope of the Bill

The Statement of Objects and Reasons appended to the Bill recognized that tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in India. It was also stated that the treatment of tobacco related diseases and the loss of productivity caused thereby cost the country almost Rs. 13,500 crores annually which more than offset all the benefits accruing in the form of revenue and employment generated by tobacco industry. Keeping in view the seriousness of the problem and recommendations of the Parliamentary Committee on Subordinate Legislation (10th Lok Sabha), the need for comprehensive legislation to prohibit advertising and to regulate the production, supply and distribution of cigarettes and tobacco products was felt necessary and a decision was taken to bring forward suitable legislation in this regard.

The Bill proposed to put a total ban on: smoking in public places, advertisement, promotion and sponsorship of tobacco products and sale of tobacco products to minors. The Bill also proposed to make rules for the

purpose of prescribing the contents of the specified warnings on tobacco product packages. The proposed Bill further seeks to implement Article 47 of the Constitution of India, which, inter-alia, requires the State to endeavor to improve public health of the people.

Of additional notes is that during at this time, a Public Interest Litigation was preferred before the Hon'ble Supreme Court of India inter-alia highlighting the inaction of the Government in regulating the use of tobacco and the failure of existing legislation, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 in achieving the objective. The petitioner sought the relief of banning smoking in public places. Interestingly the Hon'ble Court acknowledged the introduction of COTPA Bill and observed that statutory provisions are being made for prohibiting smoking in public places and the Bill introduced in the Parliament is pending consideration before a Select Committee. However, the Apex Court realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers which was in violation of a non-smokers Fundamental Right guaranteed under Article 21 of the Constitution of India, directed the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places, till the statutory provision is made and implemented by the legislative enactment. [*Murli S. Deora v. Union of India and Ors, AIR 2002 SC 40*]

1.4.2 Department Related Parliamentary Standing Committee on Human Resources Development 111th Report on COTPA Bill 2001

The Parliamentary Committee on 5th December 2001 submitted a detailed report on the 2001 Bill to Parliament. The Committee was in agreement with most of the provisions in the proposed Bill and additionally recommended adding Resolutions of World Health Assembly to the preamble and extending the Bill to all forms of tobacco products. However, there were certain observations and recommendation of the Committee which

were contrary to the objective of the proposed Bill and subsequently proved to be detrimental to the effective implementation of the Act, and required:

- Inclusion of a suitable provision in the Bill so as to provide for segregation of smoking and non-smoking area/space in airports, restaurants having a seating capacity of 30 persons and hotels having 30 rooms (known as Designated Smoking Areas or DSAs).
- Inclusion of provisions for printing of nicotine and tar contents as well as maximum permissible limit on tobacco products packages/ labels.
- Inclusion of milder punishments for offenses pertaining to non-display of health warnings and advertisements of tobacco products and its brands.

1.4.3 Adoption of the Bill

The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill of 2001 was passed by the Parliament on 30th April 2003 and received President's assent on 18th May 2003. The main provisions of the Act came into force from 1st May 2004.

1.5 Conclusions

COTPA was adopted over 15 years ago and was developed before the coming into force of the global, evidence-based treaty on tobacco control, the WHO Framework Convention on Tobacco Control and the Guidelines for Implementation (see PART II below).

Though COTPA is intended as a comprehensive law on tobacco control - providing protection from involuntary tobacco smoke and misleading advertisements, with focus on protecting minors from the influence/hazards of tobacco - with the passage of time and a greater understanding of the full range of measures necessary to combat the tobacco epidemic and the industry,

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lacunas and gaps in the Act have become apparent and proved to be a major challenge in its effective enforcements.

These gaps include the exemptions in the Act that allow smoking in designated areas, and the display of tobacco advertisements and tobacco products at its point of sale. These are coupled with weak penal provisions that have resulted in an ineffective law wanting urgent and immediate amendments. On this background amendment of the Act by removing the lacunas as well as inserting provisions which is in sync with India's International obligations under the, WHO FCTC is apposite.

This Book seeks to provide a full analysis of COTPA, to identify which provisions are failing to provide full protection and make recommendations for updating and improving provisions or for additional provisions that will close the identified gaps.

PART II:
**INTERNATIONAL SCENARIO & BEST
PRACTICES ON TOBACCO CONTROL
LEGISLATION**

2.1 Introduction

The World Health Organization Framework Convention on Tobacco Control (WHO FCTC) is the first coordinated global effort to reduce tobacco use. The WHO FCTC entered into force on February 27, 2005 and requires Parties to implement evidence-based measures to reduce tobacco use and exposure to tobacco smoke. When effectively implemented, the WHO FCTC is a fundamental tool to reduce the devastating global consequences of tobacco products on health, lives, economies and environments. With 182 Parties as of May 2020, the WHO FCTC is one of the most widely adopted treaties in the United Nations system.

India was one of the founding Parties to the treaty, signing it on 16 Jun 2003 and ratifying it on 14 June 2004.

The WHO FCTC contains a broad framework of obligations and rights and requires Parties to implement effective tobacco control measures covering a range of topics. Parties are encouraged to implement measures beyond those required by the WHO FCTC (Art. 2.1). To date, Parties to the FCTC have adopted implementing Guidelines for several Treaty Articles listed below and adopted the Protocol on Illicit Trade in Tobacco Products to increase international cooperation to fight tobacco smuggling and better control the legal tobacco trade.

Adopted by consensus, the Guidelines to the FCTC were developed to assist Parties to meet their FCTC legal obligations. The Guidelines contain principles, definitions, and key legislative elements the Parties have agreed are necessary to provide effective implementation of the treaty. To perform their treaty obligations in good faith, as required by Article 26 of the Vienna Convention on the Law of Treaties, Parties must take the FCTC Guidelines into account when determining the content and scope of their FCTC obligations.

2.2 The WHO FCTC Articles and their Implementing Guidelines

ARTICLE 5.3– protect against the vested interests of the tobacco industry: requires Parties to protect their public health policies from commercial and other vested interests of the tobacco industry.

Article 5.3 obligations apply to officials, representatives, and employees of any government body that contributes or could contribute to developing or implementing public health policies related to tobacco control. Article 5.3 Guidelines urge Parties to implement the following broad measures in order to protect their public health policies against tobacco industry interference:

- Interact with the tobacco industry only when and to the extent strictly necessary to enable Parties to effectively regulate the tobacco industry and tobacco products and conduct any necessary interactions with full transparency.
- Reject partnerships and non-binding or non-enforceable agreements with the tobacco industry.
- Reject any assistance with or any proposed tobacco control legislation or policy drafted by or in collaboration with the tobacco industry.
- Prohibit tobacco industry involvement in any youth, public education, or other tobacco control initiatives.

- Prevent tobacco-related conflicts of interest for government bodies, officials, and employees involving occupational activities by government officials, employees, and contractors with both government and the tobacco industry, tobacco holdings by government institutions or their officials or employees, tobacco industry political contributions, payments, or gifts to government officials or employees or contributions to government institutions or bodies, and tobacco industry representatives or any entity acting on its behalf from serving on any government committee.
- Require the tobacco industry to publicly report periodically on its activities and practices including information about tobacco production, manufacture, market share, marketing expenditures, revenues, lobbying, political contributions, philanthropy, and other interference activities.
- Denormalize and regulate purported “socially responsible” activities carried out by the tobacco industry.
- Prohibit incentives, privileges, benefits or exemptions for the tobacco industry.
- Ensure that any investment in the tobacco industry does not prevent Parties with a State-owned tobacco industry from fully implementing the FCTC.

COTPA does not contain any provisions that address the obligations under Article 5.3. Nor are there any other national laws, regulations, codes or guidelines that apply to the whole of government in India that seek to specifically protect public health policies from the vested interests of the tobacco industry. However, the principles of Article 5.3 are mandatory obligations on the Parties to the WHO FCTC and should pervade the development of all tobacco control policy and law. It is therefore important to set them out herein, even though specific proposals for provisions to deal

with matters relevant to Article 5.3 obligations are not included in PART III of this paper.

ARTICLE 8 – Smoke-free Environments: requires Parties to adopt effective national legislation, and actively promote effective sub-national legislation (where possible), that requires 100% smoke-free environments in all indoor public places, indoor work places, on all means of public transport, and, as appropriate, other public places.

Under the Guidelines, Parties agree that approaches other than *100% smoke-free environments*, including ventilation and air filtration technology and the use of designated smoking areas, do not provide effective protection and, thus, conflict with the mandate of Article 8.

The Article 8 Guidelines urge Parties to also create 100% smoke-free environments in outdoor or quasi-outdoor spaces where a hazard exists due to tobacco smoke exposure.

ARTICLE 9 and ARTICLE 10 – contents and emissions: require Parties to regulate the contents and emissions of tobacco products, tobacco product disclosures, and the methods by which they are tested and measured. The Articles 9 and 10 (partial) Guidelines call on Parties to require manufacturers and importers to disclose information to governmental authorities about ingredients, design features, company information, and sales volume, to enable governments to effectively regulate the products. Parties are also urged to prohibit or restrict ingredients that may be used to increase palatability in tobacco products, that have certain coloring properties, or that may create the impression that they have a health benefit, including being associated with energy and vitality. In particular though, the guidelines recommend that all characterizing flavors are prohibited. A working group will further elaborate and draft guidelines on addictiveness and toxicity to be submitted to a future session of the Conference of the Parties.

FCTC Article 11.2 specifies that each package shall, in addition to health warnings, also contain information about the harmful emissions from tobacco

products. The Guidelines state that this information should be in the form of qualitative statements such as “smoke from these cigarettes contains benzene, a known cancer-causing substance” or “smoking exposes you to more than 60 cancer-causing chemicals”.

The Guidelines recommend that parties should prohibit the display of any figures for emission yields (such as tar and nicotine) on packaging, because there is no evidence that cigarettes with lower machine tested smoke yields are less harmful, and comparing yields on different products can give the false impression that one product is less harmful than another.

ARTICLE 11 – packaging and labelling: requires Parties, within three years after entry into force of the FCTC for that Party, to adopt and implement effective measures to: 1) prohibit misleading tobacco packaging and labeling; 2) ensure that tobacco product packages carry large, clear, rotating health warnings and messages that cover 50% or more, but not less than 30%, of principal display areas and that are in the Parties’ principal language(s); and 3) ensure that that packages contain prescribed information on the tobacco products’ constituents and emissions.

The Article 11 Guidelines draw upon lessons learned from Parties’ experiences and seek to counter known tobacco industry tactics for circumventing tobacco packaging and labeling regulation. Under the terms of the treaty and the Article 11 Guidelines, Parties should:

- Prohibit packaging and labeling that promotes a tobacco product by means that are false, misleading, deceptive, or likely to create an erroneous impression about its characteristics, health effects, hazards, or emissions, including through the use of the terms (e.g., “low tar,” “light,” and any similar language) and any other figurative signs, colors, or other packaging or labeling design.
- Require that unit (e.g., individual packages) and outside packaging (e.g., cartons) of all tobacco products carry rotating pictorial and

text health warnings or messages that are as large as possible and displayed on the top of each principal display area.

- Require that unit and outside packaging carry descriptive information on constituents and emissions (as determined by the appropriate government entity), without any yield figures.
- Consider adopting plain or standardized packaging measures, which may increase the noticeability and effectiveness of health warnings and messages and prevent the tobacco industry from continuing to use packaging and labeling to mislead consumers and promote its products.

ARTICLE 13 – advertising, promotion and sponsorship: requires that Parties, in accordance with their constitutions and constitutional principles, comprehensively ban all tobacco advertising, promotion and sponsorship (APS) within five years of the treaty's entry into force for that Party. A Party not in a position to comprehensively ban tobacco APS due to its constitution or constitutional principles nevertheless must apply restrictions on all tobacco APS that are as comprehensive as legally possible. The comprehensive ban (or restrictions, where applicable) should apply to both domestic and cross border tobacco APS.

The legislation adopted by Parties should use clear, uncomplicated language and unambiguous definitions, and should avoid providing lists of prohibited activities that are, or could be understood to be, exhaustive. Moreover, legislation should have strong enforcement and monitoring, with high financial penalties for violations.

The Article 13 Guidelines make it clear that a “comprehensive ban” as required by Article 13 applies to all tobacco APS without exception, recognizing that restrictions or a ban on only some forms of tobacco APS have a limited effect and that in the absence of a complete ban, tobacco companies will shift their vast resources to promotional means that are not banned. As a result, a complete ban on all forms and means of direct and indirect tobacco

APS is necessary, subject to some very limited communications such as legitimate journalistic or political commentary or information published in the tobacco trade press.

The Appendix to the Guidelines provides an indicative, non-exhaustive list of numerous forms of tobacco APS falling within the scope of a comprehensive ban which includes the display of tobacco advertising and tobacco products at points of sale and all tobacco industry contributions to any events, organizations or individuals, whether or not a specific tobacco product is being promoted, including any corporate social responsibility programs.

Tobacco companies now frequently use new media platforms for TAPS including social media and mobile phone applications where influencers, celebrities and brand sponsored contests are used to promote tobacco products. The enormous growth in the use of communications technology especially on mobile phones has made it essential to monitor and enforce against tobacco advertising and promotion on platforms such as Instagram, YouTube, and Facebook which are easily accessed and commonly used by children and adolescents. Existing legislation banning TAPS may not include a ban on advertisements on the Internet and therefore ensuring that bans are inclusive of Internet-based media is essential. 86 countries prohibit all forms of internet advertising which should include social media platforms. However, research suggests that the tobacco companies are flouting these rules around the world and governments need to introduce specific rules to address the problem that are enforceable against both the tobacco companies and the social media platforms.

ARTICLE 16 – Sales to and by minors: requires Parties to prohibit sales of tobacco products to and by persons under the age set by domestic or national law, with a minimum age of eighteen. Other measures may also include banning the sale of tobacco products directly accessible at points of sale, restricting accessibility of vending machines, prohibiting the

manufacture and sale of toys or candy in the form of tobacco products, prohibiting free distribution of tobacco products.

Article 16 also states that Parties should endeavour to prohibit the sale of cigarettes individually or in small packets, which increase the affordability of such product to minors.

Guidelines for Article 16 have not yet been developed.

THE PROTOCOL TO ELIMINATE ILLICIT TRADE IN TOBACCO PRODUCTS (ITP) was adopted by the Parties to the FCTC in November 2012. The ITP complements and expands Parties' obligations under Article 15 of the FCTC. There are at least 59 Parties to the ITP, which entered into force on September 25, 2018. In general, the ITP obligates Parties to:

- Identify, verify, and license players in the tobacco supply chain, or equivalent systems.
- Track and trace products throughout the supply chain, and prevent the diversion of tobacco into the illicit market.
- Enforce record-keeping requirements for the tobacco industry and government.
- Regulate sales by Internet, phone, and other new technologies, as well as sales in tax- and duty-free zones.
- Establish and implement criminal laws to combat illicit trade by specifying liability for violations, search and seizure procedures, and procedures for destroying confiscated illegal products and equipment.
- Ensure international cooperation — including information sharing and coordination — between law enforcement, prosecutors, scientists, administrators, and other officials and agencies.

2.3 Global Examples of Best Practices

2.3.1 Complete protection from exposure to tobacco smoke (FCTC Article 8)

According to the WHO 2019 Report on the Global Tobacco Epidemic¹:

Comprehensive smoke-free legislation is in place for over 1.6 billion people in 62 countries (covering 22% of the world's population). There is remarkably little difference among income groups, with around one in three countries in each income group having a comprehensive ban in place. Two in three countries continue to leave their populations vulnerable to the dangers of second-hand smoke through weak or absent smoke-free laws, with 41 high-income, 68 middle-income and 24 low-income countries poorly or completely unprotected. Among them, 24 countries (with 372 million people) have no bans at all – 21 of them low- and middle-income countries. The other 109 countries have partial bans that fall short of a complete ban on smoking in public places and workplaces.

The WHO 2019 Report on the Global Tobacco Epidemic categorizes India's smoke-free policy as moderate.² India falls within the category of countries that fall short of a complete ban largely because COTPA still permits designated smoking areas. To reach GTCR's best practice level, which currently consists of 62 countries, India must completely ban smoking in all indoor public places, including disallowing all DSRs.

In recent years a number of countries have taken the steps necessary to completely protect their population against exposure to smoke. One such example is of Gambia which enacted a new Tobacco Control Act in December 2016. While previous smoke-free legislation required people not to smoke in public indoor areas, these bans were incomplete, allowing smoking areas or

1 WHO Report on the Global Tobacco Epidemic, 2019. Geneva: World Health Organization; 2019. Licence: CC BY-NC-SA 3.0 IGO. <https://www.who.int/teams/health-promotion/tobacco-control/who-report-on-the-global-tobacco-epidemic-2019>(accessed 6 October 2020).

2 See GTCR 2019 online Appendix VI, Table 6.1- Public places with smoke-free legislation, available at: https://www.who.int/tobacco/global_report/en/(accessed 4 October 2020).

designated smoking rooms in almost all venue types. The new Act took a major step forward by removing these exemptions, making the ban complete across all venues.

Other countries that the WHO class as having best practice for smoke-free environments include Pakistan, Afghanistan, Turkmenistan, Thailand, Nepal, Russia, the UK, Ireland and most countries in South America.

2.3.2 Contents and Emissions (FCTC Articles 9 and 10)

At least 39 countries ban or restrict the use of sugars and sweeteners in tobacco products. Countries that ban their use include Canada, Sri Lanka, Uganda, and Senegal. All EU countries prohibit the use of sugars unless it is essential for the manufacture and it does not result in a characterizing flavor or increase the addictiveness or toxicity of the product. At least 36 countries ban all flavors in cigarettes. This includes the UK, all EU countries, Canada, Brazil, Ethiopia and Sri Lanka. Some of those countries ban all flavors for all tobacco products. Other countries ban some, but not all flavors. At least 30 countries ban the use of ingredients that facilitate nicotine uptake, including all EU countries.

The FCTC Guidelines on the regulation of emissions is currently blank to indicate that guidance will be proposed at a later stage. Despite this at least 59 countries have set maximum levels for cigarette emissions for nicotine and tar, and in some cases, carbon monoxide. These limits are set to restrict the toxicity, health impacts and addictiveness of what is in any event a deadly product.

Although these limits vary, the majority of those countries set the maximum limits as 10mg tar; 1mg nicotine; and 10mg carbon monoxide, per cigarette.

Many countries, including all EU countries, Australia and Canada require statements on the harms of emissions on the side panels of cigarette packages, and prohibit the display of any emission yields.

2.3.3 Packaging and & Labeling (FCTC Article 11)

Strong graphic pack warnings are in place for almost 3.9 billion people in 91 countries – over half of the global population (52%). More people are protected by this WHO FCTC measure than any other, with 47% of countries implementing graphic pack warning requirements at the highest level: 65% of the principal areas or more. 118 countries or jurisdictions now require picture health warnings on cigarette packages.

India is in the top 10 countries in the world rated for the size of health warnings and therefore exhibits best practice in this area:

			FRONT	BACK
1 st	92.5%	Timor-Leste	85%	100%
2 nd	90%	Nepal	90%	90%
2 nd	90%	Vanuatu	90%	90%
2 nd	90%	Maldives	90%	90%
5 th	87.5%	New Zealand	75%	100%
6 th	85%	Hong Kong	85%	85%
6 th	85%	India	85%	85%
6 th	85%	Thailand	85%	85%
9 ^h	82.5%	Australia	75%	90%
10 th	80%	Sri Lanka	90%	80%
10 th	80%	Uruguay	90%	80%

2.3.4 Complete Elimination of all Tobacco Advertisement Promotion and Sponsorship (TAPS) (FCTC Article 13)

According to the WHO, banning TAPS remains an under-adopted measure, with only 18% of the world's population, in 48 countries, covered by a fully

comprehensive ban.³ At the same time, there are 44 countries that have not adopted any TAPS bans to date. Interestingly, more low-income countries have adopted a TAPS ban than any other FCTC measure, with 14 low income countries having comprehensive TAPS bans in place. By contrast, under 20% of high-income countries have achieved this best practice level.

Included in a comprehensive ban on TAPS is a prohibition on the display of any tobacco advertising or tobacco products at points of sale. Most countries with an advertising ban, include specific provisions that prohibit advertising at the point of sale as well. At least 80 countries ban this practice.⁴

More and more countries are recognizing the role that displays of tobacco products in stores and kiosks play in promoting tobacco as a normal product, encouraging impulse purchases and increasing initiation by young people. There are at least 28 countries that have enacted laws to fully prohibit point of sale displays and many more (38) that place strict restrictions on it.⁵

By way of comparison, **the WHO 2019 Report on the Global Tobacco Epidemic categorizes India's tobacco advertising policy as moderate.**⁶ The report notes that in India point of sale advertising and product display are allowed, as are some forms of sponsorship and corporate social responsibility by the tobacco industry. These forms of advertising must be banned for India to join the 48 other countries that the WHO categorise as having comprehensive bans on tobacco advertising.

2.3.5 Plain packaging (FCTC Article 11 and 13)

Other countries have gone further than just pictorial health warnings.

Plain packaging of tobacco is a common sense policy that removes the promotional, marketing and advertising features on packs of tobacco, but

3 Note 1.

4 Policy search on the www.tobaccocontrolaws.org database (accessed 2 October 2020).

5 Policy search on the www.tobaccocontrolaws.org database (accessed 2 October 2020).

6 See GTCR 2019 online Appendix VI, Tables 6.10, 6.11, and 6.12 on bans on direct and indirect advertising, available at: https://www.who.int/tobacco/global_report/en/ (accessed 2 October 2020).

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leaves the health warnings, tax stamps and other features required by government. Packaging for all products can act as a form of promotion, marketing and advertising. This is even truer for tobacco because in countries where other advertising is restricted, the pack becomes the main means of promoting tobacco; and tobacco is a 'badge product' which people carry around with them and display every time they take the pack out. The main elements of a plain packaging of tobacco policy are:

- Packaging must be a uniform, plain, unattractive color -usually a dull brown/green;
- All packs must be a standard shape, size and texture, and be made from cardboard;
- No branding, logos or other promotional elements can appear on the packaging - or on individual cigarette sticks;
- The brand and product name can appear on each pack, as well as the quantity of product in the pack and manufacturer's contact details, but in a standard size, color and typeface.

There are now 17 countries⁷ that have adopted plain packaging laws as recommended by the implementation guidelines for Article 11 and 13 of the WHO FCTC.

In January 2013, a non-governmental organization in an endeavor to reduce tobacco use among Indian youths, filed a writ petition before the Hon'ble Allahabad High Court, inter-alia seeking implementation of plain packaging of tobacco products in India (*Love Care Foundation v. Union of India (W P No. 1078; M/B of 2013)*).⁸ The Hon'ble High Court concluded that plain

7 Australia, France, United Kingdom, New Zealand, Norway, Ireland, Thailand, Uruguay, Saudi Arabia, Slovenia, Turkey, Israel, Canada, Singapore, Belgium, Hungary and Netherlands. Full details are available here: https://www.tobaccofreekids.org/assets/global/pdfs/en/standardized_packaging_developments_en.pdf(accessed 2 October 2020).

8 Ruling available here: <https://www.tobaccocontrolaws.org/litigation/decisions/in-20140721-love-care-foundation-v.-union->(accessed 2 October 2020).

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packaging and health warnings reduce the ability of attractive packaging to mislead consumers about the harms of tobacco use. The Hon'ble High Court in the Judgment dated 21.7.2014, took Judicial notice of plain packaging of tobacco and recommended to the Government to do so. The Hon'ble Court was pleased to observe the following:

12... The plain packaging will further advance the very purpose of Cigarettes and other tobacco products packaging Act. If plain packaging is implemented in India, the cigarettes and other tobacco products packets will cease to be a market tool for advertising the brand image and promoting smoking as a status symbol. Instead it will become effective means of spreading public health message and discouraging consumption at no cost to the Government”.

...23 “Under Article 47 of the Constitution of India a duty is vested in the State to raise the level of nutrition and standard of living to improve public health as amongst its primary duties. There cannot be any doubt to the fact situation that smoking or consumption of tobacco products is extremely injurious to health and is cause of several diseases, so it adversely affects the general health of the country. At present, the cigarettes are being packed in India in very attractive colours, and the same are being displayed openly in open shops. Such colourful packaging draws the attention of the youths and it becomes an incentive in the mind of the immature youth to start smoking but if plain packaging scheme is implemented then all the cigarettes brand shall be packaged in a common form, in a common colour. Only on a restricted part of the packet the name shall be displayed. On the rest part of the packets the health warning as required under the Rules of 2008 have to be printed. This can be done only by strict regulation. We have been informed that after implementation of the plain packaging rules in Australia, the sale of cigarettes has considerably reduced. Australia has adopted plain packaging in the year 2013. If only in one year, the sale of cigarettes starts decreasing then it is very positive sign to accept said plain packaging formula in India also. We found no harm in implementing this scheme”

2.3.6 Prohibition on single sticks and small packs (FCTC Article 16)

At least 86 countries prohibit the sale of single cigarettes sticks.

At least 62 countries set a minimum number of cigarette sticks per individual package. The minimum varies but the most common requirement is a minimum of **20 sticks per pack** (including Australia, Brazil, Canada, Chile, the UK, Singapore, Hong Kong, Thailand and Uganda).

In at least 10 countries, where smokeless tobacco use is a problem for young people, the law sets a minimum weight of smokeless tobacco product for each individual packet. The minimum weight set varies from 10 grams (in Ecuador, Kenya and Togo) to 30 grams (in Nigeria, Ghana and Maldives).

ANALYSIS OF COTPA 2003, RECOMMENDATIONS AND RATIONALE

This chapter provides a detailed analysis of every section of COTPA and makes recommendations for amendments and additions that will ensure full compliance with the WHO FCTC and global best practice.

3.1 Preamble to COTPA

3.1.1. Identifying the Issue

The Preamble of COTPA does not recognize the 52ND World Health Assembly Resolution adopting the World Health Organization Framework Convention on Tobacco (FCTC), which came into force on 27th Feb 2005 and which India ratified in February 2004, together with the Guidelines for Implementation of Articles 5.3, 6, 8, 9, 10, 11, 12, 13 and 14, subsequently adopted by the Conference of the Parties.

3.1.2. Recommendation:

Amend the Preamble of COTPA so that the legislation recognizes India's international obligations under the FCTC and the Guidelines for Implementation and recognizes that COPTA is intended to implement those obligations.

3.1.3. Rationale:

Best practice tobacco control legislation should include legislative objectives that explicitly refer to a State's obligation to implement the WHO FCTC, as well as incorporate the elements of FCTC-based definitions and substantive measures to assist in comprehensive interpretation and implementation of

the law. An examination of 182 countries' (and the European Union) tobacco control legislation (with reasonably reliable English translations) available on the Tobaccocontrolaws.org website⁹ as of 1 September 2020 indicates that at least 84 of the 182 countries and the European Union have incorporated implementation of the WHO FCTC in the legislative objectives or preambles of their tobacco control legislation.

The tobacco industry consistently uses litigation to challenge national tobacco control laws. National and International courts and tribunals are increasingly relying on Parties international obligations under the WHO FCTC to dismiss those industry legal challenges. A research analysis in 2019 showed that in litigation where the tobacco industry challenged the validity of tobacco control laws, there were 45 court judgements across 20 jurisdictions that cited the WHO FCTC in the courts' reasoning.¹⁰ That research concluded that that the WHO FCTC has made a substantial contribution to courts' reasoning in tobacco control legal challenges and has strengthened governments' arguments in defending litigation.

Where legislation specifically recognizes a state's obligations under the WHO FCTC, the national courts, in reviewing any challenge, are likely to interpret the legislation taking those obligations into account.

3.2. Definitions (COTPA Section 3)

3.2.1. 'Advertisement' and 'Sponsorship' (to be read in conjunction with section 12 below on amendments to COTPA section 5)

3.2.1.1. Identifying the Issue

The current definition of 'advertisement' in COTPA is:

9 Database of tobacco control laws www.tobaccocontrolaws.org(accessed 2 October 2020).

10 Zhou SY, Liberman JD, Ricafort E The impact of the WHO Framework Convention on Tobacco Control in defending legal challenges to tobacco control measures Tobacco Control 2019;28:s113-s118.

‘advertisement’ includes any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas;’

This definition is ambiguous and vague, does not comprehensively cover all forms of advertising, promotion and sponsorship, and does not align with the definition in the WHO FCTC. In particular it does not provide a conceptual framework for advertising and promotion. There is no reference to any action that has the purpose, effect, or likely effect of promoting a tobacco product or tobacco use, as recommended in the FCTC, and there is no concept of commercial communication.

Omitting a conceptual framework from this key term makes interpretation of many provisions difficult and precludes the application of a comprehensive ban on advertising, promotion and sponsorship as provided by FCTC Art. 13 and the FCTC Art. 13 Guidelines.

Further, there is no definition of sponsorship in COTPA, which means that there can be a lack of clarity as to exactly what actions by the tobacco industry are prohibited and provides the industry with the opportunity to exploit the grey areas in the legislation.

3.2.1.2. Recommendation

Amend the definitions to align with the definition in the WHO FCTC article 1(c) and (g):

‘tobacco advertising’ means any form of commercial communication, recommendation, or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly.

‘tobacco sponsorship’ means any form of contribution to any event, activity, or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use directly or indirectly

3.2.1.3. Rationale

Without a comprehensive framework that ensures any commercial activity that has the aim or effect or likely effect of promoting tobacco products or tobacco use, directly or indirectly, the legislation and regulations are required to specifically identify prohibited activity. The tobacco industry has shown an unwavering ability to find new ways to promote its deadly products. Advertising continues to take place in India in the form of point of sale advertising, point of sale displays, and some sponsorship of events and corporate responsibility programmes.

Removing any ambiguity and uncertainty from the definition promotes effective enforcement to take place and discourages legal challenges to the law.

3.2.2. ‘Distribution’(to be read in conjunction with section 12 below on amendments to COTPA section 5)

3.2.2.1. Identifying the Issue

The current definition of ‘distribution’ includes a reference to distribution by way of free samples. This implies that free samples are permitted.

3.2.2.2. Recommendation

Amend the definition of ‘distribution’ to remove the reference to ‘free samples/

3.2.2.3. Rationale

The Guidelines for Implementation of Article 13 of the WHO FCTC state that ‘*supply of free samples of tobacco products, including in conjunction with marketing surveys and taste tests*’ is a form of advertising and promotion.

3.3. Smoke-free Places (COTPA Section 4)

3.3.1. Designated Smoking Areas in restaurants, hotels and airports (COTPA section 4).

3.3.1.1 Identifying the Issue

Section 4 of COTPA provides for designated smoking areas (DSAs). It states:

“No person shall smoke in any public place:

Provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space may be made.”

Ministry of Health and Family Welfare Notification G.S.R. 417(E), May 30, 2008 provides specifications that a ‘smoking area or space’ must comply with that include:

- the room must be physically separate, have an automatically closing door,
- have a negative air pressure, and
- have an air flow system that complies with the schedule.

Ministry of Health and Family Welfare Notification G.S.R. 500(E), May 23, 2017 provides that there shall be no service in a ‘smoking area or space’. In addition, G.S.R.417(E) allows hotels with thirty or more rooms to designate certain rooms as smoking rooms.

These type of detailed specifications for DSA’s are difficult to enforce. A study conducted in over 6000 hospitality venues across 8 cities in India found that although only 4⁰% of the venues had a designated smoking room (DSR), among those that could be assessed for compliance, only 3% (n=3) were compliant with the COTPA requirements.¹¹

11 Institute for Global Tobacco Control. Prevalence of Designated Smoking Rooms (DSRs) and Their Compliance in Hospitality Venues: A 8-city Study in India – Sept 2019 [Fact sheet]. Baltimore, MD: Johns Hopkins Bloomberg School of Public Health. Available from <https://www.globaltobaccocontrol.org/resources/designated-smoking-room-prevalence-and-compliance-india>.(accessed 2 October 2020).

The provision that allows for DSAs has also led to confusion as to whether Hookah bars – establishments for smoking hookah or shisha pipes – are permitted. This lack of clarity has led to certain States (namely Gujarat, Punjab, Rajasthan and Maharashtra)¹² to adopt Acts that amend COTPA, as it applies within the relevant state, to specifically ban Hookah bars. Removing the provision for DSAs in COPTA would provide clarity that Hookah bars are prohibited nationwide.

3.3.1.2 Recommendation

Amend COPTA to entirely remove the provision that allows for any ‘smoking area or space’. Rescind the relevant parts of G.S.R. 417(E) and G.S.R. 500(E).

3.3.1.3 Rationale

Under the WHO GTCR, India’s smoke-free policy is classified as moderate, and to reach GTCR’s best practice level, which currently consists of 62 countries, India must completely ban smoking in all indoor public places, including disallowing all DSRs.¹³

It is widely recognized through decades of research that allowing DSAs does not provide proper smoke-free areas for other members of the public or workers in the same building. Smoke particles inevitably enter common areas irrespective of the ventilation or restrictions on access.

Principle 1 of the WHO FCTC Guidelines for Implementation of Article 8 state:

“Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smoke”

12 Gujarat Act No 27 of 2017; Punjab Act No 18 of 2018; Rajasthan Act No 20 of 2019; and Maharashtra Act No 60 of 2018.

13 See GTCR 2019 online Appendix VI, Table 6.1- Public places with smoke-free legislation, available at: https://www.who.int/tobacco/global_report/en/ (accessed 2 October 2020).

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Comprehensive smoke-free laws that include workplaces, restaurants, and bars are estimated to reduce the risk of heart attack by 85%, improve the respiratory health of workers, and may also reduce the risk of stroke.^{14,15} Many of India's State Health Acts do not allow for designated smoking areas in their tobacco control provisions.

At least 62 countries have comprehensive bans on smoking in indoor public places, and at least 42 countries completely ban smoking in airports. Brazil, Canada, and Moldova are notable examples of countries with these policies.

Designated smoking areas (DSAs), even when equipped with ventilation systems, do not protect people from secondhand smoke because smoke inevitably leaks into non-smoking areas. Ventilation systems do not remove secondhand smoke and workers still need to enter the area/room to provide services. Studies from various countries that have or had a partial smoke-free law that allows for DSAs have found that the public's exposure to secondhand smoke remains high.^{16,17,18,19}

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- 14 U.S. Department of Health and Human Services. The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General. Centers for Disease Control and Prevention 2014.
 - 15 Centers for Disease Control and Prevention. Smokefree Policies Improve Health Factsheet. 2016.
 - 16 ITC Project and Tobacco Control Office, China CDC. ITC China Project Report. Findings from the Wave 1 to 5 Surveys (2006-2015). University of Waterloo, Waterloo, Ontario, Canada, and Tobacco Control Office, Chinese Center for Disease Control and Prevention, Beijing, China, 2017.
 - 17 López MJ, Nebot M, Schiaffino A, et al. Two-year impact of the Spanish smoking law on exposure to secondhand smoke: evidence of the failure of the 'Spanish model'. *Tobacco Control* 2012;21:407-411.
 - 18 Fernández E, Fu M, Pascual JA, et al. Impact of the Spanish smoking law on exposure to second-hand smoke and respiratory health in hospitality workers: a cohort study. *PLoS One*. 2009;4(1):e4244.
 - 19 Erazo M, Iglesias V, Droppelmann A, et al. Secondhand tobacco smoke in bars and restaurants in Santiago, Chile: evaluation of partial smoking ban legislation in public places. *Tobacco Control* 2010;19(6):469-74.

3.4. Advertising, Promotion and Sponsorship. (COTPA Section 5)

3.4.1 Point of sale advertising

3.4.1.1. Identifying the legal Issue

COTPA Section 5(1) prohibits advertising and promotion. Section 5(2) states that the prohibition *shall not* apply in relation to:

- (a) *an advertisement of cigarettes or any other tobacco product in or on a packaging containing cigarettes or any other tobacco product;*
- (b) *advertisement of cigarettes or any other tobacco products which is displayed at the entrance or inside a warehouse or a shop where cigarettes or other tobacco products are offered for distribution or sale.*

Rule 4 of The Cigarettes and other tobacco Products (Prohibition of Advertisement and Regulation of trade and Commerce, Production, Supply and Distribution) Rules 2004, G.S.R. 137²⁰, set out rules as to the size of board used for advertisement at the entrance or inside a shop and provides that the board should contain only the brand name and a picture of the tobacco product. This exemption and Rule led to significant Point of Sale (PoS) advertising because of the use of multiple boards displayed together.

As a result, GSR 345(E) of 2005²¹, amended Rule 4 of G.S.R. 137 to state that a permitted board shall only list the type of tobacco products available with no brand pack, brand name or other promotional message and picture. However, this amended Rule only explicitly applies to advertisement at the entrance of a warehouse or a shop. Unlike the Act and the original 2004 Rules, there is no mention of the inside of a shop.

20 Available here: [http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-137\(E\).pdf](http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-137(E).pdf) (accessed 2 October 2020).

21 Available here: <https://www.tobaccocontrolaws.org/files/live/India/India%20-%20G.S.R.%20345%28E%29.pdf> (accessed 5 October 2020).

In practice, the provisions of the amended Rule are widely ignored and not effectively enforced. Points of sale tobacco advertising remains prominent in many areas of India including the large cities.²² Some studies show that more than one fourth of all tobacco vendors were found to violate the rules for displaying advertisement boards.²³

The WHO Global Report on the Tobacco Epidemic 2019 indicates that on the WHO analysis India does not ban point of sale advertising.²⁴

3.4.1.2. Recommendation

Amend Section 5(2) of COTPA to remove the two exceptions to the principle prohibition on advertisements detailed above.

Rescind the relevant parts of G.S.R. 137 of 2004 and G.S.R. 345(E) of 2005.

3.4.1.3. Rationale

The WHO GTCR 2019, records that in India point of sale advertising and product display are allowed, as are some forms of sponsorship and corporate social responsibility by the tobacco industry. These forms of advertising must be banned for India to join the 48 other countries that have comprehensive bans on tobacco advertising.²⁵

The Implementing Guidelines for WHO FCTC Article 13 state that a ban on tobacco advertising is effective only if it has a broad scope and that if only

22 Khariwala SS, Garg A, Stepanov I, et al. Point-of-Sale Tobacco Advertising Remains Prominent in Mumbai, India. *Tob Regul Sci.* 2016;2(3):230-238. doi:10.18001/TRS.2.3.3.

23 Goel S, Kumar R, Lal P, et al. How compliant are tobacco vendors to india's tobacco control legislation on Ban of advertisements at point of sale? A three jurisdictions review. *Asian Pac J Cancer Prev.* 2014;15(24):10637-10642. doi:10.7314/apjcp.2014.15.24.10637.

24 WHO report on the global tobacco epidemic 2019: offer help to quit tobacco use, Appendix VI, table 6.10.

25 See GTCR 2019 online Appendix VI, Tables 6.10, 6.11, and 6.12 on bans on direct and indirect advertising, available at: https://www.who.int/tobacco/global_report/en/ (accessed 2 October 2020).

certain forms of direct tobacco advertising are prohibited, the tobacco industry inevitably shifts its expenditure to other advertising strategies using creative indirect ways to promote tobacco products and tobacco use especially among young people. Therefore the effect of a partial ban is limited. The appendix to the Guidelines specifies posters and billboards of any kind as being a form of advertising and notes that only textual listing of products and prices, without any promotional elements, should be allowed.

A study of 102 countries showed that, in countries with partial bans, consumption only decreased by 1% compared to an 8% decrease in countries with comprehensive bans.²⁶ An assessment of marketing bans in 66 countries found that comprehensive bans on tobacco advertising significantly reduced consumption, while partial bans had no significant effect.²⁷ A review conducted by the US National Cancer Institute found that partial TAPS bans have little to no effect on tobacco consumption because the bans do not reduce the total level of tobacco company advertising expenditures. Instead, the money is used in non-banned media outlets or for other marketing activities.²⁸

3.4.2. Point of sale displays

3.4.2.1. Identifying the Issue

Section 5(1) of COTPA provides for a comprehensive ban on all tobacco advertising. Section 5(2) provides for exceptions from the general prohibition for advertising:

26 Saffer H. Tobacco Advertising and Promotion. In: Jha P, Chaloupka F, editors. Tobacco Control in Developing Countries. New York: Oxford University Press, Inc.; 2000.

27 US National Cancer Institute and World Health Organization. Monograph 21: The Economics of Tobacco Control—Ch 7: The Impact of Tobacco Industry Marketing Communications on Tobacco Use. Bethesda, MD: US Department of Health and Human Services, National Institutes of Health, National Cancer Institute; and Geneva, CH: World Health Organization; 2016. Available from: <http://cancercontrol.cancer.gov/brp/tcrb/monographs/21/index.html>(accessed 2 October 2020).

28 US National Cancer Institute. NCI Monograph 19: The Role of the Media in Promoting and Reducing Tobacco Use. Bethesda, MD: US Department of Health and Human Services. 2008 June. Available from: https://cancercontrol.cancer.gov/brp/tcrb/monographs/19/m19_complete.pdf. (accessed 2 October 2020).

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displayed at the entrance or inside a warehouse or a shop where cigarettes or other tobacco products are offered for distribution or sale.

In the Cigarettes and other tobacco Products (Prohibition of Advertisement and Regulation of trade and Commerce, Production, Supply and Distribution) Rules 2004, G.S.R. 137²⁹, Rule 4 is titled ‘*Prohibition of advertisement of cigarette and other tobacco products*’ and Rule 5 is titled ‘*Prohibition of sales to minors*’.

Ministry of Health and Family Welfare Notification G.S.R. 345(E), May 31, 2005, Rule 2(b)³⁰ amends Rule 4 of G.S.R. 137 to insert Rule 4(5) that states:

(5) the owner or manager or in-charge of the affairs of a place where cigarettes and other tobacco products are sold shall not display [of] tobacco products in such a way that they are visible so as to prevent easy access of tobacco products to persons below the age of eighteen years.

Ministry of Health and Family Welfare Notification G.S.R. 619(E), August 11, 2011, Rule 2³¹ amends Rule 5 of the G.S.R. 137 to insert rule (5(1)(d)) that states:

the owner of a place where tobacco products are sold shall ensure that “*tobacco products are not displayed in a manner that enables easy access of tobacco products to persons below the age of eighteen years*”.

There are therefore two separate Rules that purport to govern the display of tobacco products for the purpose of preventing easy access of tobacco products to minors. However, these two rules suggest only that the display of tobacco products should be done in such a way that their visibility is restricted so that young people cannot have easy access to them. This could

29 Available here: [http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-137\(E\).pdf](http://164.100.154.238/NTCP/Acts-Rules-Regulations/GSR-137(E).pdf)(accessed 2 October 2020).

30 Available here: <https://www.tobaccocontrolaws.org/files/live/India/India%20-%20G.S.R.%20345%28E%29.pdf>(accessed 2 October 2020).

31 Available here: <https://www.tobaccocontrolaws.org/files/live/India/India%20-%20G.S.R.%20619%28E%29.pdf>(accessed 2 October 2020).

be so they are out of reach of young people or not prominently displayed next to candy etc.

The rules do not provide a clear prohibition on the display of all tobacco products at the point of sale.

The WHO Global Report on the Tobacco Epidemic 2019 indicates that the WHO analysis is that India does not ban point of sale displays of tobacco.³²

3.4.2.2. Recommendation

Amend Section 5 of COTPA to insert a provision that specifically prohibits the display of tobacco products either inside or outside any warehouse or store that offers tobacco products for sale and requires retailers to ensure cigarettes and other tobacco products are kept in a closed container or dispenser that is not accessible to any member of the public.

Recommended wording for the provision would be:

(4) No person shall cause or permit the display of any tobacco product, or their packaging, at the entrance or inside of a warehouse or a shop where cigarettes or any other tobacco products are offered for distribution or sale.

(5) The owner or person in control of a warehouse or a shop where cigarettes or any other tobacco products are offered for distribution or sale, —

(a) shall ensure that cigarettes and other tobacco products are kept in a closed container or dispenser that is not accessible to any member of the public;

(b) may display a sign in black writing on a white background that states tobacco products are available for sale, provided that the size, nature and location of the sign are as prescribed by rules made under this Act;

³² WHO report on the global tobacco epidemic 2019: offer help to quit tobacco use, Appendix VI, table 6.12.

(c) may provide a list of cigarettes and other tobacco products available for sale, in a manner as prescribed by rules made under this Act.”

Explanation. – For the purpose of this section, “display” means, when any tobacco product or the packaging of a tobacco product is visible to any member of the public in general and not during the course of a transaction for the sale of a specific tobacco product.

3.4.2.3. Rationale

The WHO GTCR 2019, records that in India point of sale advertising and product display are allowed, as are some forms of sponsorship and corporate social responsibility by the tobacco industry. These forms of advertising must be banned for India to join the 48 other countries that have comprehensive bans on tobacco advertising.³³

The Implementing Guidelines for WHO FCTC Article 13 state that a ban on tobacco advertising is effective only if it has a broad scope and that if only certain forms of direct tobacco advertising are prohibited, the tobacco industry inevitably shifts its expenditure to other advertising strategies using creative indirect ways to promote tobacco products and tobacco use especially among young people. Therefore the effect of a partial ban is limited.

The Guidelines make it clear that display of tobacco products at points of sale constitutes a key means of advertising and promotion including by stimulating impulse purchases, give the impression that tobacco use is socially acceptable and make it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display.

33 See GTCR 2019 online Appendix VI, Tables 6.10, 6.11, and 6.12 on bans on direct and indirect advertising, available at: https://www.who.int/tobacco/global_report/en/ (accessed 4 October 2020).

Studies have consistently found significant associations between exposure to point of sale promotions and product displays with smoking initiation, susceptibility to smoking, or intentions to smoke among youth.^{34,35,36,37,38}

Tobacco product displays act as a potent marketing tool, which normalize smoking and allow the tobacco industry to communicate with non-smokers, ex-smokers and established smokers.³⁹

An Australian study found that nearly 40% of individuals trying to quit smoking experience urges to smoke when they see cigarette advertisements. More than 60% impulsively buy cigarettes as a result, and 20% avoid stores where they normally buy cigarettes to avoid the temptation.⁴⁰

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- 33 See GTCR 2019 online Appendix VI, Tables 6.10, 6.11, and 6.12 on bans on direct and indirect advertising, available at: https://www.who.int/tobacco/global_report/en/ (accessed 4 October 2020).
- 34 Henriksen L, Flora J, Feighery E, Fortmann S. Effects on youth of exposure to retail tobacco advertising. *Journal of Applied Social Psychology*. 2002;32(9):19.
- 35 Mackintosh AM, Moodie C, Hastings G. The association between point-of-sale displays and youth smoking susceptibility. *Nicotine & tobacco research : official journal of the Society for Research on Nicotine and Tobacco*. 2012;14(5):616-20.
- 36 Scheffels J, Lavik R. Out of sight, out of mind? Removal of point-of-sale tobacco displays in Norway. *Tob Control*. 2012. Epub 2012/06/09. doi: 10.1136/tobaccocontrol-2011-050341.
- 37 Slater SJ, Chaloupka FJ, Wakefield M, Johnston LD, O'Malley PM. The impact of retail cigarette marketing practices on youth smoking uptake. *Archives of Pediatric and Adolescent Medicine*. 2007;161(5):440-5. Epub 2007/05/09. doi: 161/5/440 [pii]10.1001/archpedi.161.5.440.
- 38 McNeill A, Lewis S, Quinn C, Mulcahy M, Clancy L, Hastings G, et al. Evaluation of the removal of point-of-sale tobacco displays in Ireland. *Tob Control*. 2011;20(2):137-43. Epub 2010/11/23. doi: 10.1136/tc.2010.038141.
- 39 Brown A, Boudreau C, Moodie C, Fong GT, Li GY, McNeill A, et al. Support for removal of point-of-purchase tobacco advertising and displays: findings from the International Tobacco Control (ITC) Canada survey. *Tob Control*. 2012;21(6):555-9.
- 40 Wakefield M, Germain D, Henriksen L. The effect of retail cigarette pack displays on impulse purchase. *Addiction*. 2008 February;103(2):322-8.

3.4.3. Corporate Social Responsibility (sponsorship)

3.4.3.1. Identifying the Issue

Many businesses from a wide range of sectors conduct projects and programmes that aim to reduce social inequity—by creating or improving health care or educational facilities, providing vocational and management training, enhancing the quality of leisure and cultural activities. Tobacco companies have not missed this trend.⁴¹ The purpose of Corporate Social Responsibility (CSR) programs is to improve the reputation of the tobacco companies, give the impression that the companies are responsible contributors to society, and provide the companies with greater access to government for lobbying purposes.

For instance, major tobacco companies have developed programmes for small business development in Kenya, crime prevention in South Africa, business education in China, folk culture preservation in Venezuela, and medical treatment and flood relief in Pakistan.

This type of CSR activity is not currently prohibited under COTPA.

Section 5(3) states that:

No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of-

(b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

However, CSR activity does not necessarily seek to promote specific trademarks, brands or tobacco products and the support provided by the tobacco companies is not necessarily sponsorship, gifts, prizes or scholarships.

⁴¹ World Health Organization 2004, Tobacco industry and corporate responsibility. Available from: https://www.who.int/tobacco/communications/CSR_report.pdf(accessed 6 October 2020).

There is therefore forms of CSR activity undertaken by the tobacco industry that is not currently prohibited under this provision.

In India, there have been instances of tobacco companies participating in CSR activities including in relation to health promotion, environment protection, primary education, afforestation, and watershed development.⁴² This has been in the form of support to existing Government programmes, such as contribution to the Swachh Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water; contribution to the Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga; and contribution to the Prime Minister Care fund for fighting Covid-19 pandemic.

Tobacco companies have also organised events such as the National Bravery Awards, which purports to recognize and award citizens for acts of physical bravery and social acts of courage. The companies set up WOW Clubs in 2000 in selected schools in Hyderabad and conducted creative activities, aimed at educating and engaging school children as 'Bala Swachhagrahis', which encouraged students to practice and spread awareness about waste segregation at source and sustainable management of waste.

Tobacco Companies have recently sponsored events on Covid-19 such as, "Illness to Wellness: How to make Healthy Respiratory System during

42 1. Swachh Bharat

[https://www.itcportal.com/csr_policy/ITC Sustainability Report-2020](https://www.itcportal.com/csr_policy/ITC_Sustainability_Report-2020)(accessed 15 October 2020).

<https://indiacsr.in/itc-spends-rs-306-95-cr-on-csr-during-2018-19/>(accessed 15 October 2020).

http://mospi.nic.in/sites/default/files/publication_reports/Swachhta_Status_Report%202016_17apr17.pdf(National Sample Survey-GOI)(accessed 15 October 2020).

2. Clean Ganga Fund

[https://www.itcportal.com/csr_policy/ITC Sustainability Report-2019-2017](https://www.itcportal.com/csr_policy/ITC_Sustainability_Report-2019-2017)(accessed 15 October 2020).

3. Prime Minister Care fund for fighting Covid-19

Press: <https://thewire.in/health/covid-spread-as-pil-seeks-pan-masala-ban-company-says-we-donated-10-cr-to-pm-cares>(accessed 15 October 2020).

COVID 19” and “Vocal for Local-Moving towards self-reliant India” in support of Prime Minister`s call for self-reliant India to fight economic hardships caused due to COVID-19.

3.4.3.2. Recommendation

Amend COTPA section 5 to include a provision that no person shall:

provide, receive, initiate or be a party to the provision of financial or other support to artistic, sporting, educational, political, social, environmental or other events, activities, individuals or groups, including corporate social responsibility activities, by or from a company whose principal business is the manufacture, import or distribution of cigarettes or any other tobacco products.

This proposed provision is in accordance with the text in the FCTC Article 13 guidelines intended to prevent CSR, and should be used in combination with the proposed text for the definition of tobacco sponsorship set out in paragraph 10.1.2 above.

3.4.3.3. Rationale

The WHO GTCR 2019, records that in India point of sale advertising and product display are allowed, as are some forms of sponsorship and corporate social responsibility by the tobacco industry. These forms of advertising must be banned for India to join the 48 other countries that have comprehensive bans on tobacco advertising.⁴³

The Guidelines to FCTC Article 13 recognise that it is increasingly common for tobacco companies to seek to portray themselves as good corporate citizens but that any contribution from a tobacco company to any other entity for socially responsible causes amounts to promotion and sponsorship that should be prohibited.

43 See GTCR 2019 online Appendix VI, Tables 6.10, 6.11, and 6.12 on bans on direct and indirect advertising, available at: https://www.who.int/tobacco/global_report/en/ (accessed 9 October 2020).

3.4.4. New internet based mediums of communication such as mobile phones and social media

3.4.4.1. Identifying the Issue

COTPA section 5 is drafted in a broad way that includes a provision that

...no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium...

This broad language should cover internet based mediums of communication such as mobile phones and social media. However, these new forms of internet communication were created after COTPA was drafted and the law would benefit from the inclusion of a clear prohibition on internet based communication such as social media applications, mobile phones and other new technologies.

3.4.4.2. Recommendation

Amend COTPA section 5(2) to include a prohibition that explicitly provides for a prohibition on advertising or promotion of any tobacco product on:

the internet including over-the-top media services, social media platforms, mobile telephones, and other new technologies

3.4.4.3. Rationale

A 2014 study assessing tobacco industry activity on two of China's biggest online communication platforms, Weibo and WeChat, found text, image, and video promotional content on the accounts of several Chinese tobacco companies. Loosely regulated new and evolving social media platforms offer the tobacco industry more ways to circumvent advertising bans, market their products, and normalize tobacco use.⁴⁴

44 Wang F, Zheng P, Freeman B, et al. Chinese tobacco companies' social media marketing strategies. *Tobacco Control* 2015;24:408-409.

Data from the 2017 baseline survey of Texas Adolescent Tobacco and Marketing Surveillance system showed that over 50% of students from grades 6, 8, and 10 were exposed to tobacco-related social media in the past month. Exposure and engagement were highest among high school students, girls, those with friends who use tobacco, and current tobacco users.⁴⁵

A 2019 search of tobacco company activity across six major social media platforms identified 112 leading brands of e-cigarettes, hookah, cigars, cigarettes, and smokeless tobacco with active pages on at least one platform. Brand pages rarely used age gating, did not display health warnings, and posted images of tobacco products with unrelated hashtags and captions. Many of the pages contained images of young people and flavored tobacco products. In total, there were over 5 million followers across all brand pages just on Facebook and Instagram.⁴⁶

3.5. Restrictions on Sale (COTPA Section 6)

3.5.1. Use of term “meters” instead of “yards”

3.5.1.1. Identifying the Issue

COTPA section 6 (b) provides that no person shall:

sell, offer for sale, or permit sale of, cigarettes or any other tobacco products in an area within a radius of one hundred yards of any educational institution

3.5.1.2. Recommendation

Amend COTPA section 6(b) so that the provision uses meters instead of yards.

45 Hebert ET, et al. Exposure and engagement with tobacco- and e-cigarette-related social media. *Journal of Adolescent Health*. 2017;61(3):371-377.

46 O'Brien EK, Hoffman L, Navarro MA, et al. Social media use by leading US e-cigarette, cigarette, smokeless tobacco, cigar and hookah brands. *Tobacco Control* Published Online First: 26 March 2020. doi: 10.1136/tobaccocontrol-2019-055406.

3.5.1.3. Rationale

India was one of the first countries in the developing world to metricate its economy. By 2006 India will have completed half a century of metrication. Many countries in Asia and Africa have since followed India's model. The Government of India enacted the Standards of Weights and Measures Act in 1956 to introduce the metric system. Metric systems have been used in education since the 1960s and the use of imperial measurements in education was completely phased out in the 1970s. It is therefore inconsistent that COTPA contains requirements that use imperial measurements and any revision of COTPA should be used as an opportunity to remedy this inconsistency.

The Parliamentary Committee on Subordinate Legislation, in its 196th Report of 2011, recommended replacement of the use of imperial system of measurement of distance in yards in Section 6(b) of the Act with the metric system, by considering amendment to COTPA, 2003.

3.5.2. Age of sale increased from 18 years to 21 years

3.5.2.1. Identifying the Issue

COTPA section 6(a) provides that no person shall sell, offer for sale or permit the sale of cigarettes or any other tobacco product:

(a) To any person who is under eighteen years of age.

3.5.2.2. Recommendation

Amend COTPA section 6(a) to increase the permitted age of sale for cigarettes and other tobacco products to 21 years.

3.5.2.3. Rationale

Countries are increasingly recognizing that almost all people who become long term tobacco users commence tobacco use while they are adolescents or young adults. There are at least 87 countries that set a minimum age of 18 for purchasing tobacco. However, 14 countries have now increased that

minimum age, most to 21 years.⁴⁷ These include Ethiopia, Guam, Honduras, Japan, Kuwait, Mongolia, Palau, Philippines, Samoa, Singapore, Sri Lanka, Thailand, USA, and Uganda.

The vast majority of tobacco users began before the age of 21. Raising the tobacco sales age to 21 has the potential to reduce tobacco use initiation and progression to regular smoking. Of 3245 [survey] respondents, 70.5% support raising the age to buy tobacco to 21.⁴⁸

Local tobacco-21 policies yield a substantive reduction in smoking among 18- to 20-year-olds living in metropolitan/micropolitan areas. This finding provides empirical support for efforts to raise the tobacco purchasing age to 21 as a means to reduce young adult smoking.⁴⁹

Tobacco 21 laws appear to reduce smoking among 18–20 year olds who have ever tried cigarettes. Exposure to tobacco 21 laws yielded a 39% reduction in the odds of both recent smoking among 18–20 year olds who had ever tried cigarettes.⁵⁰

3.5.2.4. Research studies:

Needham, Massachusetts:

Results suggest that raising the minimum sales age to 21 for tobacco contributes to a greater decline in youth smoking relative to communities that did not pass this ordinance. These findings support local community-level action to raise the tobacco sales age to 21.⁵¹

47 Policy search on www.tobaccocontrolaws.org legislation database with criteria ‘sales restrictions’ and ‘minimum sales age of 21 years or less’.(accessed 6 October 2020).

48 Winickoff JP, McMillen R, Tanski S, et al. Public support for raising the age of sale for tobacco to 21 in the United States. *Tobacco Control*. 2016, 25:284-288.

49 Friedman AS Phd, Rachel J Wu, BA. Do Local Tobacco-21 Laws Reduce Smoking Among 18 to 20 Year-Olds? *Nicotine & Tobacco Research*. 2020, 22(7): 1195–1201.

50 Friedman, A. S., Buckell, J., and Sindelar, J. L. Tobacco 21 laws and young adult smoking: quasi experimental evidence. *Addiction*. 2020, 114: 1816– 1823.

51 Kessel Schneider S, Buka SL, Dash K, et al. Community reductions in youth smoking after raising the minimum tobacco sales age to 21. *Tobacco Control*. 2016, 25:355-359.

California:

Very high awareness about the law was achieved among tobacco retailers and young adults. Survey findings suggest that the high awareness and support for the law may have contributed to reducing illegal tobacco sales to youth under 18 and achieving widespread retailer compliance with T21. As evidenced by retailer compliance in New York City, vigilance and reinforcement are needed to sustain and improve compliance with tobacco sales to those under 21 years of age.⁵²

3.6. Restrictions on trade and commerce in and production, supply and distribution (COTPA Sections 7)

3.6.1. Single stick sale or sale of loose tobacco products; the sale of small, cheaper packets of tobacco.

3.6.1.1. Identifying the Issue

The sales of single sticks of cigarettes and bidis, as well as individual servings of pan masala, provide easy and cheap access to tobacco. In rural communities loose tobacco products such as [x] are sold from large sacks or bags on market stalls which again provide cheap and easy access to tobacco. These practices mean that consumers purchasing single sticks or individual portions of tobacco without packaging are not regularly exposed to the warning labels the law requires on tobacco packaging.

Section 6 of COTPA (Prohibition on sales of cigarettes and other tobacco products) does not provide for a prohibition on the sale of single sticks or individual portions of oral tobacco such as pan masala.

Section 7 of COTPA (Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products) sets out that the packaging of tobacco products must contain the notified warning

⁵² Zhang X, Vuong TD, Andersen-Rodgers E, et al. Evaluation of California's 'Tobacco 21' law. *Tobacco Control*. 2018, 27:656-662.

labels and other packaging requirements. However, there is no prohibition on the sale of cigarettes or other tobacco products that are not contained in their original, sealed packaging.

As a result, at least 13 states or provinces have implemented orders or laws banning the sale of loose cigarettes and bidis.⁵³

In addition, in countries where the sale of single sticks is prohibited, the tobacco industry introduces small packets of cigarettes and other tobacco products that provide cheaper access and greater availability of tobacco. This increases youth access and the use of tobacco by communities on lower income. At least 60 countries⁵⁴ provide a legal minimum content for packs of cigarettes (usually 20 cigarettes) and other tobacco products.

3.6.1.2. Recommendation

Amend Section 7 of COTPA to insert a provision that states:

the sale of cigarettes or any other tobacco products shall not be outside its package but in the sealed, intact, original packaging that shall be of standard size, contents and weights as may be prescribed

This would prohibit the sale of any tobacco product outside its original packaging, and would allow the Minister to notify rules as to the minimum content for each individual packet of specified tobacco products.

53 This includes Uttarakhand, Chandigarh, Punjab, Rajasthan, Bihar, Jharkhand, Mizoram, Sikkim, Uttar Pradesh, Jammu & Kashmir, Delhi, Karnataka and Himachal Pradesh. One example is Notification No 1/114-FII(5)- 2015 4803 of Chandigarh, which state “*the Administrator, Union Territory, Chandigarh is pleased to ban Loose Cigarettes and other Loose Tobacco Products within Union Territory of Chandigarh which do not have specified health warnings on it in public interest with immediate effect*”

54 Policy search on www.tobaccocontrol.org legislation database with criteria ‘sales restrictions’, ‘retail package size restrictions’, ‘minimum number of cigarette sticks’ and ‘minimum weight of smokeless tobacco’. (accessed 6 October 2020).

3.6.1.3. Rationale

WHO FCTC Article 16 provides that:

Each Party shall endeavor to prohibit the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.

There are at least 86 countries that prohibit the sale of single sticks. Of those 86 countries, 58 countries require that cigarettes are sold in packs of at least 20; and 12 countries require that cigarettes are sold in packs of between 10 and 19.

At least 62 countries set a minimum number of cigarette sticks per individual package. The minimum varies but the most common requirement is a minimum of 20 sticks per pack. In at least 10 countries, where smokeless tobacco use is a problem for young people, the law sets a minimum weight of smokeless tobacco product for each individual packet. The minimum weight set varies from 10 grams (in Ecuador, Kenya and Togo) to 30 grams (in Nigeria, Ghana and Maldives).

3.6.1.4. Research studies on the impact of the sale of single sticks and small packs

- Sri Lanka:

Single stick sales facilitate smoking among non-affluent youth and beginning smoking. Retailers are more likely to sell single cigarettes to minors than to adults, thus probably initiation of smoking. The government not only accepted the desirability of banning sale of single stick cigarettes in order to promote reduction of tobacco use but took practicable steps to implement the proposal.⁵⁵

- United States:

Single cigarettes, which are sold without warning labels and often evade taxes, can serve as a gateway for youth smoking. The FDA conducted over

55 Peiris, S. D. Ban of single stick cigarettes. *Tobacco Induced Diseases*. 2018,16(1): 123.

335 661 inspections between 2010 and September 30, 2014, and allocated over \$115 million toward state inspections contracts. Substantial, unexplained variation exists in violations of single cigarette sales among states. These data suggest the possibility of differences in implementation of FDA inspections and the need for stronger quality monitoring processes across states implementing FDA inspections.⁵⁶

- India:

Sale of single cigarettes is an important factor for early experimentation, initiation and persistence of tobacco use and a vital factor in the smoking epidemic in India as it is globally. Single cigarettes also promote the sale of illicit cigarettes and neutralises the effect of pack warnings and effective taxation, making tobacco more accessible and affordable to minors. This is the first study to our knowledge which estimates the size of the single stick market in India.⁵⁷

- Africa:

Stringent measures are necessary to provide lasting solutions to the problem of selling single sticks of cigarettes in Africa. Governments are called upon to: Ensure that the sale of single sticks or small packs of tobacco products is prohibited by passing and enforcing appropriate legislation; Ensure a comprehensive ban on all forms of tobacco advertising, promotion and sponsorship and this should include any advertising or promotional materials related to single sticks; Consider licensing of retail vendors of tobacco product.⁵⁸

56 Baker HM, Lee JGL, Ranney LM, Goldstein AO. Single cigarette sales: state differences in FDA advertising and labeling violations, 2014, United States. *Nicotine & Tobacco Research*. 2016, 221-226.

57 Lal P, Kumar R, Ray S, et al. The Single Cigarette Economy in India—a Back of the Envelope Survey to Estimate its Magnitude. *Asian Pac J Cancer Prev*. 2015, 16(13):5579-5582.

58 ATCA. Sale of Single Cigarettes in Africa: Survey report from 10 capital cities. 2018.

3.6.2. Display of tar and nicotine content on tobacco packaging

3.6.2.1. Identifying the Issue

COTPA section 7(5) prohibits the sale and supply of cigarettes of other tobacco products unless they indicate on the packaging the nicotine and tar content along with the maximum permissible levels.

This provision has not yet been brought into effect but that does not prevent tobacco manufacturers from including those yield statements on packaging if they choose to.

The requirement is the opposite of the recommendations contained in the Implementation Guidelines for Article 11 of the WHO FCTC. Paragraph 44 of the Guidelines provides that the display of figures for emission yields (such as tar, nicotine, and carbon monoxide) should be prohibited because such yield numbers are misleading because they give the misleading impression that a cigarette with lower emission yields are less harmful when there is no evidence to show this.

Instead Parties should require relevant qualitative (descriptive) statements are printed or displayed on each package about the emissions of the tobacco product. Examples of such statements include “smoke from these cigarettes contains benzene, a known cancer-causing substance” or “smoking exposes you to more than 60 cancer-causing chemicals” or “smoke from these cigarettes contains benzene, a known cancer-causing substance.”

3.6.2.2. Recommendation

Amend COTPA section 7 to remove the current sub-section (5) and replace it with:

(5) In addition to the health warnings required or prescribed under this section, every package of cigarettes or any other tobacco product shall bear descriptive-only information on contents and emissions as may be prescribed. Only the prescribed information on contents and emissions shall be displayed. The display

on a packaging of cigarettes or any other tobacco product, of quantitative information or figures for emission yields is prohibited.

3.6.2.3. Rationale

A 2012 study assessing perceived risks, usefulness, and understandability of quantitative emissions information on cigarette packets from the EU, Canada, and Australia found that participants were significantly more likely to believe that packets with lower emission numbers have lower tar delivery and lower health risks than packets with higher numbers, indicating that quantitative emission values are associated with false beliefs regarding lower tar delivery and health risks.⁵⁹

Findings from a 2011 study showed that descriptive emissions information is significantly more useful in communicating health risks of smoking than numerical information. Consumers were more likely to draw false conclusions about a cigarette brand's level of risk when comparing numerical emissions and constituents information between brands.⁶⁰

3.6.3. Regulation of content and emissions

3.6.3.1. Identifying the Issue

Section 7(5) of COTPA goes on to provide that:

... the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act.

Beyond this limited power, that has not been exercised, COTPA does not regulate, nor does it grant any authority to regulate, contents or ingredients of cigarettes.

59 Gallopel-Morvan, K., Moodie, C., Hammond, D., Eker, F., Beguinot, E., & Martinet, Y. (2011). Consumer understanding of cigarette emission labelling. *European journal of public health*, 21(3), 373–375. <https://doi.org/10.1093/eurpub/ckq087>(accessed 15 October 2020).

60 Hammond D, White CM. Improper disclosure: tobacco packaging and emission labelling regulations. *Public Health*. 2012 Jul;126(7):613-9. doi: 10.1016/j.puhe.2012.03.012. Epub 2012 May 19. PMID: 22609086

The implementation Guidelines for Article 9 and 10 of the WHO FCTC state that regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users.

The harsh and irritating character of tobacco smoke provides a significant barrier to experimentation and initial use. Some tobacco products contain added sugars and sweeteners. Other tobacco products contain flavours such as menthol, vanilla, cinnamon, clove, ginger or mint. Other ingredients are used that have colouring properties or to create the impression that products have health benefits, or are associated with energy or vitality such as vitamins or caffeine.

The Guidelines recommend that Parties regulate by prohibiting or restricting ingredients that may be used to increase palatability in tobacco products, in particular flavors, that color the emissions or that are associated with health, energy or vitality.

3.6.3.2. Recommendation

Remove the existing Section 7(5) of COTPA and replace with clauses that provide for the following:

- *No person shall manufacture, import or sell a cigarette or other tobacco product that -*
 - *has a characterizing flavor, other than the flavor of tobacco;*
 - *contains any additive with properties associated or likely to be associated with energy or vitality, a health benefit, or reduced health risk, such as but not limited to, amino acids, caffeine, taurine and other stimulants, vitamins, and minerals, or is represented or suggested as containing any such additives or having such properties;*
 - *contains any additive or mixture with coloring properties for emissions.*

- *Requirements may be prescribed for the comprehensive regulation of the contents and emissions of cigarettes and other tobacco products, including the quality standard of any ingredient and the testing and methods for testing conformity of contents and emissions.*
- *Manufacturers and importers of cigarettes and other tobacco products shall submit information on product contents and emissions as prescribed.*

3.6.3.3. Rationale

Data from a 2015 US study found that 80.8% of 12-17 year-olds who had ever used a tobacco product initiated tobacco use with a flavored product.⁶¹ Tobacco industry internal documents show a long history of developing and marketing flavored tobacco products as “starter” products to attract youth.⁶²

Flavors improve the taste and reduce the harshness of tobacco products, making experimentation and addiction more likely.⁶³ Menthol cools and numbs the throat, reducing the harshness of cigarette smoke, thereby making menthol cigarettes more appealing to youth initiating tobacco use^{64,65,66} Menthol cigarettes increase the number of children who experiment with cigarettes and the number of children who become regular smokers, increasing overall youth smoking.⁶⁷ Flavors can create the false impression that a tobacco

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- 61 Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014,” *Journal of the American Medical Association*, published online October 26, 2015
- 62 See e.g., Marketing Innovations, “Youth Cigarette - New Concepts,” Memo to Brown & Williamson, September 1972, Bates No. 170042014; R.J. Reynolds Tobacco Company, “Conference report #23,” June 5, 1974, Bates No. 500254578-4580; R.J. Reynolds Inter-office Memorandum, May 9, 1974, Bates No. 511244297-4298.
- 63 HHS, Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General, 2012.
- 64 FDA, Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes, 2013.
- 65 Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR), Addictiveness and Attractiveness of Tobacco Additives, 2010
- 66 World Health Organization (WHO) Study Group on Tobacco Product Regulation. WHO Technical Report Series 967, 2012.
- 67 TPSAC, Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations, July 21, 2011.

product is less harmful than it really is.⁶⁸ Candy-like flavoring additives such as licorice, chocolate, cocoa, and vanilla improve the taste of tobacco products and reduce their harshness. When burned in a cigarette, licorice and chocolate produce carcinogenic compounds such as formaldehyde, benzo(a)pyrene, and benzene.⁶⁹

When sugar additives are burned in cigarettes, formaldehyde and acetaldehyde are produced. Acetaldehyde is a potential carcinogen and is believed to interact with nicotine to enhance its addictive effects by making receptors in the brain more receptive to nicotine.^{70,71}

As of October 2020, at least 36 countries ban all flavors in cigarettes. Other countries ban some but not all flavors.⁷²

3.6.4. Principle Display Area

3.6.4.1. Identifying the Issue

Section 7(4) of COTPA provides that:

.....the specified warning shall appear on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.

68 Huang, L.-L., et al., “Impact of Non-menthol Flavours in Tobacco Products on Perceptions and Use Among Youth, Young Adults and Adults: A Systematic Review,” *Tobacco Control*, 26(6):709-719, 2017.

69 German Cancer Research Center. Additives in Tobacco Products: Contribution of Carob Bean Extract, Cellulose Fibre, Guar Gum, Licorice, Menthol, Prune Juice Concentrate and Vanillin to Attractiveness, Addictiveness and Toxicity of Tobacco Smoking. Heidelberg, Germany: German Cancer Research Center. 2012.

70 Talhout R, Opperhuizen A, van Amsterdam JGC. Sugars as tobacco ingredient: effects on mainstream smoke composition. *Food and Chemical Toxicology*. 2006; 44(11):1789-1798.

71 Rabinoff M, Caskey N, Rissling A, Park C. Pharmacological and Chemical Effects of Cigarette Additives. *American Journal of Public Health*. 2007 November; 97(11):1981-91.

72 Policy search on www.tobaccocontrolaws.org database (search conducted on October 28, 2020).

There is discrepancy in the above provision of section 7 and its enabling Rules vide G.S.R No. 708(E) of 2008. The Rules mandate that the specified health warning shall cover the principal display area of the pack, which is defined giving specifications of display area of different forms of pack and often includes the entire surface area of the pack. However, there is no mention of principal area in section 7. Therefore, it is imperative to include the word “principal display area” to remove any ambiguity between the Act and its Rules.

3.6.4.2. Recommendation

Amend COTPA section 7 to replace the current sub-section (4) with the following:-

...the specified warning shall appear on the principal display areas of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply in a manner as may be prescribed.

3.6.4.3. Rationale

Article 11 of WHO FCTC recommends that the health warnings and messages on tobacco packaging and labeling shall cover as much of principal display areas as possible.

3.6.5. Standard or uniform packaging

3.6.5.1. Identifying the Issue

As set out in Part III above, many countries are moving beyond large graphic health warnings and are completely removing all the advertising features on tobacco packaging by introducing plain or standardized packaging. This policy is recommended in the Implementation Guidelines to both Articles 11 and 13 of the WHO FCTC because packaging is recognized as a means of advertising and can attract new users.

Even where full standardised packaging is not introduced, it is useful for the government to be able to regulate the type, size, shape and nature of tobacco

packaging to ensure that graphic health warnings are properly displayed and are not distorted.

Currently, COTPA does not regulate, and does not grant any authority to regulate, the size, shape, type or nature of the packaging of cigarettes or other tobacco products.

3.6.5.2. Recommendation

Amend Section 7 of COTPA by inserting an additional clause that provides the authority to prescribe requirements for any element or feature of the packaging of cigarettes or other tobacco products and the appearance of cigarettes and other tobacco products, including in respect of trademarks.

3.6.5.3. Rationale

There are now 17 countries⁷³ that have adopted plain packaging laws as recommended by the implementation guidelines for Article 11 and 13 of the WHO FCTC.

Plain packaging helps to change smoking attitudes and behaviors and reduce the overall demand for tobacco. It is likely to have a greater impact on younger people. Research evidence and post-implementation evidence from countries that have introduced plain packaging shows that the policy:

- Reduces the appeal and attractiveness of tobacco products to consumers,
- Increases the noticeability and effectiveness of health warnings on the packaging of tobacco products,
- Reduces the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.

⁷³ Australia, France, United Kingdom, New Zealand, Norway, Ireland, Thailand, Uruguay, Saudi Arabia, Slovenia, Turkey, Israel, Canada, Singapore, Belgium, Hungary and Netherlands. Full details are available here: https://www.tobaccofreekids.org/assets/global/pdfs/en/standardized_packaging_developments_en.pdf(accessed 7 October 2020).

There have been five international systematic evidence reviews that considered all the peer reviewed research studies from around the globe on the impact of plain packaging on smoking behaviors and attitudes.⁷⁴ All concluded that the policy would be effective at contributing to its objectives.

In Australia, over 8 years of post-implementation data shows continued significant declines in smoking rates.⁷⁵ The government's post implementation review concluded that a 0.55 percentage point drop could be attributed to plain packaging (equivalent to 118,000 less people smoking over 3 years).

The UK and France fully implemented plain packaging in early 2017 and evidence is emerging of significant declines in smoking rates as well as changing attitudes to smoking in those countries.

3.7. Penalty Provisions (COTPA sections 20, 21, 22 and 24)

3.7.1. Identifying the issue:

The penalty provisions under the Act are out of date and too weak to act as an effective deterrent. The fines and imprisonment specified under sections 20, 21, 22 and 24 has not been reviewed for almost two decades and are inadequate to curb rampant violation. The fine for the offence of smoking in public place and sale of tobacco products to minor is only upto Rs 200/-,

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- 74 i. Cancer Council Victoria (Australia 2011) <http://www.cancervic.org.au/plainfacts/plainfacts-evidence>
- ii. The Stirling Review (United Kingdom 2012 and updated 2013) http://phrc.lshtm.ac.uk/project_2011-2016_006.html(accessed 15 October 2020).
- iii. The Chanter Review (United Kingdom 2014) <http://www.kcl.ac.uk/health/10035-TSO-2901853-Chantler-Review-ACCESSIBLE.PDF>(accessed 15 October 2020).
- iv. The Hammond Review (Ireland 2014) <http://health.gov.ie/blog/publications/standardised-packaging-d-hammond/>(accessed 4 October 2020).
- v. The Cochrane Review (international 2017)<http://onlinelibrary.wiley.com/doi/10.1002/14651858.CD011244.pub2/abstract>(accessed 5 October 2020).
- 75 The Australian government's Post Implementation Review was published in February 2016 and concludes that plain packaging is having a positive impact. <https://ris.govspace.gov.au/2016/02/26/tobacco-plain-packaging/>(accessed 8 October 2020).

this is very mild in comparison with similar provisions in other sub-national and national laws. In most sub-national laws enacted before COTPA, the fine for smoking in public place and sale to minors is upto Rs 500/-, while under the Juvenile Justice(Care and Protection of Children) Act of 2015, for the offence of sale of tobacco products to minor the prescribed penalty is rigorous imprisonment of seven years and fine up to one lakh rupees.

Similarly, the penalty for violation of TAPS provisions and display of health warnings on tobacco product packages is too mild to act as a deterrent to manufacturers and retailers.

3.7.2. Recommendation

Amend Sections 20, 21, 22, 24 and related provisions of COTPA by increasing the penalty amount.

3.7.3. Rationale

This would ensure the penalty provisions of COTPA is in conformity with other laws as well as adequate to act as a deterrent.

3.8. Illicit trade

3.8.1. Identifying the issue:

India has ratified the WHO FCTC ‘Protocol to Eliminate Illicit Trade in Tobacco Products’ and therefore has to make concerted effort to implement the same. The Protocol recommends finer and specific details necessary under the law that envisage preventing illicit trade in tobacco products. Given the comprehensive nature of the Protocol, the best way to implement the provisions is to make enabling provisions under COTPA. The COTPA (Amendment) Bill of 2015, proposed extensive modifications to the existing Act, however the Bill was withdrawn on 13.12.2017 with the assurance the same will be re-introduced by incorporating provisions to counter illicit trade in tobacco products.

3.8.2. Recommendation

Amend COTPA by inserting an additional section that provides for the following:

Prohibition on import, sale and any kind of trade or commerce in tobacco products, with enabling provisions for introducing mechanisms by which cigarettes or any other tobacco product can be identified, tracked and traced.

3.8.3. Rationale:

WHO FCTC Article 15, elimination of all forms of illicit trade in tobacco products, including smuggling, illicit manufacturing and counterfeiting, and the development and implementation of related national law, in addition to sub-regional, regional and global agreements, are essential components of tobacco control.

3.9. Offences under the Act are non-cognizable

3.9.1. Identifying the issue

A cognizable offence is of more serious nature and thus empowers the police to investigate suo-motu without approval or authorization from court. India's erstwhile tobacco control Act, the Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, declared offences punishable under the Act as cognizable. Similarly, the State and Union Territories Tobacco Control Laws i.e., the Prohibition of Smoking and Protections on Non-Smokers Health Acts also considered certain offence under the Act as cognizable. Therefore, it is imperative to make offences punishable under COTPA 2003, as cognizable to strengthen enforcement of the Act.

3.9.2. Recommendation

Amend COTPA by inserting an additional section that provides for the following:

Offences punishable under the Act shall be cognizable.

3.9.3. Rationale

The amendment to make offences punishable under the Act as cognizable, will strengthen and facilitate the enforcement of the Act.

3.10. Schedule of the Act

3.10.1. Identifying the issue

Entry 8, 9 and 10, pertaining to Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth powder containing tobacco, have been banned under the Food Safety & Standards Act, 2006 and its enabling Regulations and the Drugs & Cosmetics Act of 1940. The Hon'ble Courts have also upheld the ban, However, the mention of the said products in the schedule of COTPA, 2003, is creating confusion as to the applicability of laws with respect to these products.

3.10.2. Recommendation

The Schedule of COTPA needs to be amended by removing entry 8, 9 and 10, pertaining to Pan Masala or any chewing material having tobacco as one of its ingredients (by whatever name called), Gutka and Tooth powder containing tobacco.

3.10.3. Rationale

Amendment of the Schedule will remove inconsistencies between the national legislations.

CONSTITUTIONAL PROVISIONS AND JUDICIAL INTERVENTIONS SUPPORTING TOBACCO CONTROL

4.1. Constitutional provisions

India, is a Sovereign Socialist Secular Democratic Republic with a parliamentary system of government. The Republic is governed in terms of the Constitution of India which was adopted by the Constituent Assembly on 26th November, 1949 and came into force on 26th January, 1950. Constitution of India lays down the framework demarcating fundamental political code, structure, procedures, powers, and duties of government institutions and sets out fundamental rights, directive principles, and the duties of citizens.

Tobacco control measures find ample support in the constitutional provisions, such as, fundamental right to life or health (Article 21), responsibility of the Government to direct its policy towards securing, tender age of children and giving them opportunities to develop in a healthy manner (Article 39 (e)&(f)) and duty of the Government to improve public health (Article 47). The Constitution also provides for respecting international law and treaty obligations (Article 51(c) and further empowers the Indian Parliament to make any law for implementing any international treaty, agreement or convention (Article 253). Thus the above recommendations for amendment of COTPA 2003, is in similar vein and intended towards securing right to life, protection of children, improvement of public health and an endeavour to implement international obligations under FCTC.

4.2. Judicial Interventions

The Indian Judiciary's role in supporting regulation of tobacco use and trade is noteworthy. Since the 1990's there have been several instances of judicial intervention, starting from an appeal against the Government of India notification imposing total prohibition on the use of tobacco in the preparation of tooth-powder and tooth-paste, under the Drugs and cosmetics Act, 1940. The Hon'ble Supreme Court of India held, the imposition of total ban was in the public interest.⁷⁶

The Hon'ble Supreme subsequently, in a public interest litigation preferred against inaction of the Government in regulating the use of tobacco, directed the Union of India, State Governments as well as the Union Territories to take effective steps to ensure smoking is prohibited in public place, since smoking in public place is violation of a non-smokers fundamental right to life guaranteed under Article 21 of the Constitution of India.⁷⁷

COTPA 2003 has been enacted to secure protection of health of citizens. It is settled law in catena of judgments that Right to Health is an integral part of the Right to Life and a facet of Article 21 of the Constitution of India.⁷⁸

In 2013, the Hon'ble Supreme Court in an appeal preferred against the orders of Bombay High Court staying the operation of COTPA Rules on advertisement and promotion of tobacco products, observed:⁷⁹

76 *Laxmikant v. Union of India and Others* (1997) 4 SCC 739.

77 *Murli S. Deora v. Union of India and Ors.*, (2001) 8 SCC 765.

78 *Tamil Nadu Medical Officers Association and others v. Union of India and others* (2020 Indlaw SC 441); *Association of Medical Super Speciality Aspirants and Residents and others v Union of India and others* (2019 Indlaw SC 785); *State of Punjab & Ors v. Mohinder Singh Chawla & Ors* (1997) 2 SCC 83 (1996 Indlaw SC 2054); and *Devika Biswas v. Union of India and Others* (2016 Indlaw SC 1032)].

79 *Health for Million vs. Union of India & Ors.* (Civil Appeal No. 5912-5913/2013).

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“The consumption of tobacco and tobacco products has huge adverse impact on the health of the public at large and, particularly, the poor and weaker sections of the society which are the largest consumers of such products and that unrestricted advertisement of these products will attract younger generation and innocent minds, who are not aware of grave and adverse consequences of consuming such products. We have no doubt that the Central Government and the State Governments across the country are alive to the serious and grave consequences of advertising tobacco and various products manufactured by using tobacco. They know that the consumption of these products will result in rapid increase in the number of cancer patients and huge proportion of the Budget earmarked for health of the common man will have to be used for treating the patients of cancer.”

The Hon'ble Supreme Court while setting aside the stay orders of the Bombay High Court gave the following direction:

“We also make it clear that as a sequel to setting aside of the interim order passed by the High Court, the Central Government and the Governments of all the States shall be bound to rigorously implement the provisions of the 2003 Act and the 2004 Rules as amended from time to time”

Thus it is imperative to incorporate the recommendation on COTPA amendments to strengthen the Act especially TAPS provisions, this will ensure implementation of the direction of the Hon'ble Supreme Court in its letter and spirit.

PARLIAMENTARY COMMITTEE REPORTS

The Parliament of India is a magnificent manifestation of the democratic ethos of the country. Parliament has been instrumental in ushering social change and development through progressive legislations, thus paving way for good governance which constitutes the basic principle of Constitution of India. The work done by the Parliament in modern times is not only varied and complex in nature, but also considerable in volume. The time at its disposal is limited. It cannot, therefore, give close consideration to all the legislative and other matters that come up before it. A good deal of its business is, therefore, transacted in Committees of the House, known as Parliamentary Committees.

To scrutinize and ensure whether powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by Parliament have been properly exercised within such conferment or delegation, a Committee called the Committee on Subordinate Legislation has been constituted under Rules 204-206 of the Rules of Procedure and Conduct of Business.

5.1. Recommendation of Parliamentary Committees

The recommendations for amendments to COTPA 2003 as set out in Part III above, are in agreement with many of the recommendations of several Parliamentary Committees detailed below:

5.1.1. The 196th Report of Committee of Subordinate Legislation on the Prohibition on Sale of Cigarettes and other Tobacco Products around Educational Institutions Rules, 2004-(presented to Rajya Sabha on 16th December, 2011).

The Committee while examining the COTPA Rules, observed that tobacco product manufacturers increasingly focus on youth and children. Our efforts, therefore, should be to ensure that tobacco products are not easily available to children and that they are prevented from involuntary smoke as enshrined in the Preamble to the Act. The Committee, accordingly, hopes that the Ministry of Health and Family Welfare would consciously and diligently work towards this end so that the Rules serve the purpose of the law in true spirit apart from complying with our Treaty obligations under Framework Convention on Tobacco Control (FCTC). We ought to adopt all the international best practices in implementing the law in letter and spirit.

The Committee further recommended that:

- i. the fine of Rs. 200/- for not complying with Rules for protection of minors was too low and that the same should be increased so that it acts as a deterrent, the Ministry informed that they did not have any objection to enhancing the penalty and that the Ministry would consider the same as and when a comprehensive amendment of the Tobacco Act, 2003 is taken up. The Committee notes that the Ministry of Health & Family Welfare does not have any objection and has assured to enhance the penalty for selling tobacco products within 100 yards from educational institutions from the existing Rs 200/- as and when a comprehensive amendment of the Tobacco Act, 2003 could be considered.
- ii. the use of imperial system of measurement of distance in yards in Section 6(b) of the Act should be replaced with the metric system. The Committee notes that the Ministry have no objection in replacing the imperial system of measurement of distance of hundred yards as specified in the Act by the metric system which is more prevalent today and which would require amendment to the Act. The Committee hopes the Ministry would do that as and when amendment of the Tobacco Act, 2003 is considered.

5.1.2. The 210th Report of Committee of Subordinate Legislation on the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 (presented to Rajya Sabha on 3rd September, 2013)

The Committee while elucidating the background to the Report observed that the linkage between use of tobacco and ill-health is a well-established medical fact. Tobacco is an avoidable public health hazard. It has been associated with cancer, vascular and coronary heart disease. This is one industry or a product where only the manufactures/sellers are benefited by its sales and not the consumer.

The Committee further observed that if the Ministry is serious about the prohibition on sale of these products in more stringent ways, it might have to go in for amendment of the Act to include the following:

To do away with designated smoking areas/places to ensure 100% smoke-free public places.

- i. Increase on-the-spot to a fine minimum of Rs. 1000/.
- ii. To prevent point of sale advertisement through packages.
- iii. Ban all internet advertising, promotion, sales, distribution.
- iv. To ban indirect advertisements.
- v. Ban selling of tobacco products at bus stands, railway stations, cinemas, malls, restaurants.
- vi. Ban loose and small pack sales of these products.
- vii. Ban manufacture, import and sale of products which are imitation of tobacco products.
- viii. Prohibition of free distribution of tobacco products.

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- ix. Licencing of shops for selling these products and heavy penalty for violation of such licences.
- x. Tobacco companies to disclose to Government about contents and emission levels and additives, if any, of all products.
- xi. All manufacturers/importers to submit information related to company, complete address/contact detail, number of cigarettes etc. manufactured.
- xii. Provision for the Government for product sampling and other checks.

The recommendations of the Parliamentary Committee Reports for the amendments to the COTPA 2003 aim to make the tobacco control framework in India more robust and more suitable to address the concerns raised by the strategies adopted by tobacco companies and the reality of sale of tobacco products. These recommendations should be re-examined and modified appropriately in order to make them suitable for present-day requirements. Both the legislation and the rules should be amended in order to align them with the objective of the FCTC and the goal for reducing tobacco consumption in India.

CONCLUSION

It is undisputable that tobacco causes a lot of harm to a nation. In India, over 1.2 million deaths every year are attributed to tobacco use, by either direct tobacco consumption, or through secondhand smoke, or by smokeless tobacco use.⁸⁰ Further, around 27% of all cancers in India are due to tobacco usage.⁸¹ In addition, there are immense economic costs associated with tobacco usage – approximately 1.8% of India's GDP which amounts to Rs. 1.8 trillion is lost due to loss of earning capacity which is a direct result of tobacco usage.⁸² Keeping these in mind, it is crucial that the COTPA 2003 be effective in regulating tobacco in India. However, the law has many shortcomings, which have been noted and needs to be addressed.⁸³

6.1 History of Tobacco Control Legislation in India

- The Cigarettes (Regulation of Production, Supply and Distribution) Act 1975 was the first legislation on cigarette regulation in India. In 1995, a Parliamentary Committee Report on this Act proposed changes for a more comprehensive framework.

80 Global Burden of Disease (GBD) 2020. Seattle, WA: Institute for Health Metrics and Evaluation (IHME), University of Washington, 2019. Available from: www.vizhub.healthdata.org/gbd-compare/.

81 ICMR-NCDIR, 2020. Report of National Cancer Registry Programme (2012-2016). Bengaluru; 2020.

82 Goodchild M, Nargis N, Tursan d'Espaignet E, Global economic cost of smoking-attributable diseases. *Tobacco Control* 2018;27:58-64.

83 WHO Report on the Global Tobacco Epidemic, 2019. Geneva: World Health Organization; 2019. Licence: CC BY-NC-SA 3.0 IGO. <https://www.who.int/teams/health-promotion/tobacco-control/who-report-on-the-global-tobacco-epidemic-2019>.

- From 1975 to 2003, various states and UTs passed their own tobacco control laws. For ex – Delhi, Sikkim, Goa, Himachal Pradesh, Meghalaya, Assam, Rajasthan, West Bengal, Karnataka, Andhra Pradesh, Jharkhand and Tamil Nadu.
- The COTPA Bill was introduced in 2001. It proposed a total ban on smoking in public places, advertisement, promotion and sponsorship of tobacco products and sale of tobacco products to minors. A Parliamentary Committee recommended the addition of resolutions of the World Health Assembly.
- Finally, the COPTA Bill received the president's assent in 2003 and the COTPA 2003 came into force on 1st May 2004.

6.2 International Scenario & Best Practices on Tobacco Control Legislation

- The World Health Organisation Framework Convention on Tobacco Control (WHO FCTC) is the first coordinated global effort to reduce tobacco usage, with over 182 members. India is a party to the treaty.
- Art. 5.3 of the WHO FCTC requires parties to ensure that their public health policies are protected from the interests of the tobacco industry.
- Art. 8 of the WHO FCTC requires parties to ensure public places are 100% smoke-free.
- Art. 9 and Art. 10 of the WHO FCTC require parties to control the contents and emissions of tobacco products. Countries such as Canada and Australia show best practices by requiring statements about the harm of emissions to be printed on the side panels of cigarette packages and prohibit display of emission yields.
- Art. 11 of the WHO FCTC requires proper packaging and labelling of tobacco products to prevent any misleading information. India shows best practices by requiring a health warning on cigarette packets

which covers 85% of the front and the back. Australia has gone a step further with plain packaging requirements to ensure that the packet of tobacco products is not attractive.

- Art. 13 of the WHO FCTC requires parties to ban the advertising, promotion and sponsorship of tobacco products. India's tobacco advertising policies are labelled as 'moderate', as point of sale advertising and product display are allowed, along with some form of CSR.
- Art. 16 of the WHO FCTC requires parties to prohibit sale of tobacco products to and by minors. In furtherance of this purpose, countries such as Brazil, Hong Kong, Chile etc. have set a minimum number of 20 sticks for a pack, and countries such as Equador and Kenya have set a minimum weight for a pack

6.3 Analysis of COTPA 2003

- The Preamble of the COTPA 2003 does not recognize the WHO FCTC, neither does it seek to implement the provisions of the WHO FCTC.
- Sec. 3 of the COTPA 2003 gives an extremely vague definition of 'advertisement'. This does not cover all forms of advertising, promotion and sponsorship.
- Sec. 4 of the COTPA 2003 prohibits smoking in public places. However smoking in certain designated areas are allowed.
- Sec. 5 of the COPTA 2003 prohibits advertising and promotion of tobacco products. However, point-of-sale advertising is allowed.
- Corporate social responsibility (CSR) is not prohibited under COTPA 2003. This means that tobacco companies can participate in activities such as providing health care, education, vocational training etc which gives the impression that these companies are good.

- Advertising of tobacco products on internet-based mediums of communication such as mobile phones and social media is not prohibited under COTPA 2003.
- Sec. 6(b) of the COTPA 2003 refers to prohibition on sale of tobacco products within 100 “yards” of educational institution rather than the prevalent metric system.
- Sec. 7 of the COTPA 2003 does not prohibit the sale of single-stick cigarettes or loose tobacco products.
- Sec. 20, 21, 22 and 24 of the COTPA 2003 penalise violation of the provisions of the COTPA 2003. However, the penalty is very mild.

6.4 Constitutional Provisions & Judicial Interventions Supporting Tobacco Control

- Numerous constitutional provisions are applicable for control of tobacco – Art. 21, Art. 39(e) & (f), Art. 47, Art. 51(c) and Art. 253.
- In *Murli Deora v. Union of India*, the Supreme Court has held that smoking is prohibited in public spaces as it violates the fundamental right to life under Art. 21 of a non-smoker.
- The right to health has been recognised as a crucial component of the right to life under Art. 21. Numerous decisions of courts have recognised this right.

6.5 Parliamentary Committee Reports

- The 196th Report dealt with the prohibition on sale of tobacco products around educational institutions in order to reduce availability of tobacco products to children.
- The 210th Report dealt with stringent measures for prohibition on advertisement, use and sale of tobacco products.

6.6 Recommendations

Drawing from best international practices, it is imperative to fix the existing loopholes in the Indian legal framework on regulation of tobacco. For this purpose, the following recommendations are suggested for amending the COTPA 2003:

- Prohibit designated smoking areas by removing the provision that allows for any ‘smoking area or space’.
- Prohibit all point of sale advertising.
- Prohibit tobacco product displays in stores and kiosks.
- Prohibit all tobacco company sponsorship including corporate social activities.
- Specify that advertising is banned on new internet-based medium such as social media platforms.
- Increase the age of sale of tobacco products from 18 to 21.
- Prohibit the sale of single stick cigarettes, loose tobacco products and smaller packs.
- Prohibit the display of emission yield figures.
- Regulate the contents and emissions including a ban on all flavored tobacco.
- Allow for greater regulation of tobacco packaging.
- Increase the penalties for violations.

The aim of these recommendations is to make the Indian legal framework on regulation of tobacco more robust and more effective in achieving its goals. For proper implementation and to give effect to the spirit of the law, it

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is necessary that the Ministry of Health and Family Welfare, Government of India and other government bodies should take appropriate measures for the same.

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Ms. Vandana Shah

Director
South Asia Programs CTFK, India

Mr. Robert Eckford

Associate Legal Director
CTFK, US

Mr. Ranjit Singh

Senior Law Expert, Advocate,
Supreme Court of India, New Delhi

Dr. Vishal Rao

Oncology Head, HCG Hospital, Bengaluru

Mr. Akshay Yadav

Teaching Associate
National Law School of India University, Bengaluru

Mr. Arjun Singal

Student Researcher,
National Law School of India University, Bengaluru